

DISTRICT COURT OF LOGAN COUNTY
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF)
SECURITIES, *ex rel.* Irving Faught,)
Administrator)

Plaintiff,)

v.)

Case No. CJ 2004-256

MARSHA SCHUBERT, an)
Individual, and *dba* SCHUBERT AND)
ASSOCIATES, *et al.*)

Defendants.)

NOTICE OF HEARING

PLEASE TAKE NOTICE that a hearing has been set for August 11, 2005 at 11:00 a.m. regarding intervening party Richard LeBoeuf's INTERVENOR'S MOTION TO QUASH SUBPOENA in Judge Worthington's Court, located at 301 E. Harrison, Room 201, Guthrie, Oklahoma 73044.

Respectfully submitted,



Alexander L. Bednar, Esq., OBA # 19635
P.O. Box 3021
Oklahoma City, OK 73101
Telephone: (405) 235-2800

COUNSEL FOR RICHARD LEOEUF

CERTIFICATE OF SERVICE

On this 10th day of July, 2005, a true and correct copy of the foregoing pleadings was properly served upon:

Douglas Jackson
323 West Broadway
Post Office Box 1549
Enid, OK 73702

Mack Martin
Suite 360
119 N. Robinson Ave.
Oklahoma City, OK 73102

Bradley Davenport
323 West Broadway
Post Office Box 1549
Enid, OK 73702

Gerri Stuckey
120 N. Robinson
Suite 860
Oklahoma City, OK 73102

Dept of Securities
C% Irving Faught
Administrator
120 N. Robinson
Suite 860
Oklahoma City, OK 73102



Alexander Bednar

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MARSHA SCHUBERT, an
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Defendants.

Case No. CJ 2004-256

INTERVENOR'S MOTION TO QUASH SUBPOENA

Intervenor Richard LeBoeuf hereby requests that this Court quash a subpoena served on him by the Department of Securities less than 48 hours ago, asking him to appear at a jurisdictional hearing on August 12, 2005, in Logan County. Mr. LeBocuf requests such emergency relief for the fact that the August 12 hearing is jurisdictional in nature and based on issues of law, and also for the fact that an August 26, 2005 hearing in Oklahoma County is designed for discovery purposes and case management, involving the same case and controversy, making his appearance in Logan County unduly burdensome and unnecessary. In support thereof, Mr. LeBoeuf proposes the following:

ISSUES OF LAW AND FACT SUPPORTING QUASHING

1. Mr. LeBoeuf was served with this subpoena in the last 48 hours, and undersigned counsel has been forced to file this accelerated Motion to Quash speedily.
2. Undersigned counsel had spoken with counsel for the Department of Securities on or about Thursday August 4, 2005, in response to an email threatening to subpoena Mr. LeBoeuf for the August 12 hearing. In that conversation, undersigned

counsel alerted Ms. Commesser of the Department, of a hearing regarding case management and discovery that she herself had requested be set for August 26, 2005, in Oklahoma County.

3. Because the August 26 hearing in Oklahoma County is designed to organize discovery of individuals such as Mr. LeBoeuf, undersigned counsel requested of Ms. Commesser the purpose of subpoenaing Mr. LeBoeuf in Logan County's jurisdictional hearing on issues of law. Ms. Commesser then stated she did not "need to tell" undersigned counsel the purpose of the subpoena.

4. Mr. LeBoeuf has never received legal notice of any Logan County hearing until this hearing on August 12 in Logan County.

5. Under 12 Okla. Stat. Ann. § 2004.1(C)(1), Ms. Commesser and the Department are under statutory duty to "take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." EXHIBIT A.

5. Because the Department and Ms. Commesser have set a date in Oklahoma County, on August 26, 2005, to plan discovery for Mr. LeBoeuf and others, and were reminded of that agreed-upon date in conversation with undersigned counsel, their request that Mr. LeBoeuf to appear in Logan County on August 12 (with no instructions) duplicates the discovery in Oklahoma County, and is therefore an undue burden. *Young v. Macy*, 21 P.3d 44 (Okla. 2001) at ¶¶ 12-15.

6. The Court "shall quash" a subpoena if it: (1) fails to allow reasonable time for compliance," or "subjects a person to an undue burden." 12 Okla. Stat. Ann. § 2004.1(C)(3)(a).

7. Furthermore, the Department has not shown the required "substantial need for testimony" of Mr. LeBoeuf exists on August 12, 2005, as that Intervenor's hearing regards issues of law and jurisdictional matters. 12 Okla. Stat. Ann. § 2004.1(C)(3)(b).

8. The issue of *forum non conveniens*, set to be heard on August 12 in this case, regards whether this case should be transferred to Oklahoma County, where discovery is set to begin on August 26, 2005. The Department appears to be wasting tax dollars by serving dozens of parties in the Oklahoma County case, for an unexplained reason, to appear in Logan County, on a matter relating to issues of law. *Kennedy v. Henderson*, 794 P.2d 754 (Okla. 1990) at ¶ 1.

9. Mr. LeBoeuf has a strenuous working schedule, and manages construction workers, and had only planned to appear through legal counsel on August 12, for a jurisdictional motion filed. As such, forcing him to appear without specified reason seems oppressive and unnecessary.

10. Oklahoma Criminal statutes, by analogy, show the legislature's intent that subpoenas of witnesses outside of county must be accompanied by an affidavit showing that the attendance of a witness is "material and necessary." 22 Okla. Stat. Ann. § 715. Neither the Department nor the Receiver have demonstrated any meaningful reason for the attendance of Mr. LeBoeuf at the August 12 hearing. EXHIBIT B.

CONCLUSION AND PRAYER

WHEREFORE, Intervening party LeBoeuf respectfully requests that this Court quash the subpoena issued August 8, within four days of the August 12, 2005 hearing for the reasons that: (i) it is not specific as to purpose, (ii) it is unduly burdensome,

unnecessary, and duplicative (since discovery conference is set for August 26 in Oklahoma County), and(iii) fails to allow reasonable time for compliance.

Respectfully Submitted,



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3030 Bank One Center
100 N. Broadway
Oklahoma City, OK 73102
Telephone: (405) 239-3300
Facsimile: (405) 235-3352
COUNSEL FOR PLAINTIFF
RICHARD LEBOEUF

CERTIFICATE OF SERVICE

On this 10th day of August, 2005, a true and correct copy of the foregoing pleadings was properly served upon:

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C% Irving Faught
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120 N. Robinson
Suite 860
Oklahoma City, OK 73102



Alexander Bednar

erved by a sheriff or if is filed in the office return shall be sent by attorney within three If service is made fi, deputy sheriff, or son shall make affida- forth the name of the lace, and method of

e person mailing the se on the copy of the that is filed in the ng and the date when e was rejected, and summons or order a rned envelope, if and the mailing was ac- rned. If the mailing o show the date and , pursuant to para- section. When the t by the court clerk, plaintiff's attorney of the returned card rd or envelope has

time in its discretion just, the court may rvice thereof to be s that material prej- antial rights of the sued:

FOR SERVICE. e upon a defendant days after the filing cannot show good made within that ed as to that defen- court's own initiative motion. The action rmons was served ed eighty (80) days a court later holds as invalid. After a rvice, a new sum- nant within a time w summons is not the action shall be thout prejudice as on shall not apply his been outside of 180) days following

1. Laws 1985, c. 277, § 2, operative July 1, 1987; Laws 1988, c. 208, § 1, eff. Nov. 1, 1990; Laws 1996, c. 339, § 18, eff. Nov. 1, 2002.

§ 2004.1. Subpoena

SUBPOENA

A. SUBPOENA; FORM; ISSUANCE.

1. Every subpoena shall:

- a. state the name of the court from which it is issued and the title of the action; and
- b. command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified.

2. A subpoena shall issue from the court where the action is pending, and it may be served at any place within the state. If the action is pending outside of this state, the district court for the county in which the deposition is to be taken shall issue the subpoena and, upon application, any other order or process that may be appropriate in aid of discovery in that action. Proof of service of a notice to take deposition constitutes a sufficient authorization for the issuance by the clerk of subpoenas for the persons named or described therein; provided, any person aggrieved by the issuance or enforcement of the subpoena may obtain judicial review upon the filing of a civil action and payment of the required fees.

3. A witness shall be obligated upon service of a subpoena to attend a trial or hearing at any place within the state and to attend a deposition or produce or allow inspection of documents at a location that is authorized by subsection B of Section 3230 of this title.

4. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. As an officer of the court, an attorney authorized to practice law in this state may also issue and sign a subpoena on behalf of a court of this state.

5. Leave of court for issuance of a subpoena for the production of documentary evidence shall be required if the plaintiff seeks to serve a subpoena for the production of documentary evidence on any person who is not a party prior to the expiration of thirty (30) days after service of the summons and petition upon any defendant.

6. Notwithstanding any other provision of law, a court clerk of this state shall not be subject to a subpoena in matters relating to court records unless the court makes a specific finding that the appearance and testimony of the court clerk are both material and necessary because of a written objection to the introduction of the court records made by a party prior to trial.

B. 1. SERVICE. Service of a subpoena upon a person named therein shall be made by delivering or mailing a copy thereof to such person and, if the person's attendance is demanded, by tendering to that person the fees for one (1) day's attendance and the mileage allowed by law. Service of a subpoena may be accomplished by any person who is eighteen (18) years of age or older. A copy of any subpoena that commands production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by subsection B of Section 2005 of this title. If the subpoena commands production of documents and things or inspection of premises from a nonparty before trial but does not require attendance of a witness, the subpoena shall specify a date for the production or inspection that is at least seven (7) days after the date that the subpoena and copies of the subpoena are served on the witness and all parties, and the subpoena shall include the following language: "In order to allow objections to the production of documents and things to be filed, you should not produce them until the date specified in this subpoena, and if an objection is filed, until the court rules on the objection."

2. Service of a subpoena by mail may be accomplished by mailing a copy thereof by certified mail with return receipt requested and delivery restricted to the person named in the subpoena. The person serving the subpoena shall make proof of service thereof to the court promptly and, in any event, before the witness is required to testify at the hearing or trial. If service is made by a person other than a sheriff or deputy sheriff, such person shall make affidavit thereof. If service is by mail, the person serving the subpoena shall show in the proof of service the date and place of mailing and attach a copy of the return receipt showing that the mailing was accepted. Failure to make proof of service does not affect the validity of the service, but service of a subpoena by mail shall not be effective if the mailing was not accepted by the person named in the subpoena. Costs of service shall be allowed whether service is made by the sheriff, the sheriff's deputy, or any other person. When the subpoena is issued on behalf of a state department, board, commission, or legislative committee, fees and mileage shall be paid to the witness at the conclusion of the testimony out of funds appropriated to the state department, board, commission, or legislative committee.

C. PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

1. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney, or both, in breach of this duty an appropriate sanction,



12 § 2004.1

CIVIL PROCEDURE

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which may include, but is not limited to, lost earnings and a reasonable attorney fee.

2. a. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

b. Subject to paragraph 2 of subsection D of this section, a person commanded to produce and permit inspection and copying or any party may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve written objection to inspection or copying of any or all of the designated materials or of the premises. An objection that all or a portion of the requested material will or should be withheld on a claim that it is privileged or subject to protection as trial preparation materials shall be made within this time period and in accordance with subsection D of this section. If the objection is made by the witness, the witness shall serve the objection on all parties; if objection is made by a party, the party shall serve the objection on the witness and all other parties. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. For failure to object in a timely fashion, the court may assess reasonable costs and attorney fees or take any other action it deems proper; however, a privilege or the protection for trial preparation materials shall not be waived solely for a failure to timely object under this section. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

3. a. On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

- (1) fails to allow reasonable time for compliance; or
- (2) requires a person to travel to a place beyond the limits allowed under para-

graph 3 of subsection A of this section; or

(3) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(4) subjects a person to undue burden; or

(5) requires production of books, papers, documents or tangible things that fall outside the scope of discovery permitted by Section 3224 of this title.

b. If a subpoena:

(1) requires disclosure of a trade secret or other confidential research, development, or commercial information; or

(2) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party;

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena. However, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. DUTIES IN RESPONDING TO SUBPOENA.

1. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

2. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

E. CONTEMPT.

Failure by any person without adequate excuse to obey a subpoena served upon him or her may be deemed a contempt of the court from which the subpoena issued.

Laws 1985, c. 277, § 4, eff. Nov. 1, 1985; Laws 1993, c. 351, § 1, eff. Sept. 1, 1993; Laws 1994, c. 343, § 10, eff. Sept. 1, 1994; Laws 1996, c. 61, § 2, eff. Nov. 1, 1996; Laws 1998, c. 374, § 2, eff. Nov. 1, 1998; Laws 1999, c. 293, § 19, eff. Nov. 1, 1999; Laws 2000, c. 172, § 1, eff. Nov. 1, 2000; Laws 2002, c. 92, § 1, eff. Nov. 1, 2002; Laws 2002, c. 468, § 21, eff. Nov. 1, 2002.

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§ 2004.2. Notice of

NOTICE OF PE

A. Upon the filing pending so as to charge its pendency. While person shall acquire or of the suit as against except that:

As to actions in involving real property from and after the time action identifying the pending and giving the affected by the action, the county clerk of the situated, and

2. Notice of the pe no effect unless service defendant or service within one hundred tw of the petition.

B. Except as to m claimants, any interest subject matter of an federal court, acquired subsequent to the file action as provided in acquired or purported or perfected after the f of action, shall be void or parties to such actio

C. No person purp interest in real proper tion need be given noti hearing upon confirma: Laws 1985, c. 277, § 5, et § 4, operative Nov. 1, 198

§ 2005. Service a
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A. SERVICE: WI otherwise provided in by its terms to be ser to the original petitio orders because of nun relating to discovery party or any other pe orders, every written may be heard ex pa appearance, demand, paper shall be served service need be made to appear except the additional claims for

CR-9

WITNESSES

22 § 718

§ 707. Defendant's subpoenas
 The clerk of the court at which an indictment is to be tried, must, at all times, upon the application of the defendant, and without charge, issue as many blank subpoenas, under the seal of the court and subscribed by him as clerk, for witnesses within the state, as may be required by the defendant.

R.L.1910, § 6013.

§ 708. Form of subpoena
 A subpoena, authorized by the last four sections, must be substantially in the following form:

IN THE NAME OF THE STATE
 OF OKLAHOMA.

To _____
 Greeting: You are commanded to appear before C. D., a justice of the peace of _____ at _____ (or the grand jury of the county of _____ or the district court of _____ county, or as the case may be), on the _____ (stating day and hour), and remain in attendance on and call of said _____ from day to day and term to term until lawfully discharged, as a witness in a criminal action prosecuted by the State of Oklahoma against E. F. (or to testify as the case may be).

R.L.1910, § 6014.

§ 709. Continuances, witnesses must take notice of

Every witness summoned in a criminal action pending in a district, superior or county court shall take notice of the postponements and continuances and when once summoned in such action shall, without further notice or summons, be in attendance upon such action, as such witness, until discharged by the court.

R.L.1910, § 6015.

§ 710. Subpoena duces tecum

If the books, papers or documents be required, a direction to the following effect must be contained in the subpoena.
 And you are required also, to bring with you the following: (Describe intelligently the books, papers or documents required).

R.L.1910, § 6016.

§ 711. Service of subpoena by whom—Return

A peace officer must serve in his county, city, town or village, as the case may be, any subpoena delivered to him for service, either on the part of the state or of the defendant, and must make a written return of the service, subscribed by him, stating the time and place

of service without delay. A subpoena may, however, be served by any other person.

R.L.1910, § 6017.

§ 712. Service, manner of—Cost

A. Service of subpoenas for witnesses in criminal actions in the district courts of this state shall be made in the same manner as in civil actions pursuant to Section 2004.1 of Title 12 of the Oklahoma Statutes.

B. The cost of service of subpoenas shall be borne by the parties unless otherwise ordered by the court. R.L.1910, § 6018; Laws 1984, c. 184, § 30, eff. Nov. 1, 1984; Laws 1985, c. 112, § 6, eff. Nov. 1, 1985; Laws 1997, c. 400, § 8, eff. July 1, 1997.

§§ 713, 714. Repealed by Laws 1975, c. 227, § 4, eff. Oct. 1, 1975

§ 715. Witness residing outside county—Subpoena of court clerks

A. No person is obliged to attend as a witness before a court or magistrate outside the county where the witness resides or is served with a subpoena, unless the judge of the court in which the offense is triable, upon an affidavit of the district attorney, or of the defendant or the defendant's counsel, stating that he or she believes that the evidence and attendance of the witness is material and necessary, shall endorse on the subpoena an order for the attendance of the witness.

B. The court clerks of this state shall not be subject to subpoena unless the court makes a specific finding that appearance and testimony are both material and necessary because of a written objection to the introduction of certified documents made by the defendant or other party prior to trial.

R.L.1910, § 6021; Laws 1999, c. 288, § 3, eff. Nov. 1, 1999.

§ 716. Disobedience to subpoena

Disobedience to a subpoena or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt, in the manner provided in civil procedure.

R.L.1910, § 6022.

§ 717. Disobeying defendant's subpoena—Forfeiture

A witness disobeying a subpoena issued on the part of the defendant, also forfeits to the defendant, the sum of Fifty Dollars (\$50.00), which may be recovered in a civil action.

R.L.1910, § 6023.

§ 718. Witnesses—Fees and mileage

A witness who appears from another state to testify in this state in a criminal case or proceeding pursuant to a subpoena issued in accordance with the provisions of the Uniform Act to Secure the Attendance of

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32, c. 269, § 2, eff.

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