IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator,	)	
Plaintiff,	)	Case No. CJ-2017-1138
vs.	)	
Secure Operations Group, LLC, an Oklahoma limited liability company; Johnnie Louis McAlpine, an individual; Cindy Kay McAlpine, an individual; George Franklin Conner, an individual; and Cody Belitz, an individual,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO DETERMINE AND STRIKE DEFENSES

Defendants Johnnie Louis McAlpine, Cindy Kay McAlpine, and Cody Belitz, by and through their attorneys of record, Levinson, Smith and Huffman, P.C., in response to the Plaintiff's Motion to Determine and Strike Defenses, states as follows:

INTRODUCTION

On February 27, 2017, the Plaintiff in the present case filed suit against the above named Defendants. On March 20, 2017, the Defendants filed a Special Entry of Appearance and Reservation of time. On April 5, 2017, the Defendants then filed their Answer to the Plaintiff's Petition. In their Answer, the Defendants asserted certain defenses to their claims, in order to reserve such defenses prior to the initiation of the discovery process. Despite the fact that discovery has yet to commence in this case, on April 7, 2017, the Plaintiffs filed a Motion to Determine and Strike Defenses. The Plaintiff's argument is without merit. As demonstrated below, Oklahoma case law clearly sets forth that a Defendant must be allowed to reserve all

possible defenses in their responsive pleading at risk of losing them, and allowing a Defendant do so serves to further the interests of public policy. Consequently, the Defendants respectfully submit that this Court should deny Plaintiff's motion, until discovery commences and the parties are able to determine which defenses are applicable to the case at bar.

ARGUMENTS AND AUTHORITIES

I. OKLAHOMA STATUTORY LAW REQUIRES A DEFENDANT TO PLEAD ALL AVAILABLE DEFENSES AT THE RISK OF WAIVING THEM.

Title 12 § 2012(B) requires:

> B. HOW PRESENTED. 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.

As clear from Title 12 § 2012, a Defendant must preserve every defense, in law or fact, in their first responsive pleading, or such defenses are deemed waived. Only one of the Defendants' defenses is enumerated by Title 12 § 2012. Therefore, it is clearly in the best interests of the Defendants to raise all possible defenses in their first response to the Petition. Indeed, as the Plaintiff has correctly asserted, Oklahoma courts have commonly recognized that the furtherance of public interest is the fundamental influencing factor upon which a court will determine whether or not a defense may be used. For example, an estoppel defense is only available as a defense against a state agency when it serves to "further a principle of public policy or interest." *Indiana Nat. Bank v. State Dept't of Human Servs.,* 1993 OK 101, ¶ 23, 857 P.2d 53, 64 (citation omitted). In the same way, laches are available as a defense against a state agency when application of this equitable defense serves to further the interests of public policy.

No harm will befall the Plaintiff by permitting the Defendants to maintain their defenses, and a premature determination by the Court is nothing more than a risk of judicial efficiency. The purpose of the discovery process of a case is to conduct a thorough examination of the facts surrounding the claims, to determine the truth and strength of such claims. In the case as bar, discovery has not yet commenced, and Defendants have no way of determining the facts of the case until discovery has been completed. At that time, all defenses based in facts and law as discovered shall be presented to the court. Clearly, discovery must be conducted to determine if what defenses are applicable to the case at bar, and until such discovery can be conducted, prohibiting the Defendants' ability to raise all possible defenses runs counter to the precedence of public policy set forth by Oklahoma law.

Because Rule 12 is substantially similar to § 2012, it is appropriate to look to Federal case law citing Rule 12 of the Federal Rules of Civil Procedure. *See Rooks v. State through Oklahoma*

Corporation Commission, 1992 OK CIV APP 155, ¶ 9, 843 P.2d 773 (Okla. Civ. App. 1992) (Oklahoma Statute is adopted and identical to its Federal counterpart, except for the added sentence of requirement some specificity in the Motion to Dismiss for Failure to State a Claim). Federal case law follows the same logic as state law by setting clear precedence encouraging a Defendant to liberally plead all defenses. The 10th Circuit has explicitly held "the avowed purpose of Rule 12 is to require a defendant to plead all of his available defenses at the risk of waiving them." *Moore v. Dunham,* 240 F.2d 198 (10th Cir. 1956), p. 200. Further, "if affirmative defenses are not affirmatively pleaded, such defenses are deemed to have been waived and may not thereafter be considered as triable issues." *Radio Corporation of America v. Radio Station KYFM Inc., et al.* 424 F.2d 14, 17 (10th Cir. 1970). Moreover, "an affirmative defense may not be first effectively raised during the trial of a case simply by objecting to evidence, offers to introduce into evidence or by motions unless the parties impliedly or expressly agree to the injection of the new issue into the case in the trial of the same. It is axiomatic that the failure of a party to effectively raise an affirmative defense precludes any requirement that the trial judge present such issue to the jury by an instruction." *Id.* Therefore, the failure to assert affirmative defenses precludes those defenses at trial.

Any attempt to limit the Defendants' ability to plead certain defenses at the outset of the discovery process is without merit, and contradictory to public policy. Federal Courts have consistently ruled that efforts to strike affirmative defenses for legal insufficiency are not favored and are rarely granted. *Resolution Trust Corporation v. Ascher,* 839 F.Supp 764 (D. Colo. 1993); *FDIC v. Ashley,* 749 F.Supp 1065 (D. Kan. 1990); *Federal Deposit Insurance Corporation v. Niver, Federal Deposit Insurance Corporation v. Estes and Federal Deposit Insurance*

Corporation v. Hudson, 685 F.Supp 766 (D. Kan. 1987); and *Quigley v. General Motors Corp.,* 647 F.Supp 656 (D. Kan 1986).

CONCLUSION

Until discovery has commenced, it is premature and contradictory to the public interest to prohibit the Defendants from raising all possible defenses. Therefore, the Plaintiff's Motion to Determine and Strike Defenses is premature and inappropriate at this time and should therefore be denied.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully requests, upon final hearing in this matter, that the Court deny the Plaintiff's Motion to Determine and Strike Defenses, and that Defendants be permitted to plead all possible defenses and be granted all further relief to which they may show themselves justly entitled.

Respectfully submitted,

Paige Hulse

Paige L. Hulse, OBA #32470
LEVINSON, SMITH, & HUFFMAN, P.C.
1743 East 71st Street
Tulsa, Oklahoma 74136-5108
918.492.4433 – Tel.
918.492.6224 – Fax
ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on ~~April 28,~~ May 4 2017, a true and correct copy of the above and foregoing was served via first class U.S. mail, with proper postage prepaid thereon, to the following counsel of record:

Robert Fagnant
Oklahoma Department of Securities
204 North Robinson Avenue, Suite 400
Oklahoma City, Oklahoma 73102
Telephone: (405) 280-7700
Facsimile: (405) 280-7742
Email: rfagnant@securities.ok.gov
Attorney for Plaintiff

Paige Hulse

Paige L. Hulse