

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JAN 23 2009

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

OKLAHOMA DEPARTMENT OF SECURITIES)
ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)
)
vs.)
)
FARMERS & MERCHANTS BANK, et al.)
)
Defendants,)
)
and)
)
ROBERT LYNN POURCHOT, Trustee of the)
Robert Lynn Pourchot Trust, et al.,)
)
Intervenors.)

Case No. CJ-2006-3311

**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION TO DEEM CERTAIN ALLEGATIONS IN
PLAINTIFF'S PETITION ADMITTED**

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Department), respectfully submits this reply to *Defendants' Response in Opposition to Plaintiff's Motion to Deem Certain Allegations in Plaintiff's Petition Admitted*. Plaintiff continues to rely on the arguments and authorities cited in its motion and submits this reply to address Defendants' response in general.

Like the federal rules of civil procedure, the expressed purpose of the Oklahoma Pleading Code is to "secure the just, speedy, and inexpensive determination of every action." 12 O.S. § 2001. As expanded by the federal district court in *Kortum v. Raffles Holdings, Ltd.*, 2002 WL 31455994 (N.D. Ill.), the purpose of the civil procedure rules is

to reveal the pertinent issues at hand so the parties can focus on the substantive merits of the suit. *Id.* at *4.

The road to this point in the case has indeed been long. Defendants' motion to dismiss for failure to state a claim, motion for summary judgment and numerous requests for reconsideration of this Court's rulings with respect to both motions have delayed the attention of the parties and the Court to the factual issues of this case.¹

Now is the time to streamline this matter by exposing the pertinent factual issues to be determined at trial. This very motion is the product of Plaintiff delving into the substantive merits of the case to determine the facts that are not in dispute.

Plaintiff is not aware of any statutorily imposed deadline for bringing this motion. Likewise, there is no statutory provision regarding the waiver by a plaintiff of its right to challenge the answer of a defendant. More importantly, Defendants do not cite to any such authority in their response.

Many of the authorities cited by Defendants in their response are cases decided prior to November 1, 1984, the effective date of the Oklahoma Pleading Code. The purpose of the 1984 legislation was to modernize the civil procedure statutes and to make this state's civil procedures uniform with those of the federal courts and other states' courts. One important change prohibits general denials. Defendants assert a "qualified general denial" that allows a defendant to deny all allegations in a petition except particular specified allegations that are expressly admitted.

Section 2008(B) requires Defendants to specifically admit or deny Plaintiff's allegations in order to apprise Plaintiff of those matters that will be at issue at trial and

¹ In fact, yet another hearing is scheduled for January 30th in connection with Defendants' request for reconsideration of the Court's denial of their summary judgment motion.

that will require an offer of proof by Plaintiff. *Owens v. Cimino*, 140 B.R. 280, 282 (D. Colo. 1992). Section 2008(B) limits “the use of general denials by providing more specifically for the forms of denials and inserting an obligation of good faith.” See Comment to Section 2008(B) by the Civil Procedure Committee of the Oklahoma Bar Association.

Preferring not to make an admission, Defendants combine their “qualified general denial” with the following response to certain of the allegations in the Petition: “to the extent the allegations . . . interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.” Defendants cannot deny the allegations in general and at the same time state that the “documents speak for themselves.” As the judge wrote in *State Farm Mut. Auto. Ins. v. Riley*, 199 F.R.D. 276 (N.D. Ill. 2001):

[t]his Court has been attempting to listen to [documents that speak for themselves] for years (in the forlorn hope that one will indeed give voice)-but until some such writing does break its silence, this Court will continue to require pleaders to employ one of the three alternatives that are permitted by Rule 8(b) in response to all allegations about the contents of documents (or statutes or regulations). *Id.* at 278-79.

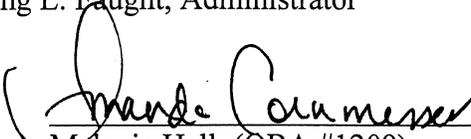
Like their “insufficient knowledge or information” responses, Defendants’ contradictions in their “documents speak for themselves” responses are not made in good faith. Plaintiff respectfully requests that the Court 1) find that Defendants have not denied the allegations in their responses to the disputed paragraphs of the *Petition*, and 2) deem such allegations admitted. In the alternative, Plaintiff requests that the Court strike the Defendants’ inappropriate responses and instruct Defendants to amend their *Answer*,

within twenty (20) days, to conform to the requirements of Section 2008 of the Pleading Code.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the *Plaintiff's Reply to Defendants' Response in Opposition to Plaintiff's Motion to Deem Certain Allegations in Plaintiff's Petition Admitted*, was mailed this 23rd day of January, 2009, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

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