IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator,	)	
Plaintiff,	)	
v.	)	Case No. CJ-2017-1138
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.	)	

REPLY TO DEFENDANTS' RESPONSE TO OBJECTION AND MOTION TO STRIKE

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator, files this reply to the response of Defendants Johnnie Louis McAlpine ("McAlpine"), Cindy Kay McAlpine and Cody Belitz (the "Defendants") to the Plaintiff's *Objection and Motion to Strike* (the "Response" and "Motion", respectively).

Defendants cite *Davis*, *Copeland* and *Julian* for the proposition that statements in McAlpine's affidavit containing hearsay should be allowed and not stricken. Response at Pgs. 2 - 3 (citing *Davis v. Leitner*, 1989 OK 146, 782 P.2d 924; *Copeland v. Lodge Enterprises, Inc.*, 2000 OK 36, 4 P.3d 695; *Julian v. Secured Inv. Advisors*, 2003 OK CIV APP 81, 77 P.3d 604). Defendants' application of this case law is incorrect. The statements in Item Nos. 29 - 31 of McAlpine's affidavit, without more, are merely contentions and not acceptable evidentiary material for the summary process. Finally, the hearsay exceptions claimed by the Defendants are inapplicable and should be denied by the Court.

Acceptable Evidentiary Material versus Mere Contention

As the Defendants' cited cases show, the *Defendants* bear the burden to present acceptable evidentiary material showing "the reasonable probability, something beyond a mere contention, that [Defendants] will be able to produce *competent, admissible* evidence at the time of trial[.]" *Davis*, 1989 OK 146, ¶ 15, 782 P.2d at 927 (emphasis added). Evidence opposing summary judgment is insufficient if, *inter alia*, it is "incapable of conversion at trial to admissible evidence." *Copeland,* 2000 OK 36, ¶ 9, 4 P.3d at 699. A court's affirmative duty is "to test all evidentiary material tendered in summary process for its legal sufficiency[.]" *Id.* at ¶ 8, 699.

None of the facts of the cited cases are on point with the Defendants' evidence in question – an affidavit containing representations allegedly uttered by an unnamed source. In *Davis*, the evidence allowed by the court was "a copy of a letter in a named witness' own handwriting containing specific allegations of fact[.]" *Davis*, 1989 OK 146, ¶ 14, 782 P.2d at 926. In *Copeland*, the evidence allowed, relevant to the case at bar, was an exterminator's affidavit relating to facts about brown recluse spiders and their eradication. *Copeland*, 2000 OK 36, ¶ 6, 4 P.3d at 698. In *Julian*, the evidence at issue was portions of a deposition regarding memories of a party declarant, her actions and photographs of sidewalk debris. *Julian*, 2003 OK CIV APP 81, ¶ 19 - 20, 77 P.3d at 607 - 08.

Unlike the case at bar, the evidence discussed in the cases cited by the Defendants "set out with great specificity the nature and content of the testimony which could and would be presented at trial to prove that allegation." *Davis*, 1989 OK 146, ¶ 14, 782 P.2d at 927 (*see also Copeland*, 2000 OK 36, ¶¶ 6, 16, 4 P.3d at 698, 701;

Julian, 2003 OK CIV APP 81, ¶ 19 - 20, 77 P.3d at 607 - 08). The Defendants herein did not attach an affidavit, letter, a business record or any other material regarding the alleged statements in McAlpine's affidavit showing a reasonable probability, something beyond the mere contention, that they would be able to produce *competent, admissible* evidence at the time of trial. Instead, Defendants attached an affidavit containing hearsay allegedly uttered by an unnamed source and nothing more. Because the Defendants did not meet their burden requiring acceptable evidence for the summary process, the Court should strike Item Nos. 29 - 31 of McAlpine's affidavit.

Present Sense, Business Records and Exceptional Circumstances Hearsay Exceptions Not Applicable

The present sense, business records and exceptional circumstances exceptions to the hearsay rule are inapplicable, without merit and should be rejected by the Court.

The court in *Portsmouth,* cited by the Defendants, stated that in order for the present sense exception to apply, three requirements pertaining to the following must be satisfied: subject matter, perception and time. There must be a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 323 (4th Cir. 1982). The pertinent event in question here was *not*, as Defendants claim, the alleged conversation between McAlpine and the unidentified Petrolite representative. The event in question, allegedly perceived by the unidentified Petrolite representative and relayed to McAlpine, was the supposed production on unspecified dates of certain oil and gas wells, and the potential for production *had* certain chemical treatments been used. It is impossible to determine whether this mystery person actually observed the production, and when his perceptions were

actually formed. Thus, the hearsay in question does not meet the requirements of this exception. Further, the unnamed source could not perceive "potential" production as it was happening or immediately thereafter.

The business record exception is also unavailable for the hearsay *statement* in McAlpine's affidavit because no business record is filed with or even discussed as part of the Response. Any contention by the Defendants that an unknown record *may* contain the same information as in the hearsay statement is exactly that – a mere contention. Such a fortuitous business record is not included in the Defendants' response to the Plaintiff's *Motion for Summary Judgment* ("MSJ") and only now does such a possibility manifest.

As stated in *Massey*, cited by Defendants, 12 O.S. § 2803(6) requires the existence of a record, not a statement, for the business record exception to apply. *United States v. Massey*, 89 F.3d 1433, 1441 – 1442 (11th Cir. 1996); *e.g., compare* 12 O.S. §§ 2803(1) and (6) (exceptions for statements and records). Here, no business record is at issue - only the statements contained in McAlpine's affidavit allegedly made by the Petrolite representative. In addition, this exception is not available if "the source of information...lack[s] trustworthiness." 12 O.S. § 2803(6). Trustworthiness is in question here since the Petrolite representative is unnamed. Further, McAlpine was previously convicted for the misrepresentation of oil and gas production to investors – hardly an indicator of trustworthiness. Because no business record has been presented and due to the lack of trustworthiness by any source, this exception is unavailable. Further, the mere contention that a business record *may* exist that may contain the same information as in the hearsay statement is not enough to meet the requirements

of acceptable evidentiary material in the summary process outlined in *Davis*, *Copeland* and *Julian*, *supra*.

In their last claimed hearsay exception, Defendants misapply its requirements. Defendants state "the record is silent as to any claim that the hearsay is not inherently trustworthy", and therefore, it appears, the record must somehow exhibit "circumstantial guarantees of trustworthiness" in accordance with the requirements of 12 O.S. § 2804.1. Response at Pg. 4 - 5. This is the opposite of what the record must show. The record must show guarantees of trustworthiness:

> from "the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief" and "must be at least as reliable as evidence admitted under a firmly rooted hearsay exception"...Unless an affirmative reason, arising from the circumstances under which the statement was made, provides a basis for rebutting the presumption that the hearsay statement is not worthy of reliance at trial, the confrontation clause requires exclusion of the out of court statement.

Mitchell v. State, 2005 OK CR 15, ¶ 33, 120 P.3d 1196, 1206 (citations omitted). First, as described above, the record provides *no* guarantees of trustworthiness of McAlpine's claim of what was allegedly stated. Second, the record *does* include an admitted fact calling into question McAlpine's trustworthiness (his previous felony conviction for fraudulent misrepresentations). *MSJ* at Material Fact No. 25. Therefore, no basis to rebut the hearsay's inadmissibility exists. The "general purposes of this Code and the interests of justice" will not best be served by the admission of this hearsay. 12 O.S. § 2804.1(A)(3).

Item Nos. 29 - 31 of McAlpine's affidavit are inadmissible hearsay, based on nothing but mere contention, and should be stricken by the Court as unacceptable and insufficient evidence.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faught, Administrator

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 5th day of January, 2018, a true and correct copy of the above and foregoing *Reply to Defendants' Response to Objection and Motion to Strike* was mailed via first-class US mail, with postage prepaid thereon, and addressed to:

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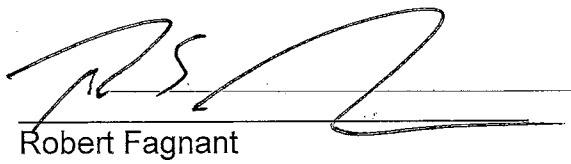

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