

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

FILED

NOV 30 1979

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 )  
 vs. )  
 )  
 JACK L. BALDWIN, )  
 )  
 ) Defendant. )

CIVIL ACTION NO. 79-C-512-*dst*

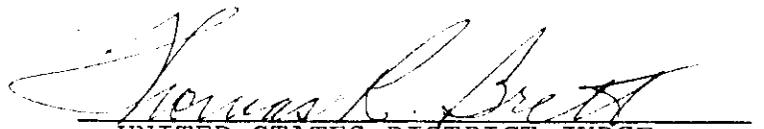
DEFAULT JUDGMENT

This matter comes on for consideration this 30<sup>TH</sup>  
day of Nov., 1979, the Plaintiff appearing by Robert  
P. Santee, Assistant United States Attorney for the Northern  
District of Oklahoma, and the Defendant, Jack L. Baldwin,  
appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendant, Jack L. Baldwin, was  
personally served with Summons and Complaint on October 2, 1979,  
and that Defendant has failed to answer herein and that default  
has been entered by the Clerk of this Court.

The Court further finds that the time within which  
the Defendant could have answered or otherwise moved as to  
the Complaint has expired, that the Defendant has not answered  
or otherwise moved and that the time for the Defendant to  
answer or otherwise move has not been extended, and that Plaintiff  
is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that  
the Plaintiff have and recover Judgment against Defendant, Jack L.  
Baldwin, for the sum of \$1,230.43, as of June 30, 1979, plus  
interest from and after said date at the rate of 7% per annum.

  
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney  
  
ROBERT P. SANTEE  
Assistant U. S. Attorney

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

PREMIER PONTIAC, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
RALPH BAGBY, )  
 )  
Defendant. ) Case No. 78 C 447 BT

O R D E R

IT IS HEREBY ORDERED that this matter be and is hereby  
dismissed with prejudice and without an award of attorney fees  
or costs to the Defendants. Stipulation of parties is approved.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

11-30-79

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

VANDERSONS CORPORATION, )  
an Illinois corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MANESS TYPE CO., INC., )  
an Oklahoma corporation; )  
THOMAS R. ELLIOTT and )  
JOE E. BROWN, )  
 )  
Defendants. )

No. 79-C-113-B

**FILED**

NOV 3 1979

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

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the parties hereto hereby stipulate that this action shall be dismissed with prejudice as to the defendant Thomas R. Elliott and as to the defendant Joe E. Brown.

*Gene C. Buzzard*

Gene C. Buzzard  
Attorney for Plaintiff

*Mack Greever*

Mack Greever  
Attorney for Defendants

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ROBERT R. ZIEGLER,

Plaintiff,

vs.

No. 79-C-383-BT

DEPUTY SHERIFF SERVANTEEZ;  
DEPUTY SHERIFF KEN DAVIS;  
POLICE COMMISSIONER JACK PURDY;  
DEPUTY SHERIFF RON ATTEBERRY;  
Former Liquor Board Director,  
IRNEST ISTOOK;  
Former Supervisor for the Eastern  
Division for the Liquor Board,  
DOUG HANSON;  
All ABC Agents unknown by name  
acting in accord with this  
Complaint;  
WILLIAM LYONS, ABC Agent;  
JOHN COPELAND, ABC Agent;  
TOM BALLARD, ABC Agent;  
JOHN HAMMER, ABC Agent;  
AVID KING, ABC Agent;  
THE CITY OF TULSA,

Defendants.

FILED

NOV 30 1979

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

ORDER

Plaintiff, Robert R. Ziegler, appears pro se in forma pauperis alleging violations of his civil rights. He has filed previous alleged civil rights violation cases in this Court.<sup>1</sup> In this

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1 Case Number 78-C-372, styled Robert Randall Ziegler v. Pete Silva, Jr., Buddy Fallis, Jr., and Members of Buddy Fallis' Staff Listed as John Doe Assistants, wherein Mr. Ziegler alleged a conspiracy to "suppress" evidence, which the Court treated as a 42 U.S.C. §1985(3) action. Mr. Buddy Fallis, Jr. was dismissed in this case by Order of May 8, 1979, under Imbler v. Pachtman, 424 U.S. 490, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), and its progeny. Mr. Pete Silva, Jr., was dismissed by Order of the Court dated November 15, 1979, pursuant to Rule 12(b)(6) for failure to state a claim; and the John Doe Assistants were dismissed in the same order for Failure to Prosecute.

Case Number 77-3-529, styled Robert Randall Ziegler v. Pete Silva and Les Earl, Jr., was instituted pursuant to 42 U.S.C. §1983 alleging deprivation of his rights. He alleged that Messrs. Silva and Earl failed to provide him with effective legal representation in his criminal trial, in violation of the Fifth, Sixth, and Fourteenth Amendments. The Court dismissed this action as being frivolous and further found that an attorney does not act under color of state law because he has accepted employment as a public defender, citing Espinoza v. Rogers, 470 F.2d 1174, 1175. On April 20, 1978, the Tenth Circuit Court of Appeals affirmed the trial court in an unpublished opinion, No. 78-8032.

latest action he asserts the applicability of 42 U.S.C. §§1981, 1983, 1985 and 1986, as well as alleged violations of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U. S. Constitution.

Plaintiff was convicted in State Court in six felony proceedings as follows:

- |            |  |
|------------|--|
| CRF-77-686 | Sodomy, after former conviction of two or more felonies; thirty (30) years.                                  |
| CRF-77-687 | Rape, First Degree, after former conviction of two or more felonies; life sentence plus twenty (20) years.   |
| CRF-77-688 | Sodomy, after former conviction of two or more felonies; thirty (30) years.                                  |
| CRF-77-689 | Unauthorized Use of a Motor Vehicle after former conviction of two or more felonies; twenty-five (25) years. |
| CRF-77-690 | Rape, First Degree, after former conviction of two or more felonies; life sentence plus twenty (20) years.   |
| CRF-77-691 | Burglary, First Degree, after former conviction of two or more felonies; forty (40) years.                   |

He is presently incarcerated in a state penal institution as a result of said convictions.

The Complaint is inartfully drawn, but construing it liberally because the prisoner is not skilled in drafting pleadings, the plaintiff contends:

That his six felony convictions "were brought about" by some type of "on The Job Training" of unspecified police officers to plant evidence; that when the acts of the unidentified police officers were exposed, the Prosecutor would not prosecute the officers, and that this so-called "on The Job Training" of those police officers was concealed. He further contends that this action is against those superiors who failed to take appropriate action and also "against police officers who were caught planting evidence." He further contends that unidentified police officers and "ABC" agents gave on the job training in planting evidence. Plaintiff asserts, as to his six felony convictions,

that the evidence was "fabricated and perjured testimony was secured and used" to "enhance" these convictions, which in turn were allegedly brought about by the negligent performance "of the City of Tulsa and Jack Purdy(sic)" and "all Defendants who knew or should have known and should have made measures to avoid and delete such actions." He states that "this and other actions were concealed and concerted(sic) to by Defendants not performing their duties by law." He seeks damages of \$2,500,000.00 and attorney fees of \$10.00 per hour.

On August 17, 1979, plaintiff filed a Motion to Amend the Original Complaint and the Motion was granted on August 22, 1979. Plaintiff, as of this date, has not filed his amended complaint.

In his Motion to Amend Complaint, plaintiff states:

(i) That defendants, Hammer and King, have given sworn depositions to their involvement in "fabrication of evidence";

(ii) That defendants, William Lyons and John Copeland, have testified that they were "instructed" on numerous occasions by defendant, Doug Hanson, to plant evidence and they followed orders;

(iii) That Deputy Sheriffs Serranteez(sic), Davis and Atteberry, Police Commissioner Jack Purdy(sic), former Liquor Board Director Ernest Istook(sic), former Liquor Board Director Doug Hanson, all ABC agents, William Lyons, John Copeland, Tom Ballard, John Hammer and Avid King, and the City of Tulsa, took part in the planting of evidence and ordering its concealment, which led to evidence being fabricated in plaintiff's criminal case;

(iv) That all defendants knowingly planted the "seeds" to deprive plaintiff by planting evidence constantly in Tulsa and all defendants are responsible for evidence being planted in plaintiff's criminal trial.

(v) That the defendants had a responsibility to make sure these actions were not done under color of state law; and

(vi) That the defendant Istook tried to blame all evidence fabrication on Doug Hanson, but that plaintiff will show that Istook was also aware and concealed his participation.

An Answer has been filed by the defendants, William Lyons, Tom Ballard, John Hammer and Avid King. Deputy Sheriffs Ron Attèberry and Ken Davis have not been served with process. John Copeland has not been served with process. Police Commissioner Jack Purdie, while served with process and named within the Complaint, was not named as a defendant in the style of the Complaint. The unknown Police Officers and ABC agents have not been identified by the plaintiff.

In his "Traverse to Defendants' Motion to Dismiss" the plaintiff alludes to the fact that it is his belief that the defendant, Servanteez(sic), had knowledge of a conspiracy to plant evidence on another defendant similarly situated to the plaintiff in the same County. He further contends that there is a pattern of planting evidence in Tulsa County and that this is enhanced "by wide spread fabrication of evidence by the ABC Board."

The Court has for consideration the following Motions:

1. Motion to Dismiss of the defendant, Doug Hanson;
2. Motion to Dismiss of the defendant, Ernest J. Istook, Jr.
3. Motion to Dismiss and Alternative Motion for More Definite Statement of the City of Tulsa and Jack Purdie, Police Commissioner of the City of Tulsa;
4. Plaintiff's Motion for Preliminary Injunction Disqualifying Attorney General of State of Oklahoma from Representing Defendants;
5. Motion of Plaintiff for the Appointment of Counsel;
6. Motion to Dismiss of the defendant, Philip L. Cervantes.

Because Ziegler has jumbled his claims, it is difficult to ascribe a jurisdictional basis for each one. His basic complaint appears to be some type of "planting of evidence" which he assumes was used to obtain his conviction of the six felony counts, plus the use of perjured testimony during his trial. In alleging misconduct, he at no place alleges a personal injury. His conclusory allegations of constitutional and civil rights violations fail to set out specific facts.

Before addressing the various motions presented by the parties litigant, the Court finds, sua sponte, that this action should be dismissed as to all defendants insofar as the alleged violations occurring under §§1981, 1985(3) and 1986 of 42 U.S.C., for the following reasons:

Title 42 U.S.C. §1981 was originally enacted as part of the Civil Rights Act of 1866, 14 Stat. 27, designed to enforce the then recently adopted Thirteenth Amendment. As such it was directed solely at racial discrimination. Jones v. Alfred H. Mayer Co., 392 U.S. 490, 413, 88 S.Ct. 2186, 20 L.Ed.2d.1189 (1968); Manganares v. Safeway Stores, Inc., 593 F.2d 968, 971, 972 (10th Cir. 1979). There is no allegation in the present complaint or other pleadings submitted by plaintiff that insinuate any racial discrimination. Indeed, plaintiff states in his initial complaint that he is a "white" citizen. The Court, therefore, finds that plaintiff has not stated a claim entitling him to relief under 42 U.S.C. §1981 so the alleged 42 U.S.C. §1981 claim should be dismissed sua sponte as to all defendants.

Title 42 U.S.C. §1985(3) provides a cause of action to parties as a result of a conspiracy by two or more persons for the purpose of depriving "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law."

In considering an alleged violation under §1985(3), the lead case is Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), wherein the Supreme Court said:

"The constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose--by requiring full effect to the congressional purpose--by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment [incorporated into the section].... The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based,

"invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

The Supreme Court expressly declined to decide whether a conspiracy motivated other than by a racial basis would be actionable under that section. *Griffin v. Breckenridge*, supra, at 102, n.9; *Lessman v. McCormick*, 591 F.2d 605 (10th Cir. 1979). Furthermore, the circuit court cases which have recognized §1985, classes which are not racially based, have stayed close to the areas protected by the First Amendment. *Lessman v. McCormick*, supra, at 608.

The Supreme Court specifically noted that §1985(3) does not expressly require state action and stated:

"....An element of the cause of action established by....42 U.S.C. §1983, is that the deprivation complained of must have been inflicted under color of state law. To read any such requirement into §1985(3) would thus deprive that section of all independent effect...."

Title 42 U.S.C. §1986 covers actions for neglect to prevent a conspiracy. It also sets up the applicable limitation period for an action pursuant to §1986 as follows:

"....But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

The Tenth Circuit Court of Appeals has ruled that where there is no valid claim under §1985, none can exist under §1986. *Taylor v. Nichols*, 558 F.2d 561, 568 (10th Cir. 1977).

Once again, the plaintiff has not stated any racial nexus to sustain a claim pursuant to 42 U.S.C. §1985(3) and cannot recover under that section of the Civil Rights Statute. If no claim is validly asserted under §1985, then a claim cannot exist under §1986, and sua sponte, the claims asserted by plaintiff under §§1985(3) and 1986, 42 U.S.C., should be dismissed as to all defendants.

As noted hereinabove, some of the defendants have filed Motions to Dismiss [Doug Hanson; Ernest J. Istook, Jr.; Jack Purdie; City of Tulsa; and Philip L. Cervantes].

In testing the validity of a Motion to Dismiss for failure to state a claim [Rule 12(b)(6), F.R.Civ. P.], the Court must assume that the facts alleged in the Complaint are true. Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974).

In Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), the Supreme Court, in considering a pro se complaint, stated that less "stringent standards than formal pleadings drafted by lawyers" be applied when considering motions to dismiss. Additionally, Rule 8(a), F.R.Civ.P., provides that pleadings are to be liberally construed.

A Complaint, relying upon 42 U.S.C. §1981 et seq., is plainly insufficient unless it contains some allegations of facts indicating a deprivation of civil rights. Fine v. City of New York, 529 F.2d 70 (2nd Cir. 1975); Martin v. Merola, 532 F.2d 191, 198 (2nd Cir. 1976); Black v. United States, 534 F.2d 524 (2nd Cir. 1976); Koch v. Yunich, 533 F.2d 80 (2nd Cir. 1976); Ostrer v. Aronwald, 567 F.2d 551 (2nd Cir. 1977).

Conclusory allegations cannot withstand a Motion to Dismiss. Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977).

The defendants, Doug Hanson and Ernest Istook, Jr., have filed Motions to Dismiss for failure to state a claim. Although the Motions were filed separately, the Court will consider them together.

The Court having heretofore found, sua sponte, that the claims asserted as to §§1981, 1985(3) and 1986 should be dismissed, the only matters remaining for consideration on the Motion to Dismiss are the claims asserted under §1983 and the various Amendments to the Constitution.

In an effort to control frivolous conspiracy suits under §1983, federal courts have come to insist that the complaint state with specificity the facts that, in the plaintiff's mind, show the existence and scope of the alleged conspiracy. Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977). A plaintiff must plead facts supporting his claims, and the court need not conjure up unpleaded facts to support conclusory allegations. O'Brien v. Digrazia, 544 F.2d 543, 546, n.3 (1st Cir. 1976).

An action for conspiracy may be maintained under §1983. Slavin v. Curry, 574 F.2d 1256, 1261 (5th Cir. 1978); Nesmith v. Alford, 318 F.2d 110, 126 (5th Cir. 1963), cert. denied, 375 U.S. 975, 84 S.Ct. 489, 11 L.Ed.2d 420 (1964).

To maintain a conspiracy action under §1983, it is necessary that there have been an actual denial of due process of equal protection by someone acting under color of state law. Slavin v. Curry, supra, p. 1261.

Under the Federal Rules of Civil Procedure, a plaintiff in a §1983 action is only "required to set forth specific illegal misconduct and resultant harm in a way which will permit an informed ruling whether the wrong complained of is of federal cognizance." Durso v. Rowe, 579 F.2d 1365, 1371 (7th Cir. 1978).

In Ostrer v. Aronwald, 567 F.2d 551 (2nd Cir. 1977), it was held:

"This court has repeatedly held that complaints containing only 'conclusory', 'vague' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed.... Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct.... In this case, appellants' unsupported allegations, which fail to specify in detail the factual basis necessary to enable appellees intelligently to prepare their defense, will not suffice to sustain a claim of governmental conspiracy to deprive appellants of their constitutional rights."

It has also been held that a general allegation of a conspiracy will not prevent dismissal as to a defendant who is named only in the caption of the complaint without any allegation of overt acts in which he engaged which were reasonably related to the promotion of the claimed conspiracy. Kadar Corp. v. Milbury, 549 F.2d 230, 232 (1st Cir. 1977). Cf. Child v. Beame, 417 F.Supp. 1023, 1025 (USDC SD NY 1976); Potter v. Clark, 497 F.2d 1206 (7th Cir. 1974).

In the instant action, the complaint filed by the plaintiff contains only conclusory allegations of a conspiracy, but plaintiff does not support the claim with reference to material facts.

Focusing first on the conspiracy, the Court finds that plaintiff's pleadings are devoid of any factual allegations that would tend to lend credence to a conspiracy. Pleading conspiracy under

§1983 requires at least minimum factual support of the existence of a conspiracy. Francis-Sobel v. University of Maine, 597 F.2d 15 (1st Cir. 1979); Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977).

The Court finds that the plaintiff has failed to state a claim under §1983 upon which relief can be granted and the Motion to Dismiss should be sustained. The Court further finds, however, in view of plaintiff appearing pro se in these proceedings, the Court will grant him fifteen (15) days to amend his Complaint failing which the Motion to Dismiss will be sustained.

The Court further finds that plaintiff has failed to state a claim under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution.

The defendants, Jack Purdie, Police Commissioner, and the City of Tulsa, have filed a Motion to Dismiss.

In the Motion to Dismiss, the defendant raises the one year Statute of Limitation contained in 42 U.S.C. §1986 and this Court is in agreement that the applicable Statute of Limitations has run insofar as the attempt of the plaintiff to assert a claim under §1986. The Court finds that the Motion to Dismiss, insofar as it relates to §1986 should be sustained in addition to the Court's sua sponte dismissal of the §1986 action hereinabove as to all defendants.

Defendants, City of Tulsa and Jack Prudie, move to dismiss the Complaint as to §1983, based on the doctrine of respondeat superior. They call the attention of the Court to the summons issued by the plaintiff wherein it is stated on the direction as to service, i.e. "SERVE The City of Tulsa (Respondant Superior [sic])." In the Complaint filed by the plaintiff he alleges "neglient(sic) performance of the city of Tulsa and Jack Purdy(sic) ...." This Court is aware of the recent decision of the Tenth Circuit Court of Appeals, McClelland v. Facteau, et al., No. 77-1709, decided November 19, 1979, wherein it was held that the doctrine of respondeat superior cannot be used to

hold liable under §1983 superior officers who have no affirmative link with the misconduct. Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976).

In Rizzo v. Goode, 423 U.S. 362 (1976) the Supreme Court said:

"The 'affirmative link' requirement of Rizzo means to us that before a superior may be held for acts of an inferior, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivations of which complaint is made.

\* \* \*

"Nothing in the record shows that any defendant instigated the investigation of plaintiff, directed its course, participated or acquiesced therein. There is no proof or lack of training or of declaration of wrongful policy...."

The Court finds, however, that it need not decide this specific point inasmuch as the Court finds that plaintiff has failed to state a claim upon which relief can be granted pursuant to §1983 for the reasons hereinabove stated by the Court in determining the Motions to Dismiss of the defendants, Hanson and Istook.

The Court having so determined, there is no need to determine the other propositions raised in the Motion to Dismiss brief.

The Court further finds that the plaintiff has failed to state a claim under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution.

The Court finds that the Motion to Dismiss of the defendants, City of Tulsa and Jack Purdie, should be sustained. The Court further finds, however, in view of plaintiff appearing pro se in these proceedings, the Court will grant him fifteen (15) days to amend his Complaint failing which the Motion to Dismiss will be sustained.

The defendant, Deputy Sheriff Philip L. Cervantes, has filed a Motion to Dismiss for failure to state a claim. He has attached to his brief an affidavit. The Court will not consider the affidavit in ruling on the Motion to Dismiss, and, thus there is no need to convert the Rule 12(b) motion to a Motion for Summary Judgment under Rule 56.

The Court finds, for the reasons hereinbefore stated, the Motion to Dismiss should be sustained. The Court further finds, however, in view of plaintiff appearing pro se in these proceedings, the Court will grant him fifteen (15) days to amend his Complaint failing which the Motion to Dismiss will be sustained.

In view of the finding of the Court on the Motion to Dismiss for failure to state a claim, it is not necessary that the Court determine Proposition IV propounded by Deputy Sheriff Cervantes as to the effect of his pending criminal appeal in the Oklahoma Court of Criminal Appeals. Nonetheless, the Court finds such proposition without merit for the following reasons:

As a general rule in civil rights actions, exhaustion of state remedies is not a prerequisite. Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 493 (1961).

In Denney v. State of Kansas, 436 F.2d 583 (10th Cir.1971), the petitioner had been convicted in the State court and his direct appeal was pending when he initiated his habeas corpus petition in the Federal Court. The Court denied habeas corpus relief for failure to exhaust state remedies. The plaintiff claimed that the exhaustion requirement was inapplicable since the relief he sought was allegedly pursuant to 42 U.S.C. §1983. The Court stated it found no reference to §1983 in the record. The Court did, however, state:

"...Regardless, the Civil Rights statute cannot be used to circumvent the exhaustion requirement of 28 U.S.C. §2254. Smartt v. Avery, 411 F.2d 408 (6th Cir. 1969)."

In Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the Supreme Court established an exception to the general rule that exhaustion is not required in civil rights actions. In Preiser, supra, the Court held that where suits for equitable relief under 42 U.S.C. §1983 come within the "core of habeas corpus," i.e., constitute a challenge to the fact or duration of plaintiff's confinement, 411 U.S. at 489, the exhaustion requirement of habeas corpus could not be circumvented. The Court reasoned that it would undermine the integrity of the writ of habeas corpus if a prisoner could evade the habeas exhaustion requirement by the simple expedient of seeking the same relief

in a civil rights action. The Preiser Court based its holding also on the notion of federalism or comity which requires that federal courts avoid unnecessary friction with and interference in the state criminal justice system.

In Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974), the Court held that it was proper to dismiss a civil rights action for damages which is brought during the pendency of a state appeal of a criminal conviction, when the civil rights action would require the court to rule upon the validity of the state criminal conviction. The Court commented:

"It is nonetheless unfortunate that a civil rights litigant might be forced to await the conclusion of state criminal proceedings against him before he may attempt to vindicate his federal rights in a federal forum. But while any delay of this type is costly, the fact of the matter is that federal relief in the form of immediate or more speedy release from incarceration, normally a matter of even more pressing concern, is subject to just this sort of delay.... In any event, whatever cost to the litigant may be involved, there is an overriding cost that is avoided. Damage to the smooth operation of the administration of criminal justice, injury to the proper workings of a federal system, and undermining of congressional concern with the functioning of the writ of habeas corpus--all are harms which are prevented by the requirement that a civil rights damage action be delayed.

"The touchstone for any decision to defer a civil rights damage action which is parallel to state criminal proceedings is whether the federal court will be making rulings whose necessary implication would be to call in question the validity of the state conviction.... As in any area of the law, marginal cases will arise, calling for the exercise of a delicate judgment. The first question will be whether or not the validity of a state criminal conviction which has not yet completed the full course of both trial and appeal will be a necessary issue in the federal action. If so, the federal action must be either dismissed or held in abeyance until the state proceedings are completed. If the answer to this first question is unclear, then the federal court may properly weigh the potential harm to comity and the orderly administration of criminal justice against the potential harm to the litigant, in reaching its decision." (Footnotes omitted).

Despite the difference in the form of relief being sought, a suit for money damages under §1983 may also have a substantially disruptive effect upon contemporary state criminal proceedings, and may also undermine the integrity of the writ of habeas corpus.

Where the federal court, in dealing with the question of damages caused by violation of civil rights, would have to make ruling on the validity of a conviction in contemporary state proceedings, the potential for federal-state friction is obvious. Guerro, supra.

In Clark v. Zimmerman, 394 F.Supp. 1166, 1173 (USDC MD PA. 1975) the Court said:

"Since the federal equity power must refrain from staying prosecutions outright, the federal courts must also refrain from adjudicating, in the context of damage suits, constitutional issues which are inherently involved in such prosecutions. A federal adjudication of such constitutional issues obviously would intrude into the state criminal process. Federal adjudication of damage claims would raise uncertainty in the state criminal proceedings as to the effect to be given there to a federal ruling on constitutional questions. Indeed, under the doctrine of collateral estoppel, it might well be that the federal ruling would be finding on the state criminal proceeding."

See also Galloway v. Watts, 395 F.Supp. 729 (USDC D. Maryland, 1975); Davis v. Hudson, 436 F.Supp. 1210 (USDC S.Car.1977).

The doctrine of abstention has been applied in other federal courts in damage actions under §1983. Wallace v. Hewitt, 428 F. Supp. 39 (USDC MD Pa. 1976); Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976); Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974).

In Meadows v. Evans, 550 F.2d 345 (5th Cir. 1977) the Court determined that when a trial court treats a §1983 action as a habeas corpus action and dismisses, the Court should have held in abeyance the §1983 action in light of the statute of limitation problem inherent in dismissal.

In Edwards v. Joyner, 566 F.2d 960 (5th Cir. 1978), the Court was faced with a Rule 60(b) question. The Court did comment:

"...Edwards' §1983 complaint alleged that a police official had perjured himself at Edwards' murder trial. He also claimed in subsequent pleadings that the duration of police interrogation was coercive, thereby invalidating his confession, and that the state withheld favorable evidence in violation of Brady v. Maryland.... These allegations were not presented to the state court on direct appeal,...., and the record reflects no other state proceedings. A §1983 action raising issues that go directly to the constitutionality of a prisoner's conviction or confinement is not properly before the federal court until state remedies have been exhausted. Fulford v. Klein, 529 F.2d 377 (5 Cir.1976), aff'd en banc, 550 F.2d 342 (1977)."

In Rimmer v. Fayetteville Police Dept., 567 F.2d 273 (4th Cir. 1977), the Court said:

"When an action under the Civil Rights Act calls into question the validity of the state court conviction, it so closely resembles an action for a federal writ of habeas corpus that a requirement of exhaustion of available state remedies may seem reasonable."

It is apparent that Ziegler has not juxtaposed habeas corpus claims and §1983 claims, and he therefore need not show that he has exhausted his state remedies.

And since the state court conviction appeal has not been finalized this Court need not meet at this time the argument of collateral estoppel or res judicata.

Plaintiff has filed a Motion for Appointment of Counsel. There is no right to counsel in Civil Rights cases. Harwick v. Ault, 517 F.2d 295, 298 (5th Cir. 1975). 28 U.S.C. §1915(d) provides that the court may request an attorney to represent a party who is proceeding in forma pauperis in a civil case, but that section contains no provision for compensation of counsel. The decision of whether to appoint counsel rests within the sound discretion of the Court unless denial would result in fundamental unfairness impinging on due process rights. Heidelberg v. Hammer, 577 F.2d 429 (7th Cir. 1978). The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, authorizes the court to allow the prevailing party a reasonable attorney's fee as part of the costs in a civil action. The act does not authorize the court to appoint counsel.

The Court, therefore, finds that the Motion for Appointment of Counsel is denied.

As to the plaintiff's Motion for Preliminary Injunction Disqualifying Attorney General of State of Oklahoma from Representing Defendants, the Court finds that the Attorney General has complied with 74 O.S.Supp.1976, §20(f)(A); 74 O.S. Supp. 1976, §20(g), is properly representing the defendants for whom he has filed an entry of appearance. Furthermore, the Court finds that a preliminary injunction would be improper in the instant case, and therefore, the plaintiff's Motion should be denied.

The Court further finds, sua sponte, that the unserved named defendants and unnamed and unserved defendants should be dismissed for failure to prosecute, the action having been commenced on May 27, 1979.

IT IS, THEREFORE, ORDERED, SUA SPONTE, that the Complaint as it relates to asserted claims under 42 U.S.C. §§1981, 1985(3) and 1986 be and the same is hereby dismissed as to all served defendants, regardless of whether they have filed a proper Motion to Dismiss.

IT IS FURTHER ORDERED that the Motions to Dismiss of the defendants, Doug Hanson, Ernest J. Istook, City of Tulsa, Jack Purdie and Philip L. Cervantes, are sustained, with the proviso that plaintiff is granted fifteen (15) days to file his Amended Complaint, failing in which the §1983 Complaint will be dismissed.

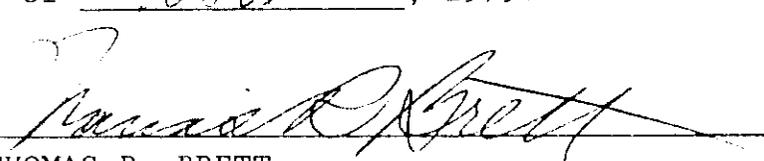
IT IS FURTHER ORDERED that the Motion of Plaintiff for the Appointment of Counsel be and the same is hereby denied.

IT IS FURTHER ORDERED that the Motion for Preliminary Injunction Disqualifying the Attorney General of the State of Oklahoma from Representing Defendants be and the same is hereby denied.

IT IS FURTHER ORDERED that the unserved defendants and the unnamed and unserved defendants be and the same are hereby dismissed sua sponte for failure to prosecute, (the action having been commenced on May 29, 1979.)

The Court notes, as a result of this order that the §1983 action is still pending as to the defendants, William Lyons, Tom Ballard, John Hammer and Avid King.

ENTERED this 30<sup>th</sup> day of Nov., 1979.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

ALVIS FRANKLIN BROWN,

Plaintiff,

vs.

JOSEPH A. CALIFANO, JR.,  
Secretary of Health,  
Education and Welfare,

Defendant.

No. 78-C-587-BT

FILED

NOV 30 1979

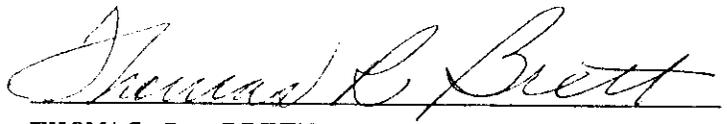
U.S. District Court  
Northern District of Oklahoma

JUDGMENT

This cause having been considered by the Court on the pleadings, the entire record certified to this Court by the Defendant Secretary of Health, Education and Welfare (Secretary), and after due proceedings had, and upon examination of the pleadings and record filed herein, including the Briefs submitted by the parties, the Court is of the opinion as shown by its Memorandum Opinion filed herein of even date that the final decision of the Secretary is supported by substantial evidence as required by the Social Security Act, and should be affirmed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the final decision of the Secretary should be and hereby is affirmed.

Dated this 30<sup>TH</sup> day of NOVEMBER, 1979.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



herewith affirmed.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the court that judgment be entered in favor of the defendants, Walter Gray and Patricia L. Gray, on the complaint of the plaintiff, Meda J. Lively, no cause of action.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the defendants be awarded their costs in this action as the prevailing party, but not including the recovery of attorney's fees as costs, as requested by the motions which defendants filed, and concerning which a separate order of denial has been entered by the court.

DATED this 26 day of November, 1979.

  
ALDON J. ANDERSON, Chief Judge,  
United States District Court for Utah

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

RECEIVED  
NOV 10 1989

-----

MEDA J. LIVELY,	)	
	)	
Plaintiff,	)	No. 78-C-89-C ✓
	)	
v.	)	ORDER DENYING MOTION
	)	FOR AWARD OF ATTORNEY
WALTER GRAY and PATRICIA	)	FEE AS COSTS
L. GRAY, his wife, and WALTER	)	
GRAY AGENCY, INC.,	)	
	)	
Defendants.	)	

-----

In the above-entitled matter, the defendants, Walter Gray and Patricia L. Gray, individually, and the defendant Walter Gray Agency, Inc., have filed applications for the award of attorney fees as costs in the above matter. A motion and supporting brief in support thereof has been filed by said defendants and responded to by counsel for the plaintiff. The court has carefully considered the materials presented and deems itself fully advised. In accordance therewith the court concludes as follows.

It is the opinion of the court that the statute as cited by defense counsel, 12 O.S.A., Section 936, purporting to provide for attorney's fees as costs in particular types of civil actions, was not intended to allow recovery in real estate transactions, which basically the cause in question concerned itself with. It is true that personal property was involved as part of the original sales transaction. However, the parties, it will be remembered, prior to any cause of action having been filed, relieved one another from the obligations of the personalty contract which had been included in the real estate contract.

As the basis for an additional claim, the defendants have urged upon the court that the action of the plaintiff was brought in bad faith. Plaintiff's counsel, it is argued, was guilty of bad faith in failing to dismiss the corporate defendant prior

to the time of trial. As noted by plaintiff's counsel the trial court on March 5, 1979, entered its order in which it observed that it was possible that plaintiff reasonably relied upon the appearance that this was a transaction on behalf of the agency in view of the very close relationship which obviously existed between Walter Gray and his wife individually and the corporation. In the course of the trial the evidence showed how directly involved Mr. Gray was in all of the transactions. He was a well informed business man. His corporation had substantial business activity. Judge Cook's observations with respect to this matter were reasonable and are shared by the trial judge, the undersigned.

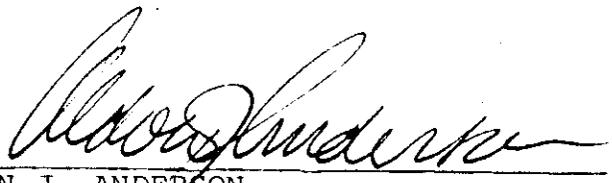
Further, the court made detailed findings in the record, which showed that there were serious factors in plaintiff's favor. It was only after a careful process of weighing all of the evidence, and personally researching areas of the law which counsel had not covered, that the court was able to render a judgment which to its satisfaction covered all of the evidence and the important legal issues raised. There was nothing in any of this which the court feels would justify the conclusion that the action was brought in bad faith, vexatiously, wantonly or for an oppressive reason.

The parties, at the time the transaction was entered into, met with an attorney to draft and execute the papers. Defendants and the attorneys arranged for might well have recognized plaintiffs' need for an attorney to advise her in connection with terms of the contract which were not in her favor. The forfeiture clause covering her substantial down payment may never have been included, or the contract may not have been entered into. Both parties could have saved themselves the losses they claim. It would be a strange turn-about if she were required to pay costs in the form of attorney's fees on a claim of her bad faith.

In view of the foregoing, the court enters the following order:

IT IS HEREBY ORDERED that the motion of the defendants, and of each of them, for an award of attorney's fees as costs is denied.

DATED, this 26 day of November, 1979.



ALDON J. ANDERSON,  
Chief Judge, United States District  
Court for State of Utah

United States District Court  
District of Utah  
Salt Lake City, Utah 84101

Chambers of  
Aldon J. Anderson  
United States District Judge  
U. S. Courthouse

November 26, 1979

NOV 26 1979

U. S. DIST. COURT

Terry Vaughn  
Deputy Clerk  
United States District Court  
Room 411, U. S. Courthouse  
Tulsa, Oklahoma 74103

RE: 78-C-89-C Lively v. Gray

Dear Terry:

Enclosed you will find copy of the court's order denying the motions for attorney's fee by defendants in the above case.

Also, please find the court's Final Judgment in the matter, drawn after the practice which the court has of making its findings and conclusions of law extensively on the record, and then filing a simple judgment form reciting that fact in lieu of writing out further findings and conclusions for the file.

Please send a copy of this letter and a copy of the documents, the order and judgment to counsel.

By this letter I would like to express appreciation to counsel for their ability in presenting a very difficult case. It was a challenging and interesting experience. In addition, it was very pleasant being in Oklahoma.

Thanks to you, Terry, Gene and the staff for their help.

Sincerely,



Aldon J. Anderson,  
United States District Judge

cc: Gene Stipe, Monte Brown, Attorneys at Law  
P.O. Box "S" McAlester, Oklahoma 74501

Lloyd E. Cole, Jr., Attorney at Law  
P.O. Box 900, Stilwell, Oklahoma 74960

encl.

FILED

NOV 29 1979 *CS*

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

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

J. C. THOMAS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PRUDENTIAL INSURANCE COMPANY )  
 OF AMERICA, )  
 )  
 Defendant. )

Cause No. 79-C-198-*DEV*

ORDER OF DISMISSAL

Upon the joint stipulation of plaintiff and defendant,  
the Court hereby orders that this action be dismissed with  
prejudice to plaintiff's rights with each party bearing its own  
costs.

It is further ordered that defendant and its surety,  
Aetna Life and Casualty Company, are hereby released from any  
and all liability arising by virtue of a certain removal bond  
filed herein.

DATED this 29 day of November, 1979.

*[Signature]*  
\_\_\_\_\_  
JUDGE OF THE UNITED STATES  
DISTRICT COURT

**NOTE:** THIS ORDER IS TO BE MAILED  
BY MOVANT TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

FILED

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

NOV 28 1979

UNITED STATES OF AMERICA for the  
 use and benefit of ROBERT W. HERRALL,  
 d/b/a HERRALL CONSTRUCTION COMPANY,  
  
 Plaintiff,  
  
 v.  
  
 UTILITY CONTRACTORS, INC., a corporation;  
 MID-STATES CONSTRUCTION OF DERBY, INC.,  
 a corporation; and FEDERAL INSURANCE COMPANY,  
 a corporation,  
  
 Defendants.

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

Case No. 79-C-180-~~C~~<sup>F</sup>

DEFAULT JUDGMENT

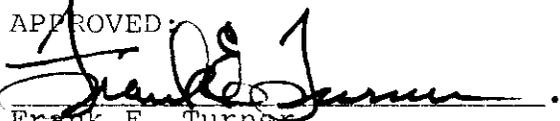
This action came on for determination before the Court,  
 James O. Ellison,  
 Honorable ~~H. Dale Cook~~, District Judge, presiding, and the Court  
 being duly informed in the matter and after being informed that the  
 Clerk has entered default in favor of plaintiff Robert W.  
 Herrall, d/b/a Herrall Construction Company, and against defendant,  
 Mid-States Construction of Derby, Inc., a corporation,

IT IS ORDERED AND ADJUDGED:

That the plaintiff Robert W. Herrall, d/b/a Herrall Construction  
 Company, recover of the defendant, Mid-States Construction of Derby,  
 Inc., a corporation, the sum of \$3,895.16, with interest thereon at  
 the rate of 10% per annum as provided by law and its costs of action.

Dated at Tulsa, Oklahoma, this 28<sup>th</sup> day of November, 1979.

  
 \_\_\_\_\_  
 James O. Ellison, District Judge

APPROVED:  
  
 \_\_\_\_\_  
 Frank E. Turner  
 525 S. Main, Suite 210  
 Tulsa, Oklahoma 74103  
 Telephone (918) 587-0141

Attorney for Robert W. Herrall,  
d/b/a Herrall Construction Company

FILED

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA, NOV 27 1979

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

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 78-C-4-B
	)	
20.00 Acres of Land, More or	)	Master File #400-10
Less, Situate in Washington	)	
County, State of Oklahoma,	)	Tract No. 417
and Fred D. Bible, et al.,	)	
and Unknown Owners,	)	
	)	
Defendants.	)	

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 78-C-5-B
	)	
1.35 Acres of Land, More or	)	Tract No. 421
Less, Situate in Washington	)	
County, State of Oklahoma,	)	
and Fred D. Bible, et al.,	)	
and Unknown Owners,	)	
	)	(Included in D.T. Filed in
Defendants.	)	Master File #400-10)

J U D G M E N T

1.  
Now, on this 27<sup>th</sup> day of Nov., 1979, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.  
This judgment applies to the entire estate condemned in Tracts Nos. 417 and 421, as such estate and tracts are described in the Complaints filed in these actions.

3.  
The Court has jurisdiction of the parties and subject matter of these actions.

4.  
Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal

11

Rules of Civil Procedure, on all parties defendant in these cases.

5.

The Acts of Congress set out in paragraph 2 of the Complaints filed herein give the United States of America the right, power and authority to condemn for public use the property described in such Complaints. Pursuant thereto, on January 5, 1978, the United States of America filed its Declaration of Taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of subject property a certain sum of money, and all of this deposit has been disbursed, as set out below in paragraph 14.

7.

The defendants named in paragraph 14 as owners of the estate taken in subject tracts are the only defendants asserting ownership of such property. All other defendants having either disclaimed or defaulted, the named defendants, as of the date of taking, were the owners, and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

On November 26, 1979, A stipulation, executed by the former owners of the estate taken in subject tracts, and the United States of America, was filed herein, whereby certain improvements, to-wit:

A. The wood frame building used as the family residence, on Tract. No. 417;

B. The wood frame building used for the Branding Iron Club, on Tract No. 417;

C. The wood frame building used for the Stardust Club, on Tract No. 417; and

D. The concrete block building used as a cafe,  
on Tract No. 421,  
situated upon the subject tracts on the date of taking herein,  
were excluded from the taking, and title thereto was revested in  
the former owners. Such exclusion of property should be approved  
by the Court.

9.

The Stipulation described in paragraph 8 above also con-  
tained a stipulation as to the amount of just compensation for the  
estate condemned in the subject tracts, and such Stipulation should  
be approved by the Court.

10.

This judgment will create a deficiency between the  
amount deposited as estimated compensation for the estate taken in  
subject tracts and the amount fixed by the Stipulation As To Just  
Compensation, and the amount of such deficiency should be deposited  
for the benefit of the owners. Such deficiency is set out in  
paragraph 14 below.

11.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the  
United States of America has the right, power and authority to con-  
demn for public use the tracts designated as Tracts Nos. 417 and  
421, as such tracts are particularly described in the Complaints  
filed herein; and such tracts, to the extent of the estate described  
in such Complaints (but subject to the exclusion provided below in  
paragraph 13) were condemned, and title thereto vested in the United  
States of America as of January 5, 1978, and all defendants herein  
and all other persons interested in such estate are forever barred  
from asserting any claim (except as to such excluded property) to  
such estate.

12.

It Is Further ORDERED, ADJUDGED and DECREED that on the  
date of taking, the owners of the estate condemned herein in sub-  
ject tracts were the parties whose names appear below in paragraph

14, and the right to receive the just compensation awarded by this judgment is vested in the parties so named.

13.

It Is Further ORDERED, ADJUDGED and DECREED that the agreement of the former owners and the Plaintiff, regarding exclusion of certain property from the taking in this case, as set forth in the Stipulation (described in paragraph 8 above) filed herein on November 26, 1979 hereby is approved.

14.

It Is Further ORDERED, ADJUDGED and DECREED that the agreement as to just compensation, described in paragraph 9 above, hereby is approved and the amount therein fixed by the parties is adopted by the Court as the award of just compensation for the estate taken in the subject tracts in these cases, as shown in the schedule which follows, to-wit:

TRACTS NOS. 417 and 421

OWNERS:

Fred D. Bible and  
Jacquelyn G. Bible, his wife (one and the same  
person as Jacquelyn J. Bible)

Note: On the date of taking, Tract 417 was subject to a mortgage issued to J. S. Gleason, Jr., Administrator of Veterans Affairs, recorded in Book 406, pg. 144 records of Washington County, State of Oklahoma. This mortgage now has been paid in full and has been released.

Award of just compensation  
for both tracts, combined,  
pursuant to Stipulation ----- \$87,000.00            \$87,000.00

Deposited as estimated compensation:  
C.A. 78-C-4 ----- \$43,300.00  
(Tr. 417)  
C.A. 78-C-5 ----- \$14,725.00  
(Tr. 421)  
-----  
\$58,025.00

Disbursed to owners and mortgagee:

Tract 417:  
To Bibles ---- \$41,132.87  
To Mortgagee - 2,167.13  
                  \$43,300.00  
Tract 421:  
To Bibles ---- \$14,725.00

Total disbursement for both tracts ----- \$58,025.00

Balance due to owners ----- \$28,975.00

Deposit deficiency ----- \$28,975.00

15.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in Civil Action No. 78-C-4 the deposit deficiency in the sum of \$28,975.00, and the Clerk of this Court then shall disburse the deposit in such case as follows:

Jointly to: Fred D. Bible and  
Jacquelyn G. Bible ----- \$28,975.00.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
HUBERT A. MARLOW  
Assistant United States Attorney

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

FILED

VICTOR W. RABON, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
TRANS WORLD AIRLINES, INC., )  
a Delaware corporation, )  
 )  
Defendant. )

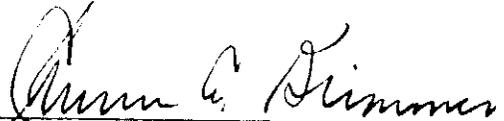
NOV 26 1979

NO. C76-C-175 ✓ Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER DENYING MOTION FOR NEW TRIAL

Upon reading and considering the Defendant's Motion  
for New Trial and Plaintiff's Response thereto, it is  
ORDERED that the motion is denied.

Dated this 19<sup>th</sup> day of November, 1979.

  
UNITED STATES DISTRICT JUDGE

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

THE UNIVERSITY OF TULSA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNITED STATES OF AMERICA )  
 )  
 Defendant. )

78-C-48-~~D~~ Eu

**FILED**

**NOV 21 1979**

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

JUDGMENT

Now on this 9th day of November, 1979, after the taking of evidence, the hearing of arguments and the dictating of findings of fact and conclusions of law into the record, the Court enters judgment effective the date this judgment is filed of record with the Clerk of the Court, as follows:

IT IS ORDERED, ADJUDGED and Decreed that the Plaintiff, The University of Tulsa, have judgment against the Defendant, United States of America, in the amount of \$55,161.00 with interest of \$1,604.45 accrued through January 31, 1978, and thereafter at the rate of 6% per annum, until paid, plus the costs of the action.

Given under my hand this 19th day of November, 1979.

Luther B. Eubanks  
United States District Judge

Approved as to form:

Lance Stockwell  
Lance Stockwell  
OF BOESCHE, McDERMOTT & ESKRIDGE  
320 South Boston, Suite 1300  
Tulsa, Oklahoma 74103  
(918) 583-1777

ATTORNEY FOR PLAINTIFF

Suzanne P'Neill  
Suzanne P'Neill  
Department of Justice  
Tax Division, Room 5B27  
1100 Commerce Street  
Dallas, Texas 75242

ATTORNEY FOR DEFENDANT

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

**FILED**

EA NOV 21 1979

BOBBY JOE OLLES, #38599-115, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 U. S. PAROLE COMMISSION and )  
 MAJOR JACK BREWER, CITY )  
 COMMANDER, SALVATION ARMY, )  
 )  
 Respondents. )

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

Civil Action No. 79-C-590-C

O R D E R

On May 20, 1974, Petitioner was sentenced on a plea of guilty, to a term of six years imprisonment for robbing a bank in the State of Arkansas, the deposits of which were insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. §2113(d). Olles v. United States, 570 F.2d 817 (8th Cir. 1978). Petitioner was released on Mandatory Release by the United States Board of Parole on March 22, 1978 (Exhibit "A" to Respondent's brief).

On February 9, 1979, a Warrant was issued by the U. S. Parole Commissioner, based on a Warrant Application of the same date (Exhibit "C" to Respondent's brief). Petitioner was arrested by the United States Marshal, Eastern District of Oklahoma, on February 15, 1979. A preliminary interview was had at the City-Federal Jail, Muskogee, Oklahoma, on February 20, 1979 (Exhibit "D" to Respondent's brief).

On March 8, 1979, a letter was sent to Petitioner advising him that the Commission had found probable cause to believe that the conditions of the mandatory release had been violated, and that a hearing on the revocation had been set for April 24, 1979, at Little Rock, Arkansas (Exhibit "E" to Respondent's brief). Exhibit "F" (a Hearing Summary) reveals that the hearing was actually held on April 26, 1979, at which time Petitioner was present and represented by a court-appointed attorney, and testimony and evidence was adduced. A recommendation was entered that Petitioner's parole be revoked. On May 1, 1979, a Notice of Action was entered revoking the parole. The record before the Court reveals that the Petitioner has exhausted his administrative remedies.

Petitioner, in his pro se §2241 complaint, asserts various alleged errors in the proceedings that entitle him to immediate release. His complaints may be summarized as follows:

(i) The Parole Commission violated 18 U.S.C. §4209 by failing to provide him with the specific conditions of release. Additionally, Petitioner claims that one condition of his mandatory release, i.e., specifically Item 6 which provides that the releasee shall not "associate with persons engaged in criminal activity", is unconstitutional.

(ii) That the Petitioner did not violate the conditions of his release by (a) failing to report; (b) leaving the district without permission; (c) failing to work regularly. Petitioner in effect calls upon this Court to review the evidence before the United States Parole Commission with reference to the activities of the Petitioner.

(iii) That the Parole Commission unlawfully delayed issuing a Violator Warrant; and

(iv) That the Parole Commission violated Petitioner's rights under 18 U.S.C. §4214 by failing to provide Petitioner with (a) notice of the revocation hearing; (b) an opportunity to present witnesses and confront adverse witnesses; and (c) failed to disclose the evidence against the petitioner.

The Court will deal individually with the alleged errors asserted by the Petitioner.

(i) THE PETITIONER CONTENDS THAT THE PAROLE COMMISSION VIOLATED PETITIONER'S RIGHTS UNDER 18 U.S.C. §4209 BY FAILING TO PROVIDE THE PETITIONER WITH SPECIFIC CONDITIONS OF RELEASE. THE CONSTITUTIONALITY OF THE REQUIREMENT THAT PETITIONER NOT ASSOCIATE WITH PERSONS ENGAGED IN CRIMINAL ACTIVITIES.

In Archiniega v. Freeman, 404 U.S. 4, 92 S.Ct. 22, 30 L.Ed.2d 126 (1970), the Supreme Court held that the Parole Board has wide authority to set conditions of release. The Court further stated that it did not believe "[t]hat a parole condition restricting association was intended to apply to incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer."

Courts have held that a parole condition that a parolee not associate with persons engaged in criminal activity was not unconstitutionally vague nor did it violate parolee's freedom of association. Birzon v. King, 469 F.2d 1241 (2nd Cir. 1972); United States v. Albanese, 554 F.2d 543 (2nd Cir. 1977); United States v. Bonanno, 452 F.Supp. 743 (USDC ND Calif. 1978). [Case deals with probation revocation in Federal Court.]

This Court is in accord with the above holdings and finds that the language used is "[n]ot so uncertain that 'men of common intelligence must necessarily guess at its meaning.'" Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); Birzon v. King, supra, at 1243.

The Court notes that the Petitioner claims the Commission violated his rights because the conditions of parole were not made clear to him as required by 18 U.S.C. §4209. First, the Court finds that the Petitioner signed a Mandatory Release Certificate, acknowledging on the second page thereof the conditions of parole; that he had read or had them read to him; received a copy thereof; and fully understood them. (Exhibit "A" to Respondent's brief). The Court finds that the terms used in the Mandatory Release are ordinary terms, having a common usage and are not so uncertain that a person of common intelligence would have to guess at their meaning.

The Parole Commission found that Petitioner had a "sustained association" with a person he acknowledged he knew to have a criminal record; failed to report when specifically directed to report; left the district without permission and failed to work regularly.

In United States v. Albanese, supra, at 547, the Court cited Broadrick v. Oklahoma, 413 U.S. 601, 608, 93 S.Ct. 2908, 2914, 37 L.Ed.2d 830 (1973), wherein the Supreme Court stated:

"[E]ven if the outermost boundaries of [the condition] may be imprecise, any such uncertainty has little relevance herein, where appellant['s] conduct falls squarely within the "hard core" of the [condition's] proscriptions..."

The Court, in reviewing and applying the applicable cases to the complaints asserted by the Petitioner, finds Petitioner's complaint to be without merit in regard to this proposition.

(ii) THE PETITIONER CONTENDS THAT HE DID NOT VIOLATE THE CONDITIONS OF HIS RELEASE BY (A) FAILING TO REPORT; (B) LEAVING THE DISTRICT WITHOUT PERMISSION; (C) FAILING TO WORK REGULARLY.

It is the duty of the Parole Commission to evaluate the testimony before it and pass on the credibility of the testimony adduced and make Findings thereon. Mack v. McCune, 551 F.2d 251 (10th Cir. 1977); Dye v. U. S. Parole Commission, 558 F.2d 1376 (10 Cir. 1977); Thompson v. Keohane, No. 78-1792 (10th Cir. May 3, 1979), "Not for Routine Publication."

"[I]t is not the function of the courts to review the Board's discretion in denying parole or to repass on the credibility of reports received by the Board in making its determination." Dye v. U. S. Parole Commission, supra; Butson v. Chairman, United States Parole Commission, 457 F.Supp. 841 (USDC D. Colo. 1978); Baker v. Day, 436 F.Supp. 593 (USDC WD Okl. 1977); Billiteri v. United States Board of Parole, 541 F.2d 938 (2nd Cir. 1976).

In Mack v. McCune, supra, at 254, the Court said:

"...As with probation revocation, all that is required is that the evidence and facts reasonably demonstrate that the person's conduct has not been as good as required by the terms and conditions of the release. See, e.g., Rodgers v. United States, 413 F.2d 251 (10th Cir. 1969); Genet v. United States, 375 F.2d 960 (10th Cir. 1967)..."

The reliability and trustworthiness of testimony is a matter for the trier of fact--in this case the hearing examiners. The question is not whether this court would have reached a different result if it had heard the testimony as the trier of fact. Under 18 U.S.C. §4214(d), the Board need only determine that a preponderance of the evidence supports a finding of parole violation, and this court cannot thereafter try the question de novo. Lewis v. United States Parole Commission, 448 F.Supp. 1327 (USDC ED Mich. SD 1978)

The Court finds, under the evidence submitted, that the revocation proceeding was "[f]ree from pure caprice on the part of the authorities and that the discretionary decision to revoke parole was not arbitrary." Mack v. McCune, supra.

(iii) THE PETITIONER CONTENDS THAT THE PAROLE COMMISSION UNLAWFULLY DELAYED ISSUING A VIOLATOR WARRANT.

Section 4213(d) of 18 U.S.C. provides that "[t]he Commission shall issue a warrant or summons as soon as practicable after discovery of the alleged violation, except when delay is deemed necessary." Petitioner complains that the alleged violations took place over a period of approximately eight (8) months. The Respondent herein admits that the violations in Petitioner's case are technical or administrative violations but asserts that it is impracticable to issue a warrant for every minor infraction. In Morrissey v. Brewer, 408 U.S. 471, 479, 92 S.Ct. 2593, 33 L.Ed 2d 484 (1972), the Court said:

"The enforcement leverage that supports the parole conditions derives from the authority to return the parolee to prison to serve out the balance of his sentence if he fails to abide by the rules. In practice, not every violation of parole conditions automatically leads to steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity...."

"Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole...."

The Petitioner has not asserted any prejudice for the delay in issuing the warrant [there is no claim that witnesses were unavailable or that pertinent evidence became unavoidable by reason of the delay].

It is apparent from reading the administrative record submitted, that the Parole Commission evaluated the cumulative facts of the Petitioner's behavior in determining that information in their possession indicated a lack of adjustment on the part of the Petitioner to the conditions of parole. McNeal v. U.S., 553 F.2d 66 (10th Cir. 1977) and Small v. Britton, 500 F.2d 299 (10th Cir. 1974) stand for the proposition that a delay to be actionable must be prejudicial. Furthermore, the Court finds that the Notice of Action, Exhibit "H" to Respondent's brief, reveals the following:

"Revoke, full credit to be allowed for time spent while on Mandatory Release. Continue to expiration."

The Court finds that the Petitioner has not demonstrated any prejudice and that the record indicates that the Commission did not unlawfully delay in issuing the warrant.

Petitioner sustained no loss as to credit for time accumulated while on parole prior to his actual revocation.

It is also clear from the legislative history that the decision to institute revocation proceedings is discretionary with the Commission. U. S. Cong. & Adm. News, 335, 366 (1976).

The Court, therefore, finds no merit to this contention by the Petitioner for it is apparent that the broad spectrum of Petitioner's actions was taken into consideration in the issuance of the warrant.

(iv) THE PETITIONER CONTENDS THAT THE PAROLE COMMISSION VIOLATED HIS RIGHTS UNDER 18 U.S.C. §4214 BY FAILING TO PROVIDE THE PETITIONER WITH (A) NOTICE OF THE REVOCATION HEARING; (B) AN OPPORTUNITY TO PRESENT WITNESSES AND CONFRONT ADVERSE WITNESSES; AND (C) FAILED TO DISCLOSE THE EVIDENCE AGAINST THE PETITIONER.

The administrative record reveals that the Petitioner was given notice of the hearing by letter dated March 8, 1979 (Exhibit "E" to Respondent's brief). The hearing was originally scheduled for April 24, 1979, but was changed to April 26, 1979. (Exhibit "F", bottom of page 3, Respondent's brief)

Petitioner was represented at the hearing by a court-appointed attorney. Prior to the hearing, the hearing examiners reviewed Petitioner's legal rights with him advising him that he had a right to voluntary witnesses, a right to cross-examine adverse witnesses, and a right to prepare his case and confer with his attorney. (Affidavit of A. Ronald Peterson, Case Analyst for the National Appeals Board of the United States Parole Commission attached to Respondent's brief); Exhibit "G" to Respondent's brief).

The Hearing Summary (Exhibit "F" to Respondent's brief) reveals the following pertinent information:

Ms. Judith Olles and Ms. Vela Beck were present at the hearing as voluntary witnesses on behalf of the Petitioner.

The following adverse witnesses were present: Mr. Sidney Beck; Mr. Harry Haney (subpoenaed at Mr. Olles' request); Mr. Dan Huie, U. S. Probation Officer, Little Rock, Arkansas.

The following voluntary witnesses were not present: Mr. Raymond Olles (brother of petitioner)--Petitioner was unable to locate his brother; Gary Brock; Jimmie Huglitt, a former employer was present on April 24, 1979, and Petitioner stated he could not return for the hearing on April 26, 1979; Donne Spears, his former girlfriend with her 14 year old daughter--Petitioner stated she did not appear as she did not want to become involved.

Petitioner requested the following adverse witnesses who were not present: Mr. Dempsey Beck (the Commission found that his testimony was not relevant to the charges); U. S. Probation Officer Robert L. Grobmyer (Commission refused to subpoena him for the hearing, but the Probation Officer did provide an Affidavit dated March 9, 1979, which was considered by the Commission).

The Petitioner did not request the presence of U. S. Probation Officer Donald Williams.

In Gagnon v. Scarpelli, 411 U. S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), relying on Morrissey v. Brewer, supra, the Supreme Court reiterated the guidelines of "minimum requirements of due process" for the final hearing prior to a revocation as follows:

"(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking [probation or] parole."  
Morrissey v. Brewer, supra, at 489."

Here, the administrative record reveals that the final hearing as to this Petitioner comported with all of the requirements set forth above.

Specifically, as to the affidavit submitted by U. S. Probation Officer Robert L. Grobmyer, in Stidham v. Wyrick, 567 F.2d 836, 838 (8th Cir. 1977) the Court said:

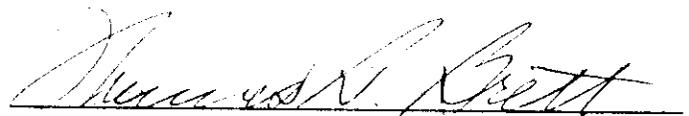
"As a third deficiency of the final revocation hearing, Stidham claims that he was denied the right to confront witnesses. The only witnesses Stidham requested were the two parole officers who prepared Stidham's parole violation report. The parole violation report was considered as evidence at the hearing. While Morrissey indicates that in most cases parole authorities are to testify to the facts so that the contesting party may have the opportunity to cross-examine them, the 'process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.' Morrissey v. Brewer, supra, 408 U.S. at 589, 92 S.Ct. at 2604. We agree with the district court that the refusal of the board to call the two parole officers was not a violation of due process."

See also Gagnon v. Scarpelli, supra, at 783, n.5.

The Court, having reviewed all of the evidence submitted and the applicable case law, finds that the U. S. Parole Commission accorded to the Petitioner all of his procedural rights required under the Parole Commission regulations and the Parole Commission and Reorganization Act and that the Writ of Habeas Corpus pursuant to 28 U.S.C. §2241 should be denied.

IT IS, THEREFORE, ORDERED that the Writ of Habeas Corpus pursuant to 28 U.S.C. §2241 be and the same is hereby denied.

ENTERED THIS 21 day of November, 1979.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

EUGENE WADE, DONALD WADE, )  
SHERMAN PYATT, MACK WADE, )  
CHARLES CRABTREE, TROY )  
WALTERS, ERIC SHANNON, TOM )  
NIPPER, BO BAKER, JACKIE )  
CURTIS, E. L. HEAD, MURLENE )  
WILSON and B. J. HUTCHINSON, )

Plaintiffs, )

vs. )

CITY OF TULSA, a municipal )  
corporation, JAMES INHOFE, )  
Mayor of the City of Tulsa, )  
BOARD OF COMMISSIONERS FOR )  
THE CITY OF TULSA, and TULSA )  
REFUSE, INC., an Oklahoma )  
Corporation, )

Defendants. )

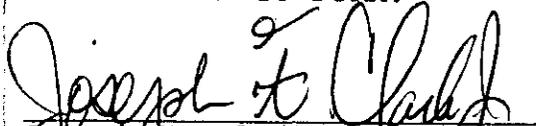
No. 79-C-633-D

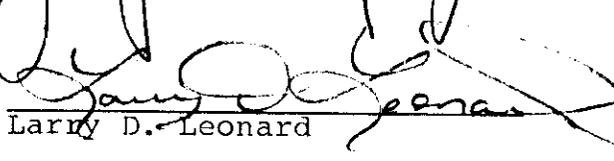
ORDER

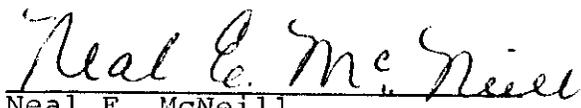
On the 21 day of November, 1979, the Application of the Plaintiffs for a dismissal without prejudice to the above captioned cause comes before the Court. The Court finds that there being no objection to the Application, the above captioned cause should be dismissed without prejudice to the filing of another cause and that all parties should pay their own costs.

  
\_\_\_\_\_  
U.S. DISTRICT COURT JUDGE

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Joseph F. Clark, Jr.

  
\_\_\_\_\_  
Larry D. Leonard

  
\_\_\_\_\_  
Neal E. McNeill

**United States District Court**

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 78-C-103-C ✓

ALONZO MONROE,

Plaintiff,

vs.

HERBERT HYDE,

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, Alonzo Monroe, recover judgment from the defendant, Herbert Hyde, in the amount of \$1.00, as nominal damages, and that the plaintiff be awarded his costs of action.

**FILED**

NOV 21 1979 *[Signature]*

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

Dated at TULSA, OKLAHOMA, this 21st day of NOVEMBER, 1979.

*[Signature]*  
Clerk of Court

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

MARION ANN SNIDER )  
 )  
 Plaintiff )  
 )  
 vs. )  
 )  
 CHRYSLER CREDIT CORPORATION, )  
 )  
 Defendant. )

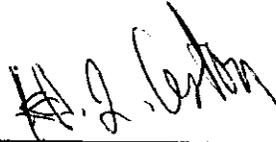
Civil Action

No. 79 - C - 449 - C ✓

**FILED**  
NOV 21 1979  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

APPLICATION FOR ORDER  
DISMISSING APPEAL

Comes now appellant and bankrupt, Marion Ann Snider, and prays  
the court to dismiss her appeal to the District Court from the judgment  
of the Referee in bankruptcy.



H. I. Aston  
Attorney for Appellant

ORDER

Now on this 21<sup>st</sup> day of November, 1979, the Court having received  
the application of appellant and bankrupt Marion Ann Snider to dismiss  
her appeal, it is hereby determined that the application should be granted.

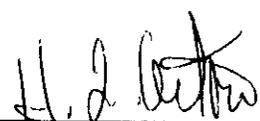
IT IS THEREFORE ORDERED that the appeal of appellant and bankrupt  
is hereby dismissed.



Judge of the District Court  
United States District Court  
for the Northern District of Oklahoma.

CERTIFICATE OF MAILING

I, H. I. Aston, hereby certify that on the \_\_\_\_\_ day of November, 1979,  
I mailed a true, correct and exact copy of the Dismissal to the Attorneys  
for the Appellee, James Martin Tisdal, Chrysler Credit Corporation, 320 S.  
Boston Building, Suite 920. Tulsa, Oklahoma 74103, with proper postage  
thereon fully prepaid.



H. I. Aston

FILED

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

NOV 20 1979

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GARY F. BRUMMETT, )  
 )  
 Defendant. )

CIVIL ACTION NO. 79-C-540-~~A~~E

DEFAULT JUDGMENT

This matter comes on for consideration this 20<sup>th</sup> day of November, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Gary F. Brummett, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Gary F. Brummett, was personally served with Summons and Complaint on August 29, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Gary F. Brummett, for the sum of \$711.61 as of August 15, 1979, plus interest from and after said date at the rate of 7% per annum.

  
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA  
  
HUBERT H. BRYANT  
United States Attorney  
  
ROBERT P. SANTEE  
Assistant U. S. Attorney

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

**FILED**

ETHREA MEANOR, )  
)  
Plaintiff, )  
)  
vs. )  
)  
PENN MUTUAL LIFE INSURANCE )  
CO., and BOBBY RAY BROWN, )  
)  
Defendants. )

NOV 20 1979

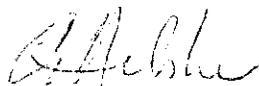
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Civil No. 79-C-659-E

NOTICE OF DISMISSAL OF BOBBY RAY BROWN

TO: Lance Stockwell  
Boesche, McDermott & Eskridge  
320 S. Boston, Suite 1300  
Tulsa, OK 74103

Please Take Notice that the above-entitled action is  
hereby dismissed as to the individual defendant, Bobby Ray  
Brown.



Gerald Hilsher  
515 S. Main Mall  
Tulsa, OK 74103  
(918) 585-2751

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF MAILING

I hereby certify that on this 20<sup>th</sup> day of November,  
1979, a true and correct copy of the foregoing instrument  
was mailed, postage prepaid, to Lance Stockwell, Boesche,  
McDermott, Eskridge, 320 S. Boston, Suite 1300, Tulsa, Oklahoma,  
74103, attorney for defendants.



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

SAMUEL J. BROWN, )  
SSA/N: 443-44-0179 )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
JOSEPH CALIFANO, JR., )  
Secretary of Health, )  
Education and Welfare of )  
the United States of )  
America, )  
 )  
Defendant. )

No. 78-C-394-C

**FILED**

NOV 20 1978 *rw*

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

JUDGMENT

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff in this action has petitioned the Court to review the final decision of the Secretary denying him disability benefits provided for in Sections 216 and 223 of the Social Security Act, as amended, 42 U.S.C. §§416, 423. He asks that the Court reverse that decision and award him the additional benefits he seeks.

This matter was first heard by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued October 19, 1977. The Administrative Law Judge found that plaintiff was not entitled to disability benefits under Sections 216 and 223 of the Social Security Act, as amended. Thereafter, that decision was appealed to the Appeals Council of the Bureau of Hearings and Appeals, which Council on June 19, 1978, issued its findings 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.

Plaintiff contends that the Secretary's decision is incorrect and that the record supports his claim of disability. The Secretary's denial was predicated on his finding that the Plaintiff's orthopedic and emotional problems were not severe enough to be considered disabling under the Act.

In his "Application for Disability Insurance Benefits" Plaintiff states that his disability consists of "Back injury (lower)" and that he became unable to work due to his disability on January 6, 1977. (Tr. 65).

Plaintiff relies on the testimony of Dr. W. M. Gross, M. D. found at Pages 47-60 of the Transcript. Dr. Gross stated that Plaintiff's return to work could be accomplished "in time." (Tr. 55). Plaintiff contends he met his burden of showing inability to return to his former work. The Plaintiff further contends that having met his burden, it was then the Secretary's burden to show by vocational expert testimony that Plaintiff could engage in other substantial gainful work which exists in the national economy. He argues that the Administrative Law Judge erred in his finding that Plaintiff "has no impairment or combination of impairments that would prevent him from engaging in all substantial gainful work activity," and in his finding that Plaintiff "has not been prevented from engaging in all substantial gainful activity for any continuous period which could be expected to last for at least 12 months." (Tr. 22).

The administrative record indicates that plaintiff first hurt his back when he slipped and fell at work on January 6, 1977. The medical reports include plaintiff's treatment records from Dr. Lins, the neurology resident who started treating plaintiff in February 1977. Although

plaintiff complained of low back pain, a myelogram failed to reveal any defect, and by March 10, 1977, plaintiff's neurological examination was normal and straight leg raising was negative. Dr. Lins' diagnosis was a lower back strain. (Tr. 88-92). Plaintiff continued to receive treatment for his low back pain under Dr. Lins' care in April and May 1977. Dr. Lins' May 19, 1977, diagnosis included a chronic lumbar strain and reactive depression. (Tr. 94-98). Dr. Lins' follow-up notes of June 20, 1977, indicated that there had been some improvement in plaintiff's back pain. The doctor's July 20, 1977 notes reflected the opinion that much of plaintiff's failure to respond to therapy was attributable to an underlying anxiety depressive state. The doctor noted that plaintiff failed to accept the possibility that psychiatric therapy might be helpful. (Tr. 107) On July 29, 1977, Dr. Lins offered her opinion that plaintiff would be disabled for "one year minimum." (Tr. 93)

The transcript also contains June and July 1977 treatment and evaluation records from Dr. Vosburgh, an orthopedic surgeon. Dr. Vosburgh conducted extensive testing, the results of which were all essentially within normal limits. Dr. Vosburgh concluded that there was no objective evidence of any structural or organic disease that would cause the pain plaintiff complained of. Dr. Vosburgh reported that there was no evidence of any permanent disability, and the doctor felt plaintiff could even return to ordinary manual labor. In Dr. Vosburgh's opinion, the sooner plaintiff returned to work, the better he would do. (Tr. 121-122)

The record also contains the testimony of Dr. Gross, the orthopedic surgeon who appeared at the administrative hearing as a medical advisor. (Tr. 47-62) Dr. Gross noted the lack of objective evidence of any serious orthopedic problem and observed that plaintiff "needs psychosomatic

evaluation." Dr. Gross further stated that although Plaintiff could not return to his former work immediately, "he's got to get off of medication and resume activity with his back or he never will." (Tr. 49).

The administrative record reveals that plaintiff was only 31 years old in January 1977, when he claimed he became totally disabled. He has a tenth grade education and has worked as a warehouse worker, a driver and deliveryman, and a machine operator. After considering the entire record, the administrative law judge concluded that plaintiff's back problem did not prevent his doing light or sedentary work.

After both the administrative hearing and the administrative law judge's decision, plaintiff was hospitalized by Dr. Lins. Plaintiff had a back operation in February 1978, and he did well postoperatively. The Appeals Council carefully considered this evidence and concluded that it did not warrant any change in the administrative law judge's decision. If in fact plaintiff's condition has changed since the hearing before the Administrative Law Judge so as to entitle plaintiff to benefits under the Act, plaintiff may submit another application for benefits.

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:

"more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relas. Bd. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (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."

Cited in 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). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See, Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F.Supp. 83 (D. S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the Administrative Law Judge applied the correct legal standards in making his findings on Plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

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 twelve months that prevents his engaging in substantial gainful activity; and

2. That he is unable to perform or engage in any substantial gainful activity. 42 U.S.C § 423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied, 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 of nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969).

The medical records do indicate that plaintiff has a problem with his lower back and that he has an emotional overlay to that problem. These impairments, have not, however, been shown to be of disabling severity. Johnson v. Finch, 437 F.2d 1321 (10th Cir. 1971).

The Secretary's decision recognizes that plaintiff's back problem might prevent his performing heavy arduous work, but correctly notes that the evidence fails to demonstrate that plaintiff could not do light and sedentary work. Because the record establishes that plaintiff can do light work, the Secretary could properly take administrative notice that light work exists in substantial numbers in the national economy. McLamore v. Weinberger, 538 F.2d 572 (4th Cir. 1976); Chavies v. Finch, 443 F.2d 356 (9th Cir. 1971). Plaintiff's psychosomatic overlay would not interfere with his performing such non-strenuous work. Gentile v. Finch, 423 F.2d 244 (3rd Cir. 1970). Moreover, plaintiff's doctors agree that his problem could be alleviated with counselling, but plaintiff has refused to accept that recommended course of treatment, which further militates against his disability claim. 20 C.F.R. §404.1507. See also Hall v. Gardner, 403 F.2d 32 (6th Cir. 1968).

The Secretary's decision indicates that he gave careful consideration to plaintiff's subjective complaints of pain,

and resolved the issue against plaintiff. Dvorak v. Celebrezze, 345 F.2d 894 (10th Cir. 1965). He also considered the opinion of plaintiff's neurologist that he would be disabled for a year, and accorded greater weight to the medical opinions which were supported by clinical and laboratory test results. Janka v. Secretary of Health, Education and Welfare, 589 F.2d 365 (8th Cir. 1978).

The Secretary's regulations vest discretion in the Administrative Law Judge to weigh physicians' conclusory opinions. 20 C.F.R. §404.1526; Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970). As trier of facts, it is the Secretary's responsibility to consider all the evidence, to resolve any conflicts in the evidence, and to decide the ultimate disability issue. Richardson v. Perales, 402 U.S. 389 (1971); Mayhue v. Gardner, 294 F.Supp. 853 (Kan. 1968), aff'd, 416 F.2d 1257 (10th Cir. 1969).

Although plaintiff has alternatively prayed for remand of this case, it is clear that the good cause requirements for remand under 42 U.S.C. §405(g) demand more than a desire to relitigate the same issues. Bradly v. Califano, 573 F.2d 28 (10th Cir. 1978).

Because the findings of the Administrative Law Judge are supported by substantial evidence and because such findings are based upon the correct legal standards, it is the determination of the Court that Plaintiff is not entitled to disability benefits under the Social Security Act. Judgment is so entered on behalf of the Defendant.

Dated this 20<sup>th</sup> day of November, 1979.

  
H. DALE COOK  
CHIEF JUDGE

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

MARILYN MARIE ANDERSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 COLT INDUSTRIES, INC., HOLLEY )  
 CARBURETOR DIVISION, )  
 )  
 Defendant, )  
 )  
 and )  
 )  
 THE WHITLOCK CORPORATION, )  
 )  
 Defendant & Third )  
 Party Plaintiff, )  
 )  
 vs. )  
 )  
 MATTHEWS AUTO ELECTRIC, INC., )  
 an Oklahoma corporation, )  
 )  
 Third Party Defendant. )

NO. 78 C 443 C

**FILED**

**NOV 19 1979**

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

APPLICATION FOR ORDER OF DISMISSAL

COMES now the plaintiff, Marilyn Marie Anderson, and the defendant, Colt Industries, Inc., Holley Carburetor Division, and the defendant and third party plaintiff, The Whitlock Corporation, and the third party defendant, Matthews Auto Electric, Inc., an Oklahoma corporation, and show the Court that their differences have been compromised and that nothing further remains to be done in this litigation and therefore moves this Court for an Order of Dismissal with Prejudice.

*Marilyn Marie Anderson*  
Marilyn Marie Anderson  
Plaintiff

*Jefferson G. Greer*  
Jefferson Greer  
Attorney for Plaintiff

*John H. Tucker*  
John H. Tucker  
Attorney for Third Party Defendant

*Alfred B. Knight*  
Alfred B. Knight  
Attorney for Defendant

**FILED**

NOV 20 1979

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

RS/Robert L. Battaglia  
Robert L. Battaglia  
Attorney for Defendant & Third  
Party Plaintiff

ORDER FOR DISMISSAL

Now on this 20<sup>th</sup> day of ~~October~~ November, 1979, the Court having received an Application for Dismissal from the parties hereto, finds that their differences have been compromised and that this case should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this case be and the same is hereby dismissed with prejudice.

RS/H. Dale Cook  
United States District Judge

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

M. J. BRAGG, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 76-C-421-B  
 )  
 FORETRAVEL, INC., and )  
 CHRYSLER MOTOR CORPORATION, )  
 )  
 Defendants. )

**FILED**  
**NOV 19 1979**  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

NOW on this 22nd day of October, 1979, there came on for trial the above cause, plaintiff appearing in person and by counsel, Bill Dale and Ron Hayes, and the defendant appearing by Don Moore, and by counsel, Dale F. McDaniel, and all parties announcing ready for trial on the regular jury docket, a jury of six good and true citizens were selected and sworn to try the cause. Thereafter, the case was adjourned to the 24th day of October, 1979. On the 24th day of October, 1979, plaintiff produced a part of his evidence and the case was adjourned to the morning of October 25, 1979. On the 25th day of October, 1979, plaintiff produced all of his evidence and then announced rest. The defendant moved for dismissal which dismissal was taken under advisement by the Court. Thereafter, defendant produced one witness and the case was then adjourned to the 26th day of October, 1979. Thereafter, the defendant produced the rest of its evidence and plaintiff then called witnesses in rebuttal and defendant called one witness in sur-rebuttal and then all parties announced rest. Thereafter, the Court instructed the jury after closing arguments were

made and the jury retired to deliberate the case. Thereafter, the jury returned into Court their verdict for the defendant, said verdict being in words and phrases as follows:

"We, the jury, find for the defendant, Foretravel, Inc. And against the plaintiff, M. J. Bragg." The verdict was signed by the foreman, Mary M. Schrader on the 26th day of October, 1979.

Whereupon, the verdict being returned into Court by the jury, the magistrate accepted the verdict which was filed into Court and judgment entered thereon.

11-15-79

Clarence A. Brimmer  
JUDGE

APPROVED AS TO FORM:

WILLIAM DALE

By

William Dale  
Attorney for Plaintiff

DALE F. MCDANIEL

By

Dale F. McDaniel  
Attorney for Defendant

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

**FILED**  
NOV 16 1979  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

HARRY LEWIS,	)	
	)	
Plaintiff,	)	
	)	Civil Action
vs.	)	
	)	No. 77-266C
	)	
RAY C. ADAMS, et al.,	)	
	)	
Defendants.	)	

ORDER SUSTAINING MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, Harry Lewis, brings this stockholder derivative action on behalf of the defendant corporation, Cities Service Company, and against a number of individuals described as present or past members of the board of directors, and/or officers of the corporation, and certain members of the accounting firm employed by the corporation, Peat, Marwick, Mitchell and Company. The complaint alleges that the individual defendants have violated federal securities laws, and have caused damage and loss to the corporation by reason of fraud, mismanagement, waste, and breach of their fiduciary duties towards the corporation.

Now before the Court are the Motions of defendants for Summary Judgment and for Order dismissing plaintiff's Amended Complaint. As grounds for such motion, defendants urge that dismissal of the derivative action is required under the "Business Judgment Rule," inasmuch as a "Special Committee on Litigation," appointed by the Board of Directors of Cities Service Company, "has determined in the good faith exercise of business judgment that litigation of the claims in the amended complaint would not be in the best interest of Cities Service Company or its shareholders. . . ."

Plaintiff's complaint is based upon alleged corporate practices during 1968 to 1978, whereby the company was caused to engage in a series of "questionable transactions," in which funds were paid out in bribes and illegal campaign contributions to both domestic and foreign government officials. It appears that these "questionable payments" came to light in early 1975, when an investigation was started by the "Audit Committee," appointed by the Board of Directors of Cities Service Company. The Audit Committee undertook to investigate activities conducted by the Company in what is described as Countries "X, Y, and Z." During an investigation which lasted from September, 1975 to June, 1976, the Audit Committee made full reports to the Federal Securities and Exchange Commission. (Form 8K reports appear as Exhibits Nos. 3 through 10 in material filed in support of defendants' motions.)

Under recent case law, in the event this Court should find that the Board of Directors of Cities Service Company, acting by, and through its appointed Committee, reached a decision not to pursue this derivative action on behalf of the corporation, that decision would bar further action in the case, and would be grounds for dismissal, if the court should further find that such decision was reached as a bona fide business judgment. This result is required since it has long been the rule that a decision as to whether to prosecute litigation on behalf of a corporation is to be made by the directors who supervise the corporation, as an exercise of business judgment which would be applicable to any other aspect of the company's business affairs. *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 61 L.Ed. 1119 (1917).

This rule will apply, except in cases where the directors themselves "are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment." *United Copper Securities Co.*, *supra*, 61 L.Ed. at 1124.

After reviewing Exhibits and Affidavits offered by the parties upon the Motion for Summary Judgment, the court is satisfied that the conclusion of the Special Committee on Litigation that it would not be in the best interest of the corporation to pursue this litigation was made in good faith, as a bona fide business judgment.

In discussing the exercise of business judgment by the Special Committee, it should first be noted that the committee decision was a culmination of investigations within the corporation which extended over a five-year period 1975-1979. It should also be noted that these investigations were conducted by two separate committees appointed by the Board of Directors of Cities Service Company, with the assistance of four separate law firms, and two separate national firms of certified public accountants.

The first committee to undertake an investigation was appointed by the Board in May, 1975. This was known as the "Audit Committee," and its members were Directors Foster Bam, John F. McGillicuddy, James O. Boisi, and Clifford W. Michel. (Ex. 3, p. 3). Foster Bam is a defendant in this *Lewis* case.

The exhibits establish that the Audit Committee undertook three separate investigations: the first, between May and August, 1975; the second, between September, 1975, and a "final report," dated June 21, 1976; and the third, an investigation undertaken beginning in the Spring, 1978, when it was learned that new evidence had been discovered regarding "questionable practices" in "Country Y". This final investigation was concluded by a second "final report" filed by the Audit Committee on February 14, 1979.

The nature of the inquiry first undertaken by the Board of Directors in 1975, is described in a September, 1975 Report made by the company to the Securities and Exchange Corporation. (Ex. 3):

In May, 1975 the Company initiated an inquiry into its international operations to determine whether any illegal political contributions or other illegal payments have been made on behalf of the Company or any of its subsidiaries. The inquiry so far, which has been conducted with the assistance of outside counsel, has been principally confined to interrogation of approximately 14 officers and employees of the Company and its subsidiaries, primarily confined to those in the Company's international operations who are believed to be most likely to have knowledge of any such activities. . . .

As a result of its preliminary investigation, the Board discovered that one overseas subsidiary had been provided with \$30,000 to cover questionable political payments, which were possibly illegal in that country, and that these payments had been channeled via an intermediary through a Swiss bank account, and disguised on the books of the Company's subsidiary. Other discoveries related to a \$15,000 payment to a foreign lobbyist, as a disguised "expense" and a cash fund of \$600,000 generated by "rebates" and "kick-backs," which was unaccounted for on the books of a foreign subsidiary. As a result of such disclosures, the Board of Directors, on August 26, 1975, directed the Audit Committee:

. . . to conduct a complete and adequate investigation of all matters mentioned (in the reports) and, with respect to the past 5 years, any similar activities involving the Company, either within or outside the United States, any use of corporate funds for political contributions or payments to government officials within or outside the United States, or any accumulation or use of corporate funds without their being properly accounted for, and to report the status and results of its investigation . . . periodically thereafter until the investigation is complete.

The Audit Committee was further ordered to broaden its investigation into the practices of the foreign subsidiary, "to determine whether or not any officer, director or employee of the subsidiary has been guilty of any fraud or defalcation in the management of the assets and affairs of the subsidiary."

In undertaking its investigation, the Audit Committee engaged the services of the law firm of Cleary, Gottlieb, Steen & Hamilton, of New York, as independent counsel, as well as the

firm of Cummings and Lockwood, of Stamford, Connecticut, as independent counsel to provide "special assistance" to the Committee. The Audit Committee also retained Peat, Marwick, Mitchell and Company, as independent accountants, to review the results of the company's initial investigation.

A series of reports was filed by the Audit Committee, each appearing in Forms 8K report to the SEC, over a period of time from September 1975 to July 1976. (See Exhibits Nos. 3 through 10 filed in support of defendants' Motions for Summary Judgment).

The work of the "Audit Committee" may be summarized as follows: Almost 300 questionnaires were sent out to officers and employees of the company; 76 personal interviews and nine telephone interviews were conducted; questionnaire forms were sent out to 100 law firms; the internal audit system of the company was reviewed, along with books and records of subsidiary companies in "Countries X, Y, and Z." Attorneys and auditors for the committee spent 7,000 hours investigating, and the members of the committee also met regularly to confer with their investigators, and to conduct their own inquiries.

In its first "final report" made June 21, 1976, the Audit Committee concluded that the use of unrecorded funds by foreign subsidiaries was "not attributable to a lack of integrity or capability in the case of those senior officers of the Company who had knowledge of the existence of the unrecorded funds." (Ex. 10, p. 9.) Instead, the Committee concluded that the questionable bookkeeping practices, and their non-discovery through ordinary internal audit procedures, was due to a lack of company experience in operating international subsidiaries and insufficient auditing staff.

As a consequence of this Audit Committee Report, the Board of Directors of Cities Service Company adopted and approved various suggestions made by the Committee, including changes in "top level management" within the "Country Z" subsidiary, expansion

of the internal audit staff through recruitment of eight additional auditors and three "professional investigators;" enactment of strict guidelines to govern solicitations of political campaigns within the company; stricter guidelines for use of corporate facilities and aircraft, to include the maintaining of written records of aircraft use; and instructions were given to improve the quality of "supporting documentation" for payments made to consultants, lawyers, and transactions regarding sale and exchanges of geological data. The practice of case payment of directors' fees and certain expenses was eliminated, and a political contribution "fund," which had been collected through questionable practices, was ordered to be turned over to the American Red Cross, as a charitable contribution. (p. 4, Ex. 10)

#### "SPECIAL COMMITTEE ON LITIGATION"

Following reports made by Cities Service Company to the SEC, and other publicity which followed, this action was filed on February 22, 1977, in the Southern District of New York, and later transferred on defendants' motion under 28 U.S.C.A. §1404(a) to the Northern District of Oklahoma on June 17, 1977, with plaintiff's consent.

On July 26, 1977, the Board of Directors of Cities Service Company appointed a "Special Committee on Litigation" to look into the merits of, and to investigate matters raised by plaintiff in this case, and to make a report and recommendation to the Board of Directors of the company as to the desirability of pursuing the litigation on behalf of the corporation.

The "Litigation Committee" was composed of two persons: Robert D. Lilley, and Peter G. Peterson, independent directors of the company. By resolution, the Board authorized the Committee to exercise the following powers on behalf of the corporation (Ex. 1):

(1) The Committee shall conduct or cause to be conducted such review, analysis and further investigation of the circumstances surrounding all matters referred to in (the litigation entitled *Lewis v. Adam, et al.*) as the Committee deems necessary or desirable to determine whether or not the Company shall undertake any litigation against any one or more of the present or former directors, officers or employees of the Company or its subsidiaries or against Peat, Marwick, Mitchell & Co. in respect of any such matters;

(2) make the determination contemplated in (1) above; and

(3) undertake and supervise any action necessary or appropriate to implement any such determination.

In respect of the foregoing, the Committee shall have and may exercise all the powers and authority of the Board of Directors, which by this resolution are delegated to the Committee. (Emphasis supplied)

The foregoing Resolution was adopted pursuant to, and in accordance with Section 141(c) of the General Corporation Law of the State of Delaware, the jurisdiction of the Company's incorporation. (Affidavit of Holland, Dkt. 52).

The background of the two members of the Litigation Committee may be described as follows. (Affidavit of Holland, Dkt. 52):

Mr. Lilley was president of American Telephone & Telegraph Company from 1972 until his retirement in 1976. Besides acting as a director for Cities Service Company, Mr. Lilley is a director of The Mutual Benefit Life Insurance Company, R. H. Macy & Company, The Continental Corporation, and Celanese Corporation, and he is Trustee of the Victoria Foundation, Inc., and of Columbia University.

Mr. Peterson has been Chairman of the Board, and President of Lehman Brothers Kuhn Loeb Incorporated, and its predecessor firm since 1973. Mr. Peterson was Secretary of Commerce of the United States from January, 1972, until February, 1973, following which he was Ambassador and Personal Representative of the President of the United States, until June, 1973. Earlier in

1971, Mr. Peterson was Assistant to the President for International Economic Affairs. He is also a director of Black & Decker Manufacturing Company, Federated Department Stores, Inc., General Foods Corporation, Minnesota Mining & Manufacturing Co., and the RCA Corporation.

Mr. Lilley became a member of the company's Board of Directors on August 24, 1976. Mr. Peterson became a member on April 26, 1977. Prior to their election to the Board of Directors, neither had had any relationship with the company or any of its subsidiaries. (Affidavit of Holland, ¶3). Under all of these circumstances, the court finds that Messrs. Lilley and Peterson were independent, "outside" directors of the Company, entirely unconnected with any of the transactions which are the basis of plaintiff's suit.

The investigation conducted by the Litigation Committee was built upon the extensive investigations which had previously been conducted by the Audit Committee, and the accountants and counsel assisting that Committee, as discussed above. The Litigation Committee was assisted in its investigation by two New York City law firms, Messrs. Davis, Polk & Wardwell, and Messrs. Janklow and Traum.

In the Spring of 1978, the Board of Directors of Cities Service Company first learned that its internal audit department had found new evidence of "questionable activity" by a subsidiary located in "Country Y". In the light of such new discoveries, the Litigation Committee determined to suspend activity pending a new investigation by the Audit Committee, pursuant to orders of the Board of Directors. The Audit Committee was assisted in this second investigation by new counsel, the law firm of Patterson, Belknap, Webb & Tyler, and new auditors, Arthur Young & Company.

On February 14, 1979, the Audit Committee submitted its second "Final Report" to the Board of Directors concerning the new information involving "Country Y". (Exhibit 11, Kramer, Lowenstein Report). It was the finding of the Audit Committee

that certain "off-book accounts" and an unrecorded cash fund had been maintained over an extended period of time in "Country Y", and that these practices were rooted in a pre-1967 plan established in that country for the purpose of avoiding income and social welfare taxes in "Country Y". It was determined that the total of all taxes and interest thereby avoided amounted to \$562,235, and that sum has been remitted to the tax authorities in "Country Y". The Audit Committee determined that the practice of maintaining unrecorded funds was not to provide money for bribes, political contributions, or other questionable payments, or to "facilitate thievery from the company," and that the employees who maintained this system believed that they were acting in the best interest of the Company. It was also found that no member of "senior management," or any Director of the Company, nor any defendant named in the *Lewis* case, knew, or had reason to know of these matters until the new evidence was revealed in 1978.

Pursuant to advice of counsel, and acting independently, the Committee on Litigation determined that it would not be in the best interest of the Company to pursue litigation in this instance. (Ex. 11, Reports of Kramer, Lowenstein, and Patterson, Belknap; Holland Affidavit, Ex. 2). The Report of the Special Committee, submitted under date of May 1, 1979 reveals that this decision was made after fully considering "(i) that there was no assurance that the Company would prevail in any legal action; (ii) that, even if the Company prevailed, there was no assurance that the Company would recover sufficient monetary damages to justify the expense of the action; (iii) that the maintenance of any action would involve considerable expense and would divert personnel from the performance of their responsibilities; and (iv) that disclosures during such action could result in unfavorable reactions from government agencies here and abroad and adverse effects on the Company's foreign and domestic business."

The Litigation Committee noted that steps had been, and were being taken by the Board to "provide adequate protection against a repetition of any practices similar to those examined in the current investigation." It was also reported that appropriate disciplinary action would be taken by management with respect to personnel matters relating to employees who were involved in any questionable transactions, that is, that it appeared likely "that senior management will arrive at the appropriate judgments respecting individual compensation and assignment matters."

The ultimate conclusion of the Special Committee on Litigation was "that the best interests of Cities Service Company would not be served by litigation against any one or more of the present or former directors, officers, or employees of the Company, or its subsidiaries, or against Peat, Marwick, Mitchell and Company, in respect of any matters referred to in the *Lewis* law suit." (Ex. 2, Holland Affidavit).

After reviewing the Affidavits and Exhibits discussed above, and hearing the argument of the attorneys, the court is satisfied that (a) the members of the Special Committee on Litigation were in fact, independent, and (b) the members made a good faith business judgment not to pursue the matters raised in the *Lewis* case by further litigation on behalf of the Company. Under Delaware law, the Board of Directors was authorized to delegate its authority to a committee, and that committee has now spoken for the Company.

The business judgment rule has been applied most recently in *Abbey v. Control Data Corp.*, 603 F.2d 724 (8th Cir. 1979) where a derivative action was brought to compel seven corporate directors to repay criminal and civil penalties assessed against the corporation as a result of illegal payments made by the company to foreign governments. An independent "special litigation committee," appointed by the corporation to investigate the

charges, determined that it was not in the best interest of the corporation to pursue the litigation. The Eighth Circuit affirmed dismissal of the complaint under the business judgment rule, as fully recognized by Delaware law. See also, *Rosengarten v. International Tel. & Tel. Corp.*, 466 F.Supp. 817 (S.D. N.Y. 1979) and *Gall v. Exxon*, 418 F.Supp. 508 (S.D. N.Y. 1976).

The business judgment rule will be applied regardless of the illegality of the underlying transaction, because a "derivative action is designed to redress wrongs to the corporation and not wrongs to the public . . . ." *Rosengarten, supra*, 466 F.Supp. at 824. In *Gall v. Exxon, supra*, the derivative action sought to recover \$59 million in illegal contributions and bribes allegedly paid by the corporation in Italy to obtain political favors. The court noted that the underlying illegality of the payments was not determinative of the question of whether or not the derivative action should be dismissed. At page 519 of 418 F.Supp. the Court stated:

. . . The issue before me for decision, however, is not whether the payments made by Esso Italiana to Italian political parties and other unauthorized payments were proper or improper. Were the court to frame the issue in this way, it would necessarily involve itself in the business decisions of every corporation, and be required to mediate between the judgment of the directors and the judgment of the shareholders with regard to particular corporate actions. . . . Rather, the issue is whether the Special Committee, acting as Exxon's Board of Directors and in the sound exercise of their business judgment, may determine that a suit against any present or former director or officer would be contrary to the best interests of the corporation.

The Court is satisfied that the independence and good faith of the Special Litigation Committee has been established in this instance. The Committee has determined not to pursue this action, and that determination was made in the exercise of bona fide business judgment. Under such circumstance, the Motions for Summary Judgment should be granted. Accordingly,

IT IS ORDERED that defendants' Motions for Summary Judgment be, and they are hereby Sustained; and

IT IS ORDERED that this action be, and it is hereby Dismissed.

The cost of the action are taxed to plaintiff.

Dated this 15th day of November, 1979.

  
United States District Judge Assigned

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

NATIONAL RAILROAD PASSENGER )  
CORPORATION, a corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
KOCH INDUSTRIES, INC., )  
 )  
Defendant and Third-Party )  
Plaintiff, )  
 )  
THE ATCHISON-TOPEKA & SANTA FE )  
RAILWAY COMPANY, )  
 )  
Third-Party Defendant, )  
 )  
HELEN McMAINS, )  
 )  
Intervenor. )

No. 78-C-3-C

FILED

NOV 16 1979

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

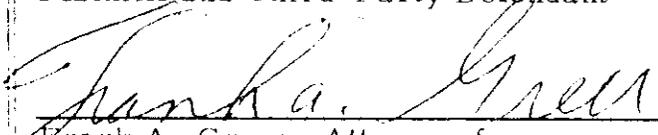
JOURNAL ENTRY OF JUDGMENT

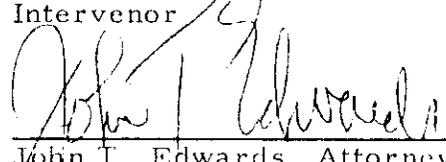
NOW, on this 16<sup>th</sup> day of November, 1979, pursuant to an Amended  
Order of the Court entered herein on the 16<sup>th</sup> day of November, 1979,  
judgment is hereby entered in favor of the Plaintiff, National Railroad  
Passenger Corporation, and Third-Party Defendant, The Atchison-Topeka  
& Santa Fe Railway Company, and against Defendant Koch Industries, Inc.

  
\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

APPROVED:

  
\_\_\_\_\_  
Tom L. Armstrong, Attorney for  
Plaintiff and Third-Party Defendant

  
\_\_\_\_\_  
Frank A. Greer, Attorney for  
Intervenor

  
\_\_\_\_\_  
John T. Edwards, Attorney for  
Defendant and Third-Party Plaintiff

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

NATIONAL RAILROAD PASSENGER )  
CORPORATION, a corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
KOCH INDUSTRIES, INC., )  
 )  
Defendant and Third-Party )  
Plaintiff, )  
 )  
THE ATCHISON-TOPEKA & SANTA FE )  
RAILWAY COMPANY, )  
 )  
Third-Party Defendant, )  
 )  
HELEN McMAINS, )  
 )  
Intervenor. )

No. 78-C-3-C ✓

FILED

NOV 16 1979

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

JOURNAL ENTRY OF JUDGMENT

NOW, on this 16<sup>th</sup> day of November, 1979, pursuant to an Amended  
Order of the Court entered herein on the 16<sup>th</sup> day of November, 1979,  
judgment is hereby entered in favor of the Plaintiff, National Railroad  
Passenger Corporation, and Third-Party Defendant, The Atchison-Topeka  
& Santa Fe Railway Company, and against Intervenor Helen McMains.

W. Dalebook  
UNITED STATES DISTRICT JUDGE

APPROVED:

Tom L. Armstrong  
Tom L. Armstrong, Attorney for  
Plaintiff and Third-Party Defendant

Frank A. Greer  
Frank A. Greer, Attorney for Intervenor

John T. Edwards  
John T. Edwards, Attorney for  
Defendant and Third-Party Plaintiff

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

NATIONAL RAILROAD PASSENGER	)	
CORPORATION, a corporation,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 78-C-3-C
	)	
KOCH INDUSTRIES, INC.,	)	
	)	
Defendant and Third-Party	)	
Plaintiff,	)	
	)	
THE ATCHISON-TOPEKA & SANTA FE	)	
RAILWAY COMPANY,	)	
	)	
Third-Party Defendant,	)	
	)	
HELEN McMAINS,	)	
	)	
Intervenor.	)	

AMENDED ORDER

Now, on this 13th day of September, 1979, this matter comes on for hearing on Objections to Findings and Recommendations of the Magistrate filed by Plaintiff, National Railroad Passenger Corporation and Third-Party Defendant, The Atchison-Topeka & Santa Fe Railway Company. Plaintiff and Third-Party Defendant appeared and were represented by their counsel, Tom L. Armstrong and William K. Powers. Koch Industries, Inc. appeared and was represented by its counsel, John Edwards, and Intervenor, Helen McMains, appeared and was represented by her counsel, Frank A. Greer.

After studying the file and the briefs presented by all parties, and after hearing oral argument and being fully advised in the premises, the Court finds that the Objections to Findings and Recommendations of the Magistrate should be sustained.

IT IS, THEREFORE, ORDERED, as follows:

1. The Objections to Findings and Recommendations of the Magistrate filed by Plaintiff National Railroad Passenger Corporation and

Third-Party Defendant The Atchison-Topeka & Santa Fe Railway Company are hereby sustained;

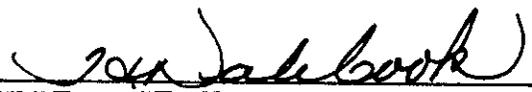
2. The Joint Motion for New Trial, filed by Defendant Koch Industries, Inc. and Intervenor Helen McMains is hereby overruled;

3. The jury verdicts, excepting that portion of the verdict setting Plaintiff's damages, are hereby affirmed;

4. That portion of the jury verdict which fixed Plaintiff's damages at \$25,599.33 is hereby vacated and a new trial on the sole issue of the amount of Plaintiff's damages is hereby ordered; and

5. The Court hereby directs and orders the entry of judgment in favor of Plaintiff National Railroad Passenger Corporation and Third-Party Defendant The Atchison-Topeka & Santa Fe Railway Company and against Defendant Koch Industries, Inc. and Intervenor Helen McMains pursuant to the previous findings and directives of this Court, and the Court does specifically find and direct that there is no just reason for delay and expressly directs the entry of final judgment in favor of Plaintiff National Railroad Passenger Corporation and Third-Party Defendant The Atchison-Topeka & Santa Fe Railway Company and against Defendant Koch Industries, Inc. and Intervenor Helen McMains.

DATED this 16<sup>th</sup> day of November, 1979.

  
UNITED STATES DISTRICT JUDGE

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

CLYDE ALDERMAN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JONNIE MYERS, TOMMY MYERS, )  
 SHEPARD ELEVATOR COMPANY, )  
 now d/b/a DOVER ELEVATOR )  
 COMPANY, an Ohio corporation, )  
 DOVER CORPORATION, a Delaware )  
 corporation, SHEPARD WARNER )  
 ELEVATOR COMPANY, an Ohio )  
 corporation, and BROTHERTON )  
 CORPORATION, an Ohio )  
 corporation, )  
 Defendants. )

No. 77-C-88-C

**FILED**

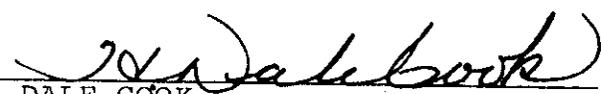
NOV 16 1979

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

ORDER

On February 8, 1979 a Suggestion of Death of the plaintiff herein was filed of record. No motion for substitution of the proper party or parties plaintiff having been made within the 90-day period allowed by Rule 25(a)(1) of the Federal Rules of Civil Procedure, the plaintiff's action is hereby dismissed in accordance with the provisions of that Rule.

It is so Ordered this 16<sup>th</sup> day of November, 1979.

  
H. DALE COOK  
Chief Judge, U. S. District Court

FILED

NOV 16 1979

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION  
FILED

DOCKET NO. 330

OCT 25 1978

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

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

PATRICIA D. HOWARD  
CLERK OF THE PANEL

IN RE SWINE FLU IMMUNIZATION PRODUCTS LIABILITY LITIGATION

Eloise Jane Keck v. United States of America,  
N.D. Oklahoma, C.A. No. 79-C-614-C

CONDITIONAL TRANSFER ORDER

On February 28, 1978, the Panel transferred 26 related civil actions to the United States District Court for the District of the District of Columbia for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 500 additional actions have been transferred to the District of the District of Columbia. With the consent of that court, all such actions have been assigned to the Honorable Gerhard A. Gesell.

It appears from the pleadings filed in the above-captioned action that it involves questions of fact which are common to the actions previously transferred to the District of the District of Columbia and assigned to Judge Gesell.

Pursuant to Rule 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.R.D. 561, 567-68 (1978) the above-captioned tag-along action is hereby transferred to the District of the District of Columbia on the basis of the hearings held on January 27, 1978, May 26, 1978, September 29, 1978, November 1, 1978, March 23, 1979 and April 27, 1979. and for the reasons stated in the opinions and orders of February 28, 1978, 446 F. Supp. 244, July 5, 1978, 458 F. Supp. 648, January 16, 1979, 464 F. Supp. 949, and with the consent of that court assigned to the Honorable Gerhard A. Gesell.

This order does not become effective until it is filed in the office of the Clerk for the United States District Court for the District of the District of Columbia. The transmittal of this order to said Clerk for filing shall be stayed fifteen days from the entry thereof and if any party files a Notice of Opposition with the Clerk of the Panel within this fifteen day period, the stay will be continued until further order of the Panel.

It is ordered that the stay is hereby lifted. This order is hereby entered.

NOV 13 1979

FOR THE PANEL:

*Patricia D. Howard*

CLERK OF THE PANEL

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GRANVILLE L. HAYNES, et. al., )  
 )  
 Defendants. )

CIVIL ACTION NO. 79-C-235-D B

FILED

NOV 16 1979

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

STIPULATION OF DISMISSAL

COME 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 New  
School For Elementary Education, a Corporation, Defendant, by  
and through its attorney, Julie E. Lamprich, and stipulate and  
agree that this action be and the same is hereby dismissed,  
without prejudice.

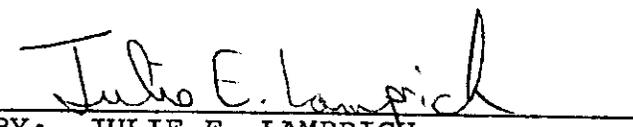
Dated this 16th day of November, 1979.

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
BY: ROBERT P. SANTEE  
Assistant United States Attorney

DOYLE, HOLMES, GASAWAY & GREEN

  
BY: JULIE E. LAMPRICH  
Attorney for Defendant,  
New School For Elementary Education

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

FILED

NOV 15 1979

ROBERT RANDALL ZIEGLER,

Plaintiff,

vs.

PETE SILVA, JR.,  
BUDDY FALLIS, JR., and  
MEMBERS OF BUDDY FALLIS' STAFF  
LISTED AS JOHN DOE ASSISTANTS,

Defendants.

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

No. 78-C-372-C

ORDER

Plaintiff was convicted in State Court in certain criminal proceedings which resulted in his incarceration. He brings a civil rights action pro se, alleging a conspiracy on the part of the defendant, Pete Silva, Jr., (a Public Defender); the defendant, Buddy Fallis, Jr., Tulsa District Attorney<sup>1</sup>; and Members of Buddy Fallis' Staff listed as John Doe Assistants<sup>2</sup>, to deny plaintiff's constitutional rights by suppressing evidence that would have aided plaintiff in proving his innocence. As part and parcel of the alleged conspiracy, plaintiff contends that Mr. Fallis offered employment to Mr. Silva during the trial in State Court and that there was a conspiracy to "hide" evidence of a "look-a-like" individual.

Plaintiff seeks \$14,000 in lost wages; \$20,000 in attorney fees and \$150,000 in actual damages.

The Court takes judicial notice of case number 77-C-529 in this Court, styled "Robert Randall Ziegler v. Pete Silva and Les Earl, Jr.", wherein an action was instituted under 42 U.S.C. §1983 for alleged deprivation of his rights. In that action Mr. Ziegler alleges that Messrs. Silva and Earl failed to provide him

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1 The defendant, District Attorney Buddy Fallis, Jr., was previously dismissed by Order of the Court on May 8, 1979, under Imbler v. Pachtman, 424 U. S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), and its progeny.

2 Process has never been issued for the "John Doe Assistants" nor have these Assistants ever been identified. Furthermore, there is nothing in the record to indicate that these "John Doe Assistants" would not enjoy the same immunity as their superior, District Attorney Fallis.

with effective legal representation in his state criminal trial, in violation of the Fifth, Sixth, and Fourteenth Amendments. The Court dismissed the §1983 action as being frivolous and further found that an attorney does not act under color of state law because he has accepted employment as a public defender, citing Espinoza v. Rogers, 470 F.2d 1174, 1175. Thereafter, Mr. Ziegler filed a Motion to Reconsider, alleging that Mr. Silva had been offered a position as an Assistant District Attorney. The trial court denied this Motion, stating the law would mandate dismissal under these new facts, just as it mandated a dismissal under the facts previously alleged. On April 20, 1978, the Tenth Circuit Court of Appeals affirmed the trial court in 78-8032.

Liberally construing the allegations of plaintiff's present complaint, the Court finds that the allegations sound in conspiracy under 42 U.S.C. §1985(3).

Statutory jurisdiction without reference to the amount in controversy is contained in 28 U.S.C. §1343(1) which provides district courts with original jurisdiction over any civil action commenced by any individual "[t]o recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;". Section 1985(3) of the federal Civil Rights Act provides a cause of action to parties injured as a result of a conspiracy by two or more persons for the purpose of depriving "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

Defendant, Silva, has filed a Motion to Dismiss pursuant to Rule 12(b)(6), F.R.Civ.P., and Summary Judgment pursuant to Rule 56(b), F.R.Civ.P. Plaintiff was directed to respond to said motions but has totally failed to comply with the Court's Order.

The 12(b)(6) Motion before the Court presents the question whether a §1985(3) conspiracy may be directed at a Public Defender in light of the "class-based animus" requirement set forth in Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed 2d 338 (1971).

The allegations of a complaint must be taken at face value and construed most favorably to the pleader. A motion to dismiss must not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Lessman v. McCormick, 591 F.2d 605, 607-608 (10th Cir. 1979).

"....An action, especially under the Civil Rights Act, should not be dismissed at the pleading stage unless it appears to a certainty that plaintiffs are entitled to no relief under any state of the facts, which could be proved in support of their claims...." Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2nd Cir. 1970), cert. denied 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed.2d 91 (1970); 2A Moore's Federal Practice ¶12.08, at 2271-2274 (2d ed. 1974). Plaintiff's action shall be examined in this light.

In discussing §1985(3), the touchstone in any case is Griffin v. Breckenridge, supra, wherein the Supreme Court said:

"The constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose--by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment [incorporated into the section].... The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

The Supreme Court expressly declined to decide whether a conspiracy motivated other than by racial basis would be actionable under that section. Griffin v. Breckenridge, supra, at

102 n.9; *Lessman v. McCormick*, supra, at 608. Furthermore, the circuit court cases which have recognized under §1985, classes which are not racially based, have stayed close to the areas protected by the First Amendment. *Lessman v. McCormick*, supra, at 608.

Construing the facts in a light most favorable to the plaintiff, plaintiff has failed to allege any kind of class-based, invidiously discriminatory animus behind the conspirators' actions as required by *Griffin v. Breckenridge*, supra. The Supreme Court specifically noted that §1985(3) does not expressly require state action and stated:

"....An element of the cause of action established by ....42 U.S.C. §1983, is that the deprivation complained of must have been inflicted under color of state law. To read any such requirement into §1985(3) would thus deprive that section of all independent effect...."

The Tenth Circuit Court of Appeals has ruled that where there is no valid claim under §1985, none can exist under §1986. *Taylor v. Nichols*, 558 F.2d 561, 568 (10th Cir. 1977).

The complaint filed by the plaintiff in this litigation fails to allege any kind of class-based, invidiously discriminatory animus behind the conspirators' action as required by *Griffin v. Breckenridge*, supra. All that this plaintiff has alleged are bare conclusory allegations of conspiracy, with no specification, insufficient to withstand a motion to dismiss on failure to state a claim under §1985(3).

The Court finds, based on the record and pleadings in this case, that the Motion to Dismiss for Failure to State a Claim pursuant to Rule 12(b)(6) should be sustained.

The Court further finds, in reviewing the allegations of the plaintiff, the action attempted to be asserted by the plaintiff is frivolous.

The Court need not determine the Motion for Summary Judgment raised by the defendant, the Motion to Dismiss being dispositive of the litigation.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendant, Pete Silva, Jr., be and the same is hereby sustained.

IT IS FURTHER ORDERED, SUA SPONTE, that the Members of Buddy Fallis' Staff listed as John Doe Assistants be dismissed for failure to prosecute.

ENTERED this 15<sup>th</sup> day of November, 1979.



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THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

NOV 15 1979

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

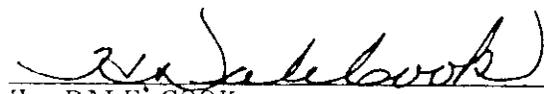
MAXCO, INC., an Oklahoma )  
corporation, )  
 )  
Plaintiff, )  
 )  
vs. ) No. 77-C-226-C  
 )  
PENNECO OIL OF KANSAS, INC., )  
a Kansas corporation, )  
 )  
Defendant. )  
 )  
PENNECO OIL OF KANSAS, INC., )  
a Kansas corporation, )  
 )  
Plaintiff, )  
 )  
vs. ) No. 78-C-122-C  
 )  
CALVIN GEE and ELIZABETH )  
DAVENPORT, )  
 )  
Defendants. )

JUDGMENT

The Court on November 15, 1979, 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 in No. 77-C-226-C, Penneco Oil of Kansas, Inc., and in favor of the defendants in No. 78-C-122-C, Calvin Gee and Elizabeth Davenport, in accordance with the Court's Findings of Fact and Conclusions of Law.

It is so Ordered this 15th day of November, 1979.

  
\_\_\_\_\_  
H. DALE COOK  
Chief Judge, U. S. District Court

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

FILED

NOV 15 1979

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

MAXCO, INC., an Oklahoma corporation,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 77-C-226-C
	)	
PENNECO OIL OF KANSAS, INC., a Kansas corporation,	)	
	)	
Defendant.	)	
	)	
PENNECO OIL OF KANSAS, INC., a Kansas corporation,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 78-C-122-C
	)	
CALVIN GEE and ELIZABETH DAVENPORT,	)	
	)	
Defendants.	)	

FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

The above-captioned actions involve the proper construction and interpretation of an agreement to refurbish and operate two oil well drilling rigs. The parties herein ask the Court to determine the basic nature of the agreement, and their rights and liabilities thereunder. Plaintiffs in both actions allege a breach of the agreement, and pray for various forms of relief therefor. The trial in this matter has been bifurcated. The liability issues were tried to the Court on October 30 and 31, 1978. The parties have submitted trial briefs and proposed findings of fact and conclusions of law, and the liability issues are now ready for disposition on the merits.

After considering the pleadings, the testimony and exhibits admitted at trial, all of 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. Maxco, Inc. (Maxco) is an Oklahoma corporation and has its principal place of business in Tulsa, Oklahoma.
2. Penneco Oil of Kansas, Inc., (Penneco) is a Kansas corporation and has its principal place of business in Salina, Kansas.
3. Elizabeth Davenport is the sole shareholder and Secretary of Maxco. She resides in Tulsa, Oklahoma and is a citizen of the State of Oklahoma.
4. Calvin Gee is the President of Maxco. He resides in Bartlesville, Oklahoma and is a citizen of Oklahoma.
5. There is more than \$10,000.00 in controversy herein.
6. Maxco uses the names of Osage Well Service (Well Service) and Osage Drilling Company (Drilling Co.) in its operations. Those names were certified by the Secretary of State as tradenames of Maxco on June 7, 1978. Plaintiff's Exhibit 4.
7. Walter J. Nelson is the President of Penneco.
8. Penneco is the owner of two oil well drilling rigs and certain appurtenant equipment. One of the rigs is a Franks rotary drilling rig. The other is a Bucyrus cable tool rig.
9. On May 20, 1976, Mr. Gee and Mr. Nelson met at Salina, Kansas to discuss the lease of Penneco's rotary drilling rig.
10. The rig needed refurbishing. Penneco did not have the funds to refurbish the rig, so Mr. Gee, in behalf of Maxco, agreed to supply those funds. Mr. Gee and Mr. Nelson, in behalf of their respective corporations, agreed to split the profits gained from the use of the rig 50/50. The costs expended to refurbish the rig were to be recouped out of one-half of Penneco's 50% of the profits.
11. On June 7, 1976, Mr. Nelson and his wife came to

Tulsa, Oklahoma, where they met with Ms. Davenport and Mr. Gee. The terms of the lease agreement were discussed further. The parties agreed to \$100.00 per month as the minimum rental on the rotary drilling rig.

12. On June 8, 1976, the written "Lease Agreement", Plaintiff's Exhibit 1, was signed by Mr. Nelson as President of Penneco, and by Mr. Gee, and Ms. Davenport as President and Secretary-Treasurer respectively of Osage Oil Well Service (Maxco). The written agreement was drawn up by Mrs. Nelson.

13. On August 7, 1976, the written "Addendum to Lease Agreement" was signed by Mr. Nelson as President of Penneco, and by Mr. Gee as President of Osage Oil Well Service (Maxco).

14. Mr. Nelson knew that he was dealing with Mr. Gee and Ms. Davenport as corporate officers and not as individuals. In entering into the agreement, Mr. Nelson was not relying upon the single credit and faith of Mr. Gee and Ms. Davenport. Furthermore, the agreement of the parties is not the type of contract that contemplates or requires any kind of personal performance.

15. The written "Lease Agreement" related to the rotary drilling rig. The written "Addendum to Lease Agreement" related to the cable tool rig. Both were subject to the same terms and conditions, except that expenses on the two rigs were to be kept separately. These two documents will hereinafter be denominated as the "written agreement". Plaintiff's Exhibits 1 and 2.

16. By the terms of the written agreement, the parties agreed that fifty percent (50%) of the monthly net profits from the operation of the drilling rigs would be paid to Penneco as rentals, the net profits being the gross profits minus operating expenses as defined in the lease agreement.

17. The parties also agreed to a monthly "rental" of \$100.00, in lieu of 50% of the net profits. The natural

meaning of this provision is that it required a monthly payment to Penneco of \$100.00 or 50% of the net profits, whichever was more. The monthly time was to begin as soon as the rigs began "turning to the right", which the Court finds can only mean as soon as the rigs began drilling a hole or operating.

18. Under the terms of the written agreement, Osage Well Service (Maxco) was to advance the funds necessary to put the rigs into operation. The written agreement further provides that the monies advanced were to be recouped by Osage Well Service (Maxco) "out of the net earning of 25% of the net amount due and owing to Penneco. The other 25% of the 50% to be paid Penneco Oil Inc. monthly, or as soon as expedient in the operation of the rig." The parties agree that the 25% figure refers to one-half of Penneco's net profits, so that Maxco was to recoup the refurbishing expenses from one-half of Penneco's 50% share of the net profits, and Penneco was to get the remaining one-half. Therefore, until the expense of refurbishing the rigs was recouped by Maxco, Penneco was entitled monthly to twenty-five percent (25%) of the net profits or \$100.00, whichever was more.

19. The written agreement also contains the following provision with respect to refurbishing expenses:

Putting the rig into operating condition will be the sole expense of Penneco Oil Inc. out of funds advanced by Osage Well Service. (This means rig turning to the right on first hole).

The natural meaning of this provision, when construed in light of the foregoing provisions of the written agreement, is that the refurbishing expenses were the sole responsibility of Penneco out of one-half of its 50% of the net profits.

20. The written agreement enumerates the following operating expenses:

a.) Insurance (physical damage, personal property

damage, workman's compensation, etc.)

- b.) Equipment repairs
- c.) Permits and tags
- d.) Federal and State employee taxes
- e.) Other taxes after July 1, 1976
- f.) Employee wages
- g.) Hiring of trucks

21. The supervision and bookkeeping expenses were to be the sole responsibility of Osage Well Service (Maxco) out of its 50% of the net profits.

22. The written agreement contains two provisions with respect to accounting. The first unnumbered paragraph required Osage Well Service (Maxco) to attach copies of "billings" when the monthly net profits were sent to Penneco "to ascertain the net profit immediately following that month of operation." Paragraph number 9 requires that

[a]pproximately twice a month, about the 1st and about the 15th, Lessee shall effect a settlement. This settlement to commence after the rig is running.

23. These two provisions, when construed together so as to give effect to both, required Maxco to provide Penneco with copies of the accounts receivable and the accounts payable monthly along with the net profits forwarded to Penneco. The word "billing" ordinarily connotes an account receivable. However, if the "billings" were to be used to verify net profits, the word must refer to both accounts receivable and accounts payable. "Settlement" is defined as "payment or adjustment of an account . . .", Webster's Third Internat'l Dict., or "[a]djustment or liquidation of mutual accounts; the act by which parties who have been dealing together arrange their accounts and strike a balance". Black's Law Dict., Rev. 4th Ed. Since the written agreement contemplates monthly payment or liquidation, the word "settlement" can only refer to the adjustment or balancing of

the accounts. The "settlement" provision therefore required Maxco to balance the books twice a month.

24. The written agreement also imposes the following pertinent duties upon Osage Well Service (Maxco):

a.) To keep the rigs and appurtenant equipment in first-class working condition, excepting usual wear and tear.

b.) To not sublet, sell or otherwise dispose of the same, and to keep them free from levies, liens, and encumbrances.

c.) To leave the repairs on the same at the conclusion of the contract.

d.) To hire employees and pay all wages.

e.) To inventory all items received and used, Calvin Gee to sign for such items.

f.) To charge all tools left in the hole to the operator.

g.) To immediately return the rigs and appurtenant equipment to the Osage Well Service yard in Hominy, Oklahoma at the conclusion of the lease.

25. The written agreement provides that the title to the rigs and appurtenant equipment, including replacements and repairs thereto, was vested in Penneco, except that Osage Well Service (Maxco) was vested with title to any "tools" purchased by it. "Tool" is defined as "an instrument . . . used or worked by hand . . .", Webster's Third New Internat'l Dict., or "[a]n instrument of manual operation, that is, an instrument to be used and managed by the hand instead of being moved and controlled by machinery." Black's Law Dict., Rev. 4th Ed. The word "tool" also refers to the "cutting or machining part of a . . . drill, or similar machine." The Random House Dict. of the Eng. Lang., Unabridged Ed.

26. It is clear from the written agreement and the

negotiations leading thereto that the parties intended a lease. The fact that there was to be a division of net profits does not detract from this conclusion. This was simply the method chosen by the parties for the payment of rental.

The written agreement is inartfully drafted. It is obvious that the parties have extracted provisions from some type of standard lease form and have adapted or attempted to adapt those provisions to their purposes. Many of the provisions of the written agreement are very similar to the provisions found in a standard mineral lease -- the minimum rental, the division of the profits among the respective parties in lieu of payment of the minimum rental, and so on. Such provisions in a mineral lease do not generally bind the parties thereto as joint venturers, and they do not compel such a result in the present case.

27. The conduct of the parties under the written agreement does not alter the conclusion that they intended a lease. Mr. and Mrs. Nelson did not take a passive role in the conduct of the drilling operations. Mr. Nelson and his wife made numerous trips to Hominy, Oklahoma where the field office for the well service and the drilling company was located, especially during the refurbishing period. Mrs. Nelson at one time helped with some bookkeeping with respect to the payroll. Mr. Nelson was active in assisting Maxco in securing the insurance on the drilling rigs and appurtenant equipment, see Plaintiff's Exhibit 205 and Defendant's Exhibit 20, and further assisted Maxco in securing a drilling contract with a Mr. Blubaugh. See Plaintiff's Exhibit 206. Mr. Nelson also brought the Four States and Henderson leases to Mr. Gee's attention, where drilling contracts were subsequently secured. The Nelsons made suggestions with respect to the bookkeeping and accounting methods that were being used, see Defendant's Exhibit 5, and with respect to

the form of drilling contract that was being used.

However, legally and factually, the Nelsons did not have nor exercise the degree of mutual control so necessary to the existence of a joint venture. The Court is impressed by the fact that the limited activities of the Nelsons did not add to problems experienced in the drilling operations which are complained of herein. They were directed toward increasing the efficiency and profitability of the operations. Had their activities added to the liabilities of the drilling operations, the Court would be more inclined to require them to share those liabilities.

28. The written agreement obviously anticipates profitable operation of the drilling rigs. The written agreement makes no provision for losses. The Court cannot rewrite the written agreement and provide for the division of losses. Penneco did not intend or assume responsibility for losses. Absent the existence of a joint venture, from which the Court could imply an agreement to share losses, and absent an expression of intent to the same effect, the parties must stand as they are with respect to losses.

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction under Title 28 U.S.C. §1332.
2. Venue is properly laid with this Court under Title 28 U.S.C. §1391(a).
3. The liability of the agent of an undisclosed principal is "predicated upon the fact that the agreement between the parties is made upon the single credit and faith of the agent because he chose not to reveal his principal." Lane v. Oklahoma-Lincoln, Inc., 583 P.2d 518, 520 (Okla. Ct.App. 1978). Because the reason behind the rule which holds agents of undisclosed principals personally liable in contract does not exist under the facts of this case, the

Court declines to hold Elizabeth Davenport and Calvin Gee personally liable on Maxco's agreement with Penneco.

4. "A contract must be interpreted so as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful." 15 O.S. §152.

5. Where the contract is in writing, and the language is clear and unambiguous, such intent must be determined from the words used. Humphreys v. Amerada Hess Corp., 487 F.2d 800 (10th Cir. 1973). See 15 O.S. §§154, 155.

6. "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." 15 O.S. §160.

7. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others." 15 O.S. §157. See Board of Regents v. Walter Nashert & Sons, Inc., 456 P.2d 524 (Okla. 1969); Dooley v. Cordes, 434 P.2d 289 (Okla. 1967).

8. Where, from an examination of a written contract in its entirety, the intent of the parties thereto is obscure and uncertain, resort may be had to parol evidence to show the situation of the parties, circumstances surrounding the execution of the contract and the negotiations preceding and leading up to the making of the agreement in order to arrive at the contract's true intent and meaning. Public Service Co. v. Home Builder's Assoc. of Realtors, 554 P.2d 1181, 1185 (Okla. 1976). See 15 O.S. §163.

9. An ambiguity in a contract should be resolved against the party who drew it. King-Stevenson Gas & Oil Co. v. Texam Oil Co., 466 P.2d 950 (Okla. 1970). See 15 O.S. §170.

10. The rule that ambiguities in a contract are to be

resolved against the party who prepared it, is subservient to the rule requiring reference to surrounding circumstances to determine the meaning and purpose of the language used by the contracting parties. Replogle v. Indian Terr. Illum. Oil Co., 143 P.2d 1002, (Okla. 1943). In other words, the former rule of construction should be applied only where ambiguities are not resolved by the latter.

11. "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause, subordinate to the general intent and purposes of the whole contract." 15 O.S. §168. See Paclawski v. Bristol Labs., Inc., 425 P.2d 452 (Okla. 1967).

12. "A joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation." Albina Engine & Mach. Wks., Inc. v. Abel, 305 F.2d 77, 81 (10th Cir. 1962).

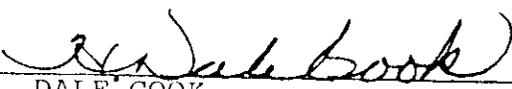
13. Where there is no express agreement to share in the losses of the joint venture, such an agreement can be implied from the agreement to share in the profits. Crest Const. Co. v. Ins. Co. of North Amer., 417 F.Supp. 564 (W.D.Okla. 1976).

14. Another characteristic of a joint venture is a joint interest in the property. However, "joint interest" does not refer to joint ownership or joint control. "Joint interest" means "that the parties need be engaged in an enterprise in which they have a community of interest and a common purpose in its performance." Crest Const. Co., supra, at p.569.

15. A right of mutual control of the enterprise is necessary to a joint venture. However, the parties may shift management or control of the enterprise by agreement. Albina Engine & Machine Wks., Inc., supra Crest Const. Co., supra.

16. The relation of the parties hereto was that of lessor and lessee.

It is so Ordered this 15th day of November, 1979.

  
\_\_\_\_\_  
H. DALE COOK  
Chief Judge, U. S. District Court

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

**F I L E D**

NOV 15 1979

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

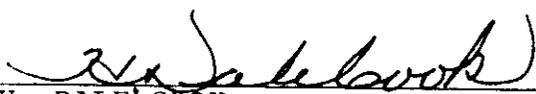
MAXCO, INC., an Oklahoma corporation,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 77-C-226-C
	)	
PENNECO OIL OF KANSAS, INC., a Kansas corporation,	)	
	)	
Defendant.	)	
	)	
PENNECO OIL OF KANSAS, INC., a Kansas corporation,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 78-C-122-C
	)	
CALVIN GEE and ELIZABETH DAVENPORT,	)	
	)	
Defendants.	)	

JUDGMENT

The Court on November 15, 1979, 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 in No. 77-C-226-C, Penneco Oil of Kansas, Inc., and in favor of the defendants in No. 78-C-122-C, Calvin Gee and Elizabeth Davenport, in accordance with the Court's Findings of Fact and Conclusions of Law.

It is so Ordered this 15th day of November, 1979.

  
\_\_\_\_\_  
H. DALE COOK  
Chief Judge, U. S. District Court

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

**FILED**

NOV 15 1979

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

ROY CRUZEN, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. C-78-613-E  
 )  
 PEAVEY COMPANY, a Minnesota )  
 corporation, )  
 )  
 Defendant. )

DISMISSAL WITH PREJUDICE

COMES NOW the plaintiff, Roy Cruzen, by and through his attorney of record, C. F. DeLaFleur, and dismisses the above entitled action against the defendant, Peavey Company, at the cost of plaintiff, with prejudice.

DATED this 21 day of September, 1979.

  
C. F. DeLaFleur

Attorney for Plaintiff

  
John S. Athens

Attorney for Defendant

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

**FILED**

**NOV 15 1979**

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

GEORGIA RUSK,

Plaintiff,

VS.

NATIONAL OIL & SUPPLY CO., INC.,  
and TRANSAMERICA INSURANCE COMPANY,  
and FIREMAN'S INSURANCE COMPANY of  
NEWARK,

Defendants.

NO. 79-C-415-*pB*

STIPULATION OF DISMISSAL

Comes now the parties and hereby dismiss Fireman's Fund Insurance Company from  
the above cause with prejudice.

Dated this 14th day of November, A.D., 1979.

*Glenn P. Bernstein*  
\_\_\_\_\_  
GLENN P. BERNSTEIN, Attorney for Plaintiff

*Alfred B. Knight*  
\_\_\_\_\_  
ALFRED B. KNIGHT, Attorney for Defendant  
Fireman's Fund Insurance Company

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**NOV 14 1979**

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JAMES PATRICK MEADOWS, JOYCE )  
 VIRGINIA MEADOWS, ROSA LEE )  
 PEARCE, OWASSO LUMBER COMPANY, )  
 a corporation, and O.C. )  
 LASSITER, Attorney-at-Law, )  
 )  
 Defendants, )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT  
Civil Action File  
NO: 79-C-523-D

O R D E R

NOW, on this 14<sup>th</sup> day of November, 1979, there having come on for hearing before the undersigned Judge in and for the Northern District of Oklahoma, United States District Court, the Application for Dismissal of Defendant, Owasso Lumber Company, filed herein, said Defendant appearing by its attorneys, Doyle, Holmes, Gasaway, Green & Harris, and for good cause shown:

This Court finds that the Defendant, Owasso Lumber Company, has no interest in the property which is the subject matter of this controversy.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, Owasso Lumber Company be dismissed from the above-styled and numbered action without costs.

S/ THOMAS R. BRETT

-----  
JUDGE

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

DENNIS C. STIEBEN and JANET K. STIEBEN, )  
TIMOTHY L. WILLIAMS and FRANCES )  
WILLIAMS, and ALL OTHER PERSONS )  
SIMILARLY SITUATED, )  
  
Plaintiffs, )  
  
vs. )  
  
CONTINENTAL FEDERAL SAVINGS AND LOAN )  
ASSOCIATION, )  
  
Defendant. )

NOV 14 1979  
Clerk  
U. S. DISTRICT COURT

No. 78-C-455-C

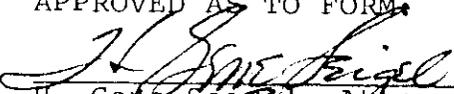
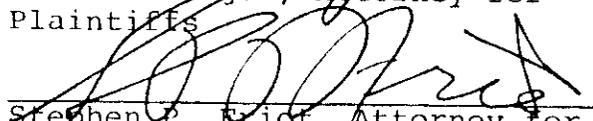
JUDGMENT

On this 2nd day of November, 1979, this action came on for hearing on the Motion for Summary Judgment filed by the Defendant, Continental Federal Savings and Loan Association. The Plaintiffs were present by their attorneys, H. Gene Seigel and James Ikard, and the Defendant was present by its attorneys, Stephen P. Friot and John Paul Walters, Jr.

The court, having considered the briefs and arguments of counsel, finds that the Motion for Summary Judgment filed by the Defendant, Continental Federal Savings and Loan Association, should be, and hereby is, sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment in this action be, and hereby is, entered in favor of the Defendant, Continental Federal Savings and Loan Association and against the Plaintiffs, Dennis C. Stieben, Janet K. Stieben, Timothy L. Williams, and Frances Williams, with costs.

  
H. DALE COOK, Chief Judge

APPROVED AS TO FORM:  
  
H. Gene Seigel, Attorney for Plaintiffs  
  
Stephen P. Friot, Attorney for Defendant

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

PETER LEE JAMES AUGERBRIGHT, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 C. RAY SMITH, )  
 )  
 Defendant, )  
 )  
 SUMMIT HOME INSURANCE COMPANY, )  
 )  
 Garnishee. )

No. 79-C-371-D<sup>✓</sup>

FILED

NOV 14 1979

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

O R D E R

This is a garnishment action which was removed from the State District Court of Osage County, Oklahoma by Garnishee, Summit Home Insurance Company. Plaintiff is a citizen of the State of Oklahoma, and Garnishee is an Arizona corporation, having its principle place of business in Phoenix, Arizona. The amount in controversy exceeds \$10,000.00. This action was properly removed, and this Court has jurisdiction, Adriaenssens v. Allstate Insurance Co., 258 F.2d 888 (Tenth Cir. 1958); Sentry Insurance Co. v. Longacre, 403 F.Supp. 1264 (W.D.Okla. 1975).

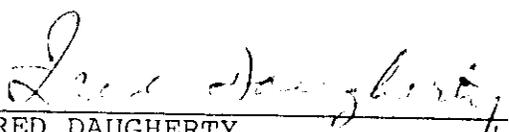
The Court now has before it Garnishee's Motion for Summary Judgment. This motion was filed September 13, 1979, and this Court, by Minute Order entered that same date, Ordered Plaintiff to respond on or before September 28, 1979. To date, Plaintiff has failed to respond to said motion, nor has Plaintiff ever moved for an extension of time.

Inherent in the power of federal courts is the power to control their dockets. Pond v. Braniff Airways, Inc., 453 F.2d 347 (Fifth Cir. 1972); see Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). Therefore, in appropriate circumstances, a district court may

dismiss a complaint on the Court's own motion. Diaz v. Stathis, 440 F.Supp. 634 (D.Mass. 1977), aff'd, 576 F.2d 9 (First Cir. 1978); see Literature, Inc. v. Quinn, 482 F.2d 372 (First Cir. 1973); see, e.g., Maddox v. Shroyer, 302 F.2d 903 (D.C.Cir. 1962), cert. denied, 371 U.S. 825, 83 S.Ct. 45, 9 L.Ed.2d 64 (1962).

In the instant case, Plaintiff has failed to comply with the Court's Order of September 13, 1979. Failure to comply with said Order is not a matter that goes to the merits of the case itself and thus does not require dismissal of Plaintiff's action. See Petty v. Manpower, Inc., 591 F.2d 615 (Tenth Cir. 1979). Accordingly, the Court finds and concludes that Plaintiff's complaint in garnishment should be dismissed without prejudice for failure to comply with the Court's Order. See Maddox v. Shroyer, supra.

It is so Ordered this 12<sup>th</sup> day of November, 1979.

  
FRED DAUGHERTY  
United States District Judge

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BILLY D. McCLELLAN, )  
 )  
 Defendant. )

CIVIL ACTION NO. 79-C-471-CE

NOV 17 1979

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, with prejudice.

Dated this 13th day of November, 1979.

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
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 13th day of November, 1979.

  
Assistant United States Attorney

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

**FILED**

FEB 13 1979

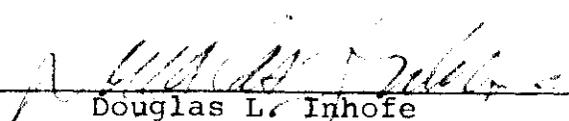
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

L. B. SMITH, INC., a )  
Pennsylvania corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FRED WESTHOFF CONSTRUCTION )  
COMPANY, INC., a Kansas )  
corporation, )  
 )  
Defendant. )

No. 79-C-501-~~BT~~

NOTICE OF DISMISSAL

Plaintiff hereby dismisses without prejudice the  
above-entitled action pursuant to Rule 41(a)(1)(i), F. R. Civ. P.

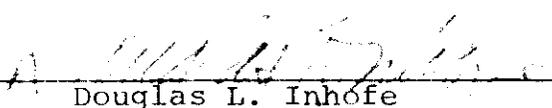
  
\_\_\_\_\_  
Douglas L. Inhofe

CONNER, WINTERS, BALLAINE,  
BARRY & MCGOWEN  
2400 First National Tower  
Tulsa, Oklahoma 74103

Attorneys for Plaintiff  
L. B. SMITH, INC.

CERTIFICATE OF MAILING

I, DOUGLAS L. INHOFE, hereby certify that on the 13<sup>th</sup> day of November, 1979, I mailed a true and correct copy of the above and foregoing Notice of Dismissal to Fred Westhoff Construction Company, Inc., 914 W. 3rd, Pratt, Kansas 67124 and to Fred Westhoff Construction Company, Inc., 405 1/2 North 5th Street, Morris, Oklahoma 74445, with postage prepaid fully thereon.

  
\_\_\_\_\_  
Douglas L. Inhofe

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

NOV 17 1979

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 79-C-202-C
	)	
JOHN H. KIMBROUGH, JR.	)	
a/k/a JOHN H. KIMBROUGH,	)	
	)	
Defendant.	)	

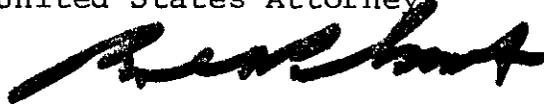
NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, with prejudice.

Dated this 13th day of November, 1979.

UNITED STATES OF AMERICA

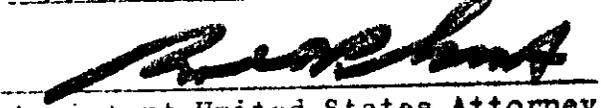
HUBERT H. BRYANT  
United States Attorney



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 13th day of November, 1979.

  
Assistant United States Attorney

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

ROBERT S. KINGREY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 R. H. BORTZ, M.D., )  
 )  
 Defendant. )

NO. 78 C 304 C

**FILED**  
**NOV 5 1979**  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES now the plaintiff and defendant and would show the Court that their differences have been compromised and that nothing further remains to be done in this litigation and therefore moves this Court for an Order of Dismissal with Prejudice.

*Robert S. Kingrey*  
\_\_\_\_\_  
Robert S. Kingrey, Plaintiff

*[Signature]*  
\_\_\_\_\_  
Attorney for Plaintiff

**FILED**  
**NOV 13 1979**  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

\_\_\_\_\_  
Attorney for Defendant

ORDER OF DISMISSAL

Now on this 31<sup>st</sup> day of October, 1979, the Court, having received an Application for Dismissal from the parties hereto, finds that their differences have been compromised and that this case should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this case be and the same is hereby dismissed with prejudice.

*Clarence A. Brummer*  
\_\_\_\_\_  
United States District Judge

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

ST. PAUL INSURANCE COMPANY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RICHARD E. TERRY and NATHAN )  
 C. TIBLOW, individually and as )  
 FIVE STATE SALVAGE, a co- )  
 partnership, )  
 )  
 Defendant. )  
 )

No. 75-C-464(C)

FILED

NOV 9 1979

Jack B. Silver Clerk  
U. S. DISTRICT COURT

STIPULATION OF DISMISSAL

COME NOW the Plaintiff, St. Paul Insurance Company, and the Defendant, Richard E. Terry, and pursuant to Rule 41 (a), Federal Rules of Civil Procedure hereby stipulate that this action against the Defendant, Richard E. Terry, only, can be and is dismissed without prejudice.

KNIGHT, WAGNER, STUART & WILKERSON

By: Stephen C. Wilkerson  
Stephen C. Wilkerson, attorney for  
the Plaintiff

310 Beacon Building  
Tulsa, Oklahoma 74103

Fred Woodson  
Fred Woodson, attorney for the  
Defendant, Richard E. Terry

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

BOBBY JOE HARRISON and )  
REGINA HARRISON, )  
Husband and Wife, )  
 )  
Plaintiffs, )  
 )  
AMERICAN MOTORISTS )  
INSURANCE COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
LION UNIFORM, INC., )  
 )  
Defendant. )

**E I L E D**

NOV 7 1979

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

No. 77-C-181-C

SECOND AMENDED JUDGMENT

Judgment was rendered in this case March 6, 1979, pursuant to a jury verdict in favor of plaintiffs, awarding plaintiffs a total of \$57,506.00 with interest, and the costs of the action. An Amended Judgment was filed on March 8, 1979, the award was divided as follows: \$34,230.00 to Subrogee-plaintiff, American Motorists Insurance Company, with interest and costs, and \$23,276.00 to plaintiff Bobby Joe Harrison, with interest and costs.

Plaintiff and third party plaintiff now disagree over the proper means of paying the attorney fees. Subrogee-plaintiff, American Motorists, contends that the applicable statute is Title 85, Okla.Stat.Annot. §44, as amended 1951, found in the main volume of West's Oklahoma Statutes Annotated, published 1970. American Motorists argues that the amended §44 did not take effect until 1978 and is thus inapplicable to this action filed in 1977.

Section 44 was amended as of January 1, 1976, in pertinent part, as follows:

"Whenever recovery against such other person is effected without compromise settlement by the employee or his representatives, the employer or insurance company having paid compensation under this act shall be entitled

to reimbursement a proportionate share of the expenses, including attorneys fees, incurred in effecting said recovery to be determined by the ratio that the amount of compensation paid by the employer bears to the amount of the recovery effected by the employee. After the expenses and attorneys fees have been paid, the balance of the recovery shall be apportioned between the employer or insurance company having paid the compensation and the employee or his representatives in the same ratio that the amount of compensation paid by the employer bears to the total amount recovered; provided however, the balance of the recovery may be divided between the employer or insurance company having paid compensation and the employee or his representatives as they may agree."

The changes effective in 1978 made no change in this portion of the statute, and it is therefore applicable to the present action.

The Stipulation filed by the parties on February 21, 1979, noted the expenses paid by American Motorists to plaintiff, Harrison (\$34,230.00). The Stipulation made no mention as to the attorney fees incurred in the trial. Those fees will therefore be allotted according to Section 44, which provides that the insurance company

". . . shall pay from its share of said reimbursement a proportionate share of the expenses, including attorneys fees, incurred in effecting said recovery to be determined by the ratio that the amount of compensation paid by the employer bears to the amount of the recovery effected by the employee."  
Title 18, Okla.Stat.Annot. §44.

American Motorists paid \$34,230.00 to plaintiff Harrison, who thereafter recovered \$57,506.00 from defendant Lion Uniform, Inc. The ratio of \$34,230.00 to \$57,506.00 is 59.524 to 100, or 59.524%, which is the portion of plaintiff's attorney fees that American Motorists must pay. Plaintiff Harrison agreed with his attorneys, W. C. Sellers and Paul McBride, to pay them forty percent (40%) of a plaintiff's judgment on a contingency basis. American Motorists must therefore pay its share, 59.524%, of that contingency fee, with plaintiff Harrison paying the balance.

The Amended Judgment of March 8, 1979, should be

amended as follows: Plaintiffs Bobby Joe Harrison and American Motorists Insurance Company will each pay a proportionate share of the expenses, including attorney fees, incurred in this action, said proportion being 40.476% for plaintiff Harrison and 59.524% for plaintiff American Motorists.

American Motorists also argues that it incurred attorney expenses in the time spent by its own counsel on this case. Such recovery of attorney fees for the insurer is provided by for Section 44, but this Court finds nothing submitted by American Motorists indicative of any attorney time it expended to effect this recovery for plaintiff Harrison. All of American Motorists' attorney's efforts were on behalf of American Motorists, not Mr. Harrison. Fees for the time of American Motorists attorneys will therefore not be covered by this judgment.

There are two additional motions now before the Court. The first is subrogee plaintiff American Motorists Insurance Company's motion for reimbursement of \$1600 expenses from plaintiff for depositions prepared for this case and its companion, the Bonwell case. This is not an item of costs, since it is not being assessed against the defendant. It is merely an arrangement between American's attorney and plaintiff's attorneys. The taxing of costs based on such an arrangement is not appropriate in this action, and co-plaintiff American's motion will therefore be overruled.

The second is plaintiff's motion seeking an additional \$453.00 from the defendant for half the cost of the Bonwell transcript in preparation for this trial. Again, this is not an appropriate item of costs, and as in the motion above, it is an arrangement between the attorneys for plaintiff and defendant. This is not appropriate as the basis for costs in this action.

For the foregoing reasons, it is hereby ordered that

Bobby Joe Harrison pay 40.476% of the attorney fees in this action, and that plaintiff American Motorists Insurance Company pay 59.524% of the attorney fees, said attorney fees to be computed as 40% of the judgment pursuant to the agreement between plaintiff Harrison and his attorneys, W. C. Sellers and Paul McBride. It is further ordered that the motion of American Motorists Insurance Company to tax \$1600 costs against the judgment be overruled; and it is further ordered that plaintiff's motion for costs of \$453.00 against defendant be overruled.

It is so Ordered this 7<sup>th</sup> of November, 1979.

  
\_\_\_\_\_  
H. DALE COOK  
Chief Judge, U. S. District Court

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

NOV 7 1979

SOONER PIPE & SUPPLY CORPO- )  
RATION, an Oklahoma corpo- )  
ration, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
INTERNATIONAL DRILLING AND )  
EXPLORATION COMPANY, INC., )  
a foreign corporation, )  
 )  
Defendant. )

Jack C. Silver  
U. S. DISTRICT COURT

No. 79-C-594-C

JUDGMENT OF DEFAULT

Defendant International Drilling and Exploration Company, Inc., a foreign corporation, has been regularly served with process. It has failed to appear and answer the plaintiff's complaint filed herein. The default of defendant International Drilling and Exploration Company, Inc., a foreign corporation, has been entered. It appears from the affidavit in support of entry of default judgment that the plaintiff is entitled to judgment.

IT IS ORDERED AND ADJUDGED that plaintiff recover from defendant International Drilling and Exploration Company, Inc., a foreign corporation, the sum of \$12,933.59, with interest thereon at the rate of 10% per annum from May 21, 1979, until paid, together with the costs of this action.

DATED this 6th day of November, 1979.



UNITED STATES DISTRICT COURT CLERK

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV. 7 1979

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

United States of America,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 78-C-308C
	)	
vs.	)	This action applies to all
	)	interests in the estate
140.00 Acres of Land, More or	)	taken in:
Less, Situate in Washington	)	
County, State of Oklahoma, and	)	Tract No. 328
James C. Gorham, et al., and	)	
Unknown Owners,	)	
	)	(Included in D.T. filed in
Defendants.	)	Master File #400-13)

J U D G M E N T

1.

Now, on this 7<sup>th</sup> day of November, 1979, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tract No. 328, as such tract is described in the Complaint filed in this action, and as such estate is set forth below in paragraph 8.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject tract.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right,

power and authority to condemn for public use the property described in such Complaint. Pursuant thereto, on June 30, 1978, the United States of America filed its Declaration of Taking of such described property, and title to the estate taken in such property (as described below in paragraph 8) should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of subject property a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 14.

7.

The defendants named in paragraph 14 as owners of the estate taken in subject tract are the only defendants asserting ownership of such property. All other defendants having either disclaimed or defaulted, the named defendants, as of the date of taking, were the owners, and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

On November 5, 1979 a document entitled "Stipulation For Revestment and Just Compensation", signed by the former owners and by the United States Attorney for the Northern District of Oklahoma, was filed in this action. By this document the parties, among other things, substituted for the estate acquired in Tract No. 328, as set forth in the Complaint and the Declaration of Taking filed herein, the following estate, to-wit:

"The subordination of all oil, gas, and other minerals in and under Tract 328, and all appurtenant rights used in connection with the exploration, development, production, and removal of said oil, gas, and other minerals, including any existing structures and improvements, to the prior right of the United States to flood and submerge the land as may be necessary in the construction, operation, and maintenance of the project; together with the right to plug wells and take any other necessary corrective action to prevent pollution, when in the opinion of the District Engineer, Tulsa District, Corps of

Engineers, Tulsa, Oklahoma, or his authorized representative, such action is required: provided further that any exploration or development of said oil, gas, and other minerals in and under said land shall be subject to Federal and State laws with respect to pollution of waters of the reservoir, and provided that the type and location of any structure, improvement, and appurtenance thereto now existing or to be erected or constructed on said land in connection with the exploration and/or development of said oil, gas, and other minerals shall be subject to the prior written approval of the District Engineer, Tulsa District, Corps of Engineers, Tulsa, Oklahoma, or his authorized representative."

Such stipulation should be approved.

9.

The Stipulation described in paragraph 8 above also contained an agreement by the parties that the sum of \$4,160.00, inclusive of interest, is just compensation for the acquisition of the revised estate in subject tract as set forth in said paragraph 8, and such agreement should be approved by the Court.

10.

Entry of this Judgment will create a surplus in the deposit of estimated compensation for the estate taken in the subject tract in this action, as set forth below in paragraph 14. Such surplus should be refunded to the Plaintiff.

11.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use the tract designated as Tract No. 328, as such tract is particularly described in the Complaint filed herein; and such tract, to the extent of the estate described in paragraph 8 above, was condemned, and title thereto vested in the United States of America as of June 30, 1978, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such estate.

12.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the estate condemned herein in subject tract were the parties whose names appear below in paragraph

14, and the right to receive the just compensation awarded by this judgment is vested in the parties so named.

13.

It Is Further ORDERED, ADJUDGED and DECREED that the agreement of the former owners and the Plaintiff, contained in the Stipulation, filed herein on November 5, 1979, as described above in paragraph 8, is approved. Thus, the estate hereby condemned in Tract 328, as such tract is described in the Complaint filed herein, is the estate quoted in said paragraph 8 above.

14.

It Is Further ORDERED, ADJUDGED and DECREED that the agreement as to just compensation, described in paragraph 9 above, hereby is approved and the amount thereby fixed by the parties is adopted by the Court as the award of just compensation for the estate taken in the subject tract in this case, as shown in the schedule which follows, to-wit:

TRACT NO. 328

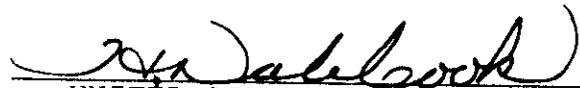
OWNERS: James C. Gorham and  
Evelyn V. Gorham

Award of just compensation pursuant to Stipulation -----	\$4,160.00	\$4,160.00
Deposited as estimated compensation -----	<u>\$4,200.00</u>	
Disbursed to owners -----		<u>None</u>
Balance due to owners -----		\$4,160.00
Deposit surplus -----	\$ 40.00	

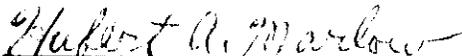
15.

It Is Further ORDERED, ADJUDGED and DECREED that the Clerk of this Court shall disburse the surplus in the deposit for such tract as follows:

To - Treasurer, United States of America ---- \$40.00.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
HUBERT A. MARLOW  
Assistant United States Attorney

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

GALBRAITH AND DICKENS AVIATION )  
INSURANCE AGENCY, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JOSEPH CURCIO, d/b/a SAFARI )  
AVIATION; CRESCENT 609 CORP., )  
d/b/a SAFARI AVIATION; and )  
SAFARI AVIATION; )  
 )  
Defendants. )

No. 78-C-35-D

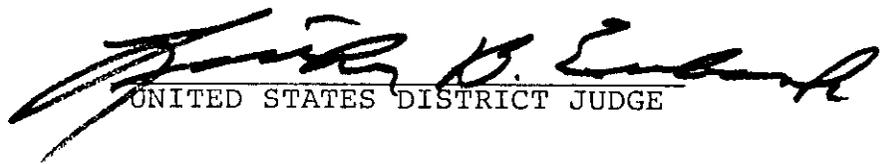
FILED

NOV 6 1979

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

JUDGMENT

NOW on this 6th day of November, 1979, this matter comes on for trial. The plaintiff appearing by and through its counsel, Reuben Davis, and the defendant appearing by and through its counsel, Phyllis L. Wade. The Court having heard announcements of counsel, finds that the plaintiff appeared ready for trial, but that the defendant announced not ready for trial and had no evidence to present in defense and, therefore, the defendants are adjudged to be in default. The Court finds that the defendants are jointly and severally indebted to the plaintiff in the sum of \$10,906.26 with interest at the rate of six percent (6%) per annum from and after June 1, 1977 until date of judgment, a reasonable attorneys' fee in the amount of \$3,500.00, the costs of this action and interest on the total of the above from the date of this judgment at the rate of ten percent (10%) per annum until paid.

  
UNITED STATES DISTRICT JUDGE

NOV 6 1979

United States District Court

FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

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

CIVIL ACTION FILE NO. 76-C-421

M. J. BRAGG,  
Plaintiff,

vs.

FORETRAVEL, INC.,  
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Clarence A. Brimmer, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Defendant, Foretravel, Inc.

It is Ordered and Adjudged that the Plaintiff, M. J. Bragg, take nothing and that the Defendant, Foretravel, Inc., recover of the Plaintiff their costs of action.

Dated at Tulsa, Oklahoma, this 26th day  
of October, 19 79.

*Clarence A. Brimmer*

HONORABLE CLARENCE A. BRIMMER  
UNITED STATES DISTRICT JUDGE

*Jack C. Silver*

Clerk of Court  
JACK C. SILVER

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

**FILED**

NOV 5 1979

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

HAROLD FISHER, MARGARET FISHER, )  
AND RICHARD FISHER, a Minor )  
By and Through His Natural )  
Guardian And Friend, )  
Harold Fisher, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
LUTHER PETERS, )  
 )  
Defendant. )

NO. 79-C-59-C  
79-C-60-C  
79-C-61-C

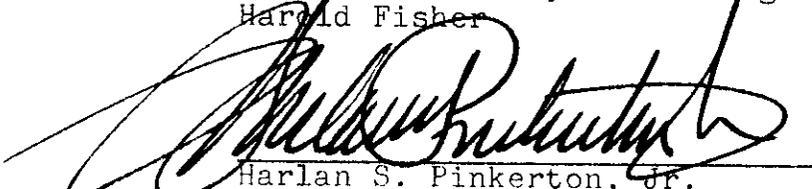
DISMISSAL WITH PREJUDICE

Come now the Plaintiffs, Harold Fisher, Margaret Fisher, and Richard Fisher a Minor by and through Harold Fisher, and dismiss their respective causes with prejudice to the right of bringing any other future action.

  
Harold Fisher, Plaintiff

  
Margaret Fisher, Plaintiff

  
Richard Fisher By and Through  
Harold Fisher

  
Harlan S. Pinkerton, Jr.  
Plaintiffs' Attorney

FILED

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

NOV 5 1979

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 WALANDA MCCUIN, )  
 )  
 Defendant. )

CIVIL ACTION NO. 79-C-600-D

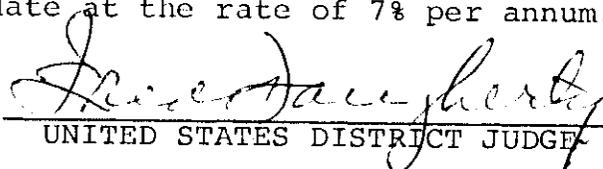
DEFAULT JUDGMENT

This matter comes on for consideration this 2<sup>nd</sup> day of November, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Walanda McCuin, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Walanda McCuin, was personally served with Summons and Complaint on October 2, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

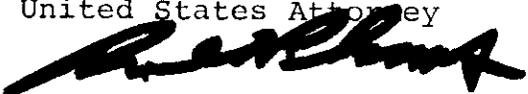
The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Walanda McCuin, for the sum of \$1,649.38, as of August 1, 1979, plus interest from and after said date at the rate of 7% per annum.

  
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
ROBERT P. SANTEE  
Assistant U. S. Attorney

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

DONALD D. REIMER and GLORIA C. )  
REIMER, husband and wife, )  
 )  
Plaintiffs, )  
 )  
-vs- )  
 )  
JEFFERSON J. BAGGETT, B & D )  
TRUCKING, INC., a corporation, )  
BEACON TIRE SERVICE NO. 2, INC., )  
a corporation, RYDER TRUCK RENTAL, )  
INC., a Florida corporation, and )  
JAMES A. STEELMAN, d/b/a BEACON )  
TIRE SERVICE, )  
 )  
Defendants. )

FILED

NOV 5 1979

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

No. 79-C-47-C

DISMISSAL WITHOUT PREJUDICE

COMES NOW the plaintiff, Gloria C. Reimer, and hereby  
dismisses without prejudice their cause or causes of action as  
against the defendant, Beacon Tire Service No. 2, Inc., a  
corporation, in the above styled and numbered action.

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

By: Rodney A. Edwards  
Rodney A. Edwards  
201 West Fifth, Suite 400  
Tulsa, Oklahoma 74103  
Telephone: (918) 583-1115

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I hereby certify that on this 5 day of November, 1979, I  
mailed a true and correct copy of the above and foregoing instrument  
to: Hugh Hardin, P. O. Box 968, Ft. Smith, Arkansas 72902; Dan A.  
Rogers, 117 East Fifth Street, Tulsa, Oklahoma 74103; Jack Thomas,  
300 Oil Capital Building, Tulsa, Oklahoma 74103; and Ed Parks, III,  
420 South Boston, Petroleum Building, Tulsa, Oklahoma 74103, with  
proper postage thereon fully prepaid.

Rodney A. Edwards  
Rodney A. Edwards

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

OMA KING, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 J. C. PENNEY COMPANY, INC., a )  
 Delaware corporation, )  
 )  
 Defendant. )

NO. 78 C 624 *JD*

**FILED**

NOV 1 1979 *B*

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

ORDER

For good cause shown, and upon the joint Stipulation for Order of Dismissal With Prejudice filed herein, the Court finds that the above styled and numbered cause of action should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all of plaintiff's causes of action are hereby dismissed with prejudice.

*Lee Dougherty*  
United States District Judge