

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

DEC 12 2008

PATRICIA PRESLEY, COURT CLERK  
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DEPUTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES )  
*ex rel.* Irving L. Faught, Administrator, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FARMERS & MERCHANTS BANK, et al. )  
 )  
Defendants, )  
 )  
and )  
 )  
ROBERT LYNN POURCHOT, Trustee of the )  
Robert Lynn Pourchot Trust, et al., )  
 )  
Intervenors. )

Case No. CJ-2006-3311

**DEFENDANTS' REPLY TO PLAINTIFF'S  
RESPONSE TO DEFENDANTS' MOTION TO COMPEL**

COME NOW Defendants, Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson, and John Tom Anderson (collectively, "Defendants"), and respectfully submits their Reply to Plaintiff's Response to Defendants' Motion to Compel. In support hereof, Defendants allege and state as follows:

**I. Plaintiff Has Confessed Defendants' Motion To Compel Interrogatory Answers**

Plaintiff's Response Brief stipulates that their interrogatory answers were deficient and in need of amendment. Plaintiff's further agreed to provide amended answers by December 12, 2008. Accordingly, Defendants request that the Court enter an Order granting Defendants' Motion to Compel and ordering that Plaintiff's provide amended answers to Interrogatory Nos. 3, 5, 6 and 7 by December 12, 2008.

## II. The Court Has A Duty Under Oklahoma Law To Order A Privilege Log

Defendants have also requested that the Court order a privilege log since Plaintiff's have withheld an unidentified number of documents based upon various privileges, without providing the factual specificity necessary to adjudicate the asserted privileges.

Importantly, Plaintiff's Response does not dispute the fact that its discovery responses lack the factual specificity required to adjudicate the asserted privileges. Rather, Plaintiff argues that the Court "does not have a duty to order the preparation and service of a privilege log." See Brief, p. 2. Plaintiff cites *Scott v. Pederson*, 2005 OK 84, 126 P.3d 1232, in support of this position. However, as explained below, a simple reading of *Scott* reveals the opposite conclusion.

In *Scott*, the plaintiff sued the defendant for damage to their home based upon defendant's negligent roofing job. During the discovery process, plaintiff served a subpoena duces tecum on the defendant's insurance carrier, requesting the file it maintained on the defendant's claim for payment to plaintiff. *Id.* at ¶ 2. Both the defendant and insurance carrier objected to producing the claims file, thereby requiring plaintiff to file a motion to compel. Citing 12 O.S. § 3226(B)(4), Plaintiff argued that neither party provided the requisite factual support required in order for the "parties to assess the applicability of the privilege or protection." *Id.* at ¶ 13. The trial court denied the motion to compel, which prompted plaintiff to file an extraordinary writ from the Oklahoma Supreme Court.

The Supreme Court held that the trial court committed an abuse of discretion by *not* ordering the filing of a privilege log under 12 O.S. § 3237. After reviewing the interplay between §§ 3226 and 3237, the Court stated that:

In the case before us today, [Defendant's] claim of privilege and exemption from discovery was not supported by facts necessary for

the particular claim it made, and thus additional facts in the form of a privilege log are necessary. The trial court's error is in failing to exercise § 3237 discretion and require a privilege log prior to adjudicating the claim privilege and exemption from discovery . . . *When an asserted privilege lacks the factual specificity necessary to adjudicate the asserted privilege, the trial judge has a mandatory § 3237 duty to order the party asserting the privilege to file a privilege log.*

*Id.* at ¶¶ 25-26 (emphasis added). Thus, since the parties failed “to present facts sufficient to adjudicate the privilege and exemption from discovery, the District Court was required to order that party to file a privilege log and the documents under seal.” *Id.* at ¶ 1.

Just as in *Scott*, this Court should similarly require Plaintiff to file a privilege log and documents under seal so that the claim of privilege and exemption from discovery may be sufficiently adjudicated in accordance with Oklahoma law.

### **III. The Content Of The Privilege Log Should Comply With § 3237**

§ 3237(A)(2) prescribes the manner in which the privilege log *shall* be filed and the content that should be included. It requires a document-by-document log that includes (a) the author or authors; (b) the recipient or recipients; (c) its origination date; (d) its length; (e) the nature of the document or its intended purpose; and (f) the basis for the objection. The filing of a privilege log in this fashion provides the information necessary for the parties and the court to assess the privilege claim.

The mere fact that producing a privilege log in this fashion may take some time is does not excuse a party from complying with it. Moreover, while ODS appears to suggest that an expenditure of state resources is a good reason to deviate from the prescribed method outlined in § 3237, there is no governmental agency exemption from its requirements. ODS must comply with the discovery code just as every private party must.

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**CERTIFICATE OF SERVICE**

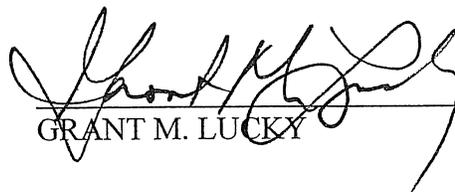
I hereby certify that on this 12<sup>TH</sup> day of December 2008, a true and correct copy of the above and foregoing instrument was mailed, via U.S. First Class Mail, postage prepaid, to the following counsel of record:

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