

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<b>MARILYN MCCLAIN GOFF,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Case No. 08-CV-71-TCK-FHM</b>
<b>vs.</b>	)	
	)	<b>On Removal from Case No.</b>
<b>SHEREE L. HUKILL, individually and</b>	)	<b>CJ-2008-31, District Court of</b>
<b>DR. JOE A. WILEY, individually and</b>	)	<b>Rogers County, State of Oklahoma</b>
<b>ROGERS STATE UNIVERSITY BOARD</b>	)	
<b>OF REGENTS,</b>	)	
	)	
<b>Defendants.</b>	)	

**REPLY TO PLAINTIFF’S RESPONSE  
TO DEFENDANTS’ MOTION TO STRIKE**

Defendants, the State of Oklahoma, *ex rel.*, the Board of Regents of the University of Oklahoma (hereinafter, the “University”) (incorrectly designated by Plaintiff as “Rogers State University Board of Regents”), Sheree L. Hukill (“Hukill”), individually, and Dr. Joe A. Wiley (“Dr. Wiley”), individually, (collectively “Defendants”), offer the following Reply Brief in opposition to Plaintiff’s Response to Defendants’ Motion to Strike (“Plaintiff’s Response”). [Doc. No. 18]. In further support of their Motion to Strike [Doc. No. 16], Defendants offer the following arguments and authorities.

**ARGUMENTS AND AUTHORITIES**

In reviewing motions to dismiss, courts may only consider documents attached to, or incorporated by reference in, the complaint and documents of public record subject to judicial notice. *See, e.g., Pace v. Swerdlow*, WL 570805, \*5 (10<sup>th</sup> Cir. 2008); and *Alvarado v. KOB-TV, L.L.C.* 493 F.3d 1210, 1215-1216 (10<sup>th</sup> Cir. 2007). Nevertheless, Plaintiff inexplicably asserts the exhibits attached to her Response and Objection to Defendants’ Motion to Dismiss [Doc. No. 14] “are not outside the pleadings.” *See* Plaintiff’s Response [Doc. 18], ¶ 4. Plaintiff makes that

assertion in spite of the fact those documents have never been attached to anything of record in this matter, including Plaintiff's First Amended Petition (hereinafter referred to as the "Complaint"). See Exhibit 4 to Notice of Removal [Doc. 2]. Further, the information contained within those documents is not even referred to in the Complaint. In fact, Plaintiff does not allege, or even intimate, that she experienced any difficulty in serving any Defendant in this case.

Seemingly, then, without actually being able to articulate the request, Plaintiff is asking the Court to take judicial notice that one particular process server allegedly experienced difficulty effecting service on Dr. Wiley in an unrelated matter more than two years before the events surrounding the present litigation even took place. The logic employed by Plaintiff appears to be that proper service in this case was not required because of those "difficulties in obtaining service of process in the past." See Plaintiff's Response [Doc. 18], ¶ 4. Such an argument is frivolous. The "facts" contained within the exhibits at issue are clearly insusceptible of being judicially noticed. See Fed. R. Evid. 201(b). Only those facts "so universally known that they cannot reasonably be the subject of dispute, those so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and those capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy," may be conclusively established through judicial notice. See Advisory Committee's Note to Subdivision (b) of Fed. R. Evid. 201.

The documents subject to this motion clearly have no bearing upon the subject matter of *this* litigation and must be stricken as a matter of law. See *U.S. v. Hardage*, 116 F.R.D. 460, 463-464 (W.D. Okla. 1987). Plaintiff cannot overcome her pleading deficiencies with arguments that extend beyond the allegations contained in the Complaint. See *Bauchman v. West High Sch.*, 132 F.3d 542, 550 (10<sup>th</sup> Cir. 1997). It is not appropriate for a court to consider additional facts or

legal theories asserted in a response brief to a motion to dismiss unless they are consistent with the facts and theories advanced in the complaint. *See Hayes v. Whitman*, 264 F.3d 1017, 1025 (10<sup>th</sup> Cir. 2001). Contrary to Plaintiff's disjointed theory, there is no exception to this rule where service of process is at issue. It is, under certain circumstances, permissible for one or more affidavits to be attached to a responsive brief, but only where the affidavits attest to the actual and/or attempted service in the action at issue. Here, Plaintiff tries to improperly influence the Court with wholly irrelevant and unattested documents allegedly addressing service issues that occurred several years ago in an unrelated matter. The fact is that Plaintiff's counsel failed to even attempt proper service in this matter and has no excuse for such failure. Attaching irrelevant and extraneous information to the responsive brief and then attempting to support such a decision with the invalid arguments asserted in the Response epitomizes the inexcusable nature of improper service in this action.

### **CONCLUSION**

There is no reasonable basis in law or fact for Plaintiff to attach these exhibits at any stage and especially in response to Defendants' Motion to Dismiss. In light of the foregoing, Defendants respectfully request the Court strike the exhibits attached to Plaintiff's Response and Objection to Defendants' Motion to Dismiss [Doc. No. 14] , and grant such other relief as the Court deems appropriate, including but not limited to attorneys' fees incurred for the preparation and filing of the Motion to Strike and this Reply.

Respectfully submitted,

s/ Shawnae E. Robey

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of April, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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s/ Shawnae E. Robey