

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

**FILED**

SEP 2 1980

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

RAY MARSHALL, Secretary of )  
Labor, United States )  
Department of Labor, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
UNITED VIDEO, INC., )  
 )  
Defendant. )

No. 77-C-207-BT

JUDGMENT

In accordance with the Memorandum Opinion, Findings of Fact and Conclusions of Law entered in this action on this date, it is:

ORDERED, ADJUDGED AND DECREED that Defendant, United Video, Inc., as well as the agents, servants, employees and those persons in active consort or participation with Defendant are permanently enjoined and restrained from violating the provisions of 29 U.S.C. §§ 207(a)(2), 211(c), 215(a)(2) and 215(a)(5) (Fair Labor Standards Act of 1938, as amended), hereinafter referred to as the Act, as follows:

I.

Defendant shall not, contrary to the provisions of the Act, 29 U.S.C. §§ 207(a)(2) and 215(a)(2), employ any employee engaged in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than 40 hours unless Defendant compensates such employee for employment in excess of 40 hours in such workweek at a rate not less than one and one-half times the regular rate at which such employee is employed.

II.

Defendant shall not, contrary to the provisions of the Act, §§ 211(c) and 215(a)(5) fail to make, keep and preserve the records required by the Act and the regulations and orders issued pursuant to the Act.

III.

It is further ORDERED, that Defendant be and is hereby enjoined and restrained from withholding payment of overtime compensation in the sum of \$20,194.26, which the Court finds to be due under the Act to Defendant's employees, named in the Findings of Fact and Conclusions of Law, together with interest at the rate of six percent (6%) per annum from the median point of each employee's period of employment as set forth in the Findings of Fact and Conclusions of Law to date of this Judgment with interest at the rate of twelve percent (12%) thereafter until paid.

IV.

It is further ORDERED, that Plaintiff, upon receipt of such certified or cashier's check from Defendant, promptly proceed to make distribution, less income tax and social security withholdings, of the sums due Defendant's employees as indicated above to such employees or to the legal representative of any deceased employee. If, after making reasonable and diligent efforts to distribute such amounts to the person entitled thereto, Plaintiff is unable to do so because of inability to locate a proper person, or because of a refusal to accept payment by any such person, Plaintiff, pursuant to 28 U.S.C. Section 2041, shall deposit such funds with the Clerk of this Court. Any such funds may be withdrawn for payment to a person entitled thereto upon order of this Court.

V.

It is further ORDERED that Defendant pay the costs of this action.

DATED this 30<sup>th</sup> day of September, 1980.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

SEP 30 1980

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

RAY MARSHALL, Secretary of )  
Labor, United States )  
Department of Labor, )  
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Plaintiff, )  
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v. )  
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UNITED VIDEO, INC., )  
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Defendant. )

No. 77-C-207-BT

MEMORANDUM OPINION

This cause came on for trial by the Court upon the stipulation of the parties that the matter be submitted to the Court for trial on the record which consists of certain depositions, admissions, answers to interrogatories, stipulations of the parties and Orders of the Court as more fully described in the Pretrial Order filed herein on May 22, 1980. The only issues remaining for decision by the Court are: (1) The amount of overtime compensation and interest thereon due certain employees by the defendant because of its violations of the Fair Labor Standards Act of 1938, as Amended (29 U.S.C. § 201, et seq.), hereinafter referred to as the Act, and (2) whether an injunction should issue permanently enjoining future violations of the Act and restraining defendant from withholding any unpaid overtime compensation found by the Court to be due certain employees of defendant.

The plaintiff seeks an injunction restraining defendant from withholding overtime compensation for defendant's employees or former employees for the dates of employment and amounts claimed due as follows:

|                       |                    |            |
|-----------------------|--------------------|------------|
| Ralph Timothy Airhart | 9/1/78 to 2/13/80  | \$ 672.89  |
| Dewey R. Clay         | 3/14/74 to 3/3/78  | \$ 442.74  |
| Paul A. Grindstaff    | 8/1/75 to 8/15/78  | \$2,793.54 |
| Shawn Johnson         | 6/8/75 to 12/21/78 | \$1,822.08 |
| Jude Lasserre         | 9/1/75 to 8/6/79   | \$1,898.28 |
| James Spinoso         | 6/10/76 to 8/2/79  | \$2,787.41 |
| Martin Szuch          | 6/1/75 to 6/30/77  | \$4,436.00 |
| Timothy Tuthill       | 6/1/75 to 4/29/79  | \$3,184.47 |

|               |                   |            |
|---------------|-------------------|------------|
| Billy Walters | 8/1/76 to 10/2/79 | \$ 897.23  |
| John Whaley   | 6/1/75 to 7/31/77 | \$1,563.95 |

The basis for plaintiff's calculation as to the overtime hours worked by each of the above named employees is the deposition testimony of each of the employees together with copies of payroll time sheets for each of the employees. Some of the employees are still employed by the defendant and the cutoff date for computing any overtime compensation which may be due to those employees who are still with the defendant is the date on which the deposition of the employee was taken. No attempt is made to determine what additional overtime compensation may be due such employees for dates other than those shown above since there is no testimony or other evidence in the record to support such additional overtime, if any.

Attached to plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment filed on April 29, 1980 are Exhibits 1 through 10 (Summaries). The Summaries are not part of the stipulated evidence. The summaries are for each of the ten employees named above showing on each of the employees by work week, the information taken from payroll time sheets, where available, reflecting the hours worked in each work week, the wages paid for such work week, and the coefficient for computing each half hour overtime compensation. Plaintiff's Exhibit 1 to the deposition of Randy G. O'Neal (O'Neal) is a "Coefficient Table For Computing Extra Half-Time For Overtime" (Coefficient Table) from which the coefficient numbers used in the summaries were taken.

Ralph Timothy Airhart (Airhart) testified by deposition on February 13, 1980. Airhart testified that his employment with the defendant commenced September 1, 1978 as a microwave engineer with some managerial duties and he was still serving in this position at the time his deposition was taken. He identified Plaintiff's Exhibit 1 to his deposition

and Defendant's Exhibit 17 to O'Neal's deposition as his time sheets. He testified that on some of the time sheets he included the hours on those days he worked in excess of 8 hours but that he failed to include any overtime on the time sheets for the months of September, October and November of 1978. He testified that for the period from September 1978 through November of 1978 he did not recall specifically the days on which he worked overtime but that he "probably" worked during those months "at least every other week in the range of 4 or 5 hours, something like that." He did not state why he failed to record any overtime on the payroll time sheet for the months of September through November of 1978. Airhart's time sheets for the months of June, July, August and September of 1979 are attached as Exhibits to the Stipulation of the parties filed April 24, 1980. Airhart also testified as to the salary he was paid by the defendant during the employment periods for which plaintiff seeks overtime compensation for Airhart. Summaries - Plaintiff's Exhibit 1 reflects the hours worked by Airhart for the pay periods shown thereon as taken from Airhart's time sheets, the total pay for each work week and the overtime coefficient as determined from the Coefficient Table, except for the period September 1, 1978 through December 15, 1978 in which the overtime hours were estimated based on Airhart's testimony that he worked four or five hours every other week during that period.

Dewey R. Clay (Clay) testified by deposition on August 24, 1977. He stated that he was employed by the defendant as a Microwave engineer on March 15, 1977. He stated that he recorded the number of hours he worked each week on the payroll time sheets. Clay's time sheets are identified as Defendant's Exhibit 13 to O'Neill's deposition. His testimony as to the salary and other sums paid to him by the defendant

during his employment together with Defendant's Supplemental Response to Plaintiff's Request for Admissions and Interrogatories are the basis for plaintiff's total pay computations for Clay. Summaries - Plaintiff's Exhibit 2 reflects the hours worked by Clay for the pay periods shown thereon as taken from Clay's time sheets, the total pay for each work week and the overtime coefficient as determined from the Coefficient Table.

Paul A. Grindstaff (Grindstaff) testified by deposition on July 10, 1979. Grindstaff stated that he was employed by the defendant as a microwave technician in August of 1973 and continued his employment until August of 1978. Grindstaff identified Defendant's Exhibit 14 to O'Neal's deposition as his time sheets. He stated that he recorded his overtime on the payroll time sheets but that such overtime was reported in pay periods following the pay periods in which the overtime was actually worked. He explained in detail the procedures used to accurately report his overtime. His testimony as to the salary and other sums paid to him by the defendant during his employment together with Defendant's Supplemental Response to Plaintiff's Request for Admissions and Interrogatories are the basis for plaintiff's total pay computations for Grindstaff. Summaries - Plaintiff's Exhibit 3 reflects the hours worked by Grindstaff for the pay periods shown thereon as taken from Grindstaff's time sheets, the total pay for each work week and the overtime coefficient as determined from the Coefficient Table. However Grindstaff's testimony together with his payroll time sheets indicate that there are errors on Plaintiff's Summary - Exhibit 3 as to the total number of hours worked for several of the work weeks. The following corrections should be noted:

| <u>YEAR AND WORK WEEK ENDING</u> | <u>TOTAL NUMBER OF HOURS WORKED</u> |
|----------------------------------|-------------------------------------|
| 8/24/75                          | 43                                  |
| 7/25/76                          | 56                                  |

|          |    |
|----------|----|
| 8/1/76   | 46 |
| 8/22/76  | 57 |
| 8/29/76  | 50 |
| 9/5/76   | 48 |
| 12/26/76 | 42 |
| 1/16/77  | 61 |
| 1/23/77  | 49 |
| 1/30/77  | 61 |
| 3/20/77  | 57 |
| 3/27/77  | 41 |
| 5/22/77  | 50 |
| 5/29/77  | 51 |
| 7/31/77  | 55 |
| 10/30/77 | 45 |
| 11/6/77  | 43 |
| 12/18/77 | 40 |
| 2/19/78  | 42 |
| 3/19/78  | 54 |
| 3/26/78  | 54 |
| 7/30/78  | 51 |

Shawn Johnson (Johnson) testified by deposition on March 3, 1978 and July 17, 1979. Johnson testified that his employment commenced with the defendant in March 1973. He first worked as a microwave engineer for the defendant but later became System Manager for the Illinois-Iowa System. Johnson stated that when he first went to work for the defendant he was paid on an hourly basis and was paid overtime for hours worked in excess of 40 hours per work week. He stated that when he was put on a straight salary plus standby pay for working weekends he no longer recorded the hours worked for each work week. He was not paid for any hours worked in excess of 40 hours during any work week. Although he worked in excess of 40 hours a week approximately one week a month which was "a very rough estimate." Although he could not estimate the number of hours in excess of 40 hours that he may have worked, he stated that "a typical overtime week for me wouldn't involve more than ten hours of overtime."

In his second deposition taken July 17, 1979, Johnson testified that since the date of his last deposition in March of 1978 he was still working in Illinois until June of 1978 and had worked in excess of 40 hours "about one out of

every four weeks" in which "there would be an overtime period that would accumulate to about ten hours a week." He further stated that after he moved from Illinois to Oklahoma in June of 1978 his "overtime roughly doubled" in that he worked "roughly" fifty hours a week every other week. Johnson identified Exhibit 5 to the O'Neal deposition as his payroll time sheets. Johnson stated that for the period of June 1975 to September of 1975 he worked as a construction engineer with approximately forty percent of those weeks being overtime weeks. His testimony as to the salary and other sums paid to him by the defendant during his employment together with Defendant's Supplemental Response to Plaintiff's Request for Admissions and Interrogatories are the basis for plaintiff's total pay computations for Johnson. Since Johnson did not record any overtime on his payroll time sheets, Summaries - Defendant's Exhibit 4 reflects only an estimate of overtime hours as to certain work weeks in which he claims to have worked overtime. The Summary also shows the total pay for each work week and the overtime coefficient as determined from the Coefficient Table.

Jude Lasserre (Lasserre) testified by deposition on August 24, 1977 and August 6, 1979. Lasserre stated that he is a microwave field engineer having commenced his employment with the defendant in September of 1975. He stated that he did not record his overtime after he was put on a straight salary but that he was in the habit of keeping his overtime accurately during the first two years of his employment when he was paid by the hour. Lasserre's time sheets from June 1975 to May 1979 are identified as Plaintiff's Exhibit 4 to O'Neal's deposition. He also testified that one week out of every five weeks he worked in excess of forty hours with approximately ten to twenty hours in overtime during those weeks in which he worked overtime. He also stated that for

about six months after they changed from hourly to salary compensation he was working overtime one out of every four weeks. He did receive overtime compensation during the period he was on an hourly wage but received no overtime pay after the company commenced paying him on a salary basis. Lasserre became a salaried employee in September of 1975.

At the time of his second deposition Lasserre testified that following the date of his earlier deposition in August of 1977 he continued to work overtime approximately one week out of every five weeks until October of 1977. Commencing in October he stated that he worked about five to seven hours a week overtime until Tim Airhart was hired at which time his overtime went down to about eight hours every four or five weeks. His testimony as to the salary and other sums paid to him by the defendant during his employment together with Defendant's Supplemental Response to Plaintiff's Request for Admissions and Interrogatories are the basis for plaintiff's total pay computations for Lasserre. Since Lasserre did not record any overtime on his payroll time sheets, Summaries - Defendant's Exhibit 5 reflects only an estimate of overtime hours as to certain work weeks in which Lasserre claims to have worked overtime. The Summary also shows the total pay for each work week and the overtime coefficient as determined from the Coefficient Table.

James H. Spinoso (Spinoso) testified by deposition on August 2, 1979. He testified that he was hired as a switch engineer or field engineer by the defendant in June of 1976. He stated that he kept a record of his overtime by reporting the information on his payroll time sheets which were identified by him as Exhibit 15 to O'Neal's deposition. He stated that his overtime was reported on the payroll time sheet for the two weeks period following the two week period in which he had actually worked overtime due to the reporting procedures

that were used for recording overtime. For example, the overtime worked during the first two weeks of June 1976 were actually recorded on the June 30, 1976 payroll time sheet. This procedure was followed by Spinoso throughout his period of employment. His testimony as to the salary and other sums paid to him by the defendant during his employment together with Defendant's Supplemental Response to Plaintiff's Request for Admissions and Interrogatories are the basis for plaintiff's total pay computations for Spinoso. Summaries - Plaintiff's Exhibit 6 reflects the hours worked by Spinoso for the pay periods shown thereon as taken from Spinoso's time sheets, the total pay for each work week and the overtime coefficient as determined from the Coefficient Table.

Martin Szuch (Szuch) testified by deposition on March 3, 1978. Szuch testified that he was employed by the defendant from September of 1974 to June of 1977 as a microwave technician. He stated that he was paid a salary and received no overtime compensation for hours worked in excess of forty hours in any work week except standby pay of \$50.00 two weekends a month. Szuch's payroll time sheets commencing with the period ending June 30, 1975 through September 30, 1977 identified as Plaintiff's Exhibit 8 to O'Neal's deposition do not reflect hours worked by Szuch. Szuch testified that he averaged about fifty to sixty hours overtime each week. His testimony as to the salary and other sums paid to him by the defendant during his employment together with Defendant's Supplemental Response to Plaintiff's Request for Admissions and Interrogatories are the basis for plaintiff's total pay computations for Szuch. Since Szuch did not record any overtime on his payroll time sheets, Summaries - Defendant's Exhibit 7 reflects only an estimate of overtime hours as to certain work weeks in which Szuch claims to have worked overtime. The Summary also shows the total pay for each

work week and the overtime coefficient as determined from the Coefficient Table.

Timothy Tuthill (Tuthill) testified by deposition on August 24, 1977 and July 31, 1979. Tuthill testified that he was employed by the defendant in November of 1974 as a microwave engineer. He reported his actual hours worked including overtime on the payroll time sheets, identified as Defendant's Exhibit 16 to O'Neal's deposition. As was the practice of the other employees, his overtime was reported on the payroll time sheet for the period ending two weeks after the pay period in which the overtime was actually worked. His testimony as to the salary and other sums paid to him by the defendant during his employment together with Defendant's Supplemental Response to Plaintiff's Request for Admissions and Interrogatories are the basis for plaintiff's total pay computations for Tuthill. Summaries - Plaintiff's Exhibit 16 reflects the hours worked by Tuthill for the pay periods shown thereon as taken from Tuthill's time sheets, the total pay for each work week and the overtime coefficient as determined from the Coefficient Table.

Billy Walters (Walters) testified by deposition on September 28, 1977 and October 8, 1979. Walters testified that he was employed by the defendant on August 1, 1976 as a microwave engineer. He stated that he tried not to work over forty hours in any one work week and that he had only worked overtime "probably twice in the last year", or "three times in the last year" (September 1976 to September 1977). He said that in order to avoid working over forty hours he takes time off so that he doesn't "build up comp time."

At the time of his second deposition on October 8, 1979 Walters identified Plaintiff's Exhibit A to his second deposition as his payroll time sheets. He stated that he did not record the number of hours he worked on his payroll time sheets but did identify some of the time sheets as including times when he was called out and worked over four

hours while on standby. However, as was the practice of other employees he included the information as to overtime when he "was called out" on the payroll time sheet for the two week period following the two week period in which he actually worked overtime due to the reporting procedures that were used for recording overtime. He also testified that commencing in April of 1978 about every other week he worked about six hours overtime. He stated, however, "that would be an assumption or a guess or whatever." He did not include the information as to the "six hours overtime" on any of his time sheets.

Walters' testimony as to the salary and other sums paid to him by the defendant during his employment together with Defendant's Supplemental Response to Plaintiff's Request for Admissions and Interrogatories are the basis for the plaintiff's total pay computations for Walters. Summaries - Plaintiff's Exhibit 9 reflects some of the work weeks in which Walters included overtime for "call outs" to which he testified in his deposition. Other work weeks include overtime hours which were estimated on the basis of Walters' testimony concerning the six hours overtime every other week which he worked during certain work weeks but did not report. Walter's testimony together with his payroll time sheets indicate that there is an error on Plaintiff's Summary - Exhibit 9 as to the overtime for the work week ending May 7, 1978. It shows a total of 46 hours worked by Walters for the work week ending May 7, 1978. This includes the six hours overtime which Walters testified he worked every other week during this period of time but failed to include the eight hours overtime on "call outs" which Walters' time sheet reflects for May 6 and May 7, 1978 which he also verified in his second deposition. It also appears from Walters' testimony and his time sheet for the pay period ending January 31,

1979 that Walters worked overtime of at least four hours on January 13, 1979. Therefore, the work week ending January 14, 1979 should show a total of 44 hours worked. It also appears that the information as to the work week ending April 22, 1979 is in error. Walters' testimony as well as his time sheet for May 15, 1979 shows Walters to have worked four hours overtime on "call outs" on April 21 and April 22, 1979. Therefore, the work week ending April 22, 1979 should show a total of 54 hours. The summary on Walters in addition to the overtime hours reflects the total pay for each work week and the overtime coefficient as determined from the Coefficient Table.

John Whaley (Whaley) testified by deposition on August 24, 1977. Whaley was employed by defendant as a microwave technician in October of 1973. Whaley's payroll time sheets for the period June 1, 1975 to April 30, 1979 are attached as Exhibit 2-B to the parties' Stipulation filed April 24, 1980. Whaley testified that his time sheets did not reflect the number of hours he actually worked following the time he was put on a straight salary. He stated that when he was paid hourly he recorded exactly the number of hours worked in each work week. He also stated that he worked overtime while on trips out of town - out of his regular system - which included about three months a year. During that three month period he stated he would work an extra four to five hours a day or approximately twenty to twenty-five hours in each work week. He also stated he worked slightly less overtime after going on salary than he did when he was being paid on an hourly basis. After going on salary he was not paid overtime compensation in excess of forty hours per week. His testimony as to the salary and other sums paid to him by the defendant during his employment together with Defendant's Supplemental Response to Plaintiff's Request for Admissions and Interrogatories are the basis for plaintiff's

total pay computations for Whaley. Since Whaley did not record any overtime on his payroll time sheets, Summaries - Defendant's Exhibit 2-B reflects only an estimate of overtime hours as to certain work weeks. The Summary also shows the total pay for each work week and the overtime coefficient as determined from the Coefficient Table.

The evidence is clear that each of the above named employees worked overtime in certain work weeks for which they received no overtime compensation. The employees testified that prior to the time they were put on straight salary and standby pay they were paid by the hour. During that period of time, they regularly worked overtime for which they were paid for all hours worked in excess of 40 hours. However, following the date the defendant commenced paying its employees on a straight salary basis it stopped paying overtime.

It is the employer's duty to keep a record of the overtime worked by its employees and should not be heard to complain when the records kept failed to show the exact number of hours worked in any week. 29 U.S.C. § 211(c) and § 215(a)(5); Anderson v. Mt. Clemens Pottery Co. 328 U.S. 680 (1946). In Anderson, the Supreme Court stated:

" . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was im- properly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."

#### FINDINGS OF FACT

1. The Court finds that the defendant did not keep accurate records as required by the Act, 29 U.S.C. § 211(c)

and § 215(a)(5) of the actual daily and weekly hours worked by the above named employees during the periods of employment as shown above for each of the employees except for the employees Clay, Spinoso, and Tuthill.

2. As to Airhart, the Court finds that for the period September 1, 1978 through December 15, 1978 Airhart worked approximately 44 hours per week every other week; that during such period of time his salary was \$346.15 per week; that he is entitled to overtime compensation for such period of time in the sum of \$109.06; that for the period commencing with the work week ending December 24, 1978 through the work week ending December 2, 1979, Airhart worked overtime in each of the work weeks as shown on Plaintiff's Summary - Exhibit 1 and is entitled to overtime compensation for those work weeks in the sum of \$549.34, making a total due of \$658.40.

3. As to Clay, the Court finds that for the period commencing with the work week ending April 17, 1977 through the work week ending July 30, 1978, Clay worked overtime in each of the work weeks as shown on Plaintiff's Summary - Exhibit 2 and is entitled to overtime compensation for those work weeks in the sum of \$2,793.54.

4. As to Grindstaff, the Court finds that for the period commencing with the work week ending August 24, 1975 through the work week ending July 30, 1978 Grindstaff worked overtime in each of the work weeks as shown on Plaintiff's Summary - Exhibit 3 with the corrections for those work weeks as shown above and is entitled to overtime compensation in the sum of \$2,704.50.

5. As to Johnson, the Court finds that for the period from June 8, 1975 to September 15, 1975, Johnson worked approximately 50 hours overtime in six of those work weeks at a salary of \$249.00 per week; that he is entitled to

overtime compensation for such period of time in the sum of \$149.40; that for the period commencing with the work week ending October 5, 1975 through the work week ending December 17, 1978, Johnson worked overtime in each of the work weeks as shown on Plaintiff's Summary - Exhibit 4 and is entitled to overtime compensation for those work weeks in the sum of \$1,618.92, making a total sum due of \$1,768.32.

6. As to Lassere, the Court finds for the period commencing with the work week ending September 28, 1975 through the work week ending February 15, 1976 Lassere worked approximately 48 hours in each of the work weeks for that period as shown on Plaintiff's Summary - Exhibit 5 and is entitled to overtime compensation in the sum of \$154.41 for such period; that for the period commencing with the work week ending March 21, 1976 through the work week ending October 2, 1977 Lassere worked approximately 50 hours in each of the work weeks for that period as shown on Plaintiff's Summary - Exhibit 5 and is entitled to overtime compensation of \$455.78 for such period; that for the work weeks commencing with the work week ending October 23, 1977 through the work week ending August 27, 1978 Lassere worked approximately 45 hours in each of the work weeks for that period as shown on Plaintiff's Summary - Exhibit 5 and is entitled to overtime compensation in the sum of \$772.58 for such period; that for the period commencing with the work week ending October 1, 1978 through the work week ending July 8, 1978 Lassere worked approximately 48 hours in each of the work weeks for that period as shown on Plaintiff's Summary - Exhibit 5 and is entitled to overtime compensation in the sum of \$230.58 for such period, making a total sum due of \$1,613.35.

7. As to Spinoso, the Court finds that for the period commencing with the work week ending June 6, 1976 through the work week ending April 29, 1979, Spinoso worked overtime

in each of the work weeks as shown on Plaintiff's Summary - Exhibit 6 and is entitled to overtime compensation in the sum of \$2,787.41.

8. As to Szuch, the Court finds for the period commencing with the work week ending June 8, 1975 through the work week ending June 19, 1977 Szuch worked approximately 50 hours in each of the work weeks for that period as shown on Plaintiff's Summary - Exhibit 7 and is entitled to overtime compensation in the sum of \$2,326.22. Although Szuch testified that he averaged about 50 to 60 hours per week, it is the view of the Court that the estimate of approximately 50 hours per week is a more reasonable inference and more consistent with the overtime of other employees involved in this action doing similar work.

9. As to Tuthill, the Court finds that for the period commencing with the work week ending June 8, 1975 through the work week ending April 29, 1978, Tuthill worked overtime in each of the work weeks as shown on Plaintiff's Summary - Exhibit 8 and is entitled to overtime compensation in the sum of \$3,184.47.

10. As to Walters, the Court finds that for the period commencing with the work week ending July 7, 1977 through the work week ending May 20, 1979 Walters worked overtime in each of the work weeks as shown on Plaintiff's Summary - Exhibit 9, with the corrections for those work weeks as noted by the Court above, and is entitled to overtime compensation in the sum of \$956.57.

11. As to Whaley, the Court finds that for the period commencing with the work week ending June 8, 1975 through the work week ending July 31, 1977, Whaley worked approximately 60 hours in each of the work weeks as shown on Plaintiff's Summary - Exhibit 10 and is entitled to overtime compensation in the sum of \$1,401.48.

12. The Court finds that none of the above named employees have been compensated by the defendant for those sums due each for overtime compensation as required by the Act, 29 U.S.C. § 207 (a) (2) and § 215 (a) (2).

13. The Court finds that the unpaid overtime compensation due each of the above named employees represents the difference between the total sum of wages paid by Defendant to each of the above named employees and the total sum of wages which defendant should have paid to each of the above named employees under the provisions of the Act, 29 U.S.C. § 207 (a) (2).

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of this action pursuant to the Act, 29 U.S.C. § 201 et seq.

2. In the Order of this Court entered December 28, 1978 the Court held:

"Because the microwave system engineers are not exempt from the wage and hour provisions of the Act, and because the defendant admits that it has not paid one and one-half times the regular rate as overtime compensation to such employees for hours worked in excess of forty per work week since June 1, 1975, S.F. 10, the defendant has been in violation of Section 7(a) of the Act [29 U.S.C. § 207 (a)(2)] since that date."

3. In the Court's Order of December 28, the Court further held:

"The defendant also admits that it has failed to keep and record the daily and weekly hours worked by its microwave system engineers since June 1, 1975, S.F. 64, and so has been in violation of Section 11(c) of the Act [29 U.S.C. § 211(c)] since that date."

4. The failure of defendant to maintain records which reflect accurately all of the daily and total weekly hours worked for the above named employees, with the exception of Clay, Spinoso and Tuthill, makes it necessary for the Court

to determine the number of hours worked in the work weeks involved in this action by just and reasonable inference from the evidence. Thus, the amounts due these employees for such overtime compensation may be computed even though the result be only approximate. Anderson v. Mt. Clemens Pottery Co., Supra; Hodgson v. Humphries, 454 F.2d 1279 (10th Cir. 1972).

5. Plaintiff is entitled to judgment enjoining defendant from violating the provisions of 29 U.S.C. §§ 207(a)(2), 211(c), 15(a)(2) and 15(a)(5). Hodgson v. Humphries, Supra; Bledsoe d/b/a Oklahoma Auction Yard v. Wirtz, 384 F.2d 767 (10th Cir. 1967).

6. Plaintiff is entitled to interest on the overtime compensation due each of the above named employees at the rate of six percent (6%) per annum from the median point of each employee's period of employment set out above to date of judgment, with interest at the rate of twelve percent (12%) per annum thereafter until paid. Usery v. Associated Drugs, Inc., 538 F.2d 1191 (5th Cir. 1976); Garland Coal & Mining Co. v. Brant, 385 F.Supp. 586 (D.C. E.D. Ok. 1974); Schultz v. Atlantic Bus Service, Inc., 304 F.Supp. 947, (D.C. Canal Zone 1969).

Judgment for the plaintiff in accordance with the foregoing Findings of Fact and Conclusions of Law should be entered forthwith.

Dated this 30<sup>th</sup> day of September, 1980.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



83

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

FILED

SEP 3 1980 *ms*

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

BERNICE WALENCIAK, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 OKLAHOMA TURNPIKE AUTHORITY, )  
 )  
 Defendant. )  
 )  
 \_\_\_\_\_ )

Civil Action No.  
78-C-94-C✓

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Comes now Plaintiff herein, Bernice Walenciak, and hereby stipulates with Defendant herein, Oklahoma Turnpike Authority, that any and all claims of Plaintiff asserted herein against Defendant, together with any and all claims of Plaintiff against Defendant which could have been asserted herein, are hereby dismissed with prejudice as authorized by Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and that each party is to bear their own costs.

Defendant and Plaintiff hereby agree to and do waive any and all rights each may have to seek attorney's fees in connection with any aspect of this action.

DATED this 27<sup>th</sup> day of September, 1980.

APPROVED AS TO FORM AND  
CONTENT:

*Bernice Walenciak*  
BERNICE WALENCIAK

ATTORNEY FOR PLAINTIFF

OKLAHOMA TURNPIKE AUTHORITY

*Linda Childers*  
Linda Childers  
P. O. Box 993  
Tulsa, Oklahoma 74101

By *E. D. Piersall*  
E. D. PIERSALL

ATTORNEY FOR DEFENDANT

*Thomas D. Robertson*  
Thomas D. Robertson  
Kothe, Nichols & Wolfe, Inc.  
124 East Fourth Street  
Tulsa, Oklahoma 74103

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

NEPTUNE MICROFLOC, INCORPORATED, )  
a corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FRANK GILSTRAP, a sole trader, )  
d/b/a WATER QUALITY MANAGEMENT, )  
 )  
Defendant, )  
and )  
 )  
WATER QUALITY MANAGEMENT, a )  
partnership composed of FRANK )  
GILSTRAP and JOHN DUNCAN, )  
General Partners, )  
 )  
Additional Party Defendant. )

No. 79-C-224-BT ✓

**FILED**

SEP 30 1980

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

J U D G M E N T

In accordance with the Findings of Fact and Conclusions of Law entered this date, judgment is hereby entered in favor of plaintiff, Neptune Microfloc, Incorporated, and against defendants, Water Quality Management and John D. Duncan, individually in the amount of \$22,725.00, plus interest at the rate of one percent (1%) per annum from June 16, 1978, to date of judgment.

DATED this 30 day of - Sept., 1980.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

NEPTUNE MICROFLOC, INCORPORATED, )  
a corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FRANK GILSTRAP, a sole trader, )  
d/b/a WATER QUALITY MANAGEMENT, )  
 )  
Defendant, )  
and )  
 )  
WATER QUALITY MANAGEMENT, a )  
partnership composed of FRANK )  
GILSTRAP and JOHN DUNCAN, )  
General Partners, )  
 )  
Additional Party Defendant. )

No. 79-C-224-BT ✓

**FILED**

SEP 30 1980

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on regularly for trial to the Court on June 2, 1980. Plaintiff appeared by and through its attorneys of record, Irvine Ungerman and I. J. Corn. Defendant, John D. Duncan, appeared pro se.

This case was originally instituted against Frank Gilstrap, a sole trader, d/b/a Water Quality Management, for monies owed for the purchase and sale of goods. Subsequent to discovery, plaintiff amended its complaint to add Water Quality Management, a partnership composed of Frank Gilstrap and John Duncan, General Partners, as additional defendant. Since the filing of this lawsuit, the original defendant, Frank Gilstrap, has filed his Petition in Bankruptcy in the United States District Court for the Northern District of Oklahoma, and thus the action against him has been stayed.

Therefore, the issues tried were whether Water Quality Management was a partnership composed of Frank Gilstrap and John Duncan, and the liability of the alleged partnership and John Duncan.

FINDINGS OF FACT

1. The following have been stipulated by the parties:

(a) In May of 1978, the Plaintiff, Neptune Microfloc, Incorporated, sold one Standard Water Boy WB-82 and 2 extra pumps to an entity known as "Water Quality Management." This sale was made on an open account with the plaintiff, at a purchase price of \$22,725.00.

(b) The entity known as "Water Quality Management" received the Standard Water Boy WB-82 and two extra pumps described above.

(c) The amount of \$22,725.00 plus interest at the rate of 1% per annum from June 16, 1978 remains due and owing the plaintiff from the entity known as "Water Quality Management" for its purchase in May of 1978 of the items described above.

(d) The entity known as "Water Quality Management" has wholly failed to make any payments against the above-described indebtedness.

2. On April 11, 1977, Frank T. Gilstrap and John D. Duncan, and their wives, Shirley R. Gilstrap and Mary R. Duncan, signed Articles of Incorporation of Water Quality Management, Inc. Each was to have a twenty-five percent (25%) ownership of the corporate stock.

3. Shortly thereafter, Shirley R. Gilstrap asked for a divorce from Frank Gilstrap, and as a result, the parties decided not to incorporate.

4. Thereafter, Water Quality Management began operation as a business entity.

5. A bank account was established for Water Quality Management, with John D. Duncan, Frank T. Gilstrap, and Jean Bale authorized to sign checks.

6. John Duncan did work for and signed checks for Water Quality Management. Duncan signed most of the checks because Gilstrap was out of town much of the time.

7. Duncan received compensation from Water Quality Management of \$250.00 per month, and Frank Gilstrap received compensation in the amount of \$1650.00 per month. The reason for the disparity was that John Duncan had income from other sources and Frank Gilstrap did not.

8. Water Quality Management was officed with Consulting Engineers of Miami, Inc. ("C.E.M.I."), an engineering firm owned by Duncan.

9. From time to time, C.E.M.I. paid bills for Water Quality Management and then billed Water Quality Management for those amounts.

10. The evidence revealed Water Quality Management earned no profits because expenses exceeded income.

11. In July 1978, when Water Quality Management was apparently in trouble, Gilstrap became an employee of C.E.M.I., bringing with him contracts of Water Quality Management.

12. Gilstrap "assumed" he and Duncan were partners but recalls no specific discussion of a partnership.

13. In the time frame of April and May 1977, following the decision not to incorporate Water Quality Management, John Duncan told the secretary, Jean Bale, he was a part owner of Water Quality Management and he and Frank Gilstrap were partners therein.

14. In 1978, John Duncan and Frank Gilstrap were partners in another business entity, D & G Construction Company.

15. Water Quality Management was a general partnership between John Duncan and Frank Gilstrap.

#### CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action by reason of diversity of citizenship and jurisdictional amount.

2. A partnership is an association of two or more persons to carry on as co-owners a business for a profit. 54 Okl.Stat. §206. Persons who join together or agree to join together in a business or venture for a common benefit each contributing property, money or services to the business or venture having a community of interest in any profits are partners. Johnson v. Plastex Company, 500 P2d 596 (Okl.App. 1972).

3. The following rules apply in determining whether a partnership exists:

"(1) Except as provided by Section 16, [54 Okl.St. Ann. 216] persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise,

(b) As wages of an employee or rent to a landlord,

(c) As an annuity to a widow or representative of a deceased partner,

(d) As interest on a loan, though the amount of payment vary with the profits of the business,

(e) As the consideration for the sale of a goodwill of a business or other property by installments or otherwise."

54 O.S. §207.

4. Implicit in (2) and (3) above is that in order to form a partnership, there must be an intent by the parties to do so. Sta-Rite Industries, Inc. v. Johnson, 335 F.Supp. 1311 (W.D.Okl. 1969), affirmed 453 F2d 1192, cert. den. 406 U.S. 958.

5. The burden of proving the existence of a partnership between Duncan and Gilstrap is upon plaintiff, by a preponderance of the evidence. Sta-Rite Industries, Inc. v. Johnson, supra.

6. Plaintiff has met its burden of proving that Frank Gilstrap and John Duncan were partners in the business entity known as Water Quality Management at the time the Standard Water Boy WB-82 and 2 extra pumps were ordered and received

from plaintiff.

7. As a general partner in Water Quality Management, John Duncan is liable on Water Quality Management's debt to plaintiff. 54 O.S. §215, Fidelity Bank, N.A. v. Garland, 463 F.Supp. 37 (1978).

8. Judgment will, therefore, be entered in favor of plaintiff and against defendants, Water Quality Management and John D. Duncan, in the amount of \$22,725.00, plus interest at the rate of one percent (1%) per annum from June 16, 1978, to date of judgment.

DATED this 29 day of Sept., 1980.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

CHARLES T. COLEMAN, SR., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DAVE FAULKNER, Sheriff )  
 Tulsa County, and Robert )  
 Duckert, Captain Tulsa )  
 County Jail, Sheriff's )  
 Department, )  
 )  
 Defendants. )

No. 80-C-292-BT

**FILED**

SEP 30 1980

O R D E R

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

This action was brought by plaintiff in forma pauperis pursuant to Title 42, U.S.C. §1983. Plaintiff alleges that when he was arrested and incarcerated in the Tulsa County Jail, defendants took from him personal property, including \$290.00 in cash. Plaintiff was subsequently convicted of murder and sentenced, and transferred to the Oklahoma State Penitentiary in McAlester, Oklahoma. Plaintiff alleges that defendants have refused to return his personal property, even though he has requested its return.

Defendants have filed a Motion to Dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. In their brief, defendants acknowledge that the money is being held by them, but assert they have no authority to release it without an order from the trial court. Defendants also assert that an appeal of plaintiff's conviction is currently pending before the Court of Criminal Appeals of the State of Oklahoma. It is defendants' position that plaintiff's remedy is to seek an order for return of this property in the State trial court. Thus, defendants assert that plaintiff's claim must be dismissed for failure to exhaust his State remedies.

As a general rule, exhaustion of state remedies is not a prerequisite to the bringing of an action under §1983. Spence v. Latting, 512 F2d 93 (10th Cir. 1975). However, there is

an exception to this rule where there are procedures for considering a claim provided in the ordinary course of pending state proceedings. Fernandez v. Trias Monge, 586 F2d 848 (1st Cir. 1978). Plaintiff's claim in this case falls into the exception. Oklahoma law provides that property taken from a defendant is to be held subject to an order of the trial court. Further, the owner of such property can petition the trial court and obtain the return of his property upon satisfactory proof of ownership. Title 22, Okla. Stat. §§1321, 1322. Plaintiff has not availed himself of this procedure, but has confined his efforts to requests to defendant.

Under these circumstances, the Court finds that plaintiff's complaint does not state a claim for deprivation of constitutional rights, and must therefore be dismissed.

IT IS THEREFORE ORDERED that defendants' Motion to Dismiss is hereby sustained.

DATED this 29 day of Sept., 1980.

  
\_\_\_\_\_  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

**FILED**

IRENE McKENZIE, )  
)  
Plaintiff, )  
)  
vs. )  
)  
THE FIRESTONE TIRE & RUBBER )  
COMPANY, )  
)  
Defendants. )

SEP 30 1980

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

No. 79-C-560-BT

ORDER OF DISMISSAL

The above matter coming on to be heard this 29 day of Sept, 1980, upon the written stipulation of the parties for a dismissal of said action with prejudice, and the Court, having examined said stipulation, finds that the parties have entered into a compromise settlement covering all claims involved in the action, and have requested the Court to dismiss said action with prejudice to further action, and the Court, being fully advised in the premises, finds that said action should be dismissed pursuant to said stipulation.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff's cause of action filed herein against the defendant be and the same is hereby dismissed with prejudice to any future action.

Thomas R. Brett  
U. S. DISTRICT JUDGE

APPROVED:

Paul E. Garrison  
PAUL E. GARRISON

of  
GARRISON & COMSTOCK, INC.  
1810 East 15th Street,  
Tulsa, Oklahoma 74104  
(918) 932-5757

ATTORNEYS FOR PLAINTIFF

John C. Niemeier  
JOHN C. NIEMEYER, and MICHAEL L. NOLAND

of  
FOLIART, MILLS & NIEMEYER  
2020 First National Center  
Oklahoma City, Oklahoma 73102  
(405) 232-4633

ATTORNEYS FOR SAID DEFENDANT

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

WAYNE L. GARDEN )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 REGENCY INDUSTRIES, INC., a )  
 Kansas Corporation, STEVEN L. )  
 BELDON, and JOHN F. MILLER, )  
 )  
 Defendants. )

Civil Action No. 80-C-456-E

**FILED**

**SEP 29 1980**

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

JOURNAL ENTRY OF JUDGMENT BY DEFAULT

This cause came on for hearing at this term, and it appearing from the affidavit of Tom Tannehill, Attorney for Plaintiff, that although more than twenty days have elapsed since service on Defendant, John F. Miller, such Defendant has not filed or served any answer or other pleading, that such Defendant is not an infant or an incompetent person nor in military service within the meaning of the Soldiers' and Sailors' Civil Relief Act, that there is due Plaintiff from such Defendant the sum of \$18,630.00 plus interest thereon at the rate of 10% per annum from March 1, 1980, until paid, under the complaint herein.

Now Therefore it is Ordered:

1. That the default of such Defendant for failure to answer or plead was entered on the 26<sup>th</sup> day of September, 1980, in the Office of the Clerk of this Court.

2. That Plaintiff recover from such Defendant, John F. Miller, the sum of \$18,630.00 together with interest thereon at the rate of 10% per annum from March 1, 1980, until paid.

S/ JAMES O. ELLISON

United States District Judge

FILED

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

SEP 29 1980

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

HONEYWELL, INC., a corporation, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MILLER ELECTRIC SHOP, INC., )  
 a corporation, FRITZ CONSTRUCTION )  
 COMPANY, INC., a corporation, and )  
 MID-CONTINENT CASUALTY COMPANY, )  
 a corporation, )  
 )  
 Defendants. )

No. 78-C-142-BT

J U D G M E N T

In accordance with the Findings of Fact and Conclusions of Law filed herewith, judgment is hereby entered in favor of plaintiff and against defendants in the amount of \$23,789.00, with interest thereon at the rate of 6% per annum from February 9, 1978, to date of judgment, and at the rate of 12% per annum from date of judgment.

Judgment is also hereby entered in favor of defendant, Miller Electric Shop, Inc., and against plaintiff in the amount of \$1714.16, with interest thereon at the rate of 12% per annum from date of judgment.

ENTERED this 25<sup>th</sup> day of September, 1980.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA **SEP 29 1980**

HONEYWELL, INC., a corporation, )

Plaintiff, )

vs. )

MILLER ELECTRIC SHOP, INC., )  
a corporation, FRITZ CONSTRUCTION )  
COMPANY, INC., a corporation, and )  
MID-CONTINENT CASUALTY COMPANY, )  
a corporation, )

Defendants. )

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

No. 78-C-142-BT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial to the Court on June 25, 1980. Upon consideration of the evidence, the Court finds as follows:

FINDINGS OF FACT

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware;
2. Each defendant is a corporation organized and existing under the laws of the State of Oklahoma;
3. On February 14, 1975, defendant, Fritz Construction Company, Inc., entered into a written contract with the State of Oklahoma by and through the State Board of Public Affairs for the remodeling of Eastern State Hospital at Vinita, Oklahoma;
4. On the same day, the defendant, Mid-Continent Casualty Company issued its statutory bond to defendant, Fritz Construction Company, Inc., with respect to the said contract, said bond being in compliance with the terms and provisions of 60 O.S.A., §§ 1 and 2;
5. On February 24, 1975, defendant, Miller Electric Shop, Inc., entered into a subcontract with defendant, Fritz Construction Company, Inc., to perform electrical work under the contract including the installation of a fire alarm system and security locking system;

6. On or about February 11, 1975, by acceptance of a written proposal of the plaintiff dated January 22, 1975, defendant, Miller Electric Shop, Inc., ("Miller") entered into a subcontract with plaintiff, Honeywell, Inc., ("Honeywell") whereby it was agreed that plaintiff would furnish and supervise the installation of a Honeywell Fire Detection and Alarm System for use in performing said subcontract for the agreed sum of Seventy Eight Thousand Five Hundred and Forty Six Dollars (\$78,546.00). By subsequent modification and addenda, the agreed price was changed to Ninety Two Thousand Four Hundred Forty Two Dollars (\$92,442.00);

7. Under the terms of the contract between Miller and Honeywell, Honeywell was to furnish the necessary shop drawings, wiring diagrams, and submittals; select the proper controls and deliver to the jobsite; instruct the installing personnel; and guarantee the equipment for a period of three years after completion of installation;

8. The contract excluded from the commitment of Honeywell mounting and wiring of equipment; any wire or cable; water flow switches; valve tamper switches; hood pressure switches; cutting, patching, painting and clean-up.

9. Miller has paid to Honeywell in accordance with said contract the sum of Sixty Eight Thousand Six Hundred Fifty Three Dollars (\$68,653.00), leaving an account balance of \$23,789.00.

10. Plaintiff has performed its duties as required by the contract with the following exceptions:

- (a) Honeywell failed to correct the unsatisfactory condition of nine battery racks. A reasonable amount of time to correct the defects is 16 hours at \$14.71 per hour for a total of \$235.36;
- (b) Honeywell furnished some bad smoke detectors and resistors, which reasonably required 16 hours at \$14.71 to replace for a total amount of \$235.36;

- (c) Miller was required to repair faulty locks by grinding them down and replacing them. A reasonable time required to make the repairs is 16 hours at \$14.71 per hour, for a total of \$235.36;
- (d) Miller was required by Honeywell to check wiring on air handling unit, alarm system, alarm bell equipment, pull station time alarms and panels, when the malfunctions were caused by defective units furnished by Honeywell. A reasonable time to complete this work is 24 hours at \$14.71 per hour for a total of \$353.04;
- (e) Miller was required to expend extra time changing an enunciator furnished by Honeywell and rejected by the State. A reasonable amount of time expended is 24 hours at \$14.71 per hour, for a total of \$353.04;
- (f) Honeywell failed to deliver four fire alarms at \$22.00 each; three bells at \$35.00 each; and one flow switch at \$109.00, for a total of \$302.00.

11. The answers of Fritz Construction Company, Inc., and Mid-Continent Casualty Company do not raise the defense of statute of limitations.

12. Defendant, Miller Electric, has been fully paid by Fritz Construction Company.

#### CONCLUSIONS OF LAW

1. This Court has jurisdiction over the persons and subject matter of this lawsuit by reason of diversity of citizenship and jurisdictional amount.

2. Under the laws of the State of Oklahoma and the Federal Rules of Civil Procedure, Rule 8(c), the statute of limitations is an affirmative defense which must be raised in the answer. If this defense is not pleaded in the answer it is waived. Giffin v. Smith, 256 F.Supp. 746 (N.D. Okl. 1966); Royal Crown Bottling Company of Oklahoma, Inc. v. Aetna Casualty and Surety Company, 438 F.Supp. 39 (W.D. Okl. 1977). Accordingly, defendants Fritz Construction Company and Mid-Continent Casualty Company, have waived the defense by failure to raise it in their answers.

3. Defendant, Miller Electric Shop, Inc., is indebted to plaintiff on the contract for the unpaid balance of \$23,789.00, with interest at the rate of six percent per annum from February 9, 1978, the date of the last payment made by Miller,

to the date of judgment, and at the rate of 12% per annum from the date of judgment.

4. Defendants, Fritz Construction Company and Mid-Continent Casualty Company, are indebted to plaintiff by reason of the bond furnished in accordance with Title 61, Oklahoma Statutes §§ 1 and 2.

5. Plaintiff has breached the contract with Miller Electric Shop, Inc., as specified in Finding of Fact 10 (a) through (f).

6. The proper measure of damages for breach of contract is the amount which will compensate the party aggrieved for the detriment caused by the breach. No damages may be recovered which are not clearly ascertainable in nature and origin. Title 23, Oklahoma Statutes §21. In this case, the amount which will compensate Miller is the value of the labor expended as a result of plaintiff's breach, plus the value of the equipment not delivered.

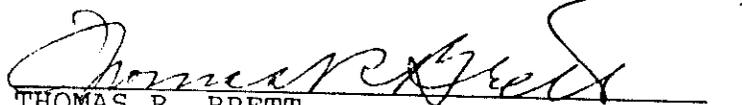
7. The value of the labor expended as a result of plaintiff's breach is \$1412.16. The value of the equipment Honeywell failed to deliver is \$302.00. Defendant, Miller Electric Shop, Inc., is entitled to judgment in the amount of \$1714.16, with interest thereon at the rate of 12% per annum from date of judgment.

8. In accordance with the above, judgment will be rendered in favor of plaintiff and against defendants, in the amount of \$23,789.00, with interest at the rate of 6% per annum from February 9, 1978, the date of the last payment by Miller, to the date of judgment, and at the rate of 12% per annum from the date of judgment.

9. Judgment will also be rendered in favor of defendant, and against plaintiff in the amount of \$1714.16, with interest at the rate of 12% per annum from date of judgment.

10. Plaintiff, Honeywell, Inc., is the prevailing party and is entitled to an award of attorneys' fees. 12 Okl.Stat. §936. The amount of such attorneys' fee will be determined after hearing, which is hereby set for the 21st day of October, 1980, at 8:30 A.M.

ENTERED this 26<sup>th</sup> day of September, 1980.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

UNIT RIG & EQUIPMENT COMPANY,

Plaintiff,

vs.

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, ET AL,

Defendants.

No. 78-C-271-C ✓

**FILED**

SEP 26 1980AM

ORDER APPROVING  
JOINT STIPULATION FOR DISMISSAL

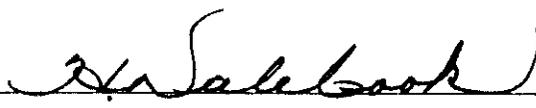
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

THIS CAUSE having come before the Court pursuant to a Joint Stipulation for Dismissal, and it appearing to the Court that the parties have mutually agreed to a dismissal of this action, and it further appearing to the Court that such Stipulation should be granted, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the claims of each of the parties against the other should be, and hereby are, DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that each party shall bear its own attorney fees and costs incurred in this action.

So ordered this 26<sup>th</sup> day of September, 1980.

  
UNITED STATES DISTRICT COURT JUDGE

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

UNIT RIG & EQUIPMENT COMPANY,

Plaintiff,

vs.

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, ET AL,

Defendants.

No. 78-C-183-C ✓

**FILED**

SEP 26 1980 AM

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

ORDER APPROVING

JOINT STIPULATION FOR DISMISSAL

THIS CAUSE having come before the Court pursuant to a Joint Stipulation for Dismissal, and it appearing to the Court that the parties have mutually agreed to a dismissal of this action, and it further appearing to the Court that such Stipulation should be granted, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the claims of each of the parties against the other should be, and hereby are, DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that each party shall bear its own attorney fees and costs incurred in this action.

So ordered this 26<sup>TH</sup> day of September, 1980.



UNITED STATES DISTRICT COURT JUDGE

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

BRADEN STEEL CORPORATION, )  
an Oklahoma corporation, )  
and BRADEN-GOODBARY )  
CORPORATION, a Delaware )  
corporation, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
DAMPER DESIGN, INC., )  
a Pennsylvania corporation, )  
 )  
Defendant. )

**FILED**

SEP 25 1980

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

No. 79-C-403 - E

ORDER ALLOWING JOINT DISMISSAL WITH  
PREJUDICE BY PLAINTIFFS AND DEFENDANT

The Stipulation For Joint Dismissal With Prejudice  
filed by Plaintiffs and Defendant coming before the Court,  
and the Court finding that said Stipulation and Dismissal  
With Prejudice are proper and should be allowed,

IT IS ORDERED that Plaintiffs' Complaint against  
Defendant, and Defendant's Counterclaims against Plaintiffs,  
be, and they hereby are, dismissed with prejudice without  
assessment of Court costs, attorneys' fees or other relief  
against any party.

  
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

LEO LOWBEER, M.D.,

Plaintiff,

v.

EXCELSIOR ADJUSTORS, LTD.,

Defendant.

No. 80-C-496-E

**FILED**

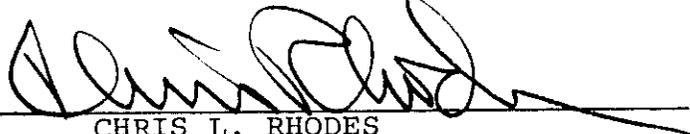
SEP 25 1980

STIPULATION FOR DISMISSAL

It is hereby stipulated that the above entitled action  
may be dismissed with prejudice.

Dated this 22 day of September, 1980.

  
LAWRENCE A. JOHNSON  
Attorney for Plaintiff

  
CHRIS L. RHODES  
Attorney for Defendant

SO ORDERED THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 1980.

  
UNITED STATES DISTRICT JUDGE

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

CITIES SERVICE COMPANY, )  
)  
Plaintiff, )  
)  
v. )  
)  
DEPARTMENT OF ENERGY, UNITED )  
STATES OF AMERICA; CHARLES W. )  
DUNCAN, SECRETARY OF ENERGY )  
in his official capacity; )  
MELVIN GOLDSTEIN, DIRECTOR, )  
OFFICE OF HEARINGS AND )  
APPEALS, DEPARTMENT OF ENERGY, )  
in his official capacity; and )  
UNION OIL COMPANY OF CALIFORNIA, )  
a Corporation, )  
)  
Defendants. )

No. 80-C-14-E

**FILED**  
**SEP 23 1980**

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

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Comes now Plaintiff, Cities Service Company, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure and gives notice of dismissal without prejudice of the above-mentioned complaint.

CITIES SERVICE COMPANY

BY Gerald H. Barnes  
GERALD H. BARNES  
P. O. Box 300  
Tulsa, Oklahoma 74102  
JONES, GIVENS, GOTCHER, DOYLE  
& BOGAN, INC.

BY Jack R. Givens  
JACK R. GIVENS  
201 West 5th Street, Suite 400  
Tulsa, Oklahoma 74103

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of September, 1980, a true and correct copy of the above and foregoing Notice of Dismissal Without Prejudice was duly mailed with postage prepaid thereon to the following parties, to-wit:

Allen R. Snyder  
Hogan and Hartson  
815 Connecticut Avenue, N.W.  
Washington, D.C. 20006

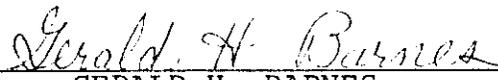
John C. Moricoli, Jr.  
Watson, McKenzie & Moricoli  
1200 Liberty Tower  
Oklahoma City, Oklahoma 73102

Attorneys for Defendant Union Oil  
Company of California

Sandra K. Webb  
U. S. Department of Energy  
Office of General Counsel  
1000 Independence Ave., S.W.  
Washington, D.C. 20461

Hubert H. Bryant  
United States Attorney  
United States Courthouse  
Tulsa, Oklahoma

Attorneys for Federal Defendant

  
\_\_\_\_\_  
GERALD H. BARNES

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

TEXACO, INC., a corporation, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 RED ROCK PETROLEUM COMPANY, )  
 a corporation, )  
 )  
 Defendant. )

NO. 79-C-181-E

**FILED**

SEP 23 1980

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

O R D E R

Upon consideration of the attached stipulation, it is hereby ordered, adjudged and decreed that said stipulation be and is hereby approved and that this case is hereby dismissed with prejudice as to all parties. Each party is to pay its own costs and attorney's fees.

Dated this 23<sup>rd</sup> day of September, 1980.

  
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA, )  
and GARY L. MAGRINI, Special )  
Agent, Internal Revenue )  
Service, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
STEVEN P. FLOWERS, )  
 )  
Respondent. )

No. 80-C-457

FILED

SEP 19 1980

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

On this 17th day of September, 1980, all parties in the above styled case being present at the Show Cause Hearing, and evidence having been presented that the taxpayer Carol Joy Russo, through her attorney, Gene M. Blessington, has withdrawn the previously filed objection. Upon the representation by the attorney for the third party record holder, that the required documents pursuant to the summons will be made available to Agent Magrini of the Internal Revenue Service, this action shall be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court, that the Respondent, Steven P. Flowers, be discharged from any further proceedings herein and this cause of action and complaint are hereby dismissed.

  
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA, )  
and GARY L. MAGRINI, Special )  
Agent, Internal Revenue )  
Service, )

Petitioners, )

vs. )

FOURTH NATIONAL BANK and )  
CHARLES A. VIER, )

Respondents. )

No. 80-C-458-*EC*

**FILED**

SEP 19 1980

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

ORDER

On this 17th day of September, 1980, all parties in the above styled case being present at the Show Cause Hearing, and evidence having been presented that the taxpayer Carol Joy Russo, through her attorney, Gene M. Blessington, has withdrawn the previously filed objection. Upon the representation by the attorney for the third party record holder, that the required documents pursuant to the summons will be made available to Agent Magrini of the Internal Revenue Service, this action shall be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court, that the Respondents, Fourth National Bank and Charles A. Vier, be discharged from any further proceedings herein and this cause of action and complaint are hereby dismissed.

  
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA, )  
and GARY L. MAGRINI, Special )  
Agent, Internal Revenue )  
Service, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
MAGER MORTGAGE COMPANY and )  
BARBARA GILL, )  
 )  
Respondents. )

No. 80-C-459

FILED

SEP 18 1980

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER GRANTING DISCHARGING OF  
RESPONDENTS AND DISMISSAL

On this 17th day of September, 1980, Petitioners' Motion to Discharge Respondents and for Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summons served upon them January 18, 1980, that further proceedings here are unnecessary and that the Respondents, Mager Mortgage Company, and Barbara Gill, should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED by the Court, that the Respondents, Mager Mortgage Company and Barbara Gill, be and they are hereby discharged from any further proceedings herein and this cause of action and Complaint are hereby dismissed.

  
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Articles of drug consisting of the )  
 following: )  
 )  
 1 bottle, more or less, labeled in )  
 part: )  
 )  
 (bottle) )  
 )  
 "250-15 mg. VI-GAIN - ROUND PELLETS )  
 Each VI-GAIN - ROUND contains 15 mg )  
 Diethylstilbestrol. \*\*\* Manufactured )  
 for VINELAND LABORATORIES, INC. A )  
 DAMON COMPANY VINELAND, NEW JERSEY )  
 08360 \*\*\*", )  
 )  
 8 bottles, more or less, labeled in )  
 part: )  
 )  
 (bottle) )  
 )  
 "250-15 mg. VI-GAIN - ROUND PELLETS )  
 Each VI-GAIN - ROUND contains 15 mg )  
 Diethylstilbestrol. \*\*\* Manufactured )  
 for VINELAND LABORATORIES, INC. A )  
 DAMON COMPANY VINELAND, NEW JERSEY )  
 08360 \*\*\*", )  
 )  
 Defendants. )

CIVIL ACTION NO. 80-C-344-E

**FILED**

SEP 19 1980

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

DEFAULT DECREE OF CONDEMNATION

On June 18, 1980, a Complaint for Forfeiture against the above-described articles was filed on behalf of the United States of America. The Complaint alleges that the articles proceeded against are drugs which were adulterated while held for sale after shipment in interstate commerce within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C., as follows:

351(a) (5) in that they are new animal drugs within the meaning of 21 U.S.C. 321(w), which are unsafe within the meaning of 21 U.S.C. 360b(a) (1) (A), since no approval of an application filed pursuant to 21 U.S.C. 360b(b) is in effect with respect to their use or intended use and no notice of claimed investigational exemption under 21 U.S.C. 360b(j) and regulation 21 CFR 511.1 is on file for these drugs.

Pursuant to monition issued by this Court, the United States Marshal for this District seized said articles on June 26, 1980.

It appearing that process was duly issued herein and returned according to law; that notice of the seizure of the above-described articles was given according to law; and that no persons have appeared or interposed a claim before the return day named in said process.

Now, therefore, on motion of Hubert H. Bryant, United States Attorney for the Northern District of Oklahoma, by Robert P. Santee, Assistant United States Attorney, for a Default Decree of Condemnation and Destruction, the Court being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that the default of all persons be and the same are entered herein; and it is further

ORDERED, ADJUDGED AND DECREED that the articles so seized are adulterated within the meaning of said Act, as follows: 21 U.S.C. 351(a)(5) in that they are new animal drugs within the meaning of 21 U.S.C. 321(w), which are unsafe within the meaning of 21 U.S.C. 360b(a)(1)(A), since no approval of an application filed pursuant to 21 U.S.C. 360b(b) is in effect with respect to their use or intended use, and no notice of claimed investigational exemption under 21 U.S.C. 360b(j) and regulation 21 CFR 511.1 is on file for these drugs.

ORDERED, ADJUDGED AND DECREED that the articles are condemned and forfeited to the United States pursuant to 21 U.S.C. 334; and it is further

ORDERED, ADJUDGED AND DECREED that the United States Marshal in and for the Northern District of Oklahoma shall forthwith destroy the seized articles and make return due to this Court.

Dated this 19<sup>th</sup> day of September, 1980.

S/ JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 )  
vs. )  
 )  
An article of drug consisting of 4 )  
bottles, more or less, labeled in )  
part: )  
 )  
(bottle) )  
 )  
"250-15 mg. VI-GAIN - ROUND PELLETS )  
Each VI-GAIN - ROUND contains 15 mg )  
Diethylstilbestrol. \*\*\*Manufactured )  
for VINELAND LABORATORIES, INC. A )  
DAMON COMPANY VINELAND, NEW JERSEY )  
08360 \*\*\*", )  
 )  
 ) Defendants. )

CIVIL ACTION NO. 80-C-343-E

**FILED**

SEP 17 1980

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

DEFAULT DECREE OF CONDEMNATION

On June 18, 1980, a Complaint for Forfeiture against the above-described articles was filed on behalf of the United States of America. The Complaint alleges that the articles proceeded against are drugs which were adulterated while held for sale after shipment in interstate commerce within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 351(a)(5) in that it is a new animal drug within the meaning of 21 U.S.C. 321(w), which is unsafe within the meaning of 21 U.S.C. 360b(a)(1)(A), since no approval of an application filed pursuant to 21 U.S.C. 360b(b) is in effect with respect to its use or intended use, and no notice of claimed investigational exemption under 21 U.S.C. 360b(j) and regulation 21 CFR 511.1 is on file for the drug.

Pursuant to monition issued by this Court, the United States Marshal for this District seized said articles on June 26, 1980.

It appearing that process was duly issued herein and returned according to law; that notice of the seizure of the above-described articles was given according to law; and that

no persons have appeared or interposed a claim before the return day named in said process.

Now, therefore, on motion of Hubert H. Bryant, United States Attorney for the Northern District of Oklahoma, by Robert P. Santee, Assistant United States Attorney, for a Default Decree of Condemnation and Destruction, the Court being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that the default of all persons be and the same are entered herein; and it is further

ORDERED, ADJUDGED AND DECREED that the articles so seized are adulterated within the meaning of said Act, as follows:

21 U.S.C. 351(a)(5) in that it is a new animal drug within the meaning of 21 U.S.C. 321(w), which is unsafe within the meaning of 21 U.S.C. 360b(a)(1)(A), since no approval of an application filed pursuant to 21 U.S.C. 360b(b) is in effect with respect to its use or intended use, and no notice of claimed investigational exemption under 21 U.S.C. 360b(j) and regulation 21 CFR 511.1 is on file for the drug.

ORDERED, ADJUDGED AND DECREED that the articles are condemned and forfeited to the United States pursuant to 21 U.S.C. 334; and it is further

ORDERED, ADJUDGED AND DECREED that the United States Marshal in and for the Northern District of Oklahoma shall forthwith destroy the seized articles and make return due to this Court.

Dated this 19<sup>th</sup> day of September, 1980.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

c1



"5. That Klatzkin & Company never gave permission to any of the Defendants named in the Complaint, particularly did not give permission to Turtle Creek Associates or Brierpatch Knob Associates to utilize financial statements on behalf of companies audited by Klatzkin & Company to any offering memorandums in connection with any syndications, nor was Klatzkin & Company ever requested to do so.

"6. That Klatzkin & Company did not learn of the existence of Brierpatch Knob Associates or Turtle Creek Associates until sometime after March 1, 1978, when Klatzkin & Company was engaged to perform an audit for the year ending February 28, 1978, for Boden Coal Company of Delaware and its operating subsidiaries.

"7. That Klatzkin & Company has no clients within the State of Oklahoma, more particularly within the Northern District of Oklahoma, has transacted no business in the Northern District of the State of Oklahoma, and derives no fees from companies represented by it from the State of Oklahoma."

In response to the motion to dismiss, plaintiffs submitted the affidavit of Robert W. Gaddis, one of the plaintiffs, stating that he received, in Tulsa, Oklahoma, financial information prepared by Klatzkin as additional information in connection with the offering and sale of the partnership units involved. The affidavit does not indicate who provided the information. Attached to the Gaddis affidavit is an Accountants' Report and Balance Sheet prepared by Klatzkin for Boden Mining Corporation (a wholly owned subsidiary of Boden, Inc.) as of February 28, 1977, and dated "March 16, 1977 Except for Note 9 which is April 19, 1977." Also attached to the Gaddis affidavit is a report signed by the Chief, Bureau of Statistics, State of New Jersey, dated January 22, 1980. This report contains information that on September 12, 1977, an indictment was filed in the United States District Court for the Southern District of New York charging K. R. Huber, Karl Huber and others with violation of provisions of 18 U.S.C. in connection with their activities in supplying equipment to hospitals. Both of the Hubers are defendants in this action.

At hearing on the Motion to Dismiss, counsel for both parties stipulated that the offering memoranda involved might also be considered by the Court in deciding the Motion to Dismiss. These

offering memoranda are dated July 1, 1977 (Turtle Creek Associates) and October 14, 1977 (Brierpatch Knob Associates). Both dates are subsequent to the date of the Report and Balance Sheet attached to the Gaddis affidavit.

Both the 1933 and 1934 Acts contain specific jurisdiction and venue statutes, 15 U.S.C. §77v (1933 Act) and 15 U.S.C. §78aa (1934 Act). When an action is brought under both Acts, the broader provisions of the 1934 Act are applied. Stern v. Gobeloff, 332 F.Supp. 909 (D. Md. 1971); Martin v. Steubner, 485 F.Supp. 88 (S.D. Ohio 1979). B & B Investment Club v. Kleinerts, Inc., 391 F.Supp. 720 (E.D. Pa. 1975).

The 1934 Act provides:

"The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district court wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found." 15 U.S.C. §78aa.

The complaint alleges that the events and transactions complained of occurred in the Northern District of Oklahoma, and therefore venue in this District is proper. In addition, nationwide service of process is specifically provided.

However, that does not answer the question whether this Court has in personam jurisdiction over Klatzkin, since the statute, 15 U.S.C. §77aa, supra, does not specifically address the question. Klatzkin argues strongly that the criteria set forth in International Shoe Company v. Washington, 326 U.S. 310 (1945) and World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) are to be applied even where a federal statute provides for nationwide service of process. Plaintiffs argue that the

presence of venue plus extraterritorial service of process is insufficient to confer in personam jurisdiction.

The Courts are divided over this question, which is discussed in some depth in Oxford First Corporation v. PNC Liquidating Corporation, 372 F.Supp. 191 (E.D. Pa. 1974). In Oxford First, the Court examined the various approaches reported in the cases and concluded that in deciding upon in personam jurisdiction questions, a "fairness" test should be applied. The "fairness" test developed by the Oxford First Court included five criteria.

"...First, a court should determine the extent of the defendant's contacts with the place where the action was brought; i.e., the International Shoe type criteria. Second, a court should weigh the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business. Subsidiary considerations here might include the nature and extent and interstate character of the defendant's business, the defendant's access to counsel, and the distance from the defendant of the place where the action was brought. Third, the matter of judicial economy should be evaluated. In particular, a court should gauge: (a) the potentiality and extent of any adverse impact upon the litigation that may result from having a part of the action sheared off; and (b) the prospect of duplication of effort by counsel and the courts in conducting two parts of the same lawsuit in different jurisdictions at the same time. As a barometer of the potential scope of the litigation in this regard, a court should also examine whether the case might involve a class action including far flung plaintiffs or defendants. Fourth, a court should consider the probable situs of the discovery proceedings in the case and the extent to which the discovery proceedings will, in any event, take place outside the state of defendant's residence or place of business, thus muting the significance of his claim that he is inconvenienced by the distant forum. Fifth, a court should examine the nature of the regulated activity in question and the extent of the impact that defendant's activities have beyond the borders of his state of residence or business."

It is noted that under the Oxford First test, the criteria of International Shoe, supra, are only one factor to be considered.

Other Courts have concluded that in enacting these venue and nationwide service of process statutes, Congress intended to extend personal jurisdiction to the outer limits permitted by the due process clause of the Fifth Amendment. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F2d 1326 (2nd Cir., 1972).

Other Courts have concluded that once venue is established, there is no question as to jurisdiction over the person of the defendant. B & B Investment Club v. Kleinert's, Inc., 391 F.Supp. 720 (E.D.Pa. 1975). Mitchell v. Texas Gulf Sulphur Company, 446 F2d 90 (10th Cir. 1971). And under the "co-conspirator theory, where a common scheme is alleged, if venue is established for any of the defendants, it is likewise established as to the other defendants, even if there is no contact between the other defendants and the forum district. Arpet, Ltd. v. Homans, 390 F. Supp. 908 (W.D.Pa. 1975); SEC v. National Student Marketing Corp., 360 F.Supp. 284 (D.D.C. 1973).

Careful consideration of the case law convinces this Court that under any of these approaches, before a defendant may be subjected to the in personam jurisdiction of the forum Court, there must be an allegation of at least some connection between the defendant and the wrongful acts complained of, even though there is no actual contact between the particular defendant and the forum. Ritter v. Suspan, 451 F.Supp. 926 (E.D. Mich. 1978); Mayer v. Development Corporation of America, 396 F.Supp. 917 (D. Del. 1975). In other words, the particular defendant must have done something which causes effects in the forum state and must know, or have good reason to know, that his conduct will have effects in the forum. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F2d 1326 (2nd Cir. 1972).

In this case, the affidavits and attachments thereto establish that in April 1977, Klatzkin completed an audit of Boden Mining Company. That audit contains a notation that "the company has entered into contracts with nine limited partnerships....the general partner in each of the partnerships is an officer of Boden Mining Corporation and Boden Coal Company." It is also established that Klatzkin did not know of the existence of either Turtle Creek Associates or Brierpatch Knob Associates until after March 1, 1978 and never performed any services for them. Further, Klatzkin did

not grant permission to the other defendants to utilize the financial statements prepared by it in any offering memorandums, and such permission was not even requested. Plaintiffs do not dispute these facts. Rather, they state, by affidavit, that the audit prepared by Klatzkin was received by plaintiffs. It is plaintiffs' theory that, since Klatzkin knew of the nine limited partnerships noted in the audit, Klatzkin could reasonably have foreseen that the audit would be used by other limited partnerships to provide prospective investors with financial information. Plaintiffs also assert that because the audit did not disclose that Karl R. Huber, Jr., was under investigation by the Department of Justice, it can reasonably be inferred that the audit prepared by Klatzkin was intended to be used as a fraud and deceit against plaintiffs. However, the report attached to the affidavit of plaintiff Gaddis shows only that an indictment was filed several months after the audit was completed. There is no information regarding when the investigation leading to the indictment commenced and no allegation that Klatzkin knew or should have known of an investigation.

Under the facts as established, the court concludes that it does not have in personam jurisdiction over Klatzkin. It stretches credibility too far to assume that Klatzkin should have foreseen that its audit of Boden Mining Corporation would be used by other persons to induce persons in Oklahoma to purchase units in limited partnerships which did not even exist at the time of the audit.

In the Leasco case, supra, the Second Circuit considered a situation similar to the present case. There, plaintiffs sought to assert jurisdiction over a London accounting firm which had prepared reports for another defendant. The Court concluded that, absent some other activity by the accountants, the Court did not have in personam jurisdiction over the accounting firm where the plaintiff relied solely on the fact that the accounting firm must have known that its reports would be relied on by

anyone interested in buying the audited defendant's shares. The Court noted that under such reasoning, an accountant would be subjected to personal jurisdiction in any country whose citizens had purchased stock of a company they had audited.

Getter v. R. G. Dickinson & Co., 366 F.Supp. 559 (S.D. Iowa 1973), also involved the question whether accountant defendants were subject to the in personam jurisdiction of the Court. There, the accounting firm had two contacts with Iowa. Not only had financial reports prepared by the accountants traveled to Iowa, but one member of the accounting firm had visited Iowa in connection with the financial data and the public offering. The Court in that case held that in personam jurisdiction was proper, but noted:

"If the financial reports traveling into Iowa were the only contact with this state by the accountants, this Court may have been compelled to reach the same conclusion as reached by Judge Friendly in Leasco..., to-wit: That the accountants could not be sued in the district in which the only contact was the fact that the financials eventually came to this district. In the present case, however, the additional contact with this state from the trip to Iowa by Mr. Parris in connection with the disputed financial reports, combined with the fact of these financials entering Iowa is sufficient to allow this Court to exercise in personam jurisdiction over the accounting defendants through extra-territorial service of process."

Another similar case is Keene Corporation v. Weber, 394 F.Supp. 787 (S.D. N.Y. 1975), in which plaintiff attempted to assert jurisdiction over an attorney who was acting in a professional advisory capacity as Weber's attorney and not as a principal in the alleged illegal activity. The Court there dismissed the case as to the attorney, and stated that in order to subject the attorney to the Court's in personam jurisdiction, there must be something to show at least a general awareness of improper conduct on the part of the principal.

The reasoning of these cases is applicable here. There is nothing in the affidavits or attachments to indicate that Klatzkin participated in or even knew of the alleged illegal activity. Neither is there any evidence of circumstances under which Klatzkin should have known. The mere fact that Klatzkin prepared audits for Boden Mining Corporation is not sufficient to warrant this Court asserting its jurisdiction.

IT IS THEREFORE ORDERED that the motion of defendant Klatzkin and Company to dismiss as to it is granted.

DATED this 18<sup>th</sup> day of September, 1980.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 19 1980

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

MARGARET MOORE,

Plaintiff,

vs.

PATRICIA ROBERTS HARRIS,  
Secretary of Health,  
Education, and Welfare,

Defendant.

CIVIL NO. 80-C-353-B/

O R D E R

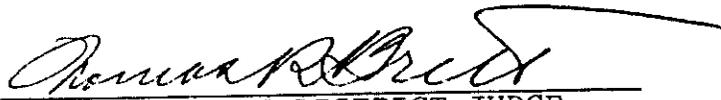
The Court has for consideration the Motion to Remand filed by the Defendant, the Brief in Support thereof, and, being fully advised in the premises, finds:

Section 205(g) of the Social Security Act, as amended, 42 U.S.C. 405(g) provides:

\* \* \* The Court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary \* \* \*.

IT IS THEREFORE, ORDERED that the Motion to Remand of the Defendant be and the same is hereby sustained and this cause of action and complaint are hereby remanded to the Secretary of Health, Education, and Welfare for further action.

ENTERED this 19 day of September, 1980.

  
UNITED STATES DISTRICT JUDGE

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

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

LYNN CRUSSEL, a/k/a/  
DANA LYNN CRUSSEL,

Plaintiff,

vs.

THE OKLAHOMA STATE ELECTION  
BOARD; GRACE HUDLIN, CHAIRMAN  
OF THE OKLAHOMA STATE ELECTION  
BOARD; DREW NEVILLE, VICE-  
CHAIRMAN OF THE OKLAHOMA STATE  
ELECTION BOARD; AND LEE SLATER,  
SECRETARY OF THE OKLAHOMA STATE  
ELECTION BOARD,

Defendants.

No. 80-C-506-BT

FILED

SEP 20 1980

FEDERAL COURTHOUSE  
TULSA, OKLAHOMA

O R D E R

Plaintiff, a citizen of Tulsa County, has filed the instant action wherein she seeks an Order of this Court placing her name on the November, 1980 ballot as a candidate for the Libertarian Party for State Senate District 35, Tulsa County, Oklahoma.

Plaintiff contends the State Election Board in Oklahoma City, Oklahoma, unconstitutionally applied 14 O.S. §80 in striking her name from the ballot after a challenge had been made to her candidacy.

The defendants have filed a Motion to Dismiss or in the Alternative Motion for Summary Judgment.

Oral argument was made on September 19, 1980. After the argument the Court took the matter under advisement.

Ab initio, the Court must determine if venue is proper in this case. At oral argument counsel for plaintiff, while not conceding venue was improper, did orally move the Court in the event venue was found lacking, to transfer this case to the Western District pursuant to 28 U.S.C. §1406(a).

The parties agree the case is governed by 28 U.S.C. §1391(b), which provides:

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

At oral argument it was plaintiff's position the members of the State Election Board lived in various and sundry places and, therefore, she could not meet the first prong of venue test, but relied on the second, "where the cause of action arose."

The general rule concerning residence of public officials is that "[w]here a public official is a party to an action in his official capacity, he resides in the judicial district where he maintains his official residence, that is, where he performs his official duties." Buffalo Teachers Federation, Inc., v. Helsby, 426 F.Supp. 828, 829 (USDC SD NY 1976); Procaro v. Ambach, 466 F.Supp. 452 (USDC SD NY 1979).

Thus, under the first prong test of §1391(b), ["where all defendants reside"] venue would be proper in the Western District of Oklahoma.

Turning to the second test ["where the cause of action arose"], federal venue is geared to districts, not to states. 1 Moore's Federal Practice and Procedure, ¶0.142[5.-2], p.1432.

In Lamont v. Haig, 590 F2d 1124, 1134-1135 (CA DC 1978), 28 U.S.C. §1391(b) the language "the claim arose" was discussed at length. The Court said:

"This practical orientation of Section 1391(b), then, counsels against adherence to mechanical standards in its application. Rather, where 'the claim arose' should in our view be ascertained by advertence to events having operative significance in this case, and a commonsense appraisal of the implications of those events for accessibility to witnesses and records. And, though a proliferation of permissible forums is staunchly to be avoided, it is evidence that the often unfruitful pursuit of a single locality as the one and only district in which the claim arose is not needed to ensure the efficient conduct of the litigation. Not surprisingly, then, courts in some number have construed Section 1391(b) as conferring venue in a district where a substantial portion of the acts or omissions giving rise to the actions occurred, notwithstanding that venue might also lie in other districts. We endorse that interpretation wholeheartedly. So long as the substantiality of the operative events is determined by assessment of their ramifications for efficient conduct of the suit--an important step upon which we would unfailingly insist--loyalty to the objectives of Section 1391(b) will be amply preserved...."

Plaintiff argues the claim arose in this district because she is a candidate for office in this district, the voters who would cast their ballots reside in this district, and her name was stricken from the ballot in this district. Defendants, on the other hand, contend a candidate for State Legislative Office such as plaintiff in this case must file her candidacy with the State Election Board (conceded by plaintiff); the State Election Board issues the certificates of candidacy to each local Election Board (conceded by plaintiff); the hearing on plaintiff's disqualification took place in Oklahoma City before the State Election Board and the order striking her name from the ballot emanated from the State Election Board (conceded by plaintiff). Further, there is no discretion with the local Tulsa County Election Board as to whose name appears on the ballot for State Office (conceded by plaintiff).

Applying the rationale of Lamont v. Haig, supra, 590 F2d 1124, to the instant case, a substantial portion of the acts or omissions giving rise to the plaintiff's cause of action occurred in the Western District of Oklahoma

The Court finds, under the two-pronged tests of 28 U.S.C. §1391(b), venue is not proper in this District. As hereinabove noted, the plaintiff orally moved for a transfer in the event this Court found the venue to be improper. The Court finds that this case should be transferred to the United States District Court for the Western District of Oklahoma.

IT IS, THEREFORE, ORDERED, pursuant to 28 U.S.C. §1406(a) this case is transferred to the United States District Court for the Western District of Oklahoma.

ENTERED this 19<sup>th</sup> day of September, 1980.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

CONSECO, INC., a Wisconsin  
corporation,

Plaintiff,

vs.

JAMES L. FINEGAN, OUIDA L.  
FINEGAN, L. H. HUMPHREY and  
MABEL M. HUMPHREY,

Defendants.

No. 77-C-472-E ✓

**FILED**

SEP 19 1980 *AM*

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

JUDGMENT

Upon consideration of the pleadings, the briefs presented by counsel for the parties, and evidence offered at the trial of the issues, as is more fully set out in the Findings of Fact and Conclusions of Law filed of even date,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be and hereby is granted in favor of Defendants and against Plaintiff, Conesco, Inc., a Wisconsin corporation, on Plaintiff's claims in this action.

IT IS SO ORDERED this 19<sup>th</sup> day of Sept, 1980.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

SEP 17 1980  
J. G. Silver, Jr.  
U. S. DISTRICT COURT

HAROLD D. LEE, )  
 )  
Plaintiff, )  
 )  
v. ) No. 80-C-82-E  
 )  
CRANE CARRIER COMPANY, )  
 )  
Defendant. )

STIPULATION OF DISMISSAL

COME NOW the plaintiff, Harold D. Lee, and the defendant Crane Carrier Company, pursuant to the provisions of Rule 41 of the Federal Rules of Civil Procedure and hereby stipulate that the above entitled cause shall be dismissed with prejudice to the plaintiff bringing another cause of action.

Dated this 17th day of September, 1980.

HOLLIMAN, LANGHOLZ, RUNNELS &  
DORWART

By

Kelly Beaver  
Kelly Beaver

Suite 700, Holarud Building  
10 East Third Street  
Tulsa, Oklahoma 74103  
(918) 584-1471

Attorney for plaintiff,  
Harold D. Lee

Crane Carrier Company

By

Vandelia Cartwright Stone  
Vandelia Cartwright Stone

Attorney for defendant  
Crane Carrier Company  
P. O. Box 51500  
Tulsa, Oklahoma 74151

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

**FILED**

SEP 17 1980

FRED J. POPP and ANN POPP, )  
husband and wife, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
GREYHOUND LINES, INC., a )  
foreign corporation, and )  
MFA MUTUAL INSURANCE COMPANY, )  
a foreign insurance corporation, )  
 )  
Defendants. )

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

No. 80-C-211-BT

O R D E R

This removed action arises out of a vehicular accident which occurred on May 31, 1979 in the State of California, approximately three miles west of Mojave, Kern County, California. The plaintiffs, Fred J. Popp and Ann Popp, were passengers on a bus which collided with a vehicle driven by Mike Masura Goto.

Plaintiffs are citizens of Tulsa County, Oklahoma; defendant, Greyhound Lines, Inc., is a California corporation with its principal place of business in Phoenix, Arizona; MFA Mutual Insurance Company is a Missouri corporation with its principal place of business in Columbia, Missouri.

Plaintiffs allege at the time the accident occurred they were fare paying passengers on a bus operated by Orange Belt States under the direction and control of Greyhound. Plaintiffs have attached copies of the front portion of tickets purchased from Greyhound Lines, Inc. Plaintiffs have sued Greyhound Lines, Inc., for personal injuries they sustained as a result of the collision.

Plaintiffs have sued MFA Insurance Company under a policy of insurance issued by MFA to Fred John Popp and Harry Herman, his son-in-law, alleging MFA has wrongfully refused to pay

plaintiffs' medical expenses under the medical payments coverage. Plaintiffs further allege Mike Masura Goto was uninsured and further that if any automobile liability insurance was in force for Mike Masura Goto, he voided any coverage by his intentional actions in attempting to commit suicide. Plaintiffs seek actual and punitive damages from MFA Insurance Company by reason of their alleged bad faith failure to pay.

Greyhound Lines, Inc., has filed a Motion for Summary Judgment pursuant to Rule 56, F.R.Civ. P. MFA Insurance Company has filed a Motion to Dismiss pursuant to Rule 12(b)(6), F.R.Civ.P., for failure to state a claim.

MOTION FOR SUMMARY JUDGMENT OF GREYHOUND LINES, INC.

Greyhound Lines, Inc., contends that it is not a proper party to this action since the tort the plaintiffs complain of was committed on the line of a connecting carrier, Orange Belt Stages, Inc., while the bus was being driven by Jesse Carl Sallee, an employee of Orange Belt Stages, Inc.

Attached to the affidavit of Everett C. Croes, Regional Vice President of Greyhound Lines, Inc., is a copy of "The Through Service Agreement" entered into between Greyhound Lines, Inc., and Orange Belt Stages, Inc. The Agreement covers the transportation of passengers and their baggage over authorized routes of Greyhound and Orange Belt between San Francisco and Albuquerque, New Mexico (over the routes of Greyhound between San Francisco and Bakersfield, California; over routes of Orange Belt between Bakersfield and Barstow, California; and over the routes of Greyhound between Barstow and Albuquerque, New Mexico). At the time of the accident Jesse Carl Sallee, the employee of Orange Belt was operating the Greyhound bus over the Orange Belt route pursuant to said Agreement. Section 5 of the Agreement provides:

"The party hereto, on whose segment of the through route the through service herein contemplated shall be operated, shall have, and does assume, as to all operations over such segment, full control and responsibility for supervision and management of the operation itself and of the motor coaches used in such service, and further assumes, as to such segment, the full obligation for compliance with all laws, rules, and regulations imposed upon and applicable

"to the conduct of such operations. Such control and responsibility shall continue with respect to each such coach up to the time that such coach shall have arrived at the terminal at which the other party's segment of the said through route begins...."

Section 6 of the Agreement provides:

"As between the parties hereto, the party having control and responsibility for the operation of the coach under this agreement ('Indemnitor') shall during the time it has such control and responsibility, be solely and exclusively responsible for any and all personal injuries (including death).... occurring or arising out of the use and operation of the coach during such time. Indemnitor shall indemnify and save harmless the other party ('Indemnitee') from and against any and all claims, demands, judgments, suits, expenses, including attorneys' fees for any and all personal injury (including death)...."

Attached to the Affidavit of R. L. Wilson, Vice President-Traffic, Greyhound Lines, Inc., is a copy of the Rules and Regulations of National Passenger Tariff ICC-NBTA-1000, which provides in Rule 6(4) of §A3:

"In issuing Tickets and Checking Baggage under authority of Tariffs subject hereto, for passage over the lines of other Carriers participating in such Tariffs, the Issuing Carriers shown in such Tariff act only as Agents and do not assume responsibility for transportation over the lines of other Carriers, except as responsibility may be imposed by law with respect to Baggage."

Attached to the Affidavit of Everett C. Croes, Regional Vice President of Greyhound Lines, Inc., is a form of ticket believed to have been issued to plaintiffs in Modesto, California on May 30, 1979. On the reverse side of the ticket it is stated:

"Issuing carrier WILL BE RESPONSIBLE ONLY FOR TRANSPORTATION ON ITS OWN LINES, in accordance with tariff regulations and limitations, AND ASSUMES NO RESPONSIBILITY FOR ANY ACTS OR OMISSIONS OF OTHERS OCCURRING WITHIN OR OUTSIDE OF THE UNITED STATES, except as imposed by law with respect to baggage...."

Plaintiffs have filed no controverting affidavits, but do state in their brief they purchased their tickets from Greyhound; they were riding on a bus designated as a Greyhound bus at the time of the accident; and that they had no knowledge of Orange Belt Stages until after the accident occurred.

In Ephraim v. Safeway Trails, Inc., 341 F.2d 815 (2nd Cir. 1965) it was held that the initial carrier whose ticket stated that it was not responsible beyond its own line and which had filed a tariff to protect itself from liability for torts committed on lines of connecting carriers, without any fault on its part, was not liable for injuries sustained by a passenger who was assaulted while traveling on lines of connecting carriers. See also Louisville & N.R.R. v. Chatters, 279 U. S. 320, 49 S.Ct. 329, 73 L.Ed. 711 (1929).

The Court finds there is no genuine issue as to any material fact and the moving party, Greyhound Lines, Inc., is entitled to a judgment as a matter of law.

If the movant presents credible evidence entitling him to a directed verdict if not controverted at trial, it must be accepted as true on a motion for summary judgment when the opposing party does not offer counter-affidavits or other evidentiary material creating an issue of fact. 10 Wright & Miller, Federal Practice and Procedure, §2727.

Under the general rule set forth in Louisville & N.R.R. v. Chatters, 279 U.S. 320, 49 S.Ct. 329, 73 L.Ed. 711 (1929) and Ephraim v. Safeway Trails, Inc., supra, 341 F2d 815 and the tariff and form of ticket herein, no liability may be imposed on Greyhound Lines, Inc., while plaintiffs were traveling on the lines of Orange Belt Stages, Inc.

The Court finds the Motion for Summary Judgment of Greyhound Lines, Inc., should be sustained and judgment entered in its favor.

MOTION TO DISMISS OF MFA INSURANCE COMPANY

MFA Mutual Insurance Company moves, pursuant to Rule 12(b)(6), F.R.Civ. P. to dismiss for failure to state a claim. MFA contends plaintiffs' complaint reveals they do not know whether Mike Masura Goto, who is not joined as a party-defendant, was insured. In plaintiffs' complaint they allege Mr. Goto was not insured, and in the alternative if he was insured, his attempted suicide voided any liability coverage. MFA further contends there are no allegations Greyhound Lines, Inc., is uninsured and asks the Court take judicial

notice of the ability of Greyhound Lines, Inc., to respond in damages.

Plaintiffs do not dispute the ability of Greyhound Lines, Inc., to respond for damages but assert they are seeking damages both against Greyhound and Mr. Goto and that the evidence developed in discovery will reveal Mr. Goto is uninsured. As to the medical payments claim, plaintiffs acknowledge they have received payments of some medical bills from Orange Belt Stages and have received payment for food, lodging and other expenses which are not generally paid under a medical payments policy. Plaintiffs state they have been advised Orange Belt Stages does not have medical payments coverage and they have no knowledge of Greyhound Lines, Inc., having any medical payments coverage. Plaintiffs assert the medical payments coverage of MFA is excess over other similar medical insurance coverage and believe there is no other coverage in existence on this accident and that discovery will establish this fact.

In Keel v. MFA Insurance Company, 553 P.2d 153, 159 (Okla. 1976), the Oklahoma Supreme Court set forth the options of an insured when involved with an uninsured motorist. One of the options is:

"(1) He may file an action directly against his insurance company without joining the uninsured motorist as a party defendant and litigate all of the issues of liability and damages in that one action. Associated Indemnity Corp. v. Cannon, 536 P.2d 920 (Okla.1975)."

The insurance policy provides in "V-Uninsured Motorists Insurance" as follows:

"1. Coverage E- Uninsured Motorists (Damages for Bodily Injury)--The Company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the Company or by arbitration as hereinafter provided.

"No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the Company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the Company."

The Court finds MFA Insurance Company's Motion to Dismiss should be overruled. At this juncture of the proceedings, there is no way to ascertain who will ultimately be liable, if at all, to plaintiffs on the theory of negligence. If the operator of the bus should be found to be not negligent and Mr. Goto is the negligent party, then it will have to be determined if Mr. Goto was in fact an uninsured motorist. The insured has pursued option number 1 as set forth in Keel v. MFA Insurance Company.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. The Motion for Summary Judgment of Greyhound Lines, Inc., is sustained.
2. The Motion to Dismiss of MFA Insurance Company is overruled.

ENTERED THIS 17 day of September, 1980.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

**FILED**

SEP 17 1980

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

FRED J. POPP and ANN POPP,  
husband and wife,

Plaintiffs,

vs.

GREYHOUND LINES, INC., a  
foreign corporation, and  
MFA MUTUAL INSURANCE COMPANY,  
a foreign insurance corporation,

Defendants.

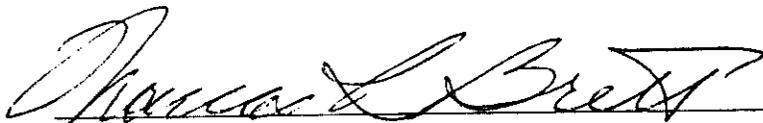
No. 80-C-211-BT

J U D G M E N T

Pursuant to the Order entered simultaneously with this  
Judgment, IT IS ORDERED:

Judgment is entered in favor of the defendant, Greyhound  
Lines, Inc., and against the plaintiffs, Fred J. Popp and  
Ann Popp.

ENTERED this 17<sup>th</sup> day of September, 1980.



THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

GLENANN WILKERSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SIEGFRIED INSURANCE AGENCY, )  
 INC., an Oklahoma corporation, )  
 COOK, TREADWELL & HARRY, INC., )  
 a Tennessee corporation, and )  
 COOK INDUSTRIES, INC., a )  
 Delaware corporation, )  
 )  
 Defendants. )

No. 76-C-479-C

**FILED**

SEP 17 1980

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

J U D G M E N T

Pursuant to the Findings of Fact and Conclusions of Law entered this date,

IT IS ORDERED that Judgment be entered in favor of the Defendant Siegfried Insurance Agency, Inc. and against the Plaintiff Glenann Wilkerson sustaining Defendant's Motion for Summary Judgment and dismissing Plaintiff's Second Amended Complaint.

ENTERED this 17 day of September, 1980.

(Signed) H. Dale Cook

\_\_\_\_\_  
H. DALE COOK  
Chief Judge  
United States District Court for  
the Northern District of Oklahoma

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

GLENANN WILKERSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SIEGFRIED INSURANCE AGENCY, )  
 INC., an Oklahoma corporation, )  
 COOK, TREADWELL & HARRY, INC., )  
 a Tennessee corporation, and )  
 COOK INDUSTRIES, INC., a )  
 Delaware corporation, )  
 )  
 Defendants. )

No. 76-C-479-C

**FILED**

SEP 17 1980

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

FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

This matter came on to be heard as a result and pursuant to the order of remand in the mandate opinion of the Tenth Circuit Court of Appeals. The Court, in reaching the determination herein, has considered the evidence adduced at the evidentiary hearing had on August 25, 1980. The parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to present evidence bearing on the issues and to argue on the evidence and law. The Court has fully considered the evidence, arguments and briefs of counsel. Upon the entire record, the Court makes the following:

Findings of Fact

1. Plaintiff Glenann Wilkerson ("Wilkerson") was employed by Defendant Siegfried Insurance Agency, Inc. ("Siegfried") as Vice President, Secretary, Treasurer, Manager of Finance and Manager of Administration and she was a member of the Management Committee of Siegfried.

2. Wilkerson's employment was terminated by Siegfried on March 14, 1975. She was told that she was being terminated because her job had been discontinued and a substantial part of her duties were being transferred to the main offices of Cook,

Treadwell & Harry, Inc., Siegfried's parent company, because the accounting of Siegfried and its other subsidiaries was being centralized pursuant to plan in Memphis, Tennessee.

3. Wilkerson had until September 10, 1975 to file her sex discrimination charge with the Oklahoma Human Rights Commission and her notice of intent to sue for age discrimination with the Department of Labor and until January 9, 1976 to file her sex discrimination charge with the Equal Employment Opportunity Commission. Wilkerson did not file her charges prior to those dates.

4. Wilkerson was terminated for the reasons she was told. The reasons given to Wilkerson for her termination were not a pretext for discrimination.

5. There are no other equitable considerations which would excuse Wilkerson's late filing of her charges of age and sex discrimination.

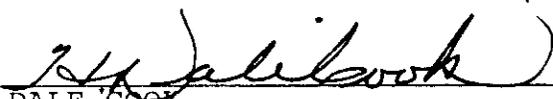
#### Conclusions of Law

1. This Court has jurisdiction of the parties and the subject matter of this proceeding under the Age Discrimination in Employment Act of 1967, as amended, and Title VII of the Civil Rights Act of 1964, as amended.

2. Timely filing with the proper administrative agencies for age and sex discrimination is a condition precedent to maintaining this action. Since Wilkerson failed to file timely her charges of age and sex discrimination with the Department of Labor, the Oklahoma Human Rights Commission or the Equal Employment Opportunity Commission, her action is time-barred.

3. There is not sufficient evidence to effect equitable tolling of the statutory time periods for filing age and sex discrimination charges with the various administrative agencies and therefore, this action must be dismissed.

ENTERED this 17<sup>th</sup> day of September, 1980.

  
H. DALE COOK  
Chief Judge  
United States District Court for  
the Northern District of Oklahoma

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

SEP 15 1980

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JAMES L. SCYPION, )  
 )  
 Defendant. )

CIVIL ACTION NO. 80-C-319-B

DEFAULT JUDGMENT

This matter comes on for consideration this 13<sup>th</sup>  
day of September, 1980, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney for the Northern District of  
Oklahoma, and the Defendant, James L. Scypion, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendant, James L. Scypion, was personally  
served with Summons and Complaint on June 18, 1980, and that  
Defendant has failed to answer herein and that default has  
been entered by the Clerk of this Court.

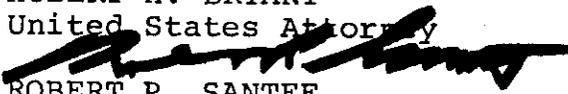
The Court further finds that the time within which  
the Defendant could have answered or otherwise moved as to  
the Complaint has expired, that the Defendant has not answered  
or otherwise moved and that the time for the Defendant to answer  
or otherwise move has not been extended, and that Plaintiff  
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, James L.  
Scypion, for the principal sum of \$1,940.00, plus the accrued  
interest of \$588.67, as of April 25, 1980, plus interest at 7%  
from April 25, 1980, until the date of Judgment, plus interest  
at the legal rate on the principal sum of \$1,940.00 from the  
date of Judgment until paid.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

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

FILED

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

SEP 1 1980

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

WALSWORTH PUBLISHING COMPANY  
Plaintiff

vs

No. 80-C-91-BT

PHIL SUTTON  
Defendant

APPLICATION FOR DISMISSALS WITH PREJUDICE

Come the parties, Plaintiff and Defendant, and announce and show to the court that they have settled all issues herein by compromise and settlement. That they pray the court to enter an order dismissing the Complaint and the Counterclaim with prejudice to any further action thereon.

WALSWORTH PUBLISHING COMPANY

By

*Lawrence A. Johnson*  
Lawrence A. Johnson

Attorney for Plaintiff

*William C. Kellough*  
William C. Kellough

Attorney for Phil Sutton

FILED

SEP 15 1980

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

ORDER

Now on this 13<sup>th</sup> day of August, 1980, for good cause shown, the court does hereby dismiss the Complaint and the Counterclaim with prejudice to any further action for the reason that the parties have fully compromised and settled the issues herein.

S/ THOMAS R. BRETT

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

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

KIRKWAL, INC., an Oklahoma  
corporation,

Plaintiff,

vs.

MR. QUICK LUBE, INC., a  
Tennessee corporation, H. P.  
GLINDEMAN, JR. and RICHARD  
HAAS,

Defendants.

No. 80-C-349-E

**FILED**

SEP 15 1980

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

ORDER

On the Stipulation for Dismissal filed herein on  
September 16<sup>th</sup>, 1980, it is ordered that the above entitled  
action be dismissed with prejudice and that each party bear  
its own costs.

Dated this 13<sup>th</sup> day of Sept, 1980.

S/ THOMAS R. BRETT

United States District Court Judge

FILED

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

SEP 12 1980

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DELBERT J. BAILEY, )  
 )  
 Defendant. )

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

CIVIL ACTION NO. 80-C-295-E

DEFAULT JUDGMENT

This matter comes on for consideration this 12<sup>th</sup>  
day of September, 1980, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney for the Northern District of  
Oklahoma, and the Defendant, Delbert J. Bailey, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendant, Delbert J. Bailey, was  
personally served with Summons and Complaint on May 29, 1980,  
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.

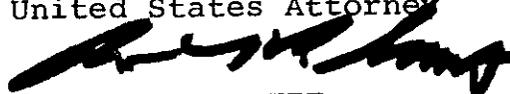
IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that  
the Plaintiff have and recover Judgment against Defendant, Delbert J.  
Bailey, for the principal sum of \$318.00, plus interest at  
the legal rate from the date of this Judgment until paid.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
ROBERT P. SANTEE  
Assistant U. S. Attorney

20

FILED

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

SEP 10 1980 Am

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 AUDREY A. McCONNELL, )  
 )  
 Defendant. )

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

CIVIL ACTION NO. 80-C-441-E ✓

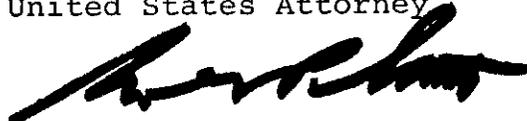
NOTICE OF DISMISSAL

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, without prejudice.

Dated this 10<sup>th</sup> day of September 1980.

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney



ROBERT P. SANTEE  
Assistant United States Attorney

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

THERMA TECHNOLOGY, INC., )  
an Oklahoma corporation, )

Plaintiff, )

vs. )

No. 80-C-15-C

KINETICS TECHNOLOGY )  
INTERNATIONAL CORPORATION, )  
a Delaware corporation, )

Defendant. )

**FILED**

**SEP 10 1980**

O R D E R

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

Now before the Court is the defendant's motion to dismiss for lack of personal jurisdiction over the defendant, or in the alternative to transfer venue to the United States District Court for the Central District of California, at Los Angeles, California, pursuant to the provisions of Title 28 U.S.C.A. §1406.

The plaintiff herein, Therma Technology, Inc. (Therma Tech) is an Oklahoma corporation doing business in Tulsa, Oklahoma. The defendant herein, Kinetics Technology International Corporation (KTI), is a Delaware corporation licensed to do business in the State of California, with its principal place of business located in Pasadena, California. KTI claims by affidavit that it has never been qualified to do business in the State of Oklahoma and does not now, nor has it ever maintained an office or telephone listing in Oklahoma, nor has it maintained sales representatives or an agent of any kind in Oklahoma.

On September 25, 1978 Therma Tech entered into a purchase order agreement with KTI wherein Therma Tech would supply certain steelwork, refractory anchors, and coil installations for three cylindrical heaters at the price of \$418,264.00, F.O.B. Bayport, Texas. Subsequently, according to the

plaintiff, on May 11, 1979, KTI offered, by means of a telephone call to Stephen Goth, Vice President of Therma Tech, in Tulsa, Oklahoma, to cancel the order and to replace it with a revised order in the amount of \$219,000.00. Later on the same day, the Vice President of Therma Tech accepted the offer of KTI by means of Telex, originating in Tulsa and sent to the defendant in Pasadena, California. On May 14, Mr. Goth of Therma Tech had a telephone conversation with David J. Baker, President of KTI, to discuss a list of all materials purchased for such jobs and the present status of the work in process. The call originated with Mr. Goth in Tulsa. Later that same day in Tulsa, Mr. Goth deposited a letter in the U. S. mail to Mr. Baker to confirm the previous Telex cancellation and substitution of a new order for \$219,000.00. On May 21, KTI sent a revised purchase order by Telex to "Thermafab", an unincorporated division of Therma Tech located in Channelview, Texas, the stated purpose of which was to formally cancel the outstanding order and to replace it with the order of \$219,000.00. The defendant claims that this cancellation order was sent to "Therma Fab" in Texas. In accordance with the revised purchase order, on May 18, 1979 KTI sent a check for the first installment due under the revised order to Thermafab in Tulsa, Oklahoma. On September 6, 1971, Therma Tech notified KTI of the shipment of the last materials under the cancellation purchase order agreement and requested payment by KTI. The plaintiff claims that \$45,320.32 remains to be paid by the defendant under the aforescribed agreement. The defendant claims that all dealings on the part of KTI were had with Thermafab, located in Texas, and denies that this Court has jurisdiction over KTI under the Oklahoma "long-arm" statutes. The question presented is whether this Court has jurisdiction over KTI under Oklahoma's long-arm

statutes.

In diversity cases, federal district court sitting in Oklahoma looks to Oklahoma long-arm statutes in determining whether it has in personam jurisdiction over non-residents. Federal Nat. Bank & Trust Co. of Shawnee v. Moon, 412 F.Supp. 644 (W.D.Okla. 1976). Under 12 O.S. 1971, §187(a)(1)&(2), and under 12 O.S. 1971 §1701.03(a)(1) of the Uniform Interstate and International Procedure Act, an individual (or corporation) is subject to in personam jurisdiction if he involves himself in the transaction of any business within this State. The only limitation placed upon a court in exercising in personam jurisdiction is that of due process, as stated by the Supreme Court in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and in McGee v. International Life Ins. Co., 355 U.S. 220, 788 S.Ct. 199, 2 L.Ed.2d 223 (1957). In International Shoe Co., supra, and in McGee, supra, the Supreme Court has stated that the due-process limitation is essentially based on "minimum contacts", that is, a nonresident of the forum is subject to in personam jurisdiction in the forum with which he had minimum contacts, providing maintenance of the suit does not offend traditional notions of fair play and substantial justice. Just what amounts to minimum contacts must be decided by the facts of each case. Vacu-Maid, Inc. v. Covington, 530 P.2d 137, 139 (Okla.App. 1974). Oklahoma has made it clear that "the Oklahoma long-arm statutes were intended to extend the jurisdiction of Oklahoma courts over nonresidents to the outer limits permitted by the due process requirements of the Fourteenth Amendment of the United States Constitution." Vacu-Maid, supra, at 141. Although in personam jurisdiction is often upheld in Oklahoma where the nonresident defendant is a seller, shipping goods into the State, it is more uncertain in the case of nonresident purchasers from Oklahoma sellers. In

Vacu-Maid, supra, at 143, the court adopted the "passive-active purchaser" concept as a basis on which to distinguish in personam jurisdiction over nonresidents. ". . . [w]here jurisdiction is extended over a nonresident defendant purchaser, that purchaser has either initiated the relationship or actively participated in negotiations and plans for production (e.g. design specifications). And if a nonresident buyer merely places an order by phone or mail, or to a salesman in the defendant's state, the majority of courts find insufficient contacts for in personam jurisdiction in the forum state." The criteria used by Oklahoma courts for determining whether a nonresident purchaser is subject to in personam jurisdiction are stated in Vacu-Maid, supra, at 143, where the court noted that the purchaser must have either (1) initiated the relationship, or (2) actively participated in negotiations and plans for production, as, for example, providing design specifications. If, however, the nonresident buyer merely places an order by phone or mail, he remains in the role of "passive" buyer, and the majority of courts find insufficient contacts for in personam jurisdiction in the forum state. Vacu-Maid, supra, at 143. In subsequent decisions, the Oklahoma Supreme Court has accorded more importance to the latter of these alternative requirements for nonresident purchasers. In Yankee Metal Products Co. v. District Court of Oklahoma County, 528 P.2d 311 (Okla. 1974), the nonresident purchaser did not initiate the relationship with an Oklahoma resident, but rather responded to a direct mail advertisement of the Oklahoma seller. However, the nonresident purchaser ordered custom-built materials and furnished samples to the Oklahoma seller. Since the items ordered were not stock items, the court concluded that the nonresident buyer "actively participated in negotiations and plans for production," thus placing the buyer in the "active" category, following the definition of

Vacu-Maid, supra. Similarly, in CMI Corporation v. Costello Construction Corp., 454 F.Supp. 497 (W.D.Okla. 1977), the court affirmed the "active-passive buyer" distinction, noting that the critical factor for such a distinction is that the buyer give specifications for custom-built equipment. Also in Henderson v. University Associates, Inc., 454 F.Supp. 493, 498 (W.D.Okla. 1977), the court concluded that the nonresident buyer exercised sufficient direction and control over the activities of the resident seller in the completion and revision of a manuscript in Oklahoma, so as to place him in a role analogous to an "active purchaser".

On the other hand, the "passive purchaser" has been characterized as one who simply places an order and sits by until the goods are delivered. Henderson, supra, 496. In Vacu-Maid, supra, the court declined to find in personam jurisdiction since the seller, not the nonresident purchaser, initiated the contact, the contract between seller and purchaser was made outside of Oklahoma, and the purchaser's activity within Oklahoma consisted only of telephone orders placed from outside the State. Similarly, in Yankee Metal Products, supra, at 313, the classification of a nonresident as a passive purchaser is described as necessary to protect "the ordinary 'mail order catalogue' consumer who merely orders a stock item of merchandise from a distant state, from the jurisdiction of the courts of a distant state." In CMI v. Costello, supra, at 504, the court noted that the mailing of rental payments by a nonresident buyer to the resident seller in Oklahoma were irrelevant to the determination of an active versus passive purchaser. Neither was the place in which the contract was made controlling in such determination. See also Crescent Corp. v. Martin, 443 P.2d 111 (Okla. 1968), at 115. In fact, Oklahoma courts have required that some act by the nonresident purchaser must have occurred in relation to the contract in Oklahoma. In

Oklahoma Publishing Co. v. National Sportsmen's Club, Inc., 323 F.Supp. 929-31 (W.D.Okla. 1971), the court found that the resident seller's act of signing a contract, evidencing his acceptance, where the defendant signed the order in Texas, was not an act of the defendant performed in Oklahoma within the meaning of the long-arm statutes. In personam jurisdiction was not found in this case because no evidence was presented showing that the nonresident buyer had done any act or consummated any transaction with respect to the contract within the State of Oklahoma. Similarly, in Stillings Transportation Corp. v. Robert Johnson Grain & Molasses Co., 413 F.Supp. 410, 412-13 (N.D.Okla. 1975) the court found the nonresident purchaser to be a passive purchaser because his contacts with Oklahoma consisted only of the payment of invoices to the plaintiff-seller's office in Tulsa, Oklahoma and one visit to that office. Finally, numerous Oklahoma cases have held that mere employment of an Oklahoma resident by a nonresident is insufficient to meet the minimum contacts requirement of the long-arm statutes, even when the Oklahoma resident performs work in Oklahoma. See Henderson, supra at 495; CMI Corp., supra, at 503; Anderson v. Shiflett, 435 F.2d 1036 (10th Cir. 1971).

In the present case, whether KTI, the nonresident purchaser, is subject to Oklahoma long-arm statutes is dependent on whether KTI's activities within Oklahoma which relate to or arise from the contract in question characterize the corporation as an active or passive purchaser. The evidence submitted to the court shows that the defendant's only activities within the State of Oklahoma in relation to said contract consisted of phone calls to the plaintiff's office in Tulsa and payment of installments due on said contract to the plaintiff's office in Tulsa, Oklahoma. The evidence presented in the briefs of both plaintiff and defendant shows that the initial contact which led to the

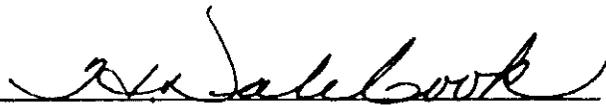
original September, 1978 contract were made by KTI, and that the orders of September, 1978 and May, 1979 were, in effect, special orders. In addition, there is some evidence of continuing supervision by the defendant over the manufacturing activities of Therma Fab. However, the site of the manufacture of items ordered by the defendant was located in Channelview, Texas at Therma Fab, an operating division of Therma Tech. The affidavit of Mr. Baker, President of KTI, indicates that all communications by the defendant with regard to the order, except the placing of the revised purchase order by phone to Tulsa and payment to Therma Tech in Tulsa, were directed to Therma Fab in Texas. No evidence to the contrary was presented by the plaintiff. Thus, although the defendant might be fairly categorized as an active purchaser in relation to Therma Fab in Texas, he is not an active purchaser as to Therma Tech Oklahoma.

Thus the evidence fails to show sufficient acts by defendant in Oklahoma in relation to the plaintiff's cause of action necessary to meet the "minimum contacts" requirement of due process. The plaintiff's cause of action here is based on the revised purchase order of May, 1979, which did not provide for the performance of any act by the defendant within the State of Oklahoma other than payment on the order. No further act in relation to the revised purchase order has been shown to have occurred in Oklahoma. Any other acts by the defendant in Oklahoma pursuant to other contracts with other entities are irrelevant to the determination of jurisdiction in this cause of action. Crescent Corp. v. Martin, supra, at 116. See also Okla. Publishing Co., supra, at 930.

It is the determination of this Court that the telephone calls and telex communications of the defendant with the plaintiff's office in Tulsa are insufficient to meet the "minimum contacts" requirements of due process. The defendant's

motion to dismiss for lack of in personam jurisdiction is hereby sustained. This conclusion as to jurisdiction over the defendant obviates the necessity for discussion as to whether venue is proper in this district.

It is so Ordered this 10<sup>th</sup> day of September, 1980.



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

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

SWIFT NAIFEH, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 PATRICIA ROBERTS HARRIS, )  
 Secretary of Health, Edu- )  
 cation and Welfare, United )  
 States of America, )  
 )  
 Defendant. )

No. 79-C-542-C ✓

**FILED**  
SEP 8 1980 NO

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

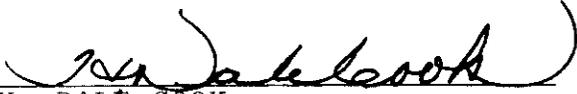
JUDGMENT

The Court has before it for consideration the Findings and Recommendations of the Magistrate filed on August 25, 1980, in which it is recommended that Judgment be entered for the Defendant. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of all the matters presented to it, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

It is hereby Ordered that Judgment be entered for the Defendant affirming the Secretary's decision that the Plaintiff was overpaid the sum of \$2,036.30 for the period 1973 through 1976 and that recovery of the overpayment should not be waived.

Dated this 8<sup>th</sup> day of September, 1980.

  
H. DALE COOK  
CHIEF JUDGE



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

**FILED**

SEP 5 1980

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

AXELSON, INC.,

Plaintiff,

v.

THE NATIONAL LABOR RELATIONS  
BOARD AND EDWIN YOUNGBLOOD,  
REGIONAL DIRECTOR,

Defendants.

No. 80-C-484-Bt

ORDER

This case came on for hearing before the undersigned United States District Court on Plaintiff's Motion for Temporary Restraining Order. Defendant has filed a Motion to Dismiss.

In its complaint, Plaintiff asks this Court to enjoin the Defendant National Labor Relations Board from proceeding on its Fourth Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Case Numbers 16-CA-8677, 16-CA-8835, 16-CA-8877, 16-CA-8966, 16-CA-9058, 16-CA-8735, 16-CA-8754, 16-CA-8765, and 16-CA-8907, scheduled for trial on September 15, 1980. The NLRB has, subsequent to the filing of this complaint, issued a Fifth Order Consolidating Cases which adds Case Number 16-CA-9276. Plaintiff contends that the order of the Administrative Law Judge denying Plaintiff's Motion to Make More Definite and Certain and the refusal of the NLRB to provide plaintiff with certain additional information, have deprived it of its rights under the Administrative Procedures Act, 5 U.S.C. § 554(b) and due process.

Upon consideration of the applicable law, the Court concludes that it lacks subject matter jurisdiction in this matter and has no power to enjoin the hearings as requested by Plaintiff. Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41 (1938) makes it clear that the National Labor Relations Act provides

that exclusive jurisdiction in such cases is vested in the NLRB and that adequate and exclusive review procedures are available. See also 29 U.S.C. § 160 (e) and (f); Board of Trustees of Memorial Hospital of Freemont County, Wyoming v. NLRB, 523 F. 2d 845 (10th Cir. 1975); Chicago Automobile Trade Association v. Madden, 328 F. 2d 766 (7th Cir. 1964).

Plaintiff's reliance on Community Nutrition Institute v. Butz, 420 F. Supp. 751 (D.D.C. 1976) to assert jurisdiction is misplaced, since that case dealt with failure of an administrative agency to comply with the Administrative Procedures Act in promulgating regulations. Likewise, this case does not fall into the narrow exception of Leedom v. Kyne, 358 U. S. 184 (1958), since it does not involve any action by the Board in excess of its powers. Neither does it involve a failure of the Board to act, as was the case in Hamil v. Youngblood, 96 LRRM 3016 (N.D. Okla. 1977). What is challenged here is a decision made within the powers of the Board.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Temporary Restraining Order is hereby overruled and Defendant's Motion to Dismiss is hereby granted.

Dated this 5<sup>th</sup> day of September, 1980.

  
United States District Judge

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

BOYD & PARKS, a )  
partnership, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
UNITED BENEFIT LIFE )  
INSURANCE COMPANY, a )  
Nebraska corporation, )  
 )  
Defendant. )

**FILED**

**SEP 5 1980**

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

NO. 80-C-300-E

ORDER GRANTING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT

This cause comes on before the Court on the 5th day of September, 1980, upon the motion of Plaintiff for Summary Judgment in the above entitled cause in its favor. It appearing to the Court that notice of such motion, and the date of hearing thereon, was given to Defendant pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, and it further appearing to the Court that notice of such motion, and the date of hearing thereon, was as well given to Mr. Richard M. Kenney, Air Force Association Group Life Program, and to Mr. Jerry Allen Montgomery. It is noted by the Court that appearances made, by or on behalf of Plaintiff and Defendant or any individual or association, are as follows, to-wit: appearing for plaintiff is John L. Boyd and Ed Parks, and appearing for defendant is Joseph A. Sharp, no other apprisement of an appearance by or on behalf of any other interest having been made to the Court, and by reason thereof none others being noted. The Court, after having considered the affidavit of Ed Parks in support of Plaintiff's motion, as well as the pleadings and briefs submitted by Plaintiff and Defendant, finds that there is no genuine issue as to any fact material to this controversy. The Court has examined the original application signed by James E. Montgomery and attached to the policy, and after examination thereof finds that Betsy Montgomery is named therein as the primary beneficiary and that the children of the insured, Michael Ross Montgomery, son, and Margaret Lynn Montgomery, daughter, are named therein as contingent beneficiaries

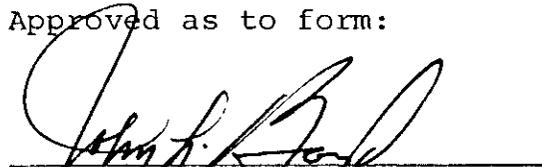
under Group Policy GLG 2625 and that plaintiff as assignee for consideration of Betsy Montgomery is entitled to the proceeds of the aforesaid policy in the amount of \$87,465.13, such amount previously being tendered into Court by Defendant pursuant to permission granted by order of this Court dated the 18th day of July, 1980, and by reason thereof, that Plaintiff is entitled to summary judgment for the aforestated amount as a matter of law.

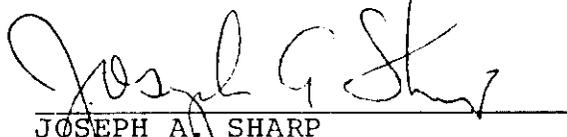
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered herein, such being done hereby, in favor of Plaintiff, and against Defendant, for \$87,465.13.

DATED this 5th day of September, 1980.

  
DISTRICT JUDGE

Approved as to form:

  
JOHN L. BOYD  
Attorney for Plaintiff

  
JOSEPH A. SHARP  
Attorney for Defendant

BP

FILED  
SEP 11 1980  
U. S. DISTRICT COURT

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

HEMPHILL CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GAYLON W. JACKSON, VIRGINIA )  
 JACKSON, and G. W. JACKSON & )  
 COMPANY, INC., all d/b/a )  
 SOUTHWEST ENGINEERING COMPANY, )  
 )  
 Defendants. )

No. 79-C-374-E

JOURNAL ENTRY OF JUDGMENT

Now on this 4th day of September, 1980, the above captioned matter comes on regularly for trial. Plaintiff appears in person and by and through its attorneys of record, C. S. Lewis, III, of Robinson, Boese & Davidson. Defendants appear in person and by and through their attorneys of record, Deryl L. Gotcher of Jones, Givens, Gotcher, Doyle & Bogan, Inc. Whereupon, the Court being fully advised in the premises, finds as follows:

Plaintiff is entitled to have and recover judgment against the defendants in the principal amount of Eighteen Thousand Nine Hundred Dollars (\$18,900.00), together with interest thereon at the rate of ten percent (10%) per annum from September 14, 1978, until date of judgment, with interest thereon at the rate of twelve percent (12%) per annum from date of judgment until paid, together with an attorney fee in the amount of Three Thousand Dollars (\$3,000.00), and all the costs of this action.

The Court further finds that plaintiff is entitled to have and recover judgment of and against the defendants on the counterclaim filed herein by defendants, and the defendants shall take nothing by way of said counterclaim.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff be and it is hereby granted a judgment

against the defendants in the amount of Eighteen Thousand Nine Hundred Dollars (\$18,900.00), together with interest thereon at the rate of ten percent (10%) per annum from September 14, 1978, until date of judgment, together with interest from date of judgment at the rate of twelve percent (12%) per annum, together with an attorney fee in the amount of Three Thousand Dollars (\$3,000.00), and all the costs of this action.

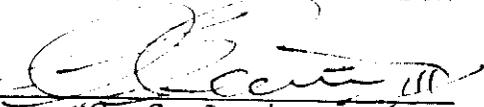
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that plaintiff be and it is hereby granted judgment on the counterclaim of the defendants herein, and the defendants shall take nothing by way of said counterclaim.

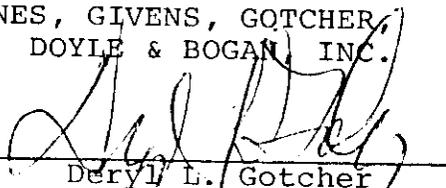
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that plaintiff shall not levy execution on this judgment for ninety (90) days from the date hereof.

  
United States District Judge

APPROVED:

ROBINSON, BOESE & DAVIDSON

By   
C. S. Lewis, III  
Attorneys for plaintiff  
P. O. Box 1046  
Tulsa, Oklahoma 74101  
(918) 583-1232

JONES, GIVENS, GOTCHER,  
DOYLE & BOGAN, INC.  
By   
Deryl L. Gotcher  
Attorneys for defendants  
201 West 5th Street, Suite 400  
Tulsa, Oklahoma 74103  
(918) 583-1115

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

KENNETH RAY CASTLEBERRY, )  
 )  
 Petitioner, )  
 )  
 vs. ) No. 79-C-640-E  
 )  
 WARDEN MACK H. ALFORD, et )  
 al., )  
 )  
 Respondents. )

**FILED**

**SEP 5 1980**

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

MEMORANDUM OPINION AND ORDER

Now before the Court for consideration is Petitioner's Petition for a Writ of Habeas Corpus, pursuant to the provisions of 28 U.S.C. § 2254. Petitioner is a state prisoner confined in the State Vocational Training Center at Stringtown, Oklahoma.

Petitioner herein attacks the validity of the judgment and sentence rendered by the District Court of Tulsa County, State of Oklahoma, in Case Nos. CRF-72-359, CRF-72-360, and CRF-72-361. Petitioner was found guilty after trial by jury as to each of these charges of murder, and his punishment was fixed at confinement in the state penitentiary for life as to each charge, the sentences to run concurrently. The judgment and sentence of the District Court was affirmed on direct appeal to the Oklahoma Court of Criminal Appeals, Castleberry v. State, 522 P.2d 257 (Okla. Crim. 1974). The United States Supreme Court denied certiorari, Castleberry v. Oklahoma, 419 U.S. 1079, 95 S.Ct. 667 (1974).

The petition presently before the Court is Petitioner's second Petition for Writ of Habeas Corpus. Petitioner's earlier petition, raising the same grounds, was dismissed without prejudice by the Court in order to permit proper State court review of the grounds raised therein, Castleberry v. Crisp, 414 F.Supp. 945 (N.D. Okla. 1976). On June 23, 1976, Petitioner's Application for Post-Conviction Relief was filed in the Tulsa County District Court, and on October 18, 1976, Petitioner's application was denied by the trial court. The denial of Petitioner's

application was affirmed on appeal, Castleberry v. State, 590 P.2d 697 (Okla. Crim. 1979).

On October 11, 1979, Petitioner instituted the present case, and on October 19, 1979, an Order was entered directing Respondents to respond to the Petition. The Response was filed on December 12, 1979, and the state record was received on January 15, 1980.

Although Petitioner originally raised three grounds for relief, the Court determined in Castleberry v. Crisp, supra, that his contention relating to polygraph results was without merit and deserving of no further consideration. Petitioner's remaining allegations are:

1. [T]he State Court's admission of certain incriminatory statements made by the petitioner were procured in violation of his Fifth Amendment privilege against self-incrimination and thereby denied petitioner due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

2. [T]he prosecution's failure to produce evidence favorable to the accused violated petitioner's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

It appears from the file that Petitioner has exhausted his state court remedies. The Court has reviewed the entire file, including the transcripts of the state court proceedings, and concludes that this matter is now in a proper posture for dispositive ruling.

Although this Court, in Castleberry v. Crisp, supra, specifically spoke in terms of Petitioner's second contention above, the state court's findings of fact and conclusions of law deal with both contentions (the same judge having presided at both the trial and the hearing of the application for post-conviction relief). The state court held the evidentiary hearing on Petitioner's application on July 20, 21, 22, and 29, 1976, and rendered its decision on October 14, 1976. On October 18, 1976, the state court's findings of fact and conclusions of law were filed.

Upon its review of the transcripts of the hearing held

prior to trial on Petitioner's motion to suppress, the transcript of the trial itself and the transcript of the hearing on Petitioner's motion for new trial (Vol. III, 1346 - 1837), as well as the transcript of the hearing held on Petitioner's application for post-conviction relief, this Court finds that the Petitioner received full and fair evidentiary hearings, that the material facts were adequately developed at those hearings, and that the merits of the factual disputes involved were resolved by the state court in those hearings. The Court concludes, therefore, that an evidentiary hearing is not required in this case, 28 U.S.C. § 2254(d); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963); Cranford v. Rodriguez, 512 F.2d 860 (Tenth Cir. 1975); Maxwell v. Turner, 411 F.2d 805 (Tenth Cir. 1969); Maxey v. Benton, 483 F.Supp. 1 (E.D. Okla. 1977).

I. DID THE PROSECUTION FAIL TO PRODUCE EVIDENCE FAVORABLE TO THE ACCUSED IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS?

The issue raised, of course, falls within the rule announced in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). There the court said:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

373 U.S. at 87, 83 S.Ct. at 1196-1197. Brady does not, however, require that the prosecution reveal to the defense all of the work done by the police in their investigation of a case, nor does it mean that the prosecution's files are freely open to the defense's scrutiny for the purpose of discovering anything which could be favorable, see, e.g., United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976); United States v. Disston, 612 F.2d 1035 (Seventh Cir. 1980); United States v. Gardner, 611 F.2d 770 (Ninth Cir. 1980); United States v. Preston, 608 F.2d 626 (Fifth Cir. 1979).

To sustain a claim under Brady, the Petitioner must establish three broad factors: (1) the prosecution must have suppressed evidence; (2) the suppressed evidence must be favorable to the accused; and (3) the suppressed evidence must be material. United States v. Preston, supra, at 637. In Lewis v. State of Oklahoma, 304 F.Supp. 116, 120 (W.D. Okla. 1969), this basic list was expanded to four factors by the inclusion of a need to show that the evidence was in the possession of the prosecution. In United States v. Agurs, supra, the court said:

The rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, arguably applies in three quite different situations. Each involves the discovery, after trial of information which had been known to the prosecution but unknown to the defense.

427 U.S. at 103, 96 S.Ct. at 2397 (emphasis added).

It is, of course, elementary that the prosecution cannot suppress that which it does not possess.

After the hearing afforded to Petitioner in the state court, which is not challenged herein upon any of the grounds set forth in 28 U.S.C. § 2254(d), the state court made the factual determination that the State of Oklahoma was not in possession of any Brady material either before, or during, the trial in this case. The state court entered detailed findings of fact on October 18, 1976. This Court's independent review of the extensive record in this case has lead it to conclude that the hearing was full and fair, and that the state court's factual determination is supported by the record. In such cases, the determination by the state court "shall be presumed to be correct", absent the exceptions set forth in 28 U.S.C. § 2254(d), none of which the Court finds to be present in this case. Hopkins v. Anderson, 507 F.2d 530 (Tenth Cir. 1974), cert. denied, 421 U.S. 920, 95 S.Ct. 1586 (1975); Ramirez v. Rodriguez, 467 F.2d 822 (Tenth Cir. 1972), cert. denied, 410 U.S. 987, 93 S.Ct. 1518 (1973); Sandoval v. Rodriguez, 461 F.2d 1097 (Tenth Cir. 1972); Martley v. Douglas, 463 F.Supp. 4 (W.D. Okla. 1977);

Pierce v. State of Oklahoma, 436 F.Supp. 1026 (W.D. Okla. 1977).

At the hearing on the Petitioner's motion for new trial, Michael Cozart testified that he had seen one Jackie Dean Tandy on the evening of the day the bodies of the victims were discovered (February 16, 1972) near his home, which was in the same general neighborhood as the Castleberry's home. At that time, he testified, he saw what appeared to him to be spots of blood on Tandy's clothing and shoes, and that Tandy appeared to be nervous. He testified that he had given a statement to the police, but was unsure of exactly what he told the officer who interviewed him. Arlie Owens, the police officer who had interviewed Cozart, in testifying at the evidentiary hearing on Petitioner's application for post-conviction relief, stated that he had interviewed Cozart on that date, but that no mention was made of blood on Tandy's clothing, or that he appeared nervous. Further testimony was given by Chief Harry Stege that he had reviewed the written reports relating to the case, and had discovered Officer Owens' report of the interview with Cozart, but no written statements by him.

Larry Lowther, at the hearing of the motion for new trial, testified that he, too, had seen Tandy on February 16, 1972, and that he observed spots which appeared to be blood on Tandy's pants, and what appeared to be the handle of a knife protruding from Tandy's boots. He testified that he had telephoned the police to relate his suspicions concerning Tandy, but that he was not interviewed by police officers. Officer Owens testified that he took no statement from Lowther. As to his telephone call, Chief Stege testified that while calls to the police communications center were tape recorded, the tapes were routinely reused every 24 hours.

The testimony of Jimmy Lee Mize at the hearing on the motion for new trial was that sometime in early 1972, between January and March (he being unable to fix an exact date), he saw Tandy at the home of Tandy's ex-wife, in the morning hours. He further testified that the individuals present in the home at that time

were his wife, himself, his father, James Martin Mize, and Carol, Tandy's ex-wife. At that time, according to his testimony, Tandy entered the home, and Jimmy Mize observed blood on his clothing. He testified that Tandy left the home that morning with Jimmy's father in a car, and that Tandy left in the same clothes he had arrived in (Vol. III, 1619). Jimmy Mize also testified that he had not talked to the police about his observations (Vol. III, 1635-1642).

Jimmy Mize's father, James Martin Mize, testified, at the hearing on the motion for new trial, that on February 16, 1972, he was living with Jackie Dean Tandy and Carolyn Bowdler. He initially testified (Vol. III, 1486) that before noon Tandy came into the house in a condition the elder Mize described as "pretty drunk", and that he had blood on himself. Mize testified that Tandy changed his clothes, and that he was taken to West Tulsa by Mize. He also testified that he had never spoken to anyone connected with the police or the state during trial, or before trial, and that although he lived in the neighborhood of the crime, no police officer contacted him (Vol. III, 1502). Mr. Mize further testified that on February 16, 1972, Tandy was employed at a car lot on East 11th Street in the City of Tulsa, and that he had been working there for some time. On the morning of the 16th of February, he testified, he purchased a half pint of liquor from a bootlegger prior to 10:00 a.m., and that he took it to the car lot where Tandy was employed, where he and Tandy drank it, in the company of one Walter E. Moore. After this, Mize testified, he returned to the house, where later that same morning, Tandy arrived in the condition already described.

At the same hearing, Jackie Dean Tandy testified that on February 16, 1972, he was living with Carolyn Bowdler. He testified that James Martin Mize did not reside at his residence on February 16, 1972, but that he had moved in one or two weeks later. He further testified that on February 16, 1972, he

was working for Pete Skidmore, hauling wood and brush.

Carolyn Bowdler testified during the evidentiary hearing on Petitioner's application for post-conviction relief that she was living with Jackie Dean Tandy in February of 1972, and that James Martin Mize was not living in their house on February 16, 1972, but that he did move in about three weeks later. She further testified that Tandy went to work at approximately 7:30 a.m. on the morning of February 16, 1972, and that at the time he was employed by Pete Skidmore.

Pete Skidmore, at the hearing on the motion for new trial testified that on February 16, 1972, he had seen Tandy at about 8:30 a.m., and that Tandy was employed by him on that date, delivering wood.

At the same hearing, Jeanne Kruse testified that on February 16, 1972, she was living on East 49th Street in the City of Tulsa, and that on that day, Tandy (whom she identified from a photograph) was delivering wood at her residence sometime between 9:00 a.m. and 9:30 a.m. Her testimony further was that she had been buying wood from Pete Skidmore for quite a few years.

Walter E. Moore also testified at that hearing. He testified that on February 16, 1972, he was in the Tulsa County Jail. The State and the defense stipulated at the hearing that Walter Elmer Moore was booked into the Tulsa County Jail on or about February 8, 1972, and was released on or about February 26, 1972. Walter Moore testified that he had not seen James Martin Mize on February 16, 1972, and that he purchased the car lot referred to by Mr. Mize in his testimony after he was released from jail.

The evidence relating to Jackie Dean Tandy that was in the possession of the State, specifically his clothing, boots, fingernail scrapings, and the knife removed from his home, cannot be considered to be exculpatory as to Petitioner. Tandy was questioned by the police, and allowed them to search his home; the items just described were analyzed for

the presence of blood, and no traces were found. Tandy was released by the police at approximately noon on February 17th. What is shown is that the police investigated a certain lead, and found it to be fruitless. The physical evidence relating to Tandy in the possession of the state was, if anything, exculpatory as to Tandy, and would not be supportive of a defense theory that Tandy was the perpetrator of the crime. The testimony of Michael Cozart, Larry Lowther, Jimmy Lee Mize and James Martin Mize on the other hand, was inculpatory as to Tandy, but it does not appear that the Mizes ever contacted the police or the prosecutor or that Lowther's phone call was ever preserved. This, of course, removes such material entirely from the purview of Brady. The testimony also supports the state court's conclusion that Cozart did not give Officer Owens the information he later stated that he had.

The state court further concluded that the evidence in question was not "material" within the meaning of Brady. This is assuming arguendo that the state was in possession of all of the material and failed to disclose it.

Although some courts have focused on the possibility that non-disclosed material could have influenced the jury's verdict in their determination of materiality, e.g., Grant v. Alldredge, 498 F.2d 376 (Second Cir. 1974), the Supreme Court, in United States v. Agurs, supra, rejected this view, saying:

The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly rejected in Brady. For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.

Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. While expressing the opinion that representatives of the State may not "suppress substantial material evidence," former Chief Justice Traynor of the California Supreme Court has pointed out that "they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." In re Imbler, 60 Cal.2d 554, 569, 35 Cal.Rptr. 293, 301, 387 P.2d 6, 14 (1963). And this Court recently noted that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

427 U.S. at 108-110, 96 S.Ct. 2400 (emphasis added, footnotes omitted). The court went on to describe the proper standard to be applied in determining whether evidence is "material" under Brady:

[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

427 U.S. at 112-113, 96 S.Ct. at 2402.

The state court determined that there was "no reasonable probability that the results of the jury trial would have changed if the testimony adduced at the Motion for New Trial, or during the hearing on Defendant's Application for Post-Conviction Relief, had been introduced at the trial." Findings of Fact and Conclusions of Law, paragraph 2, page 6, October 18, 1976. From its own review of the record, this Court agrees. The primary evidence implicating Tandy is the testimony of the Mizes; it is so riddled with gross inconsistencies, and statements of fact that are highly improbable, if not impossible, that any reasonable mind would not hesitate to reject it completely.

For the above stated reasons, this Court finds that there was no violation of Petitioner's rights as to any Brady material, and the Petition should be denied as to this contention.

II. WAS PETITIONER'S  
CONFESSION VOLUNTARY?

At the outset, the Court would note that there is no question raised herein dealing with the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), or with the adequacy of the warnings given. Petitioner does not deny that the appropriate warnings were repeatedly given by the police; indeed, the record reflects that the officers questioning Petitioner scrupulously observed the dictates of Miranda. What is involved, however, is the application of the "voluntariness" test under the "totality of the circumstances," a test developed and refined by the Supreme Court in approximately thirty cases spanning the period between Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936) and Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758 (1964). see Schneckloth v. Bustamonte, 412 U.S. 218, 223 93 S.Ct. 2041, 2046 (1973).

In Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879 (1961), the court said:

The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. . . . The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.

The "totality of the circumstances" test requires that the Court look to the characteristics of the accused as well as the details of the interrogation. Schneckloth v. Bustamonte, supra.

The Respondent quite rightly points out the fact that a confession is not per se evidence of an overborne will, and

the Court agrees with Respondent that "[t]he police may be midwife to a declaration naturally borne of remorse, or relief, or desperation, or calculation." Culombe v. Connecticut, supra, 367 U.S. at 576, 81 S.Ct. at 1864. Police midwifery is unobjectionable; it is induced labor that the Constitution prohibits.

The Petitioner, in his earlier case before this Court, stated that he "would agree with ... the state ... that indeed an evidentiary hearing before this Court is unnecessary. Petitioner would contend that the record now before this Court is more than adequate under the 'totality of the circumstances' ... for this Court to hold that reversible error was committed in the introduction of the Petitioner's incriminating statements." Petitioner's Response, November 17, 1975, at 5-6, Castleberry v. Crisp, supra. The Court agrees with Petitioner and Respondent; this point was the subject of extensive testimony both before and during trial, and the facts have been adequately developed, making a hearing unnecessary, see, e.g., Townsend v. Sain, supra.

All of the details relating to the crime need not be recounted. Petitioner's wife and two children were murdered in their home in mid-February of 1972. It will suffice to say that the scene disclosed a gruesome crime of shocking savagery. The first conversation between Petitioner and the police took place on February 16, 1972, the day of the discovery of the bodies. This conversation between Petitioner and Officer Moser, one of the first officers to arrive at the scene, involved Petitioner's identification of himself, and his recounting to Officer Moser of his activities on that day. That same evening Petitioner gave the police a statement as to what he had discovered at his home earlier that evening, after which he was released. In the early afternoon (1:30 p.m.) of February 17, 1972, the Petitioner was contacted by Detective Johnson at the home of Petitioner's former sister-in-law. Detective John-

son took Petitioner to the police station, where he questioned Petitioner as to the events of February 15 and 16, 1972, and the background of Petitioner and his family. Petitioner allowed scrapings to be taken from his fingernails at this time. Detective Johnson recalled that this interview ended at approximately 3:00 p.m. or 3:30 p.m.; James L. Brown, the identification officer who scraped Petitioner's fingernails, recalled that he had first seen Petitioner at 5:30 p.m., however. In any event, it appears that Petitioner spent this entire afternoon at the police station. He was released, and returned to Kansas to attend the funeral of his family, returning to Tulsa on February 22, 1972. On that date, Petitioner called the Tulsa Police Department in an effort to reach Detective Johnson, but finally contacted Detective Hunt instead. Hunt picked Petitioner up at the residence of Petitioner's former sister-in-law, and Petitioner was again interviewed as to the events surrounding the crime, the Petitioner's relationship with his family, and the backgrounds of Petitioner and the victims. Petitioner was returned to the residence at which he was staying that same evening. The following day, February 23, 1980, Petitioner was again picked up at his temporary residence, but this time by both Detective Johnson and Detective Hunt. The detectives began to transport Petitioner to the police station for additional questioning, but in the car, the subject of Petitioner's seeing a minister arose. A detour was then made to see Reverend Pieratt, who was the minister of the church attended by Detective Johnson. Petitioner was left alone with Reverend Pieratt, who prayed with him, and read certain Bible passages to him. Petitioner then made certain admissions to the detectives. The officers then proceeded to return Petitioner to the scene of the crime, where the blood of the victims still remained, and questioned him further while viewing the scene. After this interlude, Petitioner was transported to the office of the District Attorney, where he was again questioned in the presence of the District Attorney, the doctor who had per-

formed the autopsies on the victims, and certain police personnel. This session culminated in the making of Petitioner's tape recorded confession, state's Exhibit 43, which was introduced at trial.

The foregoing recitation sets out the primary historical facts as to the sequence of events and the persons involved. At this level, there is no Constitutional infirmity; Petitioner was not subjected to grueling and prolonged interrogation, nor was Petitioner physically abused; a visit to a minister or other party is, in itself, unobjectionable; and, a return to the scene of the crime, again, standing alone, is of no moment. But the question of whether Petitioner's will was overborne through psychological pressure is a subtle one, and these gross instruments are incapable of probing its depths. An examination of the details is necessary to discover the "totality of the circumstances" and the impact of those circumstances on Petitioner's will.

The Petitioner was, at the time of his questioning, 21 years old. He was a high-school dropout who had had no prior involvement with the law and law enforcement officers. Petitioner had spent most of his life in Kansas, coming to Oklahoma in 1969. He had worked briefly in a restaurant, and then secured a job mounting automobile tires and doing related work. He had few friends in Tulsa, and his life consisted primarily of work and church activities. In 1970, Petitioner became interested in the Church of Jesus Christ of Latter Day Saints, and was baptized into that church. Elder Henline testified that Petitioner was a shy individual, needing much encouragement, and very susceptible to suggestion. Elder Henline's assessment of the Petitioner was supported by the testimony of Dr. Salvatore Russo, an expert witness for the defense in the field of psychology. Based upon his tests and evaluations, Dr. Russo concluded that the Petitioner was a shy individual of average intelligence who was somewhat passive, dependent, and submissive.

From the record, it is reasonable to conclude that the police were not unaware of Petitioner's religious beliefs. During his first visit to the police station, he was seen by three elders of his church, including Elder Henline; Petitioner testified that he told the police officers during his interview of the 17th of his general background, including his church affiliation. The subsequent activities of the police bolster this conclusion.

Petitioner testified that Detective Hunt, on February 22, 1972, picked him up at the residence where Petitioner was staying. Petitioner's testimony was that a detour was made to the crime scene, where Petitioner was walked through the house, shown the blood stains there, and asked if it reminded him of seeing blood on the morning of the 16th of February. Petitioner also related that the officer spoke to him of temporary insanity, and the fact that Petitioner was the only person who could have committed the crime based upon the estimated probable time of death (12:00 midnight, February 15, 1972 to 6:00 a.m., February 16, 1972). Petitioner further testified that at the police station, Detective Hunt questioned him as to Petitioner's belief in God, and asked Petitioner to pray to God. Detective Hunt testified that he could not recall a detour to the scene of the crime, and that the conversation between the two of them was "general" conversation.

On February 23, 1972, Petitioner was again contacted by the police. Detectives Hunt and Johnson proceeded to Petitioner's temporary residence, picked him up, and began driving towards the police station. Detective Johnson testified that at this time some general conversation took place in the car, during which the subject of Petitioner seeing a minister was again brought up, it having been initially discussed on February 17, 1972, between Petitioner and Detective Johnson. Petitioner was asked if he wanted to see a minister and he answered that he did, or at least that he wouldn't mind seeing one. Detective Johnson told Petitioner of his own minister, Reverend Pieratt, who

Johnson characterized as a good man, and a good minister, in whom Detective Johnson had confidence. A phone call was made to Reverend Pieratt by Detective Johnson, and the trio proceeded to the Carbondale Assembly of God Church.

Upon arrival at the church, Detective Hunt either remained in the car, while Detective Johnson and Petitioner went in to see Reverend Pieratt, or returned to the car after walking in with them. After some introduction, Detective Johnson left Petitioner alone with Reverend Pieratt.

Reverend Pieratt testified that he spoke with Petitioner about his soul's needs, read some scripture to him and prayed with him.

The Reverend testified that he read the following verses to Petitioner:

That if thou shalt confess with thy mouth  
the Lord Jesus and shalt believe in thine heart that  
God hath raised him from the dead, thou shalt be  
saved.

For with the heart man believeth unto  
righteousness and with the mouth confession  
is made unto salvation. For whosoever shall  
call upon the name of the Lord shall be saved.

If we confess our sins he is faithful and  
just to forgive us our sins and to cleanse us  
from all unrighteousness.

Reverend Pieratt also testified that he spoke to Petitioner about the power of the Spirit and the power of the resurrection and that if Petitioner would believe in the resurrection of the Lord and confess his sins that he could be saved.

Upon the conclusion of Petitioner's visit with Reverend Pieratt, Detective Johnson entered the room. Detective Johnson testified that he asked Petitioner what was on his mind, and Petitioner responded by stating that in his mind he felt as though he had taken the lives of his wife and children but he did not recall the details of how he had done it. Detective Johnson testified that he left at this point, returning with Detective Hunt, after which Petitioner again stated that he "felt like in his heart and mind that he had taken the lives of his wife and children but his mind was a blank as far as if he did it, how he did it, he could not remember." Reverend

Pieratt testified that the only statement he could remember Petitioner making was "If I did kill my family, I do not remember it."

After this, Petitioner and the detectives left Reverend Pieratt's church, and returned to the crime scene. During the drive, the detectives discussed with Petitioner, among other things, the possibility that he had "blacked out" and that it was their theory that Petitioner was the only person who could have committed the crime. Upon arrival at the still bloody scene, the officers and Petitioner walked through the house, viewing the places where the bodies of Petitioner's wife and children had been found. Detective Johnson also posed certain "hypotheticals" to Petitioner, concerning where he would go in the home to find a knife, and what he would do if he was covered with blood. The detectives and Petitioner spent from forty-five minutes to an hour at the scene.

After this, Petitioner was taken to the District Attorney's office, where he met the District Attorney, the deputy medical examiner, and another detective. Petitioner's recorded statement was taken during this meeting. The transcription of the recording, state's Exhibit Number 43, appears in Volume II of the transcript at pages 765 through 800.

In its Findings of Fact and Conclusions of Law of October 18, 1976, the state court stated:

The defendant was in no way physically or mentally abused, coerced, threatened, or intimidated by any member of the Tulsa Police Department, District Attorney's Office, or anyone else, nor were any promises or inducements made to him by any member of the Tulsa Police Department, District Attorney's Office, or anyone else, to get him to make any admissions or confession, or to waive any of his rights against self-incrimination:

\* \* \* \*

The incriminatory admissions and confession made by the defendant, which were introduced into evidence during the course of the jury trial in these cases, were voluntarily made by the defendant with full knowledge on the part of the defendant of his constitutional privilege against self-incrimination as guaranteed to him by Article II, Section 7 of the Oklahoma Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution and the

rights incident thereto as defined and mandated by Miranda v. Arizona;

In Culombe v. Connecticut, supra, the Supreme Court said:

Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate, with due regard to federal-state relations, that the state court's determination should control. But where on the uncontested external happenings, coercive forces set in motion by state law enforcement officials are unmistakably in action; where these forces under all the prevailing states of stress, are powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subjected to such an extracting process - where this is all that appears in the record - a State's judgment that the confession was voluntary cannot stand.

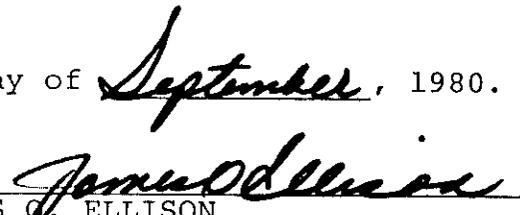
367 U.S. at 605, 81 S.Ct. at 1880-1881.

It is the opinion of this Court that the existence of Miranda warnings is significant in assessing the voluntariness of Petitioner's statement, but their existence and the Petitioner's understanding of them cannot be the sole criteria in assessing the voluntariness of a statement in a case such as this. To say that the Miranda litany is sufficient in itself to insure the voluntariness of Petitioner's confession under the circumstances of this case, is, in the words of the Supreme Court, to "be ignorant as judges of what we know as men." Watts v. Indiana, 338 U.S. 49, 52, 60 S.Ct. 1347, 1349 (1949).

This is a difficult case; the Court is not unaware of the ramifications of its decision, but, upon its review of the record and relevant authorities, the Court concludes that Petitioner's confession was not voluntary under the circumstances, and that its admission at trial was a violation of the rights secured to him by the Fifth and Fourteenth Amendments to the United States Constitution.

IT IS, THEREFORE, ORDERED that the Writ of Habeas Corpus sought by Petitioner shall issue and he shall be released from state custody unless he is afforded a new trial within 90 days of this date.

It is so Ordered this 5<sup>TH</sup> day of September, 1980.

  
JAMES C. ELLISON  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA  
TULSA DIVISION

FILED

SEP 2 1980

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

MARY K. KRUMMEL, ]  
 ]  
 Plaintiff, ]  
 ]  
 V. ] CIVIL ACTION NO. 80-C-451-E  
 ]  
 THE DUNLAP COMPANY d/b/a ]  
 Vandever's Department Store, ]  
 ]  
 Defendant. ]

ORDER OF DISMISSAL WITH PREJUDICE

It appearing to the Court that the Plaintiff and Defendant have compromised and settled all matters in dispute between them and have requested that the Court dismiss the above entitled and numbered action with prejudice, and the Court has determined there is no reason why this should not be done, and,

IT IS HEREBY ORDERED that the above entitled and numbered action be, and the same is, hereby dismissed with prejudice to the reassertion of the same or any part thereof.

SIGNED and ENTERED on this 3rd day of September  
1980.

S/ JAMES O. ELLISON  
United States District Judge

APPROVED:

Attorney for Plaintiff

J. Patterson Bond  
J. Patterson Bond  
Hall, Estill, Hardwick, Gable,  
Collingsworth & Nelson, P.C.

David Fielding  
David Fielding  
A member of the firm of  
McDonald, Sanders, Ginsburg,  
Phillips, Maddox & Newkirk

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

87 0 11 11  
1980

UNITED STATES OF AMERICA, and )  
R. DALE McDANIEL, Special )  
Agent, Internal Revenue )  
Service, )

Petitioners, )

vs. )

NO. 80-C-200-E

BANK OF OKLAHOMA and )  
VIRGINIA DOMINGOS, )

Respondents. )

ORDER DISCHARGING RESPONDENTS  
AND DISMISSAL

On this 3<sup>rd</sup> day of Sept., 1980, Petitioners' Motion to Discharge Respondents and for Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summons served upon them; that further proceedings herein are unnecessary, and that the Respondents, Bank of Oklahoma and Virginia Domingos, be and they are hereby discharged from any further proceedings herein and this action is hereby dismissed.

S/ JAMES O. ELISON

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
1980  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

United States of America, )  
 )  
Plaintiff, ) CIVIL ACTION NO. 78-C-294-E  
 )  
vs. ) This action applies to all  
 ) interests in the estate  
 ) taken in:  
21.98 Acres of Land, More or )  
Less, Situate in Osage County, ) Tract No. 1010  
State of Oklahoma, and Mary )  
Josephine Kipp Semons, et al., )  
and Unknown Owners, )  
 ) (Included in D.T. filed in  
Defendants. ) Master File #398-13)

J U D G M E N T

1.

NOW, on this 3<sup>rd</sup> day of September, 1980, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on stipulations 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. 1010, as such estate and tract are described in the Complaint filed in this action.

3.

This 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.

5.

The Acts of Congress set out in paragraph 2 of the Complaint 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 27, 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 a certain estate in subject tract a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

A. Mary Josephine Kipp Semons was made a party defendant in this action because, on the date of taking, the land records of Osage County, Oklahoma, reflected that she was the owner of the subject property. However, an order entered by the District Court, of Osage County, Oklahoma, and filed in the land records of such county on March 12, 1979, in Book 558, page 93, found that such defendant died on May 11, 1977, and that her only heirs were Dan Small, Jr.; Deborah Ann Small (one and the same person as Deborah Ann Small Switch and Deborah Ann Small Switch Gauge); and Teresa Evangeline Semons (one and the same person as Therese Tatashe Kilpatrick); each of whom inherited 1/3 of Mary Josephine Kipp Semons' interest in subject property.

B. Claude Millsap was made a party defendant in this action because it was believed he was a tenant at will on the subject property. Although personally served with notice of the filing of this action, such defendant has filed no written appearance in this case. However, he did appear at the first meeting of Commissioners appointed to try the issue of just compensation, and stated that he claimed no interest in the subject property. The Court concludes that such defendant had no interest in the subject property on the date of taking.

C. The defendants named in paragraph 12 below, under the designation "owners," are the only defendants asserting any interest in subject property. All other defendants having either

disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject property and the United States of America have executed and filed herein Stipulations As To Just Compensation wherein they have agreed that just compensation for the estate condemned in subject tract is in the total amount shown as compensation in paragraph 12 below, and such Stipulations should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estate taken in subject tract and the amount fixed by the Stipulations 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 12 below.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use Tract No. 1010, as such tract is particularly described in the Complaint filed herein; and such tract, to the extent of the estate described in such Complaint, is condemned; and title thereto is vested in the United States of America, as of June 27, 1978, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such estate.

11.

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 defendants whose names appear below in paragraph 12; the interest held by each defendant is set forth following his or her name; and the right to receive the just compensation for the estate taken herein in such tract is vested in the parties so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulations As To Just Compensation mentioned in paragraph 8 above hereby are confirmed; and the sum thereby fixed is adopted as the total award of just compensation for the estate condemned in subject tract as follows:

TRACT NO. 1010

OWNERS:

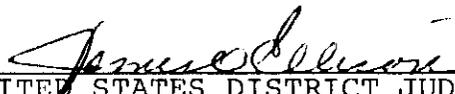
Dan Small, Jr. ----- 1/3  
Deborah Ann Small Switch Gauge ----- 1/3  
Therese Tatashe Kilpatrick ----- 1/3

|                                                                                   |            |                   |
|-----------------------------------------------------------------------------------|------------|-------------------|
| Award of just compensation<br>for all interests<br>pursuant to Stipulations ----- | \$7,050.00 | \$7,050.00        |
| Deposited as estimated<br>compensation -----                                      | 6,425.00   |                   |
| Disbursed to owners -----                                                         |            | <u>None</u>       |
| Balance due to owners -----                                                       |            | <u>\$7,050.00</u> |
| Deposit deficiency -----                                                          | \$ 625.00  |                   |

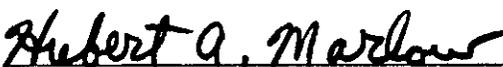
13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tract, the deposit deficiency in the sum of \$625.00, and the Clerk of this Court then shall disburse the deposit for such tract as follows:

|                                                                                                 |            |
|-------------------------------------------------------------------------------------------------|------------|
| Bureau of Indian Affairs, for the use<br>and benefit of Dan Small, Jr. -----                    | \$2,350.00 |
| Bureau of Indian Affairs, for the use<br>and benefit of Deborah Ann Small<br>Switch Gauge ----- | \$2,350.00 |
| Bureau of Indian Affairs, for the use<br>and benefit of Therese Tatashe<br>Kilpatrick -----     | \$2,350.00 |

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
HUBERT A. MARLOW  
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

SEP 11 1980  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

United States of America, )  
 )  
Plaintiff, ) CIVIL ACTION NO. 78-C-293-E  
 )  
vs. ) This action applies to all  
 ) interests in the estates  
 ) taken in:  
15.61 Acres of Land, More or )  
Less, Situate in Osage County, )  
State of Oklahoma, and John ) Tracts Nos. 1005-1, 1005-2  
Jake, Jr., et al, and Unknown ) and 1005E  
Owners, )  
 ) (Included in D.T. filed in  
Defendants. ) Master File #398-13)

J U D G M E N T

1.

NOW, on this 3RD day of Sept., 1980, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on stipulations 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 estates condemned in Tracts Nos. 1005-1, 1005-2 and 1005E, as such estates and tracts are described in the Complaint filed in this action.

3.

This 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.

5.

The Acts of Congress set out in paragraph 2 of the Complaint 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 27, 1978,

the United States of America filed its Declaration of Taking of such described property, and title to the described estates 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 certain estates in subject tracts a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

A. Mary Josephine Kipp Semons was made a party defendant in this action because, on the date of taking, the land records of Osage County, Oklahoma, reflected that she had an undivided 63/84 interest in the subject property. However, an order entered by the District Court, of Osage County, Oklahoma, and filed in the land records of such county on March 12, 1979, in Book 558, page 93, found that such defendant died on May 11, 1977, and that her only heirs were Dan Small, Jr.; Deborah Ann Small (one and the same person as Deborah Ann Small Switch and Deborah Ann Small Switch Gauge); and Teresa Evangeline Semons (one and the same person as Therese Tatashe Kilpatrick); each of whom inherited 1/3 of Mary Josephine Kipp Semons' interest in subject property.

B. Freda Lee Kipp Pratt, named as a party defendant in this action, is one and the same person as Freda Kipp Pratt, and as Freda Lee Kipp Pratt Ballard.

C. George Sells was made a party defendant in this action because it was believed he was a tenant at will on the subject property. Although personally served with notice of the filing of this action and of the first meeting of Commissioners appointed to try the issue of just compensation, such defendant has made no appearance and is wholly in default in this case. The Court concludes that such defendant had no interest in the subject property on the date of taking.

D. The defendants named in paragraph 12 below, under the designation "owners," are the only defendants asserting any interest in subject property. All other defendants having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject property and the United States of America have executed and filed herein Stipulations As To Just Compensation wherein they have agreed that just compensation for the estates condemned in subject tracts is in the total amount shown as compensation in paragraph 12 below, and such Stipulations should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estates taken in subject tracts and the amount fixed by the Stipulations 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 12 below.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use Tracts Nos. 1005-1, 1005-2 and 1005E, as such tracts are particularly described in the Complaint filed herein; and such tracts, to the extent of the estates described in such Complaint, are condemned; and title thereto is vested in the United States of America, as of June 27, 1978, and all defendants herein and all other persons interested in such estates are forever barred from asserting any claim to such estates.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the estates condemned herein in subject tracts were the defendants whose names appear below in paragraph 12; the interest held by each defendant is set forth following

his or her name; and the right to receive the just compensation for the estates taken herein in such tracts is vested in the parties so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulations As To Just Compensation mentioned in paragraph 8 above hereby are confirmed; and the sum thereby fixed is adopted as the total award of just compensation for the estates condemned in subject tracts as follows:

TRACTS NOS. 1005-1, 1005-2 and 1005E

OWNERS:

1. George Hiram Jake ----- 1/84
2. John Jake, Jr. ----- 1/84
3. Mary Katherine Jake ----- 1/84
4. Susan Nell Jake ----- 1/84
5. Josephine Jake ----- 1/84
6. Ida Marie Jake ----- 1/84
7. Darryle Norman Jake Kipp ----- 8/84
8. Freda Lee Kipp Pratt Ballard -- 7/84
9. Dan Small, Jr. ----- 63/252
10. Deborah Ann Small  
Switch Gauge ----- 63/252
11. Therese Tatashe Kilpatrick ---- 63/252

|                                                                                   |            |             |
|-----------------------------------------------------------------------------------|------------|-------------|
| Award of just compensation<br>for all interests<br>pursuant to Stipulations ----- | \$4,500.00 | \$4,500.00  |
| Deposited as estimated<br>compensation -----                                      | 4,300.00   |             |
| Disbursed to owners -----                                                         |            | <u>None</u> |
| Balance due to owners -----                                                       |            | \$4,500.00  |
| Deposit deficiency -----                                                          | \$ 200.00  |             |

13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tracts, the deposit deficiency in the sum of \$200.00, and the Clerk of this Court then shall disburse the deposit for such tracts as follows:

1. Bureau of Indian Affairs, for the use  
and benefit of George Hiram Jake ----- \$53.57
2. John Jake, Jr. ----- \$53.57
3. Bureau of Indian Affairs, for the use  
and benefit of Mary Katherine Jake ---- \$53.57

4. Bureau of Indian Affairs, for the use  
and benefit of Susan Nell Jake ----- \$53.57
5. Bureau of Indian Affairs, for the use  
and benefit of Josephine Jake ----- \$53.57
6. Bureau of Indian Affairs, for the use  
and benefit of Ida Marie Jake ----- \$53.57
7. Bureau of Indian Affairs, for the use  
and benefit of Darryle Norman  
Jake Kipp ----- \$428.58
8. Bureau of Indian Affairs, for the use  
and benefit of Freda Lee Kipp  
Pratt Ballard ----- \$375.00
9. Bureau of Indian Affairs, for the use  
and benefit of Dan Small, Jr. ----- \$1,125.00
10. Bureau of Indian Affairs, for the use  
and benefit of Deborah Ann Small  
Switch Gauge ----- \$1,125.00
11. Bureau of Indian Affairs, for the use  
and benefit of Therese Tadashe  
Kilpatrick ----- \$1,125.00

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
HUBERT A. MARLOW  
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
1980  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

United States of America, )  
 )  
Plaintiff, ) CIVIL ACTION No. 78-C-292-E  
 )  
vs. ) This action applies to all  
 ) interests in the estates  
 ) taken in:  
71.39 Acres of Land, More or )  
Less, Situate in Osage County, )  
State of Oklahoma, and Hazel ) Tracts Nos. 1004-1, 1004E-1  
Lohah Harper, et al., and ) thru 1004E-5 and 1004E-7 thru  
Unknown Owners, ) 1004E-9  
 )  
 ) (Included in D.T. Filed in  
Defendants. ) Master File #398-13

J U D G M E N T

1.

NOW, on this 3<sup>RD</sup> day of September, 1980, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on stipulations 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 estates condemned in Tracts Nos. 1004-1, 1004E-1 through 1004E-5, and 1004E-7 through 1004E-9, as such estates and tracts are described in the Complaint filed in this action.

3.

This 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.

5.

The Acts of Congress set out in paragraph 2 of the Complaint 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 27, 1978, the United States of America filed its Declaration of Taking of such described property, and title to the described estates 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 certain estates in subject tracts a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

A. Mary Josephine Kipp Semons was made a party defendant in this action because, on the date of taking, the land records of Osage County, Oklahoma, reflected that she had an undivided 7/84 interest in the subject property. However, an order entered by the District Court, of Osage County, Oklahoma, and filed in the land records of such county on March 12, 1979, in Book 558, page 93, found that such defendant died on May 11, 1977, and that her only heirs were Dan Small, Jr.; Deborah Ann Small (one and the same person as Deborah Ann Small Switch and Deborah Ann Small Switch Gauge); and Teresa Evangeline Semons (one and the same person as Therese Tatashe Kilpatrick); each of whom inherited 1/3 of Mary Josephine Kipp Semons' interest in subject property.

B. Freda Lee Kipp Pratt, named as a party defendant in this action, is one and the same person as Freda Kipp Pratt, and as Freda Lee Kipp Pratt Ballard.

C. On the date of taking in this action the land records of Osage County, Oklahoma, reflected that the defendant Hazel Lohah Harper owned a life estate with the remainder to her issue in an undivided 2/3 interest in the subject property. However, the evidence before the Court in this matter reveals that the only issue of Hazel Lohah Harper, to date, was her son, Joseph Van Lohah,

that such son is now deceased, that Hazel Lohah Harper is now 62 years of age and the possibility of her having issue in the future is extremely remote. Therefore, the Court concludes that on the date of taking Hazel Lohah Harper was the owner of a full undivided 2/3 interest in the subject property.

D. George Sells was made a party defendant in this action because it was believed he was a tenant at will on the subject property. Although personally served with notice of the filing of this action and of the first meeting of Commissioners appointed to try the issue of just compensation, such defendant has made no appearance and is wholly in default in this case. The Court concludes that such defendant had no interest in the subject property on the date of taking.

E. The defendants named in paragraph 12 below, under the designation "owners," are the only defendants asserting any interest in subject property. All other defendants having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject property and the United States of America have executed and filed herein Stipulations As To Just Compensation wherein they have agreed that just compensation for the estates condemned in subject tracts is in the total amount shown as compensation in paragraph 12 below, and such Stipulations should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estates taken in subject tracts and the amount fixed by the Stipulations 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 12 below.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use Tracts Nos. 1004-1, 1004E-1 through 1004E-5, and 1004E-7 through 1004E-9, as such tracts are particularly described in the Complaint filed herein; and such tracts, to the extent of the estates described in such Complaint, are condemned; and title thereto is vested in the United States of America, as of June 27, 1978, and all defendants herein and all other persons interested in such estates are forever barred from asserting any claim to such estates.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the estates condemned herein in subject tracts were the defendants whose names appear below in paragraph 12; the interest held by each defendant is set forth following his or her name; and the right to receive the just compensation for the estates taken herein in such tracts is vested in the parties so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulations As To Just Compensation mentioned in paragraph 8 above hereby are confirmed; and the sum thereby fixed is adopted as the total award of just compensation for the estates condemned in subject tracts as follows:

TRACTS NOS. 1004-1, 1004E-1 through  
1004E-5, and 1004E-7 through 1004E-9

OWNERS:

- 1. Hazel Lohah Harper ----- 2/3
- 2. George Hiram Jake ----- 1/84
- 3. John Jake, Jr. ----- 1/84
- 4. Mary Katherine Jake ----- 1/84
- 5. Susan Nell Jake ----- 1/84
- 6. Josephine Jake ----- 1/84
- 7. Ida Marie Jake ----- 1/84
- 8. Darryle Norman Jake Kipp ----- 8/84
- 9. Freda Lee Kipp Pratt Ballard -- 7/84
- 10. Dan Small, Jr. ----- 7/252
- 11. Deborah Ann Small  
Switch Gauge ----- 7/252
- 12. Therese Tasahe Kilpatrick ---- 7/252

|                                                                                   |             |             |
|-----------------------------------------------------------------------------------|-------------|-------------|
| Award of just compensation<br>for all interests<br>pursuant to Stipulations ----- | \$22,000.00 | \$22,000.00 |
| Deposited as estimated<br>compensation -----                                      | 20,890.00   |             |
| Disbursed to owners -----                                                         |             | None        |
| Balance due to owners -----                                                       |             | \$22,000.00 |
| Deposit deficiency -----                                                          | \$ 1,110.00 |             |

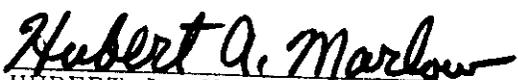
13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tracts, the deposit deficiency in the sum of \$1,110.00, and the Clerk of this Court then shall disburse the deposit for such tracts as follows:

- |                                                                                                     |             |
|-----------------------------------------------------------------------------------------------------|-------------|
| 1. Bureau of Indian Affairs, for the use<br>and benefit of Hazel Lohah Harper -----                 | \$14,666.67 |
| 2. Bureau of Indian Affairs, for the use<br>and benefit of George Hiram Jake -----                  | 261.90      |
| 3. John Jake, Jr. -----                                                                             | 261.90      |
| 4. Bureau of Indian Affairs, for the use<br>and benefit of Mary Katherine Jake -----                | 261.90      |
| 5. Bureau of Indian Affairs, for the use<br>and benefit of Susan Nell Jake -----                    | 261.90      |
| 6. Bureau of Indian Affairs, for the use<br>and benefit of Josephine Jake -----                     | 261.90      |
| 7. Bureau of Indian Affairs, for the use<br>and benefit of Ida Marie Jake -----                     | 261.90      |
| 8. Bureau of Indian Affairs, for the use<br>and benefit of Darryle Norman<br>Jake Kipp -----        | 2,095.24    |
| 9. Bureau of Indian Affairs, for the use<br>and benefit of Freda Lee Kipp<br>Pratt Ballard -----    | 1,833.33    |
| 10. Bureau of Indian Affairs, for the use<br>and benefit of Dan Small, Jr. -----                    | 611.12      |
| 11. Bureau of Indian Affairs, for the use<br>and benefit of Deborah Ann Small<br>Switch Gauge ----- | 611.12      |
| 12. Bureau of Indian Affairs, for the use<br>and benefit of Therese Tadashe<br>Kilpatrick -----     | 611.12      |

APPROVED:

  
UNITED STATES DISTRICT JUDGE

  
HUBERT A. MARLOW

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

|                                |   |               |
|--------------------------------|---|---------------|
| DONNA NOLE and CHARLES NOLE,   | ) |               |
|                                | ) |               |
| Plaintiffs,                    | ) |               |
|                                | ) |               |
| vs.                            | ) | NO. 80-C-46-E |
|                                | ) |               |
| W. W. GRAINGER CORPORATION and | ) |               |
| THE ANSUL COMPANY,             | ) |               |
|                                | ) |               |
| Defendants.                    | ) |               |

ORDER

NOW on this 14th day of Sept, 1980, there came on for hearing the joint Application of the Plaintiffs and the Defendant The Ansul Company to dismiss the above-entitled cause against The Ansul Company without prejudice. After the Court reviewed the matter, the Court finds that the cause should be dismissed without prejudice against The Ansul Company.

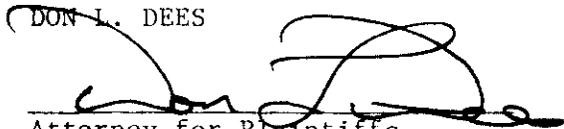
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Complaint filed herein against The Ansul Company be and the same is hereby dismissed without prejudice.

S/ JAMES O. ELLISON

---

JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

DON L. DEES  
  
 Attorney for Plaintiffs

ALFRED B. KNIGHT

---

Attorney for Defendant Ansul

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

1980

UNITED STATES OF AMERICA, and )  
R. DALE McDANIEL, Special )  
Agent, Internal Revenue )  
Service, )

Petitioners, )

vs. )

SOONER FEDERAL SAVINGS AND )  
LOAN and W. R. HAGSTROM, )

Respondents. )

NO. 80-C-199-E

• Jack W. Foy, Clerk  
U. S. DISTRICT COURT

ORDER DISCHARGING RESPONDENTS  
AND DISMISSAL

On this 3<sup>RD</sup> day of Sept., 1980, Petitioners' Motion to Discharge Respondents and for Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summons served upon them; that further proceedings herein are unnecessary, and that the Respondents, Sooner Federal Savings and Loan and W. R. Hagstrom, be and they are hereby discharged from any further proceedings herein and this action is hereby dismissed.

James O. Delmonico  
UNITED STATES DISTRICT JUDGE

AK/ji  
8/28/80

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

BOULDER BANK & TRUST )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
KENNETH THOMAS ANDERSON, )  
 )  
Defendant. )

Case No. M-905

FILED

SEP 3 1980

ORDER OF DISMISSAL

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

UPON the Stipulation of the parties filed herein on  
July 25, 1980, it is

ORDERED BY THE COURT that this case be dismissed with  
prejudice and each party to pay its own costs and fees.

  
UNITED STATES DISTRICT JUDGE

LAW OFFICES

UNGERMAN  
CONNER,  
LITTLE  
UNGERMAN &  
GOODMAN

110 FOURTH NATIONAL  
BANK BUILDING  
TULSA, OKLAHOMA  
74119

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

United States of America, )  
 )  
 Plaintiff, )  
 )  
 vs. ) CIVIL ACTION NO. 78-C-33-Bt  
 )  
 240.00 Acres of Land, More or ) Tract No. 409  
 Less, Situate in Washington )  
 County, State of Oklahoma, )  
 and Jack Hollingworth, Jr., )  
 et al., and Unknown Owners, )  
 )  
 Defendants. )

AMENDMENT TO JUDGMENT

This matter came on for disposition of the Application To Amend Judgment filed herein on August 29, 1980, by the Defendant Jack Hollingworth, Jr.

Having considered such application, and having considered the copies of releases of mortgages attached thereto, and being advised by counsel for Plaintiff that the Plaintiff urges approval of such application,

The Court concludes that the above described application should be granted.

It Is Therefore ORDERED that the judgment, entered herein on July 28, 1980, hereby is amended in the following particulars only:

1. Immediately above the last line on page 3 of said judgment there is inserted the following language:

"Since the filing of this action the debts secured by both of these mortgages have been paid in full and releases of both such mortgages have been duly filed of record. Therefore, the mortgagees under these mortgages are not entitled to receive any part of the balance of just compensation due to the owners as set forth below in this paragraph."

2. The last paragraph of Number 13, on page 4 of said judgment, is deleted and in lieu thereof there is inserted the following language:

"After such deficiency deposit has been made, the Clerk of this Court shall disburse the

entire sum then on deposit for the subject tract as follows:

To Jack Hollingworth, Jr. ---- 1/2 of the sum on deposit, and

To Faye H. Hubbard ----- 1/2 of the sum on deposit.

5/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

5/ Hubert A. Marlow  
HUBERT A. MARLOW  
Assistant United States Attorney

5/ David O. Harris  
DAVID O. HARRIS, Attorney for  
Defendant



moot, and need not be considered at this time.

Accordingly, the Petition for Writ of Habeas Corpus should be dismissed without prejudice to allow proper state court review of Petitioner's claims.

It is so Ordered this 2<sup>nd</sup> day of September, 1980.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

SEP 2 - 1980

JOHN B. JARRETT, III and  
LUTHER C. GRAHAM, d/b/a  
INFINITE ENTERPRISES, a  
Joint Venture,

Plaintiffs,

vs.

KAMO ELECTRIC COOPERATIVE,  
INC., a Corporation, DAVID A.  
HAMIL as Administrator of the  
Rural Electrification Admin-  
istration, and BOB BURGLAND  
as Secretary of the United  
States Department of Agriculture,

Defendants.

No. 79-C-404-BT ✓

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried to the Court on August 8, 1980, and the record was re-opened for additional evidence at the request of the plaintiff on August 25, 1980. The matter is submitted for decision and having heard the evidence, arguments of counsel, and considered the applicable legal authorities, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. KAMO Electric Cooperative, Inc., is a corporation incorporated under the laws of the State of Oklahoma with its principal place of business in Vinita, Oklahoma.
2. KAMO exists to supply its member cooperatives with electrical power and energy.
3. The Rural Electrification Administration ("REA") is an agency of the federal government which both insures and guarantees loans for the purpose of rural electrification by authority of Title 7 U.S.C. §901 et seq.
4. Previous to June 5, 1979, KAMO applied to REA for approval of a loan to finance the construction of a substation, referred to as the "Prue Project" on a tract of land in Osage County, Oklahoma. The Prue Project is a 69kV substation, operating at less than 25,000 kilowatts capacity and with

associated equipment of less than 230 kilovolts.

5. The National Environmental Policy Act of 1969, 42 U.S.C. §4301 et seq ("NEPA") requires a federal agency to prepare and submit an Environmental Impact Statement ("EIS") for a federal project significantly affecting the quality of the human environment.

6. REA Bulletin 20-21:320-21, "National Environmental Policy Act," 39 Fed.Reg. 23240 (1974), ("Bulletin 20-21"), is the REA regulation implementing NEPA as it pertains to the REA program.

7. Secretary's Memorandum No. 1827, Revised (October 30, 1978) establishes departmental land use policy promoting the retention of prime farm land, except where national interest conflicts with retention or otherwise outweighs the environmental benefits derived from continued protection.

8. REA Bulletin 20-21:320-21 requires that a Brief Environmental Report ("BER") providing information necessary for the REA to assess the environmental impacts and effects of a proposed project be submitted when loan funds are used in the construction of electrical generating equipment of less than 25,000 kilowatts capacity or electric transmission lines and associated equipment of less than 230 kilovolts.

9. REA Bulletin 20-21:320-21 requires that the BER may be submitted after the filing of the loan application to REA, but before final action by the REA.

10. On or about June 5, 1979, KAMO submitted a proper BER to the REA concerning the Prue Project.

11. The Prue Project site was identified in the BER as prime farm land and the Soil Conservation Service of the United States Department of Agriculture was consulted and confirmed this identification.

12. The BER included a letter from Robert M. Short, Acting Field Supervisor, United States Department of Interior Fish and Wildlife Service, which stated that the proposed site

for the Prue Project is considerably removed from the most active feeding area for eagles, and further that the site does not provide the necessary habitat for Bald Eagles.

13. The BER included a discussion of available alternative sites for the Prue Project as well as the alternative of "no action." The BER concluded that using the preferred site immediately adjacent to the exist 69 kV line would have the least impact on the environment.

14. The investigation of available alternative sites for the Prue Project was adequate and there are no practicable alternative sites.

15. The proposed substation site of the Prue Project is not a roosting or nesting place for the American Bald Eagle.

16. The BER was reviewed and analyzed by the Engineering Branch of the Southwest Area Engineering, REA, and it was determined by the REA on or about August 3, 1979 that:

(a) The proposed site was too remote from areas known to be frequented by the Bald Eagle, the only rare or endangered species identified as being in the general area;

(b) The proposed site lacked the necessary habitat to attract or support any rare or endangered species;

(c) There would be no effect upon any rare or endangered species;

(d) The project site was located on land classified by the Soil Conservation Service as "prime farmland;"

(e) The project site was not currently being used for growing of agricultural food stuffs;

(f) Two sites were available for the project which would not require new line construction;

(g) Both sites were on land classified as "prime farmland,"

(h) If neither of the two sites were chosen, but instead a third non-prime farmland site was used, new connecting line construction over prime farmland would be necessary;

(i) The connecting line construction would have impact upon the prime farmland crossed;

(j) The connecting line construction would also have increased impact on environmental and economic considerations;

(k) There was no practicable alternative to constructing the project on prime farmland;

(l) Loading and voltage problems were presently being experienced on KAMO's existing line set up;

(m) The proposed project would eliminate the poor service and loading and voltage problems;

(n) There was an overriding public need for adequate supply of electrical power and energy which warranted removal of the project site from potential agriculture cultivation; and

(o) The alternative of "no action" was not feasible.

17. From this review the REA found the request for administrative approval to use general funds to construct the Prue Project was not a major federal action significantly affecting the quality of the human environment.

18. The REA thereafter approved KAMO's use of general funds to construct the Prue Project.

#### CONCLUSIONS OF LAW

1. Jurisdiction is based upon the National Environmental Policy Act, the Fifth and Fourteenth Amendments to the United States Constitution, and the Rural Electrification Act of 1936.

2. The National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq., requires all federal agencies to prepare an Environmental Impact Statement (EIS) on all major federal actions significantly affecting the human environment. 42 U.S.C. §4332(2)c.

3. The Prue Project will not have a significant effect on the human environment so the REA did not have to prepare an EIS.

4. The defendants met the requirements for the timely filing of the BER prior to the final REA action.

5. The REA complied with the procedural and substantive requirements of NEPA and Bulletin 20-21.

6. REA made appropriate findings relative to the prime farmlands in accordance with the Secretary's Memorandum No. 1827, Revised (October 30, 1978).

7. Adequate assurance is given pursuant to the Endangered Species Act, 16 U.S.C. §1531 et seq., the project as proposed and approved does not jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify the habitat of such species.

8. The Prue Project as proposed and approved does not violate the Protection of Bald and Golden Eagles Act, 16 U.S.C. §668 et seq.

9. REA's approval of the use of general funds to construct the Prue Project is not a major federal action significantly affecting the quality of the human environment.

10. Neither the Fifth nor the Fourteenth Amendment to the United States Constitution prohibits the defendants in the acquisition of the substation site comprising the Prue Project.

11. A judgment in keeping with the Findings and Conclusions expressed herein shall be filed simultaneously.

DATED this 2<sup>nd</sup> day of September, 1980.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

SEP 2 1980

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JOHN B. JARRETT, III and )  
LUTHER C. GRAHAM, d/b/a )  
INFINITE ENTERPRISES, a )  
Joint Venture, )

Plaintiffs, )

vs. )

No. 79-C-404-BT ✓

KAMO ELECTRIC COOPERATIVE, )  
INC., a Corporation, DAVID A. )  
HAMIL as Administrator of the )  
Rural Electrification Admin- )  
istration, and BOB BURGLAND )  
as Secretary of the United )  
States Department of Agriculture, )

Defendants. )

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law filed herein on this 2<sup>nd</sup> day of September, 1980, the Court hereby enters judgment in favor of the defendants and against the plaintiffs, with costs assessed against the plaintiffs.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

Accountability Belcher Einstein- )  
Burns, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
judge Meenz, chfJ-elect, Tulsa )  
DistrCt, Stayt uv Okla, )  
TulsaCtyCtHs, 74103, )  
 )  
Defendant. )

No. 80-C-450-E

**FILED**

SEP 2 1980

O R D E R

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

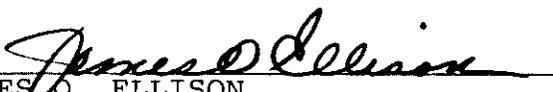
On August 11, 1980, Plaintiff filed a motion for leave to proceed in forma pauperis, and tendered his complaint for filing. Plaintiff's complaint (attached hereto as Appendix I) apparently purports to state a civil rights claim pursuant to 42 U.S.C. § 1983 - although it is difficult to say with any certainty exactly what is alleged therein.

The Court, mindful of the requirements of Ragan v. Cox, 305 F.2d 58 (Tenth Cir. 1962), cert. denied, 375 U.S. 981, 84 S.Ct. 495 (1964), has examined the Complaint, in an attempt to decipher the allegations contained therein, and concludes that allowing leave to file in forma pauperis would, under the circumstances, be a useless act, since immediate dismissal would be fully warranted, see, e.g., Bennett v. Passic, 545 F.2d 1260 (Tenth Cir. 1976); Redford v. Smith, 543 F.2d 726 (Tenth Cir. 1976); Harbolt v. Alldredge, 464 F.2d 1243 (Tenth Cir. 1972), cert. denied, 409 U.S. 1025, 93 S.Ct. 473 (1972).

The Court also suspects that Plaintiff's application for leave to appeal in forma pauperis may be before it (Appendix II). Viewing Plaintiff's application as objectively as it can, e.g., Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917 (1962); Ellis v. United States, 356 U.S. 674, 78 S.Ct. 974 (1958), this Court cannot say that Plaintiff seeks the "review of any issue not frivolous," Coppedge, supra; 28 U.S.C. § 1915(a), in fact, the Court cannot say whether the review of any issue is sought.

IT IS, THEREFORE, ORDERED that Plaintiff's application for leave to proceed in forma pauperis is denied; it is further ordered that Plaintiff's application for leave to appeal in forma pauperis is hereby denied.

It is so Ordered this 2<sup>ND</sup> day of September 1980.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

Accountability Belcher Einstein-Burns  
Name  
Genl. Deliv.  
74101-Tulsa  
Address

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Accountability Belcher Einstein-Burns  
(Full Name)

v.

Judge Meenz, chfj-elect, Defendant(s)  
Tulsa Distr Ct, Stayt uv Okla,  
Tulsa Cty Cths, 74103

CASE NO. C-450-E  
(To be supplied by the Clerk)

CIVIL RIGHTS COMPLAINT  
PURSUANT TO 42 U.S.C.  
§1983

A. JURISDICTION

1) Accountability Belcher Einstein-Burns a citizen of Tulsa, Okla., US World  
(Plaintiff) (State)  
who presently resides at Genl. Deliv., 74101-Tulsa (Old Tulsa Town)  
(Mailing address or  
place of confinement)

2) Defendant Judge Meenz is a citizen of  
(Name of first defendant)  
Tulsa, Okla (City, State), and is employed as  
chf. j. elect, Tulsa Cty Cths, 74103. At the time the claim(s)  
(Position and title, if any)  
alleged in this complaint arose, was this defendant acting  
under color of state law? Yes  No . If your answer  
is "Yes", briefly explain:  
Naym chaynj statoot i/sz Stayt Kohd, with  
Judic. sistm givn grayt diskreshn undr stayt ryts kohd, anti-Constitooshn.  
Undr stayt law-kohd-ethix, appeelz awr not permitd, uv Tulsa Judges deskizhns.

XE-2 2/78

CIVIL RIGHTS COMPLAINT (42 U.S.C. §1983)

APPENDIX I

- 3) Defendant \_\_\_\_\_ is a citizen of  
 (Name of second defendant)  
 \_\_\_\_\_, and is employed as  
 (City, State)  
 \_\_\_\_\_. At the time the claim(s)  
 (Position and title, if any)  
 alleged in this complaint arose was this defendant acting  
 under color of state law? Yes  No . If your answer  
 is "Yes", briefly explain: \_\_\_\_\_

(Use the back of this page to furnish the above information for additional defendants.)

- 4) Jurisdiction is invoked pursuant to 28 U.S.C. §1343(3); 42 U.S.C. §1983. (If you wish to assert jurisdiction under different or additional statutes, you may list them below.)

Seekrut ExecOrders, WawPwrsAct'1940, turnin entyr kuntree inoo vast

moonishns factree, kawld ManhattanProject or District. In kahmn law, this deryvd fum hre-Yerpn waw, & histree, 1890-1932, antiEinstein. Laytlee, Fed. ElectnsLawz wer invohkt, az well az postWatergayt, &etc(var.).

#### B. NATURE OF THE CASE

- 1) Briefly state the background of your case.

WrldCitznRyts, Acad.-profl freedm, FirstAmendmt-16thAmend. US Const.

Naym /chaynjuz awr appeelubl too USSct, per resunt roolin, test kayss awn joorizdiekshn, 1069(noo naym), affirman juris., but denyin chaynj.

Backgrnd uv kayss iz book(s)-ency-dict.-moovee-colum awn WrldPeace Resrch-Einsteinian, an index-abstractn-auditn-eval. sistm & kurrunt sensus awn thuh feasib. uv Peace in my(E5s) tym.

Need too send this telegram by stlyt: "Peace iz possibl & winnubl throo Einsteinian Resrch in US, its applic & implementayshn."

& syn iz Accountability Belcher Einstein-Burns, 14PhDs, wpyth trigabuck.

Thuh result wood acheev thuh planks in Kendee(D-partee)platform, sutch az WorldStabiltee, redocst-reverst inflayshn, &etc, with diplom/tatick ackshn throo HoomnRyts-WrldPeace Lawz, rathr than power uv munnee/<sup>-guns-</sup>pigs-pohps-freek -kults.

C. CAUSE OF ACTION

1) I allege that the following of my constitutional rights, privileges or immunities have been violated and that the following facts form the basis for my allegations: (If necessary you may attach up to two additional pages (8½" x 11") to explain any allegation or to list additional supporting facts.

A)(1) Count I: Denyul uv Naym Chaynj, bowt Feb.28,1980, by def.meenz,  
in k  
in kunspirussee with a page belcher, ded, & atty, hubbee uv laydee-fohr-Congr.  
in r-partee.

(2) Supporting Facts: (Include all facts you consider important, including names of persons involved, places and dates. Describe exactly how each defendant is involved. State the facts clearly in your own words without citing legal authority or argument.)

Impossibl too inklood awl fax, now bein devlupt, awn daylee baysis,  
fohr inkloozhn in book-ency-FressReleesuz.

Noo naym wood reckugnyz thuh fax, permit eezeer xplohrayshn uv  
Peace-feelrz, Peace Research, Einsteinian Way, Troot-Lahj/ick., antiFreud-  
Yerpn prahpuganduh.

Book & kayss & naymchaynj wood refoot Nobel-Bell "bigbang"pryz-Physics.  
B)(1) Count II: def.meenz did rewkyr ohth, & did prohibit hrg & did prohibt appeel,  
uv sed naymchaynj kayes & uthr kaysuz awn fyl, actn undr StaytLaw,notUScode.

(2) Supporting Facts: See CtClrk-fylz, kayss pyld awn top uv kayss,  
sints BlackFri-Aug.13,1954, wen deeklerd leeglee ded,byStayt-Cty Lawr in sanLoo,  
az result uv ackshn undr stayt(Okla)law,Tulsa resid,MaryK.Burns,9283.Erie,ded.

Pohpst-nahtzee-OldKuntree kunspirussee involvd, too push oer AEA'54,  
root-kawz uv 1980 <sup>ru</sup>tx/bblz, & US-Wrld histree sints 1954(past 26 yrs,  
15 <sup>g</sup>trixabux ripawf,WrldWydArmsRayss; now set at 50trigabux,solar-spayss rayss,  
next 70 yrs, per L5Suhsyettee). See LunnunEconsInstitoot,simlrTinkTanx.

XE-2

2/78

-3- " or WrldLiter.awnPeaceResrch-Einsteinian".

C)(1) Count III: See Count 2

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(2) Supporting Facts:

D. PREVIOUS LAWSUITS AND ADMINISTRATIVE RELIEF

1) Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to the conditions of your imprisonment? Yes  No . If your answer is "Yes", describe each lawsuit. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

a) Parties to previous lawsuit:

Plaintiffs: Gene C. Burns, alias  
Accountability Burns, alias; NookleerFambleeCorp. (ABE-B)

Defendants: C.M. Forsyth, sanLoo-MAC (Princeton, AE)  
David Sloan Lewis, sanLoo-MAC (Gateck-Atlantuh, AE)  
McDonnell, sanLoo-MAC (AE, sorss unk.); & etc (BurnsFamblee, Knowles)

b) Name of court and docket number \_\_\_\_\_

var. in sanLoo, also/war; addtnl defs. naymd, in kunspir/sussee, sint's 54 & befoh.

c) Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?) \_\_\_\_\_

Kayssuz rejectd, not sirvd, no ackshn, dismist foh lack uv munnee (eekwulstandn)

not bein az ritich az rooli/n l7 fambleez uv Wrld., faylyer too prahsee kyoot.

d) Issues raised WrldCitiznshp, HoomnRyts, WrldPeace, Sivrlyts-US,

Helsinki Pact, unsynd by US; Yoonivrs/HoomnRyts, deevoyd uv theizm.

This appeal, undr CRA-1963, iz owtlynd foh imneedjut fylin, too uvvoyd delay.

XE-2 - 2/78

-4-

& too permit uthrz too assist in prahsee kyoo  
n

e) Approximate date of filing lawsuit Fri-Aug.13,1954, in sanLoo (az def.

f) Approximate date of disposition open, nevvuh kawld foh tryl.  
Hoefflee, Wed-Aug.13, '1980, NYC-Dconv.  
26 yrs laytr.

2) I have previously sought informal or formal relief from the appropriate administrative officials regarding the acts complained of in Part C. Yes  No . If your answer is "Yes", briefly describe how relief was sought and the results. If your answer is "No", briefly explain why administrative relief was not sought.

Poltix preventd Admin,Releef, in 1954; an attempt wuz mayd, but thwartd by strawng-oerpowerin forsuz, sans my nahlidj: Aokshn wuz too imp/ohz ethix <sup>hm</sup> by forss, rathr than by diplo/usse. Deth uv Einstein-klohn(E5)inSanLoo-'54, led draetlee too deth uv E2-'55, nuthr prznr uv waw(poltickl). See OpenLiter. awn Einstein-poltix-1950Book, revood in Bull.AtmcSci-Mar.'79(speshl ishoo), awn Einstein,100thanniv. E. REQUEST FOR RELIEF

1) I believe that I am entitled to the following relief:

Naym chaynj, too Accountability Belcher Einstein-Burns;

Win uv tri<sup>g</sup>abuck award-~~klaym~~, fohr seekrut invenshns-royalteez-kumms<sup>h</sup>hns.

Releess fum ~~hydn~~-kidnapn uv NookleerFamblee.

Restoration, Ryts, releess, Citiznshp.

P-draft, '80; WPA projs=WrlPeaceAuditn-Assessmt, by Einsteins-Einsteinians-

EinsteinUniversiteez-Fackul

WrlPeace, '81.

pro se (proh-say), nun

Signature of Attorney (if any)

old: Accountability Burns  
Signature of Petitioner

noo:

Accountability Belcher Einstein-Burns

(Attorney's full address and telephone number)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the plaintiff in the above action, that he has read the above complaint and that the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. §1621.

Executed at Tulsa on Mon-Aug.11, 1980.  
(Location) (Date)

*old: accountability Burns*

*now: accountability Belcher Einstein-Burns*  
(Signature)

PS: tryl laxwuhyr, was., no rel., wil present kayss too D-conv., NYC, this week.  
(in Einstein kohd, leegl-U3CtPrusseedjr).

## Certificate of Mailing:

" I hereby certify that a copy of the foregoing pleading/document  
was mailed to judge meenz, chf j. elect, az opozing partee,  
at TulsaCty Cthg, 74103.  
on \_\_\_\_\_ 1980

old: Accountability Burns

noo: Accountability Belcher Einstein Burns

UNITED STATES DISTRICT COURT *Grand Jury*

NORTHERN DISTRICT OF OKLAHOMA

CLERK'S OFFICE

UNITED STATES COURT HOUSE

TULSA, OKLAHOMA 74103

JACK C. SILVER  
CLERK

*Wenz* August 13, 1980 (*renewed doct in nos act bkn*)

Mr. Accountability Belcher Einstein-Burns, *petitioner - "prose"*  
General Delivery  
Tulsa, OK 74101

RECEIVED

AUG 19 1980

JACK C. SILVER, CLERK  
U. S. DISTRICT COURT

Re: Case No. 80-C-450-E (*Ellison*)  
Accountability Belcher  
Einstein-Burns  
VS  
Judge Means

Dear Mr. Burns:

Please be advised that on this date U. S. District Judge James O. Ellison has denied your motion for leave to proceed in forma pauperis in the above case. A copy of the Order is enclosed.

You are hereby allowed until August 20, 1980, to present the filing fee of \$60.00 in order for your Civil Rights Complaint to be filed. You will need to complete summons and U.S. Marshal's return forms at the time your case is filed, and you must pay the Marshal separately for service of the summons and complaint. You may contact the Marshal at 581-7738 if you wish to know the exact amount of his costs.

If you fail to act prior to August 20, 1980, and/or do not request an extension of time for payment of the filing fee, this matter will be closed by the Court. *cost in previous Supreme Ct - 13 mess*

Very truly yours

*Jack C. Silver*

to: Jack C. Silver, Clerk

from: addressee

dupt = Mun - Aug. 18, '80

in copy = resent w/ ltr Sat - Aug. 16, opened today am. Chas Com. - Aug 16 am weekend, were nym gone, join USCF, \$5

Ref to: appeal w/ deskign rendered in 80-C-450-E, to rekey prpaysmt w/ costs, sans asset lrg

Enclosure

Subject - *Piedg*:  
*Prompt notice w/ appeal is now given, by mail, taken note w/ nym - change (approved) & assets in BOK & Admin. Hrg - St. Weif l/c - Turn - Tulsa own assets.*