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

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| MARK E. SCHELL,<br><br>Plaintiff,<br><br>v.<br><br>NOMA GURICH, Chief Justice of the Oklahoma Supreme Court; et al.,<br><br>Defendants. | ) | Case No. CIV-2019-281-H |

**ANSWER OF DEFENDANT TIMOTHY E. DeCLERCK**
**TO PLAINTIFF'S FIRST AMENDED COMPLAINT**

COMES NOW Defendant Timothy E. DeClerck ("Defendant") and for his Answer to Plaintiff's First Amended Complaint [Doc. 19], alleges and states as follows[1]:

1. No response is required to the allegations set out in paragraph no. 1; however, Defendant denies that this action was brought on behalf of all Oklahoma attorneys.

2. The allegations set out in paragraph no. 2 are admitted.

3. The allegations set out in paragraph no. 3 are moot given the Court's Order dismissing Counts 1 and 2 of the First Amended Complaint [Doc. 61] (the ("Order").

[1] The paragraph numbers referred to in the Answer correspond to the numbered paragraphs of the First Amended Complaint.

4. The allegations set out in paragraph no. 4 are moot given the Court's Order [Doc. 61].

5. The allegations set out in paragraph no. 5 are denied.

6. The allegations set out in paragraph no. 6 do not require a response.

**JURISDICTION AND VENUE**

7. The allegations set out in paragraph no. 7 are admitted.

8. The allegations set out in paragraph no. 8 are admitted.

9. The allegations set out in paragraph no. 9 are admitted.

10. The allegations set out in paragraph no. 10 are admitted.

**PARTIES**

11. With respect to the allegations set out in paragraph 11, Defendant admits that Mr. Schell is a member of the OBA, but does not know his reasons.

12. The allegations set out in paragraph no. 12 are admitted.

13. The allegations set out in paragraph no. 13 are admitted.

14. The allegations set out in paragraph no. 14 are admitted.

15. The allegations set out in paragraph no. 15 are admitted.

16. The allegations set out in paragraph no. 16 are admitted.

17. The allegations set out in paragraph no. 17 are admitted.

18. The allegations set out in paragraph no. 18 are admitted.

19. With respect to the allegations set out in paragraph no. 19, Defendant admits that the seat on the Oklahoma Supreme Court formerly occupied by the recently retired Justice was vacant when the First Amended Complaint was filed.

20. With respect to the allegations set out in paragraph no. 20, Defendant admits that the seat on the Oklahoma Supreme Court formerly occupied by the Honorable Patrick Wyrick was vacant when the First Amended Complaint was filed.

21. The allegations set out in paragraph no. 21 are admitted in that Mr. Chesnut was President of the Board of Governors when the First Amended Complaint was filed. The authority of the Board of Governors is set out primarily in the Rules Creating and Controlling the Oklahoma Bar Association ("RCAC"), which are subject to amendment. At the time the First Amended Complaint was filed, the Board of Governors had the authority to withdraw dues and to remove attorneys from the rolls for nonpayment.

22. The allegations set out in paragraph no. 22 are admitted in that Ms. Shields was President-Elect of the Board of Governors when the First Amended Complaint was filed.

23. The allegations set out in paragraph no. 23 are admitted.

24. Defendant admits John M. Williams is the OBA's Executive Director. His responsibilities are set out primarily in the RCAC, which are subject to amendment. To the extent the balance of the allegations set out in paragraph no. 24 require a response, they are denied.

25. The allegations set out in paragraph no. 25 are admitted.

26. The allegations set out in paragraph no. 26 are admitted.

27. The allegations set out in paragraph no. 27 are admitted.

28. The allegations set out in paragraph no. 28 are admitted.

29. The allegations set out in paragraph no. 29 are admitted.

30. The allegations set out in paragraph no. 30 are admitted.

31. The allegations set out in paragraph no. 31 are admitted.

32. The allegations set out in paragraph no. 32 are admitted.

33. The allegations set out in paragraph no. 33 are admitted.

34. The allegations set out in paragraph no. 34 are admitted.

35. The allegations set out in paragraph no. 35 are admitted.

36. The allegations set out in paragraph no. 36 are admitted.

37. The allegations set out in paragraph no. 37 are admitted.

38. The allegations set out in paragraph no. 38 are admitted.

39. The allegations set out in paragraph no. 39 do not require a response.

## FACTS

### Oklahoma's Mandatory Bar Association Membership and Fees

40. The allegations set out in paragraph no. 40 are admitted.

41. The allegations set out in paragraph no. 41 are admitted only in that dues are a requirement, but Defendant states there are exceptions to the requirement, and further, that Art. VIII, §§ 1-4 of the RCAC speak for themselves as to their terms.

42. While the Oklahoma Supreme Court may suspend membership under the circumstances set out in the RCAC, the allegations set out in paragraph no. 42

are denied in that Art. VIII, §§ 2, 4 of the RCAC speak for themselves as to their terms.

43. While the Oklahoma Supreme Court may reinstate membership and strike a member from the rolls under the circumstances set out in the RCAC, the allegations set out in paragraph no. 43 are denied in that Art. VIII, § 5 of the Rules speaks for itself as to its terms.

44. The allegations set out in paragraph no. 44 are admitted to the extent that if he is a licensed Oklahoma attorney who desires to practice in the State, Mr. Schell is required to be a member of the OBA and generally, to pay dues, but further states there are exceptions to the dues requirement set out in the RCAC and the OBA's policies and procedures.

45. The allegations set out in paragraph no. 45 are admitted.

46. The allegations set out in paragraph no. 46 are admitted.

47. With respect to the allegations set out in paragraph no. 47, Defendant admits generally that the members of the Board of Governors have power to approve use of funds that may be comprised in part by member dues, as subject to the requirements and limits of, and further set out in, the RCAC.

48. The allegations set out in paragraph no. 48 are denied.

49. Article VIII, §§ 2-3 of the OBA's bylaws speak for themselves as to their express terms, and Defendant denies any characterization of them other than as they are fully stated and read together with the RCAC and other sections of the bylaws, as they may be amended.

50. Article VIII, § 9 of the OBA's bylaws speaks for itself as to its express terms, and Defendant denies any characterization of it other than as it is fully stated and read together with the RCAC and other sections of the bylaws, as they may be amended.

51. Article VIII, § 4 of the OBA's bylaws speaks for itself as to its express terms, and Defendant denies any characterization of it other than as it is fully stated and read together with the RCAC and other sections of the bylaws, as they may be amended.

52. The allegations set out in paragraph no. 52 are denied, but Defendant admits the OBA engages with legislative proposals that are germane.

53. The allegations set out in paragraph no. 53 are denied, and Defendant denies that an individual member's acts or opinions are the acts or opinions of the OBA.

54. The allegations set out in paragraph no. 54 are denied, and Defendant denies that an individual member's acts or opinions are the acts or opinions of the OBA.

55. Defendant admits that the OBA and/or OBA voluntary committee membership engage with legislation that is germane, but denies that the OBA engages in activities that are non-germane under *Keller*, or that an individual member's acts or opinions are the acts or opinions of the OBA or Defendant.

56. Defendant admits that the OBA voluntary committee membership engage with legislation that is germane, but denies that voluntary committee

membership engage in activities that are non-germane under *Keller*, or that an individual member's acts or opinions are the acts or opinions of the OBA or Defendant.

57. The allegations set out in paragraph no. 57 are denied.

58. The allegations set out in paragraph no. 58 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

59. The allegations set out in paragraph no. 59 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

60. The allegations set out in paragraph no. 60 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

61. The allegations set out in paragraph no. 61 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

62. The allegations set out in paragraph no. 62 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged

speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

63. The allegations set out in paragraph no. 63 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

64. The allegations set out in paragraph no. 64 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

65. The allegations set out in paragraph no. 65 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

66. The allegations set out in paragraph no. 66 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

67. Defendant has insufficient information to admit or deny the allegations of paragraph no. 67, and therefore denies same.

68. The allegations set out in paragraph no. 68 are denied. The alleged advertisement's content speaks for itself and must be read as a whole and the alleged

speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author or advertiser.

69. The allegations set out in paragraph no. 69 are denied.

70. The allegations set out in paragraph no. 70 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

71. The allegations set out in paragraph no. 71 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

72. The allegations set out in paragraph no. 72 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

73. The allegations set out in paragraph no. 73 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

74. The allegations set out in paragraph no. 74 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged

speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

75. The allegations set out in paragraph no. 75 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

76. The allegations set out in paragraph no. 76 are denied. The alleged OBJ article's content speaks for itself and must be read as a whole and the alleged speech or opinions expressed are not that of Defendant, the OBA, or anyone other than the author.

**OBA's Dues Refund Procedures**

77. The allegations set out in paragraph no. 77 are admitted generally in that at the time the First Amended Complaint was filed the OBA gave notice of proposed budgets, including by publishing a summary in the OBJ, but Defendant denies that the procedure alleged in paragraph no. 77 comprises the entire process, which is set out in more detail in the RCAC and bylaws.

78. Defendant denies that Exhibit 1 is the complete proposed budget.

79. The allegations set out in paragraph no. 79 are denied, and Defendant further denies that Exhibit 1 is the complete proposed budget.

80. The allegations set out in paragraph no. 80 are denied, and Defendant further denies that Exhibit 1 is the complete proposed budget.

81. The allegations set out in paragraph no. 81 are denied.

82. With regard to the allegations set out in paragraph no. 82, the policy speaks for itself.

83. The allegations set out in paragraph no. 83 are denied.

84. With regard to the allegations set out in paragraph no. 84, the policy speaks for itself.

85. With regard to the allegations set out in paragraph no. 85, the policy speaks for itself.

86. With regard to the allegations set out in paragraph no. 86, the policy speaks for itself.

87. With regard to the allegations set out in paragraph no. 87, the policy speaks for itself.

88. With regard to the allegations set out in paragraph no. 88, the policy speaks for itself.

89. The allegations set out in paragraph no. 89 are denied.

**Plaintiff's Injury**

90. Defendant is without sufficient information to admit or deny the allegations set out in paragraph no. 90, and therefore denies same, but also specifically denies that Mr. Schell is without effective means or recourse. Defendant further denies that the speech alluded to is that of the OBA or is non-germane. Further, the allegations as to membership are moot given the Court's Order [Doc. 61].

91. Defendant is without sufficient information to admit or deny the allegations set out in paragraph no. 91, and therefore denies same, but also specifically denies that Mr. Schell is injured by the dues requirement. Further, the allegations are moot given the Court's Order [Doc. 61].

92. Defendant is without sufficient information concerning Mr. Schell's wishes or intent to admit or deny those allegations, and therefore denies the same, but also specifically denies that Mr. Schell is injured by the dues requirement and denies the balance of the allegations, and that the allegations set out in paragraph no. 92 are moot given the Court's Order [Doc. 61].

93. Defendant is without sufficient information concerning Mr. Schell's wants or intent to admit or deny those allegations, and therefore denies the same, but also specifically denies that Mr. Schell is injured by the dues requirement and denies the balance of the allegations in paragraph no. 93.

**FIRST CLAIM FOR RELIEF**

**Compelled membership in the OBA violates attorneys' First and Fourteenth Amendment rights to free association and free speech.**

94. Defendant incorporates his answers to paragraph nos. 1-93.

95. The allegations set out in paragraph no. 95 state a legal conclusion and do not require a response. Further, the allegations set out in paragraph no. 95 are moot given the Court's Order [Doc. 61].

96. The allegations set out in paragraph no. 96 state a legal conclusion and do not require a response. Further, the allegations set out in paragraph no. 96 are moot given the Court's Order [Doc. 61].

97. The allegations set out in paragraph no. 97 are denied. Further, the allegations set out in paragraph no. 97 are moot given the Court's Order [Doc. 61].

98. The allegations set out in paragraph no. 98 state a legal conclusion and do not require a response. Further, the allegations set out in paragraph no. 98 are moot given the Court's Order [Doc. 61].

99. The allegations set out in paragraph no. 99 state a legal conclusion and do not require a response. Further, the allegations set out in paragraph no. 99 are moot given the Court's Order [Doc. 61].

100. The allegations set out in paragraph no. 100 are denied. Further, the allegations set out in paragraph no. 100 are moot given the Court's Order [Doc. 61].

101. The allegations set out in paragraph no. 101 are denied. Further, the allegations set out in paragraph no.101 are moot given the Court's Order [Doc. 61].

102. The allegations set out in paragraph no. 102 are denied. Further, the allegations set out in paragraph no. 102 are moot given the Court's Order [Doc. 61].

103. The allegations set out in paragraph no. 103 are denied. Further, the allegations set out in paragraph no. 103 are moot given the Court's Order [Doc. 61].

104. The allegations set out in paragraph no. 104 are denied. Further, the allegations set out in paragraph no. 104 are moot given the Court's Order [Doc. 61].

## SECOND CLAIM FOR RELIEF

**The collection and use of mandatory bar dues to subsidize the OBA's speech – including its political and ideological speech – violates attorneys' First and Fourteenth Amendment rights to free speech and association.**

105. Defendant incorporates his answers to paragraph nos. 1-104.

106. The allegations set out in paragraph no. 106 are denied. Further, the allegations set out in paragraph no. 106 are moot given the Court's Order [Doc. 61].

107. The allegations set out in paragraph no. 107 are denied. Further, the allegations set out in paragraph no. 107 are moot given the Court's Order [Doc. 61].

108. The allegations set out in paragraph no. 108 are denied, including that the state forces attorneys to subsidize the OBA's political or ideological speech. Further, the allegations set out in paragraph no. 108 are moot given the Court's Order [Doc. 61].

109. The allegations set out in paragraph no. 109 are denied. Further, the allegations set out in paragraph no. 109 are moot given the Court's Order [Doc. 61].

110. The allegations set out in paragraph no. 110 are denied. Further, the allegations set out in paragraph no. 110 are moot given the Court's Order [Doc. 61].

111. The allegations set out in paragraph no. 111 are denied. Further, the allegations set out in paragraph no. 111 are moot given the Court's Order [Doc. 61].

112. The allegations set out in paragraph no. 112 are denied. Further, the allegations set out in paragraph no. 112 are moot given the Court's Order [Doc. 61].

113. The allegations set out in paragraph no. 113 are denied. Further, the allegations set out in paragraph no. 113 are moot given the Court's Order [Doc. 61].

114. The allegations set out in paragraph no. 114 are denied. Further, the allegations set out in paragraph no. 114 are moot given the Court's Order [Doc. 61].

115. The allegations set out in paragraph no. 115 are denied. Further, the allegations set out in paragraph no. 115 are moot given the Court's Order [Doc. 61].

116. The allegations set out in paragraph no. 116 are denied. Further, the allegations set out in paragraph no. 116 are moot given the Court's Order [Doc. 61].

117. The allegations set out in paragraph no. 117 are denied. Further, the allegations set out in paragraph no. 117 are moot given the Court's Order [Doc. 61].

118. The allegations set out in paragraph no. 118 are denied. Further, the allegations set out in paragraph no. 118 are moot given the Court's Order [Doc. 61].

**THIRD CLAIM FOR RELIEF**

**The OBA violates attorneys First and Fourteenth Amendment rights by failing to provide safeguards to ensure mandatory dues are not used for impermissible purposes.**

119. Defendant incorporates his answers to paragraph nos. 1-118.

120. The allegations set out in paragraph no. 120 state a legal conclusion and do not require a response.

121. To the extent the allegations set out in paragraph no. 121 state a legal conclusion, they do not require a response. Defendant denies that the OBA's procedures fail to comply with applicable legal requirements.

122. The allegations set out in paragraph no. 122 are denied.

123. The allegations set out in paragraph no. 123 are denied.

124. The allegations set out in paragraph no. 124 are denied.

125. The allegations set out in paragraph no. 125 are denied.

126. The allegations set out in paragraph no. 126 are denied.

127. The allegations set out in paragraph no. 127 are denied.

128. The allegations set out in paragraph no. 128 are denied.

**Requests for Relief**

Defendant denies that plaintiff is entitled to judgment in his favor, or to any relief, including that sought in lettered paragraphs A-F of the First Amended Complaint.

**AFFIRMATIVE DEFENSES**

1. Plaintiff fails to state a claim as to Defendant upon which relief may be granted.
2. Plaintiff failed to utilize the policies, procedures or opportunities offered to challenge any expenditure he may contend is non-germane, and is therefore barred from bringing a personal or an applied challenge.
3. Plaintiff's claims are barred by the applicable statute of limitations and the doctrine of laches.
4. Plaintiff's request for attorney's fees is barred by the Civil Rights Act.
5. The OBA has complied with state law, including the Oklahoma Constitution, with regard to treatment of contingent liabilities and otherwise.

WHEREFORE, Defendant prays that plaintiff take nothing by way of the remaining count of the First Amended Complaint, and that plaintiff's requests for relief be denied in

their entirety; that Defendant recover all costs of this action, including a reasonable attorney's fee, and that Defendant be granted such other and further relief, whether legal or equitable, as may be just and proper.

Respectfully submitted,

*/s/ Thomas G. Wolfe*
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**ATTORNEYS FOR DEFENDANT TIMOTHY E. DeCLERCK**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of October, 2019, I filed the attached document with the Clerk of Court. Based on the records currently on file in this case, the Clerk of Court will transmit a Notice of Electronic Filing to the following:

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*/s/ Thomas G. Wolfe*
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