

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator,)
)
Plaintiff,)
)
v.)
)
The Estate of Bryan David Roark,)
)
Defendant.)

NOV - 4 2009

PATRICIA PRESLEY, COURT CLERK

CJ _____
DEPUTY

Case No.

CJ - 2009 - 10905

EMERGENCY APPLICATION FOR ORDER FREEZING ASSETS
AND ORDER APPOINTING RECEIVER

The Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (“Plaintiff” or “Department”), respectfully submits this application for an order freezing the assets of the Estate of Bryan David Roark (Roark Estate) and the appointment of a receiver for the Roark Estate assets, pursuant to the authority granted by Section 1-603 of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §1-101 through 1-701 (Supp. 2003). This application is necessary to protect the rights of the Department in its obligation to safeguard the public interest; to prevent irreparable loss, damage or injury to investors who were sold investments by Bryan Roark (Roark); to avoid the misapplication of funds and other assets; and to remedy the violations of the Act described in Plaintiff’s *Petition for Restitution and/or Other Equitable Relief* (Petition). The Department moves this Court to issue *instanter* such order freezing assets and order appointing a receiver. The entry of such orders is necessary for the

reasons set forth below, to preserve the status quo and to protect the Department's rights in administering and enforcing the Act.

I. BACKGROUND

Plaintiff filed the Petition alleging violations of the Act by Bryan David Roark in connection with the issuance, offer and sale of securities in and/or from the state of Oklahoma by fraudulent means. At all times material hereto, Roark was registered under the Act as an agent of Morgan Stanley Smith Barney (Morgan Stanley). Roark operated from the Morgan Stanley office in Ada, Oklahoma. Roark died on October 24, 2009.

It has come to the attention of the Department that monies have been withdrawn from at least one bank account into which investor funds were deposited.

II. AUTHORITY AND ARGUMENT FOR ASSET FREEZE AND RECEIVER

Section 1-603 of the Act provides:

A. If the Administrator believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or constituting a dishonest or unethical practice or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this act or a rule adopted or order issued under this act or a dishonest or unethical practice, the Administrator may, prior to, concurrently with, or subsequent to an administrative proceeding, maintain an action in the district court of Oklahoma County or the district court of any other county where service can be obtained to enjoin the act, practice, or course of business and to enforce compliance with this act or a rule adopted or order issued under this act.

B. In an action under this section and on a proper showing, the court may:

1. Issue a permanent or temporary injunction, restraining order, or declaratory judgment;
2. Order other appropriate or ancillary relief, which may include:

a. an asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the Administrator, for the defendant or the defendant's assets,

b. ordering the Administrator to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property,

c. imposing a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or up to Two Hundred Fifty Thousand Dollars (\$250,000.00) for more than one violation; an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this act or the predecessor act or a rule adopted or order issued under this act or the predecessor act, and

d. ordering the payment of prejudgment and postjudgment interest; or

3. Order such other relief as the court considers appropriate.

The violations of the Act described in the Petition give the Department the right to seek one or more of the remedies available by statute and in equity. *Oklahoma Securities Commission v. CFR International, Inc.*, 622 P.2d 293, 295 (Okla. Ct. App. 1980). Section 1-603 of the Act specifically grants this Court the power to order an asset freeze for a defendant or a defendant's assets.

Roark engaged in acts and practices in violation of the Act and, as a result of these activities, received, as yet, an unknown amount of money from Investors. The whereabouts of all of the money raised by Roark through such violations is not known at this time. A danger

exists that money received from the Investors and/or assets purchased with Investor funds, will be lost, removed or transferred. An order to issue *instanter* against Roark's estate is necessary to preserve these funds and the records relating thereto, to prevent the dissipation of assets, and to account for the money raised through violations of the Act.

Another available remedy under Section 1-603 of the Act is that of the appointment of a receiver. In *SEC v. American Bd. of Trade, Inc.*, 830 F.2d 431 (2d Cir. 1987), the court, quoting *SEC v. Manor Nursing Centers, Inc.* 458 F.2d 1082, 1105 (2d. Cir, 1972), stated that the primary purpose of the appointment of a receiver is to help "preserve the status quo while the various transactions [are] unraveled." *Id.* at 436.

The form and quantum of evidence required for such appointment is a matter of judicial discretion. *U.S. v. O'Connor*, 291 F.2d 520 (2d Cir. 1961); *Haase v. Chapman*, 308 F.Supp. 399 (W.D.Mo. 1969). There is no definitive list of facts by which the Court must abide; however, the Sixth Circuit in *Tennessee Pub. Co. v. Carpenter*, 100 F.2d 728 (6th Cir. 1938), identified factors which can be considered, most of which are applicable here and justify the appointment of a receiver over the Roark Estate:

Factors typically influencing the district court's exercise of discretion include the existence of a valid claim by the moving party; the probability that fraudulent conduct has occurred or will occur to frustrate the claim; imminent danger that property will be lost, concealed, or diminished in value; inadequacy of legal remedies; lack of a less drastic equitable remedy; and the likelihood that appointment of a receiver will do more harm than good.

Id. at 732.

The Department, pursuant to Section 1-602 of the Act, is conducting an investigation into Roark's activities in and/or from the state of Oklahoma. To date, the investigation has produced evidence that clearly indicates Roark issued, offered and/or sold securities in and/or from this

state by fraudulent means. The Department submits that the evidence firmly establishes a *prima facie* case for an asset freeze.

Plaintiff also believes that a receiver is needed in this matter to take possession of all real and personal property, to collect debts, to compromise debts, to make transfers, and to perform any other act with respect to the receivership assets as the Court may authorize. Therefore, Plaintiff requests the appointment of a receiver for all of the Roark Estate assets in the state of Oklahoma, to include monies, securities and properties, real and personal, tangible and intangible, of whatever kind and description, whether held personally or by a Roark beneficiary or affiliate¹; and all other assets, wherever located if paid for, in whole or in part, with Oklahoma Investor funds, to include monies, securities and properties, real and personal, tangible and intangible, of whatever kind and description (collectively, "Roark Estate Assets"), with direction and authority as follows:

a. to take immediate custody, possession and control of any and all Roark Estate Assets, as well as any records or documents relating to the Roark Estate Assets including, but not limited to, bank statements, checkbooks, and invoices previously paid or currently owed;

b. to conserve, hold, and manage all of the Roark Estate Assets, pending further action by this Court in order to prevent any irreparable loss, damage, or injury; to conserve and prevent the withdrawal or misapplication of funds entrusted to Roark, his agents and /or his affiliates; and to take the necessary steps to protect the Roark Estate Assets;

¹ For purposes of this proceeding, the term "Affiliate" includes (a) a corporation or organization of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities; (b) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity; and (c) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of any entity described in subsection (a) above or any of its parents or subsidiaries.

c. to receive and collect any and all sums of money due or owing to the Roark Estate whether the same are due or shall hereinafter become due and payable, and to make such payments and disbursements as may be necessary and advisable for the preservation of the Roark Estate Assets and as may be necessary and advisable in discharging his duties as receiver;

d. to institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings in any state court, federal court, or United States bankruptcy court as may in the receiver's opinion be necessary or proper for the protection, maintenance, and preservation of the Roark Estate Assets, or the carrying out of the terms of this Order, and likewise to defend, compromise, adjust, or otherwise dispose of any or all actions or proceedings now pending in any court by or against Roark or his estate where such prosecution, defense, or other disposition of such actions or proceedings is, in the judgment of the receiver, advisable or proper for the protection of the Roark Estate Assets; and

e. to exercise those powers necessary to implement the orders and directives of this Court.

Plaintiff further requests that the Court direct delivery and surrender to the appointed receiver all Roark Estate Assets, and further direct Roark's agents and/or Affiliates to fully cooperate with and assist the receiver appointed in this action and to take no action, directly or indirectly, to hinder or obstruct the receiver in the conduct of his duties or to interfere in any manner, directly or indirectly, with the custody, possession or control exercised by said receiver.

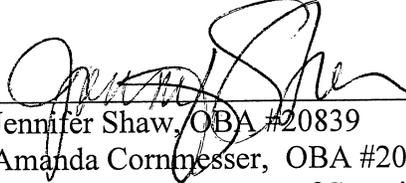
CONCLUSION

For the reasons stated above, the Department respectfully requests that this Court order an asset freeze and appoint a receiver over the Roark Estate Assets.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faught, Administrator

By:



Jennifer Shaw, OBA #20839
Amanda Cornmesser, OBA #20044
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, Oklahoma 73102
Telephone (405) 280-7700
Fax (405) 280-7742