

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JAN 23 2013

TIM RHODES
COURT CLERK

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Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
 Administrator,)
)
 Plaintiff,)
)
 v.)
)
 David Warren Harris,)
)
 Defendant.)

Case No. CJ-2012-2604
Judge Barbara Swinton

**DEPARTMENT’S SURREPLY TO DEFENDANT’S MOTION TO DISMISS
FOR LACK OF JURISDICTION**

The Oklahoma Department of Securities (“Department”) respectfully submits the following surreply to the Reply to Response to Defendant’s Motion to Dismiss for Lack of Jurisdiction (“Reply”).

In his Reply, Defendant claims his motion to dismiss is filed pursuant to Okla. Stat. tit. 12, §2012(B)(1), (2), (6) and (10). Okla. Stat, tit. 12, §2012(B) provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

1. Lack of jurisdiction over the subject matter;
2. Lack of jurisdiction over the person;
3. Improper venue;
4. Insufficiency of process;
5. Insufficiency of service of process;
6. Failure to state a claim upon which relief can be granted;
7. Failure to join a party under Section 2019 of this title;
8. Another action pending between the same parties for the same claim;
9. Lack of capacity of a party to be sued; and
10. Lack of capacity of a party to sue.

A motion making any of these defenses shall be made before pleading if a further

pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. **If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by the rules for summary judgment.** A motion to dismiss for failure to state a claim upon which relief can be granted shall separately state each omission or defect in the petition, and a motion that does not specify such defects or omissions shall be denied without a hearing and the defendant shall answer within twenty (20) days after notice of the court's action (emphasis added).

On May 22, 2012, Defendant filed a reservation of time in which to answer or otherwise plead pursuant to Okla. Stat. tit. 12, §2012(A). Okla. Stat. tit. 12, §2012(A) provides:

Unless a different time is prescribed by law, a defendant shall serve an answer:

- a. within twenty (20) days after the service of the summons and petition upon the defendant,
- b. within twenty (20) days after the service of the summons and petition upon the defendant, or within the last day for answering if applicable; provided, a defendant may file a reservation of time which shall extend the time to respond twenty (20) days from the last date for answering. **The filing of such a reservation of time waives defenses of paragraphs 2, 3, 4, 5, 6, and 9 of subsection B of this section** (emphasis added).

Defendant's filing of the reservation of time in May, 2012, waived certain defenses he now attempts to claim, particularly Okla. Stat. tit. 12, §2012(B)(2) and (6).

Defendant mysteriously cites *Benson v. Hunter*, 2002 OK CIV APP, ¶5, 45 P.3d 444, in support of an argument that the Department's witness affidavit and an administrative order should be stricken from the record. The *Benson* Court simply recited that a motion to dismiss pursuant to Okla. Stat. tit. 12, §2012(B)(6) is converted to a summary judgment motion when "materials outside the pleadings are presented to, and not excluded by, the court." The Court never determined that any materials should have been excluded from consideration. Further, the

present case is not a motion to dismiss pursuant to Okla. Stat. tit. 12, §2012(B) as Defendant previously waived this defense. Finally, nowhere does Defendant seek to convert his motion to one for summary judgment.

The witness affidavit and administrative order are relevant in this case pursuant to Okla. Stat. tit. 12, §2402, to refute what Defendant refers to as his “Undisputed Material Facts” in support of his motion to dismiss. Factually, Defendant created a relationship with a company in which he positioned himself to financially and directly profit by means of what he himself called “Success Fees,” by working in and from Oklahoma to locate, solicit and refer investors to oil and gas investments. This is precisely the activity to which the Oklahoma securities laws apply.

Respectfully submitted,



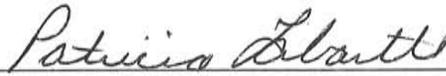
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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2013, the foregoing document was sent by email and first-class mail to the following:

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