IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

LINDA CASS, an individual, NICOLE FITZER, an individual, and GRANDMA'S GROCERY, INC., an Oklahoma Corporation, **Plaintiffs,**	)	
vs.	)	**CASE NO. 13-CV-483-SPS**
BALBOA CAPITAL, a Delaware Corporation, which has a primary place of business in California, **Defendants.**	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

COMES NOW, Plaintiffs, by and through their attorney of record and offer the following as their Response to Defendant's Motion to Dismiss.

INTRODUCTION AND STATEMENT OF FACTS

Plaintiffs accept and adopt as their own the brief statement of facts of the Defendant except in as much as they are responded to specifically or are in contradiction to the statements below:

1. The Defendant improperly alleges that the initial payment date was February 5, 2012. The Defendant, in their Welcome packet to the Plaintiff's state, "Your first regular monthly lease payment will be due 05/05/12." See attached exhibit "A". Attached to the Welcome packet was the Equipment Financing Agreement which the Defendant attached at exhibit "1" to their motion to dismiss.

2. Further, the documents forwarded to my clients to be completed, executed, and

returned do not list the due date of the first quarterly payment on the Equipment Financing Agreement. The "Important Documents" packet from Defendant Balboa is attached hereto as exhibit "B". Further, the Plaintiffs executed and returned an Authorization Agreement for Pre-Authorized Payments, a copy of which is in the "Important Documents" packet from Balboa attached hereto as exhibit "B" which authorizes the Defendant to draft all of the approved payments automatically.

3. The "dispute" which arose as to the "payment terms" were simply when the defendant notified the Plaintiffs that:

   a. They had improperly taken payments from a third party's account and applied them to the Plaintiff's loan,

   b. They would now draft payments from the account information which had been provided to them by the Plaintiffs at the initiation of the loan,

   c. They did not send ANY notification of payment due or statements of payments received in regard to the loan, and

   d. That the Plaintiffs would be given additional time if they made one of the quarterly payments at that time.

4. After the Plaintiffs made the payments as promised to ensure that they would be given time, the account manager informed them that they payment would not provide extra time and that the entire balance was now due.

5. The Introduction of the Defendant ignores the bulk of the facts relevant to the actual claims of this suit and as such the Plaintiffs hereby incorporate by reference their

statement of facts from the Petition herein.

6. The Plaintiffs herein have filed a bankruptcy in the Eastern District of Oklahoma, and have received a discharge. Therefore, any monetary claims of Balboa, and/or their attorneys, were discharged in the bankruptcy, and cannot be enforced in this lawsuit, or the California breach-of-contract lawsuit.

ARGUMENT AND AUTHORITY

I. THIS ACTION SHOULD NOT BE DISMISSED AS VENUE IS PROPER IN OKLAHOMA.

While it is true that Plaintiffs and Defendant entered into an agreement regarding the financing of some equipment, it is not true that the breach of that agreement is the basis of this lawsuit. The Plaintiffs have several claims against the Defendants, other than a simple breach of contract. Even though the said agreement may contain some language stating, "[v]enue for any action related to this Agreement shall be in an appropriate court in Orange County, California...", the actions currently filed in this Court against the Defendants are NOT directly related to the said agreement.

Rather than a breach of contract action, the Plaintiffs brought this action under several theories, all relating to the wrongful actions of the Defendant, which occurred in Oklahoma. These include: Conversion, Promissory Estoppel, Fraud, Intentional Infliction of Emotional Distress, Tortious Interference, Negligence, Defamation, Willful Deceit, and Malicious Wrong. Again, these are separate and distinct actions from anything that may "relate" to the said agreement. This lawsuit is filed in regard to the malicious, wrongful actions of the Defendant, NOT simply because of the breach of the agreement.

In other words, the suit filed herein by the Plaintiffs is not one related to the terms of the agreement but is rather based on the consequences of the actions taken by the defendant OUTSIDE the agreement. Nowhere in the agreement is there any mention of what is to be done if the Defendant fails to draft payments pursuant to the "Agreement". Further, the Defendant acted outside of the agreement in its attempts to resolve the "dispute" over the payments.

The Authority offered by the Defendant supports the contention of the Plaintiffs that the Fraud by the Defendants and the unreasonable and unjust circumstances that led to the instant action. Applying the very authority cited by the Defendant the Court is to, "draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004) cited in *Prism Corp v. Buray Energy Int'l*, 2011 WL5509036.

Further, cited in *Prism*, id. "A permissive forum selection clause permits suit to be brought in a particular jurisdiction, but does not prevent the parties from litigating in a different forum." *SBKC Serv. Corp. v. 1111 Prospect Partners, L.P.*, 105 F.3d 578, 581-82 (10th Cir. 1997). Hence, the proposition that because California may be proper, Oklahoma would not be, is an inaccurate statement of the law.

As a summary response; the evidence and allegations of fact, when taken in the light most favorable to the Plaintiffs (non-moving party), provide a sufficient claim that Fraud exists in the actions of the Defendant sufficient to ignore the Venue clues. Further, the evidence in light most favorable to the Plaintiffs shows that the actions of the Defendant were unreasonable and unjust in as much as they are alleged to have led to this/these cause(s) of action. Wherefore, the venue clause, being found to be unenforceable by operation of the conduct of the Defendant, it is permissive to

continue the instant action in the State of Oklahoma.

In regard to the California action, the Plaintiffs believe that action is improper and should be dismissed, and have filed a Motion to Dismiss that action. See attached Exhibit "c". Again, when the motion to dismiss is considered, the facts are considered in the light most favorable to the non-moving party.

The Plaintiffs do not presume that the forum of Oklahoma is "friendlier" but rather is relying on the forum and the law thereof to determine if tort(s) have been committed by the Defendant for actions that were done almost exclusively in the State of Oklahoma. The State of California has almost no involvement in this matter as the equipment was in Oklahoma, the contract was negotiated in Oklahoma, the UCC affidavit alleging ownership and lien(s) was filed in Oklahoma, the businesses affected are in Oklahoma, and the vast majority of the evidence of the claims exists in Oklahoma. To require defense of these claims in the State of California for this small town Oklahoma business owner is to essentially deny them the option of presenting their claims as it is so cost prohibitive.

Again the authority listed by the Defendant provides enough fodder to allow this action to proceed. Pursuant to their authority on page 6 of their motion to dismiss, the eight factors to consider in this claim are: (1) whether the state court assumed jurisdiction over any partym (2) whether the federal forum is less convenient for the parties, (3) avoidance of piecemeal litigation, (4) the order in which jurisdiction was obtained, (5) whether the source of the governing law is state or federal, (6) the adequacy of the State Court action to protect the federal Plaintiffs rights, (7) the relative progress of the state and federal proceedings, and (8) the presence or absence of concurrent jurisdiction.

Additionally, it is worth noting that the case referenced for these factors, *Colorado River Water Conservation District v. United States*, 424 U.S 800 (1976), involved two (2) suits filed in the SAME state and dealing FEDERAL law. The instant case involves a case in State Court in California and a federal case in Oklahoma neither of which rely on FEDERAL law.

The Plaintiffs contentions to the application of this test being noted in paragraph 16 hereto the formulation actually leads to at best a draw for the defense and at worst a denial of their motion based on their own test. Again, assuming the facts in the light most favorable to the non-moving party the Plaintiffs apply the test: (1) There are contentions in both courts witnessed by the pending motions to dismiss as to jurisdiction; (2) The federal forum is the most convenient to allow access of both parties to the Court, (3) The Plaintiffs are attempting to have the entirety of the legal action between the parties in the Eastern District of Oklahoma Federal Court; (4) no jurisdiction has been established, but considering the contentions of the Plaintiffs, the Court can accept jurisdiction of the Defendant for this argument, (5) The entirety of the claims is Oklahoma State Law which the California Court has no familiarity with, (6) As the State Court has no knowledge of Oklahoma law the Plaintiff would have little to no ability to properly assert her claims in State Court in California, (7) both cases are waiting for hearings on the motions to dismiss, (8) in the light most favorable to the Plaintiffs the California Court does not have concurrent jurisdiction under the venue clause due to the Fraudulent, unjust, and unreasonableness of the Defendant's actions.

Additionally, the "first to file" rule relied on by the Defendant is not properly applied here as: (1) the Defendant attempted to prevent the filing of the Plaintiffs action by promising to work with them to reinstate their loan. A process which required them to pay valuable funds to the Defendant and delayed their perceived necessity to file any action. It is apparent that the Defendant

and its agents had no intention of working with the Plaintiffs and their fraud should not be rewarded.

II. CASS AND FITZER DO HAVE STANDING TO ASSERT THEIR CLAIMS IN THIS ACTION.

The complaints of the Plaintiffs are sufficient to survive the plausibility exam at first blush. The prima facie case for each of the causes of action is properly alleged and supported sufficiently by a factual basis that has not yet been disputed by the Defendant who has yet to even State that it was not their mistake that caused the claim to start and that they failed to notify the Plaintiffs of payments due or draft them from the correct account.

It is true that a bankruptcy was pending at the time of the re-filing of this action, as the Plaintiffs had filed for, and have now received, relief from the Eastern Oklahoma Federal Bankruptcy Court, case number 13-81146. The Defendants, as well as their attorneys, were listed on the Creditor Matrix, and any claims they had, including claims for attorney fees, were discharged in the bankruptcy case. The existence of this lawsuit was disclosed to the bankruptcy trustee, both in the bankruptcy schedules, and at the bankruptcy trustee meeting. In addition, even though the Plaintiffs had already received a discharge, the bankruptcy trustee was notified when the service of this lawsuit was obtained on the Defendant.

It is important to note that a similar lawsuit was dismissed without prejudice on October 26, 2012. Because of the wrongful actions of the Defendant, the Plaintiffs were not financially able to adequately prosecute the original lawsuit filed in 2012. Therefore, it was dismissed without prejudice and properly re-filed within one (1) year of its dismissal. The Defendant was served within the one hundred twenty (120) days, as allowed by the Federal Rules of Civil Procedure. Again, the dismissal of the original lawsuit and its re-filing were brought to the attention of the bankruptcy

trustee. The trustee never asserted any authority over these claims, and never denied the Plaintiffs the ability to pursue them.

In regard to the individual claims of the Plaintiffs Cass and Fitzer, it is indisputed that they both signed personal guaranty(s) for the note and are subject to the suit alleging default. In addition, they both have interest in the related businesses that were affected by the fraud and actions of the Defendant, and have major personal financial losses as a result of these wrongful actions on the part of the Defendant.

Even the allegation that they would be denied from stating their individual claims of loss under the contract, which is the basis of the suit in California, is further evidence that if this matter is dismissed, the Plaintiffs, Cass and Fitzer, will have no forum for their cause(s) of action to be heard. Therefore, it is even more imperative that this action be allowed to continue in this forum, so that Cass and Fitzer not be further harmed by the wrongful actions of the Defendant.

III. PLAINTIFFS HAVE CLEARLY STATED GROUNDS UPON WHICH RELIEF MAY BE GRANTED, AND, THEREFORE, DISMISSAL WOULD BE IMPROPER.

The allegations that the Petition fails to state claims upon which relief may be granted is essentially an answer to the claims. Each of the claims as alleged in the Petition clearly states the nature of the claim, the source of the cause of action, and applies the law to the fact which, for the purposes of this motion, are seen in the light most favorable for the Plaintiffs.

CONCLUSION

Based on the foregoing, it is clear that the Defendant's Motion to Dismiss should be denied.

The allegations in this lawsuit are clearly based on the consequences of the actions taken by the defendant OUTSIDE the agreement. This lawsuit is not related to a breach of contract, but rather, as stated above, the wrongful actions of the Defendant OUTSIDE the agreement.

WHEREFORE, based upon the foregoing arguments and authorities, the Plaintiffs pray that the *Motion to Dismiss* filed by the Defendant be denied.

Respectfully Submitted,

/s/ Brian R. McLaughlin
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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2014, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants (names only are sufficient):

Jason M. Kreth
Michael R. Perri

Attorneys for Defendant

/s/ Brian R. McLaughlin
Brian R. McLaughlin