

JAN 18 2013

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF)
SECURITIES, ex rel, IRVING L. FAUGHT,)
Administrator,)

Plaintiff,)

vs.)

DAVID WARREN HARRIS, an individual,)

Defendant.)

Case No.: CJ-2012-2604
Judge Barbara G. Swinton

REPLY TO RESPONSE TO DEFENDANT’S MOTION TO DISMISS FOR
LACK OF JURISDICTION

Plaintiff the Oklahoma Department of Securities (“ODOS”) did not, and cannot, directly dispute a single Undisputed Material Fact as enumerated in Defendant’s Motion to Dismiss.

Though improperly attached,¹ Defendant implores the Court to carefully review the “evidence that supports the Department’s case against Defendant.”

Simply stated, there is nothing in this matter that would confer jurisdiction upon ODOS, invoke the Oklahoma Securities Act, or invoke the jurisdiction of this Court.

Defendant David W. Harris (“Defendant”), by and through his attorney of record, and pursuant to Rule 4 of the Rules for District Courts of Oklahoma, Rules 10 and 37 of the Official Court Rules of the Seventh Judicial and Twenty-sixth Administrative Districts, and OKLA. STAT. tit. 12 § 2012(B)(1), (2), (6), and (10), submits this *Reply to Response to Motion to Dismiss for Lack of Jurisdiction*. In support, Defendant would show as follows.

¹ ODOS attached, as evidence to its Response, a witness affidavit - excluded as hearsay and improper evidentiary material pursuant to OKLA. STAT. tit. 12, § 2802, Rule 13(c) of the Rules for District Courts of Oklahoma, and *Benson v. Hunter*, 2002 OK CIV APP 44, ¶5, 45 P.3d 444. ODOS further attached its own administrative investigative ruling against Defendant in a wholly unrelated matter - excluded for relevancy and otherwise pursuant to OKLA. STAT. tit. 12, § 2402, 2403, and 2803(8), and Rule 13(c) and *Benson*, supra.

1. ODOS did not, and cannot, dispute the following material facts which require dismissal for lack of jurisdiction:

Not one of the alleged "investors" reside in Oklahoma. Southlake (as defined in the *Motion to Dismiss*) is not located in Oklahoma. Southlake is not registered to do business in Oklahoma. Southlake does not have any operations in Oklahoma. None of Southlake's alleged oil well interests are located in Oklahoma. None of the "units" were issued from Oklahoma. None of Southlake's Subscription Agreements were sent to any investor from Oklahoma. All Subscription Agreements were returned by investors to Southlake, in Texas, not to Oklahoma. *The Defendant had never even seen* any of the Subscription Agreements until receiving them in ODOS' discovery responses in this matter. The Defendant never mailed any of the Subscription Agreements to any investor or to anyone else. The Defendant did not, and does not to this day, know the terms of the alleged investment or the contents of the Subscription Agreements. The Defendant never discussed the Subscription Agreements with any of the investors or anyone else. The Defendant did not speak with the investors about the terms of Southlake's investment, how much money to invest, the return on investment, a time frame for return, or any of the oil activities that Southlake was engaged in. And perhaps most importantly, the investments made money for the investors, and no investors are unhappy with the investment. Defendant's *Motion to Dismiss for Lack of Jurisdiction*, Undisputed Material Facts, citation provided.

2. ODOS relies on a witness affidavit, which should be stricken from the record as improperly attached material which would be excluded under the rules of evidence. OKLA. STAT. tit. 12, § 2802, Rule 13(c) of the Rules for District Courts of Oklahoma, and *Benson v. Hunter*, 2002 OK CIV APP 44, ¶5, 45 P.3d 444.

3. Should the Court entertain such attachment, Defendant implores the Court to scrutinize what the affiant actually says - because at no point does the affidavit counter any material undisputed fact put forth by the Defendant, and, at no point does it provide any fact which would create a nexus between any offer or sale of Southlake's securities, and Oklahoma.

4. Apparently, the only or best argument that ODOS can put forth as to why this matter

has anything to do with a sale of securities invoking Oklahoma law or Oklahoma courts is as follows:

- a. There was an agreement that Defendant would “identify, introduce and present project information to potential funding sources... .” *Response*, Exhibit 2, Affidavit of Mark Teinert, ¶5. Having an agreement to do one thing, and performing the act is another. Defendant in fact did not identify, introduce, or present project information to potential investors. Exhibit “B,” and “D” to the *Motion to Dismiss*. At no point does the affidavit state that Defendant actually identified, introduced, or presented project information to any potential investor, nor did Defendant do so, nor has ODOS presented any such evidence.
- b. There was an agreement for Southlake to provide information to Defendant for his own financing or investment. *Response*, Exhibit 2, Affidavit of Mark Teinert, ¶7. Clearly, this statement has nothing to do with any alleged offer or sale made by Defendant to any potential investor.
- c. There was an agreement such that Southlake was to furnish Defendant with project materials, and authorized Defendant to transmit them to potential investors. *Response*, Exhibit 2, Affidavit of Mark Teinert, ¶8. Having authorization to do one thing, and actually performing the act is another. In fact, Defendant did not transmit any materials to any potential investor. Exhibit “B,” and “D” to the *Motion to Dismiss*. At no point does the affidavit actually state that Defendant transmitted any information to any potential investor, nor has ODOS presented any such evidence.
- d. The affiant claims to have provided the Defendant with a Southlake private placement memorandum. *Response*, Exhibit 2, Affidavit of Mark Teinert, ¶9. Though this non-material fact is disputed, even if true, *Southlake giving information to the Defendant* does not make the Defendant part of a sale of a security by Southlake to any alleged investor - particularly when the Defendant did not participate in the sale or forward any information to an investor. See, Exhibit “D” to the *Motion to Dismiss*.
- e. The Defendant gave contact information of individuals to Southlake. *Response*, Exhibit 2, Affidavit of Mark Teinert, ¶10. This is not disputed. Defendant simply had no further involvement with any alleged sale past that point. See, Exhibit “D” to the *Motion to Dismiss*.

5. ODOS further attached its own administrative investigative ruling against Defendant in a wholly unrelated matter which should be excluded for relevancy and otherwise pursuant to

OKLA. STAT. tit. 12, § 2402, 2403, and 2803(8), and Rule 13(c) and *Benson v. Hunter*, 2002 OK CIV APP 44, ¶5, 45 P.3d 444. The effect of this attachment is far more prejudicial to Defendant than probative to the issues herein, and serves only to taint Defendant's character. Defendant requests that this attachment be stricken from the record under the authority cited in this paragraph.

6. ODOS is correct in that in order to find liability in this matter, the offer or sale must have been made "in this state," meaning the offer or sale either "originated from within this state" or was directed "to a place in this state and received" there. OKLA. STAT. tit. 71, § 1-610. ODOS is simply incorrect however in arguing that an Oregon appellate decision from 1981 states that "Section 1-610 applies if there is sufficient evidence from which the trier of fact could conclude that the offers to sell an investment originated in Oklahoma." *Response*, §2.

7. Likewise, the Court should not be misled by ODOS' statement that "Defendant was in fact present in the state of Oklahoma at the time the offers of the investments were made." *Response*, §2. Defendant does live in Oklahoma, but simply being present in Oklahoma, when one has nothing to do with an offer or sale,² does not create liability. OKLA. STAT. tit. 71, § 1-610.

8. As argued by Defendant, Oklahoma law does not apply, ODOS does not have authority over this matter on the facts, and this Court does not have jurisdiction. This is because there must be some nexus between the alleged offer or sale and Oklahoma. *Newsome v. Diamond Oil Producers, Inc.*, [1982-1984 Transfer Binder] Blue Sky L. Rptr. (CCH) ¶71,869 (D.C. Okla. 1983); *Barnebey v. E.F. Hutton & Co.*, 715 F.Supp. 1512 (D.C. FL. 1989). That nexus is created when some amount of offer or sales information about the investment comes from Oklahoma, when the issuer is in Oklahoma, when the investment is in Oklahoma, when information is to be returned to

² See, Exhibit "D" to *Motion to Dismiss*.

Oklahoma, or a similar such recognizable connection. *McCullough v. Leede Oil & Gas, Inc.*, 617 F.Supp. 384, Fed. Sec. L. Rep. P 92, 475 (1985); *Barnebey v. E.F. Hutton & Co.*, 715 F.Supp. 1512, 1536-42 (D.C. FL. 1989). There is simply no such nexus here. Defendant gave a list of names to a Texas company, and had no further “offer” or “sales” connection; this simply does not rise to a level of liability. *McCullough v. Leede Oil & Gas, Inc.*, 617 F.Supp. 384, Fed. Sec. L. Rep. P 92, 475 (1985); and, Exhibit “D,” *Motion to Dismiss*.

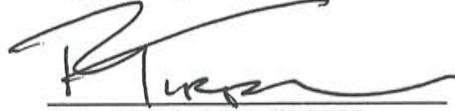
9. Ultimately, a state has a legitimate interest in applying its securities laws to operations conducted within state, even if aimed at nonresidents - and this is why ODOS is effectively, backwards on the facts of this case. Even if Defendant was selling the unregistered securities of a Texas company, to an investor in California, it would be the securities departments of Texas and California that would have an interest in protecting their citizens and in keeping their states from being a springboard for unscrupulous securities promoters. In this scenario, Texas and California could reach Defendant in Oklahoma and subject him to their jurisdiction and laws.

10. Oklahoma simply has no interest in this matter. ODOS’ improper and irrelevant attachments do not dispute the fact that Defendant had nothing to do with any alleged offer or sale. And, perhaps of most importance, ODOS does not dispute that there are no unhappy investors in the Southlake investment. The investment was, upon all information and belief, a success.

CONCLUSION

There are no facts in this matter that would invoke Oklahoma securities law, invoke the regulatory authority of ODOS, or invoke the jurisdiction of an Oklahoma Court. Therefore, the Defendant respectfully requests that this Court dismiss this matter, and grant to Defendant his costs and fees, and any other and further relief that the Court may deem just and equitable.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 18, 2013, a true and correct copy of the above and foregoing *Reply to Response to Motion to Dismiss for Lack of Jurisdiction* was served via hand delivery upon:

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