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IN THE DISTRICT COURT IN AND FOR TULSA COUNTY  
STATE OF OKLAHOMA

2011 FEB - 7 AM 11:13

DR. JIM SISNEY, an individual )  
Plaintiff, )

v. )

Case No. CJ-2008-06173

Judge Daman Cantrell

MARYANNE FLIPPO, SHARI WILKINS, )  
SHARON WHELPLEY, as individuals )  
and in their official capacities )  
as Members of the Broken Arrow )  
Public School Board of Education, )  
And )  
INDEPENDENT SCHOOL DISTRICT )  
NO. 3 OF TULSA COUNTY )  
Defendants. )

DISTRICT COURT  
**FILED**

FEB 7 - 2011

BALLY HOWE SMITH, COURT CLERK  
STATE OF OKLA. TULSA COUNTY

PLAINTIFF'S OBJECTION TO MOTION TO DISMISS

Defendants, Flippo, Wilkins and Whelpley have filed a 12 O.S. 2012 (B) (6), motion to dismiss for failure to state a claim on Plaintiff's Third Amended Petition. The Plaintiff filed his Third Amended Petition setting forth causes of action against the defendants for breach of contract and breach of the implied covenant of good faith and fair dealing. Both of the causes of action are contract actions, but Plaintiff is aware that breach of the implied covenant of good faith and fair dealing can also arise as a tort action.

The defendants' motion also challenges the Plaintiff's Third Amended Petition because he incorporated by reference the tort claims, causes of action and allegations contained in Plaintiffs First and Second Petitions. Defendants argue that this is not sufficient to satisfy Oklahoma's notice pleading requirements.

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**STANDARD FOR REVIEW**

As this Court knows, a motion to dismiss is disfavored under Oklahoma law. The function of such a motion is to test the law of the claims and not the facts of a case. Further, a case should not be dismissed for failure to state a claim unless the Plaintiff cannot prove any set of facts which could support a claim and entitle the plaintiff to relief. *State ex rel. Wright v. Oklahoma Corporation Commission*, 2007 OK 73 ¶ 52, 170 P.3d 1024. The defendants bear the burden of demonstrating to the Court the insufficiency of the pleadings and if any set of facts are shown to be consistent with the Plaintiff's allegation, then dismissal must be denied. *Gens v. Casady School*, 2008 OK 5, 177 P.3d 565. Oklahoma's notice pleading requirements, like their federal counterparts, require only that plaintiff's petition give fair notice of the plaintiff's claim and the grounds upon which it rests. *Gens v. Casady School*, 2008 OK 5, 177 P.3d 565; *Powers v. District Court of Tulsa County*, 2009 OK 91.

In defendants brief they do not cite to any case law for their argument that the Petition is insufficient but state only that the pleading code requires more than "I adopt and reallege my prior causes". Defendants brief at page 6 ¶ 2. The Plaintiff has done much more than merely adopt and reallege claims in his Third Amended Petition. This case file is inches deep in lengthy pleadings from all parties setting out their many facts, allegations and causes of action against each other. See Original Petition and Second Amended Petition and Counter Claim Petition. In the Third Amended Petition, the Plaintiff stated:

11. "In previous pleadings the Plaintiff has presented his claims against the Board Members for defamation, intentional infliction

of emotional distress, tortious interference with business contract. These tort claims and damages sought against the Board Members are re-alleged and adopted in this pleading.

Plaintiff need not regurgitate those claims in the Third Petition. He has adequately notified the defendants that the previously pled tort claims are still causes of action in the lawsuit. The defendants are on plenty of notice that the Plaintiff stands by his causes of action for intentional infliction of emotional distress, defamation and tortious interference with business contract.

**Breach of contract causes of action against the three Board members:**

In the *Gens* case, the Plaintiff asserted a breach of contract and breach of implied covenant of good faith and fair dealing. The Court emphasized that every contract in Oklahoma contains an implied covenant of good faith and fair dealing. *Id* at ¶ 11. The Court also held, “*Most certainly, Gens has asserted the existence of a contract, the breach thereof, and facts from which it might be determined that the breach was in bad faith. She met all that is required under notice pleading. It is of little consequence whether the bad faith breach might result in independent tort liability. The allegations of breach of contract are sufficient to survive a motion to dismiss for failure to state a claim upon which relief may be granted.*” *Id* at ¶ 12.

In the present case the defendants contend that the Plaintiff cannot prevail on a breach of contract action against them because the school board members, individually, do not have the power to bind the school district because the power to act on behalf of the district is vested in the board. This is precisely what the Plaintiff has pled. The Plaintiff asserts that the three defendant school board members, acting in their official capacity, as

a majority of the Broken Arrow Board of Education, ("Board") breached his contract. The defendants, acting as the majority of the Board, voted to fire him without cause and thereby breached his contract. The Plaintiff's petition asserts that in acting as a majority of the Board, as public officials, they fabricated capricious and arbitrary excuses to fire him, which did not give rise to cause and as a result, breached the contract and the implied covenant of good faith and fair dealing.

The Third Amended Petition sets forth facts to support Plaintiff's claims that the defendants, as public officials and acting as the majority of the Board, with the power to bind the District, breached his employment contract by voting to fire him. The actions described in the Third Amended Petition portray the actions taken by the Board, as public officials. The actions sounding in tort, and pled in the first two Petitions, portray Flippo, Wilkins and Whelpley, acting as individuals and inflicting intentional injury and harm to Plaintiff.

Defendants assert that the school board members as individuals are not parties to Plaintiff's employment contract. True. However, they are parties to the contract as School Board Members acting as the majority of the Board, the entity that hired him and fired him. The power to act and bind the Broken Arrow School District regarding Plaintiff's employment and termination is vested in the majority of the board. *Board of Education v. American National Co*, 1928 OK 258 ¶ 41, 275 P. 285.

**Breach of Implied Covenant of Good Faith and Fair Dealing:**

The defendants' second proposition is that they could not have breached the implied covenant of good faith and fair dealing because they are not parties to the employment contract. They also contend that breach of an implied covenant for good

faith and fair dealing can result only in damages for breach of contract and not liability for the tort of bad faith. Defendants are incorrect on both notions for several reasons. First, the Board was a party to the contract and the named defendants constituting the majority voted to fire the Plaintiff. Second, even if they were not a party to the contract, they possessed primary control over Plaintiff's employment. They were in a unique and special relationship with Plaintiff- they hired, supervised, evaluated and had the power to fire him. The Board- these majority members acting as the Board, had the duty to act in good faith towards the Plaintiff. *Wathor v. Mutual Assurance Administrators, Inc*, 2004 OK 2 ¶¶10, 11, 12; 87 P.3d 559. In *Wathor*, the Oklahoma Supreme Court held that a third party administrator, not a party to the contract, who had denied the plaintiff's insurance claim, could be held liable for breach of good faith because of the "special relationship" in reviewing and denying the claim. See also, *World Logics Corp. V. Chatham Reinsurance Corp.*, 2005 OK CIV APP 16, 108 P.3d 5.

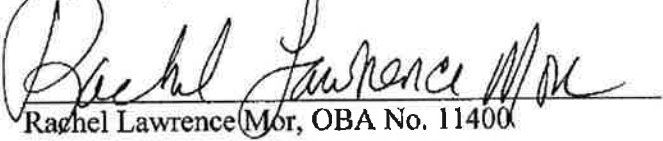
Oklahoma law recognizes that the implied covenant of good faith and fair dealing is an action for breach of contract which can *also* give rise to an action in tort. *Wathor v. Mutual Assurance Administrators, Inc*, 2004 OK 2 ¶¶14, 15, 16, 17; 87 P.3d 559; *Gens v. Casady School*, 2008 OK 12, 177 P.3d 565.

Plaintiff has pled the causes of action sufficient to test the law and the facts to withstand a motion to dismiss. Plaintiff has properly alleged both tort claims against the individual defendants in the previous Petitions and put defendants on notice that these are still causes of action against them. Plaintiff has presented breach of contract claims against the Broken Arrow School Board, these defendants acting as a majority of the

Board, as public officials, who took action by voting to fire Plaintiff and breached his contract.

Wherefore, the Plaintiff requests that the defendants' motion to dismiss be denied.

Respectfully submitted,



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**ATTORNEYS FOR PLAINTIFF**

### **CERTIFICATE OF SERVICE**

I certify that on the 4 day of February, 2011, a true and correct copy of the above and foregoing document was delivered upon Service via U.S. Mail, postage prepaid thereon, to:

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