



MAY 31 1978

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

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
v.	Plaintiff,	)
	)	) NOS. 77-C-515-B
	)	) 75-CR-1-B
ALVINO RAY LA NEAR, # 39587-115,	)	
	)	
Movant.	)	

O R D E R

The Court has for consideration a motion pursuant to 28 U.S.C. § 2255 filed pro se, in forma pauperis, by the Movant, Alvino Ray LaNear. The cause has been assigned civil Case No. 77-C-515-B and docketed in his criminal Case No. 75-CR-1-B.

Movant is a prisoner in the Medical Center for Federal Prisoners, Springfield, Missouri, pursuant to conviction in Case No. 75-CR-1 upon his plea of guilty to an indictment charging Count One, mail theft in violation of 18 U.S.C. § 1702, and Count Two, uttering and publishing a stolen United States Treasury check in violation of 18 U.S.C. § 495. On January 21, 1975, the imposition of sentence was suspended on said charges and the Defendant (Movant herein) was placed on four years' probation, Count Two to run concurrently with Count One, and it was a condition of probation that the Defendant (1) stay employed, (2) avoid criminal involvement and association with criminals, and (3) make restitution of the \$123.30 in monthly payments of \$5.00 to the U. S. Court Clerk's office beginning at the end of February, 1975. On February 12, 1976, following a probation revocation hearing, the Defendant's probation was revoked and he was committed to the custody of the Attorney General for four years as to Count One and the imposition of sentence was suspended on Count Two and he was placed on three years probation with the condition that he make restitution in the sum of \$123.30 at the rate of \$10.00 a month.

Movant in his § 2255 motion demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution of the United States of America. In particular, Movant claims that:

1. He was discriminated against in that one of the grounds for his probation revocation was that he was not looking for a job when in truth he was looking for a job.

2. Another ground for probation revocation was that he left the District to which he was assigned, and in fact he did not leave Tulsa, Oklahoma, or Kansas City, Missouri, except upon transfer of his probation supervision.
3. He became emotional at his probation revocation hearing and was forcibly removed from the courtroom, and the sentence is invalid since he was not present at the time sentence was imposed.

The Court remembers the probation revocation hearing of Alvino Ray LaNear, and has carefully reviewed the motion, response and file. Being fully advised in the premises, the Court finds that the § 2255 motion is without merit and should be overruled.

Movant's first claim that one of the grounds for the revocation of his probation was that "he was not looking for a job" is without merit. The question was not whether he was looking for work, rather it was his failure to expend his best efforts to keep a job once he found one. Further, he made no restitution payments during his brief periods of employment. Second, he contends that he did not leave supervision except upon transfer of his probation supervision. This allegation is not supported by the record. He went to Kansas City, Missouri, on June 13, 1975, without the permission or knowledge of his probation officer and at that time there had been no transfer of supervision from Tulsa, Oklahoma. He returned to Tulsa and thereafter his supervision was transferred to Kansas City, Missouri, on September 22, 1977. On November 13, 1975, he returned to Tulsa without the permission of the Kansas City Probation Office and his supervision had not been returned to Tulsa. His third contention is also without merit. He did become emotional and unruly during the revocation proceedings, but he was present before the Court when probation was revoked and sentence imposed. Movant states no valid grounds to support his § 2255 motion.

IT IS, THEREFORE, ORDERED that the motion pursuant to 28 U.S.C. § 2255 of Alvino Ray LaNear be and it is hereby overruled, denied and the case is dismissed.

Dated this 31<sup>st</sup> day of May, 1978, at Tulsa, Oklahoma.

  
\_\_\_\_\_  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

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

COCA-COLA BOTTLING COMPANY OF )  
TULSA, INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FOWLER PRODUCTS COMPANY, INC., )  
 )  
Defendant. )

FILED

MAY 31 1978

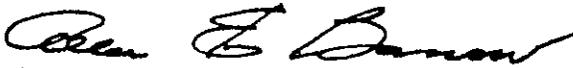
No. 76-C-32-B

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER APPROVING DISMISSAL

Upon consideration of the Stipulation of Dismissal with Prejudice filed herein by the parties to this action, the Court hereby approves dismissal of the causes of action, complaint and counterclaim in the captioned action with prejudice to any and all further action.

DATED this 31st day of May, 1978.

  
United States District Judge



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

FREDERICK J. FUNKHOUSER,  
Social Security No. 448-10-7501,

Plaintiff,

vs.

JOSEPH CALIFANO, JR.,  
Secretary of Health, Education  
and Welfare of the United  
States,

Defendant.

77-C-255-B ✓

FILED

MAY 26 1978 J.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

This is an action instituted by plaintiff for a review of the final decision of the Secretary of Health, Education and Welfare of the United States of America denying Social Security disability benefits to the plaintiff.

Federal jurisdiction is invoked pursuant to Section 205(g) of the Social Security Act, as amended, 42 U.S.C. §405(g).

The case is presently before this Court for determination. In the pre-trial order filed, it is stated and agreed to by the parties that there is no issue of fact for trial and the only question of law for determination is as follows: Whether plaintiff is entitled to social security disability benefits under the Social Security Act.

The Court ordered a briefing schedule, and the respective have filed their briefs. The Court has carefully perused the entire file, including all briefs and the administrative record and transcript, and, being fully advised in the premises, finds:

Plaintiff originally filed an application to establish a period of disability and for entitlement to disability benefits on January 27, 1971. He was notified by the Bureau of Disability Insurance, Social Security Administration that his application had been denied. Reconsideration was requested of this denial and plaintiff was subsequently notified by letter dated July 29, 1971, that the

original denial had been affirmed. Plaintiff did not pursue this application to the hearing level.

Plaintiff filed his second application for a period of disability and disability insurance benefits on June 27, 1974. This application was denied and plaintiff requested reconsideration. Plaintiff was again denied upon reconsideration and thereafter requested a hearing on December 6, 1973. A hearing was held on March 8, 1974, and a decision was rendered on May 8, 1974, affirming the previous denial. Plaintiff did not pursue this application to the Appeals Council.

Thereafter and on July 3, 1974, plaintiff filed his third application for a period of disability and this current application is the subject matter of this litigation. Plaintiff's claim was initially denied and plaintiff requested reconsideration of the denial. Plaintiff was notified on June 7, 1976, that the denial had been affirmed. Plaintiff filed a request for a hearing, and a hearing was had before the Administrative Law Judge on November 11, 1976. Plaintiff was represented by retained counsel at that hearing and said counsel has filed this litigation on behalf of the plaintiff.

The Administrative Law Judge rendered his decision on April 27, 1977, stating (TR-17):

"IT IS THE DECISION of the Administrative Law Judge that, based upon the application filed on January 27, 1971, and on June 27, 1973, and July 3, 1974, the claimant is not entitled to a period of disability or to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended."

On May 27, 1977, the decision of the Administrative Law Judge was rendered, affirming the decision of the Administrative Law Judge (TR-4).

Plaintiff was born February 15, 1919, and attended school through the fourth grade (TR 34). He testified that he had been employed as a drycleaner and spotter and chief engineer, maintenance man. (TR 34) His longest employment was with Guaranty Laundry in Tulsa as an engineer and maintenance man. (TR 34)

Plaintiff is semi-literate (TR 35).

In his application for Disability Insurance Benefits submitted on July 3, 1974, in the space provided for disability, plaintiff stated "muscle spasms". (TR 182-185).

The medical evidence has been more than adequately detailed by the Administrative Law Judge and need not be reiterated in this order. The Court has carefully reviewed the medical exhibits submitted in the administrative transcript.

A vocational expert testified at the Plaintiff's hearing (TR 62-73). Assuming a hypothetical that plaintiff had all the physical impairment he alleged, that he could not return to his previous jobs. The expert did testify that considering plaintiff's age, education, an ability to sit for two hours, hand to eye coordination, manual dexterity of his hands and arms, the ability to lift up to ten pounds, the inability to climb stairs or to engage in any exhaustive activities or physical exertion; that there were numerous light and sedentary jobs in the regional economy that plaintiff could perform, including wiring assembler, engraver machine operator, deburring small parts, and assembling of small precision items.

The roll of the Court in reviewing a Social Security matter is limited to a determination of whether there is substantial evidence in the entire record to support the fact findings or decision of the Secretary, as the trier of facts, and not to reweigh the evidence, or try the issues de novo, or substitute the judgment of the Court for that of the Secretary. *Mayhue v. Gardner*, 294 F.Supp. 853 (D.Kan. 1969), aff'd 416 F.2d 1257 (10th Cir. 1969).

If supported by substantial evidence, the Secretary's findings and conclusions must be affirmed. *Richardson v. Perales*, 402 U.S. 389 (1971).

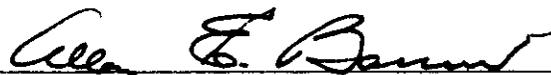
The plaintiff has the burden of proving his disability. *Valentine v. Richardson*, 468 F.2d 588 (10th Cir. 1972).

To sustain this burden, the plaintiff must prove that he is unable to engage in any substantial gainful activity. *Timmerman v. Weinberger*, 510 F.2d 439 (8th Cir. 1975). It is not incumbent upon the Secretary to make an initial showing of nondisability. *Reyes Robles v. Finch*, 409 F.2d 84 (1st Cir. 1969); *Griffin v. Weinberger*, 407 F.Supp. 1388 (N.D.Ill. 1975). Additionally, plaintiff must establish a physical impairment lasting at least 12 months that prevents the engaging in substantial gainful activity. *Alexander v. Richardson*, 451 F.2d 1185 (10th Cir. 1971), cert.den. 407 U.S. 911 (1972).

The Court has carefully reviewed the entire record and has applied the applicable law thereto, and, finds that the decision of the Secretary is supported by substantial evidence and should be affirmed.

IT IS, THEREFORE, ORDERED that Judgment be entered in favor of the defendant, Joseph Califano, Jr., Secretary of Health, Education and Welfare of the United States and against the plaintiff, Fredrick J. Funkhouser.

ENTERED this 26<sup>th</sup> day of May, 1978.



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CHIEF UNITED STATES DISTRICT JUDGE

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

PAULA WARNE

Plaintiff

vs.

DAYTON-HUDSON CORPORATION,  
a corporation, d/b/a JOHN A.  
BROWN COMPANY

Defendants

No. 77-C-166-B

**FILED**

**MAY 26 1978**

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

This action came on for trial before the Court and a jury, Honorable Royce Savage, Special Master, presiding, and the issues having been duly tried and after all parties have rested, the court finds that the recommendations of the Special Master that the defendants' Motion for Directed Verdict should be sustained and the cause dismissed with prejudice.

IT IS THEREFORE ORDERED AND ADJUDGED that the defendants' Motion for Directed Verdict be and the same is hereby sustained, and the plaintiff's cause of action dismissed with prejudice at the cost of the plaintiff.

Dated this 26 day of May, 1978.

  
United States District Judge

WS

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

WESTINGHOUSE CREDIT CORPORATION,  
a Delaware corporation,

Plaintiff,

vs.

CHAPEL PARK CORPORATION,  
a Louisiana corporation;  
CUSTOM AIR MOTIVE, INC.,  
an Oklahoma corporation;  
MITCHELL FLIGHT CENTER, INC.,  
an Oklahoma corporation,

Defendants.

No. 78-C-85-C

MAY 2 1978

JOURNAL ENTRY OF JUDGMENT

NOW on this 26<sup>th</sup> day of MAY, 1978, this cause comes on to be heard on plaintiff's motion for entry of judgment by default against Chapel Park Corporation; plaintiff, Westinghouse Credit Corporation, appearing by its attorney, Kevin Blaney, and defendant, Chapel Park Corporation, appearing neither in person nor by attorney.

The Court, being fully advised in the premises, finds that said defendant has been duly served with summons, that said defendant has been served with notice of plaintiff's motion for entry of judgment by default at least three days prior to the hearing on such application, and that this Court has jurisdiction of the subject matter of this action. That the defendant, Chapel Park Corporation, has failed to plead or otherwise respond to plaintiff's complaint filed herein on February 24, 1978. That said defendant is adjudged to be in default and the allegations of plaintiff's verified complaint are ordered taken as true and confessed.

The Court finds that plaintiff is entitled to recover judgment against the defendant, Chapel Park Corporation, for the immediate and permanent possession of the aircraft described as: Piper PA 31-350, S/N 31-7405438, N54315, including all accessories thereon.

The Court further finds that plaintiff redeemed the subject aircraft from the defendant, Custom Air Motive, Inc., which possessed a valid possessory lien in and to said aircraft and that plaintiff has been subrogated to the rights and benefits of said lien in the amount of \$19,252.32.

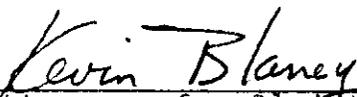
The Court further finds that the plaintiff has a valid perfected security interest lien upon and against the hereinabove described aircraft, including accessories, in the amount of \$150,278.10.

The Court further finds that the lien of plaintiff may be foreclosed by plaintiff, as provided by law, and the proceeds applied to satisfy the debt owing to plaintiff by defendant, Chapel Park Corporation.

IT IS SO ORDERED.

  
H. DALE COOK

EAGLETON, NICHOLSON & PATE

By   
Attorneys for Plaintiff

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CLIFFORD L. JENKINS a/k/a )  
 CLIFFORD LEE JENKINS and )  
 DELORES K. JENKINS a/k/a )  
 DELORES KAY JENKINS, )  
 )  
 Defendants. )

CIVIL ACTION NO. 78-C-117-C

**FILED**

MAY 26 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 26<sup>th</sup>  
day of May, 1978, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney; and, the Defendants, Clifford L.  
Jenkins a/k/a Clifford Lee Jenkins and Delores Kay Jenkins a/k/a  
Delores K. Jenkins, appearing not.

The Court being fully advised and having examined the  
file herein finds that Defendants, Clifford L. Jenkins a/k/a  
Clifford Lee Jenkins and Delores Kay Jenkins a/k/a Delores K.  
Jenkins, were served with Summons and Complaint on April 24, 1978,  
as appears on the United States Marshal's Service herein.

It appearing that the Defendants, Clifford L. Jenkins  
a/k/a Clifford Lee Jenkins and Delores Kay Jenkins a/k/a Delores K.  
Jenkins, have failed to answer herein and that default has been  
entered by the Clerk of this Court.

The Court further finds that this is a suit based upon  
a promissory note and foreclosure on a real property mortgage  
securing said promissory note upon the following described real  
property located in Rogers County, Oklahoma, within the Northern  
Judicial District of Oklahoma:

Lot Twenty (20), Block One (1), of CRESTVIEW  
HEIGHTS, a Subdivision of Section 15, Township  
21 North, Range 16 East, according to the  
recorded plat thereof.

THAT James C. Jenkins and Margaret M. Jenkins, husband and wife, did, on the 16th day of March, 1973, execute and deliver to the United States of America, acting through the Farmers Home Administration, their mortgage and promissory note in the sum of \$16,250.00 with 7 1/4 percent interest per annum, and further providing for the payment of one installment of \$1,059.00 due on January 1, 1974, and annual installments of \$1,308.00 due on each January 1, and continuing until paid.

The Court further finds that the Defendants, Clifford L. Jenkins and Delores Kay Jenkins, are the record owners of the property described herein and the Court also finds that said Defendants, Clifford L. Jenkins and Delores Kay Jenkins, assumed and agreed to pay the promissory note and mortgage herein being foreclosed by virtue of an Assumption Agreement dated January 7, 1976.

The Court further finds that this is a suit based upon a promissory note and foreclosure on a real property mortgage securing said promissory note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty (20), Block One (1), of CRESTVIEW HEIGHTS, a Subdivision of Section 15, Township 21 North, Range 16 East, according to the recorded plat thereof.

THAT the Defendants, Clifford L. Jenkins and Delores Kay Jenkins, did, on the 11th day of May, 1976, execute and deliver to the United States of America, acting through the Farmers Home Administration, their promissory note and mortgage in the sum of \$850.00 with interest thereon at the rate of 8 1/2 percent per annum, and further providing for the payment of annual installments of principal and interest.

The Court further finds that Defendants, Clifford L. Jenkins and Delores Kay Jenkins, made default under the terms of the aforesaid promissory notes by reason of their failure to make the annual installments due thereon, which default has

continued and that by reason thereof, the above-named Defendants are now indebted to the Plaintiff in the amount of \$18,160.73 as of May 15, 1978, plus accrued interest as of May 15, 1978, of \$2,084.07, plus a daily interest accrual from and after May 15, 1978, of \$4.3478, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Clifford L. Jenkins and Delores Kay Jenkins, in personam, for the sum of \$18,160.73 as of May 15, 1978, plus accrued interest as of May 15, 1978, of \$2,084.07, plus a daily interest accrual from and after May 15, 1978, of \$4.3478, until paid, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants, and each of them, and all persons claiming under them since the filing of the Complaint herein, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
ROBERT P. SANTEE  
Assistant United States Attorney

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

MAY 26 1978

WILLIS K. JOHNSON, )  
 )  
 Plaintiff )  
 )  
 v. ) No. 77-C-120-C  
 )  
 BOB HOWE, d/b/a Bob Howe Fine Car )  
 Center, and DAVID H. KORNEMAN, )  
 )  
 Defendants )

JUDGMENT

This action came on for trial before the Court and a jury, Honorable H. Dale Cook, United States District Judge, presiding, and the issues having been duly tried before a jury of six good people, and the jury having duly rendered a true verdict according to the evidence, and having returned a verdict in the amount of \$750.00 for actual damages on behalf of the plaintiff and against the defendant Bob Howe with regard to plaintiff's First Cause of Action, and having returned a verdict in favor of the plaintiff and against the defendant Bob Howe in the amount of \$750.00 as well as a verdict in favor of the plaintiff and against the defendant David H. Korneman in the amount of \$750.00 under plaintiff's Second Cause of Action, and having returned a verdict in favor of the plaintiff and against the defendant Bob Howe in the amount of \$750.00 actual damages and \$50,000.00 punitive damages and a judgment in favor of the plaintiff and against the defendant David H. Korneman in the amount of \$750.00 actual damages under plaintiff's Third Cause of Action.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff's claim for treble damages in accordance with the provisions of 15 U.S.C. §1989 (a)(1) is denied because of

plaintiff's recovery of punitive damages under Oklahoma State law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Willis K. Johnson, have and recover from the defendants Bob Howe and David Korneman, jointly and severally, the sum of \$750.00 as actual damages, and, in addition, have and recover the sum of \$50,000.00 from the defendant Bob Howe as punitive damages, plus the costs of this action.

A handwritten signature in black ink, appearing to read "H. Dale Cook", written over a horizontal line.

H. DALE COOK  
UNITED STATES DISTRICT JUDGE

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

CAROL G. MASSINGILL,  
SSA/N 441-56-3697,

Plaintiff,

vs.

JOSEPH CALIFANO, JR.,  
SECRETARY OF HEALTH,  
EDUCATION AND WELFARE  
OF THE UNITED STATES OF  
AMERICA,

Defendant.

77-C-222-B

FILED

MAY 26 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT

Pursuant to the Order entered this date,

IT IS ORDERED that Judgment be entered in favor of the  
defendant, Joseph Califano, Jr., Secretary of Health, Education  
and Welfare of the United States of America, and against the plaintiff,  
Carol G. Massingill.

ENTERED this 26<sup>th</sup> day of May, 1978.

*Allen E. Barrow*

CHIEF UNITED STATES DISTRICT JUDGE

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

CAROL G. MASSINGILL,  
SSA/N 441-56-3697,

Plaintiff,

vs.

JOSEPH CALIFANO, JR.,  
SECRETARY OF HEALTH,  
EDUCATION AND WELFARE  
OF THE UNITED STATES OF  
AMERICA,

Defendant.

77-C-222-B ✓  
FILED

MAY 26 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

On July 3, 1977, plaintiff instituted this action, complaining of the denial of her application for disability benefits under the provisions of Title 42 U.S.C.A. §§416(i), 423, 1381 et seq. The action was brought pursuant to the provisions of Title 42 U.S.C.A. §§405(g), 1383(c)(3) and Title 5 U.S.C.A. §706, to review a final decision relating to said disability benefits and supplemental security income benefits.

In the filed pre-trial order, it is recited that there are no issues of fact for determination in this matter and only a question of law, i.e., whether plaintiff is entitled to disability benefits and supplemental security income benefits.

The Court directed the parties to file briefs with reference to the question of law, and this matter is now in a posture for determination and decision by this Court.

The Court has carefully perused the entire file, including the transcript of proceedings submitted, and, being fully advised in the premises, finds:

On October 5, 1975, plaintiff filed an Application for Disability Benefits (TR 122-125), wherein she stated that she was disabled due to "petite mall, nerves".

Thereafter, and on November 5, 1975, plaintiff filed an Application for Supplemental Security Income (TR-126-129).

On February 5, 1976, plaintiff received a Notice of Disapproved Claim (TR 130-131).

On February 10, 1976, plaintiff filed a Request for Reconsideration (TR 132). On March 8, 1976, plaintiff was sent a Notice of Reconsideration (TR 133) wherein plaintiff was advised of the denial of her request and advised that she could request a hearing before an administrative law judge. The Notice of Reconsideration of the claim for supplemental benefits was also denied on March 8, 1976. (TR 135).

The applications for disability benefits and supplemental benefits were consolidated and a hearing was had before the Administrative Law Judge in Tulsa, Oklahoma, on July 7, 1976 (TR 7).

The decision of the Administrative Law Judge, dated September 29, 1976, appears at pages 13 and 14 of the Transcript and state:

"It is the decision of the Administrative Law Judge that based on the application filed on November 5, 1975, the claimant is not entitled to a period of disability or disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended.

"It is the further decision of the Administrative Law Judge that based on claimant's application for supplemental security income benefits filed on November 5, 1975, that she has not been disabled on or before the date of this decision and is not entitled to such benefits under Sections 1611 and 1614, respectively of the Social Security Act, as amended."

On April 6, 1977, the Appeal Council of the Department of Health Education and Welfare affirmed the decision of the Administrative Law Judge (TR 3) and thereafter plaintiff timely commenced the present litigation.

Plaintiff was born April 1, 1952 (TR 29) and has been married and divorced (TR 29). She completed her twelfth grade education at Will Rogers High School (TR 31). She was last employed by Safeway at a cashier (TR 32) for approximately one year and two months (TR 32). Plaintiff testified she terminated her employment at Safeway as follows: "\*\*\*well, fired me, I guess you could say. I sort of quit or he fired me, it was kind of a crazy situation." (TR 34). She evidently injured or strained her back while employed at the store (TR 35) and received an award in the sum of \$1,000

from the State Industrial Court (TR 36).

She testified that she had also worked at Howard's before it went out of business for about three months (TR 36).

She presently resides with her parents and her brother (TR 39) and crochets, does embroidery and reads and does some creative writing (TR 39). She also fishes (TR 39) and does some light housework (TR 40). She does has a driver's license but hasn't driven (TR 41). She testified that she does not drive because her mother does not want her to as her mother thinks she is too nervous (TR 42). The plaintiff took dancing when she was real young (TR 43).

She went to vocational rehabilitation prior to obtaining her position at Safeway (TR 44) and had started going back to them at the time of the hearing (TR 44).

The evaluation of the medical evidence concerning plaintiff's alleged impairment is more than adequately set forth in the "Evaluation of the Evidence" in the Decision of the Administrative Law Judge and will not be set forth in this order in detail. The evidence does reflect that plaintiff has maintained a consistent full-scale IQ of 85 for many years. There has been a diagnosis of petit mall seizures, for which pkaintiff has taken Dilantin. Electroencephalographic studies have been found to be normal.

The Administrative Law Judge found that "claimant is capable of engaging in a variety of light or sedentary work activities, particularly work of a repetitive nature". The Administrative Law Judge further found that "many such entry level jobs are being performed in the Tulsa area and that claimant has no physical or mental impairment which would preclude performance of such work activity."

The Court notes, hidden within the brief of plaintiff filed on April 5, 1978, a statement that two additional medical reports were discovered subsequent to the hearing decision in the case ( these two reports are attached to plafhtiff's brief). One is a report of Ralph W. Richter, M.D., dated September 10, 1976, stating a diagnosis os pyschometer epilepsy and giving the plaintiff's progn.

as guarded. The report further states that the plaintiff had had further recurrent seizure episodes. The second report is by Terrill Simmons, M.D. relating to plaintiff's back condition and reveals that it was probably rendered in October of 1976. In her brief, therefore, plaintiff maintains that this case should be remanded to the defendant for a hearing de novo to determine the effect of plaintiff's functional capacity to engage in work activity.

Although no formal written pleading has been filed by plaintiff requesting remand, the Court will consider the statements of plaintiff in the brief as a motion to remand, and finds that such Motion to Remand should be overruled.

The role of this Court in a judicial review under 42 U.S.C.A. §405(g) is limited to a determination of whether there is substantial evidence in the record to support the decision of the Secretary, who is the trier of the facts, and not to reweigh the evidence or consider the case de novo, or substitute the judgment of the Court for that of the Secretary. This is fundamental. *Mayhue v. Gardner*, 294 F.Supp. 853 (D.Kan. 1969), aff'd 416 F.2d 1257 (10th Cir. 1969)

If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389 (1971).

The burden is on the plaintiff claiming disability to prove her disability. *Valentine v. Richardson*, 468 F.2d 588 (10th Cir. 1973). To meet this burden, plaintiff must prove that she is unable to engage in any substantial gainful activity. *Timmerman v. Weinberger*, 510 F.2d 439 (8th Cir. 1975).

Additionally, plaintiff must prove that she became disabled prior to the expiration of her insured status. *Johnson v. Finch*, 437 F.2d 1321 (10th Cir. 1971). The Court finds that the record in this case supports the Secretary's decision that plaintiff has failed to discharge her burden of proving a medically determinable disability within the meaning of the Act, by December 31, 1975 when she was last insured for disability benefits.

The mere fact that plaintiff was successful in a Workman's

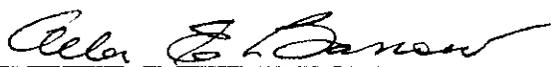
Compensation claim does not bind the Secretary. It is well settled that the Secretary is entitled to make his own independent finding as to whether or not an individual is 'disabled' within the meaning of the Social Security Act. *Skeels v. Richardson*, 453 F.2d 882 (5th Cir. 1972), cert. denied, 409 U.S. 857 (1972).

The Court finds that the decision of the Secretary is amply supported by the evidence and such decision should be affirmed and adopted by this Court.

IT IS, THEREFORE, ORDERED that plaintiff's Motion to Remand be and the same is hereby overruled (this is the statement contained in plaintiff's brief and while not in actuality a motion, will be considered by the Court as such in the interest of justice).

IT IS FURTHER ORDERED that Judgment be entered in favor of the defendant and against the plaintiff.

ENTERED this 26<sup>th</sup> day of May, 1978.



---

CHIEF UNITED STATES DISTRICT JUDGE



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

JOHN L. MOBLEY,  
Social Security No.  
442-28-3099,

Plaintiff,

vs.

THE SECRETARY OF HEALTH,  
EDUCATION, AND WELFARE OF  
THE UNITED STATES OF  
AMERICA,

Defendant.

77-C-230-B ✓

**FILED**

MAY 26 1978 J.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

MEMORANDUM OPINION AND ORDER

This is an action under §205(g) of the Social Security Act, as amended, 42 U.S.C.A. §405(g), to review a final decision of the Secretary of Health, Education and Welfare, denying the plaintiff's claim for a period of disability and for disability insurance benefits.

This action is presently before the Court for determination on an agreed pre-trial order reciting that there is no question of fact for determination, but only a question of law.

Plaintiff's first application to establish a period of disability and for entitlement to disability insurance benefits was filed on May 22, 1973. He was notified by the Bureau of Disability Insurance, Social Security Administration, that his application had been denied. He requested reconsideration of this denial and was subsequently notified by letter dated August 9, 1973, that the original denial had been affirmed. Plaintiff then filed a request for hearing on November 26, 1973. A hearing was had on January 23, 1974, and the Administrative Law Judge issued an affirmation decision on March 7, 1974. Plaintiff requested a review of the decision by the Appeals Council and was denied review on May 8, 1974. No appeal was taken from these proceedings.

Plaintiff filed his second application (the subject of this review) for disability benefits on August 28, 1975. He was notified by the Bureau of Disability Insurance that his application had been denied. Plaintiff requested reconsideration of this denial and was notified by letter dated January 16, 1976, that the original denial had been affirmed. Claimant filed a second request for hearing on January 22, 1976. A hearing was had before an Administrative Law Judge on April 7, 1976. The Administrative Law Judge rendered his decision on May 4, 1976, finding that the plaintiff was not entitled to a period of disability or to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended. (TR 21-22) The Appeals Council, on request for review, affirmed the Administrative Law Judge, on April 11, 1977. (TR 4)

The only issue before this Court in this action is whether the Secretary's final decision is supported by substantial evidence. Section 205(g) of the Act, 42 U.S.C.A. §405(g), precludes a de novo judicial proceeding and requires this Court uphold the the Secretary's decision even should the Court disagree with such decision as long as it is supported by substantial evidence. *Whiten v. Finch*, 437 F.2d 73 (4th Cir. 1971).

Ab initio, the Court does not feel that it is necessary to relate in detail the contents of the various medical reports, hospital records, opinion and the like, in the record concerning plaintiff's complaints. Reference to pertinent portions of such evidence will be made, where appropriate.

The Findings rendered by the Administrative Law Judge which were affirmed by the Secretary were:

1. The claimant stated he was born December 29, 1928, completed an eighth-grade education, and had worked for various oil well drilling contractors and other small independent oil companies as a roughneck and roustabout. He last worked as a form press operator and welder helper for five years which would be described as light work.
2. The claimant met the special earnings requirements of the Social Security Act, as amended, on November

1971, the date of alleged "disability" and continues to meet them through the date of this decision.

3. The claimant has a history of alcoholism. He also has cirrhosis and pancreatitis. The claimant also has hemorrhoids.

4. The latest medical evaluation and evidence in the record indicates the claimant should have continued physical improvement in the above areas if he refrains from alcohol and continues his diet and medication.

5. The claimant has no impairment or handicap which would prevent him from performing his work activities as a form press operator or as a general laborer in the oil or related industry. There are numerous jobs of this nature available in this region of the country.

6. The claimant was not prevented from engaging in any substantial gainful activity for any continuous period beginning on or before the date of this decision, which has lasted or could be expected to last for at least 12 months.

7. The claimant was not under a "disability" as defined in the Social Security Act, as amended, at any time on or prior to the date of this decision.

Plaintiff is presently receiving Veterans Administration benefits (or was at the time of the hearing before the Administrative Law Judge). (TR 73). The fact that a claimant is receiving VA benefits is of course a factor to be considered in a Social Security case, but it is not controlling. See *Veneri v. Swenson*, 453 F.2d 883 (5th CCA 1972) and cases cited therein.

Turning to the medical of the plaintiff, Dr. Robert G. White's report of November 19, 1975, reflects the following (TR 237-240):

"DIAGNOSIS:

1. History of Cirrhosis with GI bleeding from esophageal varices and history of recurrent pancreatitis.
2. History of alcoholism.
3. Scoliosis
4. History of ankle sprain.
4. Hemorrhoids.

The Doctor went on to say (TR-240):

"This individual gives a history of alcoholism from age 17 until age 44. Since then, his consumption of alcohol has apparently been only an occasional beer. Undoubtedly the alcoholism lead to cirrhosis of the liver and bleeding from esophageal varices one year ago. Since this episode of bleeding, apparently his liver has regressed in size, he has not been jaundiced, and he does not have any evidence of ascites. I feel that the cirrhosis is now compensated and asymptomatic. He also gives a history of epigastric pain, nausea,

vomiting, loose stools compatible with recurrent pancreatitis. Undoubtedly the recurrence of this pancreatitis is related to dietary indiscretions and possible alcoholic indiscretions. He has been free of significant pancreatic symptoms for six weeks. During the present examination, there was no evidence of active pancreatitis and physical examination of the abdomen was negative.

"I feel the combination of alcoholism, cirrhosis and pancreatitis is now compensated. If the patient will continue to refrain from drinking, stay on his diet, and medication, I feel that he will have continued improvement without recurrence of significant symptoms.

"At the time of this examination, I do not feel that he is disabled from any type of gainful employment because of these conditions.

"He also complains of recurrent low back pain treated with Tylenol with success. Physical examination reveals only mild scoliosis of the lower dorsal and lumbar areas. There is no evidence of significant osteoarthritis, ruptured disc, or sciatica. I do feel that this back condition would prevent repeated and prolonged heavy lifting but would not be restrictive in employment otherwise.

"He gives a history of recurrent pain in the right ankle following a sprain of his ankle in 1942. X-rays of this ankle are normal and physical examination of this ankle is also normal. With proper supportive laced up high top shoes, I feel that it would not hinder his employment in any way.

"Hemorrhoids are complained of and small hemorrhoids are found on physical examination but I do not feel that they are disabling in any way at this time."

The Court is limited in a judicial review under 42 U.S.C. §405(g) to a determination of whether there is substantial evidence in the record to support the fact findings or decision of the Secretary, as the trier of the facts, and not to reweigh the evidence, or try the issues de novo, or substitute the judgment of the Court for that of the Secretary. *Mayhue v. Gardner*, 294 F.Supp. 853 (D.Kan. 1969), aff'd 416 F.2d 1257 (10th Cir. 1969).

The Secretary's findings are conclusive and must be affirmed if supported by substantial evidence. *Richardson v. Perales*, 402 U.S. 389 (1971).

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. *Valentine v. Richardson*, 468 F.2d 588 (10th Cir. 1972). Plaintiff must

meet two criteria under the act:

1. That the physical impairment has lasted at least 12 months that prevents his engaging in substantial gainful activity; and

2. That he is unable to perform or engage in any substantial gainful activity.

Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert.den. 407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975).

The burden is not on the Secretary to make an initial showing on nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir., 1969).

In connection with the medical problems asserted by the plaintiff he complains of a pulmonary condition. The medical reports reveal no significant impairment in breathing capacity. Plaintiff testified he could walk 6 blocks before developing difficulty in breathing. He also testified he smokes 3 packs of cigarets a day and had cut back to two. The mere presence of a respiratory problem does not constitute disability. Furthermore, when a party fails to stop smoking, it is militation against a finding of disability where shortness of breath is alleged. Laffoon v. Califano, 558 F.2d 253 (5th Cir., 1977); Hirst v. Gardner, 365 F.2d 125 (7th Cir. 1966).

This Court is in agreement with the analysis of the alcoholic problems as delineated by the Secretary and the cases cited by the Secretary as involving alcoholic disability.

The Court finds that the decision of the Secretary is clearly supported by substantial evidence and such decision should be affirmed by this Court.

IT IS, THEREFORE, ORDERED that Judgment be entered in favor of the defendant, The Secretary of Health, Education and Welfare of the United States and against the plaintiff, John L. Mobley.

ENTERED this 26<sup>th</sup> day of May, 1978.

  
CHIEF UNITED STATES DISTRICT JUDGE







ph

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

JANETT KAY PETRIS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ERNEST L. PATTERSON, )  
 )  
 Defendant. )

No. 78-C-83-B

FILED  
MAY 23 1978 J.  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

APPLICATION FOR ORDER OF DISMISSAL

COME NOW the Plaintiff and Defendant jointly, and show to the Court that the issues in the above captioned matter have been compromised and settled; and that there is no longer any adjudicable issue between the parties existing. That these parties would jointly move this Court to enter its Order dismissing the cause with prejudice.

*[Signature]*  
ATTORNEY FOR THE PLAINTIFF

*[Signature]*  
ATTORNEY FOR THE DEFENDANT

FILED

MAY 26 1978 J.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

This matter comes on for <sup>consideration</sup> ~~hearing~~ this 26th day of May, 1978, on the joint Application of the Plaintiff and Defendant for an Order of Dismissal. The Court being fully advised finds that said matter should be dismissed with prejudice to any future action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above and foregoing <sup>cause of and complaint are</sup> ~~action/~~ dismissed with prejudice to any future action.

*[Signature]*  
JUDGE OF THE DISTRICT COURT

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

ROY REYNA, )  
 )  
 Plaintiff, )  
 )  
 vs )  
 )  
 WILLIAMS RODDA ADAMS, )  
 )  
 Defendant. )

77-C-346-C ✓

FILED

MAY 25 1978 *fun*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

The above case, having come on for disposition hearing this 25th day of May, 1978, for failure of the Plaintiff to prosecute, and the Plaintiff having been notified on May 8, 1978, of said hearing and failing to appear, and no action having been taken by the Plaintiff since August 11, 1977, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure,

IT IS ORDERED that the case and cause of action is hereby dismissed for failure to prosecute.

Dated this 25th day of May, 1978.

*W. Dale Cook*  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAY 25 1978

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

LEROY BRANTLEY, VERTIE L.  
BRANTLEY, DANIEL J.  
ALEXANDER, M.D., COUNTY  
TREASURER, Tulsa County,  
Oklahoma, and BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma,

Defendants.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

CIVIL ACTION NO. 77-C-463-B

JUDGEMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 24<sup>th</sup>  
day of May, 1978, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; and the Defendants,  
County Treasurer, Tulsa County, Oklahoma, and Board of  
County Commissioners, Tulsa County, Oklahoma, appearing by  
their attorney, Andrew B. Allen, Assistant District Attorney;  
and the Defendants, Leroy Brantley, Vertie L. Brantley and  
Daniel J. Alexander, M.D., appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Leroy Brantley and  
Vertie L. Brantley were served with Summons and Complaint, and  
Amendment to Complaint, on November 14, 1977, and December 22,  
1977, respectively, as appears from the United States Marshal's  
Service herein; that Defendant Daniel J. Alexander, M.D., was  
served by publication as shown on Proof of Publication filed  
herein; and that Defendants, County Treasurer, Tulsa County,  
Oklahoma, and Board of County Commissioners, Tulsa County,  
Oklahoma, were served with Summons, Complaint and Amendment to  
Complaint on December 21, 1977, as appears from the United  
States Marshal's Service herein.

It appearing that the Defendants, County Treasurer,  
Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa



subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Leroy Brantley and Vertie L. Brantley, in personam, for the sum of \$9,517.67, with interest thereon at the rate of 4 1/2 percent per annum from March 25, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendants, Leroy Brantley and Vertie L. Brantley, for the sum of \$ 0 as of the date of this judgment, plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendant, Daniel J. Alexander, M.D.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisal the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants, and each of

them, and all persons claiming under them since the filing of the Complaint herein, be and they are forever barred and foreclosed of any right, title, interest, or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

*St. Allen C. Barrow*  
UNITED STATES DISTRICT JUDGE

APPROVED:

*Robert P. Santee*  
ROBERT P. SANTEE  
Assistant United States Attorney

*Andrew B. Allen*  
ANDREW B. ALLEN  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

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

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

CIVIL ACTION NO. 77-C-464-B

AARON LEON BUFFORD, COUNTY )  
TREASURER, Tulsa County, )  
Oklahoma, and BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )

Defendants. )

**FILED**

MAY 25 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 24<sup>th</sup> day of May, 1978, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appearing by their attorney, Robert L. McDonald, Assistant District Attorney; and, the Defendant, Aaron Leon Bufford, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, were served with Summons, Complaint, and Amendment to Complaint on December 20, 1977, as appears on the United States Marshal's Service herein; and, that Defendant, Aaron Leon Bufford, was served by publication as shown on the Proof of Publication filed herein.

It appearing that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, have duly filed their answers herein on January 9, 1978; and, that Defendant, Aaron Leon Bufford, has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage

securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Four (4), Block Seven (7), in SHARON HEIGHTS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendant, Aaron Leon Bufford, did, on the 21st day of March, 1975, execute and deliver to the Administrator of Veterans Affairs, his mortgage and mortgage note in the sum of \$12,500.00 with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendant, Aaron Leon Bufford, made default under the terms of the aforesaid mortgage note by reason of his failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendant is now indebted to the Plaintiff in the sum of \$12,407.17 as unpaid principal with interest thereon at the rate of 9 percent per annum from June 1, 1977, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendant, Aaron Leon Bufford, the sum of \$ 50<sup>00</sup> plus interest according to law for personal property taxes for the year(s) 1976-77 and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendant, Aaron Leon Bufford, in rem, for the sum of \$12,407.17 with interest thereon at the rate of 9 percent per annum from June 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendant, Aaron Leon Bufford, for the sum of \$ 50<sup>00</sup>- as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

S/ Allen G. Barrow  
UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
ROBERT L. McDONALD  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County



Clyde Fosdyke; the Defendant, Okmulgee Plumbing Company, a Corporation, appearing by its attorney, Steven M. Harris; the Defendant, Federal National Mortgage Association, appearing by its attorney, Susan Hill Shanbaum; the Defendant, Paul Cull d/b/a Home Service Club North, appearing pro se; the Defendant, Willa Johnson a/k/a Willia Willis Johnson, if living, or if not, her unknown heirs, assigns, executors, and administrators, appearing by Jack Winn, Administrator; and, the Defendants, Larry L. Givens, Barbara Givens, Cal Johnson d/b/a Cal Johnson Real Estate Company, Oklahoma Surety Company, a Corporation, Max Kessler, Charles H. Ostrander, Wendell Sugg, Jr., Owasso Lumber Company, a Corporation, Empire Plumbing Supply Company, Inc., Children's Medical Center, a non-profit organization, Anesthesia Associates, Inc., Eagle Material Handling, Inc., Boise Cascade Corporation, Balboa Insurance Company, and First National Bank and Trust Company of Tulsa, a Corporation, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Larry L. Givens, Barbara Givens, and Balboa Insurance Company, were served by publication as shown on the Proof of Publication filed herein; that Defendants, Cal Johnson d/b/a Cal Johnson Real Estate Company, John F. Cantrell, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, were served with Summons, Complaint, and Amendment to Complaint on July 8, 1977, and October 14, 1977, respectively; that Defendants, Oklahoma Tax Commission and Oklahoma Employment Security Commission, were served with Summons, Complaint, and Amendment to Complaint on July 8, 1977, and October 18, 1977, respectively; that Defendants, Charles H. Ostrander and Wendell Sugg, Jr., were served with Summons, Complaint, and Amendment to Complaint on July 8, 1977, and October 19, 1977, respectively; that Defendant, Oklahoma Surety Company, a Corporation, was served with Summons, Complaint, and Amendment to Complaint on July 12, 1977, and October 14, 1977, respectively; that Defendant, Max Kessler, was served with Summons, Complaint, and Amendment to

Complaint on July 12, 1977, and October 19, 1977, respectively; that Defendants, American State Bank, a Corporation, and Owasso Lumber Company, a Corporation, were served with Summons, Complaint, and Amendment to Complaint on July 13, 1977, and October 14, 1977, respectively; that Defendant, Okmulgee Plumbing Company, a Corporation, was served with Summons, Complaint, and Amendment to Complaint on July 22, 1977, and October 26, 1977, respectively; that Defendants, Empire Plumbing Supply Company, Inc., Anesthesia Associates, Inc., and First National Bank and Trust Company of Tulsa, a Corporation, were served with Summons, Complaint, and Amendment to Complaint on October 14, 1977; that Defendants, Children's Medical Center, a non-profit organization, and Federal National Mortgage Association, were served with Summons, Complaint, and Amendment to Complaint on October 17, 1977; that Defendants, Eagle Material Handling, Inc. and Boise Cascade Corporation, were served with Summons, Complaint, and Amendment to Complaint on October 19, 1977; that Defendant, Paul Cull d/b/a Home Service Club North, was served with Summons, Complaint, and Amendment to Complaint on November 4, 1977; and, that Defendant, Willa Johnson a/k/a Willia Willis Johnson, if living, or if not, her unknown heirs, assigns, executors, and administrators, was served with Summons, Complaint, and Amendment to Complaint on March 9, 1978; all as appears on the United States Marshal's Services herein.

It appearing that the Defendant, American State Bank, a Corporation, has duly filed its Disclaimer herein on July 20, 1977; that Defendant, Oklahoma Employment Security Commission, has duly filed its Answer and Cross-Petition herein on July 22, 1977; that Defendants, Board of County Commissioners, Tulsa County, and John F. Cantrell, County Treasurer, Tulsa County, have duly filed their Answers herein on August 1, 1977; that Defendant, Oklahoma Tax Commission, has duly filed its Answer and Cross-Petition herein on August 1, 1977; that Defendant, Okmulgee Plumbing Company, a Corporation, has duly filed its Answer herein on August 11, 1977; that Defendant, Federal National Mortgage

Association, has duly filed its Disclaimer herein on October 21, 1977; that Defendant, Paul Cull d/b/a Home Service Club North, has duly filed his Answer and Disclaimer herein on November 22, 1977; that Defendant, Willa Johnson a/k/a Willia Willis Johnson, if living, or if not, her unknown heirs, assigns, executors, and administrators, has duly filed her Disclaimer herein on March 13, 1978; and, that Defendants, Larry L. Givens, Barbara Givens, Cal Johnson d/b/a Cal Johnson Real Estate Company, Oklahoma Surety Company, a Corporation, Max Kessler, Charles H. Ostrander, Wendell Sugg, Jr., Owasso Lumber Company, a Corporation, Empire Plumbing Supply Company, Inc., Children's Medical Center, a non-profit organization, Anesthesia Associates, Inc., Eagle Material Handling, Inc., Boise Cascade Corporation, Balboa Insurance Company, and First National Bank and Trust Company of Tulsa, a Corporation, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Thirteen (13), Block Forty-Seven (47), VALLEY VIEW ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Larry L. Givens and Barbara Givens, did, on the 15th day of April, 1966, execute and deliver to the Administrator of Veterans Affairs, his successors in such office, their mortgage and mortgage note in the sum of \$10,650.00 with 5 3/4 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Larry L. Givens and Barbara Givens, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason

thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$8,787.70 as unpaid principal with interest thereon at the rate of 5 3/4 percent per annum from September 1, 1976, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Cal Johnson and Willa Johnson the sum of \$ 230<sup>00</sup> plus interest according to law for personal property taxes for the year(s) 1974-75 and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Oklahoma Employment Security Commission is entitled to judgment against Cal Johnson d/b/a Cal Johnson Real Estate Company in the amount set out in its Answer and Cross-Petition, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Oklahoma Tax Commission is entitled to judgment against Cal Johnson in the amount set out in its Answer and Cross-Petition, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Defendant, Okmulgee Plumbing Company, a Corporation, is entitled to judgment against Cal Johnson in the amount of \$5,644.01 with interest of 10 percent per annum from date of judgment, plus \$1,800.00 attorney fees, and costs, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Larry L. Givens and Barbara Givens, in rem, for the sum of \$8,787.70 with interest thereon at the rate of 5 3/4 percent per annum from September 1, 1976, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff

for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Cal Johnson and Willa Johnson for the sum of \$                      as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Oklahoma Employment Security Commission have and recover judgment, in rem, against the Defendant, Cal Johnson d/b/a Cal Johnson Real Estate Company, in the amount set out in its Answer and Cross-Petition, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Oklahoma Tax Commission have and recover judgment, in rem, against the Defendant, Cal Johnson, in the amount set out in its Answer and Cross-Petition, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Okmulgee Plumbing Company, a Corporation, have and recover judgment, in rem, against the Defendant, Cal Johnson, in the amount of \$5,644.01 with interest of 10 percent per annum from date of judgment, plus \$1,800.00 attorney fees, and costs, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Oklahoma Surety Company, a Corporation, Max Kessler, Charles H. Ostrander, Wendell Sugg, Jr., Owasso Lumber Company, a Corporation, Empire Plumbing Supply Company, Inc., Children's Medical Center, a non-profit organization, Anesthesia Associates, Inc., Eagle Material Handling, Inc., Boise Cascade Corporation, Balboa

Insurance Company, and First National Bank and Trust Company of Tulsa, a Corporation, and Cal Johnson.

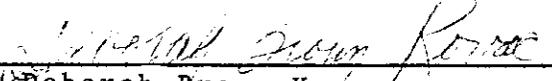
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them, and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

S/Allen L. Barrow  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
ROBERT P. SANTEE  
Assistant United States Attorney

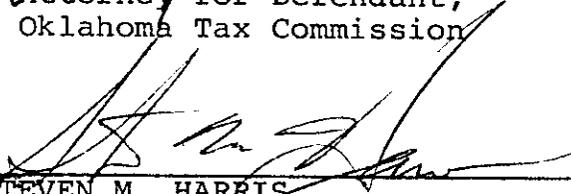
  
Deborah Brown Kovac  
Attorney for Defendant,  
Oklahoma Employment Security  
Commission

  
ANDREW B. ALLEN  
Assistant District Attorney  
Attorney for Defendants,  
John F. Cantrell, County Treasurer  
Board of County Commissioners  
Tulsa County, Oklahoma



CLYDE FOSDYKE

Attorney for Defendant,  
Oklahoma Tax Commission



STEVEN M. HARRIS

Attorney for Defendant,  
Okmulgee Plumbing Company  
a Corporation

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

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

TIM L. REEL and MAXINE REEL,  
husband and wife; JOHN F.  
CANTRELL, County Treasurer of  
Tulsa County; BOARD OF COUNTY  
COMMISSIONERS OF TULSA COUNTY;  
and GERI E. DAVIDSON and JUDY  
KAY DAVIDSON,

Defendants.

CIVIL ACTION NO. 78-C-12-B

FILED

MAY 25 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 24<sup>th</sup>  
day of May, 1978, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney; and the Defendants, John F.  
Cantrell, County Treasurer, Tulsa County, and Board of County  
Commissioners of Tulsa County, appearing by their attorney,  
Andrew B. Allen, Assistant District Attorney; the Defendants,  
Geri E. Davidson and Judy Kay Davidson a/k/a Judy K. DeMott,  
appearing by their attorney, William C. Anderson; and, the  
Defendants, Tim L. Reel and Maxine Reel, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Tim L. Reel and Maxine  
Reel, were served by publication as shown on the Proof of Publication  
filed herein; that Defendants, John F. Cantrell, County Treasurer  
of Tulsa County, and Board of County Commissioners of Tulsa County,  
were served with Summons and Complaint on January 12, 1978; that  
Defendants, Geri E. Davidson and Judy Kay Davidson a/k/a Judy K.  
DeMott, were served with Summons and Complaint on January 20,  
1978, all as appears on the United States Marshal's Service herein.

It appearing that the Defendants, John F. Cantrell,  
County Treasurer of Tulsa County and Board of County Commissioners  
of Tulsa County, have duly filed their answers herein on February 1,  
1978; that Defendants, Geri E. Davidson and Judy Kay Davidson a/k/a

Judy K. DeMott, have duly filed their Disclaimer herein on February 16, 1978; and, that Defendants, Tim L. Reel and Maxine Reel, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Surface only to the East 440 feet to Tract 8 and the East 440 feet to Tract 9 all in THOMAS PLAT, an Addition in Tulsa County, Oklahoma, according to the recorded plat thereof except North 25 feet of the West 483 feet of Tract 9 reserved for a roadway and utility easement.

THAT the Defendants, Tim L. Reel and Maxine Reel, did, on the 18th day of July, 1975, execute and deliver to First Bank and Trust Company of Sand Springs, Oklahoma, their mortgage and mortgage note in the sum of \$18,300.00 with 10 1/4 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

THAT by Assignment of Mortgage of Real Estate dated September 21, 1976, First Bank and Trust Company of Sand Springs, Oklahoma, assigned said note and mortgage to Small Business Administration.

The Court further finds that Defendants, Tim L. Reel and Maxine Reel, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$16,716.96 as unpaid principal with interest accrued thereon in the amount of \$1,547.59 through August 25, 1977, and interest accruing thereafter at the rate of \$4.76 per day.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendants, Tim L. Reel and Maxine Reel, the sum of \$ 62<sup>00</sup> plus interest

according to law for real estate taxes for the year(s) 1976-77  
and that Tulsa County should have judgment, in rem, for said  
amount, and that such judgment is superior to the first mortgage  
lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that  
the Plaintiff have and recover judgment against Defendants, Tim L.  
Reel and Maxine Reel, in rem for the sum of \$16,716.96 together with  
interest accrued thereon in the amount of \$1,547.59 through  
August 25, 1977, and interest accruing thereafter at the rate  
of \$4.76 per day plus the cost of this action accrued and accruing,  
plus any additional sums advanced or to be advanced or expended  
during this foreclosure action by Plaintiff for taxes, insurance,  
abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the  
County of Tulsa have and recover judgment, in rem, against Defendants,  
Tim L. Reel and Maxine Reel, for the sum of \$ 62<sup>00</sup> as  
of the date of this judgment plus interest thereafter according  
to law for real estate taxes, and that such judgment is superior  
to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that  
upon the failure of said Defendants to satisfy Plaintiff's money  
judgment herein, an Order of Sale shall be issued to the United  
States Marshal for the Northern District of Oklahoma, commanding  
him to advertise and sell with appraisalment the real property  
and apply the proceeds thereof in satisfaction of Plaintiff's  
judgment, which sale shall be subject to the tax judgment of  
Tulsa County, supra. The residue, if any, shall be deposited  
with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from  
and after the sale of said property, under and by virtue of  
this judgment and decree, all of the Defendants and each of  
them and all persons claiming under them since the filing of  
the complaint herein be and they are forever barred and foreclosed  
of any right, title, interest or claim in or to the real property

or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

*s/Allen L. Barrow*  
UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
ANDREW B. ALLEN  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer, Tulsa County  
Board of County Commissioners,  
Tulsa County

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

~~FILED~~

MAY 24 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

CROWN FINANCE CORPORATION, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JAMES D. SMITH and CHERIE )  
SMITH, )  
 )  
Defendants, )  
 )  
and )  
 )  
UNITED STATES POSTAL SERVICE, )  
 )  
Garnishee. )

No. 77-C-394-C

FILED

MAY 25 1978 *ph*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

Now on this 25<sup>th</sup> day of May, 1978, the above styled matter came on for a hearing pursuant to the Motion of Plaintiff for Dismissal of the above entitled action with prejudice.

It appears that garnishee in its answer makes no counterclaim against the plaintiff and will not be substantially prejudiced by a dismissal; the court therefore orders that the above entitled action be dismissed with prejudice.

The Court further finds that the plaintiff has fully recovered its costs in this action from the defendants, James D. Smith and Cherie Smith.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled action be, and it is hereby dismissed with prejudice; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that there be no award of costs in that the plaintiff has fully recovered its costs from the defendants, James D. Smith and Cherie Smith.

Dated this 25<sup>th</sup> day of May, 1978.

*W. Dalebrook*  
\_\_\_\_\_  
JUDGE

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

BANK OF OKLAHOMA, N.A., a )  
National Banking Association, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
KINCAID INDUSTRIES, INC., )  
 )  
Defendant. )

No. 77-C-347-C

**FILED**

**MAY 25 1978**

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT

The Defendant, Kincaid Industries, Inc., failed to plead or otherwise defend in this action and its default having been entered,

Now, upon application of the Plaintiff and upon affidavit that Defendant is indebted to Plaintiff in the sum of \$513,549.22, that Defendant has been defaulted for failure to appear and that Defendant is not an infant or incompetent person, and is not in the military service of the United States, it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff recover of Defendant the sum of \$513,549.22, together with interest thereon at the rate of 10% per annum from January 4, 1974, until paid, an attorney's fee of \$50,000.00, and all costs of the action, accrued and accruing, less a credit against accrued interest in the amount of \$30,000.00, for all of which let execution issue.

18/W Dale Cook  
United States District Judge

Dated ~~April~~ <sup>May</sup> 25, 1978.

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

**FILED**

MAY 25 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

PCS-1976, LIMITED,  
Plaintiff,  
vs.  
SHELL CANADA LIMITED,  
Defendant.

No. 78-C-164-C

*Notice of* DISMISSAL WITHOUT PREJUDICE

The plaintiff hereby dismisses the above cause  
without prejudice.

Dated this 24<sup>th</sup> day of May A.D. 1978

SONBERG AND WADDEL, INC.

By Gene C. Buzzard  
Gene C. Buzzard

ATTORNEYS FOR PLAINTIFF  
907 Philtower Building  
Tulsa, Oklahoma 74103

*Defendant has no  
objection to dismissal*

CERTIFICATE OF MAILING

This certifies that a true and correct copy of the  
above Dismissal Without Prejudice was mailed, postage prepaid  
on the 25 day of May, 1978 to John E. Barry, 2400 First  
National Tower, Tulsa, Oklahoma 74103, Attorney for the Defend-  
ant.

Gene C. Buzzard  
Gene C. Buzzard

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

FILED

EDWARD A. ROLLINS, et al, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PACER OIL COMPANY, )  
 )  
Defendant. )

MAY 24 1978

Jack D. Silver, Clerk  
U. S. DISTRICT COURT

NO. 77-C-56-B ✓

NOTICE OF  
DISMISSAL WITH PREJUDICE

Comes now the plaintiff Edward A. Rollins and dis-  
misses the above entitled cause with prejudice to his right of  
filing any further action, all issues of law and fact having  
been fully compromised and settled. Further, that the parties  
hereto stipulate to the contents of this instrument.

Edward A. Rollins  
EDWARD A. ROLLINS, Plaintiff

[Signature]  
JAMES O. GOODWIN, Attorney for Plain-  
tiff

[Signature]  
ROGERS, ROGERS & JONES, Attorneys  
for Defendant



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

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

LAROYE C. HUNTER, SHERRON Y.  
HUNTER, POSTAL FINANCE COMPANY,  
INC., COUNTY TREASURER, Tulsa  
County, and BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,

Defendants.

CIVIL ACTION NO. 78-C-15-C

**FILED**

MAY 24 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 24<sup>th</sup>  
day of May, 1978, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney; the Defendants, County Treasurer,  
Tulsa County, and Board of County Commissioners, Tulsa County,  
appearing by their attorney, Robert L. McDonald, Assistant District  
Attorney; the Defendant, Postal Finance Company, Inc., appearing  
by its attorney, Bryce A. Baggett; and the Defendants, Laroye C.  
Hunter and Sherron Y. Hunter, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Laroye C. Hunter and  
Sherron Y. Hunter, were served with Summons, Complaint, and  
Amendment to Complaint on January 19, 1978, and March 16, 1978,  
respectively; that Defendants, County Treasurer, Tulsa County,  
and Board of County Commissioners, Tulsa County, were served with  
Summons, Complaint, and Amendment to Complaint on March 7, 1978;  
and, that Defendant, Postal Finance Company, Inc., was served with  
Summons, Complaint, and Amendment to Complaint on March 8, 1978;  
all as appears on the United States Marshal's Service herein.

It appearing that the Defendants, County Treasurer,  
Tulsa County, and Board of County Commissioners, Tulsa County,  
have duly filed their Answers herein on March 28, 1978; that  
Defendant, Postal Finance Company, Inc., has duly filed its Answer  
and Disclaimer herein on April 5, 1978; and, the Defendants,

Laroye C. Hunter and Sherron Y. Hunter, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-One (21), Block Fifty-Seven (57),  
VALLEY VIEW ACRES THIRD ADDITION to the City  
of Tulsa, Tulsa County, Oklahoma, according  
to the recorded plat thereof.

THAT the Defendants, Laroye C. Hunter and Sherron Y. Hunter, did, on the 8th day of February, 1975, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$10,300.00 with 9 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Laroye C. Hunter, and Sherron Y. Hunter, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$10,184.81 as unpaid principal with interest thereon at the rate of 9 1/2 percent per annum from June 1, 1977, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendants, Laroye C. Hunter and Sherron Y. Hunter, the sum of \$ 0 plus interest according to law for personal property taxes for the year(s) 1977 and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Laroye C. Hunter and Sherron Y. Hunter, in personam, for the sum of \$10,184.81 with interest thereon at the rate of 9 1/2 percent per annum from June 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendants, Laroye C. Hunter and Sherron Y. Hunter, for the sum of \$ 0 as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

J. H. Dale Cook  
UNITED STATES DISTRICT JUDGE

APPROVED



ROBERT P. SANTEE  
Assistant United States Attorney



ROBERT L. McDONALD  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer, Tulsa County  
Board of County Commissioners,  
Tulsa County



FILED

MAY 24 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

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

LARRY D. COLBERT,  
Plaintiff,

vs.

FORD MOTOR CREDIT COMPANY,  
Defendant.

)  
)  
) 77-C-521-B  
)  
)  
)  
)  
)

ORDER, FINDINGS OF FACT AND CONCLUSIONS OF  
LAW

On May 4, 1978, the Court considered the following Motions:

1. Motion to Dismiss Without Prejudice filed by the Plaintiff;
2. The defendant's Response to the Motion to Dismiss;
3. The Application of plaintiff for Allowance of Attorney fees.

In this connection it is noted that on March 14, 1978, the defendant filed a Motion for Summary Judgment, with affidavits and exhibits attached thereto. On the same date, a Minute Order was entered directing plaintiff to file a response to the Motion for Summary Judgment within 10 days. The file reflects that the plaintiff did not comply with said order; that no response has been filed; and that no extension was granted or requested to do so.

In the Order of March 14, 1978, the Court ordered the following:

"IT IS, THEREFORE, ORDERED that the plaintiff's Motion to Dismiss be and the same is hereby granted, conditioned upon the payment by the plaintiff to the defendant, with proper notice of such payment to the Court, of an attorney fee in the sum of \$1,500.00, within ten days, failing which the motion to dismiss will be overruled.

"IT IS FURTHER ORDERED that if plaintiff does not comply with the conditions imposed by the Court for dismissal without prejudice, the Court will, 5 days after the expiration of said 10 day period, consider and determine the defendant's Motion for Summary Judgment."

The file reflects that plaintiff has not complied with the May 4, 1978, Order, and, therefore,

IT IS ORDERED that the plaintiff's Motion to Dismiss be and the same is hereby overruled.

The Court has considered the entire file, in connection with the Motion for Summary Judgment filed by the defendant, including affidavits, exhibits and depositions, and, being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

1. On June 13, 1977, plaintiff purchased a 1977 Ford Thunderbird from Lief Johnson Ford in Austin, Texas, for a purchase price of \$8,167.95. (Def. Ex. #1 to deposition of Larry D. Colbert) The Retail Instalment Contract signed by the plaintiff on said date reflects a balance due of \$8,915.76 (including the finance charge) payable in 42 monthly installment of \$212.28, commencing on July 25, 1977. (Def. Ex. #1 to deposition of Larry D. Colbert).

2. A Texas Certificate of Title issued on 7/22/77, reflects the lien holder (who was mailed the original title) to be Ford Motor Credit Company in Austin, Texas, with the date of the lien being 6/15/77. (Def. Ex. #2 to deposition of Larry D. Colbert).

3. On November 17, 1977, plaintiff instituted this action in the District Court of Tulsa County, Oklahoma, seeking actual damages in the sum of \$4,029.92 and punitive damages in the sum of \$100,000.00. Plaintiff's complaint is premises on the alleged wrongful repossession of said 1977 Ford Thunderbird by the Ford Motor Credit Company, defendant, herein.

4. The case was properly removed to this Court by the defendant on March 14, 1978.

5. The Installment Contract between plaintiff and Leif Johnson Ford, Inc. of Austin, Texas, was subsequently assigned to the defendant.

6. By virtue of the assignment, the defendant herein was obligated and entitled to enforce all of the provisions of the retail instalment contract, including the right of repossession

upon default by the plaintiff in the payment of the instalments called for under the contract, or for the breach of any other conditions as contained in paragraph 19 of the Automobile Retail Instalment Contract.

7. The payments were received by defendant from the plaintiff on said instalment contract as follows (Affidavit of Terry Carey attached to defendant's Motion for Summary Judgment):

(a) On August 4, 1977, a late charge of \$5.00 was assessed on the July 25, 1977 payment;

(b) On August 18, 1977, a partial payment of \$207.00 was received for the July 25 payment;

(c) On September 6, 1977, a late charge of \$5.00 was assessed for the August 25 payment;

(d) On September 9, 1977, a payment of \$212.28 was received for the August 25 payment;

(e) On October 5, 1977, a late charge of \$5.00 was assessed for the September 25 payment;

(f) On October 26, 1977, a partial payment of \$200.00 was received for the September 25 payment;

(g) On November 9, 1977, the account was past due for the September payment and past due \$212.28 for the October payment.

8. The automobile in possession was repossessed by the defendant on November 9, 1977. (See exhibit attached to affidavit of Terry Carey).

9. That the plaintiff purchased two money orders on November 9, 1977, (See affidavit of R. L. Goodwin, Division Controller, Safeway Stores, attached to Motion for Summary Judgment), for the sum of \$1.00 each, paying a fee of 30 cents for each money order, and not for \$144.00 and \$100.00 respectively nor dated November 7, 1977, as claimed by the plaintiff. It is interesting to note that the stubs on the two money orders (i.e. the dates and amounts) were filled in by the plaintiff and not by the issuing party of the money order.

10. That Richard Campbell, Customer Account Representative, employed by Ford Motor Credit Company in Austin, Texas, telephoned plaintiff in Tulsa, Oklahoma, and was advised that the payments were in default and inquired concerning the location of the subject vehicle. This call was made on November 8, 1977. (Affidavit of Richard Campbell attached to Motion for Summary Judgment).

11. That the alleged payment by plaintiff to the defendant of the two money orders did not occur.

12. That the telephone call advising plaintiff of the amount of his delinquency was made on November 8, 1977, one day prior to the actual purchase of the two money orders (money orders purchased November 9, 1977, the date the vehicle was repossessed). The Court further finds that the said money orders were not purchased on November 7, 1977, as alleged by the plaintiff, but on November 9.

13. That the payments on said vehicle were in default in the amount of \$244.00 when said vehicle was repossessed and that the payments called for in said contract were never made in accordance with said contract from the time of the inception of said contract.

14. That by virtue of said contract and the law, the defendant had the right to repossess said vehicle, and such repossession was accomplished in a peaceful manner, and without breach of the peace.

#### CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

1. This Court has jurisdiction of the parties and the subject matter of this litigation.

2. Title 12A O.S.A. §9-503 provides:

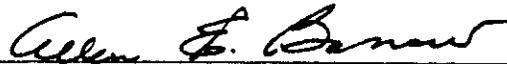
"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of peace or may proceed by action. If the security agreement  
\*\*\*."

3. Paragraph 19 of the Retail Sale Instalment Contract provides, in pertinent part:

"Default. Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or Seller in good faith believes that the prospect of payment or performance hereunder is impaired, Seller shall have the right to declare all amounts due or to become due hereunder immediately due and payable and Seller shall have the right to repossess the Property wherever the same may be found with free right of entry, and to recondition and sell same at public or private sale. \*\*\*."

4. Under Title 12A O.S.A. §9-503 and paragraph 19 of the Retail Instalment Contract, defendant had the right to repossess said vehicle. Helfinstine v. Martin (Okla. 1977) 561 P.2d 951.

5. That the defendant is entitled to have judgment rendered in its favor and against the plaintiff. IT IS ORDERED that defendant's Motion for Summary Judgment be and the same is hereby sustained. ENTERED this 24<sup>th</sup> day of May, 1978.



CHIEF UNITED STATES DISTRICT JUDGE

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

FILED

MAY 24 1978

COMMERCE BANK OF KANSAS CITY, N.A., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FIRST BANK AND TRUST COMPANY, )  
 )  
 Defendant. )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Case No. 76-C-606-B

ORDER OF DISMISSAL WITH PREJUDICE

It having come before the Court upon stipulation of the parties,

IT IS HEREBY ORDERED that this <sup>cause of + complaint are</sup> ~~action~~ dismissed with prejudice. Costs to be borne by plaintiff.

*Allen E. Barnaw*

United States District Judge

Date: May 24, 1978

MAY 23 1978

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

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

FREDDIE D. SMITH, )  
 )  
v. Movant, )  
 )  
UNITED STATES OF AMERICA, )  
 )  
 Respondent. )

NOS. 78-C-116-B  
74-CR-86

O R D E R

The Court has a second motion pursuant to 28 U.S.C. § 2255 filed pro se, in forma pauperis, by Freddie D. Smith. The cause has been assigned civil Case No. 78-C-116-B and docketed in his criminal Case No. 74-CR-86.

Movant is a prisoner in the Federal Correctional Institution, Seagoville, Texas, pursuant to conviction on his plea of guilty to an indictment charging him in Count One with a Hobbs Act violation of 18 U.S.C. § 1952, and in Count Two with willfully and knowingly using a firearm in the commission of a felony prosecutable in a United States Court in violation of 18 U.S.C. § 924(c). Final sentence, after modification, was to twenty years imprisonment on Count One and five years imprisonment on Count Two, the sentence in Count Two to run consecutively to the sentence in Count One, and the Defendant (Movant herein) was made eligible for parole in the discretion of the Parole Board (now Parole Commission) pursuant to 18 U.S.C. § 4208(a)(2) as to each Counts One and Two.

Petitioner filed a prior § 2255 motion based upon his claim of an unfulfilled plea bargain. That motion was denied by Order of this Court dated January 7, 1977, and on appeal, the Tenth Circuit Court of Appeals affirmed by mandate filed August 17, 1977, Freddie D. Smith v. United States, No. 77-1113 unreported. This prior § 2255 is now pending on Petition for Writ of Certiorari before the Supreme Court of the United States.

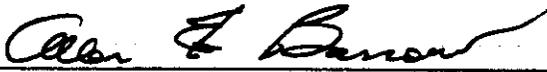
In the present second and successive motion, Movant claims that he has been denied due process of law in that no factual basis for the acceptance of a guilty plea was ever established for Count Two. He also asserts that there was no firearm involved in his offense, rather it was a plastic, toy pistol capable only of expelling, by means of a spring, rubber-suction-cup-tipped darts. Movant further contends that this Court

"did in fact agree" referring to Volume III, "Reporters Transcript of Proceedings" of June 26, 1974, Page 14 Line 1, Page 19 Line 4, and Page 22 Line 1. Said transcript is before the United States Supreme Court, nevertheless, the Court being fully advised in the premises finds that the present motion is without merit and should be denied, and that a response and evidentiary hearing are not required.

Movant's plea of guilty has been previously found by this Court and the Appellate Court to have been knowing, voluntary, and free of threat, coercion, or defect, and the validity of the plea will not be again considered. A valid plea of guilty to the indictment admitted all material facts well pleaded therein and constituted an admission of guilt. Thereafter, the Judgment is not open to attack by § 2255 motion upon a factual matter of defense ground as to whether Movant committed or was guilty of the crime charged in Count Two of the indictment. See, Hoover v. United States, 268 F.2d 787 (10th Cir. 1959); Williams v. United States, 283 F.2d 59 (10th Cir. 1960); Rogers v. United States, 350 F.2d 297 (10th Cir. 1965); Crow v. United States, 397 F.2d 284 (10th Cir. 1968); Davis v. United States, 392 F.2d 291 (10th Cir. 1968) cert. denied 393 U. S. 986 (1968); Payton v. United States, 436 F.2d 575 (10th Cir. 1970). A valid plea of guilty waives all nonjurisdictional defects. Runge v. United States, 427 F.2d 122 (10th Cir. 1970).

IT IS, THEREFORE, ORDERED that this second and successive motion pursuant to 28 U.S.C. § 2255 of Freddie D. Smith be and it is hereby overruled, denied and dismissed.

Dated this 23<sup>rd</sup> day of May, 1978, at Tulsa, Oklahoma.

  
\_\_\_\_\_  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

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

WILLIAM G. LACKEY, III, )  
 )  
 Plaintiff, )  
 )  
 -vs- )  
 )  
 COLLEX, INC., a Pennsylvania )  
 corporation, COLLEX LEASING, )  
 INC., a Pennsylvania )  
 corporation, and COLLEX )  
 FRANCHISING OF AMERICA, INC., )  
 a Pennsylvania corporation, )  
 )  
 Defendants. )

No. 76-C-105-B

**FILED**

MAY 23 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

CONSENT JUDGMENT

THIS CAUSE came on to be considered on the 22nd day of May, 1978, pursuant to the stipulation and consent of all parties. The Plaintiff, William G. Lackey, III, appeared by his counsel of record, Richard B. Noulles, and the Defendants, Collex, Inc., a Pennsylvania corporation, Collex Leasing, Inc., a Pennsylvania corporation, and Collex Franchising of America, Inc., a Pennsylvania corporation, each appeared by their attorney of record, Jack I. Gaither. Thereupon, the Court heard and received the following stipulation on behalf of the parties, to-wit:

It is stipulated and agreed by and between the parties that (i) the Court may enter the Judgment hereinafter set forth without the necessity of receiving evidence, provided, however, that this stipulation and consent on behalf of the parties shall neither constitute an admission nor denial of the allegations contained in Plaintiff's complaint; (ii) said stipulation and consent are being entered into solely for the purpose of settling and disposing of the captioned litigation; and (iii) the Defendants have specifically waived the entry of Findings of Fact or Conclusions of Law and trial by jury.

Thereupon and in conformity with the foregoing stipulations, IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiff shall have judgment against the Defendants, and each of them, jointly and severally, for Twenty

Thousand Dollars (\$20,000.00); however, each party shall bear its own costs and attorneys' fees as may have been incurred herein;

2. Defendants shall pay the aforesaid judgment by making the following payments to Plaintiff: \$5,000.00 by no later than May 23, 1978; \$5,000.00 by no later than July 8, 1978; \$5,000.00 by no later than September 8, 1978; and \$5,000.00 by no later than November 8, 1978. Plaintiff shall not seek to enforce the judgment against Defendants as long as the foregoing payments are timely made; PROVIDED, should Defendants fail to make any payment on or before the date designated herein, Plaintiff shall then be free to enforce his judgment against the Defendants for the full amount remaining owed thereon, plus interest from the date on which such payment was due, by such means as the law provides;

3. Plaintiff shall retain all equipment, inventory and other assets purchased from the Defendants or otherwise acquired from third parties;

4. Defendants are entitled to retain the Collex sign;

5. Defendants will dismiss with prejudice their action against the Plaintiff now pending in the United States District Court for the Eastern District of Pennsylvania, case No. CA 76-1853, styled Collex Franchising of America, Inc. and Collex Leasing, Inc. vs. William G. Lackey, III;

6. Judgment is hereby granted in favor of the Plaintiff and against these Defendants as to Defendants' counterclaim asserted herein and each and every claim and cause of action asserted therein;

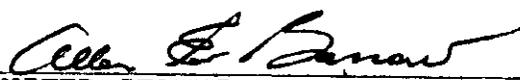
7. All parties hereto will execute mutual releases, subject to the limitations as provided in this Consent Judgment; and, upon Defendants' payment to the Plaintiff of the sums adjudged against them herein, Plaintiff shall file a Release and Satisfaction of Judgment;

8. The franchise agreement and lease agreement are hereby rescinded and declared null and void; and

9. Plaintiff is released from any obligation on the \$5,000.00 note which he executed in favor of Defendants, and said note is hereby declared cancelled.

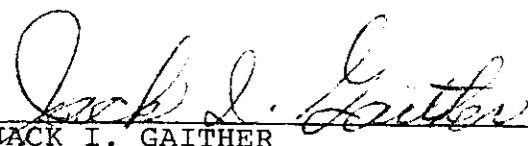
IT IS FURTHER ORDERED, ADJUDGED AND DECREED jurisdiction of this cause is retained by this Court for the purpose of enforcement of compliance herewith and for further Orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment.

ENTERED at Tulsa, Oklahoma, on this 22nd day of May, 1978.

  
UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM, CONTENT  
AND FOR ENTRY; DOCKET FEES  
AND APPEAL WAIVED:

  
RICHARD B. NOULLES of  
GABLE, GOTWALS, RUBIN, FOX,  
JOHNSON & BAKER  
Attorneys for Plaintiff

  
JACK I. GAITHER  
Attorney for Defendants

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

CONNECTICUT GENERAL LIFE )  
INSURANCE COMPANY, )  
 )  
Plaintiff, )  
 )  
vs )  
 )  
THERESA FINE and DORENE J. )  
FINE, )  
 )  
Defendants. )

NO. 77-C-231-B

FILED

MAY 23 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE  
AND DISBURSEMENT OF FUNDS

This matter comes on for hearing on this ~~22nd~~ day of May, 1978, upon the joint application of the defendants, Theresa Fine and Dorene J. Fine, and the Court after having an opportunity to examine the file and being fully advised herein finds that this is an action in interpleader wherein the plaintiff paid into this Court the sum of \$24,000.00, being the proceeds of the insurance policy issued to Dale V. Fine, and the defendants herein being named at one time or another beneficiaries thereunder.

The Court further finds that an order was heretofore entered on the 19th day of April, 1978, discharging the plaintiff from further action and awarding to it reasonable attorney fees in the sum of \$1,000.00, and the plaintiff having waived any further right to any costs expended herein, and that the defendants have settled the dispute between them concerning the balance of the proceeds and request that the Court enter an order of dismissal with prejudice.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court the cause should be and the same is hereby dismissed with prejudice and that the matter fully, finally and completely disposed of hereby.

BE IT FURTHER ORDERED, ADJUDGED AND DECREED by the

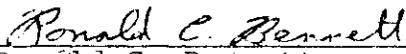
*In re E. Fine -  
7/1 Silver*

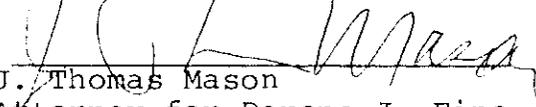
Court that the Court Clerk is hereby ordered and directed to pay Theresa Fine and her attorney, Ronald C. Bennett, the sum of \$9,200.00, and to the defendant, Dorene J. Fine and her attorney, J. Thomas Mason, the sum of \$13,800.00.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

  
Casey Cooper  
Attorney for Plaintiff

  
Ronald C. Bennett  
Attorney for Theresa Fine

  
J. Thomas Mason  
Attorney for Dorene J. Fine



The instrument before the Court is not a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 as the relief sought is not for release from custody in violation of the Constitution of the United States. Rather, Petitioner seeks a transcript for proposed or prospective litigation. Petitioner is not entitled to a transcript so that he may comb the record in preparation for proposed or prospective litigation. Sides v. Tinsley, 333 F.2d 1002 (10th Cir. 1964); Wade v. Wilson, 396 U. S. 282 (1970); Hines v. Baker, 422 F.2d 1002, 1006 (10th Cir. 1970).

By Petitioner's own admission on the face of his petition, the District Court of Tulsa County and the Oklahoma Court of Criminal Appeals have informed him of the procedures open to him in the State of Oklahoma and that he has failed to follow them. His adequate and available State remedies are not exhausted.

IT IS, THEREFORE, ORDERED that the petition of Brazzyer Padillo seeking the transcript of his preliminary hearing be and it is hereby denied and the case is dismissed, without prejudice to a later § 2254 petition, if necessary, after adequate and available State remedies are properly exhausted.

Dated this 22<sup>nd</sup> day of May, 1978, at Tulsa, Oklahoma.

  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

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

FILED

PATTY COCHRAN, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 78-C-31-C  
 )  
 NEWSPAPER PRINTING CORPORATION, )  
 an Oklahoma corporation, )  
 )  
 Defendant. )

MAY 22 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

*Dismissed with prejudice*  
DISMISSAL WITH PREJUDICE

Comes now Patty J. Cochran, by and through her attorney of record, Joe Moss, and dismisses the above entitled action with prejudice to a future cause of action.

*Joe Moss*  
\_\_\_\_\_  
JOE MOSS  
P. O. Box 1297  
Grove, Oklahoma 74344

Attorney for Patty Cochran, Plaintiff

*Patty Cochran*  
\_\_\_\_\_  
PATTY COCHRAN, Plaintiff

*James R. Jessup*

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

ROBERT HASSELL, Adminis- )  
trator of the Estate of )  
JUDY ANN HASSELL, Deceased, )  
v. ) No. 77-C-475-B  
JACK D. VANAUKER, BRAD E. )  
BUSHYHEAD and LINDA EVINGER, )  
Defendants. )

FILED

MAY 22 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

This Court has for consideration the Motion to Dismiss of each defendant herein and has carefully reviewed the entire file, the briefs, the cited authorities, and all of the recommendations concerning said Motions, and being fully advised in the premises, finds:

That the Motion to Dismiss by each defendant herein should be sustained for the reasons stated herein.

This is a diversity action brought pursuant to Title 28, USC § 1332, by plaintiff and against each of the three (3) defendants. The requisite amount in controversy is present. However, in plaintiff's Complaint it is alleged that plaintiff is a resident of the State of Oklahoma, the defendant Vanauker is a resident of the State of Kansas, and the defendants Busyhead and Evinger are residents of the State of Oklahoma.

The proposition is well settled that for Federal diversity jurisdiction to be invoked, diversity must exist between all plaintiffs and all defendants. In other words, no party on one side may be a citizen of the same State as a party on the other side.

In their motions to Dismiss, the defendants relied on the Tenth Circuit's decision in Mathers and Mathers v. Urschel, 74 F.2d 591 (10th Cir. 1935). In the cited case the record reflected that plaintiffs and one defendant were citizens of

the State of Oklahoma and the citizenship of the other defendants were not shown on the record. In dismissing the action for lack of subject matter jurisdiction, the Court said:

"Jurisdiction predicated on diversity of citizenship exists only where there is a complete diversity, that is, excluding nominal parties, all plaintiffs are citizens of different States from all defendants. It does not exist if plaintiffs and one defendant are citizens of the same State and the parties can neither confer it by consent nor waive it by inaction."

In opposition to the Motion to Dismiss, Plaintiff relies upon Mas v. Perry, 489 F.2d 1396 (5th Cir. 1974), contending that the Court would have jurisdiction of the matter if the defendant Vanauker alone was the defendant. Plaintiff further contends that to allow all claims to be joined together, that is, the claim of plaintiff against the defendants Bushyhead and Evinger, is only to speed the conclusion of the entire matter and since there is here as in the Mas case, complete interdependence between all claims and the proof required on the issues which will be raised.

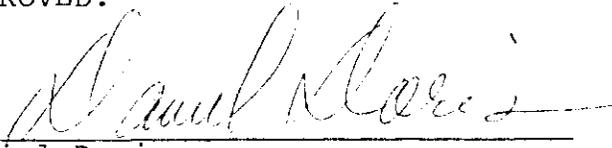
The Court finds, however, that the decision in Mas v. Perry, is not in conflict with the Tenth Circuit Rule cited above, as the Court in Mas was concerned primarily with a question of domicile in reaching a decision that diversity did in fact exist between all plaintiffs and all defendants.

IT IS, THEREFORE, ORDERED that the defendant's Motion to Dismiss be and the same is hereby sustained.

Dated this 22nd day of May, 1978.

  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA.

APPROVED:



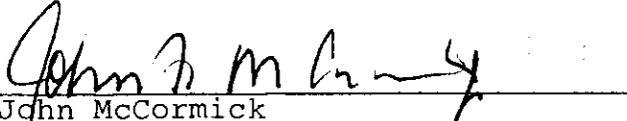
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Daniel Doris  
Attorney for Plaintiff



---

Coy Dean Morrow  
Attorney for Defendant  
Jack D. Vanauker



---

John McCormick  
Attorney for Brad R. Bushyhead  
and Linda Evinger

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

JERRILYNN LAREATHA WRIGHT, )  
Administratrix of the Estate of )  
GARY CHARLES WESLEY BICKELL, )  
DECEASED, and JERRILYNN LAREATHA )  
WRIGHT, the Natural Mother of )  
GARY CHARLES WESLEY BICKELL, )  
DECEASED, )

Plaintiff, )

vs. )

MILES LABORATORIES, INC. and )  
AMES COMPANY, a Division of )  
Miles Laboratories, Inc., )

Defendants. )

FILED

MAY 18 1978 K

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

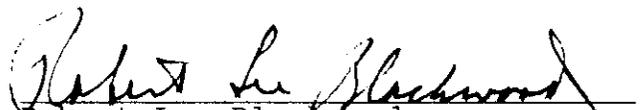
No. 77-C-68-B ✓

STIPULATION FOR DISMISSAL WITH PREJUDICE

It is hereby stipulated, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, and subject only to the approval of the Court herein, that the above-styled and entitled action and all claims and causes of action of the Plaintiff herein be dismissed with prejudice, each party to bear her or its own costs.

Concurrent with the presentation to the Court of this Stipulation, there has been presented to the Court, and read and examined by the Court, an Order of the Probate Division of the District Court in and for Tulsa County, State of Oklahoma, in a case styled, "In the Matter of the Estate of Gary Charles Wesley Bickell, Deceased," No. P-76-1219, under the terms and conditions of which the Probate Division of the District Court of Tulsa County, State of Oklahoma, has approved the Plaintiff herein dismissing this action with prejudice, subject only to the approval of this Court.

DATED this 18 day of May, 1978.

  
Robert Lee Blackwood  
Attorney for Plaintiff

E. W. Yeagley, Jr. Esq.  
Associate General Counsel  
MILES LABORATORIES, INC.  
Elkhart, Indiana 46514

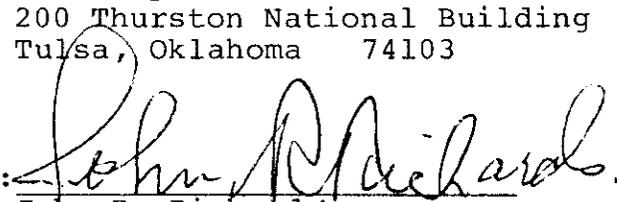
and

John R. Richards  
GRIGG, RICHARDS & PAUL  
Attorneys at Law  
200 Thurston National Building  
Tulsa, Oklahoma 74103

**FILED**

MAY 22 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

By: 

John R. Richards  
Attorney for Defendants

ORDER OF DISMISSAL WITH PREJUDICE

This case came on before the Court upon the Stipulation of the parties for a voluntary dismissal of said cause with prejudice; and the Court being fully advised, it is:

ORDERED, that the above-styled and entitled action, and each of the claims and causes of action of the Plaintiff, be and the same is hereby dismissed with prejudice to the filing of a future action; and it is further:

ORDERED, that each of the parties bear her or its own costs incurred herein.

DATED, this 22nd day of May, 1978.



ALLEN E. BARROW, CHIEF JUDGE  
U. S. District Court for the  
Northern District of Oklahoma

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

PATRICIA ANN PROFIT, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 THE HONORABLE LAURENCE A. )  
 YEAGLEY, Judge of the )  
 Municipal Court of the City )  
 of Tulsa, State of Oklahoma; )  
 and, )  
 )  
 THE ATTORNEY GENERAL OF THE )  
 STATE OF OKLAHOMA, )  
 )  
 Respondents. )

No. 78-C-95-C ✓

**FILED**

MAY 19 1978 *sum*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

The Court has for consideration a Petition for Writ of Habeas Corpus and has reviewed the file, the briefs and all of the recommendations and being fully advised in the premises, finds:

That the Petition for Writ of Habeas Corpus should be denied for the following reasons:

This is a proceeding brought pursuant to the provisions of Title 28, U.S.C., § 2254 by a City of Tulsa prisoner confined in the Tulsa County Jail at Tulsa, Oklahoma.

Petitioner attacks the validity of the judgment and sentence rendered and imposed on April 20, 1977 in the Municipal Court of the City of Tulsa, Tulsa County, Oklahoma in Case No. 228202A. In that case Petitioner was convicted in a non-jury trial for the offense of soliciting another to commit an act of lewdness in violation of Section 154B of the Ordinances of the City of Tulsa. Petitioner was sentenced to serve a term of 60 days in jail. From that judgment and sentence Petitioner appealed to the Court of Criminal Appeals of the State of Oklahoma which court affirmed the trial court's judgment on January 25, 1978. Profit v. City of Tulsa, No. M-77-487. Execution of the sentence was

ordered by the trial court on March 8, 1978 at which time the defendant was ordered to commence serving the 60 days jail sentence. Petitioner has exhausted her state court remedies.

Petitioner demands her release from custody and as grounds therefor claims that she is being deprived of her liberty in violation of her rights under the constitution of the United States of America. In particular, Petitioner claims:

1. "Petitioner's Fourteenth Amendment right to Due Process of law was violated by the disjunctive and vague information filed against her."
2. "Petitioner's First and Fourteenth Amendment rights were violated by the city ordinance under which she was charged as it is vague, overbroad, and sanctions a 'status crime.'"
3. "Petitioner's First Amendment right to freedom of speech was violated as she was convicted of the act of speech without proof or a ruling by the trial court that her speech was obscene under constitutional standards."
4. "Petitioner's First and Fourteenth Amendment rights were violated by the trial court's rulings that the prosecution need not prove that the conduct complained of was offensive, was committed in front of third-party witnesses or committed in public."

The information filed by the City of Tulsa against the Petitioner charged the Petitioner with having "On or about the 6th day of December, 1976, within the corporate limits of the City of Tulsa, Tulsa County, Oklahoma, Patricia Ann Profit, the above named defendant, did then and there unlawfully, wrongfully, wilfully and knowingly solicit, another, R. Harmon TPD to commit an act of lewdness or prostitution to-wit: drop pants and urinate with herself at #11 W. Haskell, contrary to the form of ordinance in such cases made and provided and against the peace and dignity of the State of Oklahoma and the City of Tulsa." The Petitioner moved to dismiss the charge on the ground that the inform-

ation did not set forth facts or acts sufficient to constitute the offense of lewdness and also on the ground that the information is duplicitous in that it charges lewdness or prostitution and is disjunctive. In ruling on the objection the trial court stated:

"I think Information in the disjunctive use of lewdness or prostitution, prostitution certainly doesn't appear to be an appropriate situation. Lewdness does. As far as the disjunctive use, it is strictly a recitation of the ordinance, I think that should be stricken at this point in time." (Tr. 8)

Petitioner's counsel objected to striking the language of the information referring to prostitution on the basis that jeopardy having attached the case could only be dismissed. The Court overruled Petitioner's objection and stated:

"I will allow the City to go ahead and proceed with what it has. I think the test of course is not whether the Information could be better written, but whether it states an offense. It's undoubted that the Information could be better worded than the way it is. I will listen to the evidence and take that under advisement, and reconsider that motion at the conclusion of the evidence." (Tr. 8)

Officer Roger Harmon was the only witness called by the City. He testified that on December 6, 1976 he was driving his personal car by a house located at #11 West Haskell; that he was not in uniform; that as he drove by the house at 11 West Haskell the defendant (Petitioner) came out on the porch of the house and waived at him; that he stopped the car and rolled down the window at which time the defendant asked him to "Pull up in the driveway"; that he pulled his car in the driveway and the defendant came to the car at which time he said to the defendant "Why don't you come in and sit down" to which the defendant replied "No you come in the house; that he followed the defendant into the house

where he observed three other girls in the house and then followed the defendant into the bedroom; that the defendant shut the door to the bedroom and there was no one else in the bedroom during the time he and the defendant were there; that he and the defendant talked for a minute and then he asked the defendant "How much is this going to cost me?" to which the defendant replied "Well, we will talk about price in a minute. First come here, I want you to urinate for me in the stool". Harmon then told the defendant "Well, I am kind of nervous I don't think I can", to which the defendant replied "Take it out and let me look at it"; that he again started asking her what the price was and the defendant then stated "I don't want to talk about the price, I think you might be a cop". Following that conversation the defendant asked him to leave at which time he placed the defendant under arrest. (Tr. 16-18).

The defendant called no witnesses in her own behalf. Based upon the testimony of Officer Harmon the Court found the defendant guilty.

The Petitioner contends in her first allegation that her Fourteenth Amendment right of due process of law was violated by the disjunctive and vague information filed against her. In support of her claim Petitioner cites the case of Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8. L.Ed. 2d 240 (1962). In Russell, the Court held that the indictment was defective because it failed to allege an essential element of the offense charged. However, in that case the Supreme Court stated:

"As we have elsewhere noted, 'This Court has, in recent years, upheld many convictions in the face of questions concerning the sufficiency of the charging papers. Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused.'" [citing cases]

The Court further said:

"In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and, secondly, "'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'" [citing cases]

In the case before this Court, all of the elements of the offense are included in the Information. Additionally, the Information adequately informs the Petitioner of the facts and circumstances surrounding the alleged offense. In considering the sufficiency of the Information in Petitioner's case, the Oklahoma Court of Criminal Appeals stated:

"As we previously stated in Groom v. State, Okl.Cr., 419 P.2d 286 (1966), the tests of an information are whether the defendant was in fact misled by the information, and whether conviction under the information could expose her to the possibility of subsequently being put in jeopardy a second time for the same offense. Using these two criteria, we are of the opinion that the defendant's assignment of error is without merit. Although the information in this case was worded in the disjunctive, it went on to state specifically the act giving rise to the charge, 'to-wit: drop pants and urinate with herself at number 11 West Haskell.' This statement was sufficiently specific to enable the defendant to prepare an adequate defense; and it was sufficiently specific to permit a future determination as to whether any subsequent charge brought against her was based on the same act." Profit v. City of Tulsa, Supra.

This Court agrees with the reasoning of the Oklahoma Court of Criminal Appeals and therefore finds that Petitioner's first claim is without merit.

In her second allegation, Petitioner claims that the ordinance under which she was charged is vague, overbroad

and sanctions a "status crime". As noted by the Oklahoma Court of Criminal Appeals in ruling on Petitioner's direct appeal, the ordinance under which Petitioner was charged is identical to 21 O.S. 1971, § 1029 (b), which was considered by that Court in the case of Griffin v. State, Okl.Cr., 357 P.2d 1040 (1960). In Griffin, the Court criticized the Information for lack of specificity. In Petitioner's case, the Court stated:

"In considering a statute or ordinance with regard to challenges of vagueness, only reasonably certainty is required. Cf., Lawrence v. State, 9 Okl.Cr. 16, 130 P. 508 (1913); and Synnott v. State, Okl.Cr., 515 P.2d 1154 (1973). We hold that the concept of lewdness is sufficiently a matter of common knowledge that the average citizen can determine what conduct is proscribed."

The Oklahoma Court of Criminal Appeals also held that the ordinance was not overbroad nor did it create a "status offense". The Court noted that originally two charges had been filed against the defendant, one under Title 27, § 154 (C) of the City Ordinances, which refers to being a known prostitute, and which charge was dismissed by the trial court, and the other charge under which the Petitioner was convicted. Profit v. City of Tulsa, Supra.

In the case of Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), the Court stated:

"It is a general rule that the federal courts will follow the interpretation of the constitution and laws of a state by the highest court of that state, [citing cases] unless such interpretation is inconsistent with the fundamental principles of liberty and justice." [citing cases]

See also Salazar v. Rodriguez, 371 F.2d 726 (1967). The interpretation of the ordinance under which the Petitioner was convicted is not inconsistent with fundamental principles of liberty and justice. Therefore, Petitioner's second claim for relief should be denied.

Petitioner's third allegation claims that the ordinance under which she was charged and convicted was unconstitutional as applied to her, since the trial court did not follow the standards outlined in the case of Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973).

In its opinion in Petitioner's case, the Oklahoma Court of Criminal Appeals stated that the standards set out by the Supreme Court in Miller were intended to protect "freedom of expression" and that "No aspect of the situation described by Officer Harmon could be considered to be a form of expression." The Court of Criminal Appeals also held that at no time during the course of the trial did the defendant ask the trial court to consider Miller or to make findings under the Miller standards. Petitioner further argues that her constitutional right to privacy was invaded in applying the ordinance to her under the facts of this case. In dealing with that same contention the Oklahoma Court of Criminal Appeals stated:

"The defendant asked a total stranger to expose himself to her, and to urinate in her presence. This solicitation was not laved (sic) of its lewdness by the mere fact that the door was closed. There is no merit to this assignment."

This Court should follow the interpretation of the ordinance as applied to Petitioner under the facts and circumstances in this case, since such interpretation is not inconsistent with the fundamental principles of liberty and justice. Pearce, Supra. Therefore, Petitioner's third allegation above should be denied.

Finally, Petitioner claims that the Court's construction of the City Ordinance under which Petitioner was charged and convicted violated her rights under the First

and Fourteenth Amendments of the Constitution because the City was not required to prove that the conduct of the Petitioner was offensive, or that such conduct was committed in front of any one other than the police officer. In construing the City Ordinance in Petitioner's direct appeal, the Oklahoma Court of Criminal Appeals held as follows:

"If a person is found to have committed a lewd act then there is no need for a separate finding as to whether the act was offensive, or whether anyone in particular saw it or was offended by it."

Again the interpretation of the ordinance by the Oklahoma Court of Criminal Appeals does not appear to be inconsistent with fundamental principles of liberty and justice. Pearce, Supra. Petitioner's fourth claim should be denied.

Accordingly, the Petition for Writ of Habeas Corpus is hereby denied.

IT IS SO ORDERED this 19<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

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

GLACIER GENERAL ASSURANCE )  
COMPANY, a corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PACIFIC EMPLOYERS INDEMNITY )  
COMPANY OF HOUSTON, TEXAS, )  
a Division of Insurance )  
Company of North America, )  
a Texas corporation; )  
HARTFORD ACCIDENT AND )  
INDEMNITY COMPANY, a )  
Connecticut corporation; )  
and LLOYD'S OF NEW YORK, )  
a foreign insurance )  
corporation, )  
 )  
Defendants. )

**FILED**

**MAY 18 1978**

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 78-C-86-B

PLAINTIFF'S NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the plaintiff, Glacier General Assurance Com-  
pany, and hereby gives notice of its dismissal without pre-  
judice as to the defendant, Lloyd's of New York.

HALL, ESTILL, HARDWICK, GABLE,  
COLLINGSWORTH & NELSON

By

*Mike Barkley*  
MIKE BARKLEY

4100 Bank of Oklahoma Tower  
One Williams Center  
Tulsa, Oklahoma 74103  
(918) 588-2738

Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 18 day of May, 1978, I mailed a true and correct copy of the above and foregoing Plaintiff's Notice of Dismissal Without Prejudice to:

Dan A. Rogers  
Attorney for Defendant, Hartford Accident  
and Indemnity Company  
117 East Fifth Street  
Tulsa, Oklahoma 74103

Joseph A. Sharp  
Best, Sharp, Thomas & Glass  
Attorneys for Defendant, Pacific Employers  
Indemnity Company of Houston, Texas  
300 Oil Capital Building  
Tulsa, Oklahoma 74103

and

Gerald Grimes  
State Insurance Commissioner  
Agent for Lloyd's of New York  
408 Will Rogers Memorial Office Bldg.  
Oklahoma City, Oklahoma 73105

by placing the same in the United States mail with proper postage thereon fully prepaid.

  
MIKE BARKLEY

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

FILED

MAY 17 1978 *ph*

ARTHUR G. BIRNEY, CLERK  
U. S. DISTRICT COURT

M.F.Y. INDUSTRIES, INC., )  
a corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MAY'S DRUG STORES, INC., )  
a corporation, )  
 )  
Defendant. )

No. 77-C-339-C ✓

J U D G M E N T

The Court on May 17, 1978, filed its Findings of Fact and Conclusions of Law which are hereby incorporated herein and made a part of its judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be entered declaring that Paragraph 37 of the License Agreement executed on April 15, 1967, as amended, is enforceable and not void.

It is so Ordered this 17<sup>th</sup> day of May, 1978.

*H. Dale Cook*  
H. DALE COOK  
United States District Judge

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

FILED

MAY 17 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

M.F.Y. INDUSTRIES, INC., )  
a corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MAY'S DRUG STORES, INC., )  
a corporation, )  
 )  
Defendant. )

No. 77-C-339-C

FINDINGS OF FACT

and

CONCLUSIONS OF LAW

This is an action for a declaratory judgment, brought pursuant to 28 U.S.C. § 2201. Plaintiff asks the Court to declare void a certain paragraph of a written license agreement to which plaintiff and defendant are parties, on the following grounds: (1) that it violates the rule against perpetuities and constitutes an unlawful restraint on alienation, (2) that it violates statutes prohibiting contracts in restraint of trade, and (3) that it is too vague, ambiguous or otherwise indefinite to be of legal effect. Defendant contends that the paragraph is valid and enforceable, and further alleges that plaintiff's claim is barred by laches. The parties have submitted exhibits and stipulations of fact and have requested the Court to make its determination without the taking of testimony.

After considering the pleadings, the stipulations of fact and exhibits, the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The plaintiff is a corporation incorporated under the laws of the State of Kansas, with its principal place of business in that State. The defendant is a corporation incorporated under the laws of the State of Oklahoma, with its principal place of business in a State other than the State of Kansas. The amount in controversy is in excess of \$10,000.00, exclusive of interest and costs. This action presents an actual controversy between the plaintiff and the defendant.

2 On April 15, 1967, plaintiff's predecessor, Oertle Management Company, Inc., (Oertle) licensed defendant, whose then corporate name was BB&B Corporation, to sell, at retail, health and beauty aids and related items of merchandise on the premises of a discount store leased by Oertle and located at 2625 South Memorial Drive, Tulsa, Oklahoma. Those parties subsequently amended the License Agreement (Agreement) on May 1, 1972.

3. On July 18, 1974, Oertle assigned its lease of the discount store to the plaintiff. Plaintiff assumed Oertle's rights and obligations under the Agreement.

4. On February 28, 1977, plaintiff and defendant executed an addendum to the Agreement.

5. As originally executed in 1967, the Agreement provided, in Paragraph 4, for the following term:

"The term of this Agreement shall commence on March 1, 1967 and shall terminate after the expiration of five (5) contract years unless extended or sooner terminated as hereinafter provided."

6. Paragraph 7 of the 1967 Agreement provided gave the defendant the following option to renew:

"Operator shall have the option to renew this Agreement for two further terms of five (5) years each on all the same terms and conditions set forth herein, except that Operator shall not be deemed to have any further right to renew this Agreement for any further period. . . ."

7. Following the May 1, 1972 Amendment to the Agreement, Paragraphs 4 and 7 read as follows:

"4. The term of this Agreement shall commence on March 1, 1967 and shall terminate February 28, 1977 unless extended or sooner terminated as hereinafter provided.

7. Operator shall have the option to renew this agreement for one further term of five years each on all the same terms and conditions set forth herein, except that Operator shall not be deemed to have any further right to renew this agreement for any further period. . . ."

8. Paragraph 36 of the Agreement provides, in part:

"During the term hereof, Operator will not, without the written consent of Owner, operate a leased department for the selling of merchandise of the kind set forth in Schedule A annexed hereto in a store or retail outlet with a discount type of operation similar to Owners [sic] other than the Store, within a five mile radius of the Store, nor will Operator itself enter into the operation of any type of discount drug operation within a one mile radius of the Owners [sic] store without the prior written consent of Owner, . . ."

9. Paragraph 37 of the Agreement, as amended in 1972, provides:

"In the event that at any time during the term hereof Owner, or any affiliated or parent or subsidiary company of Owner, shall build, own or operate, directly or indirectly, any additional retail store or stores within a 25 mile radius of Owner's store at 2625 South Memorial, Tulsa, Oklahoma substantially similar to the Store, Owner shall notify Operator thereof. Owner warrants and agrees that it or its affiliated or parent or subsidiary company, as the case may be, will, at the option of Operator, enter into an agreement or agreements with Operator for the operation by Operator or an affiliated or subsidiary company or companies of Operator of a Department within each such store for the sale of the same types of merchandise referred to in Schedule A hereof upon all the same terms and conditions set forth herein. The space to be occupied by the department operated by Operator or its affiliated or subsidiary company in each such additional store shall be reasonably comparable to the Department premises hereunder and the effective date of each such agreement shall be the opening date of the store in which such

department is located, or the date upon which paved parking facilities for not less than a reasonable number of cars under the circumstances, immediately adjacent to such store have been completed and 85% of the rentable selling space in such store has been rented and is open for business for the sale of merchandise at retail, whichever is later."

10. The parties have stipulated that plaintiff notified defendant of its intention to expand its operations to another location within 25 miles of its present location on South Memorial Drive that defendant has advised plaintiff that it intends to exercise its option for a license agreement in the new store pursuant to Paragraph 37. The parties have further stipulated that the proposed new store would be "substantially similar" to the existing store, within the meaning of Paragraph 37.

11. The defendant offered into evidence its answers to plaintiff's interrogatories, filed on February 15, 1978. In answer to question number 2, defendant gave several examples of opportunities for expansion which it turned down based upon Paragraphs 36 and 37 of the Agreement, only two of which occurred subsequent to 1974.

12. There was no evidence presented by either party concerning the reasonableness or unreasonableness of the restraints imposed by Paragraph 37.

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction under 28 U.S.C. §§ 1332 and 2201.

2. In a declaratory judgment action, the burden of proof is on the party seeking relief; in this case, the plaintiff. Reliance Life Ins. Co. v. Burgess, 112 F.2d 234 (8th Cir. 1940); Sims v. Amos, 365 F.Supp. 215 (M.D.Ala. 1973); Royal Indemnity Company v. Wingate, 353 F.Supp. 1002 (D. Maryland 1973).

3. Title 60 O.S. § 31 provides, in pertinent part:

"The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition. . . ."

In Oklahoma, this statute is declaratory of the common law Rule Against Perpetuities (Rule), which states that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Melcher v. Camp, 435 P.2d 107 (Okla. 1967). See also LeForce v. Bullard, 454 P.2d 297 (Okla. 1969).

4. Plaintiff relies primarily upon Melcher v. Camp, supra, to support its position that Paragraph 37 of the Agreement violates the Rule. However, that case, as well as several similar cases relying upon its holding, all involved restrictions upon an interest in specific, presently identifiable property. See Producers Oil Company v. Gore, 437 F.Supp. 737 (E.D.Okla. 1977); Stoltz, Wagner & Brown v. Duncan, 417 F.Supp. 552 (W.D. Okla. 1976); Cities Service Oil Company v. Sohio Petroleum Company, 345 F.Supp. 28 (W.D. Okla. 1972). In fact,

"[t]he rule against perpetuities concerns itself only with interests in property. It does not affect in any manner the making of contracts which do not create rights or interests in property."

Morgan v. Griffith Realty Co., 192 F.2d 597, 600 (10th Cir. 1951). See also Melcher v. Camp, supra. The Rule was designed to further alienability and to prevent the tying up of property within a family line for generation after generation, Producers Oil Company v. Gore, supra, which accounts for its inextricable association with the statutes regarding restraints on alienation. In the instant case, the only specific, identifiable property with which the Agreement is concerned is the property located at 2625 South Memorial Drive, Tulsa, Oklahoma. Any restrictions which are placed upon that property can exist only for the term of the Agreement,

a maximum of fifteen years, or well within the twenty-one year period contained in the Rule. Paragraph 37 of the Agreement does not in any way purport to encumber any specific, identifiable property and therefore cannot restrain the alienation of any property. Consequently, Paragraph 37 of the Agreement does not violate either the Rule Against Perpetuities or any statute prohibiting restraints on alienation.

5. Plaintiff contends that Paragraph 37 violates two Oklahoma statutes prohibiting restraints of trade. Title 15 O.S. § 217 provides, in pertinent part:

"Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind . . . is to that extent void."

Title 79 O.S. § 1 provides as follows:

"Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal."

6. In a recent case before the Oklahoma Court of Appeals, involving a contract granting a five-year preference in shipping produce and exempt commodities, the Court held that 15 O.S. § 217 was inapplicable because the restriction was ". . . at most a limited restriction on the manner in which the business is done and does not restrain Defendant from exercising his business." Cooper v. Tanaka, Okl. Ct. App., 49 O.B.A.J. 349, 349 at f.n. 1, 1978. That reasoning is persuasive in the case now before this Court. Paragraph 37 does not purport to restrain plaintiff from exercising its business, but only limits the number of entities to which it can grant a license to operate one specialized department in certain of its discount stores.

7. As the Court said in Cooper v. Tanaka, supra at 350, "[t]aken literally, 79 O.S. 1971 § 1 would be incapable of administration since virtually all contracts restrain

some trade."

"It is well settled that only undue or unreasonable restraints of interstate trade or commerce and not all possible restraints are prohibited by the Sherman Antitrust Act and the statutes of the State of Oklahoma. The true test of legality is whether the restraint imposed is such as merely regulates and thereby promotes competition or whether it is such as may suppress or destroy competition. The fundamental test of the reasonableness of restraint is its effect on the public."

Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association, 561 P.2d 499, 506 (Okla. 1977). The case of Utica Square, Inc. v. Renberg's Inc., 390 P.2d 876 (Okla. 1964) involved an anti-competitive clause in a retail shopping center lease. In discussing the clause in terms of the Oklahoma statutes prohibiting restraints of trade, the Oklahoma Supreme Court cited with approval the following language from a California case:

"Statutes are interpreted in the light of reason and common sense, and it may be stated as a general rule that courts will not hold to be in restraint of trade a contract between individuals, the main purpose and effect of which are to promote and increase business in the line affected, merely because its operations might possibly in some theoretical way incidentally and indirectly restrict trade in such line." Id. at 881.

8. The burden of showing the unreasonableness of a restraint of trade, except where there is a per se violation of an anti-trust statute, is on the plaintiff. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967); United States v. Empire Gas Corporation, 537 F.2d 296 (8th Cir. 1976). There is no evidence of record in this case which would allow the Court to make a determination of the reasonableness of the restraints imposed by Paragraph 37 of the Agreement. Consequently, plaintiff has failed to sustain its burden of showing that Paragraph 37 violates either 15 O.S. § 217 or 79 O.S. § 1.

9. Plaintiff contends that Paragraph 37 is too vague, ambiguous or otherwise indefinite to be of legal effect.

The only term of Paragraph 37 over which the parties appear to be in actual dispute at the present time is that providing that any new license agreement shall be "upon all the terms and conditions set forth herein." The remaining alleged ambiguities relate either to terms with which the parties have already complied, or to terms which will become effective, if at all, at some future date. As to the former category of terms, there is no "actual controversy" as required by 28 U.S.C. § 2201. A controversy has not yet arisen, and may never arise, over the terms in the latter category. Therefore, any declaration by the Court involving those terms would be merely an advisory opinion, which is not authorized by the Declaratory Judgment Act. Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); Coffman v. Breeze Corporations, Inc., 323 U.S. 316, 65 S.Ct. 298, 89 L.Ed.264 (1945); Oklahoma City, Oklahoma v. Dulick, 318 F.2d 830 (10th Cir. 1963).

10. Title 15 O.S. § 104 provides:

"Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void."

However,

". . . it is the rule in Oklahoma that the destruction of contracts or agreements for vagueness and uncertainty is disfavored; and that if a contract or agreement is sufficiently definite and certain in its totality that the intention of the contracting parties can be ascertained with reasonable certainty, it is not void for indefiniteness and uncertainty even though it fails to enter into all of the details respecting the subject matter, especially where there has been partial performance."

Phillips Petroleum Company v. Buster, 241 F.2d 178, 183

(10th Cir. 1957). See also Brown v. Bivings, 277 P.2d 671

(Okla. 1954); Watts v. Elmore, 176 P.2d 220 (Okla. 1946).

In construing the contract involved in the instant case, the Court must also consider 15 O.S. § 159, which provides:

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

11. The primary dispute between the parties with regard to the "same terms and conditions" language of Paragraph 37 appears to be the length of the term of any new license agreement. Plaintiff takes the position that Paragraph 37, if valid, would give defendant an option for a license agreement in a new store which would expire in 1982, the present expiration date of the 1967 Agreement. Defendant argues that Paragraph 37 contemplates a new license agreement with a term of ten years and an option to renew for five additional years. It appears to the Court that as amended in 1972 and as applied to the store at 2625 South Memorial Drive, the Agreement clearly contemplated that the defendant would have between ten and fifteen years to recoup its investment and realize profits. Reading the Agreement as a whole, it is clear to the Court that the parties intended that the defendant should have the same economic opportunity in any new store opened by plaintiff within 25 miles of the South Memorial Drive location. To ascribe to the parties an intention to limit the defendant, for example, to a one-year investment period in a store opened by plaintiff in 1981 would be to ignore economic reality and the plain language of the Agreement. In light of the applicable statutory and case law, the Court therefore finds that Paragraph 37 unambiguously provides that a new license agreement will be for a term of ten years, with a right to renew as set forth in Paragraph 7. It is also clear to the Court that the parties intended that the remaining "terms and conditions", including those providing for the compensation to be paid to plaintiff, be those contained in the Agreement as it exists at the time the new agreement is executed. Consequently, Paragraph 37

is not void because of vagueness or ambiguity.

12. Defendant contends that plaintiff has known of the existence of Paragraph 37 at least since plaintiff's acquisition of the lease in 1974 and that in view of the restrictions placed upon the defendant in Paragraph 36, plaintiff's delay in challenging the Agreement constitutes laches which should bar this action.

"The question of whether a claim is barred by laches must be determined by the facts and circumstances in each case, and according to right and justice. Laches in legal significance is not merely delay, but delay that works a disadvantage to another."

Leathers v. Commercial National Bank in Muskogee, 410 P.2d 541 (Okla. 1965). Laches is inappropriate where there is no evidence of record showing prejudice to the defendant because of delay. Stanolind Oil and Gas Company v. Bridges, 160 F.Supp. 798 (E.D. Okla. 1958); Crumley v. Smith, 397 P.2d 119 (Okla. 1964); Lumm v. Colliard, 317 P.2d 273 (Okla. 1957). The record in this case is insufficient to show prejudice to the defendant, since 1974, resulting from plaintiff's delay in bringing this action; hence, it is not barred by laches.

13. Judgment should be entered in this case declaring that Paragraph 37 of the Agreement is enforceable and not void.

It is so Ordered this 17<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

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

FILED

MAY 17 1978

PAUL A. BISCHOFF,

Plaintiff,

vs.

GRUMMAN AMERICAN AVIATION  
CORPORATION, GRUMMAN COR-  
PORATION, et al,

Defendants.

Jack G. Silver, Clerk  
U. S. DISTRICT COURT

No. 77-C-343-C

O R D E R

Plaintiff herein, having filed his Motion to dismiss the above styled and numbered cause without prejudice as to defendant EMMY PICCARD, for the reason that no service has been had upon her and that she does not appear at this time to be a necessary party to this action;

IT IS THEREFORE ORDERED that the above styled and numbered cause is dismissed without prejudice as to defendant EMMY PICCARD.

Dated this 17<sup>th</sup> day of May, 1978.

H. DALE COOK  
U. S. District Judge

NOTED  
BY  
FEDERAL BUREAU OF INVESTIGATION  
UPON RECEIPT

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

UNITED FIDELITY LIFE INSURANCE COMPANY )  
(As Successor to NATIONAL EDUCATORS )  
LIFE INSURANCE COMPANY), A Texas )  
Corporation, )

Plaintiff, )

vs. )

THE LAW FIRM OF BEST, SHARP, THOMAS )  
& GLASS, a partnership, composed of )  
JOSEPH M. BEST, JOSEPH A. SHARP, )  
JACK M. THOMAS and JOSEPH F. GLASS, )  
as co-partners, )

Defendant. )

MAY 17

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

NO. C-77-300-B

**FILED**

MAY 17 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT

On this 9th day of May, 1978, the captioned cause comes on for trial pursuant to the regular assignment upon the docket before me, the undersigned Judge of the court, upon issues as made by the plaintiff's Complaint and the defendant's Answer thereto. And with plaintiff present by and through authorized representatives and its counsel of record, and the defendant present in person and by and through counsel of record, and both parties announcing ready for trial, the following proceedings are had: A jury is empaneled and sworn, opening statements are made by the attorneys, and evidence by and through the testimony of witnesses and the introduction of exhibits is offered by plaintiff. Whereupon the plaintiff rests and the defendant interposes its Demurrer to the sufficiency of said evidence, which same is considered by the court and, upon such consideration, is overruled. And the trial day having concluded, the jury is admonished and the trial is adjourned until the following day.

Thereupon, and on the 10th day of May, 1978, with the parties and attorneys present and announcing ready to resume, the

defendant introduces its evidence by and through the testimony of witnesses and identified exhibits, and rests. After the plaintiff has announced that it has no rebuttal to offer, the defendant moves the court for a verdict directing the jury to find in its favor, which same motion is considered by the court and overruled. Thereupon, the arguments of counsel to the jury are had, the jury is instructed by means of written instructions read by the Court, and with the bailiff having been sworn in accord with law the jury retires in said bailiff's custody to deliberate upon a verdict.

Whereupon, on the same date of May 10, the jury returns into open court and delivers the following verdict: "We the jury empaneled and sworn in the above entitled cause do upon our oaths find the issues in favor of the plaintiff and fix the amount of its recovery at \$20,000.00. (Signed) GEORGE LECK, Foreman." The said jury is duly polled, upon the request of counsel for the defendant, and upon their individual confirmations of the said verdict the same is ordered received and recorded, and judgment is entered upon it, accordingly.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against the defendant for \$20,000.00, and proper costs, as the same, if any, be claimed, verified, and proven in accord with law.

151 Luther Bohanon  
JUDGE

Howard K. Berry  
HOWARD K. BERRY, SR.  
Attorney for Plaintiff

JONES, GIVENS, BRETT, GOTCHER,  
DOYLE & BOGAN, INC.

By: Howard K. Brett  
Attorney for Defendant

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

TULSA ADJUSTMENT BUREAU, INC., )  
A Corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FOUNT COTTON and PEGGY COTTON, )  
 )  
Defendants, )  
 )  
and, )  
 )  
POSTMASTER )  
UNITED STATES POSTAL SERVICE, )  
Muskogee, Oklahoma, )  
 )  
Garnishee. )

CIVIL ACTION NO. 77-C-448-C

**FILED**

MAY 16 1978 *hcr*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

NOW, on this 16<sup>th</sup> day of May, 1978, there came on  
for consideration the Stipulation for Dismissal. The Court  
finds this action, based upon the Stipulation for Dismissal,  
should be dismissed.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that  
this cause of action and complaint be, and the same are hereby  
dismissed without prejudice.

*W. J. [Signature]*  
UNITED STATES DISTRICT JUDGE

# United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 77-C-409-C ✓

STEPHEN TIDWELL, as Father and Next Friend of  
SANDY G. TIDWELL, and STEPHEN TIDWELL,  
individually,

vs.

J. C. PENNEY COMPANY, INC.

Plaintiff

Defendant

JUDGMENT

This action came on for trial before the Court and a jury, Honorable H. Dale Cook  
United States District Judge, presiding, and the issues having been duly tried and  
the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Stephen Tidwell, as next  
friend of Sandy G. Tidwell, have judgment in the amount of \$0.00 on  
his first cause of action against the defendant, J. C. Penney Company,  
Inc.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Stephen  
Tidwell, individually, have judgment in the amount of \$1,965.00  
on his second cause of action against the defendant, J. C. Penney  
Company, Inc.

**FILED**

MAY 15 1978 *jm*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 15th day  
of May, 1978.

JACK C. SILVER, Clerk

By: *Rosanne J. Miller*  
Deputy Clerk of Court

# United States District Court

FOR THE

Northern District of Oklahoma

United Fidelity Life Insurance Company  
(as successor to National Educators Life  
Insurance Company), a Texas Corporation,

vs.

The Law firm of Best, Sharp, Thomas & Glass,  
a partnership, composed of Joseph M. Best,  
Joseph A. Sharp, Jack M. Thomas, and  
Joseph F. Glass, as co-partners.

CIVIL ACTION FILE NO.

77-C-300-B Civil

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Luther Bohanon  
, United States District Judge, presiding, and the issues having been duly tried and  
the jury having duly rendered its verdict, in favor of the Plaintiffs.

It is Ordered and Adjudged that judgment is entered in favor of Plaintiff,  
United Fidelity Life Insurance Company in the amount of Twenty Thousand  
Dollars (\$20,000.00) against the Defendant, The Law Firm of Best, Sharp,  
Thomas & Glass.

**FILED**

MAY 15 1978 *pm*

Jack C. Silver, Clerk  
U. S. District Court

Dated at Oklahoma City, Oklahoma , this 12th day  
of May , 19 78 .

*S. J. Bailey, Deputy*  
Clerk of Court

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

WERTHEIM & CO., et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 CODDING EMBRYOLOGICAL )  
 SCIENCES, INC., a )  
 corporation, et al., )  
 )  
 Defendants. )

No. 75-C-454-C ✓

FILED

MAY 15 1978 PH

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

J U D G M E N T

The Court, on May 15<sup>th</sup>, 1978, filed its Memorandum Judgment including its Findings of Fact and Conclusions of Law, which are hereby incorporated herein and made a part of this Judgment.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Judgment be entered in favor of the defendants, Coddling Embryological Sciences, Inc., Coddling Cattle Research, Donald K. Coddling and Charles H. Coddling, and against the plaintiffs, Wertheim & Co.; John W. Hanes, Jr., Custodian for John Hanes, III; John W. Hanes, Jr., Custodian for Carol M. Hanes; John W. Hanes, Jr., Custodian for Lindsay Hanes; John W. Hanes, Jr., Custodian for Lucy P. Hanes; Ellen G. Hirsch; Alan D. Cohen; Burmanese Trust No. 2, H. F. Manweiler Trustee; Mildred Hilson; John S. Hilson; Leonard M. Leiman; Paul F. Balsar; Robert Bach; Arne Fuglestad; Peter J. Repetti; Leonard M. Leiman, Trustee for Anne F. Cowett UTD 5/7/57; Leonard M. Leiman, Trustee for Frederick D. Cowett UTD 11/1/55; John W. Hanes, Jr., a co-executor of the Estate of Lucy D. Hanes, Deceased; Lawrence B. Morris, Jr.; Lawrence B. Morris, III; Betty Ann Morris; Lawrence B. Morris, Jr., Trustee for Michele H. Morris; Lawrence B. Morris, Jr., Trustee for Anne Tod Morris; Frederick A. Klingenstein, co-Executor of Estate of Esther A. Klingenstein, Deceased; Frederick A. Klingenstein,

Executor of Estate of Joseph A. Klingenstein, Deceased;  
Frederick A. Klingenstein, Trustee for Kathy Anne Klingenstein;  
Frederick A. Klingenstein, Trustee for Susan Jane Klingenstein;  
Frederick A. Klingenstein, Trustee for Amy Jo Klingenstein;  
Frederick A. Klingenstein, Trustee for Lucy Lowe Klingenstein;  
John Klingenstein, Trustee for Thomas Davis Klingenstein;  
John Klingenstein, Trustee for Nancy Davis Klingenstein;  
John Klingenstein, Trustee for Andrew Davis Klingenstein;  
John Klingenstein, Trustee for Sarah Davis Klingenstein; and  
Wilbur Cowett.

It is so Ordered this 15<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

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

WERTHEIM & CO., et al.,            )  
  )  
                                  Plaintiffs,    )  
  )  
vs.                                        )  
  )  
  )  
CODDING EMBRYOLOGICAL            )  
SCIENCES, INC., a                    )  
corporation, et al.,                )  
  )  
                                  Defendants.    )

No. 75-C-454-C

FILED

MAY 15 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

J U D G M E N T    M E M O R A N D U M

The above-styled action was filed in the Southern District of New York on January 4, 1975. Pursuant to a stipulation dated September 18, 1975, an Amended Complaint was filed and the action was transferred to the Northern District of Oklahoma. Plaintiffs assert violations by defendants of §§ 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. § 771(2) and 77q(a); § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated by the Securities Exchange Commission, 17 C.F.R. 240.10(b)-5, and the common law.

Plaintiffs have alleged that the defendants, Donald K. Coddling, Charles H. Coddling, Coddling Cattle Research and CES, in violation of the above-cited provisions of the federal securities laws, offered and sold securities to the plaintiffs through use of interstate transportation and communication devices, including the United States mails. Plaintiffs have further alleged that they purchased said securities in reliance upon an offering circular dated July 11, 1973 (hereinafter "Confidential Memorandum") and distributed to them by defendants which contained untrue statements of material facts and omitted to state material facts

necessary in order to make the statements made therein not misleading.

Plaintiffs have alleged that these misstatements and omissions relate to, among other things, a deliberate and gross understatement of the cost of completing a surgical building and related improvements, and a deliberate failure to disclose the previous involvement of Donald and Charles Coddling (hereinafter "the Coddings") in a similar unsuccessful business which resulted in protracted litigation and charges that the Coddings had misappropriated assets and violated their fiduciary duties to the business enterprise.

Plaintiffs have further alleged that defendants are liable to them under the common law for fraud, for breach of contract and for breach of trust and fiduciary duty. Said common law claims arise out of the same set of transactions upon which the foregoing federal securities law claims are based. This Court has jurisdiction over these common law claims under the doctrine of pendent jurisdiction.

In addition to the foregoing, plaintiffs have alleged certain pendent derivative claims on behalf of CES and against Coddling Cattle Research, Donald Coddling and Charles Coddling. These derivative claims are also directly related to the federal securities law violations described above and are based upon the said defendants' refusal to honor a commitment to supply \$240,000 additional capital to CES and, in addition, their causing CES to waste its assets.

Federal jurisdiction is invoked under the provisions of § 22 of the Securities Act of 1933 as amended, 15 U.S.C. § 77(v), § 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78aa and under the principles of pendent jurisdiction. The action came on for non-jury trial before this Court on November 16, 1976. Based upon the testimony, exhibits and other evidence presented at trial the Court makes the following Findings of Fact and Conclusions of Law.

## Findings of Fact

1. Wertheim & Co. is a partnership engaged in the investment banking business with its principal place of business in New York, New York. It is a major bracket investment firm in the Wall Street area. It has engaged in all the traditional investment banking activities except retail selling. Wertheim & Co. however has traditionally stayed away from "start-up" situations.

2. The individual plaintiffs were partners in Wertheim & Co. or members of families of partners of Wertheim & Co., except Paul F. Balser, who was a Vice President of Wertheim & Co., Inc., Harlan F. Manweiler, who initially advised Wertheim of the CES investment opportunity, and Leonard M. Leiman and Peter J. Repetti, who are members of the New York law firm of Reavis & McGrath.

3. Donald and Charles Coddling were raised on a cattle ranch operated by their father. In 1940 they began research in connection with the cattle industry in the form of performance and progeny testing. Don and Charles Coddling operated their cattle business as a partnership under the name of Coddling Cattle Research. The partnership was initially known as C. H. Coddling & Sons.

4. In 1958 the Coddings entered into a joint venture with Armour & Company the purpose of which was to obtain, evaluate and identify superior progeny tested bulls. The principal income to the venture was to be derived from the sale of semen from bulls. The joint venture was in existence until 1964.

5. In 1972, Coddling Cattle Research began two concurrent projects in addition to its basic cow herd program. Don Coddling's main activity was the development of a beef stock project which envisioned the utilization of technological advances relating to breeding, feeding, and animal nutrition. Charles Coddling was interested in the technique

of embryo transplants.

6. On about December 13, 1972 the Coddings entered into a contract with Alberta Livestock Transplants, Ltd. of Alberta, Canada, which provided for an exclusive arrangement whereby Coddling personnel could visit the Alberta facility, observe its procedures and consult its personnel. Alberta's know-how and documentation, including its records of operations, equipment lists and architectural drawings were made available to the Coddings.

7. By January of 1973 the Coddings had embarked upon their embryo transplant program and had begun construction of some of the facilities. At this same time, Don Coddling was aggressively pursuing the beef stock program and attempting to secure financing to undertake the project.

8. Coddling's attempt to secure financing for the beef stock project led to an introduction to Harlan F. Manweiler, an independent financial consultant, in February of 1973 in Houston, Texas. Manweiler was present at a slide presentation made by Coddling in regard to the beef stocks project.

9. Manweiler contacted Coddling a week later and asked if Coddling would like for him to make a search for possible funding for the project and Manweiler mentioned that he had been intimately involved with some New York firms, such as Wertheim & Co.

10. Manweiler thereafter contacted Al Cohn, and arranged a meeting in New York City between Coddling and representatives of Wertheim & Co. in February, 1973, at which time Coddling made a presentation regarding the beef stock project and the embryological transplant program which was a part of the project. Wertheim & Co. indicated an interest in the entire project, particularly the embryo transplant phase.

11. John W. Hanes, Jr., a general partner in Wertheim & Co. and Lawrence R. Campbell, a Vice President of Wertheim & Co., Inc., were designated to investigate the CES investment

opportunity. John Hanes was particularly interested in the embryological transplant program in light of his own activities in the cattle market. He contacted the Coddings expressing his interest and on the 26th or 27th of February, 1973, Hanes and his wife, Alan Cohen and Lawrence R. Campbell met with the Coddings at their ranch in Foraker, Oklahoma. During their visit, the Wertheim & Co. representatives toured the facility, which Hanes found impressive.

12. At the time, the Coddling ranch had facilities and improvements consisting of, among other things, a bull evaluation center including a 600-foot feed barn, a semen laboratory with related facilities, a well-appointed guest house and a 3,200-foot paved airstrip capable of accomodating multi-engined aircraft. The ranch consisted of thousands of acres of pasture, miles of sturdy fencing and a large herd of purebred Hereford cattle.

13. In initial discussions between Hanes and Don Coddling and virtually all subsequent conversations for the next year, Coddling expressed that his true interest was not limited to the embryological project but was in a much larger and more ambitious project, of which embryological technology would be only a portion.

14. On March 6, 1973 Hanes visited the Alberta facility with Don Coddling to investigate the technical and financial aspects of the Alberta commercial embryo transplant business.

15. John Hanes prepared a four-page memorandum in regard to the Alberta facility and the procedures utilized there. He found the facility was operated by highly dedicated and thoroughly competent personnel, however he noted that the physical facilities were in many ways primitive and certainly very far from optimum. He found that the operating facilities were not functionally designed for the purpose to which it was being put, nor spacious for that purpose.

Further, he notes the handling equipment was somewhat awkward and inflexible; the operating room was sparsely equipped; the holding pens for prospective "patients" were somewhat inconvenient; and the recovery room was inadequate. He also discussed the need to have a holding area for recipient cows closer to the facility. Hanes was also informed by the Alberta group as to the success rate they had been achieving. This memorandum was placed in the file at Wertheim & Co.

16. The Coddings prepared printed brochures and written presentations in regard to their embryo project using the name Coddling Embryological Sciences, Inc., one of which was prepared as early as January 2, 1973. This written presentation of the Coddings' concept of CES included information on the nature of the business, the market demand, competition, technical feasibility, organization, a projected income statement and projected capital expenditures. The CES financial data was basically prepared by Sid Lida, an employee of the Coddings who had a background in management and finance. Copies of these were given to Wertheim representatives.

17. In regard to competition, one brochure states:

"CES retained an independent consulting firm to survey the extent of the practice of embryo transplants in Canada.

"A number of activities were discovered. All except Albert Livestock Transplants were either very new and unproven, dormant or abandoned.

"One embryo transplant operation exists elsewhere in Oklahoma and so far as is known is the only other facility in the United States. There is a noticeable lack of evidence of success by this small group."

18. As of March 7, 1973 Hanes had been informed by Don Coddling that the projected cost of the building was estimated at \$125,000 rather than an earlier estimate of \$45,000. In a memorandum concerning those discussions, Hanes stated that it appeared CES would reach a negative peak of approximately \$400,000 cash requirement in the sixth or seventh month, and

that it appeared \$600,000 was a reasonable capitalization figure.

19. Hanes stated in the memorandum:

"For purposes of the financial statements, month one is as of the completion of the building and full-start-up, which Coddling feels is reasonable to project as June 1 or June as month one. Certain of the assumptions and figures will need to be changed to bring this into accord with reality."

Hanes further stated that Coddling did not intend to back the enterprise with any of his own assets but that realistically he thought Wertheim should recognize that Coddling was backing it with his name and reputation, "placing it literally in his front yard."

20. At the time of this memorandum, the Coddings were proceeding with the erection of the building, expenditures on marketing and advertising, and the employment of personnel.

21. On or about March 9, 1973, Hanes obtained from Dr. Nissbaum of Cornell University an independent verification of the embryo transplant techniques in use at Alberta Transplants, Ltd. and proposed to be used by CES.

22. Lawrence Campbell asked the Coddings for references and was given the names of several breeders' associations, the Coddings' banker and a United States Senator. Campbell contacted the references and was told that the Coddings' credit standing was good, that they were in fact one of the largest breeders of Hereford cattle in the United States, and that they generally enjoyed a good reputation.

23. On March 22, 1973, CES was incorporated as a Delaware Corporation by Don and Charles Coddling for the purpose of providing surgical embryo transplant breeding services to raisers of cattle. The principal place of business of CES was located in a facility constructed in Foraker, Oklahoma on land leased by CES from Coddling Cattle Research.

24. The lease between CES and Coddling Cattle Research

provided that in the event of the termination of the CES enterprise for any reason, including bankruptcy, the land and all physical improvements thereon would revert to Coddling Cattle Research as lessor.

25. In March, 1973, Don Coddling met in New York with Lawrence Campbell of Wertheim & Co. and Richard McCarthy, an associate of the law firm of Reavis & McGrath, which was retained by Wertheim & Co. in connection with the preparation of securities offerings. Don Coddling was in New York on several occasions, and had about a dozen further meetings with these individuals.

26. Wertheim & Co., Inc. is a corporation formed by Wertheim & Co. in approximately 1971 to perform certain functions and to avoid problems encountered with underwriting liability. Wertheim & Co., Inc. functioned as the agent of CES in the mechanical preparation of the offering circular. Lawrence Campbell was specifically assigned the task of being in charge of this function of Wertheim & Co., Inc. Richard McCarthy of Reavis & McGrath was to assist Campbell in the due diligence functions. He had responsibility for preparation of the confidential offering to be sure that the due diligence requirements were complied with. The normal due diligence procedure was a question and answer process to determine and collect information about the people, to get references, to learn the business, and make a preliminary judgment as to whether to proceed. Wertheim & Co., Inc. had a comprehensive due diligence check list which tracked the rules and regulations of the SEC.

27. In regard to the preparation of the prospectus, as John Hanes testified Wertheim & Co., Inc. was to elicit data which it felt would give a full and complete statement of the offering, to advise the client what type of data an investor would normally look for, and to ask questions that would make sure that the client did not inadvertently misstate

or leave out material disclosure.

28. Don Coddling furnished Wertheim & Co., Inc. extensive information in regard to the background of the ranch, the cattle business, embryo transplant procedures, financial statements pertaining to CES and biographical information on the employees of CES which was subsequently incorporated into a proposed private placement memorandum submitted on March 23, 1973 and finally into a Confidential Memorandum dated July 11, 1973.

29. Lawrence Campbell also consulted with John Hanes on a number of occasions, usually in connection with clarification of various matters which Campbell felt Hanes was more intimately familiar with in view of Hanes' numerous conversations with the Coddings.

30. Don Coddling also produced on request evidence of the customers' deposits to verify the amount of such deposits to be set forth in the Confidential Memorandum.

31. Although Don Coddling supplied extensive information to Campbell and McCarthy, the actual preparation of the Confidential Memorandum was done by Wertheim & Co., Inc. Don Coddling did not understand a need for the Memorandum because he understood from Hanes and Campbell they already had an arrangement, but was told this "was the way they did business." Don Coddling received and read draft copies of the Memorandum and made some suggestions in regard thereto.

32. Prior to CES offering the securities for sale, Don Coddling had contacted various sources in an attempt to secure financing. In a commitment letter dated May 11, 1973, C.I.T. Financial Services agreed to make a capital loan to CES in the amount of \$600,000, the proceeds of which were to be used by CES as operating capital and for construction of facilities. The Coddings decided to accept funding through Wertheim & Co. because Don Coddling believed John Hanes and Wertheim were very interested in and dedicated to

assisting him in obtaining funding for the beefsteak program.

33. A letter from John Hanes to Don Coddling establishes the fact that Wertheim & Co. had committed funding as of June 18, 1973. In the letter Hanes expresses the need to complete all of the paper work concerned with the Coddling Embryological project and states: "You and I may recognize that we have concluded a deal at the time we have shaken hands on it -- but our friends in the Internal Revenue Service take a much more legalistic point of view." In regard to whether Hanes had the authority to speak on behalf of Wertheim and the investors in relation to the CES transaction, Hanes had such authority as an innate matter of his position at Wertheim.

34. Hanes recognized in testimony that at the time of the writing of the letter he was:

". . . pushing Don a little bit because Larry [Campbell] was getting a lot of trouble in getting the final draft out of the Coddings' lawyer and we felt that at the time indeed all of the significant matters, as far as we knew them, had been covered and there was no reason why we shouldn't get on with the finalization."

35. Hanes further testified that as of that time Wertheim & Co. had sufficient commitments from the investors that Wertheim was satisfied it could be syndicated whenever a closing date was established.

36. As stated, the private placement confidential memorandum was issued on July 11, 1973. On that same date, CES authorized Wertheim & Co., Inc. to distribute it to prospective investors. The closing was held on July 16, 1973 in New York City. Don Coddling attended the closing on behalf of CES. John Hanes and Lawrence Campbell became directors of CES in July, 1973.

37. As to the securities acquired by Wertheim & Co., each partner of Wertheim acquired an interest in proportion to his interest in the firm.

38. The Coddings purchased \$18,000 in CES securities at the time of the initial offering.

39. The \$650,000 in proceeds obtained by CES by the sale of the securities was distributed as follows: \$30,000 to Wertheim & Co., Inc.; \$20,000 legal fees; and \$600,000 in funds to CES.

40. At closing, the parties to the transaction executed various closing documents, including the Unit Purchase Agreement and the Security Holders Agreement.

41. The Unit Purchase Agreement provides in part:

"2. Representations, Warranties and Agreements of the Company and Others. Each of the Company, Donald K. Coddling and Charles H. Coddling, jointly and severally, represents, warrants and agrees that:

". . . . (q) The Memorandum contains all material facts regarding the Company and does not include any untrue statement of material fact and does not omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading; provided, however, that (i) the representation contained in this subsection 2(q) is made only by the Company. . . .

"(s) Each of the foregoing representations, warranties and agreements shall have been accurate and complete in every respect at and as of the closing."

The Unit Purchase Agreement further provides that the Company agrees to apply the net proceeds of the offering and sale of Units contemplated by the Memorandum for the purposes and in the manner set forth in the Memorandum.

42. as stated, in 1958 Don and Charles Coddling had entered into a joint venture with Armour and Company known as Coddling-Armour Research. As part of the project, the joint venture financed certain permanent improvements on the Coddling ranch consisting of an airstrip, guest lodge, feed barns and an estrus shelter. As part of the joint venture agreement, title to these permanent improvements passed to the Coddings upon termination of the joint venture.

43. The Court takes judicial notice of prior litigation adjudicated in this Court in a case styled Armour and Company, etc. v. C. H. Coddling & Sons, etc., No. 5841 - Civil, and of the appeal from the judgment therein as reported under the style of C. H. Coddling & Sons v. Armour & Company, 404 F.2d 1 (10th Cir. 1968).

44. In the spring of 1973, Don Coddling and Harlan Manweiler met for dinner, and among other topics, discussed requirements in regard to the furnishing of information for the memorandum document. Don Coddling sought Manweiler's advice in regard to whether or not it would be important for Coddling to discuss the prior Armour "situation" with Wertheim and whether Manweiler felt it had any relevancy. Coddling generally described that they had difficulty with Armour in previous dealings which ultimately led to litigation. Manweiler stated it depended upon the memorandum requirements and indicated that the Coddings' relationship with Armour might be part of the history of the company. However, Manweiler added he really didn't know because he didn't know how extensive the inquiry was. Coddling indicated he thought he would probably discuss it with Wertheim. In May, 1973, Manweiler received a draft of the confidential memorandum which was prepared on April 11, 1973. The confidential memorandum contained no information in regard to the Coddling-Armour venture.

45. The Coddings did not discuss the Coddling-Armour venture or its resultant litigation with Wertheim. Wertheim was unaware of it since neither it nor Wertheim & Co., Inc. made inquiry in regard to whether the Coddings had ever been involved in litigation; the Coddings did not raise the subject; and all visible references to Armour had been removed from the Coddling ranch prior to the CES venture.

46. The confidential memorandum warned potential investors that the Coddings, who were majority stockholders,

officers and directors of the Company and who had the right to elect a majority of the directors of the Company, were in positions where conflicts of interest might arise between the interests of the Company and their personal interests. The potential conflicts enunciated included such matters as financing arrangements, business opportunities and other matters which the Company was unable to predict.

47. The Confidential Memorandum also enumerated various risk factors the potential investor should be aware of such as:

(a) The Company had recently been incorporated, had not generated any revenues other than customers' deposits and its facilities were under construction.

(b) Neither the Company nor its management had utilized the surgical embryo transplant method and this method of breeding cattle had not previously been employed in the United States to the extent contemplated by the Company.

(c) The ability of the Company to operate profitably would depend substantially on its ability to attract and retain a highly qualified and skilled staff.

(d) There could be no assurance that a sufficient market would develop for the embryo transplant method of breeding on the scale contemplated by the Company.

The "Risk" portion of the memorandum concluded with this statement:

"The securities offered hereby are highly speculative and should only be considered for purchase by sophisticated and experienced persons who are financially able to absorb the loss of their entire investment."

48. The Confidential Memorandum also included a one paragraph background sketch on Donald and Charles Coddling stating their ages and that they had worked in various capacities on their father's ranch until 1953 when they assumed management and control of the ranch. Information is given in regard to the size of the ranch and the cattle. It

further states:

"In addition, they constructed a bull evaluation center with a capacity of 600 bulls, a bull stud (for collecting semen) and semen laboratory with a capacity of 20 bulls, offices, a guest lodge and a 3,200-foot paved airstrip."

49. The Confidential Memorandum stated that the full cost of construction of the CES surgical building would be \$150,000, which included \$125,000 for the building itself, \$6,000 for adjacent pens, \$6,000 for fencing and \$13,000 for utility relocation and plumbing. The Confidential Memorandum further stated that the cost of all of the required laboratory and other equipment would be \$60,000.

50. The building cost as set forth in the Confidential Memorandum was based upon a construction cost estimate dated January 3, 1973 in the amount of \$133,410 which was prepared by John Maker, the Coddings' building contractor. The estimate was supplied by Maker to Charles Coddling in January 1973.

51. The Confidential Memorandum stated that as of June 30, 1973, of the \$210,000 planned cost for the building and equipment, \$133,695 had already been incurred for work completed and on hand, and additional costs of \$77,000 remained to be incurred for completing and equipping the facility.

52. The Coddings certified to plaintiffs that there had been no material changes in the figures recited in the preceding paragraph between June 30, 1973 and the closing on July 16, 1973.

53. The cost of the site building preparation work was not included in the building estimate prepared by Mr. Maker. Due to unusually heavy rain in the spring of 1973 and the resultant mud problems the cost of the site preparation work reached \$25,000. The record is inconclusive as to when the work was actually completed and the total cost incurred. However, the Court finds that it was substantially completed

prior to the issuance of the Confidential Memorandum in July. The evidence presented does not show what anticipated expense items were included in the \$125,000 figure for construction of the surgical building. However, in light of the estimate received by the Coddings from Maker in January the Court finds that the cost of site preparation was not included as an anticipated cost item in the Confidential Memorandum. Maker's estimate of January 3, 1973 covered a two-story structure, the first story of which was to be completed. Very little work on the second story was anticipated and the estimate did not include the cost of completing the partitioning, plumbing, electricity, and heating for the second story of the facility. The Court finds that the costs of completing the second story were not included in the building budget stated in the Confidential Memorandum. Architectural plans for the CES building, drawn by Messrs. Ebert and Cramer of Bartlesville, Oklahoma and dated March 12, 1973, showed a building with a fully partitioned second floor, and extensive plumbing, heating, air conditioning and electrical connections for the second floor. It was reasonable for the Coddings to direct the architects to prepare plans for a completed two-story structure regardless of when the second story was to be completed. The Court does not find that because the architectural plans included completion of a second story that it necessarily follows that the Coddings prior to July 11, 1973 intended to complete the second story at a predetermined time. The evidence shows that the second story was eventually completed in stages to meet subsequent needs which arose in furtherance of the project.

54. On June 22, 1973 Maker prepared an estimate in the amount of \$3,923 for the construction of a shed over the adjacent holding pens that was subsequently constructed in August or September of 1973. The cost of this shed was not

included in Maker's original estimate. This cost was not originally anticipated and therefore was not included in the estimates provided in the Confidential Memorandum.

55. In July of 1973 Maker prepared an estimate in the sum of \$4,277 for the construction of a carport. The materials were shipped on August 31, 1973. The Court finds that this cost was not included in the figures used in the Confidential Memorandum.

56. Concrete slabs were also required for the installation of mobile homes for housing CES employees near the new CES facility. There was no written estimate for this work. These slabs were poured in the summer of 1973. Their cost was not included in the figures used in the Confidential Memorandum.

57. The Court finds that as of the issuance of the Confidential Memorandum on July 11, 1973 the Coddings should have been aware of certain costs that had been or would be necessarily incurred in the furtherance of the project that were not originally anticipated or included in the figures shown in the Confidential Memorandum. The Court finds that the Coddings should have known that the amounts allocated in the Confidential Memorandum were insufficient to cover the additional cost. The Coddings did not inform the plaintiffs of the anticipated increased costs. The Court finds, however, that it was not shown, by a preponderance of the evidence that the Coddings intentionally failed to disclose the information in order to induce plaintiffs to invest; but rather that the Coddings acted negligently in failing to monitor the costs and in failing to appreciate the significance of the cost overruns in relationship to the information furnished investors. The Coddings unquestionably believed in the success of the project and paid insufficient attention to the expenditures required to effectuate their goals -- goals they had discussed with the Wertheim representatives

and which the Coddings believed were shared by Wertheim & Co.

58. The Confidential Memorandum budgeted \$6,000 for the construction of fencing and \$6,000 for the construction of adjacent pens for a total of \$12,000. The actual cost of the pens, chutes and fencing was \$72,000.

59. CES prepared a balance sheet dated July 31, 1973. The date of preparation is unknown. The balance sheet was not distributed or seen by plaintiffs until late 1973 or early 1974.

60. The balance sheet dated July 31, 1973 stated that \$188,000 in building and equipment expenses had been incurred and that \$133,000 was projected for the work remaining to be done.

61. Hanes visited the CES facility in August of 1973. During that visit he was not apprised of the extent of the cost overruns. He did not inquire as to whether the costs of the building and equipment were in keeping with initial projections, nor did he ask to see the company books or any financial statements, which were available for inspection. John Hanes met with Drs. Vincent and Elliott on October 4, 1973 in Chicago. The doctors, who had just resigned from CES, voiced doubt as to whether the success ratios furnished by Coddling to Hanes were accurate. On October 17, 1973 Hanes visited the CES facility at which time he met with Don Coddling and "most of the rest of the financial and CES staff." Don Coddling explained in some detail the method utilized to arrive at the statistics furnished, and the memorandum written by Hanes in regard to the visit indicates his general satisfaction with the progress of the project and the competency of the staff. Hanes expressed concern about the lack of current operational and financial reports and Coddling stated he was equally concerned since he had not been getting reports. Don Coddling had drawn up a series of

forms to be utilized in reporting, and indicated that more comprehensive financial reporting would be promptly initiated.

62. The first disclosure to plaintiffs of the extent of the expenditures for the building and equipment was made in a telephone call from Don Coddling to Hanes on December 3, 1973. In that conversation Coddling told Hanes that there would be a "cost overrun" on the building of \$170,000 to \$180,000. Hanes states in a memorandum dated December 3, 1973 that: "Original plans for a one-story structure had been changed to a two-story building early in construction; niceties (unspecified) had been added; a shed where donor cows are kept was not anticipated, but has been built; and ten steel pens inside had been 'quite expensive.'" Coddling promised to supply Hanes with more detailed financial information.

63. Under cover of a letter dated December 12, 1973, Don Coddling forwarded to Hanes a CES balance sheet dated as of November 30, 1973. This balance sheet showed current and projected expenditures for the building and equipment totaling \$401,000.

64. In his December 12, 1973 letter to Hanes, Coddling stated that CES now "had immediate cash needs" which he suggested alleviating by using a \$115,000 line of credit from CIT at an interest rate of 4-1/4 points above prime.

65. The CES balance sheet for October 31, 1974 shows the final total cost of the building as \$324,041. The total cost of the "property, plant and equipment" was \$516,434.

66. The modifications and additions made with respect to the CES facility were based upon the recommendations of the technical staff in order to improve the efficiency and success of the project. Don Coddling consulted with the Chief Veterinarian concerning requested changes. The Court finds that the Coddings believed that each modification or addition was warranted in order to achieve and maintain

success in the project.

67. Various factors dictated the need for as rapid completion of the facilities as possible. Numerous other transplant projects were beginning operation during this time. In addition, it was necessary to expedite the building completion to retain customers. John Hanes noted in a memorandum dated December 3, 1973 that some customers had withdrawn cows on the basis that CES had them a long time and had not been successful, in which case the company returned the deposits. CES was at that time endeavoring to achieve a higher level of production to "chew up the backlog."

68. The Confidential Memorandum stated that the projected unit costs were in part based on the assumption that an average of four of seven embryos would result in pregnancy in the recipient cows and that this figure was based on the Company's estimate of the Alberta Livestock experience. In May, 1973, Dr. Charles Vincent, a CES embryologist, examined the Alberta Livestock records and ascertained they had been achieving an overall average of 1.5 to 2 pregnancies per donor operation. Everyone associated with the CES operation, including Don Hanes, knew, however, that the CES facilities and procedures were to be more sophisticated and superior to those of Alberta Livestock and could therefore have reasonably anticipated a substantially greater success ratio.

69. In early December 1973, Wertheim & Co. became aware of the prior Coddling-Armour joint venture which culminated in litigation.

70. After John Hanes received the financial statements dated November 30, 1973, he spoke to Don Coddling about the cost overrun on the building and equipment and a subsequent meeting was arranged in San Juan, Puerto Rico on January 11, 1974.

71. At this meeting Hanes informed Coddling that the operation of the enterprise, and the results being achieved,

while below projections, did not seem to Hanes to be a cause for more than normally prudent concern. Hanes expressed that the matters of immediate concern were the cost overruns and that he could not understand how such overruns had occurred without any discussion with him. Hanes stated his own embarrassment at being unable to answer the elemental questions of his partners as to what was happening and why.

72. Hanes told Coddling that he felt the Coddings should put in \$240,000 in return for debentures and preferred stock. In a memorandum written by Hanes in regard to this meeting Hanes stated:

"If the Coddings are unwilling to put in the additional money, I believe we should take steps to unwind the situation and retrieve our original investment. My present feeling, however, is that this course of action will prove unnecessary."

73. Further financing by the Coddings was again discussed on January 23, 1974 when Hanes visited the ranch. Various methods of funding were discussed, but the Court does not find that a binding agreement was entered into.

74. The Court finds that although Hanes did propose that the Coddings invest further capital and believed that the investment would probably be made, no definite agreement was entered into between the parties and no contractual obligation was created.

75. In his memorandum of January 11, 1974, John Hanes, with knowledge of the Coddling-Armour venture, and of the cost overruns, made the following appraisal of the behavior and conduct of Don Coddling:

"I must say that I continue to feel -- perhaps naively, although I do not think so -- that we are not being dishonestly treated. Don Coddling is an extremely proud, and frequently pompous person, who is unable to recognize the limits of his own capabilities. He tends to think that things will go right because he wants them to; he underestimates problems; and he vastly overestimates his managerial abilities, which are very good in small matters, and still untutored in the operation of a total business."

76. On September 6, 1974 the Coddings loaned CES \$25,000, and on October 2, 1974 they loaned CES an additional \$10,000 for the purpose of providing operating funds.

77. Commencing in June, 1974, and for several months thereafter, MGAC, a partnership in which Harlan Manweiler was a general partner, incurred an account which eventually amounted to \$170,000 for services performed by CES for cattle owned by MGAC. CES did not receive payment of the MGAC account, which factor contributed greatly to the financial crisis of CES.

78. By the end of 1974, the Coddings, acting on behalf of Coddling Cattle Research, had accumulated a claim in excess of \$100,000 for various charges purportedly due from CES to Coddling Cattle Research under the Management Agreement.

79. By the end of 1974, the Coddings were in arrears on certain loan payments owing to the Bank of Oklahoma. That Bank was threatening suit against the Coddings.

80. At about the same time, Don Coddling informed plaintiffs that CES was so short of cash that it was about to miss a late December payroll.

81. Wertheim & Co. caused a petition to be filed in January, 1975, to place CES in involuntary Chapter X proceedings pursuant to the Bankruptcy Laws of the United States.

82. In the fall of 1975, Coddings lost their ranch through foreclosure and their cow herd was also sold.

83. The cost of the surgical procedure was about \$2,500 per pregnancy. It was therefore imperative that the cattle produced sell at higher price to afford a profit. When CES began operations, the exotic cattle market was very strong and was steady throughout 1973. However, by the summer of 1974 it had decreased substantially and in December 1974 the price of one exotic cow was less than the cost of the surgery.

## CONCLUSIONS OF LAW

### ALLEGATIONS OF SECURITIES VIOLATIONS

#### Section 10 and Rule 10b-5

Section 10 of the 1934 Act makes it "unlawful for any person . . . (b) [t]o use or employ in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j. In 1942, acting pursuant to the power conferred by § 10(b), the Commission promulgated Rule 10b-5, which provides:

"Employment of manipulative and deceptive devices.

"It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, "in connection with the purchase or sale of any security."

The existence of a private cause of action for violations of the statute and the Rule is now well established. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972).

Plaintiffs assert that defendants violated § 10(b) and Rule 10(b)-5 and made various material misrepresentations including:

- (1) That defendants intentionally understated the cost of the surgical building.

- (2) That defendants failed to disclose the prior Coddington-Armour venture.
- (3) That defendants intentionally led plaintiffs to believe the Coddingtons had paid for all the ranch assets.
- (4) That defendants misrepresented the cost that would be charged for feed.
- (5) That defendants intentionally misrepresented the organizational expenses and expenses of the offering.
- (6) That defendants failed to disclose conflicts of interest.

In order to recover under 10(b) the plaintiff must prove several factors. As stated in Straub v. Vaisman & Co. Inc., 540 F.2d 591 (3rd Cir. 1976):

"The plaintiff must prove knowledge by the defendant, intent to defraud, failure to disclose or misrepresentation, materiality of the information and, in some instances, reliance by the plaintiff."

In Dupuy v. Dupuy, 551 F.2d 1005 (5th Cir. 1977) the Court similarly held:

"The courts have established that with regard to private recovery for the violation of Rule 10b-5, a properly stated cause of action must establish the scienter of the defendant, the materiality of any misrepresentation or omission by the defendant, the extent of actual reliance by the plaintiff on the defendant's statements, and the justifiability of the reliance, frequently translated into a requirement of due diligence by the plaintiff."

Prior to Hochfelder, infra, the Tenth Circuit in Kerbs v. Fall River Industries, Inc. 502 F.2d 731 (10th Cir. 1974), stated: "Jurisdiction will be established and a case will be made out under the statute and the rule, if plaintiff is successful in proving (1) the use of the mails or instrumentalities of interstate commerce; (2) the purchase or sale of a security; and (3) the use of a manipulative or deceptive device."

Section 10(b) makes unlawful the use or employment of

"any manipulative or deceptive device or contrivance" in contravention of Commission rules. As stated by the Supreme Court in Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199, (1976):

"[T]he use of the words 'manipulative,' 'device,' and 'contrivance' -- . . . make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence. Use of the word 'manipulative' is especially significant. It is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."

The Supreme Court reviewed the Congressional Reports and determined that the congressional intent was to prevent "manipulative and deceptive practices which . . . fulfill no useful function" and to create private actions for damages stemming from "illicit practices," where the defendant has not acted in good faith. As stated by the Court:

"There is no indication that Congress intended anyone to be made liable for such practices unless he acted other than in good faith."

In a recent Tenth Circuit opinion, Hassig v. Pearson, No. 76-1537, (10th Cir. November 11, 1977) the Court stated: "It is further apparent that the plaintiff here had a burden to prove 'scienter'", and the Court stated that in Hochfelder the Supreme Court held "that proof must include knowing or 'intentional misconduct.'" In affirming a judgment for defendants, the Tenth Circuit stated: There was no evidence of any deceptive scheme by either of the defendants or together."

#### Jurisdiction

1. It is the determination of the Court that it has jurisdiction over the causes of action based upon § 10 of the Act and Rule 10b-5. As stated in Kerbs v. Fall River Industries, supra:

"To meet the jurisdictional requirements of § 10 of the Act and Rule 10b-5 the manipulative

or deceptive device or contrivance must be shown to have been accomplished by the use of some means or instrumentality of interstate commerce or of the mails, or of some facility of any national securities exchange. It is not required by the statute or the rule that the manipulative or deceptive device or contrivance be a part of or actually transmitted in the mails or instrumentality of interstate commerce; it is sufficient that such a device or contrivance be employed in connection with the use of the instruments of interstate commerce or the mails.

In the case at bar, meetings were conducted in both New York and Oklahoma in regard to securing the financial backing of Wertheim & Co. and in the preparation of the confidential memorandum. Both the telephone and United States mail were used to transmit information concerning the project.

Scienter

2. It is the determination of the Court that in the case at bar plaintiffs did not prove that defendants Don and Charles Coddling knowingly or intentionally made any misrepresentations or failed to disclose material facts. They did not devise or perpetrate a deceptive scheme to defraud the plaintiffs. Although the evidence shows that the Coddings were negligent in determining costs and informing plaintiffs in regard to expenditures and anticipated expenditures, and that it would have been better practice for them to have fully discussed the prior Coddling-Armour venture with potential investors, any omissions or misstatements were not knowingly or intentionally calculated to defraud the plaintiffs. No manipulative or deceptive device was proven. The evidence does not support a finding that the Coddings acted other than in good faith. The Court further notes that in Hassig v. Pearson, supra, the Court stated that § 10(b) and Rule 10(b)-5 do not cover disclosures of what the future might bring or speculation as to decisions which might be made.

The Court having determined that the required element of scienter has not been proven, recovery is precluded based solely on this finding. However, since evidence was presented

in regard to all the elements of a § 10(b) violation, the Court will consider these elements as well.

#### Reliance

The Supreme Court in Affiliated Ute Citizens of Utah v. United States, supra, considered the reliance element in the 10(b)-5 action. The Court held that where the deceit arose from nondisclosure, proof of reliance was unessential. As stated by the Tenth Circuit in Holdsworth v. Strong, 545 F.2d 687 (10th Cir. 1976): "[T]he effect of the Supreme Court's ruling is . . . not to eliminate reliance as an element but rather to recognize the difficulty of proving reliance in a failure to disclose. The proof of reliance or materiality is essential to the case where a positive misrepresentation is involved and justifiable reliance is the required element. Holdsworth v. Strong, supra at 695. Plaintiff must demonstrate reliance in the acts or inaction of the defendant. Financial Industrial Fund, Inc., v. McDonnell Douglas Corporation, 474 F.2d 514, 517, 521 (10th Cir.), cert. denied, 414 U.S. 874, 94 S.Ct. 155, 38 L.Ed.2d, 114 (1973). As stated by the Court in Holdsworth,

"Reliance does not flow from a showing of some abstract wrong. Plaintiff is obligated to prove his reliance and must prove that it is justifiable."

3. In the case at bar, Wertheim & Co. and the individual plaintiffs placed great reliance in John Hanes' knowledge and expertise in regard to the cattle market and investments in general. His recommendation to invest in CES was the most significant factor in their decisions to invest. This conclusion is supported by the fact that the majority made their decisions to invest prior to receiving the finalized Confidential Memorandum. Reliance was no doubt also placed in Wertheim & Co., Inc. to ask the pertinent questions and elicit all relevant information in regard to the preparation of the Confidential Memorandum. Whether John Hanes, on behalf of the investors, placed his reliance on the alleged

misrepresentations and omissions is more difficult to determine. As did the defendant in Nicewarner v. Bleavins, 244 F.Supp. 261 (D.Col. 1965) in which the Court denied recovery, it is clear Hanes "relied on his own estimate of the venture based on his own investigations." He was unquestionably enthusiastic about the venture, and had he known of the overruns as of the date the investment was made, which were not extensive at that time, it is doubtful he would have abandoned the project. John Hanes had confidence in the success-potential of the embryological transplant program and also in the integrity of the Coddings. Had Don Coddling discussed the prior Coddling-Armour venture with him and presented his side of the litigation, John Hanes would probably still have considered the CES program a good investment in light of his respect for the Coddings. This conclusion is supported by his statements after learning of the Coddling-Armour venture and the extent of the overruns to the effect that Wertheim was not being dishonestly treated by the Coddings.

#### Materiality

In Gilbert v. Nixon, 429 F.2d 348 (10th Cir. 1970) the Tenth Circuit stated the basic test of materiality under Section 10(b) and Rule 10(b)-5 to be whether a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question. The Court concluded that an omission or misrepresentation of fact was material if, considering its full context, including the subject matter and the relationship of the parties, the misrepresentation or omission was of a fact which, considering plaintiffs as reasonable or prudent investors, would affect or influence them in determining whether to invest. While expenditures above those stated in an offering and the fact that the initiators and managers of the investment opportunity had been involved in litigation

might influence a potential investor, when the "subject matter and relationship of the parties" is considered, the materiality of the asserted misrepresentations and omissions is more questionable. The investors' relationship and reliance on John Hanes and also on Wertheim & Co., Inc. in eliciting whatever information would be pertinent must therefore be considered. Even though the above factors diminish the materiality of the representations and omissions, it is the determination of the Court that they would influence a prudent investor and are therefore material.

#### Due Diligence

In Dupuy v. Dupuy, supra, the Court, based upon the Supreme Court's recognition of a 10(b)-5 private action as a device to compensate victims of stock fraud and thereby promote the public objectives of the Act, stated due diligence as a separate element in private 10(b)-5 cases. As stated by the Court, the diligence of the plaintiff in 10(b)-5 cases is judged subjectively and the role model for a plaintiff, then, is an investor with the attributes of the plaintiff, rather than the average investor.

However, the Courts in Straub v. Vaisman & Co., Inc., supra, and Holdsworth v. Strong, supra, recognized the limited applicability of the due diligence issue following the Supreme Court holding in Hochfelder that negligent conduct is not violative of 10(b) or 10(b)-5.

The Court in Straub v. Vaisman & Co., Inc., supra, noted that adoption of due diligence as a means of eligibility for recovery was a result of the Court's concern with the scope of litigation brought under Rule 10(b)-5. The courts also sought to deter investor carelessness in securities transactions. In those courts where the basis of a 10(b)-5 recovery began to broaden from intentional to negligent conduct, the concept of a plaintiff's contributory negligence was a natural progression. As noted by the

Straub Court, however:

"[S]ince Ernst & Ernst v. Hochfelder, supra, has limited actions to those in which defendant has a mental state 'embracing intent to deceive, manipulate or defraud,' the desirability of a 'contributory negligence' defense becomes less compelling."

The Court concluded that in Rule 10(b)-5 cases, where the defendant acts intentionally, the line should be drawn between the extremes of making the plaintiff's lack of diligence, regardless of degree, a complete bar or at the other limit -- completely irrelevant. Accordingly, the Court stated that such matters as fiduciary relationship, opportunity to detect the fraud, sophistication of the plaintiff, the existence of long standing business or personal relationships, and access to the relevant information are all worthy of consideration.

The Tenth Circuit in Holdsworth v. Strong, supra, also considered the balancing of scienter and due diligence.

"If the negligence standard were being applied it might be appropriate to allow due diligence to be exacted from the victim, but where liability of the defendant requires proof of intentional misconduct, the exaction of a due diligence standard from the plaintiff becomes irrational and unrelated. On the other hand, if a defendant is being subjected to liability even when he has not knowingly misrepresented but has been negligent, it is not unreasonable to hold a plaintiff to a similar standard."

In the case at bar, plaintiffs contend the Coddings were guilty of more than mere negligence, but in some instances plaintiffs appear to assert that if the Coddings should have known of the cost overruns and of their obligation to furnish revised cost figures or should have known of the materiality of the prior litigation, they should be held liable. As stated in Holdsworth v. Strong, supra:

"It is noteworthy that the courts which have most clearly charged defendant with constructive knowledge are, by and large, the same courts that have similarly charged plaintiff. There is a logic and balance in this."

If the Court were to consider defendant's constructive

knowledge, the Court should then also consider the diligence of plaintiffs. Where the due diligence standard is applied it requires insiders or sophisticated investors who have access to information to take positive steps to ascertain the facts for themselves. Holdsworth v. Strong, supra. Unquestionably, John Hanes and other Wertheim representatives investigated CES before investing. They were, however, extremely sophisticated investors and there is no indication that any information or cost figures known by the Coddings were withheld from them. Whatever information the Coddings had was there for the asking. The fact is that Wertheim & Co., Inc., acting in part on behalf of Wertheim & Co., simply did not inquire as to any prior litigation. If a sophisticated engineer deems it unimportant to inquire, then unsophisticated as the Coddings were, it can be understood why they did not disclose.

4. It is the determination of the Court that even if actual knowledge were not a requirement of a 10(b) or 10(b)-5 violation as previously held by the Court and the scienter requirement were relaxed, the balancing of due diligence would preclude recovery by plaintiffs.

#### Section 12(2)

Section 12(2) provides an express remedy for defrauded buyers as follows:

"Any person who offers or sells a security . . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction. . . ."

Unlike 10(b)-5 the substantive and procedural elements of

section 12(2) are expressly prescribed. While a buyer need not prove scienter or reliance, he must be in privity with his seller and must bring his suit within one year after the misstatement was or should have been discovered or in any case three years after the sale.

#### Jurisdiction

In Creswell-Keith, Inc. v. Willingham, 264 F.2d 76 (8th Cir. 1959) the Court stated the following in regard to the interstate commerce requirement:

"[W]e believe that Congress intended to make use of its full constitutional powers in making the remedy prescribed by section 12(2) available to victims of fraudulent sales; that the mails and interstate commerce provision was inserted only for jurisdictional purposes; that the application of the rules of grammar to the construction of the statute results in an interpretation of the statute to the effect that the remedy is available if the mails or interstate commerce is used in any manner in consummating the sale. . . ."

5. It is the determination of the Court that interstate commerce was utilized in the case at bar sufficient to sustain jurisdiction of the § 12(2) cause of action.

#### Statute of Limitations

Section 13 of the Act provides:

"No action shall be maintained to enforce any liability created under section [12(2)] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. . . ."

As recognized in Trussell v. United Underwriters, Ltd., 228 F.Supp. 757 (D.Col. 1964), in view of the fact that a plaintiff purchaser in a § 12(2) action has been relieved of the burden of alleging and proving either his own reliance or scienter on the part of the defendant seller, and in view of the further fact that a burden of proving his own non-negligence and lack of scienter has been placed on the defendant in a § 12(2) action (a burden unique to § 12(2), which is not carried over to actions arising under § 10(b) of the 1934 Act), a unique counter-balancing restriction has

been placed on a § 12(2) action (which is similarly not carried over to a § 10(b) action). This counter-balancing restriction is provided by § 13. In view of the greatly diminished burden of proof imposed on the plaintiff in a § 12(2) action it was felt appropriate to require plaintiffs to assert their claims within a short period of time.

The one-year limitation of Section 13 does not depend wholly on the subjective judgment of the buyer. Instead it must be tested by the objective standard of reasonable diligence on the part of the buyer in making discovery. Johns Hopkins University v. Hutton, 422 F.2d 1124 (4th Cir. 1970).

In the case at bar, on December 3, 1973 John Hanes learned there was a cost overrun on the building of \$170,000 to \$180,000 and that a shed for donor cows which had not been anticipated and steel pens had been constructed. Wertheim representatives also learned in early December of the prior Coddington-Armour venture. Based upon this information and with the exercise of due diligence in making discovery, Wertheim & Co. and the investors they represented could have discovered the information which forms the basis of this litigation. This action was not brought until January 4, 1975, more than one year after the information was or could have been discovered.

Plaintiffs contend that defendants waived their statute of limitations defense because they did not raise it prior to trial. However, evidence relevant to the issue of statute of limitations was presented and not objected to at trial. The Court will therefore consider this defense. Bucky v. Sebo, 208 F.2d 304 (2nd Cir. 1953).

#### Privity of Parties

As previously stated, § 12(2) provides one who makes an untrue statement is liable to the person purchasing such security. In the case at bar, none of the plaintiffs purchased

their securities directly from Don or Charles Coddling. Most plaintiffs received them from Wertheim, Inc. The offering was made by Coddling Embryological Sciences, Inc., not Don and Charles Coddling.

6. It is the determination of the Court that plaintiffs' cause of action based upon § 12(2) is barred by the statute of limitations provided in § 13 and also lack of privity of the parties.

Section 17(a)

Section 17(a) provides:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --

"(1) to employ any device, scheme or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Defendant asserts that plaintiffs have waived their alleged cause of action based upon § 17(a). The Court does not find from a review of the record a clear or unequivocal waiver in regard to § 17(a), and the Court will therefore consider whether a cause of action has been proven in regard to § 17(a).

Section 17(a) is interrelated and in part overlaps certain provisions of Rule 10(b)-5 and § 12(2). Plaintiff states by way of brief that although they assert a private right of action under § 17(a): "In any event, the argument is academic because of the overlap between that section and the broader Rule 10(b)-5 which brings within its purview all of the conduct which plaintiffs have alleged has also violated § 17(a)." Rule 17(a) of the 1933 Act only made it unlawful

to defraud or deceive a purchaser of securities and no prohibition against fraud on a seller existed. Consequently the SEC adopted Rule 10(b)-5 and indicated in the press release accompanying it, SEC Release No. 3230, May 21, 1942, that the Commission was attempting only to make the same prohibitions contained in 17(a) of the 1933 Act applicable to purchasers as well as to sellers. Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2nd Cir. 1952).

In Lanza v. Drexel, 479 F.2d 1277 (2nd Cir. 1973) the Court noted that Judge Frankel considered that the requirements for a private cause of action under § 17(a) were identical to those under 10(b)-5 and the circuit did likewise.

The Court in Trussell v. United Underwriters, Ltd., supra, stated that "any violation of Section 17(a) may bring about the imposition of injunctive or criminal sanctions sought by the SEC; but only violation of 17(a)(2) appears to relate expressly to the civil remedy created by Section 12(2)."

"Even if a seller of securities merely promulgates misstatements or half-truths negligently he violates § 17(a)(2), however, and creates a situation in which the purchaser could avail himself of that which has been called the "special right to recover for misrepresentation" created by § 12(2). Trussell at 767.

However, as noted by the Court in Trussell, the "special right to recover for misrepresentation" created by 12(2) has a counter-balancing restriction in § 13's statute of limitation. If the civil remedy of § 17(a) is created by § 12(2), the statute of limitations would logically also be applicable.

7. It is the determination of the Court that plaintiff may not recover based upon § 17(a) for the reasons above given in regard to § 12(2) and 10(b)-5.

#### COMMON LAW FRAUD

The essential elements of fraud are a material false representation, made with knowledge of its falsity or

recklessly without knowledge of its truth or falsity, as a positive assertion, with the intention that it be acted upon by another, who does act in reliance thereon, to his injury. Varn v. Maloney, 516 P.2d 1328 (Okla. 1973). In addition, concealment of material facts which one is bound under the circumstances to disclose may constitute fraud. Varn v. Maloney, supra.

8. It is the determination of the Court that the defendants did not make any material fact representations with knowledge or recklessly with the intention that they be acted upon by another. The Coddings believed that Wertheim & Co. was investing based upon their investigation and Wertheim's enthusiasm for the venture. The Coddings did not intend that Wertheim & Co. or the investors Wertheim located invest based upon information in the Confidential Memorandum. Nor did defendants act with knowledge or recklessly in regard to any failure to disclose.

BREACH OF COMMON LAW OBLIGATIONS  
OF TRUST AND FIDUCIARY DUTY

Plaintiffs contend that the manner in which the Coddings managed CES, including the expenditure of funds, constituted a breach of the Management Agreement dated April 1, 1973, and a breach of common law obligations of trust and fiduciary duty.

In Financial Industrial Fund, Inc. v. McDonnell Douglas Corp., 474 F.2d 514 (10th Cir. 1973) the Court considered the exercise of business judgment in a case involving 10(b)-5 allegations. The Court discussed the "business judgment" rule, noting that although it was not directly applicable, the reasons for it were worth considering. As stated by the Court:

"The business judgment rule has been expressed in a variety of ways but it may be stated that the directors and officers of a corporation will not be held liable for errors or mistakes

in judgment, pertaining to law or fact, when they have acted on a matter calling for the exercise of their judgment or discretion, when they have used such judgment and have acted in good faith. The reason for the rule is stated to be that in order to make the corporation function effectively, those having management responsibility must have the freedom to make in good faith the many necessary decisions quickly and finally without the impairment of having to be liable for an honest error in judgment."

9. Although in many respects the Coddings did an insufficient job in fulfilling their managerial function, the actions they took and the expenses they incurred were done in the good faith belief that they were both necessary and in the long range best interests of the project. It is therefore the determination of the Court that defendants are not liable for breach of any trust or fiduciary duty.

#### Breach of Contract -- Derivative Suit

##### Express Contract

10. It is the determination of the Court that there was no express contract entered into between the Coddings and John Hanes or Wertheim in regard to the payment by the Coddings of \$240,000 to CES.

##### Implied Contract

In Kirk v. United States, 451 F.2d 690 (10th Cir. 1971) the Tenth Circuit stated:

"Professor Corbin has said that an implied contract includes those contracts actually intended and tacitly understood. 3 Corbin on Contracts § 563, 1960 Ed. Thus, then, there must be either circumstances or conduct from which it can be inferred there was a meeting of the minds."

11. It is the determination of the Court that there was no implied contract in regard to the payment of \$240,000 by the Coddings. Although it was proposed and discussed the Court cannot infer from the evidence that there was an actual meeting of the minds in regard to this matter.

#### CONCLUSION

Those who are willing to venture into new fields, to utilize new methods, different approaches, innovative procedures,

do so with the hope of realizing a dream, of being responsible for improvement, or to make substantial financial gains. These potential rewards to the innovator are counterbalanced by the potential of disaster when the unproven idea fails. Many factors can contribute to failure, such as poor management, outside circumstances, or the decline in demand for the improvement. In the case at bar, all of the above factors played a role in causing the loss of not only plaintiff's investment, but the Coddings' dreams and assets as well. MGAC ran up a \$200,000 bill which it failed to pay. The cattle market dropped to the point that an embryological transplant operation cost more to perform than the amount a calf was worth on the market. As to the various questionable management decisions made by the Coddings, the Court agrees with John Hanes' assessment of the situation in his memorandum written after learning of the Coddington-Armour venture and the cost overruns to the effect that: "Don Coddington is an extremely proud . . . person who is unable to recognize the limits of his own capabilities. He tends to think that things will go right because he wants them to."

It can be said the Coddings were not practical in regard to expenditures, that they dreamed on too large a scale and failed to keep investors informed as the project developed, but the Court cannot say, based upon the evidence, that the Coddings acted in bad faith, with intent to defraud.

Judgment shall be entered in favor of defendants herein.

It is so Ordered this 15<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

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

QUEEN VICTORIA BYERS, on behalf )  
of herself and all others )  
similarly situated, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
SOUTHWESTERN BELL TELEPHONE CO., )  
a corporation, )  
 )  
LINDA RUBY, individually and in )  
her capacity as an employee of )  
defendant corporation, )  
 )  
ANNABELLE MATTHEWS, individually )  
and in her capacity as an employee )  
of defendant corporation, )  
 )  
ROBERTA HAFF, individually and in )  
her capacity as an employee of )  
defendant corporation, )  
 )  
CONNIE WILSON, individually and )  
in her capacity as an employee )  
of defendant corporation, )  
 )  
BERNIE WILLIAMS, individually and )  
in his capacity as an employee of )  
defendant corporation, )  
 )  
Defendants. )

No. 76-C-556

FILED

MAY 12 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT

The above styled and numbered case came on to be tried before the Court sitting without a jury on the 19th day of April, 1978. The plaintiff appeared in person, pro se, and the defendants appeared through their counsel, Nancy L. Coats. The plaintiff presented her case and rested. The defendants moved for judgment asserting that the plaintiff had failed to sustain her burden of proof.

The Court, having heard all the evidence in the case presented by the plaintiff, giving to that evidence all reasonable inferences to be drawn therefrom, having carefully examined all documents admitted into evidence and having considered the law applicable to this case, finds that the

plaintiff has wholly failed to sustain her burden of proof and that the allegations of the complaint are wholly unsupported by facts and evidence.

IT IS, THEREFORE, THE JUDGMENT of the Court that the defendants' motion be sustained, and judgment is hereby entered for the defendants, Southwestern Bell Telephone Company, a corporation, and the individual defendants, Linda Ruby, Annabelle Matthews, Roberta Haff, Connie Wilson and Bernie Williams, as employees of the co-defendant, and against the plaintiff, Queen Victoria Byers.

ENTERED THIS 12<sup>th</sup> day of May, 1978.

(Signed) H. Dale Cook

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UNITED STATES DISTRICT JUDGE

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

FILED

EARL WILSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JOSEPH A. CALIFANO, JR., )  
 Secretary of Health, )  
 Education & Welfare, )  
 )  
 Defendant. )

No. 77-C-235-C

MAY 12 1978 *ph*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT  
AND  
ORDER OF REMAND

This is an action brought by the plaintiff, Earl Wilson, to review the final determination of the defendant, Secretary of the Department of Health, Education and Welfare (Secretary), denying disability benefits under Sections 216(i) and 223 of the Social Security Act, as amended (42 U.S.C. §§ 416(i) and 423) and supplemental security income benefits under Sections 1611 and 1614(a) of the Social Security Act, as amended (42 U.S.C. §§ 1382 and 1382c(a)). Plaintiff asks the Court to set aside the decision of the Secretary, or, in the alternative, to remand the case to permit the Secretary to consider additional evidence.

The Court in its review has been granted power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for a rehearing period. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. In this action, the plaintiff alleges the record does not support the determination of the Secretary by substantial evidence. In the alternative, plaintiff asks the Court to remand this action to the Secretary for the taking of additional evidence.

This matter was first heard, on record, by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration whose written decision was issued January 21, 1977, in which it was found that the claimant was entitled to neither a period of disability or to disability insurance benefits under §§ 216(i) and 223, respectively, of the Social Security Act, as amended, nor supplemental security income benefits under §§ 1611 and 1614(a) of the Social Security Act, as amended. Thereafter, the decision of the Administrative Law Judge denying permanent disability was appealed to the Appeals Council of the Bureau of Hearings and Appeals which Council on May 11, 1977 issued its Order finding that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the plaintiff. Thus the decision of the Administrative Law Judge became the final decision of the Secretary of the Department of Health, Education and Welfare.

Plaintiff's eligibility for disability benefits under 42 U.S.C. §§ 416(i) and 423 expired on June 30, 1976. The Court therefore cannot consider any new evidence of a disability which occurred subsequent to that date, and its review is of the record as it existed at the time of the administrative hearing. Judicial review of the Secretary's denial of Social security disability benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo. Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as ". . . such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion, and it must be based on the record as a whole." Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300, 59 S.Ct. 501, 83 L.Ed. 660 (1939), the Court, interpreting what constitutes substantial evidence, stated:

"It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Atteberry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957).

The transcript of the entire record of proceedings relating to the application of the plaintiff, Earl Wilson, and filed of record in this cause has been carefully reviewed. The principal issue presented herein is whether the record, by substantial evidence, sustains the finding that the plaintiff is not under a disability as defined by the Social Security Act at any time prior to the date of that decision.

Section 223(d)(1) of the Social Security Act defines disability, as pertinent to the matters here in issue, as the "inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." Section 223(d)(2)(A) further provides that "an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any

kind of substantial gainful work which exists in the national economy, regardless of whether he would be hired if he applied for work." The term "disability" is further defined in Section 223(d)(3), which provides that "[f]or purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." If the claimant sustains the burden of showing that he is incapable of working at his former job, the burden shifts to the Secretary to show that there is another kind of substantial gainful activity in the national economy that the claimant could perform. Russell v. Secretary of Health, Education & Welfare, 540 F.2d 353 (8th Cir. 1976); McLamore v. Weinberger, 538 F.2d 572 (4th Cir. 1976); Noe v. Weinberger, 512 F.2d 588 (6th Cir. 1975).

A review of the record reveals that plaintiff was examined by at least five physicians in connection with his claimed disability. Dr. Kenneth Craig performed both physical examination and laboratory tests of the plaintiff and concluded:

"I feel that any work which involves stooping for any prolonged length of time may be difficult for the patient to perform. I feel though that he could carry out his usual occupation."

Dr. Lawrence A. Jacobs also examined the plaintiff and reported ". . . that this patient would be unable to fulfill the requirements of his previous occupation at the present time." The plaintiff was referred to Dr. James C. Walker, who concluded, following his examination:

"As to his disability, I feel this is restricted only to any occupational pursuit which would involve stooping and raising with the legs. The very slight degree and very slight discomfort found in the right shoulder is seldom exercised and I would not see that it would impose any disability."

Dr. Vern O. Laing concluded his report of examination with the following remarks:

"With the evidence at hand, it would appear he is disabled from his usual occupation as a painter because of his unwillingness to bend and raise the right arm above the horizontal. It is obvious he would have difficulty climbing the ladders and raising the paint brush with the right hand to apply paint. It is unlikely that treatment either presently or in the future will increase the functionability any great extent."

The only examining physician who found a total disability was Dr. Paul N. Atkins, Jr., who concluded:

". . . [I]n my opinion as a result of the progress of this arthritis in the lumbar spine and both knees, it is my opinion that Mr. Earl Wilson is totally permanently disabled as far as working at anytime in the future."

The medical evidence clearly established that the plaintiff is incapable of working at his former job as a painter. To meet his burden of showing other substantial gainful activity, the defendant relied upon the testimony of Vivian Evans, a vocational expert. Mrs. Evans considered all of the relevant medical evidence and the plaintiff's subjective complaints and concluded that the plaintiff was capable of performing the following jobs: self-service gas station attendant, parking lot attendant, security guard, house parent, bench assembly, janitorial service, laundry folder, insurance adjuster and toll-gate attendant. Mrs. Evans also testified as to the number of jobs of those types which exist in the Tulsa area.

Plaintiff's primary contention appears to be that the Administrative Law Judge did not adequately consider his subjective complaints of pain. A claimant's "[s]ubjective symptoms must be evaluated with due consideration for credibility, motivation, and medical evidence of impairment," Dvorak v. Celebrezze, 345 F.2d 894 (10th Cir. 1965), and as a fact finder, the Administrative Law Judge has a right to reject a claimant's testimony entirely, so long as his findings indicate that it was considered. Baerga v. Richardson, 500 F.2d 309 (3rd Cir. 1974); Good v. Weinberger, 389 F.Supp.

350 (W.D.Pa. 1975). In this case, the findings of the Administrative Law Judge include the following:

"5. Claimant alleges that he is disabled because of severe and debilitating pain.

6. Claimant does not demonstrate severe and debilitating pain, which would prevent him from engaging in light and sedentary occupations, which would be consistent with his impairments, education, and former employment."

Clearly, plaintiff's subjective symptoms were considered.

The Court finds that the determination of the Appeals council to the effect that the plaintiff is not under a disability under 42 U.S.C. §§ 416(i) and 423 is supported by substantial evidence and should be affirmed.

Plaintiff also filed a claim for supplemental security income benefits under 42 U.S.C. §§ 1382 and 1382c(a). There are no insurance requirements under those statutes, and evidence of a disability which occurred subsequent to June 30, 1976 can be considered. In that regard, plaintiff has submitted to the Court a letter from Dr. Lawrence A. Jacobs, who previously examined the plaintiff and reported that he was disabled only from performing his occupation as a painter. In his letter, dated January 13, 1978, Dr. Jacobs reveals that

"Mr. Wilson has had a very significant clinical change with respect to his rheumatic problems and there seems to be no question at the present time, but that a diagnosis of Rheumatoid Arthritis can be confirmed. . . . Mr. Wilson returns today with an entirely new finding, which completely changes our perspective from a diagnostic point of view."

Title 42 U.S.C. § 405(g) provides that the Court may remand this case to the Secretary and order additional evidence to be taken "on good cause shown." "'Good cause' consists of something more than mere 'new evidence.' It must also be relevant and probative." Hess v. Weinberger, 363 F.Supp. 262 267 (E.D. Penn. 1973). The burden of showing the existence of good cause is upon the moving party, Long v. Richardson, 334 F.Supp. 305 (W.D. Va. 1971), and

remand should not be ordered ". . . where the Secretary's findings are not based upon vague, ambiguous or otherwise deficient evidence." Schad v. Finch, 303 F.Supp. 595, 599 (W.D. Penn. 1969). The letter from Dr. Jacobs indicates that there may well have been a substantial change in plaintiff's physical condition since action was last taken by the Appeals Council. Such a change would certainly be relevant and probative to a determination of whether plaintiff is under a disability at this time. In his brief in response to plaintiff's motion to remand, the defendant attached an undated memorandum from the Chief of the Civil Actions Branch of the Bureau of Hearings and Appeals. That memorandum concludes with the following language in reference to plaintiff's claim for supplemental security income benefits:

"The Appeals Council certainly could not establish entitlement on the existing evidence. If the Court wants to remand the case for further medical development to clarify his current status, the Appeals Council would not oppose a remand."

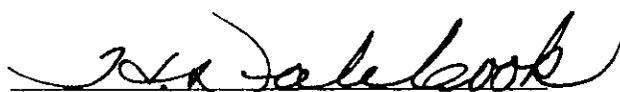
The Court finds that the plaintiff has established "good cause" for a remand of his claim for supplemental security income benefits.

For the foregoing reasons,

As to plaintiff's claim for disability benefits under 42 U.S.C. §§ 416(i) and 423, judgment is hereby entered on behalf of the defendant.

As to plaintiff's claim for supplemental security income benefits under 42 U.S.C. §§ 1382 and 1382c(a), that portion of this case is hereby remanded to the Secretary for the taking of additional evidence.

It is so Ordered this 12<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

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

FILED

MAY 12 1978 (10)

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

EQUAL EMPLOYMENT OPPORTUNITY )  
COMMISSION, )  
 )  
Plaintiff, )  
 )  
and )  
 )  
MARCUS J. RUSSELL, )  
 )  
Intervenor, )  
 )  
vs. )  
 )  
BRADEN STEEL CORPORATION, )  
 )  
Defendant. )

No. 76-C-627-B ✓

CONSENT DECREE

Plaintiff, Equal Employment Opportunity Commission (hereinafter the "Commission"), filed Civil Action No.76-C-627-B on December 16, 1976, alleging that Defendant, Braden Steel Corporation (hereinafter "Braden Steel"), utilized and maintained employment practices at its Tulsa, Oklahoma facility discriminating against blacks with respect to hiring over-the-road truck drivers, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., (hereinafter "Title VII"). Defendant Braden Steel answered the Complaint of the Commission, denying all allegations of discrimination. Marcus J. Russell, the Charging Party whose charge (EEOC Charge No. 063-51204-6) serves as the basis for this lawsuit (hereinafter "Russell"), was permitted to intervene in this action on February 21, 1978.

WHEREAS, all parties are desirous of implementing a solution to the subject matter of this action without the necessity of contested litigation; the Court having jurisdiction of the parties and the subject matter of this action pursuant to Title VII; and the parties having agreed to the entry of this Consent Decree without an admission of any violation of Title VII and it appearing to the Court that the parties have waived

hearing and the entry of findings of fact and conclusions of law; now therefore,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

I. GENERAL PROVISIONS

A. Defendant, Braden Steel, its officers, agents, employees, successors and all persons in active concert or participation with them, are enjoined from engaging in any act or practice relating to employment opportunity with respect to hiring which has the purpose of discriminating against any individual on the basis of race. Braden Steel shall not limit, segregate, classify or make any employment decision with respect to hiring on the basis of race, or in any way which would deprive any individual of employment opportunities with respect to hiring or otherwise adversely affect his or her status as a prospective employee because of such individual's race.

B. The specific terms of this Consent Decree are designed for all Braden Steel operations within the Tulsa, Oklahoma Standard Metropolitan Statistical Area (SMSA).

C. This Consent Decree resolves all issues between the Commission, Braden Steel and Russell relating to alleged practices, acts and omissions of discrimination by Braden Steel which are raised by the Commission's Complaint and Russell's Petition in Intervention filed herein, as well as any effects of such alleged practices, acts and omissions, and, with respect to such alleged practices, acts and omissions, compliance with this Consent Decree shall be deemed to be compliance with Title VII and shall be deemed to satisfy any requirements for affirmative action by Braden Steel with respect to those specific issues raised in this lawsuit. This Consent Decree is final and shall be considered binding among the signatories and their successors and all those represented by the signatories and is

final and binding on all other persons to whom this Court determines this Consent Decree should be applicable. The doctrines of res judicata and collateral estoppel shall apply to the Commission and Russell with respect to all issues of law and fact and matters of relief within the scope of the Complaint filed by the Commission, the Complaint in Intervention filed by Russell, or this Consent Decree.

D. Each party shall bear its own expenses and costs, including attorney's fees, incurred in this litigation.

E. This Consent Decree shall include and the Court finds the persons to be covered by this Consent Decree with respect to prospective relief are any past, present and future applicants for employment as over-the-road truck drivers with Braden Steel dating back to July 2, 1965. With respect to specific relief detailed in Section IV of this Consent Decree, the Court finds that the only person to be covered is the Intervenor, Marcus J. Russell.

## II. PROSPECTIVE RELIEF

A. In its attempts to achieve a working force of over-the-road truck drivers representative of the relevant labor market in the area in which it operates, Braden Steel shall make a good faith effort to achieve the prospective relief as indicated below. Whenever a party establishes the failure to meet a goal, it shall be Braden Steel's burden to demonstrate its good faith. In evaluating the good faith effort of Braden Steel, the following factors should be taken into account:

- 1) The general economic and employment conditions in the community;
- 2) The volume of work being performed by Braden Steel;
- 3) The extent to which minorities avail themselves of the opportunities offered by Braden Steel as over-the-road truck drivers; and

4) Such other factors as the Court or the parties by agreement may deem relevant.

Braden Steel shall not be required to hire, promote, or retain unqualified employees, or to discharge any employee for the purpose of implementing any of the provisions of this Consent Decree.

B. Relief at Braden Steel's Tulsa, Oklahoma facility has been established as follows:

The percentage of blacks in the Tulsa, Oklahoma Standard Metropolitan Statistical Area (SMSA) is 6.5% of the total work force. Therefore, Braden Steel shall make a good faith effort to insure that the percentage of black over-the-road truck drivers at Braden Steel at all times subsequent to ninety (90) days after the entry of this Consent Decree shall equal at least 6.5% of the total number of over-the-road truck drivers employed by Braden Steel. Additionally, Braden Steel will endeavor to seek out and hire blacks into over-the-road truck driver positions and will use all available means to affirmatively locate qualified black employees for over-the-road truck driving positions. In seeking out qualified black over-the-road truck drivers, first consideration will be given to those black employees already working in other capacities at Braden Steel at the time an over-the-road truck driver vacancy occurs.

Braden Steel's compliance status shall not be judged solely by whether or not it reached its goals and met its timetables and implementing ratio. Rather, Braden Steel's compliance shall be determined by reviewing the extent of its good faith efforts made toward compliance.

### III. RECRUITING

A. In order to ensure that Braden Steel's policy of nondiscriminatory hiring for over-the-road truck drivers is communicated to minority groups and individuals, Braden Steel will undertake the following:

To notify the employment counselors in the high schools, trade schools and junior colleges in the Tulsa, Oklahoma SMSA that Braden Steel maintains a nondiscriminatory hiring policy and that applicants for employment will be considered without regard to race, color, national origin or sex.

B. Braden Steel will contact agencies in the Tulsa, Oklahoma SMSA which are potential sources of minority job applicants and will continue active regular communications with them in order to procure a source of qualified black applicants for employment in over-the-road truck driver positions. If these communications fail to develop a potential applicant pool of reasonable size after the first contact, or if a reasonable number of over-the-road truck driver applicants is not continuously supplied through such communications for job opportunities, Braden Steel may discontinue communications with particular agencies and substitute other agencies and/or other media having general circulation in the area of Tulsa, Oklahoma SMSA provided that the Commission has approved the discontinuation of communications with a particular agency and has approved all substitutions.

C. Both communications with agencies and media advertising shall be designed to inform members of the black community and to notify potential black applicants that job opportunities in over-the-road truck driver positions are, or shortly will become available so that they can make application for such openings.

D. Braden Steel shall be permitted to employ the best qualified applicant for the job opening without regard to race.

Braden Steel may require applicants for over-the-road truck driver positions to be qualified to perform the job; and Braden Steel may require all applicants for such positions to possess qualifications which meet the minimum criteria contained in the current collective bargaining agreement, to-wit:

- 1) Must be at least 21 years of age;
- 2) Must have passed and be able to pass a physical examination annually or at a more frequent interval if requested to do so by Braden Steel;
- 3) Must have valid Oklahoma Commercial Chauffeurs License;
- 4) Must have passed safety and driving tests required, and shall operate at all times in accordance with ICC and DOT Regulations and in conformance with prevailing state and local safety driving laws; and
- 5) Must have five (5) years experience or be a graduate of an approved Truck Driving School.

E. Braden Steel will strongly encourage its black employees to refer qualified over-the-road truck driver applicants for employment.

F. Braden Steel will post an announcement in a conspicuous place at its Tulsa, Oklahoma facility each time an over-the-road truck driver position becomes available in order to give its employees an opportunity to apply for that vacant position.

G. It is the purpose of this Section to permit flexibility in Braden Steel's efforts to notify the black community of job opportunities for over-the-road truck drivers. Except where specifically provided to the contrary herein, the Company is not required to use newspaper or other means of advertising unless such advertising is necessary to accomplish

the objectives of giving broad notice to the black community of job opportunities for over-the-road truck drivers.

#### IV. SPECIFIC RELIEF

A. In order to resolve any claims of alleged specific discrimination based on race against Braden Steel, the following amount of back pay shall be paid by Braden Steel to the individual listed below:

Intervenor, Marcus J. Russell, 2609 East 29th Place North, Tulsa, Oklahoma 74110, will receive the amount of \$2,000.00, which amount includes interest at the rate of six percent per annum dating from May 7, 1974, the date Russell made application for employment as an over-the-road truck driver with Braden Steel.

The amount of back pay due to Russell shall be delivered to him by Braden Steel within sixty (60) days of the date of entry of this Consent Decree.

B. Russell releases any claims against or liability of Braden Steel, its officers, directors, agents, employees, successors and assigns, resulting from any alleged violations based on race, color, sex, or national origin, occurring on or before the date of entry of this Consent Decree, of any equal employment opportunity laws, ordinances, regulations, or orders, including but not limited to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., the Civil Rights Act of 1866, 42 U.S.C. § 1981 et seq., Executive Order 11246, as amended, the United States Constitution, the duty of fair representation under the Labor Management Relations Act, 29 U.S.C. § 151 et seq., and any other applicable federal, state or local constitutional or statutory provisions, orders or regulations. Russell is also barred from recovering any damages suffered at any time after the date of entry of this Consent

Decree by reason of continued effects of any such discriminatory acts which occurred on or before the date of entry of this Consent Decree.

C. Braden Steel will offer employment to Russell as an over-the-road truck driver the first time such position becomes vacant after the date of entry of this Consent Decree. When Russell is hired, he shall receive no seniority, front pay or any other benefits except those customarily received by all new employees of Braden Steel. Russell will receive, from his date of hire, all wages and benefits established by the current collective bargaining agreement.

Russell shall keep the personnel office of Braden Steel advised of his current mailing address. Braden Steel shall give Russell written notice of the first job opening for an over-the-road truck driver at least five (5) days prior to the date Russell is required to report for work. If Russell does not accept or act upon the first offer made hereunder or if he does not meet the qualifications (set forth at Section III.D. of this Consent Decree) required for employment as an over-the-road truck driver, Braden Steel shall have no further responsibility to offer subsequent positions to Russell; provided however, that Russell may re-apply for a position as an over-the-road truck driver and Braden Steel may hire him for any subsequent opening if it feels that he is the best qualified applicant for the position.

It is understood by the parties that some of Braden Steel's over-the-road truck drivers are currently on lay-off status and that pursuant to the current collective bargaining agreement Braden Steel must give such drivers an opportunity to resume full-time activities as over-the-road truck drivers before it can offer employment to Russell.

Braden Steel shall not take any action which would deprive Russell of equal employment opportunities or otherwise adversely affect his status as an employee because of his race (black) or because of filing his charge of discrimination with the Commission.

## V. REPORTING

A. As part of review of compliance with this Consent Decree, the Commission may require written reports concerning compliance and may, where relevant to this Consent Decree, inspect the premises, examine witnesses upon reasonable notice and examine and copy documents if reasonable notice is given. Braden Steel shall submit all required reports in writing to the Assistant General Counsel, Denver Regional Office of General Counsel, Equal Employment Opportunity Commission, 1531 Stout Street, 6th Floor, Denver, Colorado 80202 or the Commission Office which is monitoring the Consent Decree at the time any report is due.

These reports will describe the manner in which the undertakings herein are being carried out. The first report shall be submitted not later than sixty (60) days from the date of this Consent Decree and will reflect the awarding of back pay to Russell as provided in this Consent Decree. The second report shall be submitted not later than one hundred twenty (120) days from the date of this Consent Decree and will detail the efforts being made by Braden Steel to comply with the affirmative requirements of Sections II and III of this Decree and will detail the results of those efforts. Subsequent reports shall be submitted to the Commission every twelve (12) months until the expiration of this Consent Decree. Any party may have access to these reports upon reasonable notice. These reports shall include all data pertinent to this Consent Decree and shall specify any over-the-road truck driver vacancy, and the name and race of each person applying for, or filling that vacancy as well as a detailed description of the manner in which applicants were sought and selected for the vacancy. Each report shall list the name and race of each current over-the-road truck driver employed by Braden Steel.

For each person applying for, or filling the vacancy, the report shall state that person's previous position, that person's salary in his or her previous position and salary in

the new position.

B. The Commission shall have thirty (30) days to submit their comments or objections to the reports to Braden Steel who shall review such comments or objections and within thirty (30) days thereafter submit its response to the Commission. Any unresolved objection to a report shall be resolved by the Court upon the motion of any party.

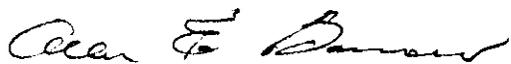
C. As part of Braden Steel's record keeping with regard to applicants for employment, all persons evidencing a desire to apply for employment as over-the-road truck drivers with Braden Steel and who are at least 21 years old, will be given the opportunity to complete an application form and all application forms will be retained by Braden Steel for at least three (3) years.

#### VI. ENFORCEMENT PROVISION

A. Any dispute concerning compliance with this Consent Decree shall be resolved by the Court upon the motion of any party. The only issue in such a proceeding shall be compliance with the Consent Decree, not liability under Title VII of the Civil Rights Act of 1964, as amended.

B. The Court retains jurisdiction of this matter and shall order any further relief as may be appropriate to effectuate the provisions of this Consent Decree. Any time after three (3) years from the date of this Consent Decree, Braden Steel may move for dissolution of this Decree in whole or in part and unless the Commission shows good cause otherwise, the Decree shall be dissolved in whole or in part at that time.

The Clerk of the Court is directed to enter this Decree, done this 12<sup>th</sup> day of May, 1978 at Tulsa, Oklahoma.



ALLEN E. BARROW  
Chief Judge  
United States District Court  
for the Northern District  
of Oklahoma

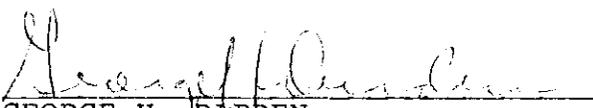
APPROVED AS TO FORM AND SUBSTANCE AND ENTRY REQUESTED.

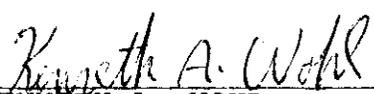
FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BY:

  
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General Counsel

  
WILLIAM L. ROBINSON  
Associate General Counsel

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COMMISSION  
Office of General Counsel  
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Washington, D.C. 20506

  
GEORGE H. DARDEN  
Assistant General Counsel

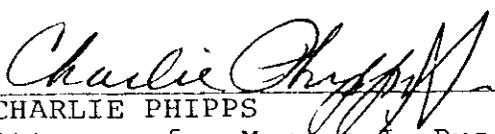
  
KENNETH A. WOHL  
Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY  
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FOR MARCUS J. RUSSELL, BY:

  
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Attorney for Marcus J. Russell  
1502 South Boulder  
Tulsa, Oklahoma 74119

  
MARCUS J. RUSSELL  
2609 East 29th Place North  
Tulsa, Oklahoma 74110

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

EQUILEASE CORPORATION )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 78-C-148-B  
 )  
 NORMAN VINCENT, )  
 )  
 Defendant. )

✓ FILED

MAY 12 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

THIS MATTER comes on for hearing this 12<sup>th</sup> day of May, 1978, on motion of Plaintiff for default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure. Plaintiff filed a complaint in this action on April 5, 1978, and the service of the summons and complaint was had on Defendant as required by law. Defendant has defaulted in that he has not answered the complaint herein on file and the time to answer such complaint has expired. The Court, having examined the file herein and being fully advised in the premises finds that the Plaintiff is entitled to recover damages from the Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff recover from Defendant on Plaintiff's First Cause of Action the sum of \$1,736.00 with interest thereon at the rate of 10% per annum from date of judgment until paid, together with an attorney's fee in the amount of \$264.40, and all costs of this action as taxed by the Clerk of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff recover from Defendant on Plaintiff's Second Cause of Action the sum of \$9,461.80 with interest thereon at the rate of 10% per annum from the date of judgment until paid together with an attorneys fee in the amount of \$1,419.47 and all costs of this action as taxed by the Clerk of this Court.

DATED this 12<sup>th</sup> day of May, 1978.

*Allen E. Barrow*  
UNITED STATES DISTRICT JUDGE

LAW OFFICES  
UNGERMAN,  
UNGERMAN,  
MARVIN,  
WEINSTEIN &  
GLASS  
  
SIXTH FLOOR  
WRIGHT BUILDING  
TULSA, OKLAHOMA

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

**FILED**

GLADYS McDONALD, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DONNA HOLT, )  
GUARANTY LOAN AND INVEST- )  
MENT CORPORATION OF TULSA, )  
INC., and MID-CONTINENT )  
CASUALTY, )  
)  
Defendants. )

**MAY 12 1978**

No. 77-C-453-B *Jack D. Silver, Clerk*  
U. S. DISTRICT COURT

O R D E R

THIS cause having come before the Court upon the stipulation for dismissal filed by the plaintiff and the defendant, Guaranty Loan And Investment Corporation of Tulsa, Inc., and the Court having considered said stipulation and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that the Complaint <sup>*and cause of action*</sup> of the plaintiff be and the same hereby is dismissed with prejudice as to the defendant, Guaranty Loan And Investment Corporation of Tulsa, Inc., only.

DONE AND ORDERED this 12<sup>th</sup> of May, 1978.

*Allen E. Bonner*

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Warren L. McConnico  
2431 East 51st Street  
Suite 206  
Tulsa, Oklahoma 74105

Attorney for the Plaintiff

PRICHARD, NORMAN, REED & WOHLGEMUTH

By \_\_\_\_\_  
Timothy J. Sullivan  
1100 Philtower Building  
Tulsa, Oklahoma 74103

Attorneys for the Defendant,  
Guaranty Loan And Investment  
Corporation of Tulsa, Inc.

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

FILED

JOHN P. WATKINS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RICHARD JOHNSON, JIM RUSH )  
 and DAVID ROBBINS, )  
 )  
 Defendants. )

MAY 12 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 77-C-414-B

ORDER OF DISMISSAL

NOW, on this 12<sup>th</sup> day of May, 1978, upon application of the plaintiff for dismissal of the Complaint filed herein, for the reasons as stated in the plaintiff's Application, and the Court being aware of the premises,

IT IS, THEREFORE, ORDERED by the Court that the above-  
*of action & complaint are*  
styled cause *is* hereby dismissed with prejudice.

  
U.S. DISTRICT JUDGE

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

FILED

MAY 12 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

DALE KNOTT, )  
)  
Plaintiff, )  
)  
-vs- )  
)  
GENERAL AMERICAN TRANSPORTATION )  
CORPORATION and BOILERMAKER- )  
BLACKSMITH NATIONAL PENSION TRUST, ) Civil Action  
) No. 75-C-309-B ✓  
Defendants. )

O R D E R

The Court has for consideration the Motions for Summary Judgment filed herein by Defendants General American Transportation Corporation and Boilermaker-Blacksmith National Pension Trust and has carefully reviewed the entire file, the briefs, the cited authorities and all of the recommendations concerning said Motions, and being fully advised in the premises, finds:

That the Motions for Summary Judgment filed herein by Defendants General American Transportation Corporation and Boilermaker-Blacksmith National Pension Trust should be sustained for the reasons stated below:

This action was originally instituted by the Plaintiff against Defendant General American Transportation Corporation (hereinafter, the "Company") on June 12, 1975. Plaintiff alleges that he was employed by the Company during the period from March 23, 1964, through December, 1971. Plaintiff further alleges that during the course of his employment, the Company failed to make required contributions on his behalf to the Boilermaker-Blacksmith National Pension Trust (hereinafter, the "Trust").<sup>1/</sup>

- 
1. The Trust was joined as a party Defendant in this action subsequent to the date upon which the same was originally instituted by Plaintiff.

Plaintiff further alleges that the Company's failure to make contributions to the Trust resulted in a denial of pension benefits thereunder.

The central issue involved in this case is whether the Plaintiff herein, Dale Knott, was entitled during the course of his employment to have contributions made on his behalf by the Company to the Trust. The class of employees eligible to be participants in the Pension Plan administered by and through the Trust or beneficiaries of the Trust corpus is determined by the Trust Agreement creating the same, as well as applicable federal statutes governing the structure and administration of the Trust. As a tax exempt Trust and Pension Plan, the Trust must meet the requirements for tax exempt status under Section 401(a) of the Internal Revenue Code, 29 U.S.C. §401(a). One predominant requirement for tax exempt qualification for a pension plan of an employer is that the plan and assets be "for the exclusive benefit of his employees", 29 U.S.C. §401(a). In determining whether an individual is an employee for purposes of Section 401(a), common law concepts are used, with the right of control being an essential element. Burnetta, et al. v. Commissioner, 68 T.C. 13 (1977); Ellison v. Commissioner, 55 T.C. 142, 152 (1970).

Although the Internal Revenue Code permits a wide variety of individuals to be considered as employees, a pension trust such as that involved in this case can set up specific classifications of employees to be covered thereunder. The Boilermaker Trust involved in this case, as established and subsequently approved by the Internal Revenue Service, specifies limited categories of employees who are eligible to participate in the Pension Plan

established thereby. In relevant part, the Trust Agreement defines an employee as follows:

(e) Employee. The term "employee" shall mean and include: (1) all persons represented in collective bargaining by the Union and employed by an Employer in a class of work for which the Employer has agreed to contribute, or does contribute, to the Trust;

The foregoing definition limits participation in the Trust to individuals on behalf of whom the Boilermaker Union serves as collective bargaining agent with respect to wages and working conditions. This category of covered or eligible Trust participants would include rank and file employees, but excludes supervisors, company officers, and other management personnel. In view of the Internal Revenue Code Mandate that the Plan be for the exclusive benefit of "employees", the inclusion of individuals such as supervisory personnel as participants in the Boilermaker Pension Plan would violate the Internal Revenue Code as well as the Trust Agreement, and could jeopardize the ~~entire~~ tax exempt qualification of the Trust.

A second significant body of federal law applicable to the Trust involved in this case is the Labor Management Relations Act (L.M.R.A.) 29 U.S.C. §141 et seq. Section 302 of the Act, 29 U.S.C. §186, inter alia, makes unlawful payments of money by an employer to a labor organization. Section 302(c)(5), 29 U.S.C. §186(c)(5), however, carves out an exception permitting an employer to pay or submit contributions to a pension trust fund which fulfills the various structural requirements of Section 302(c)(5) of the Act. Since the Trust Fund in the instant case is administered by a Board of Trustees equally representing employers and employees, and is an entity distinct from the employer and a labor organization, the Magistrate

finds that such Trust has been created in accordance with Section 302(c)(5) of the Act.

Section 302(c)(5) of the Act requires that the Trust Fund be established "for the sole and exclusive benefit of the employees of such employer ..." (emphasis added). Section 2(3) of the same Act defines the term "employee" but excludes from such definition "... any individual employed as a supervisor". 29 U.S.C. §152(3). In a subsequent subsection, the Act defines the term "supervisor" as follows:

(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.  
29 U.S.C. §152(11).

The definition of a supervisor must be read in the disjunctive, and the possession of any one of the listed powers is sufficient to cause the individual in question to be classified as a supervisor, even if the power is exercised infrequently. Pacific Inter-Mountain Express Company v. N.L.R.B., 412 F.2d 1, 3 (10th Cir., 1969).

Based upon the foregoing subsections of the L.M.R.A., a supervisor is clearly distinguishable from an employee; and an individual in the capacity of a supervisor would not fall within the ambit of the "sole and exclusive benefit of employees" provision of Section 302(c)(5) of the L.M.R.A. To permit a Company supervisor to be a participant in the Boilermaker Trust, therefore, would clearly be incompatible with the Labor Management Relations Act.

The Court concludes, therefore, that the Boilermaker Trust Agreement, the Internal Revenue Code, and the Labor

Management Relations Act do not permit the Trust to accept contributions on behalf of an individual falling within the definition of the term "supervisor", nor does the Trust Agreement or the aforementioned federal statutes entitle an individual acting as a supervisor to pension benefits from the Trust. The Court further finds that undisputed facts constituting the present record in this case indicate clearly that the Plaintiff herein, Dale Knott, is in fact a supervisor. Thus, in the Pre-Trial Order submitted to the Court on February 23, 1976, by the Plaintiff and Defendant Company the following facts are admitted:

3. The parties admit the Plaintiff was employed by the Defendant, General American Transportation Corporation, as a salaried field supervisor from the dates of March 23, 1964, to a date in December, 1971.

The foregoing recitation serves as an unequivocal admission of Plaintiff's status as a supervisor at all times material herein. Plaintiff's deposition, which was taken under oath on March 14, 1977, resolves any possible doubt as to Plaintiff's supervisory status. That deposition is replete with admissions by Plaintiff that his capacity with the Company was that of a salaried field supervisor. The most comprehensive description of Plaintiff's work for the Company is found on page 31 of the deposition. There, Plaintiff was asked if a particular job description accurately described his work as a supervisor. The question states, in part, as follows:

Q. ... Does the following describe your work as a salaried field supervisor for GATX over the period of time involved here:

On a tank erection site, the salaried field supervisor is the sole representative of the company. His duty is to plan and execute the job as he sees fit. Obviously area construction managers supervise his work, but in the day to day administration of the job, the

salaried field supervisor or salaried field foreman is the sole authority. The salaried field supervisor or foreman has the authority to bind the company and to speak for the company. He is in complete charge of the work force. He is responsible for scheduling his work in respect of work being performed by others on the same job site. He may discuss job problems with representatives of the customer. He is also responsible for the weekly payroll. A more appropriate designation than field foreman would be job superintendent.

The Plaintiff's answer was as follows:

A. That's correct, one hundred percent.

The Plaintiff also stated that he served as a supervisor one hundred percent of the time (Dep. 32).

Without belaboring the contents of Plaintiff's deposition, or pointing on a page-by-page basis to Plaintiff's admissions as to his supervisory status, the Court notes that such deposition revealed beyond any doubt whatsoever that Plaintiff was, in fact, a supervisor. The Plaintiff did not engage in boilermaker type work (Dep. 32-34); he was paid according to a salary management classification (Dep. 44); he received bonuses not paid to union employees (Dep. 48, 50). The Plaintiff also had contributions paid on his behalf by the Defendant Company into the Company's own salaried or management pension fund (Dep. 56, 78). Plaintiff knew that if he continued working for the Company, he would receive a pension under the Company's pension fund (Dep. 78-79), and that in the event he quit before vesting, he would not receive pension benefits (Dep. 80). The above-recited stipulation in the Pre-Trial Order and the extensive admissions in Plaintiff's deposition show beyond any doubt that no genuine issue exists as to the facts supporting or indicating Plaintiff's status as a supervisor. Accordingly, Plaintiff was not eligible to receive

pension benefits under the Trust Agreement involved in this case and relevant federal statutes governing the same. See Warren v. Davis, F.Supp. , 81 CCH Lab. Cas. ¶13,274 (E.D. Okla., 1977). To permit Plaintiff to participate in or be eligible for trust benefits could jeopardize the tax exempt status of the Trust and also violate applicable federal law.

IT IS, THEREFORE, ORDERED that the Motions for Summary Judgment filed herein by Defendants General American Transportation Corporation and Boilermaker-Blacksmith National Pension Trust be, and the same are hereby sustained.

DATED this 12<sup>th</sup> day of ~~April~~ <sup>May</sup> 1978.



---

Chief Judge  
United States District Court  
For the Northern District of  
Oklahoma

FILED

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

MAY 11 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 IRVIN L. JARNAGIN and )  
 RUTH D. JARNAGIN, )  
 )  
 Defendants. )

CIVIL ACTION NO. 78-C-36-C

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff,  
by and through its attorney, Robert P. Santee, Assistant United  
States Attorney for the Northern District of Oklahoma, and  
herewith dismisses this action, without prejudice.

Dated this 11 day of May, 1978.

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States of America



ROBERT P. SANTEE  
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy  
of the foregoing pleading was served on each  
of the parties hereto by mailing the same to  
them or to their attorneys of record on the  
11 day of May, 19 78.

  
Assistant United States Attorney

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

FILED

MAY 11 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

DONALD A. LEACHMAN )

Plaintiff )

vs. )

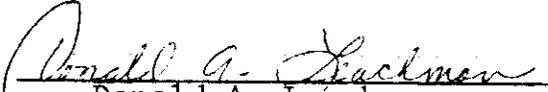
LARRY FIELDS, Superintendent; )  
SKIP HOFFMAN, Assistant )  
Superintendent; RICK WYATT )  
and TOM MAYES, Tulsa )  
Community Treatment Officers )

Defendants )

Case No. 77-C-533-B

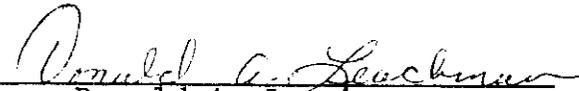
NOTICE OF DISMISSAL

Comes now the Plaintiff and dismisses the above styled  
and numbered action.

  
Donald A. Leachman

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of May, 1978,  
I deposited in the U. S. Mail with proper postage  
thereon a true and correct copy of the above and  
foregoing Notice of Dismissal to Larry Derryberry,  
Attorney General, Room 112, State Capitol, Okla. City,  
OK 73105

  
Donald A. Leachman

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

FILED

TERRY EUGENE McDONALD, )  
individually, and )  
MILDRED McDONALD, )  
individually )  
Plaintiffs, )  
vs. )  
SURETY MANAGERS, INC., )  
IMPERIAL INSURANCE CO., )  
DEWEY WARD, et al. )  
Defendants. )

MAY 10 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

CASE NO. 77-~~X~~-C-305B

NOTICE OF DISMISSAL  
WITHOUT PREJUDICE

COME NOW the Plaintiffs and each of them and dismiss the above styled and numbered action as to DEWEY WARD only. This dismissal is based upon stipulation between Plaintiffs and counsel for the aforesaid Defendant.

  
James R. Elder

CERTIFICATE OF MAILING

I hereby certify that on the \_\_\_\_\_ day of May, 1978, I deposited in the United States Mail with proper postage thereon a true and correct copy of the above and foregoing Notice of Dismissal to Dewey Ward, 802 1/2 West Markham Street, Little Rock, Arkansas.

James R. Elder

MOREHEAD, SAVAGE, O'DONNELL, McNULTY & CLEVERDON  
ATTORNEYS & COUNSELORS  
Suite 500, Two Hundred One Office Building  
Tulsa, Oklahoma 74103  
918 - 584-4716

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

UNITED STATES OF AMERICA and )  
JERRY F. KERR, Revenue Agent, )  
Internal Revenue Service, )  
Petitioners, )

vs. )

SARAH K. GREGORY, )  
Respondent. )

No. 78-C-69

FILED

MAY 10 1978

UNITED STATES OF AMERICA and )  
JERRY F. KERR, Revenue Agent, )  
Internal Revenue Service, )

vs. )

H. FRANKLIN GREGORY, )  
Respondent. )

No. 78-C-70

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

GOOD CAUSE APPEARING in the Motion to Dismiss, and  
the brief in support thereof, filed by petitioners, and the  
enforcement of the summonses appearing now to be unnecessary,  
it is hereby,

ORDERED, ADJUDGED, and DECREED that pursuant to Rule  
41(a)(2), Federal Rules of Civil Procedure, these two cases  
are dismissed, without prejudice, each party to bear his own costs.

DATED this 9<sup>th</sup> day of May, 1978.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

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

FRATES INVESTMENT COMPANY, )  
DALE A. GIBSON, ROBERT E. )  
MERRICK, JR. and PAUL PETER )  
PRUDDEN, III, )  
 )  
Plaintiffs, )

vs. )

NO. 78-C-178-C

UNITED STATES OF AMERICA and )  
DISTRICT DIRECTOR OF INTERNAL )  
REVENUE FOR THE STATE OF OHIO, )  
and THE DISTRICT DIRECTOR OF )  
INTERNAL REVENUE SERVICE FOR )  
THE STATE OF OKLAHOMA, )  
 )  
Defendants. )

FILED

MAY 10 1978

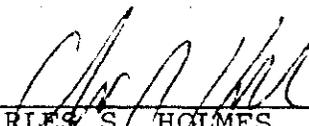
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

NOTICE OF DISMISSAL

TO: United States of America and District Director  
of Internal Revenue for the State of Ohio,  
and The District Director of Internal Revenue  
Service for the State of Oklahoma and Hubert  
A. Marlow, attorney.

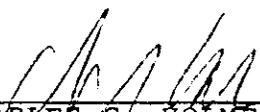
Notice is hereby given that whereas the above entitled  
action was commenced by the Plaintiff, Frates Investment Company,  
et al., and whereas the Defendants, United States of America and  
District Director of Internal Revenue for the State of Ohio and  
The District Director of Internal Revenue Service for the State  
of Oklahoma have neither filed an Answer nor Motion for Summary  
Judgment herein, Plaintiff hereby dismisses the above styled  
action without prejudice.

Dated this 9th day of May, 1978.

  
\_\_\_\_\_  
CHARLES S. HOLMES  
Attorney for the Plaintiff

CERTIFICATE OF MAILING

I, Charles S. Holmes do hereby certify that on the  
9th day of May, 1978, I mailed a true and correct copy of the  
above and foregoing Notice of Dismissal to: Hubert A. Marlow,  
U.S. Court House, Tulsa, Oklahoma 74103, by depositing the  
same in the United States mail with sufficient postage thereon  
fully prepaid.

  
\_\_\_\_\_  
CHARLES S. HOLMES

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

T. HOBART WILSON and )  
ROLLAND COMSTOCK, )  
co-administrators of the )  
Estate of SAUNDRA L. NIX, )  
Deceased, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
YELLOW FREIGHT SYSTEM, INC., )  
a corporation, )  
 )  
Defendant. )

No. 77-C-517-C

**FILED**

MAY - 9 1978 *ms*

O R D E R

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

On April 7, 1978, the Court entered an Order remanding this action to the District Court of Creek County, Oklahoma, Sapulpa Division. Defendant now moves the Court to reconsider that Order. Title 28 U.S.C. § 1447(d) provides in pertinent part that:

"[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . ."

It is well established that that provision exemplifies a Congressional policy of "not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." United States v. Rice, 327 U.S. 742, 751 (1946). See also Chandler v. O'Bryan, 445 F.2d 1045 (10th Cir. 1971); In re La Providencia Development Corp., 406 F.2d 251 (1st Cir. 1969); Yarbrough v. Blake, 212 F.Supp. 133 (W.D. Ark. 1962).

That policy has also been interpreted to prohibit a district court's reconsideration of an order of remand. See La Providencia and Yarbrough, supra.

In its Order of April 7, 1978, this Court held that the present action was improvidently removed in that certain essential jurisdictional allegations were missing from the

defendant's Petition for Removal. Title 28 U.S.C. § 1447(c) provides in part:

"If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . ."

The Court is not therefore presented with a situation where the prohibition against review found in Section 1447(d) would not be applicable because the remand order was entered on a ground not found in Section 1447(c). See Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976).

The Court must therefore acknowledge the Congressional policy behind Section 1447(d) which compels it to decline reconsideration of its earlier order of remand.

Defendant has joined with its Motion to Reconsider a Motion to Allow Amendment to Petition for Removal. To allow defendant to amend its Petition for Removal, the Court would have to reconsider and vacate its order of remand. Since the Court may not reconsider that order, it cannot allow defendant to amend.

For the foregoing reasons, it is therefore ordered that defendant's Motion to Reconsider and Motion to Allow Amendment to Petition for Removal are hereby overruled.

It is so Ordered this 9<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

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

TIMOTHY WAYNE THOMAS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DAVID YOUNG, DISTRICT )  
 ATTORNEY; THE HONORABLE )  
 STREETER SPEAKMAN, JR.; )  
 BRICE COLEMAN, SHERIFF OF )  
 CREEK COUNTY, OKLAHOMA, and )  
 THE STATE OF OKLAHOMA, )  
 )  
 Defendants. )

No. 77-C-531-C

**FILED**

MAY 8 1978

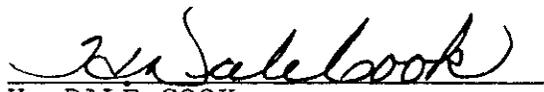
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

This is a civil rights action brought pursuant to 42 U.S.C. §§ 1983 and 1985. The Court has previously held that the plaintiff has failed to state a cause of action against any of the defendants under § 1985, and it now has before it for consideration the motion of defendant Young to dismiss for failure to state a claim upon which relief can be granted under § 1983.

Plaintiff complains of action taken by defendant Young pursuant to Oklahoma's material witness statute, 22 O.S. § 719. He alleges that at all relevant times, this defendant was acting in his official capacity as the District Attorney of Creek County, Oklahoma. The United States Supreme Court has held that a prosecutor is absolutely immune from a civil suit for damages under § 1983 while performing activities which are "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). See also Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977). From an examination of plaintiff's allegations and the entire file in this case, and based upon the above authorities, the Court is convinced that defendant Young is immune from liability under § 1983. Therefore, his motion to dismiss is hereby sustained.

It is so Ordered this 8<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

FILED

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

MAY 8 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 78-C-60-B
	)	
JAY L. SHIELDS,	)	
	)	
Defendant.	)	

D I S M I S S A L

COMES NOW the United States of America by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and dismisses this action, with prejudice, for all purposes.

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney



ROBERT P. SANTEE  
Assistant United States Attorney

cl

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 8th day of May, 1978.

Robert P. Santee/cl  
Assistant United States Attorney

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

FILED

MAY 4 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

T. C. DILLARD,  
Plaintiff,

vs.

LIFE INSURANCE COMPANY OF  
NORTH AMERICA,

Defendant.

78-C-100-B ✓

ORDER

The Court has for consideration the Motion to Dismiss filed by the defendant, the brief in support thereof, and the plaintiff having filed a response confessing that said Motion to Dismiss is good and that this matter should be dismissed, being barred by the Statute of Limitations, 36 O.S.A. §4405(a) (11)(1971), and the Court being fully advised in the premises, finds that said Motion to Dismiss should be sustained.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendant be and the same is hereby sustained and this cause of action and complaint are hereby dismissed.

ENTERED this 4<sup>th</sup> day of May, 1978.

*Allen E. Barron*

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM H. BELL,  
Plaintiff,  
v.  
CECIL D. ANDRUS, et al.,  
Defendants.

Civil Action No. 77-C-159-C

BANK OF OKLAHOMA, et al.,  
Plaintiffs,

v.  
REPUBLIC GAS AND OIL  
COMPANY, et al.,  
Defendants.

Civil Action No. 77-C-115-C

**FILED**

MAY - 4 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT AND ORDER

The Plaintiff, William H. Bell, Individual Executor of the Estate of Horace G. Barnard, Deceased (Plaintiff) having filed his First Amended Complaint against Cecil D. Andrus, Secretary of the Interior of the United States (Secretary), David Baldwin, Superintendent of the Osage Agency (Superintendent) and the Republic Gas and Oil Co. (Republic) and his Complaint against the defendant Secretary, the defendant Superintendent and J. M. Graves (Graves), demanding a declaration that certain oil and gas activities approved and authorized by the defendant Superintendent pursuant to regulations and authorities issued by the defendant Secretary were performed without previous compliance with the provisions of the National Environmental Policy Act of 1969, as amended, and were therefore void and also demanding an injunction enjoining said oil and gas mining activities unless and until the requirements of said Act have been met and the defendant Secretary having directed that an environmental assessment of said oil and gas operations be made

under the provisions of said Act and the Plaintiff and the defendants Graves and Republic having entered into a stipulation with respect to oil and gas operations on the lands which are the subject matter of these causes, the original of which is being filed with the Court and due deliberation being had thereon, now on motion of counsel for all parties, it is

ORDERED, ADJUDGED and DECREED by this Court that:

(1) The defendant Secretary and Superintendent are hereby ordered to make or cause to be made an environmental assessment under the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321, et seq., as amended, of the effect on the environment of oil and gas operations under oil mining leases, gas mining leases, oil and gas mining leases, drilling permits, authorizations to use water and other such documents approved or used by the Secretary relating to oil and gas operations on the lands in Osage County, Oklahoma, in which the minerals are owned by the Osage Tribe of Indians, to cause a copy of said assessment to be available for public inspection and a copy of said assessment to be delivered to the Plaintiff on or about January 31, 1979.

A copy of the decision, based upon said assessment, as to whether to prepare an environmental impact statement, pursuant to Section 102(2)(c) of NEPA, will be delivered to Plaintiff within 30 days of the issuance of said assessment.

(2) The defendant Secretary and Superintendent shall diligently implement and enforce the rules and regulations issued by each of them so as to create the minimum impact on the lands in Osage County, Oklahoma, arising out of and incident to the oil and gas operations thereon pursuant to leases, permits and other authorization issued or approved by the defendant Secretary or Superintendent and so as to permit the exercise of ingress and egress thereto in a way as to create the minimum reasonable impact of said oil and gas operations on said lands.

(3) The defendants Republic and Graves shall fully comply with the provisions, conditions and limitations of the Stipulations between said parties and Plaintiff with respect to the oil and gas operations and related activities on the lands described therein.

(4) Entry of this Judgment and Order shall and does not determine nor limit the right of the Plaintiff to challenge the environmental assessment or the decision of the defendant Secretary or the defendant Superintendent based thereon, nor does it determine or limit the right of the Plaintiff to assert that the defendants Secretary and Superintendent are required to prepare, file and publish an environmental impact statement nor to take actions based thereon to protect the environment of the lands in Osage County from the impact of said oil and gas operations thereon.

DATED this 4<sup>th</sup> day of May, 1978.

W. H. Duke Cook  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

ROGERS and BELL, Attorneys for Plaintiff,  
William H. Bell, Individual Executor of  
the Estate of Horace G. Barnard, Deceased,  
Plaintiff,

By A. Wayne Breeland  
A. Wayne Breeland

Georgina B. Landman  
Georgina B. Landman

David B. Whitehill  
David B. Whitehill

HUBERT H. BRYANT  
United States Attorney

Hubert A. Marlow  
Assistant United States Attorney

Attorneys for Defendants Cecil D. Andrus,  
Secretary of the Interior of the United  
States and David Baldwin, Superintendent  
of the Osage Agency

By *H. A. Marlow*  
HUBERT A. MARLOW

CHAPEL, WILKINSON, RIGGS and ABNEY  
Attorneys for Defendant J. M. Graves

By *B. P. Abney*  
Benjamin P. Abney

KANE, KANE, WILSON and MATTINGLY  
Attorneys for Defendant Republic Gas and Oil Co.

By *M. J. Kane*  
Matthew J. Kane

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

CECIL J. KROW, )  
 )  
Plaintiff, )  
 )  
vs. ) No. 78-C-63-C  
 )  
CLAYTON BROKERAGE COMPANY )  
and CLAYTON BROKERAGE )  
COMPANY OF ST. LOUIS, INC., )  
 )  
Defendants. )

**FILED**

MAY 4 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

This is an action in which plaintiff seeks to recover damages from the defendants for an alleged breach of a brokerage contract. Now before the Court is defendants' motion for summary judgment, on the ground that this action is barred by the applicable statute of limitations.

The alleged breach of contract occurred in February, 1973. This action was filed on March 28, 1978. Title 12 O.S. § 95 provides a three-year statute of limitations for "[a]n action upon a contract express or implied not in writing," and a five-year statute of limitations for "[a]n action upon any contract, agreement or promise in writing." The issue in this case is therefore whether this is an action upon a written contract.

Both parties have filed affidavits in support of their positions. Plaintiff has attached several documents which he contends demonstrate that the parties were governed by a written agreement. Exhibit "A" is a confirmation/invoice sent from defendants to plaintiff. It contains the signature of neither party and does not contain any obligations on the part of the defendants upon which plaintiff's suit is based. It does provide, however, that all transactions are subject to ". . . all provisions of any customer's agreement and authorization existing between you and ourselves." Such

a document is attached as Exhibit "B". The affidavits reveal that plaintiff received that document in August, 1972, but that he never executed it or returned it to the defendants. Plaintiff argues that a defendant executed the document by printing its name thereon. The portion of the document relied upon by plaintiff reads in part as follows: "We hereby accept the account on the above terms and conditions. CLAYTON BROKERAGE CO. By \_\_\_\_\_ V-Pres." No signature by one of defendant's agents or employees appears, and it is clear that the printed language was not intended to be a signature, and that a signature signifying acceptance was required after the document was executed by plaintiff and returned to defendant. Plaintiff relies upon J.P.C. Petroleum Corp. v. Vulcan Steel Tank Corp., 118 F.2d 713 (10th Cir. 1941) to support his contention that Exhibit "B" constitutes a binding, written contract. The court held in that case that

". . . a contract becomes binding where it is executed by one party, is forwarded to the other for execution or approval, is received and retained by the latter but never formally signed or approved by him, and both parties act in reliance upon it as a valid contract." Id. at 716.

Because Exhibit "B" was never executed by either party, the above case is inapplicable to the facts present here.

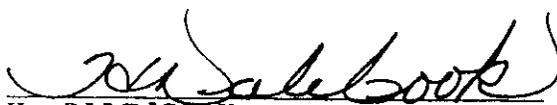
Exhibit "C" is a customer draft. It does not purport to be a contract, and, in any event, plaintiff's action is not based upon that document. Exhibit "D" is merely a telegram sent by plaintiff, authorizing defendant to exercise silver call options and cannot be construed to be a contract. Exhibit "E" is a letter from defendant to plaintiff, offering to settle the dispute for \$600.64. Plaintiff's action is not based upon that offer.

Plaintiff also relies upon 12A O.S. § 3-319 as authority for the proposition that the parties were operating under a written contract. However, that statute is merely a Statute of Frauds which establishes the requirements of the enforceability of a contract. It does not purport to define a

written contract for the purpose of a statute of limitations.

For the foregoing reasons, plaintiff's action is not "[a]n action upon any contract, agreement or promise in writing." Consequently, the three-year limitation of 12 O.S. § 95 is applicable. Because this action was commenced more than three years after the alleged breach of contract, this Court does not have subject matter jurisdiction, and defendants' motion for summary judgment is hereby sustained.

It is so Ordered this 4<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

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

DILLARD CRAVENS, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 AMERICAN AIRLINES, et al., )  
 )  
 Defendants. )

No. 74-C-301-C

**FILED**

MAY 4 1978 *ph*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

The Court has before it for consideration the motions of defendant American Airlines, Inc. to dismiss the claims of several plaintiffs in intervention and for summary judgment against plaintiff Leroy Billingslea.

Counsel for Leroy Billingslea has responded to the motion for summary judgment by advising the Court that Billingslea has died and that counsel does not represent his estate. Rule 25(a) of the Federal Rules of Civil Procedure provides that a motion for substitution following the death of a party must be made within 90 days after the death is suggested upon the record, in this case March 30, 1978. The Court feels it appropriate to hold the motion for summary judgment in abeyance until the time for filing a motion for substitution has elapsed.

Plaintiffs admit that intervenors William M. Kirk, Jr., Harry J. Thompson, Samuel L. Horey and Mary Weathers were improperly named as intervenors, and defendant's motion to dismiss as to them is sustained. Plaintiff also admits that intervenors Paulette A. Byrch and Melvin Hanes were improperly named as nonbargaining unit intervenors, and defendant's motion to dismiss them as such intervenors is also sustained.

For the foregoing reasons,

IT IS ORDERED that defendant's motion for summary judgment against plaintiff Leroy Billingslea is held in

abeyance until the earlier of June 30, 1978 or the filing of a motion for substitution.

IT IS FURTHER ORDERED that defendant's motion to dismiss William M. Kirk, Jr., Harry J. Thompson, Samuel L. Horey and Mary Weathers as plaintiffs in intervention is hereby sustained.

IT IS FURTHER ORDERED that defendant's motion to dismiss Paulette A. Byrch and Melvin Hanes as nonbargaining unit plaintiffs in intervention is hereby sustained.

It is so Ordered this 4<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

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

INOLA MACHINE & FABRICATING )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FARMERS NEW WORLD LIFE )  
INSURANCE COMPANY, )  
 )  
Defendant. )

No. 77-C-362-C

**FILED**

MAY - 4 1978 *mm*

J U D G M E N T

Jack G. Silver, Clerk  
U. S. DISTRICT COURT

The Court on May 4<sup>th</sup>, 1978, filed its Findings of Fact and Conclusions of Law which are hereby incorporated herein and made a part of its judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of the defendant, Farmers New World Life Insurance Company, and against the plaintiff, Inola Machine and Fabricating Company, in light of this Court's Findings of Fact and Conclusions of Law.

It is so Ordered this 4<sup>th</sup> day of May, 1978.

*H. Dale Cook*  
H. DALE COOK  
United States District Judge

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

INOLA MACHINE & FABRICATING )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FARMERS NEW WORLD LIFE )  
INSURANCE COMPANY, )  
 )  
Defendant. )

No. 77-C-362-C ✓

**FILED**

MAY - 4 1978 *Just*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

FINDINGS OF FACT  
and  
CONCLUSIONS OF LAW

In this action, plaintiff alleges that it is the beneficiary under a policy of insurance issued by the defendant, insuring the life of Houston R. Medlock (Medlock). Plaintiff further alleges that Medlock died, that proper notice and proof of death was given to the defendant but that defendant has refused to pay the \$100,000.00 face amount of the policy. The defendant denies that the policy was ever made, executed or delivered. The parties have submitted stipulations of fact and have requested the Court to make its determination without the taking of testimony.

After considering the pleadings, the stipulations of fact and exhibits, the briefs, and being fully advised in the premises, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The plaintiff is a corporation incorporated under the laws of the State of Oklahoma, with its principal place of business in Claremore, Oklahoma. The defendant is a corporation incorporated under the laws of the State of Washington, with its principal place of business in Mercer Island, Washington. The amount in controversy is in excess of \$10,000.00, exclusive of interest and costs.

2. Prior to March 8, 1976, Leo Faught (Faught), an agent of the defendant, and Medlock had been acquainted for approximately fifteen years. Faught had in earlier years sold several life insurance policies to Medlock, two of which required a medical examination and certain medical information as a part of the applications. Each of those applications was of the same form as that involved in the instant case. Faught and Medlock had discussed on earlier policies that depending upon one's age the amount of insurance sought, a medical examination would be required.

3. On March 8, 1976, Medlock and Faught met and prepared in part the application for insurance here in issue. The application sought coverage in the amount of \$100,000.00 in the event of Medlock's death payable to Arkansas Valley State Bank as the primary beneficiary and the plaintiff as subordinate beneficiary and owner of the policy.

4. The application was sent to the defendant company by Faught, processed and subsequently designated by them as Policy No. 1037303 for records purposes. Medical examination was required by the company's underwriting rules due to the age of the insured and the amount of such policy. Company underwriting rules for several years had required all applicants of this age requesting this amount of coverage to submit current medical information as called for in Part II of their application form before acceptance or denial of coverage.

5. Medlock knew of the necessity of such medical examination and submission of Part II of such application and desired to arrange the examination through his family doctor. On March 8, 1976, Faught again explained the reason for needing such examination. On two or three occasions, Faught called Medlock and reminded him of the needed examination. On one occasion Faught had a medical examiner coming to his office to examine others and suggested that

Medlock come in, but Medlock declined again, stating his desire to use his family physician and at the same time secure a complete physical. On another occasion, Medlock had a personal conflict and had to cancel his appointment.

6. At the time of the application for life insurance, the plaintiff paid \$184.68 through Faught. This payment was made under and by virtue of a conditional receipt, and was for advance payment of two months' premiums for two insurance policies, one of which was the policy in issue here. Farmers New World had never issued the policy applied for and had given no receipts for premiums except for the conditional receipt executed at preparation of Part I and submission of same to the company.

7. At the time of making said partial application on March 8, 1976, Inola Machine also entered into an agreement with Prematic Service Corporation, (Prematic), whereby the amount of each monthly premium would automatically be deducted from the plaintiff's bank account every month by means of a bank draft drawn upon Inola Machine by Prematic.

Prematic is a corporation owned jointly by the Casualty and Property Companies of Farmers Insurance Group. Farmers New World Life is a life insurance company, a part of the Farmers Insurance Group. Farmers New World Life does not participate in ownership or any profits from the operation of Prematic Services Corporation. When application is made for a life insurance policy, with premiums to be paid through Prematic, the writing agent is to forward two months' premium received under the conditional receipt, together with the Prematic Payment Agreement executed by the person to be insured. Prematic then sets up an account, under the authority of the Agreement between them and the insured, and begins premium billing, remitting monthly to Farmers New World Life. If a policy is not issued, a corrected advice is sent to Prematic who in turn credits the account for

whatever refund is due and makes a corresponding deduction from the monthly remittance to Farmers New World.

9. Medlock had scheduled an examination by his family physician on May 3, 1976. The same physician had performed a physical examination of Medlock on September 19, 1975, in which he had found Medlock to be "entirely within normal limits." Medlock died accidentally on April 29, 1976.

10. Part I of the application was received by Farmers' underwriting office on March 16, 1976, and as upon receipt of any partial or completed application, a policy number was assigned for record keeping purposes. The policy number thus assigned is retained regardless of the disposition of the request for coverage.

11. Because the application in question was not complete, the defendant's underwriting department had reached no determination as to whether the policy requested by the application would be issued.

12. On May 24, 1976, a proof of death and claim statement was filed by Arkansas Valley State Bank, as named beneficiary.

13. On May 1, 1976, Prematic sent Inola Machine a monthly statement requesting payment on account in the amount of \$157.14, a portion of said payment to be used for payment of premiums on Policy No. 1037303. The requested amount was paid by check by Inola Machine on May 10, 1976. Prematic cashed the check and after subtracting a service charge, paid the proceeds to Farmers.

14. On June 1, 1976, pursuant to the bank draft payment plan described above, Prematic drafted \$95.45 from Inola Machine's bank account. A portion of this draft, \$56.92, represented payment of one month's premium on life insurance Policy No. 1037303. After subtracting a small sum as a service charge, Prematic paid the proceeds of the bank draft to Farmers. On July 1, 1976, pursuant to the bank's draft

payment plan, Prematic again drafted \$95.45 from Inola Machine's bank account. Again, \$56.92 of this amount represented payment of one month's premium on Policy No. 1037303. As in the preceding month, Prematic subtracted a small sum as a service charge and credited the remainder of the proceeds to Farmers.

15. On July 2, 1976, Defendant advised Mrs. Medlock: "There has not yet been a final decision made regarding Policy No. 1037303 that was not issued."

16. On July 10, 1976, Arkansas Valley State Bank, the principal beneficiary, was advised by the claims manager of Farmers New World Life Insurance Company that there was a denial of liability, on the basis that as the application had not been completed and submitted, or considered, no policy was approved or issued and no coverage would be in force.

17. On August 1, 1976, Prematic credited Inola Machine's account in the amount of \$56.92. This amount represented the return of one month's premium on Policy No. 1037303.

18. An error was made in charging back and refunding the premiums, and such refund should have been \$341.52 rather than \$56.92. The difference, \$284.60, was tendered on August 26, 1977, after this lawsuit was instituted. The plaintiff did not cash the check.

19. The tendered refund of \$284.60 was erroneously represented as return of premium payments which had been received by Prematic on Policy No. 1037304. Such error in numbering was explained by Faught as being a clerical error and did apply to 1037303. Inola Machine had never been involved with a policy from Farmers numbered 1037304.

20. On August 26, 1977, the same date that Prematic tendered the above described refund to Inola Machine, Prematic wrote to Farmers and requested that Farmers reimburse Prematic for the \$284.60 which Prematic had sent to Inola Machine.

On September 1, 1977, Farmers sent Prematic a reimbursement check in the amount of \$284.60 for the premium payments that Farmers had earlier been credited for on Policy No. 1037303.

21. The application in issue contains the following provision:

"Except as provided in the conditional receipt, . . . the insurance applied for shall not become effective until a policy is delivered and full payment of the initial premium required has been made to the Company during the lifetime and good health of the persons proposed for insurance."

22. The conditional receipt issued to Medlock provided in part as follows:

"No insurance is provided under the terms of this receipt unless all of its conditions have been satisfied.

1. The application must have been approved by the Company at its Home Office for the issuance of a policy of life insurance on the plan and for the class of risk and for the amount of insurance applied for.

2. If all medical examinations required by the Company have been completed."

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction under 28 U.S.C. § 1332.

2. An insurance contract must be construed to give effect to all of its provisions, where possible, and its terms and provisions, if unambiguous, must be accepted in their usual and ordinary sense. Great Northern Life Ins. Co. v. Cole, 248 P.2d 608 (Okla. 1952); United States Fidelity & Guaranty Co. v. Briscoe, 239 P.2d 754 (Okla. 1951).

3. "An application for insurance is not itself a contract, but is a mere proposal, which requires acceptance by the insurer through some one actually or apparently authorized to accept the same to give it effect as a contract." Hartford Fire Ins. Co. v. Wade, 257 P.2d 1064, 1067 (Okla. 1953). See also McCracken v. Travelers' Ins. Co., 156 P. 640 (Okla. 1916); Drake v. Missouri State Life Ins. Co., 21 F.2d 39 (8th Cir. 1927).

4. The application and conditional receipt involved

in the instant case clearly and unambiguously provide that an insurance policy is not in effect until it is approved, and that a prerequisite to approval is the submission of medical information. It is undisputed that Medlock knew of this condition and had not complied with it at the time of his death. Therefore, there was no contract of insurance in effect at the time of Medlock's death. See Alt v. American Income Life Insurance Co., 337 F.2d 472 (10th Cir. 1964); Missouri State Life Ins. Co. v. Brown, 300 P. 623 (Okla. 1931).

5. Plaintiff contends that 36 O.S. § 3609 is applicable to this case and prevents the defendant from denying liability. That statute provides:

"All statements and descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy unless:

1. Fraudulent; or
2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
3. The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise."

Plaintiff argues that "[t]he failure of Medlock to undergo a medical examination is nothing more than an omission in the application for insurance." However, the statute by its terms applies only to attempts to recover under a policy which has been issued. Because no policy was ever in effect in this case, 36 O.S. § 3609 has no application.

6. Plaintiff argues that because the defendant accepted and retained premium payments over an extended period of time, it is estopped to deny coverage. The essential elements necessary to create an estoppel are: (1) a false representation

or concealment of material facts; (2) made with knowledge, actual or constructive, of the facts; (3) made to a party without knowledge, or the means of knowledge, of the real facts; (4) made with the intention that it should be acted upon; (5) made to a party who relied on or acted upon it to his prejudice. L. C. Jones Trucking Company v. Cargill, 282 P.2d 753 (Okla. 1955). See also United Services Automobile Association v. Royal-Globe Insurance Co., 511 F.2d 1094 (10th Cir. 1975); Western Contracting Corp. v. Sooner Construction Co., 256 F.Supp. 163 (W.D. Okla. 1966).

7. The facts of this case show no detrimental reliance by the plaintiff upon any representations made by the defendant. Consequently, the defendant is not estopped to deny coverage. Agee v. Travelers Indemnity Company, 396 F.2d 57 (10th Cir. 1968).

8. Plaintiff does not challenge the first refund of premium as untimely, and it is admitted that the delay in refunding the balance of the premiums was due to clerical error. Estoppel cannot be set up against a party whose conduct was based upon pure mistake. Id.

9. The defendant, Farmers New World Life Insurance Company, is entitled to judgment against the plaintiff, Inola Machine and Fabricating Company.

It is so Ordered this 4<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

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

MARY LOU BARNHOUSE, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STANLEY J. MURPHY, )  
 )  
 Defendant. )

No. 77-C-454-C ✓

**FILED**

MAY - 4 1978 *fern*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

This is an action brought to recover damages for injuries allegedly sustained by plaintiff in an automobile accident in St. Francois County, Missouri. Plaintiff alleges that she is a "resident" of Oklahoma and that the defendant is a "resident" of Missouri. Now before the Court for consideration is defendant's motion to dismiss or, in the alternative, to transfer this action to the Eastern District of Missouri.

Plaintiff has responded to the motion by arguing that venue is proper in this Court under 28 U.S.C. § 1391(a). Assuming that plaintiff is correct in regard to venue, she has not alleged any contacts by the defendant with the State of Oklahoma, and certainly has made no allegations which would invoke the jurisdictional provisions of 12 O.S. §§ 187 and 1701.03. Consequently, this Court lacks in personam jurisdiction over the defendant, and his motion to dismiss is hereby sustained.

It is so Ordered this 4<sup>th</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

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

FILED

MAY 3 1978

WILLIAM O. WALKER,

Plaintiff,

-vs-

PHILADELPHIA LIFE INSURANCE  
COMPANY, a corporation,

Defendant.

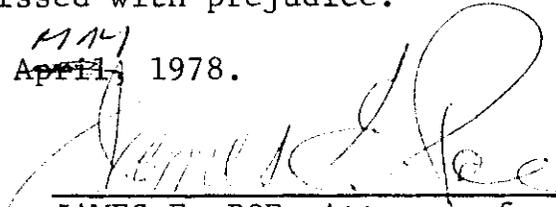
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

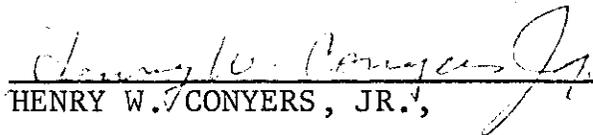
No. 77-C-358-C

STIPULATION FOR DISMISSAL

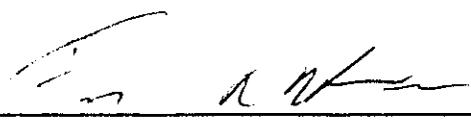
Come now the parties, through their respective counsel of record, and herewith advise the Court that a compromise settlement has been agreed to between the parties. In accordance therewith, the parties hereby stipulate that the above-styled cause of action may be dismissed with prejudice.

Dated this 3 day of <sup>MAY</sup>~~April~~, 1978.

  
JAMES E. POE, Attorney for Plaintiff

  
HENRY W. CONYERS, JR.,

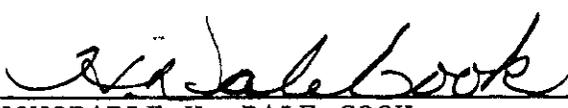
and

  
FRANK R. HICKMAN,  
Attorneys for Defendant.

ORDER OF DISMISSAL

Upon stipulation of the parties and by reason of a compromise settlement disposing of the issues herein, the Court finds that the above-styled cause should be and is herewith dismissed with prejudice to refiling.

Dated this 3 day of <sup>MAY</sup>~~April~~, 1978

  
HONORABLE H. DALE COOK,  
United States District Judge

*Handwritten notes:*  
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IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY - 3 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

LARRY DEAN TURNER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 76-C-247-C
	)	
LARRY MARKS,	)	
	)	
Defendant.	)	

STIPULATION FOR DISMISSAL; ORDER

COME NOW the parties to the above-captioned cause and hereby stipulate and agree to the dismissal with prejudice of this case and the cause of action, and stipulate, pursuant to Rule 41(a), and the settlement agreed to by all parties before the Court on April 14, 1978, that the Court may dismiss the cause of action and case, with prejudice, each party to bear his own costs.

<i>Larry Dean Turner</i>	<i>Larry Marks</i>
_____ LARRY DEAN TURNER, Plaintiff	_____ LARRY MARKS, Defendant

<i>Fred Gilbert</i>	<i>Kenneth P. Snoke</i>
_____ FRED GILBERT Attorney for Plaintiff	_____ KENNETH P. SNOKE Attorney for Defendant

O R D E R

GOOD CAUSE APPEARING, it is hereby ordered that this case and cause of action are dismissed with prejudice, each party to bear his own costs.

DATED this 3rd day of May, 1978

*J. H. Dale Cook*  
\_\_\_\_\_  
United States District Judge

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

CARLSON COMPANY, an )  
Oklahoma Corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
ADAMS MACHINERY COMPANY, )  
an Illinois Corporation, )  
 )  
Defendant. )

No. 77-C-430-B ✓

**FILED**

MAY - 2 1978 ✓

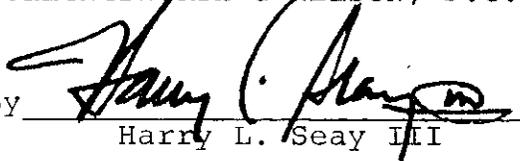
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

STIPULATION FOR DISMISSAL

COME NOW Plaintiff Carlson Company and Defendant Adams Machinery Company, and stipulate that the above-entitled action has been fully and finally settled and compromised, and may be dismissed with prejudice.

HALL, ESTILL, HARDWICK, GABLE,  
COLLINGSWORTH & NELSON, P.C.

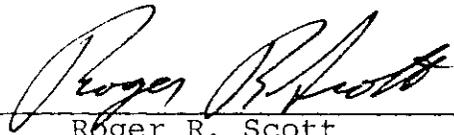
By

  
Harry L. Seay III

ATTORNEYS FOR PLAINTIFF

PRAY, SCOTT, WILLIAMSON & MARLAR

By

  
Roger R. Scott

ATTORNEYS FOR DEFENDANT

ORDER ALLOWING STIPULATION

The above and foregoing Stipulation For Dismissal coming before the Court, and the Court finding that said Stipulation For Dismissal is proper and should be allowed,

IT IS THEREFORE ORDERED that the above-entitled action be, and it hereby is, dismissed with prejudice.

  
UNITED STATES DISTRICT JUDGE FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 2 1978 160

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

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

JESSIE SCHULZ, Administratrix  
of the Estate of RAYMOND JOSEPH  
SCHULZ, Deceased,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,  
a Pennsylvania corporation,

Defendant and Third-Party Plaintiff,

vs.

CONSOLIDATED FABRICATORS, INC.,  
a Massachusetts Corporation, and  
AUSTIN BUILDING COMPANY, a Texas  
corporation,

Third-Party Defendants.

76-C-111-B ✓

ORDER

The Court has for consideration the following:

1. Plea to Jurisdiction and Motion to Dismiss for Failure to State a Claim against Third-Party Defendant Upon Which Relief Can be Granted filed by the Third-Party Defendant, Austin Building Company, a Texas Corporation;
2. Motion to Dismiss and Amended Motion to Dismiss filed by the Third-Party Defendant, Consolidated Fabricators, Inc., a Massachusetts Corporation;
3. The Findings and Recommendations of the Magistrate;
4. The Objections to the Findings and Recommendations of the Magistrate filed by the defendant and third-party plaintiff, Westinghouse Electric Corporation, a Pennsylvania corporation.

The Court has carefully perused all briefs, affidavits, exhibits and the entire file, and, being fully advised in the premises, finds:

Ab initio, turning to the objections directed to the Findings and Recommendations of the Magistrate as to the Motion to Dismiss and Amended Motion to Dismiss of the Third-Party Defendant, Consolidated Fabricators, Inc., the Court finds that a hearing for oral argument was had by the Magistrate on June 10, 1977. The Motion to Dismiss and Brief of the Third-Party Defendant, Consolidated Fabricators, Inc. was filed on June 30, 1977; the Amended Motion to Dismiss was filed on July 1, 1977; and the brief of Westinghouse Electric Corporation, a Pennsylvania Corporation, Defendant and Third-Party Plaintiff was filed in response to the Motion to Dismiss on July 28, 1977. The Court notes on the Minute Sheet of the Magistrate contained in the file that Mr. Dan Wagner was present at said hearing on behalf of Third-Party Defendant, Consolidated Fabricators, Inc., which was set for argument on the Motion filed by Austin Building Company. In its objection, Westinghouse states:

"(1) The hearing held before the Honorable Robert Rizley, Magistrate, on June 10, 1977, was primarily devoted to the Plea to the Jurisdiction and Motion to Dismiss as previously filed by third party defendant, Austin Building Company. Any oral argument which was heard on the Motion to Dismiss as filed by the third party defendant, Consolidated Fabricators, Inc., was de minimis, at best, as neither the defendant, Westinghouse Electric Corporation, nor the third party defendant, Consolidated Fabricators, Inc., had filed Briefs on said Motion, as of the date of that hearing. The findings and recommendations of the Magistrate as filed in this Court encompassed the Motion to Dismiss as filed by the third party defendant, Consolidated Fabricators, Inc., in spite of the fact that the defendant, Westinghouse Electric Corporation, has not had an opportunity to orally argue the matters briefed in regard thereto.

The Court finds, that in order that maxim justice can be afforded to the parties, and in view of the fact that Westinghouse, by virtue of its objection, has in effect requested oral argument on the Motion to Dismiss filed by Consolidated Fabricators, that said Objection should be sustained and the Motion to Dismiss referred to the Magistrate for oral argument and Findings and Recommendations. By so ordering, this Court makes no indication at this juncture as to the merits of the Motion and Findings and Recommendations of the Magistrate, but refers the same for oral argument so that the parties

will be afforded every opportunity to present the merits of their respective positions.

Turning to the Plea to Jurisdiction and Motion to Dismiss filed by the third-party defendant, Austin Building Company, the Court finds:

This is an action brought by Jessie Schulz, Administratrix of the Estate of Raymond Joseph Schulz, Deceased, against Westinghouse Electric Corporation, wherein the plaintiff alleges that the defendant, Westinghouse, manufactured a defective turbine housing which was to be installed by the Public Service Company at the Riverside Power Plant in Jenks, Oklahoma.

On approximately May 15, 1974, the deceased, Raymond J. Schulz, was working as an employee of Austin Building Company, which was the general contractor responsible for assembly of the turbine at the Public Service Plant in Jenks, Oklahoma. At that time, a two piece center section of the turbine housing was being prepared to be lifted by a crane into its proper position when four of the bolts connecting the two-piece assembly allegedly sheared and the assembly collapsed upon Schulz and fatally injured him. Plaintiff alleges that the defendant, Westinghouse, has breached its implied warranty of fitness in that the product was unsafe for its intended use and that the defective condition of said turbine housing was the direct and proximate result of the decedent's death. Plaintiff prays for damages in the sum of \$353,500.00.

On January 26, 1977, the defendant, Westinghouse, filed a Third-Party Complaint, naming Austin Building Company (hereinafter referred to as Austin) as a third-party defendant. The third-party plaintiff, Westinghouse, alleged that the third-party defendant, Austin, failed to erect the enclosure in accordance with the instructions and specifications furnished to it by Westinghouse, and that its failure to so follow said instructions and directions was the direct and proximate cause of the accident which fatally injured Raymond Joseph Schulz.

It is the contention of the third-party plaintiff, Westinghouse, that by reason of the combined acts of both third-party defendants, if the plaintiff recovers against Westinghouse, Westinghouse is entitled to recover over and against the third-party defendants.

Austin states that prior to the initiation of this action, Austin, pursuant to a Joint Petition Settlement filed with the Oklahoma State Industrial Court, paid the plaintiff the sum of \$14,000.00 in complete settlement of all claims against Austin. Austin further maintains that jurisdiction over the deceased employee, Raymond Joseph Schulz, lies exclusively with the Oklahoma State Industrial Court. Austin's Motion is supported by the Affidavit of George Hulsey, Assistant Claims Manager for Austin. The affidavit establishes that Raymond Joseph Schulz was an employee of Austin on the date of the accident, and confirms that Workmen's Compensation death benefits were paid by Austin as stated above.

The facts as set forth in the Affidavit of George Hulsey, as to the employment of the deceased, Raymond Joseph Schulz, and the payment of death benefits, remain uncontroverted by Westinghouse.

The law of the State of Oklahoma specifically states that an injured employee's exclusive remedy against his employer is an action under the Oklahoma Workmen's Compensation Act. Title 85, O.S.A. 1971, §12 provides:

"Liability prescribed in the last preceding section shall be exclusively and in place of all other liability of the employer and any of his employees, at common law or otherwise, for such injury, loss of services or death, to the employee, spouse, personal representative, parent, defendant, or any other person, except that if an employer has failed to secure the payment of compensation for its injured employee, as provided in this Act, then an injured employee, or his personal representative if death results from the injury, may maintain an action in the Courts for damages on account of such injury, and in such action the defendant may not plead or prove his defense if the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his servant, or that the injury was due to the contributory negligence of the employee; provided, that this section shall not be construed to relieve the employer from any other penalty provided for in this Act for failure to secure the payment of compensation provided for in this Act."

The Tenth Circuit Court of Appeals has acknowledged the Oklahoma Workmen's Compensation statute providing for the exclusive remedy of an injured employee applies in actions brought in the United States District Courts located within the State of Oklahoma. *Sade v. Northern Natural Gas Company*, 458 F.2d 210 (10th Cir. 1972).

The exclusive remedy provision of the Oklahoma Workmen's Compensation Act (85 O.S.A.1971 §12) has also been held to preclude an action in indemnity over and against the injured worker's employer. In *Peak Drilling Company v. Halliburton Oil Well Cementing Company, et al.*, 215 F.2d 368 (10th Cir. 1964), the Tenth Circuit Court of Appeals held that the Oklahoma Workmen's Compensation Act precluded the right of indemnity to a third party plaintiff in the absence of an independent contractual relationship creating a duty on the part of the injured worker's employer to indemnify. Therefore, any action brought against Austin would lie with the Oklahoma State Industrial Court and Austin's Plea to the Jurisdiction must be sustained.

The Third-Party Complaint of Westinghouse claims a right of indemnity and contribution from Austin. Austin points out that the law of the State of Oklahoma prohibits an action for contribution or indemnity between alleged joint tortfeasors. *National Trailer Convoy, Inc. v. Oklahoma Turnpike Authority*, 434 P.2d 238 (Ok1.1967); and *Cain v. Quannah Light and Ice Company*, 131 Okl. 25, 267 Pac. 641 (1928). This rule applies to actions brought in the United States District Courts within the State of Oklahoma. *Hartford Accident & Indemnity Company v. Tri-State Insurance Co.*, 384 F.2d 386 (10th Cir. 1967); and *Peak Drilling Company v. Halliburton Oil Well Cementing Company, supra*.

In opposition to the Motion to Dismiss of Austin Building Company, Westinghouse alleges that an independent contractual relationship exists between Westinghouse and Austin, which falls within the exceptions set forth in *Peak Drilling Company, supra*.

Westinghouse contends that the independent contractual relationship was established pursuant to sub-paragraph 3 of the contract between Public Service Company of Oklahoma and Austin Building Company, executed July 12, 1972 (Exhibit A to Brief of Westinghouse in Response to Motion to Dismiss filed March 16, 1977). Sub-paragraph 3 provides:

"Contractor undertakes the performance of this contract as an independent contractor, at its sole risk and assumes full responsibility for the safety of the work hereunder and all liability for injury or damage to the person or property of any and all persons whomsoever in any way growing out of the performance of this contract, and shall defend, indemnify and save harmless of and from any and all claims, demands, suits, loss, cost or expense of any damage which may be asserted, claimed or recovered against or from company (Public Service Company of Oklahoma) by reason of any damage to property or injury, including death, sustained by any person whomsoever and which damage, injury or death arises out of or is incident to or in any way connected with the performance of this Contract regardless of whether or not claim, demand, damage, loss, cost or expense is caused in whole or in part by the negligence of Company, Contractor, any sub-contractor or by a third party or by the agents, servants, employees or factors of any of them." (Emphasis supplied)

The contractual provision cited above is a portion of the construction contract between third-party defendant, Austin Building Company, and Public Service Company of Oklahoma. Third-Party Plaintiff, Westinghouse, is not a party to this contract and therefore to enforce the provisions, Westinghouse must do so as a third-party beneficiary. Title 15 O.S.A. §29 sets forth the applicable Oklahoma law concerning enforcement of a contract by third-party beneficiary.

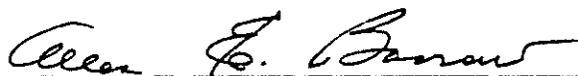
"BENEFICIARY MAY ENFORCE: A contract, made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescinded."

The language of sub-paragraph 3 of the contract between Public Service Company of Oklahoma and the third-party defendant, Austin, reveals that it is clear Westinghouse would be benefited only incidentally and, therefore, no right of action accrues to Westinghouse. *Neal v. Neal*, 250 F.2d 885 (10th Cir. 1958); *Willis v. E.I. DuPont de Nemours & Company*, 76 F.Supp. 1010 (E.D.Okla.1948); *Watson v. American Creosote Works, Inc.*, 184 Okl. 13, 84 P.2d 431 (1938).

IT IS, THEREFORE, ORDERED that the Plea to Jurisdiction and Motion to Dismiss for Failure to State a Claim against Third-Party Defendant Upon Which Relief Can be Granted, filed by the Third-Party Defendant, Austin Building Company be and the same are hereby sustained and the objections of Westinghouse Electric Corporation to the Findings and Recommendations of the Magistrate with reference to said Motions be and the same are hereby overruled.

IT IS FURTHER ORDERED that the Objection of Westinghouse Electric Corporation to the Findings and Recommendations of the Magistrate as to the Motion to Dismiss and Amended Motion to Dismiss be and the same is hereby sustained and said Motion to Dismiss and Amended Motion to Dismiss is hereby referred to the United State Magistrate for oral argument and Findings and Recommendations. By so ordering, this Court makes no indication at this juncture as to the merits of the Motions and Findins and Recommendations, but due to the objection premised on the basis that Westinghouse is entitled to oral argument, the Court makes this ruling.

ENTERED this 2nd day of May, 1978.



---

CHIEF UNITED STATES DISTRICT JUDGE





and Federal Fair Labor Standards Act approved method of paying non-exempt salaried employees. For every hour worked over forty you will be paid a premium of one-half your regular rate.

"FOR EXAMPLE:

"If you are hired at a rate of \$500 a month, you will always get \$250 gross on each paycheck for one-half month's pay. In addition to this base pay you may also receive commissions and/or lead money. Your commissions and overtime pay are received on the settlement payday of the following month.

"Example: 45 hours worked in a week

"Monthly Salary	\$500	
Commissions	30	(For previous month. Paid on settlement payday this month).
Leads	25	(Paid at various times during the month.)
	<hr/>	
	\$555	

"1. Divide the total monthly earnings by the number of weeks in the average month. \$555.00 divided 45 = \$128.18. This is your weekly salary for this example month.

"2. Divide the weekly salary by the number of hours worked in the week. \$128.18 divided 45 = \$2.85 an hour. This is your regular hourly rate for the regular portion of all hours worked during this example week.

"3. To calculate your premium rate (pay for hours in excess of 40), divide the hourly rate in half. \$2.85 divided by 2 = \$1.43. Your premium or overtime pay would then be \$1.43 x 5 hours overtime = \$7.15."

At the bottom of the form the following language is found:

"I understand that during my employment with Orkin my hours may vary from week to week. I understand that I will be paid a salary and, in addition, I will be paid a premium of on-half of my regular rate for every hour worked over forty hours (in each calendar week). I agree to report daily my hours worked in a totally accurate and honest manner on the forms provided by Orkin."

In the instant litigation plaintiff sues defendant to recover damages allegedly incurred by plaintiff by reason of defendant's method of computing plaintiff's regular rate of pay, plaintiff claiming that he was underpaid the sum of \$234.50 for the overtime plaintiff worked during the course of his employment. Plaintiff alleges he worked overtime during his employment totaling 80.2 hours, and that he was entitled to be paid \$4.762 for each such overtime hour worked. In computing these figures, plaintiff contends that his salary was \$550.00

per month and should have been paid at the "regular rate" of \$3.175 per hour for 40 hours of work and the overtime rate of twice the "regular rate" or \$4.762 per hour for each hour overtime, or 80.2 hours. Defendant, however, contends that the plaintiff worked and was paid for 90.2 hours overtime on the fluctuating work week pay plan. Plaintiff alleges that the defendant's method of computation, which method is referred to as the "fluctuating work week" system of pay, is violative of the Fair Labor Standards Act of 1938, supra.

As stated above, defendant contends that plaintiff was properly paid in accordance with the "fluctuating work week" system of pay and that such method of computing compensation is not contrary to the aforestated Act.

In *Overnight Motor Transportation Co., Inc. v. Missell*, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942) the Court discussed a fluctuating work week type of compensation computation formula and the United States Supreme Court determined that, "week by week the regular rate varies with the number of hours worked."

As stated in one treatise published by the Commerce Clearing House on *Federal Wage-Hour*, ¶25,520.122 it is stated:

"A common type of wage agreement involves the payment of a fixed weekly wage to an employee with the understanding that the salary is to compensate him for all hours worked during any particular workweek. Since the agreement specifies no definite number of weekly working hours, there can be no fixed regular rate. The rate varies from week to week depending upon the number of hours worked; it must be computed each week by dividing the fixed weekly wage, if that is the sole pay, by the number of hours worked during that week. Under this formula it is obvious that the regular rate will decrease as the number of hours worked increase. This is not objectionable, the U.S. Supreme Court ruled in *Overnight Motor Transportation Co. v. Missel* (5 LC #51,145) when laying down these rules for an employment arrangement whereby a fixed salary pays for all time worked by the employee. However, only one-half of the regular rate need be paid for hours worked in excess of the applicable FLSA straight-time workweek to satisfy the statutory overtime pay requirements under this type of agreement, since the weekly wages include straight time for all overtime hours."

It is stated in the U.S. Department of Labor's "Interpretive Bulletin on Overtime Compensation", 29 C.F.R. §778.114(a):

"An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a work-week, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each work-week, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those work-weeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement."

In *Triple "AAA" Co., Inc. v. Wirtz*, 378 F.2d 884 (10th Cir. 1966), cert.denied, 389 U.S. 959 (1967), in dealing with the "fluctuating work week" computation, the Court said:

"For purposes of computing overtime compensation to be recovered by the four employees, and to compute the statutory 'regular rate' of compensation, the trial court found, and the employer agreed, that each employee had worked at least an average of forty-four hours per week. The trial court computed the overtime compensation by taking the monthly salary times twelve months and then dividing by fifty-two weeks. This figure represents the weekly compensation, the forty-four hours, the number of hours the weekly salary was meant to compensate. The resulting figure is the hourly 'regular rate' for forty-four hours. Because the employees had already received the 'regular rate' for the four overtime hours, as computed above, the trial court added one-half the regular rate to the four overtime hours for each week. We find no error in the trial court's method of computing overtime compensation to be recovered from the employer. *Overnight Motor Co. v. Missel*, 314 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942), *Crawford Production Co. v. Bearden*, 272 F.2d 100 (10th Cir), *Seneca Coal & Coke Co. v. Lofton*, 136 F.2d 359 (10th Cir.) and *Patsy Oil & Gas Co. v. Roberts*, 132 F.2d 826 (10th Cir.). On appeal the employer has relied on *Walling v. A. H. Belo Corp.*, 316 U.S. 624, 62 S.Ct. 1223, 86 L.Ed. 1716, as authority that the employees' semi-monthly paychecks included forty hours at the regular rate and compensation

for overtime at the statutory rate. The facts in the Belo case are wholly dissimilar from the facts in the case at bar."

The distinction between the Overnight case, supra and the case of Walling v. A. H. Bello Corp, 316 U.S. 624 is that the Bello plan pays a fixed salary which includes overtime for a fluctuating work week, while the "fluctuating work week" method pays a fixed salary which does not include overtime for a fluctuating work week.

The Court finds that the defendant's method of computation as described in the pleadings, motions, memoranda of law and accompanying Affidavits and exhibits clearly comports with the method of computing a fluctuating work week compensation plan as described and defined in the heretofore cited case law and the U.S. Department of Labor directives. The Court finds, as a matter of law, that plaintiff herein has already received the properly computed 'regular rate' for hours worked in each week involved herein and was therefore only entitled to one-half of said 'regular rate' for a given week as compensation for the hours of overtime worked during that week. This overtime compensation was properly computed and paid by defendant to the plaintiff.

There being no question of material fact in dispute, and the only remaining question of law having been determined by the Court as hereinabove stated, IT IS ORDERED:

1. That the objections to the Findings and Recommendations of the Magistrate filed by the plaintiff be and the same are hereby overruled.

2. That the defendant's Motion for Summary Judgment be and the same is hereby sustained.

ENTERED this 2nd day of May, 1978.



CHIEF UNITED STATES DISTRICT JUDGE



FILED

h/c MAY 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HOWARD E. SCHILLER, III, )  
 MARY P. SCHILLER, and )  
 ALVIN DUBOIS, )  
 )  
 Defendants. )

CIVIL ACTION NO. 77-C-498-B ✓

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 2nd  
day of May, 1978, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney; and the Defendants, Howard E.  
Schiller, III, Mary P. Schiller, and Alvin Dubois, appearing  
not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Howard E. Schiller, III  
and Mary P. Schiller, were served by publication as shown on the  
Proof of Publication filed herein, and that Defendant, Alvin Dubois,  
was served with Summons and Complaint on November 30, 1977, as  
appears on the United States Marshal's Service herein.

It appearing that the Defendants, Howard E. Schiller, III,  
Mary P. Schiller, and Alvin Dubois, have failed to answer herein  
and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based  
upon a mortgage note and foreclosure on a real property mortgage  
securing said mortgage note upon the following described real  
property located in Tulsa County, Oklahoma, within the Northern  
Judicial District of Oklahoma:

Lot Nineteen (19), Block Seven (7), GLENPOOL  
PARK, an Addition in the Town of Glenpool,  
Tulsa County, State of Oklahoma, according  
to the recorded amended plat thereof.

THAT the Defendants, Howard E. Schiller, III and Mary P.  
Schiller, did, on the 7th day of January, 1977, execute and

deliver to the United States of America, acting through the Farmers Home Administration, their mortgage and mortgage note in the sum of \$23,500.00 with 8 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

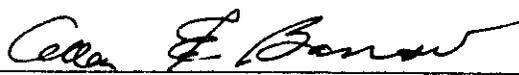
The Court further finds that Defendants, Howard E. Schiller, III and Mary P. Schiller, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$24,825.04 as of March 16, 1978, plus interest from and after said date at the rate of 8 percent per annum, until paid, plus the cost of this action, accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Howard E. Schiller, III and Mary P. Schiller, in rem, for the sum of \$24,825.04 with interest thereon at the rate of 8 percent per annum from March 16, 1978, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendant, Alvin Dubois.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
ROBERT P. SANTEE  
Assistant United States Attorney

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

CHARLES D. BARNHOUSE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 STANLEY J. MURPHY, )  
 )  
 Defendant. )

**FILED**

No. 77-C-455-B      MAY 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

The Court has for consideration Defendant's Motion to Dismiss Plaintiff's Complaint and Alternative Motion to Transfer to U. S. District Court for the Eastern District of Missouri, Eastern Division and Defendants First Amended Motion to Dismiss and Alternative Motion to Transfer, and has reviewed the file, the briefs and all of the recommendations concerning the motions, and being fully advised in the premises, finds:

That Defendant's Motion to Dismiss Plaintiff's Complaint should be sustained for the following reasons:

This is an action for alleged personal injuries as the result of an automobile accident which occurred in the State of Missouri.

In his Complaint the Plaintiff alleges that he is a resident of Tulsa, Oklahoma and that the defendant is a resident of Leadwood, Missouri. The records reflect that personal service was had upon the defendant at his home in Leadville, Missouri. Defendant filed a Motion to Dismiss on several different grounds, one being that this Court has no personal jurisdiction over the defendant. Since the Court's ruling on this ground would be dispositive of the case, the Court will not consider Plaintiff's additional grounds for relief. In response to Defendant's Motion to Dismiss Plaintiff has cited Title 28, U.S.C., § 1391, which statute

contains provisions with respect to "venue". Plaintiff does not point to any facts establishing personal jurisdiction over the defendant. Nor does the Plaintiff cite any authority or otherwise indicate under which provisions of the Oklahoma "Long Arm" statutes, Title 12, O.S.A. § 187 and § 1701.03, this Court can exercise personal jurisdiction over the defendant. See Anderson v. Shiflett, 435 F.2d 1036 (10th Cir. 1971). "Jurisdiction" goes to the power of the Court to hear and determine a cause of action and is not to be confused with "venue" which relates only to the place of trial after jurisdiction is determined. Bookout v. Beck, 354 F.2d 823 (9th Cir. 1965).

From a review of the file, briefs and other documents in this case it appears that this Court has no personal jurisdiction over the defendant.

IT IS, THEREFORE, ORDERED that Defendant's Motion to Dismiss be and is hereby sustained.

Dated this Ind day of <sup>May</sup>~~April~~, 1978.

  
CHIEF JUDGE, UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA.

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

IN THE MATTER OF  
RICHARD EUGENE TERRY,  
Bankrupt,  
ANNA LEE ROBISON, Creditor,  
Plaintiff-Appellee,  
vs.  
RICHARD EUGENE TERRY,  
Defendant-Appellant,

IN THE MATTER OF  
FIVE STATES SALVAGE,  
a co-partnership composed of  
RICHARD EUGENE TERRY and  
NATHANIEL T. TIBLOW,  
Bankrupt,  
ANNA LEE ROBISON, Creditor,  
Plaintiff-Appellee,  
vs.  
FIVE STATES SALVAGE,  
a co-partnership composed of  
RICHARD EUGENE TERRY and  
NATHANIEL T. TIBLOW,  
Defendant-Appellant.

**FILED**

MAY - 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

77-C-432-B

Bk. No. 75-B-1304  
Bk. No. 75-B-1434

JUDGMENT

Based on the Order filed this date,

IT IS ORDERED that the plaintiff, Anna Lee Robison, be and she is hereby awarded Judgment against the defendant, Richard Eugene Terry, in the amount of \$10,705.50.

IT IS FURTHER ORDERED that the plaintiff, Anna Lee Robison, be and she is hereby awarded Judgment against the defendant, Five States Salvage, a co-partnership composed of Richard Eugene Terry and Nathaniel T. Tiblow, in the amount of \$10,705.50.

IT IS FURTHER ORDERED that this Judgment in the amount of

\$10,705.50 as against each defendant above named be non-dischargeable in bankruptcy.

ENTERED this 2nd day of May, 1978.

*Allen E. Brown*

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CHIEF UNITED STATES DISTRICT JUDGE

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

IN THE MATTER OF  
RICHARD EUGENE TERRY,  
Bankrupt,  
ANNA LEE ROBISON, Creditor,  
Plaintiff-Appellee,  
vs.  
RICHARD EUGENE TERRY,  
Defendant-Appellant,

IN THE MATTER OF  
FIVE STATES SALVAGE,  
a co-partnership composed of  
RICHARD EUGENE TERRY and  
NATHANIEL T. TIBLOW,  
Bankrupt,  
ANNA LEE ROBISON, Creditor,  
Plaintiff-Appellee,  
vs.  
FIVE STATES SALVAGE,  
a co-partnership composed of  
RICHARD EUGENE TERRY AND  
NATHANIEL T. TIBLOW,  
Defendant-Appellant.

**FILED**

MAY - 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

77-C-432-B

Bk. No. 75-B-1304  
Bk. No. 75-B-1434

ORDER

The Court has for consideration an Appeal from the Judgment of the Bankruptcy Court, and oral argument, pursuant to Rule 809 of the Rules of Bankruptcy Procedure having been had before the United States Magistrate, and said Magistrate having filed his Findings and Recommendations and objections having been filed thereto, the Court has carefully perused the entire file, including briefs and the transcript of the testimony had before the Bankruptcy Judge on June 30, 1976, and, being fully advised in the premises, finds:

The issues on appeal involve the application of Section 17 of the Bankruptcy Act, 11 U.S.C.A. §35, and §§13 and 15 of the Uniform Partnership Act, 54 O.S.A. 1971, §§213 and 215.

11 U.S.C.A. §35 provides, in pertinent part:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, whether allowable in full or in part, except such as \*\*\* (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another \*\*\*\*."

Sections 213 and 215 of Title 54, Oklahoma Statutes, provide that if the wrongful act of any partner acting in the ordinary course of business of the partnership causes injury to any person who is not a partner, the partnership is liable for the injury; and furthermore, that all partners are jointly and severally liable for all acts which result in partnership liability caused by wrongful acts or breaches of trust of a partner.

The Bankruptcy Judge held that the fraud and misrepresentation of a general partner clearly created a debt of the partnership, Five States Salvage, which was not dischargeable by the partnership in bankruptcy pursuant to Section 17(a)(2) of the Bankruptcy Act. The Court further held that the fraudulent acts of a partner were imputed to the Five States Salvage partnership and the members thereof which thereby established a debt the Appellant, Richard Eugene Terry, could not discharge in bankruptcy pursuant to Section 17(a)(2) of the Act. The Bankruptcy Judge and the Magistrate adopted the issues and suggested conclusions of law set out in the Trial Brief of the Appellee, the plaintiff below, as being determinative of the issues relating to the admissibility of evidence and the liability of Richard Eugene Terry, Appellant.

The Bankruptcy Judge, in his Findings of Fact, found that the Appellee was fraudulently induced to incur a debt by a

member of the general partnership of Five States Salvage. The proceeds of the debt were delivered to a member of the Five States Salvage partnership. The trial court further found that the Appellee was damaged in the amount of \$10,705.50, the amount of the debt she was fraudulently induced to incur. The Findings of Fact of the Bankruptcy Judge were not at issue in this appeal.

The Appellants argue that the debt is dischargeable in bankruptcy for it is improper to impute fraud to a party who did not participate in the fraud or commit a fraudulent act. He admits that the Appellant Richard Eugene Terry would be personally liable on the debt were there not the intervening bankruptcy proceedings, but urges that the debt is dischargeable in bankruptcy because it is improper to impute a fraud to a non-participating partner. The Appellants further argue that it is contrary to the intent and purpose of the Bankruptcy Act to deny a discharge in bankruptcy to a partner for a partnership debt.

The Appellee cited the case of *Strang v. Bradner*, 114 U.S. 555, 5 S.Ct. 1038, 29 L.Ed. 248 (1885), in support of his position. The *Strang* case held that a fraud was to be imputed to the members of a partnership who did not participate in the fraud and their liability for the fraudulent acts was not dischargeable in bankruptcy. The Appellee further relied on Sections 213 and 215 of Title 54, Oklahoma Statutes. The Appellee argued that the Oklahoma Statutes dictated a finding that the liability of Richard Eugene Terry, Appellant, flows through Five States Salvage partnership to Richard Eugene Terry individually. He further urges that the debt is non-dischargeable in Bankruptcy pursuant to Section 17(a)(2) of the Bankruptcy Act for the transaction was fraudulent from its inception until the time the Appellee delivered the money to the fraudulent partner. The Appellee continues by stating that the deposit of the bulk of the money in the partnership bank account estops the Appellants,

Richard Eugene Terry and the Five States Salvage Partnership from denying post-bankruptcy liability.

This Court agrees with the view that the statutes and cases cited by the Appellee clearly establish the non-dischargeability of the debt of the Appellants, Richard Eugene Terry and Five States Salvage, a co-partnership composed of Richard Eugene Terry and Nathaniel T. Tiblow.

Rule 810 of the Rules of Bankruptcy Procedure provides:

"Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge of the credibility of the witnesses."

IT IS, THEREFORE, ORDERED that the objections to the Findings and Recommendations of the Magistrate be and the same are hereby overruled.

IT IS FURTHER ORDERED that the Findings and Recommendations of the Magistrate and the Findings and Recommendations of the Bankruptcy Judge be and the same are hereby affirmed.

ENTERED this 3rd day of May, 1978.



---

CHIEF UNITED STATES DISTRICT JUDGE

FILED

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

MAY 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

TULSA BUSINESS COLLEGE, INC., )  
 )  
 Plaintiff )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Defendant )

CIVIL NO. 75-C-210

CORRECTED JUDGMENT

The Court having been advised by the United States that defendant on counterclaim, Tulsa Business College, Inc., is legally entitled to certain credits under Section 3402(d) of the Internal Revenue Code of 1954 (26 U.S.C.) in the amount of \$4,947.68, and that such credits were not taken into consideration by the United States' counterclaim, or reflected in the Court's prior judgment of December 22, 1975, in favor of the United States and against Tulsa Business College, Inc., in the principal amount of \$21,328.84, it is accordingly

ORDERED, ADJUDGED, and DECREED that the Court's judgment of December 22, 1975, is modified to grant judgment to the United States of America in the principal amount of \$16,381.16, plus interest according to law from September 9, 1974.

DATED this 2nd day of May 1978.

*[Handwritten Signature]*

UNITED STATES DISTRICT JUDGE

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

EZERA E. ALLEN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MALLINCKRODT CHEMICAL )  
 WORKS, a Missouri )  
 corporation, and E. I. )  
 DU PONT DE NEMOURS & )  
 COMPANY, a Delaware )  
 corporation, )  
 )  
 Defendants. )

No. 78-C-24-B

FILED

MAY 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

The plaintiff and defendants, having stated that the above-entitled action, and each and every claim for relief asserted therein, may be dismissed with prejudice, each party to bear its or his own costs, and the Court being fully advised, IT IS ORDERED that this cause of action and complaint be and the same are hereby dismissed with prejudice to the bringing of future action thereon and that each party hereto shall bear its own costs.

DATED this 2nd day of May, 1978.

  
UNITED STATES DISTRICT JUDGE

**F I L E D**

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

MAY 2 1978

STERLING CONSTRUCTION COMPANY, )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 WESTERN COMMERCIAL TRANSPORT COMPANY, )  
 HOUSTON GENERAL INSURANCE COMPANY, )  
 and ROBERT A. McLEMORE, )  
 )  
 Defendants. )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 77-C-440-B

ORDER OF DISMISSAL

This matter came on for consideration on this 2nd day of April, 1978 upon the Joint Application for Dismissal With Prejudice filed herein. The Court being duly advised in the premises, finds that said Application for Dismissal is in the best interests of justice and should be approved and the above styled and numbered cause of action dismissed with prejudice to a refiling.

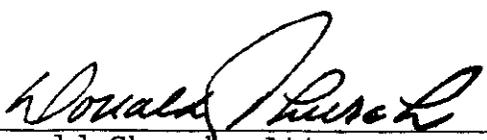
IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT that the Joint Application for Dismissal With Prejudice by the parties be and the same is hereby approved and the above styled and numbered cause of action and Complaint, as amended, is dismissed with prejudice to a refiling.

(Signed) Allen E. Barrow

ALLEN E. BARROW, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

APPROVED:

Leslie V. Williams, Attorney  
for Plaintiff

  
Donald Church, Attorney  
for Defendants

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

WINFRED RIGNEY,  
Plaintiff )  
vs )  
DON THORNTON FORD, INC.,  
Defendant )

NO. 76-C-121-B

**FILED**

MAY 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

NOTICE OF DISMISSAL

All issues, both of law and of fact, having been fully and completely compromised and settled, now comes the plaintiff Winfred Rigney and hereby dismisses the above styled and numbered action, with prejudice, at the cost of the plaintiff.

Winfred C. Rigney  
Plaintiff

APPROVED:

Thomas G. Marsh  
Thomas G. Marsh

Donald A. Edwards  
Attorney for Plaintiff

CERTIFICATE OF DELIVERY

I, Donald A. Edwards, do hereby certify that a true and correct copy of the above Dismissal was delivered to Thomas G. Marsh, attorney for defendant Don Thornton Ford, Inc. on May 2, 1978.

Donald A. Edwards  
Donald A. Edwards

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

JACK KOFAHL, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FEDERAL GAS AND OIL LEASE )  
 SERVICE, INC., a Nevada )  
 corporation, )  
 )  
 Defendant. )

NO. 77-C-383

**FILED**

MAY 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Plaintiff having failed to obtain service of process  
on defendant Carl Toole in accordance with the orders of this  
Court entered on October 28, 1977;

IT IS THEREFORE ORDERED that the defendant Carl Toole  
be dismissed without prejudice to future action.

  
JUDGE

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

GLENN SUPPLY COMPANY, INC., )

Plaintiff, )

vs. )

MISCO-UNITED SUPPLY, INC. and )  
MISCO INDUSTRIES, INC., )

Defendants. )

No. 78-C-19-C

**FILED**

MAY 2 1978

ORDER OF DISMISSAL

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

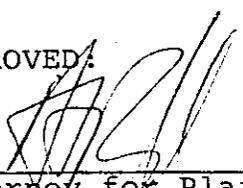
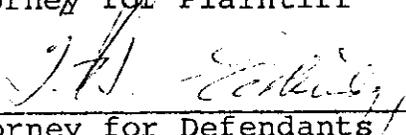
Upon stipulation of counsel for Plaintiff and Defendants,  
and for good cause shown, the Complaint of Plaintiff against  
the Defendants shall be and the same is hereby dismissed with  
prejudice to the refiling thereof, and Defendants' Third Party  
Complaint against Valley Steel Products Co., Third Party Defen-  
dant, shall be and is hereby dismissed with prejudice to the  
refiling thereof.

DONE this 2nd day of May, 1978.



UNITED STATES DISTRICT JUDGE

APPROVED:

  
\_\_\_\_\_  
Attorney for Plaintiff  
\_\_\_\_\_  
Attorney for Defendants

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

CHARLES BERNELL BARR, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DR. W. R. SLATER, Physician, )  
 )  
 Defendant. )

No. 78-C-170-C

**FILED**

MAY 2 1978 *per*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

This is an action brought pro se pursuant to 42 U.S.C. § 1983 by a prisoner at the Oklahoma State Penitentiary in McAlester, Oklahoma. Plaintiff was permitted to file his complaint in forma pauperis, but was advised that any further proceedings must be specifically authorized in advance by the Court. Title 28 U.S.C. § 1915, the statute authorizing proceedings in forma pauperis, provides in subsection (d) that "[t]he court . . . may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." Under this statute,

"It is preferable procedure for a federal district court to authorize the commencement and prosecution of an action without the prepayment of costs, if the requirements of § 1915(a) are satisfied on the face of the papers submitted, and if the court thereafter discovers that the allegation of poverty is untrue, or if it is satisfied that the action is frivolous or malicious, then to dismiss the action."

Duhart v. Carlson, 469 F.2d 471, 473 (10th Cir. 1972), cert. denied 410 U.S. 958, 93 S.Ct. 1431, 35 L.Ed.2d 692 (1973); Oughton v. United States, 310 F.2d 803 (10th Cir. 1962) cert. denied 373 U.S. 937, 83 S.Ct. 1542, 10 L.Ed.2d 693 (1963). Once filed, the complaint may be dismissed by the Court on its own motion, prior to the issuance of summons, if it determines that the action is frivolous. Conway v. Fugge, 439 F.2d 1397 (9th Cir. 1971); Williams v. Field, 394 F.2d 329 (9th Cir. 1968).

Plaintiff alleges that the defendant committed perjury by submitting a false affidavit in a civil case previously heard in this District. Plaintiff does not allege how the defendant violated his rights, or even which rights were violated. Title 42 U.S.C. § 1983 is applicable only to persons who act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Plaintiff has not alleged that defendant was acting in any of those capacities and has, in fact, alleged in his prayer for relief that the defendant failed to so act. Consequently, plaintiff's claim under 42 U.S.C. § 1983 is frivolous, and under the authority of 28 U.S.C. § 1915(d), this action is hereby dismissed.

It is so Ordered this 2<sup>nd</sup> day of May, 1978.

  
H. DALE COOK  
United States District Judge

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

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

DORIS J. DILLARD, NORMAN L.  
JONES, and FLOYD LOUSER d/b/a  
TULSA AUTO SALES,  
Defendants.

CIVIL ACTION NO. 77-C-489-C

**FILED**

MAY 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 2nd  
day of May, 1978, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney; and the Defendants, Doris J.  
Dillard, Norman L. Jones, and Floyd Louser d/b/a Tulsa Auto Sales,  
appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Doris J. Dillard and  
Norman L. Jones, were served by publication as shown on the  
Proof of Publication filed herein, and that Defendant Floyd  
Louser d/b/a Tulsa Auto Sales, was served with Summons and  
Complaint on November 23, 1977, as shown on the United States  
Marshal's Service herein.

It appearing that the Defendants, Doris J. Dillard,  
Norman L. Jones, and Floyd Louser d/b/a Tulsa Auto Sales, have  
failed to answer herein and that default has been entered by  
the Clerk of this Court.

The Court further finds that this is a suit based  
upon a mortgage note and foreclosure on a real property mortgage  
securing said mortgage note upon the following described real  
property located in Tulsa County, Oklahoma, within the Northern  
Judicial District of Oklahoma:

Lot Nine (9), Block Eighteen (18), NORTHRIDGE,  
an Addition in Tulsa County, State of Oklahoma,  
according to the recorded plat thereof.

THAT the Defendant, Doris J. Dillard, did, on the 14th day of December, 1972, execute and deliver to the Administrator of Veterans Affairs, her mortgage and mortgage note in the sum of \$10,500.00 with 4 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendant, Norman L. Jones, was the grantee in a deed from Defendant, Doris J. Dillard, dated February 10, 1975, filed March 13, 1975, in Book 4156, Page 1638, records of Tulsa County, wherein Defendant, Norman L. Jones, assumed and agreed to pay the mortgage indebtedness being sued upon herein.

The Court further finds that Defendants, Doris J. Dillard and Norman L. Jones, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$9,856.64 as unpaid principal with interest thereon at the rate of 4 1/2 percent per annum from February 1, 1977, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Doris J. Dillard and Norman L. Jones, in rem, for the sum of \$9,856.64 with interest thereon at the rate of 4 1/2 percent per annum from February 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

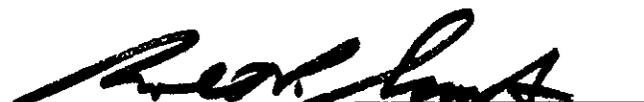
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendant, Floyd Louser d/b/a Tulsa Auto Sales.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

cl

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

CHARLES C. GROOM,  
Plaintiff,

vs.

No. 76-C-541-C

FORD MOTOR CREDIT COMPANY,  
A Corporation; AAACON AUTO  
TRANSPORT, INC., A Corpora-  
tion; and JOHN DOE, Indi-  
vidually,

Defendants.

FILED

MAY 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

NOW, on this 2nd day of May, 1978, Charles C. Groom, Pl-  
aintiff, and AAACON Auto Transport, Inc., a Corporation, Defen-  
dant, upon their Motion for Dismissal coming on for consideration,  
and counsel for Charles C. Groom, Plaintiff, and counsel for  
AAACON Auto Transport, Inc., a Corporation, Defendant, herein re-  
presenting and stating that all issues, controversies, debts and  
liabilities between Charles C. Groom, Plaintiff, and AAACON Auto  
Transport, Inc., a Corporation, Defendant, have been paid, settled  
and compromised.

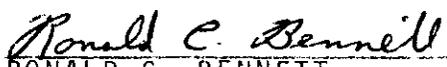
That counsel for Plaintiff, presents and states to the Court,  
that the Plaintiff prays that the Court dismiss this action  
against the Defendant, John Doe, individually, without prejudice.

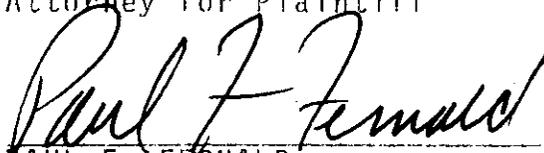
IT IS THE ORDER OF THIS COURT that said action be, and the  
same is hereby dismissed with prejudice to the bringing of another  
and future action between the two (2) parties, Charles C. Groom  
and AAACON Auto Transport, Inc., a Corporation, herein.

IT IS THE ORDER OF THIS COURT that said action be, and the  
same is hereby dismissed without prejudice as to the Defendant,  
John Doe, individually herein.

  
DISTRICT JUDGE

APPROVED:

  
RONALD C. BENNETT  
Attorney for Plaintiff

  
PAUL F. FERNALD  
Attorney for AAACON Auto  
Transport, Inc.

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

H. A. CHAPMAN d/b/a )  
H. A. CHAPMAN INVESTMENTS )  
Plaintiff )  
v. )  
AMF TUBOSCOPE, INC., )  
Defendant )

No. 76-C-642-C

**FILED**

MAY 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

On March 17, 1978, on the Motion fo Defendant to Alter or Amend Judgment or in the Alternative, for a New Trial, Defendant appearing by its Counsel, Dan A. Rogers, Esq., Rogers, Rogers and Jones; and by Gregor F. Gregorich, Esq., Rogers, Hoge, & Hill, New York City, appearing specially for purposes of arguing this Motion; and Plaintiff appearing by his Counsel, Mack Muratet Braly, Esq., Hall, Estill, Hardwick, Gable, Collingsworth & Nelson; and the matter having been fully briefed, and Counsel having been heard; and upon consideration of the briefs and arguments of Counsel and upon a review of the record in this case, it is

ORDERED, that the Motion of Defeneant to Alter or Amend Judgment or in the Alternative for a New Trial be overruled; and it is further

ORDERED, that the record be re-opened for the purpose of taking additional testimony with respect to the following matters only:

1. The cost of secondary production (Point IX of Defendants Motion); and
2. The scientific and economic basis for the reduction to present net worth of the net value

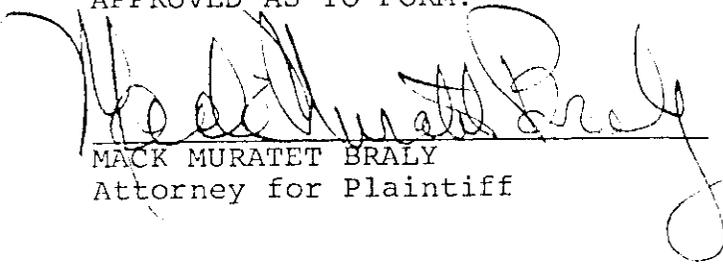
of the lost primary and secondary production  
from the Hooper #2 well;

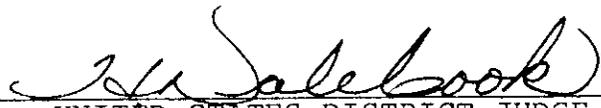
~~and it is further-~~

~~ORDERED, that the parties appear before this Court at  
\_\_\_\_\_ o'clock \_\_\_ M. on the \_\_\_\_\_ day of \_\_\_\_\_, 1978,  
for the above stated purposes.~~

DATED: Tulsa, Oklahoma  
~~April~~, 1978  
May 2,

APPROVED AS TO FORM:

  
MACK MURATET BRALY  
Attorney for Plaintiff

  
UNITED STATES DISTRICT JUDGE

\_\_\_\_\_  
DAN A. ROGERS  
Attorney for Defendant



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

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

THOMAS P. BROWN a/k/a THOMAS  
PERRY BROWN, MARY L. BROWN,  
ELBERT W. VASHER, JR., and  
VERNON WILSON,

Defendants.

CIVIL ACTION NO. 77-C-468-C

**FILED**

MAY 2 1978

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 2nd day of May, 1978, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendants, Thomas P. Brown a/k/a Thomas Perry Brown, Mary L. Brown, Elbert W. Vasher, Jr., and Vernon Wilson, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Mary L. Brown, was served by publication as shown on the Proof of Publication filed herein; that Defendant, Elbert W. Vasher, Jr., was served with Summons and Complaint on November 17, 1977; that Defendant Vernon Wilson, was served with Summons and Complaint on November 21, 1977; and, that Defendant, Thomas P. Brown a/k/a Thomas Perry Brown, was served with Summons and Complaint on December 7, 1977; all as appears on the United States Marshal's Service herein.

It appearing that the Defendants, Thomas P. Brown a/k/a Thomas Perry Brown, Mary L. Brown, Elbert W. Vasher, Jr., and Vernon Wilson, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Eighteen (18), Block Nineteen (19), VALLEY VIEW ACRES ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Thomas P. Brown and Mary L. Brown, did, on the 7th day of April, 1976, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$12,300.00 with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Thomas P. Brown and Mary L. Brown, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$12,298.31 as unpaid principal with interest thereon at the rate of 9 percent per annum from March 1, 1977, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Thomas P. Brown/in personam and Mary L. Brown, in rem, for the sum of \$12,298.31 with interest thereon at the rate of 9 percent per annum from March 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Elbert W. Vasher, Jr. and Vernon Wilson.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's

judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.



UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

