

**IN THE DISTRICT COURT IN AND FOR LOGAN COUNTY
STATE OF OKLAHOMA**

Oklahoma Department of Securities)	
<i>Ex rel.</i> Irving L. Faught,)	
Administrator,)	
)	
Plaintiff,)	
v.)	Case No. CJ-2004-256
)	
Marsha Schubert, an individual and)	
d/b/a Schubert and Associates;)	
Richard L. Schubert, an individual and)	
d/b/a Schubert and Associates; and)	
Schubert and Associates,)	
an unincorporated association,)	
)	
Defendants,)	

RESPONSE TO CITATION FOR INDIRECT CIVIL CONTEMPT OF COURT

COMES NOW the Farmers & Merchants Bank ("F&M"), by and through its attorney of record, Brandon R. Kerr and Charles A. Meyers, responds to the Citation for Indirect Civil Contempt of Court filed by the Receiver, Douglas Jackson, as follows:

STATEMENT OF FACTS

1. As of October 14, 2004, Defendants Marsha Schubert, Richard L. Schubert and other various family members and related business entities (hereinafter collectively referred to as "Schuberts") have collateralized loans due and payable in an amount in excess of \$200,000.00 to F&M. The proceeds from a majority of these loans were deposited directly into account 34-7477 (hereinafter "Account") for the purchase of livestock, automobiles and general business operating capital. See Affidavit of John Tom Anderson attached hereto as Exhibit "A". The livestock, automobiles, business inventory and certain real estate is secured by properly filed security interests.
2. On November 11, 2004, Receiver, Douglas L. Jackson, made a formal request on F&M for the proceeds of the Account. See Jackson letter attached hereto as Exhibit "B". F&M by

and through their attorney of record, responded indicating F&M's desire to research the source of funds in the account because of F&M's right of setoff and their rights under Okla. Stat. Ann. Tit. 42, § 32. See F&M letter attached hereto as Exhibit "C".

3. By letter dated November 22, 2004 F&M identified two (2) deposits into the Account that reference the sale of cattle. These deposits total \$12,000.00. The deposits were made within thirty (30) days of the Temporary Restraining Order being entered. See letter attached hereto as Exhibit "D". In said correspondence, F&M agreed to immediately turn over all funds not traceable to the sale or disposition of cattle secured by their loans.

4. By e-mail dated November 22, 2004, Receiver, by and through his counsel, Bradley Davenport, agreed to F&M forwarding the balance of Account less the proceeds F&M identified as cattle proceeds. See e-mail attached hereto as Exhibit "E".

5. On November 24, 2004, F&M forwarded the sum of \$34,708.57 to Douglas L. Jackson, Receiver, leaving a balance of \$12,000.00 in Account.

ARGUMENT AND AUTHORITIES

6. Upon receipt of the Temporary Restraining Order on October 14, 2004, F&M has been in constant contact with Receiver concerning said Account and has assisted in the production of various documents pertaining to the investigation of this case.

7. Account 34-7477 is a multipurpose account that held numerous sources of funds. Schuberts retained unlimited discretion and dominion over the Account. The monthly statements demonstrate that personal funds, investor funds and loan proceeds used for the benefit of Schuberts other farm and business interests were held in this Account.

8. Schuberts executed certain Promissory Notes with F&M wherein they agreed to make certain payments. In these Promissory Notes, Schuberts further agreed to and grant F&M

a right of setoff if timely payments were not made. F&M's exercise of its setoff rights are well within its rights under the Promissory Note and Oklahoma statutes. Okla. Stat. Ann. Tit. 42, § 32 provides as follows:

"A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business".

9. The longstanding test for appropriateness of setoff was stated in *Southwest National Bank v. Evans*, 94 Okla. 185, 221 P. 53 (1924) and restated in *Hall v. Duncan Savings & Loan Association*, 820 P.2d 1360 (1991), which presupposes:

(a) That the fund deposited in the bank by the debtor was the property of the latter; (b) that the fund was deposited without restrictions and was not a special fund; and (c) an existing indebtedness then due and owing by the depositor to the bank.

Applying this test to the case at bar, it is apparent that the present situation meets the factors considered by the *Southwest National Bank* holding. Various sources of funds were deposited in the Account including proceeds from a majority of the promissory notes with F&M. Cancelled checks demonstrate that the proceeds were paid to a variety of persons or entities; not just investors. See Anderson Affidavit attached hereto as Exhibit "A". Account was not a "special" fund such as a payroll account or individual retirement account and as such has no protection from setoff.

10. That Respondent F&M has exercised its authority pursuant to Oklahoma case and statutory law and the Receiver is not entitled to the funds demanded in the Citation for Contempt.

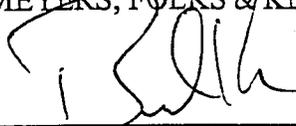
11. That F&M is not in contempt of the Court's Orders dated October 14, 2004 and November 15, 2004.

WHEREFORE, premises considered. Respondent Farmers & Merchants Bank, respectfully requests that this Court deny the Receiver's Citation for Contempt and award Farmers & Merchants Bank all costs incurred herein.

Respectfully submitted,

MORGAN, BAKER, MORGAN,
MEYERS, FOLKS & KERR

By:



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CERTIFICATE OF SERVICE

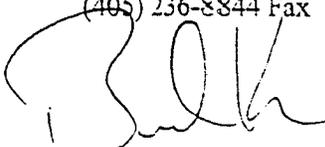
I hereby certify that on the 4th day of February, 2005, I mailed and faxed a true and correct copy of the above and foregoing Response to Citation for Indirect Civil Contempt of Court with sufficient postage thereon prepaid to the following:

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