

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

DEC 30 2008

PATRICIA PRESLEY, COURT CLERK

by _____
DEPUTY

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

Plaintiff,)

vs.)

Case No. CJ-2006-3311

FARMERS & MERCHANTS BANK, et al.)

Defendants,)

and)

HEARING SET FOR
JANUARY 30, 2009 @ 9:00 A.M.

ROBERT LYNN POURCHOT, Trustee of the)
Robert Lynn Pourchot Trust, et al.,)

Intervenors.)

**PLAINTIFF'S MOTION TO DEEM CERTAIN ALLEGATIONS IN
PLAINTIFF'S PETITION ADMITTED**

In their *Answer* to Plaintiff's *Petition*, Defendants firmly admit some allegations and firmly deny others. However, in connection with more than a third of the allegations made in Plaintiff's *Petition* (Disputed Allegations), Defendants respond (1) that the "documents speak for themselves" or (2) that Defendants lack sufficient knowledge or information when, in fact, the allegations are clearly within their sphere of knowledge. Because Defendants fail in their *Answer* to comply with the Oklahoma Pleading Code (Pleading Code), 12 O.S. §§ 2001-2027, Plaintiff hereby requests that the Court deem the Disputed Allegations admitted by Defendants.

ARGUMENT

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. § 2001.¹ The federal district court in *Kortum v. Raffles Holdings, Ltd.*, 2002 WL 31455994 (N.D. Ill.), stated that the civil procedure rules “are intended to expose the pertinent issues in the litigation at the earliest possible stage, so the parties can focus on the actual substance of the dispute as soon as practically possible.” *Id.* at *4. Accordingly, when answering a petition, the “party . . . shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this statement has the effect of a denial.” 12 O.S. § 2008(B). *See also* Fed. R. Civ. P. 8(b).

In preparing their *Answer*, Defendants had three straightforward statutory alternatives for addressing each allegation in Plaintiff’s *Petition*, that is: 1) to admit the allegation, 2) to deny the allegation, or 3) to state that the Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation. 12 O.S. § 2008(B). However, with respect to many of Plaintiff’s allegations, Defendants create a fourth answer in making their responsive pleading. Specifically, Defendants respond by stating that “to the extent the allegations . . . interpret the bank records of Marsha Schubert, the documents speak for themselves and any allegations contrary therewith are denied.” *See Exhibit A, Defendants’ responses to paragraphs 34-39, 59-62, 74-78, 80-*

¹ The Oklahoma Pleading Code is based on the federal rules of civil procedure, therefore, federal case law provides guidance when construing this state’s corresponding statutes. *Pan v. Bane*, 2006 OK 57, at ¶7, 141 P.3d 555, 558-559.

84, 86-90, 99-106, 116, 120, 138, 142, 143, 157, 158, 164, 172, 173, 183-185, 189, 190, 205, and 218.²

In connection with their “documents speak for themselves” responses, Defendants do not directly admit or deny Plaintiff’s allegations. Further, these responses by Defendants do not qualify for a “deemed” denial because they do not specifically identify the parts of the allegations that are true or consistent with, and not contrary to, the documents in question.³ Such responses by Defendants are improper and in violation of the pleading statutes. See *Donnelly v. Frank Shirey Cadillac, Inc.*, 2005 WL 2445902 (N.D. Ill.).

As to certain allegations in the *Petition*, Defendants ignore the required diligence standard and respond that they “are without knowledge or information sufficient to form a belief as to the truth of the allegations.” See *Exhibit A, Defendants’ responses to paragraphs 12-15, 27-32, 57, 59, 61, 63, 65, 79, 85, 91, 119, 125, 143, 146-148, 158, 161, 162, 164, 187, 193-196, 198, 201-204, 208-211, 214-216, 219 and 220*. Generally, such a response is proper under the Pleading Code and has the effect of a denial; however, such a response must be made in good faith. Comment to Section 2008(B) by the Civil Procedure Committee of the Oklahoma Bar Association; see also *Djourabchi v. Self*, 240 F.R.D. 5, 12 (D.D.C. 2006). The federal district court in *U.S. v. 1866.75 Board Feet, 11 Doors and Casings, More or Less of Dipteryx Panamensis Imported from*

² In certain responses, Defendants similarly answer by stating that “to the extent the allegations . . . interpret written documents the documents speak for themselves and any allegations contrary therewith are denied.” See *Exhibit A, Defendants’ responses to paragraphs 183-185, 189, 190, and 205*.

³ Section 2008(B) provides in part: “When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as true and material and shall deny only the remainder.” (Emphasis added.)

Nicaragua, 2008 WL 839792 (E.D. Va.), addressed the third pleading alternative as follows:

Resort to this form of allegation should not be capricious. A denial of knowledge or information requires that the party not only lack first-hand knowledge of the necessary facts involved but also that the pleader lack information upon which [the pleader] reasonably could form a personal belief concerning the truth of the adversary's allegations. Normally, **a party may not assert a lack of knowledge or information if the necessary facts or data involved are within his knowledge or easily brought within his knowledge, a matter of general knowledge in the community, or a matter of public record.** A denial of knowledge or information in this context casts doubt on the good faith of the pleader.

Id. at *3, citing 5 Wright & Miller Federal Practice and Procedure § 1262 (3d ed. 2004) (emphasis added).

While exhaustive efforts were not required, Defendants should “be held to the duty to exert reasonable effort to obtain knowledge” of the matters addressed by each allegation in the *Petition*. *Greenbaum v. U.S.*, 360 F.Supp. 784, 787-788 (E.D. Pa. 1973) (the defendant denied having sufficient knowledge or information to respond to Greenbaum’s allegation but failed to examine relevant documents within its possession; consequently, the court deemed Greenbaum’s allegation admitted). The allegations set forth in *paragraphs 12-15, 27-32, 57, 59, 61, 63, 65, 79, 85, 91, 119, 125, 143, 146-148, 158, 161, 162, 164, 187, 193-196, 198, 201-204, 208-211, 214-216, 219 and 220* are based on information taken from bank account records created and produced by Defendant Farmers & Merchants Bank (F&M Bank), public records, and/or statements made by current and former F&M Bank employees, to include Ed Stanton, Justin Tarrant, Chad Johnson and Beth Armer (F&M Employees).

Like the court in *Greenbaum*, this Court should deem those allegations based on public records or relevant documents within Defendants' possession admitted. Further, in order to respond to those allegations relating directly to the F&M Employees, it is fair to expect Defendants to make reasonable efforts to obtain knowledge of the facts by (1) communicating with the F&M Employees; and (2) examining the F&M bank account records for the F&M Employees.

The allegations set forth in *paragraphs 12-15, 27-32, 57, 59, 61, 63, 65, 79, 85, 91, 119, 125, 143, 146-148, 158, 161, 162, 164, 187, 193-196, 198, 201-204, 208-211, 214-216, 219 and 220* are within Defendants' sphere of knowledge. Obviously, Defendants, with minimal effort, could have informed themselves of the factual content of each of the allegations, and formed a belief as to their truth. Each of these responses by Defendants was not made in good faith; therefore, the allegations should be deemed admitted.

CONCLUSION

In their *Answer*, Defendants fail to comply with § 2008(B) of the Pleading Code. The federal district court in *Donnelly* stated that when "defense counsel fails to comply with Rule 8(b), it is within the Court's discretion to find that the defendant has not denied the plaintiff's allegation and deem that allegation admitted, per Rule 8(d) of the Federal Rules of Civil Procedure." *Donnelly* at *1. The Pleading Code exactly parallels Federal Rule 8(d) by providing in part as follows: "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." 12 O.S. § 2008(D).

The *only* effect of Defendants' improper responses to *paragraphs 12-15, 27-32, 34-39, 57, 59-63, 65, 74-91, 99-106, 116, 119, 120, 125, 138, 142, 143, 146-148, 157, 158, 161, 162, 164, 172, 173, 183-185, 187, 189, 190, 193-196, 198, 201-205, 208-211, 214-216, and 218-220* is delayed justice. See *Ice Plant Equipment Co. v. Martocello*, 43 F. Supp. 281 (D.C. Pa. 1941). Plaintiff respectfully requests that the Court, in its discretion, 1) find that Defendants have not denied the allegations in their responses to such disputed paragraphs of the *Petition*, and 2) deem such allegations admitted. In the alternative, Plaintiff requests that the Court instruct Defendants to amend their *Answer* to conform to the requirements of Section 2008 of the Pleading Code.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faught, Administrator

By:



Melanie Hall, (OBA #1209)
Amanda Cornmesser, (OBA #20044)
Gerri Stuckey, (OBA #16732)
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, Oklahoma 73102
(405) 280-7700 phone number
(405) 280-7742 facsimile number
Attorneys for Oklahoma Department of
Securities

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the *Plaintiff's Motion to Deem Certain Allegations in Plaintiff's Petition Admitted*, was mailed this 30th day of December, 2008, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

Patrick J. Ryan, Esq.
Daniel G. Webber, Jr., Esq.
Jason A. Ryan, Esq.
Matthew C. Kane, Esq.
RYAN, WHALEY & COLDIRON
900 Robinson Renaissance
119 N. Robinson
Oklahoma City, OK 73102

Ann L. Hoover
5611 SW Barrington Ct. S, Suite 100
Topeka, KS 66614-2489

Joseph H. Bocock, Esq.
Spencer F. Smith, Esq.
McAfee & Taft, A Professional Corporation
Tenth Floor, Two Leadership Square
211 N. Robinson Avenue
Oklahoma City, OK 73102-7102
Attorneys for Third Party Intervenors

Kurtis Ward, Esq.
Law Offices of Kurtis J. Ward
East Wharf Plaza
9225 Lake Hefner Pkwy., Suite 101
Oklahoma City, OK 73120
Attorney for Third Party Intervenors


