

FILED IN DISTRICT COURT  
OKLAHOMA COUNTY

SEP 17 2013

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Set  
Oct 3<sup>rd</sup>  
9:00 a.m.

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

Oklahoma Department of Securities )  
*ex rel.* Irving L. Faught, )  
Administrator, )  
)  
Plaintiff, )  
)  
v. )  
)  
2001 Trinity Fund, L.L.C. and )  
Robert Arrowood, )  
)  
Defendants. )

Case No. CJ-2012-6164  
Judge Roger Stuart

**PLAINTIFF'S COMBINED MOTION TO QUASH  
AND MOTION FOR PROTECTIVE ORDER  
AND BRIEF IN SUPPORT**

Pursuant to 12 O.S. § 3226(C), Plaintiff, the Oklahoma Department of Securities (Department), respectfully moves the Court to quash a notice of deposition and also moves the Court for a protective order. In support of this motion, Plaintiff submits the following:

1. On August 28, 2012, Plaintiff filed its Petition for Permanent Injunction (Petition) in this matter against Defendants Robert Arrowood and the 2001 Trinity Fund, L.L.C.

2. In the Petition, Plaintiff alleged that Defendant Arrowood both offered and sold unregistered securities in violation of Section 1-301 of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71 §§ 1-101 through 1-701 (2011), and in

connection with the offer and sale of securities engaged in acts, practices and a course of business that operated as a fraud upon investors.

3. In December 2012, the Department responded to interrogatories and requests for production of documents propounded by Defendants. In connection with those discovery requests, the Department provided the names of persons with information about the case.

4. On September 10, 2013, Defendant Arrowood provided Plaintiff with a Notice of Deposition of Irving Faught (the "Notice"). Defendants did not contact the Department to schedule the deposition, but arbitrarily set a time for appearance.

5. Irving L. Faught is the Administrator of the Oklahoma Department of Securities (Administrator).

6. In compliance with 12 O.S. 3226(C), counsel for Plaintiff hereby certifies that he spoke by telephone with counsel for Defendant Arrowood on September 17, 2013, and in good faith attempted to resolve this matter without court action.

7. On September 17, 2013, when counsel for Plaintiff inquired as to the reason why Defendant Arrowood wished to depose the Administrator, counsel responded that, based upon the timing of media coverage of this matter, Defendant Arrowood believes some conspiracy exists to impugn his business reputation. Counsel provided no substantive explanation concerning the relevancy of the proposed discovery.

### **Argument and Authorities**

#### **I. The head of a public agency should not be deposed.**

Case law has long recognized that to protect the integrity of administrative processes, upper-level agency officials ordinarily should not be required to testify about

their reasons for taking official action. See *U.S. v. Morgan*, 313 U.S. 409, 422 (1941); *In Re United States (Holder)*, 197 F.3d 310, 313 (8<sup>th</sup> Cir. 1999), and *In Re F.D.I.C.*, 58 F.3d 1055, 1062 (5<sup>th</sup> Cir. 1995)(finding that magistrate abused his discretion by failing to quash subpoenas directed towards three members of agency's board of directors).

This rule is appropriate because “high ranking government officials have greater duties and time constraints than other witnesses and that without appropriate limitations on discovery such officials would spend “an inordinate amount of time tending to pending litigation.” *In re United States (Kessler)*, 985 F.2d 510, 512 (11<sup>th</sup> Cir. 1993). Courts have reasoned that public officials “should not have to spend their time giving depositions in cases arising out of the performance of their official duties unless there is some reason to believe that the deposition will produce or lead to admissible evidence.” *Stagman v. Ryan*, 176 F.3d 986, 994-95 (7<sup>th</sup> Cir. 1999)(quoting *Olivieri v. Rodriguez*, 122 F.3d 406, 409-10 (7<sup>th</sup> Cir. 1997)).

Irving Faught qualifies as such an official because he is the Administrator of the Department. The Administrator is responsible for all activities of the Department and its various divisions. The Department carries out numerous functions beyond investigating potential violations of the Act. The Department administers, hears and adjudicates administrative proceedings. The Department is engaged in numerous civil enforcement proceedings in district court. The Department registers and regulates thousands of broker-dealers, agents, investment advisers and investment adviser representatives. The Department conducts on-site examinations of the records and business activities of such registered persons. The Department also receives and reviews applications for registration of securities offerings to be sold to the public. The Department processes

notifications of claims for exemption from the securities registration provisions of the Act. The Department maintains an active investor education program spanning the entire state of Oklahoma. The Department engages in regulatory rulemaking. All of these activities are performed in addition to the daily administrative functions and operations of the agency.

If the Administrator were required as a matter of course to appear and be deposed in all of the administrative and civil cases brought by the Department, he would be unable to fulfill his duties to the agency and the state of Oklahoma. The Administrator should not have to appear for a deposition in this matter simply because a defendant is upset that an enforcement proceeding has been initiated against him. Nor should the Administrator have to appear and be deposed based upon some vague notion of a conspiracy that has no relevance to the issues before the Court in this matter.

## **II. Any testimony by the Administrator is irrelevant and/or privileged**

Section 3226 of the Discovery Code provides that a party is entitled to obtain discovery of non-privileged matters that are relevant to any party's claim or defense. A trial judge may limit or deny discovery when it is sought in an excessively burdensome manner. *Crest Infiniti II, L.P. et al. v. Swinton*, 174 P.3d 996, 1004. Upon a showing of good cause, the person sought to be deposed may request a protective order to protect a party or person "from annoyance, harassment, embarrassment, oppression or undue delay, burden or expense. . . ." *Id.* (also recognizing that we may consider the federal rules of civil procedure when construing similar language in the Oklahoma Discovery Code). *Id.* at 999.

**A. Defendants' proposed deposition of the Administrator is not calculated to lead to the discovery of admissible evidence.**

Although the discovery rules are meant to be given a “broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials”, they must also “be construed to secure the just, speedy, and inexpensive determination of every action.” *Quinn v. City of Tulsa*, 777 P.2d 1331, 1342 (citing *Herbert v. Lando*, 441 U.S. 153, 177 (1979)). The trial judge should firmly apply the requirement “that the material sought in discovery be relevant” and should use their power to restrict discovery where “justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense”. *Id.*

Here, the Department has never identified the Administrator as a potential witness in this matter, on any subject. Furthermore, the Defendant Arrowood has not suggested that the Administrator possesses first-hand personal knowledge about the facts at issue in this case. Rather, Defendant's only expressed concern is that the Administrator is involved in some sort of a conspiracy against him. This issue is not before this Court and any testimony by the Administrator is irrelevant for purposes of this proceeding. Inquiry into such claims would not lead to the discovery of admissible evidence in the case before this Court.

**B. Defendant cannot depose the Administrator without intruding upon privileged communications and attorney work-product.**

The Administrator's knowledge about the facts underlying this case, as well as his knowledge of the investigation and litigation of this matter, have been the result of conversation with Department staff. As such, the entirety of his testimony would be subject to privilege objections, including the attorney-client privilege, the law

enforcement privilege and the deliberative process privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 389-94 (1981); *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988); *Dept of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001). The Department would also be entitled to object by asserting the attorney work-product privilege. *Hickman v. Taylor*, 329 U.S. 495, 510-13 (1947); *SEC v. Sentinel Management Group, Inc.*, 2010 WL 4977220 at \*\* 6-7 (N.D. Ill. 2010).

In a deposition, the Administrator would be subjected to repeated questions about the work, analysis and views of the Department's attorneys who investigated the case and recommended the filing of this action. Courts ordinarily find such inquiry to be impermissible. *SEC v. Buntrock*, 217 F.R.D. 441, 444 (N.D. Ill. 2003) (finding that defendant's deposition notice was an inappropriate attempt to discover the theories and mental impressions of the SEC's attorneys who investigated the case);

### **Conclusion**

The deposition of the Administrator should not be taken. The Department respectfully requests that the Notice be quashed and that a protective order be granted prohibiting the deposition of the Administrator.

Respectfully Submitted,

OKLAHOMA DEPARTMENT OF SECURITIES



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CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of September, 2013, the foregoing document was sent by email and first-class mail to the following:

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Shaun Mullins