

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

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

Plaintiffs,)

v.)

FARMERS & MERCHANTS BANK, an)
Oklahoma banking entity; JOHN V. ANDERSON,)
Individually, and as Officer and Director of)
Farmers & Merchants Bank; and JOHN TOM)
ANDERSON, Individually, and as Officer)
and Director of Farmers & Merchants Bank,)

Defendants,)

and)

ROBERT LYNN POURCHOT, Trustee of the)
Robert Lynn Pourchot Trust; DONALD W. ORR,)
Trustee of the Pork Chop Trust; THE WILL)
FOUNDATION; POURCHOT INVESTMENTS,)
LP; PHILLIP M. POURCHOT, Trustee of the)
Phillip M. Pourchot Revocable Trust; RICHARD)
REYNOLDS; RICHARD REYNOLDS, Trustee of)
the Richard Reynolds Living Trust; ANNENDA)
REYNOLDS; STEVEN B. SANDERS; VICKI L.)
SANDERS; and CRANDALL & SANDERS, INC.,)

Intervenors.)

Case No.: **CJ-2006-3311**

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

MAR - 2 2007

PATRICIA PRESLEY, COURT CLERK

by _____
DEPUTY

**INTERVENORS' REPLY IN SUPPORT
OF THEIR MOTION TO INTERVENE**

I. **DESPITE DEFENDANTS' PROTESTS TO THE CONTRARY, THE INTERVENORS HAVE A RIGHT TO INTERVENE UNDER 12 OKLA. STAT. §2024(A)(2).**

A. **Mandatory Intervention Is Appropriate Because the Intervenor Claim an Interest in the Transactions Which Are the Subject of the Action**

Defendants' contention that Intervenor are not entitled to mandatory intervention because their claim does not relate to real or personal property and seeks to recover actual damages is misplaced. The Oklahoma intervention statute clearly provides that mandatory intervention is required under these circumstances.

Conveniently, none of the cases upon which Defendants rely to support their contention dealt with the current, mandatory intervention statute which, unlike the prior statutes related to intervention, specifically provides that intervention is permitted as a matter of right when "the applicant claims an interest relating to the *property or transaction* which is the subject of the action". 12 Okla. Stat. § 2024(A)(2) (emphasis added). For example, Defendants tout the holding in *Gettler v. Cities Service Co.* 739 P.2d 515 (Okla. 1987) as being "dispositive of intervenors' claim for intervening as a matter of right" but fail to mention that the *Gettler* court applied "the old Pleading Code and authorities in resolving this appeal, because no application for intervention ... was pending under the Rule of the new pleading code at the time of the denial", rendering portions of the holding inapplicable to the matter. *Gettler*, 739 P.2d at 517.¹

Under the old Pleading Code, the joinder and intervention statutes² made no reference to the ability of an intervenor to base mandatory intervention on an interest in the *transaction* that

¹ Intervenor relied upon *Gettler* in their Motion to Intervene in connection with the four countervailing interests the courts balance when considering a motion to intervene. See Motion to Intervene at 4-5. An analysis of these factors, which all favor intervention in this instance, is not inconsistent with 12 O.S. § 2024(A)(2) and as a result, should still be considered by the Court.

² These statutes were "12 O.S. 1981 §§ 231, 232, 236 and 237". *Gettler*, 739 P.2d at 517.

was the subject of the action. See Exhibit A (12 O.S. 1981 §§ 231, 232, 236 and 237) attached hereto. As a result, even if it has not been explicitly recognized in an Oklahoma opinion, cases requiring the interest to relate to specific property have been superseded by the current statutory scheme. In this regard, Defendants cannot cite a single Oklahoma case that interprets 12 O.S. § 2024(A)(2) to require the intervenor to claim an interest in specific property only and not seek damages, because no such case exists. See, e.g., *Nicholas v. Morgan*, 58 P3d 775, 781 (Okla. 2002) (noting that intervention is “controlled by 12 O.S. 1991, § 2024” and mandatory “where the intervenor claims an interest relating to the property or *transaction* which is the subject of the action”) (emphasis added) (citing *Tulsa Rock Co. v. Williams*, 640 P.2d 530, 532 (Okla. 1982)³. To adhere to Defendants interpretation of this statute would render an intervenor’s right to claim an “interest relating to the transaction” as a basis for mandatory intervention meaningless and should, therefore, be rejected.

Here, the Intervenors have clearly identified the transactions in which they have an interest that are the subject of this action – every transaction related to the Defendants’ activities in connection with aiding or participating in the securities fraud at issue. These transactions are set forth in detail in both the Petition for Intervention and the ODS’ Petition.

B. The Disposition of This Action May Impair or Impede Intervenors’ Ability to Protect Their Interest in the Transactions

Intervention is mandatory where the “disposition of the action may impair or impede [the intervenors’] ability to protect that interest.” *Nicholas*, 58 P3d at 781. Here, if the motion to

³ The current intervention statute had not been promulgated when the *Tulsa Rock* decision was rendered in 1982, and as a result, the court made no reference to an interest in the transaction when it stated that intervention is a matter of right when “an applicant claims an interest in specific property involved and within the exclusive jurisdiction of the court”. *Tulsa Rock*, 640 P.2d at 532. The *Nicholas* court, however, recognized the change in the law when it defined mandatory intervention to include claims related to a transaction despite citing the *Tulsa Rock* opinion in support of this definition.

intervene is denied, and Intervenors are forced to pursue their claim in a separate action (the "Companion Action"),⁴ the disposition of this action could impair or impede their ability to protect their interest in the transactions.

First, the district court handling Intervenors' suit against the Defendants (the "Companion Court") will more than likely be faced with ruling on a motion to stay any Companion Action because of this already pending action involving common (i) parties and interests,⁵ and (ii) issues of fact and law.⁶ If such a motion to stay were to be granted, Intervenors' interests would be impaired or impeded because they would be deprived of any ability to argue issues to this Court which could have a preclusive effect in their pending but stayed action. Obviously, Defendants would seek to use any favorable rulings from this proceeding when arguing the same issue in any Companion Case, hoping to use the shield of issue preclusion.

Alternatively, any Companion Court could allow Intervenors to move forward with their action against the Defendants. If this occurs, the Companion Court and this Court will be ruling at or near the same time on many of the same complex, legal issues related to the identical theories of recovery being pursued by the ODS and the Intervenors. As a result, an undesirable risk of inconsistent adjudications will be created. In addition, the first court to rule on a legal question or enter a judgment may expose Intervenors or the ODS (depending on which court rules first) to arguments by Defendants that issue preclusion should prevent re-litigation of any ruling that they find favorable. Either option would impair or impede Intervenors' ability to pursue their claim. Defendants' arguments to the contrary should be rejected.

⁴ While Intervenors filed a separate action in Oklahoma County, they moved to consolidate it with this proceeding before Defendants filed any responsive pleading.

⁵ ODS is bringing this action on behalf of all investors who lost money in the Purported Investment Program, which includes the Intervenors

⁶ ODS and Intervenors are seeking to impose liability on Defendants pursuant to the same theory of recovery, (aiding or participating in securities fraud under the Oklahoma Securities Act), based on the same facts, (transactions related to Marsha Schubert's scheme).

Defendants rely upon a Colorado opinion, *Feign v. Alexa Group, Ltd.*, 19 P.3d 23 (Colo. 2001), to argue that Intervenors will not be impaired or impeded if they are not allowed to intervene. Obviously, the *Feign* opinion is non-authoritative on an Oklahoma court.⁷ In addition, the mandatory intervention statute in Colorado differs from 12 O.S. 2024(A)(2) in that it requires that the “intervenor’s interest be inadequately represented by the parties to the action”, which the *Feign* court found was not present.⁸ *Feign*, 19 P.3d at 31-32. Finally, the *Feign* intervenors were seeking to intervene to contest a settlement reached by the Colorado Securities Commissioner and the fraudulent actors. The negotiated stipulation specifically provided that defrauded investors who elected not to accept payment under the claims resolution process would “not be impaired or otherwise affected by the Stipulation.” *Id.* at 30. That is not the case in this dispute.

In addition to the fact that it is non-authoritative and involves a different intervention statute, the *Feign* court was simply not faced with the possibility of inconsistent adjudications or issue preclusion because it was analyzing intervention in the context of a party who was seeking to contest a settlement that specifically allowed non-participating parties to pursue their claim in a separate proceeding. Here, there is no settlement, and the Defendants have not agreed that a judgment in favor of the ODS does not prevent defrauded investors, such as the Intervenors, to pursue their own claims for the same wrongful conduct pursuant to the same theory of recovery. As such, Defendants reliance on this holding is misplaced.

Defendants also contend that “any argument that intervention must be allowed” in this proceeding is negated because a receiver has been appointed in the ODS action against Marsha

⁷ Despite this fact, Defendants imply that Intervenors had an obligation to alert the Court to this Colorado opinion.

⁸ It should be noted that *Feign* court found that the intervenors had an interest in the transactions at issue in the action.

Schubert in Logan County to recover and distribute Marsha Schubert's remaining assets to the defrauded investors pursuant to a claims procedure (the "Schubert Receiver Action"). In fact, the Schubert Receiver Action has no relationship or bearing on Intervenor's claims.

For example, Defendants rely upon *Commodity Future Trading Commission v. Chilcott Portfolio Management*, 724 F.2d 584 (10th Cir. 1984) to support their contention. In *Chilcott*, the intervenor sought to intervene and sue the receiver in an action instituted by the Commodity Future Trading Commission in which a receiver had been appointed and established a claims procedure for those individuals who had been defrauded. *Id.* at 586. The *Chilcott* court reasoned that the intervenor "was not being foreclosed from asserting his claim" because he had the opportunity to pursue it via the claims procedure. *Id.* The situation presented in this matter is not analogous.

In the Schubert Receiver Action, there is no appointed receiver or claims procedure related to the actions of Defendants and the damages caused thereby. Instead, the Receiver is only seeking to recover stolen funds from Marsha Schubert herself or so-called "long" investors that were paid the Ponzi scheme proceeds from those defrauded.⁹ As noted by Defendants, the Receiver's anticipated distribution is only \$1 million, which will be distributed on a pro rata basis to the investors who filed claims with the Receiver. This recovery is a small portion of the approximately \$9 million stolen in the scheme. The Receiver's "collection" actions are irrelevant to Defendants' liability for aiding and abetting the securities fraud.

In sum, the requirements for mandatory intervention are present, and as a result, this Court should grant the Motion to Intervene.

⁹ In fact, the Intervenor's have each pursued and concluded arbitration claims for securities fraud against Schubert's brokerage firms prior to bringing this action. The Receiver had no role in those proceedings other than as a witness.

II. THE INTERVENORS SHOULD BE PERMITTED TO INTERVENE UNDER 12 OKLA. STAT. § 2024(B)(2).

Defendants do not dispute that the Intervenor's claim in this action presents questions of law and fact in common with those being raised by ODS in this action, which satisfies the requirement for permissive intervention under 12 O.S. § 2024(B)(2). Instead, Defendants argue that the Motion to Intervene should be denied on venue grounds. As an initial matter, there is no requirement in Oklahoma that the intervenor establish venue. In addition, Defendants will not be prejudiced by Intervenor's presence in this action on the basis of venue, because venue is proper in connection with ODS' claims. If anything, the burden on Defendants will be greater if they are forced to defend the same claim in two different counties.

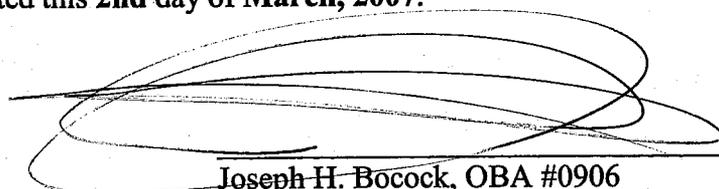
Defendants also contend that intervention will unduly delay the underlying litigation. This is simply not true. The parties have not engaged in any discovery, and the ODS and the Intervenor are pursuing the same theory of recovery and will require the testimony of many of the same witnesses and analysis of the same evidence. As such, intervening at this point in the litigation will not delay this case. In addition, while Defendants claim that hundreds of other investors will seek to intervene if this motion is granted, this scenario is not realistic. The Intervenor represents almost \$3.9 million of the approximately \$9 million in losses, and the majority of the other 87 investors who lost money in the scheme do not have sufficient losses to make intervening in this action cost effective. Instead, these investors will more than likely allow the ODS to pursue their claims and not expend the significant time and money it will cost to bring their own action thereby vindicating the important and necessary role of the ODS in helping defrauded investors.

Defendants' objection to the intervention is merely a thinly-veiled attempt to deprive Intervenor of their right to counsel while Defendants would be able to move forward in both actions with counsel of their choice. This Court should reject such an inequitable result.

CONCLUSION

For these reasons, the Intervenor meets the requirements of intervention as of right and by permission under 12 Okla. Stat. § 2024.

Respectfully submitted this 2nd day of March, 2007.



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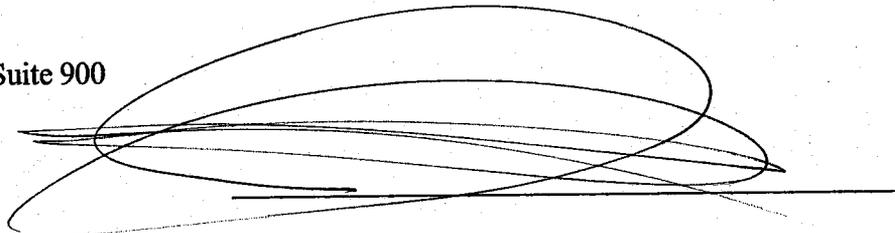
ATTORNEYS FOR INTERVENORS

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2007, a true and correct copy of the foregoing was mailed, via U.S. First Class Mail, postage prepaid, to the following counsel of record:

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§ 232. All united in interest to be joined

Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the petition.

R.L.1910, § 4692.

Gen.St.Kan.1889, par. 4114; C.S.1921, § 220; St.1931, § 153.
Parties ⇐ 18, 29, 35.

§ 231. Joinder of parties defendant

Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

R.L.1910, § 4691.

Gen.St.Kan.1889, par. 4113; C.S.1921, § 219; St.1931, § 152.

§ 236. Determination as to parties before court—Necessary parties to be brought in

The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

R.L.1910, § 4696.

Gen.St.Kan.1889, par. 4118; C.S.1921, § 224; St.1931, § 157.
Parties ⇐50 *et seq.*

§ 237. Interested person made party on petition

When in an action for the recovery of real or personal property any person having an interest in the property applies to be made a party, the court may order it to be done.

R.L.1910, § 4697.

Gen.St.Kan.1889, par. 4119; C.S.1921, § 225; St.1931, § 153.
Parties ⇐ 38 et seq.