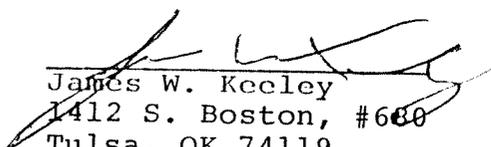




  
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(918) 742-5864  
ATTORNEY FOR PLAINTIFF

FILED

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

JUN 30 1988

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GLENDA KAY ICE, Administratrix )  
 with Will Annexed of the Estate )  
 of Robert Max Smith, Deceased, )  
 )  
 Defendant. )

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

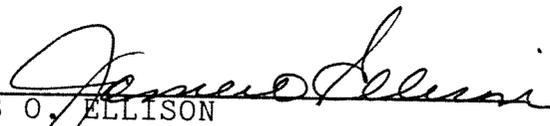
No. 87-C-269-E

JUDGMENT

This action came on for hearing before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff United States of America take nothing from the Defendant Glenda Kay Ice, Administratrix with Will Annexed of the Estate of Robert Max Smith, Deceased, that the action be dismissed on the merits, and that the Defendant Glenda Kay Ice recover of the Plaintiff United States of America her costs of action.

DATED at Tulsa, Oklahoma this 29th day of June, 1988.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

FILED

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

JUN 30 1988

RICHARD LEE ASHER,  
Plaintiff,

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

vs.

No. 87-C-219 E

BULLET EXPRESS, INC., a New  
York corporation, and WILLIAM  
FITZGERALD, INSURANCE  
COMPANY OF THE STATE OF  
PENNSYLVANIA, a Member of the  
American Home & National Union  
Insurance Group, a Pennsylvania  
Corporation, and SEVEN-WAY LEASING,  
INC., a Missouri Corporation,  
Defendants.

ORDER OF DISMISSAL WITH PREJUDICE

Upon Application of the parties, and for good cause shown, the Court finds that the above styled and numbered cause of action should be dismissed with prejudice to refiling in the future.

IT IS SO ORDERED this 29<sup>th</sup> day of June, 1988.

S/ JAMES O. BLISON

UNITED STATES DISTRICT JUDGE

JLR

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

FILED

JUN 30 1988

AIRLINES REPORTING CORPORATION, )  
  )  
                                  Plaintiff, )  
  )  
vs.  )  
  )  
KENNETH M. SOUTHARD t/a                  )  
OMNI TRAVEL, ET AL.,                    )  
  )  
                                  Defendants. )

No. 86-C-845-E

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

JUDGMENT

This action came on for trial before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff Airlines Reporting recover of the Defendants Kenneth M. Southard and Elizabeth M. Southard the sum of \$11,580.79, with interest thereon at the rate of 7.59 per cent as provided by law, and his costs of action.

DATED at Tulsa, Oklahoma this 29<sup>th</sup> day of June, 1988.

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





preparation work, the sum of \$22,170.50 actual damages and \$7,500.00 punitive damages for the sum total of \$29,670.50 with the interest thereon at the rate of <sup>7.59</sup>~~7.20~~ percent as provided by law, and costs of this action.

IT IS FURTHER ORDERED that the Plaintiff Campbell Enterprises recover of the Defendant Arnold Burleson Properties, Inc. for the utilities claim the sum of \$64,057.66, with interest thereon at the rate of <sup>7.59</sup>~~7.20~~ percent as provided by law, and costs of this action. ORDERED this 30<sup>th</sup> day of June, 1988.

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

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

FILED  
JUN 30 1988

ACORN, et al,

Plaintiffs,

-vs-

CITY OF TULSA, et al,

Defendants.

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

No. 83-C-835-E  
(N.D. Okla.)

No. 84-2606  
(10th Cir.)

CONSENT JUDGMENT

This matter was tried before the court on November 1, 1983. On November 16, 1983, judgment was granted to defendants, Jim Inhofe and Hugh McKnight. On October 18, 1984, by Memorandum Opinion and Order, judgment was granted to the defendant, City of Tulsa, on the merits. An appeal was lodged in the Tenth Circuit Court of Appeals in Case No. 84-2606, and on December 15, 1987, the Court of Appeals reversed in part and affirmed in part the decision of the United States District Court for the Northern District of Oklahoma. The parties agree that only the issues of damages, attorneys' fees and costs are ripe for adjudication. The parties also understand and agree that this Consent Judgment does not constitute an admission of liability, fault or guilt on the part of the defendants.

The parties stipulate and agree to the entry of the following judgment:

1. It is hereby adjudged that Acorn, a non-profit Arkansas corporation; Jeff Murray, an individual; and Zak Pollett, an individual; plaintiffs, and Stephen Bachmann, Michael D. Hilsabeck, and Green & Josefiak, P.C., attorneys for the plaintiffs, are awarded jointly judgment in the amount of

Twenty Thousand and 00/100 Dollars (\$20,000.00), payable upon entry of this Consent Judgment, and representing all of plaintiffs' damages, costs and attorneys' fees.

2. This Consent Judgment shall include and cover all issues of fact and law raised by the Complaint and all responsive pleadings and defenses raised by the defendants.

3. This Consent Judgment shall act as a final judgment as to all issues raised by the parties and shall be a full and complete final judgment.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1988.

S/ JAMES O. ELLISON

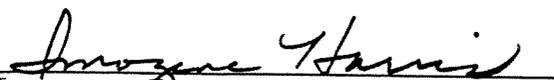
\_\_\_\_\_  
JAMES O. ELLISON  
United States District Judge

We, the undersigned, Imogene Harris, on behalf of the defendants, and Stephen Bachmann, on behalf of all plaintiffs and all attorneys for the plaintiffs, hereby consent to the entry of the foregoing Consent Judgment as a final judgment herein.

CITY OF TULSA, OKLAHOMA,  
a municipal corporation,

NEAL E. McNEILL,  
City Attorney

  
\_\_\_\_\_  
Stephen Bachmann  
Attorney for Plaintiffs  
and Plaintiffs' attorneys

By   
\_\_\_\_\_  
Imogene Harris, OBA #3894  
Assistant City Attorney  
200 Civic Center, Room 316  
Tulsa, Oklahoma 74103  
(918) 592-7717

FILED

JUN 30 1988

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

KIMBERLY K. MARRS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

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

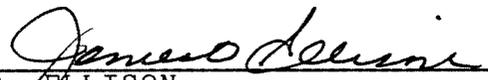
No. 86-C-483-E

JUDGMENT

This action came on for trial before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff Kimberly K. Marrs take nothing from the Defendant The United States of America, that the action be dismissed on the merits, and that each side shall bear its own costs and attorney fees.

DATED at Tulsa, Oklahoma this 29<sup>th</sup> day of June, 1988.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

53

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

JUN 30 1988

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

LARRY DEAN JESZENKA, )  
 )  
 Petitioner, )  
 )  
 vs. ) No. 87-C-963-C  
 )  
 U. S. PAROLE COMMISSION )  
 c/o Newt Scott, )  
 )  
 Respondents. )

O R D E R

Now before the Court for its consideration is the objection of the petitioner to the Findings and Recommendations of the U. S. Magistrate, the latter filed on December 29, 1987.

After reviewing the application for habeas corpus relief filed by petitioner, the Magistrate concluded that petitioner could make no rational argument on the law or facts in support of his claim for relief, and that therefore his claim was frivolous. The Magistrate recommended that the petition for relief be denied and that the case be dismissed with prejudice.

On January 13, 1988, the petitioner filed his objection to the Magistrate's Recommendation, simply asserting that it was erroneous. On May 23, 1988, the petitioner filed a motion to dismiss his petition for relief without prejudice. On June 15, 1988, a letter from the petitioner to the Court was filed with leave of Court, in which petitioner again requests that his petition be dismissed without prejudice. He states that he has

filed a 42 U.S.C. Sec.1983 action based upon many of the same facts, and that there is great "overlap" between the two cases. The petitioner may be under the impression that a dismissal with prejudice of his habeas corpus petition will bar his civil rights action; this is not the case, however. The two mechanisms are distinct and are directed toward different relief. Schuemann v. Colorado State Bd. of Adult Parole, 624 F.2d 172, 173 n.1 (10th Cir. 1980). The fact that petitioner was unable to state a claim for habeas corpus relief does not mean he will be unable to state a claim under 42 U.S.C. Sec.1983.

The Court has independently reviewed the pleadings and briefs of the parties and the case file and finds that the Findings and Recommendations of the Magistrate are reasonable under the circumstances of this case and consistent with applicable law.

It is the Order of the Court that the petition for writ of habeas corpus filed by the petitioner is hereby DENIED, and that the case is hereby dismissed with prejudice.

IT IS SO ORDERED this 30<sup>th</sup> day of June, 1988.

  
H. DALE COOK  
United States District Judge

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

FILED

JUN 30 1988

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

REPUBLIC FINANCIAL CORPORATION,  
an Oklahoma corporation,

Debtor.

P. A. HACKLER and DELORES HACKLER,  
KENNETH D. and MARY L. MOORE, and  
KEMAL SAIED and CONSTANCE SAIED,

Appellants,

vs.

R. DOBIE LANGENKAMP, Successor  
Trustee,

Appellee.

REPUBLIC TRUST & SAVINGS, d/b/a  
Western Trust and Savings Company,

Debtor.

C. A. CULP, JULIA CULP, and CULP  
DISTRIBUTING COMPANY; HATTIE LOU  
GESIN; and LEROY DENNIS and JANET  
DENNIS,

Appellants,

vs.

R. DOBIE LANGENKAMP, Successor  
Trustee,

Appellee.

No. 87-C-616-C

No. 87-C-618-C

No. 87-C-619-C

No. 87-C-617-C

No. 87-C-620-C

No. 87-C-692-C

(Consolidated Under  
No. 87-C-616-C)

O R D E R

Now before the Court for its consideration are the consolidated appeals filed by appellants P. A. Hackler and Delores Hackler, C. A. Culp, Julia Culp and Culp Distributing Company, Kenneth D. and Mary L. Moore, Kemal Saied and Constance Saied,

Hattie Lou Gesin, and LeRoy Dennis and Janet Dennis (collectively the appellants) from the judgments rendered against them and in favor of appellee R. Dobie Langenkamp, Successor Trustee of the Estates of Republic Financial Corporation (RFC) and Republic Trust & Savings Co. (RTS) (Successor Trustee), based on a finding that the monies received by the appellants from Republic Financial Corporation or Republic Trust & Savings Co. within 90 days of the filing of bankruptcy by these entities, were avoidable preferences pursuant to 11 U.S.C. §547, after a consolidated non-jury trial conducted before the Honorable Glenn E. Clark, United States Bankruptcy Judge (sitting by designation), on June 1-5, 1987.

The appellants raise five separate arguments on appeal, which shall be addressed in turn.

I.

Initially, the appellants contend that they were improperly denied a jury trial in the proceedings below. The United States Court of Appeals for the Tenth Circuit has previously addressed this issue, stating:

[t]he right to a jury trial in bankruptcy proceedings is purely statutory. There is no constitutional right to such trial as bankruptcy proceedings are equitable in nature.

In re Beery, 680 F.2d 705, 710 (10th Cir.), cert. denied, 459 U.S. 1037 (1982) (citing Katchen v. Landy, 382 U.S. 323 (1966)). However, inasmuch as the Beery decision was not rendered under the presently applicable 1984 Bankruptcy Amendments and Federal

Judgeship Act, this Court will address the issue in view of recent authority.

The relevant statutory provision is 28 U.S.C. §1411(a) which provides that the bankruptcy statutes do not affect the right of trial by jury that one may have regarding a personal injury or wrongful death tort claim. Appellants do not contend that the preference actions in question fall within this provision, and therefore effectively concede that there is at present no statutory right to jury trial available to them. The appellants contend, however, that the Seventh Amendment to the United States Constitution provides a right to a jury trial even within the bankruptcy universe. The decision in Beery, supra, did not specifically address the issue of jury trials in preference actions. There presently exists conflicting authority on the issue.

One view is that when a preference action seeks only monetary damages, it constitutes what has traditionally been characterized as an action at law, as opposed to an equitable cause of action. Under the Seventh Amendment, one is entitled to a jury trial in an action at law. See Ross v. Bernhard, 396 U.S. 531 (1970). The other view is that all bankruptcy proceedings are inherently equitable, and that thus no jury trial right exists. The 1984 Amendments divide bankruptcy jurisdiction into "core" and "non-core" proceedings. Proceedings dealing with preferences and fraudulent conveyances are denominated as "core" proceedings pursuant to 28 U.S.C. §157(b)(2)(F) and 28 U.S.C. §157(b)(2)(H), respectively. In essence, courts who take this view hold that

even a traditional legal action, by being termed a core proceeding, undergoes a conversion into an equitable proceeding to which the right to jury trial does not attach. The two views are summarized in In re Adams, Browning & Bates, Ltd., 70 B.R. 490 (Bankr. E.D.N.Y. 1987).

Upon review, this Court finds that the greater weight of support in existing authority favors the second view. In Katchen v. Landy, 382 U.S. 323 (1966), the Supreme Court stated:

"So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

Id. at 337 (quoting Barton v. Barbour, 104 U.S. (14 Otto) 126, 134 (1881)) (emphasis added). The Court also noted:

The Bankruptcy Act, passed pursuant to the power given to Congress by Art.I, §8 of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro rata share of the res.

Id. at 336 (emphasis added). This Court is aware of Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932), which contains the statement that "[s]uits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it." Id. at 94-95. In Katchen v. Landy, the Supreme Court cited Schoenthal for the proposition that a creditor "might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding". Katchen, 382 U.S. at 336, (i.e., by making a claim, one submitted oneself

to the bankruptcy court's jurisdiction under the old summary/plenary jurisdiction dichotomy.) This issue has been resolved, in those decisions which this Court views as better reasoned, by concluding that Congress has made the decision to name preference actions as "core" proceedings, thus performing the constitutional conversion from legal claim to equitable proceeding approved in Katchen. See In re Harbour, 840 F.2d 1165, 1178 (4th Cir. 1988) (core proceeding assumes historical equitable posture of all such bankruptcy proceedings); In re Chase & Sanborn Corp., 835 F.2d 1341, 1349 (11th Cir. 1988) (core proceeding is inherently equitable in nature); In re Southern Industrial Banking Corp., 66 B.R. 370, 374-75 (Bankr. E.D.Tenn.) (statement in Schoenthal that preference actions are not part of bankruptcy proceedings, "is no longer true and there is implicit congressional intent that preference actions be tried without a jury"). This Court has concluded that the appellants had no constitutional right to jury trial in these actions, and that the judgments should not be reversed on that basis.

## II

In 1984, Congress amended Title 11 of the United States Code by enacting the 1984 Bankruptcy Amendments and Federal Judgeship Act (1984 Act). Section 553(a) of the 1984 Act provides:

Except as otherwise provided in this Section the amendments made by this title shall become effective to cases filed 90 days after the date of enactment of this Act.

(emphasis added). The date of enactment was July 10, 1984. The ninetieth day after this date -- October 8, 1984 -- was a

holiday; therefore, the effective date of the amendments was October 9, 1984. The pre-1984 Act version of 11 U.S.C. §547(c)(2) provided as follows:

(c) The trustee may not avoid under this section [§547] a transfer --

(2) to the extent that such transfer was --

(A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made not later than 45 days after such debt was incurred;

(C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(D) made according to ordinary business terms;

The parties stipulate that defendants have satisfied §547(c)(2)(A), (C) and (D). However, the 1984 Act repealed §547(c)(2)(B), thereby doing away with the 45-day rule. The parties do not dispute that the defendants did not satisfy the 45-day rule. However, the defendants argue that the term "cases" in Section 553(a) of the 1984 Act does not merely refer to the filing of a bankruptcy petition, but "all actions, suits or controversies arising in or related to a case under Title 11 -- the total body of litigation related to a bankruptcy proceeding." (Appellants' Brief at 22). This argument was addressed in In re Chase & Sanborn Corp., 51 B.R. 736 (Bankr. S.D.Fla. 1985) as follows:

Defendant has argued that the effective date provision quoted above should be applied as though Congress had specified that the amendment is applicable to "adversary proceedings" filed on or after October 8, 1984 rather than bankruptcy "cases" filed after that date. This argument presupposes that Congress was

unaware of the distinct meaning each of these terms has acquired in the bankruptcy law since the 1973 adoption of the bankruptcy rules, which first introduced adversary proceedings. I reject this contention.

It is apparent from a review of the 1984 Act that the two terms are used with precision in many other provisions where the context makes it clear that the terms were intended to have their customary meaning. A similar effective date provision was contained in the Bankruptcy Reform Act of 1978, Pub.L. 94-598 §403(a), which also employed the word "case" and provided that all matters and proceedings in or relating to any such "case" would be determined under the former Act as if the 1978 amendment had not been enacted. Without dissent, that provision has been applied literally, giving the customary bankruptcy meaning to the term "case". Nicholson v. First Investment Co., 705 F.2d 410, 411 n.1 (11th Cir. 1983). There is no reason to assume less precision in the selection of the same term for the same purpose by Congress six years later. I conclude that the former 45-day provision in §547(c)(2) is applicable for the purposes of this case and, therefore this adversary proceeding.

Id. at 738. See also In re Amarex, Inc., 74 B.R. 378, 382 (Bankr. W.D.Okla. 1987). These adversary proceedings were filed in 1985. Therefore, this Court concludes that the 45-day rule applies, as the lower court found.

### III

The appellants contend that they were denied due process in that they constitute creditors of the estate and should have received notice so as to participate in the proceedings leading to confirmation of the reorganization plan. The Bankruptcy Code does recognize a claim arising from the recovery of avoided preferences, which are treated as pre-petition claims. 11 U.S.C. §502(h).

The appellants place principal reliance upon Reliable Elec. Co., Inc. v. Olson Const. Co., 726 F.2d 620 (10th Cir. 1984). In

Reliable, the appellate court held that the holder of a pre-petition unsecured claim was denied due process by not receiving adequate notice of the confirmation hearing. The appellate court affirmed the holding of the lower court that the creditor's claim was therefore not subject to the confirmed plan of reorganization.

The identical argument, including reliance upon the Reliable decision, was presented to the court in In re Southern Indus. Banking Corp., 66 B.R. 349 (Bankr. E.D.Tenn. 1986). The court stated:

[the claim at issue in Reliable differs] materially from the rights defendants assert as claims. None of the creditors in those cases asserted a claim contingent upon, or arising as a result of, the exercise of an avoidance power in bankruptcy. Instead, each of the four cases involved an identifiable creditor with a claim actually arising prepetition.

"Claim" is broadly defined in §101(4) to assure the debtor a fresh start. See H.R.Rep. No. 595, 95th Cong., 1st Sess. 309, reprinted in 1978 U.S.Code Cong. & Adm.News 5787, 5963, 6266. Congress wanted to assure that a debtor be able to obtain "the broadest possible relief in the bankruptcy court." Id. However, in a reorganization case involving an application for the appointment of a legal representative to represent the interests of individuals who may manifest asbestos-related diseases in the future, in denying the application, the court observed that: "It is not true that any conceivable claim is contingent." In re UNR Industries, Inc., 29 B.R. 741, 745 (N.D.Ill. 1983), appeal dismissed, 725 F.2d 1111 (7th Cir. 1984).

Sustaining defendant's contention that they are creditors within the scope of §101(9)(A) would mean that prepetition transferees of transfers avoidable under §§544, 545, 547, 548, and 553 are entitled to notice and, presumably, to all the rights available to creditors in bankruptcy. Formal notice of bankruptcy proceedings to potential preference defendants has never been customary and perhaps never considered previous to this case. This court is confident that neither Congress nor the Bankruptcy Rules Committee

envisioned formal notice of bankruptcy proceedings to transferees of avoidable transfers or their participation in reorganization proceedings until disgorgement of the avoidable transfer. The defendants' prospective rights to file claims, §502(h), are not contingent claims within the circumscription of §101(4)(A). Hence, the defendants are not "creditors" within the scope of §101(9)(A). Further, defendants do not qualify as creditors under §101(9)(B) because to date there has been no recovery of property from them pursuant to §550. See §502(h) (a claim arising from the recovery or property under §550 shall be allowed or disallowed as if such claim had arisen prepetition).

Id. at 361. (footnote omitted). This Court agrees with the analysis above. The recent decision of Sheftelman v. Metals Corp., 839 F.2d 1383 (10th Cir. 1987) is not to the contrary. Again, Sheftelman did not involve preference defendants, but bondholders who held existing pre-petition claims. Preference defendants may not withhold their property, forcing the trustee to initiate a recovery action, while maintaining that they are contingent creditors who deserve notice of the confirmation action. A preference defendant's claim only arises upon recovery of the property. Thus, under appellants' theory, reorganization plans could only be confirmed after the conclusion of all preference actions. Such delay is contrary to the purpose of bankruptcy proceedings. Cf. In re Amarex, 74 B.R. 378, 381 (Bankr. W.D. Okla. 1987). Accordingly, the decision of the bankruptcy court will be affirmed on this basis.

#### IV

The appellants contend that the trial court erred in two findings: (1) that the debtors were insolvent on the dates of the transfers at issue and (2) that appellants received more than they would have under a Chapter 7 liquidation.

Under 11 U.S.C. §547(b)(3) the trustee must prove by a preponderance of the evidence that the challenged transfers were made while the debtor was insolvent. Under 11 U.S.C. §547(b)(5), the trustee must show by the same standard that the transfers enabled the [appellants] to receive more than they would receive if the bankruptcy case were a case under Chapter 7; if the transfer had not been made; and if the appellants had received payments of the debts as provided by the Code. (Appellants' Brief at 45). The trustee has the burden of proving these elements pursuant to 11 U.S.C. §547(g).

Title 11 U.S.C. §547(f) provides that the debtor is presumed to have been insolvent on and during the ninety days immediately preceding the filing of the bankruptcy petition. At the conclusion of the trial, the bankruptcy court found -- and the trustee does not dispute -- that the presumption of insolvency had been rebutted.

Determination of solvency is a question of fact, subject to the clearly erroneous standard. Clay v. Traders Bank of Kansas City, 708 F.2d 1347, 1350 (8th Cir. 1983). See also In re Mullet, 817 F.2d 677, 678 (10th Cir. 1987).

A finding of fact may be deemed "clearly erroneous" only if the finding is without factual support in the record, or if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

Colon-Sanchez v. Marsh, 733 F.2d 78, 81 (10th Cir.) cert. denied, 469 U.S. 855 (1984) (citations omitted).

The United States Supreme Court has stated that

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.

. . .

Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985)  
(citations omitted).

The appellants contend that the bankruptcy court admitted incompetent and irrelevant evidence on the insolvency issue. Their argument is that the successor trustee employed a theory of "retrojection" in its presentation of evidence. Retrojection involves the use of a subsequent balance sheet in order to demonstrate insolvency on some date prior to the date of the balance sheet. See, e.g. In re Kaylor Equip. and Rental, Inc., 56 B.R. 58 (Bankr. E.D.Tenn. 1985). The successor trustee denies that it employed retrojection theory, but rather that it introduced evidence that the debtors were insolvent on each day of the 90-day period.

The Court finds that the successor trustee introduced exhaustive evidence by an established accounting firm as to daily balance sheets for every day of the 90-day period. This evidence was bolstered by testimony of Harold Madigan, an independent consultant in the area of valuation of loan portfolios. (Loans receivable were the principal assets of the debtors). Contrary

evidence introduced by the appellants was found by the bankruptcy court to not be credible. Under the applicable standard, this Court cannot state that the bankruptcy court's finding of insolvency was clearly erroneous.

Regarding 11 U.S.C. §547(b)(5), the appellants place principal reliance upon In re Tenna Corp., 801 F.2d 819 (6th Cir. 1986). They argue that "the trustee must create a hypothetical Chapter 7 liquidating estate as of the filing date of the bankruptcy case and demonstrate the defendant's standing as a distributor of the estate," (Appellants' Brief at 53), which appellants assert was not done in the case at bar. Appellants focus their discussion of Tenna upon the necessity of creating a hypothetical Chapter 7 model. Actually, the Tenna court noted that "by definition, in any Chapter 11 proceeding a hypothetical liquidation must be done." Tenna, 801 F.2d at 821. Rather, the court was addressing "the narrow issue concerning the appropriate time for testing the preferential effect of a payment." Id. at 820 (emphasis added). The issue was critical in Tenna because during the Chapter 11 proceedings the debtor borrowed funds from two banks to continue its operation. As security for the loans, the bankruptcy court granted the banks super-priority liens on the debtor's property pursuant to 11 U.S.C. §364. Id. The bankruptcy court took into account the post-petition accumulated debt in making its §547(b)(5) determination. The Sixth Circuit Court of Appeals held this to be improper, ruling that the hypothetical liquidation must be made as of the date that the bankruptcy petition is filed.

In the case under review, the bankruptcy court found

that the evidence establishing the debtor's insolvency on the date of the filing of the bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendant received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

(Finding of Fact 32. Findings of Fact and Conclusion of Law in Saied) (emphasis added). This finding indicates that the bankruptcy court did make its §547(b)(5) determination as of the date the bankruptcy petition was filed. Nothing before this Court indicates that the bankruptcy court took account of post-petition debt, as Tenna condemns. This Court cannot conclude that the bankruptcy court's determination was erroneous.

V

Finally, the appellants argue that the transfers in question were contemporaneous exchanges for new value, and thus exempt from the avoiding powers of the trustee pursuant to 11 U.S.C. §547(c)(1) which provides as follows:

(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

With respect to the definition of "new value," §547(a)(2) of the 1978 Bankruptcy Code provides as follows:

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation;

Payment of long-term debt does not fall within this exception. See, e.g., In re Candor Diamond Corp., 44 B.R. 195 (Bankr. S.D.N.Y. 1984). The defendants' citation of In re George Rodman, Inc., 792 F.2d 125 (10th Cir. 1986) is inapposite. In Rodman the court held that a release of a materialman's lien upon an oil well in response to payment of a debt constituted "new value." The court specifically noted that Oklahoma law defines a lien as a property right. Id. at 128 n.7. Thrift certificates do not constitute property interests, but rather are evidence of underlying indebtedness. Accordingly, this argument is rejected.

It is the Order of the Court that the consolidated appeal of the appellants herein is hereby DENIED. The judgment of the bankruptcy court is hereby AFFIRMED in all respects.

IT IS SO ORDERED this 30<sup>th</sup> day of June, 1988.

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

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

FILED

JUN 30 1987

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

REPUBLIC FINANCIAL CORPORATION,	)	
an Oklahoma corporation,	)	
	)	
Debtor.	)	
	)	
P. A. HACKLER and DELORES HACKLER,	)	No. 87-C-616-C
KENNETH D. and MARY L. MOORE, and	)	No. 87-C-618-C
KEMAL SAIED and CONSTANCE SAIED,	)	No. 87-C-619-C
	)	
Appellants,	)	
vs.	)	
	)	
R. DOBIE LANGENKAMP, Successor	)	
Trustee,	)	
	)	
Appellee.	)	
	)	
REPUBLIC TRUST & SAVINGS, d/b/a	)	
Western Trust and Savings Company,	)	
	)	
Debtor.	)	
	)	
C. A. CULP, JULIA CULP, and CULP	)	No. 87-C-617-C
DISTRIBUTING COMPANY; HATTIE LOU	)	No. 87-C-620-C
GESIN; and LEROY DENNIS and JANET	)	No. 87-C-692-C
DENNIS,	)	
	)	
Appellants,	)	
vs.	)	
	)	
R. DOBIE LANGENKAMP, Successor	)	(Consolidated Under
Trustee,	)	<u>No. 87-C-616-C</u> )
	)	
Appellee.	)	

O R D E R

Now before the Court for its consideration are the consolidated appeals filed by appellants P. A. Hackler and Delores Hackler, C. A. Culp, Julia Culp and Culp Distributing Company, Kenneth D. and Mary L. Moore, Kemal Saied and Constance Saied,

Hattie Lou Gesin, and LeRoy Dennis and Janet Dennis (collectively the appellants) from the judgments rendered against them and in favor of appellee R. Dobie Langenkamp, Successor Trustee of the Estates of Republic Financial Corporation (RFC) and Republic Trust & Savings Co. (RTS) (Successor Trustee), based on a finding that the monies received by the appellants from Republic Financial Corporation or Republic Trust & Savings Co. within 90 days of the filing of bankruptcy by these entities, were avoidable preferences pursuant to 11 U.S.C. §547, after a consolidated non-jury trial conducted before the Honorable Glenn E. Clark, United States Bankruptcy Judge (sitting by designation), on June 1-5, 1987.

The appellants raise five separate arguments on appeal, which shall be addressed in turn.

I.

Initially, the appellants contend that they were improperly denied a jury trial in the proceedings below. The United States Court of Appeals for the Tenth Circuit has previously addressed this issue, stating:

[t]he right to a jury trial in bankruptcy proceedings is purely statutory. There is no constitutional right to such trial as bankruptcy proceedings are equitable in nature.

In re Beery, 680 F.2d 705, 710 (10th Cir.), cert. denied, 459 U.S. 1037 (1982) (citing Katchen v. Landy, 382 U.S. 323 (1966)). However, inasmuch as the Beery decision was not rendered under the presently applicable 1984 Bankruptcy Amendments and Federal

Judgeship Act, this Court will address the issue in view of recent authority.

The relevant statutory provision is 28 U.S.C. §1411(a) which provides that the bankruptcy statutes do not affect the right of trial by jury that one may have regarding a personal injury or wrongful death tort claim. Appellants do not contend that the preference actions in question fall within this provision, and therefore effectively concede that there is at present no statutory right to jury trial available to them. The appellants contend, however, that the Seventh Amendment to the United States Constitution provides a right to a jury trial even within the bankruptcy universe. The decision in Beery, supra, did not specifically address the issue of jury trials in preference actions. There presently exists conflicting authority on the issue.

One view is that when a preference action seeks only monetary damages, it constitutes what has traditionally been characterized as an action at law, as opposed to an equitable cause of action. Under the Seventh Amendment, one is entitled to a jury trial in an action at law. See Ross v. Bernhard, 396 U.S. 531 (1970). The other view is that all bankruptcy proceedings are inherently equitable, and that thus no jury trial right exists. The 1984 Amendments divide bankruptcy jurisdiction into "core" and "non-core" proceedings. Proceedings dealing with preferences and fraudulent conveyances are denominated as "core" proceedings pursuant to 28 U.S.C. §157(b)(2)(F) and 28 U.S.C. §157(b)(2)(H), respectively. In essence, courts who take this view hold that

even a traditional legal action, by being termed a core proceeding, undergoes a conversion into an equitable proceeding to which the right to jury trial does not attach. The two views are summarized in In re Adams, Browning & Bates, Ltd., 70 B.R. 490 (Bankr. E.D.N.Y. 1987).

Upon review, this Court finds that the greater weight of support in existing authority favors the second view. In Katchen v. Landy, 382 U.S. 323 (1966), the Supreme Court stated:

"So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

Id. at 337 (quoting Barton v. Barbour, 104 U.S. (14 Otto) 126, 134 (1881)) (emphasis added). The Court also noted:

The Bankruptcy Act, passed pursuant to the power given to Congress by Art.I, §8 of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro rata share of the res.

Id. at 336 (emphasis added). This Court is aware of Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932), which contains the statement that "[s]uits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it." Id. at 94-95. In Katchen v. Landy, the Supreme Court cited Schoenthal for the proposition that a creditor "might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding". Katchen, 382 U.S. at 336, (i.e., by making a claim, one submitted oneself

to the bankruptcy court's jurisdiction under the old summary/plenary jurisdiction dichotomy.) This issue has been resolved, in those decisions which this Court views as better reasoned, by concluding that Congress has made the decision to name preference actions as "core" proceedings, thus performing the constitutional conversion from legal claim to equitable proceeding approved in Katchen. See In re Harbour, 840 F.2d 1165, 1178 (4th Cir. 1988) (core proceeding assumes historical equitable posture of all such bankruptcy proceedings); In re Chase & Sanborn Corp., 835 F.2d 1341, 1349 (11th Cir. 1988) (core proceeding is inherently equitable in nature); In re Southern Industrial Banking Corp., 66 B.R. 370, 374-75 (Bankr. E.D.Tenn.) (statement in Schoenthal that preference actions are not part of bankruptcy proceedings, "is no longer true and there is implicit congressional intent that preference actions be tried without a jury"). This Court has concluded that the appellants had no constitutional right to jury trial in these actions, and that the judgments should not be reversed on that basis.

## II

In 1984, Congress amended Title 11 of the United States Code by enacting the 1984 Bankruptcy Amendments and Federal Judgeship Act (1984 Act). Section 553(a) of the 1984 Act provides:

Except as otherwise provided in this Section the amendments made by this title shall become effective to cases filed 90 days after the date of enactment of this Act.

(emphasis added). The date of enactment was July 10, 1984. The ninetieth day after this date -- October 8, 1984 -- was a

holiday; therefore, the effective date of the amendments was October 9, 1984. The pre-1984 Act version of 11 U.S.C. §547(c) (2) provided as follows:

(c) The trustee may not avoid under this section [§547] a transfer --

(2) to the extent that such transfer was --

(A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made not later than 45 days after such debt was incurred;

(C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(D) made according to ordinary business terms;

The parties stipulate that defendants have satisfied §547(c) (2) (A), (C) and (D). However, the 1984 Act repealed §547(c) (2) (B), thereby doing away with the 45-day rule. The parties do not dispute that the defendants did not satisfy the 45-day rule. However, the defendants argue that the term "cases" in Section 553(a) of the 1984 Act does not merely refer to the filing of a bankruptcy petition, but "all actions, suits or controversies arising in or related to a case under Title 11 -- the total body of litigation related to a bankruptcy proceeding." (Appellants' Brief at 22). This argument was addressed in In re Chase & Sanborn Corp., 51 B.R. 736 (Bankr. S.D.Fla. 1985) as follows:

Defendant has argued that the effective date provision quoted above should be applied as though Congress had specified that the amendment is applicable to "adversary proceedings" filed on or after October 8, 1984 rather than bankruptcy "cases" filed after that date. This argument presupposes that Congress was

unaware of the distinct meaning each of these terms has acquired in the bankruptcy law since the 1973 adoption of the bankruptcy rules, which first introduced adversary proceedings. I reject this contention.

It is apparent from a review of the 1984 Act that the two terms are used with precision in many other provisions where the context makes it clear that the terms were intended to have their customary meaning. A similar effective date provision was contained in the Bankruptcy Reform Act of 1978, Pub.L. 94-598 §403(a), which also employed the word "case" and provided that all matters and proceedings in or relating to any such "case" would be determined under the former Act as if the 1978 amendment had not been enacted. Without dissent, that provision has been applied literally, giving the customary bankruptcy meaning to the term "case". Nicholson v. First Investment Co., 705 F.2d 410, 411 n.1 (11th Cir. 1983). There is no reason to assume less precision in the selection of the same term for the same purpose by Congress six years later. I conclude that the former 45-day provision in §547(c)(2) is applicable for the purposes of this case and, therefore this adversary proceeding.

Id. at 738. See also In re Amarex, Inc., 74 B.R. 378, 382 (Bankr. W.D.Okla. 1987). These adversary proceedings were filed in 1985. Therefore, this Court concludes that the 45-day rule applies, as the lower court found.

### III

The appellants contend that they were denied due process in that they constitute creditors of the estate and should have received notice so as to participate in the proceedings leading to confirmation of the reorganization plan. The Bankruptcy Code does recognize a claim arising from the recovery of avoided preferences, which are treated as pre-petition claims. 11 U.S.C. §502(h).

The appellants place principal reliance upon Reliable Elec. Co., Inc. v. Olson Const. Co., 726 F.2d 620 (10th Cir. 1984). In

Reliable, the appellate court held that the holder of a pre-petition unsecured claim was denied due process by not receiving adequate notice of the confirmation hearing. The appellate court affirmed the holding of the lower court that the creditor's claim was therefore not subject to the confirmed plan of reorganization.

The identical argument, including reliance upon the Reliable decision, was presented to the court in In re Southern Indus. Banking Corp., 66 B.R. 349 (Bankr. E.D.Tenn. 1986). The court stated:

[the claim at issue in Reliable differs] materially from the rights defendants assert as claims. None of the creditors in those cases asserted a claim contingent upon, or arising as a result of, the exercise of an avoidance power in bankruptcy. Instead, each of the four cases involved an identifiable creditor with a claim actually arising prepetition.

"Claim" is broadly defined in §101(4) to assure the debtor a fresh start. See H.R.Rep. No. 595, 95th Cong., 1st Sess. 309, reprinted in 1978 U.S.Code Cong. & Adm.News 5787, 5963, 6266. Congress wanted to assure that a debtor be able to obtain "the broadest possible relief in the bankruptcy court." Id. However, in a reorganization case involving an application for the appointment of a legal representative to represent the interests of individuals who may manifest asbestos-related diseases in the future, in denying the application, the court observed that: "It is not true that any conceivable claim is contingent." In re UNR Industries, Inc., 29 B.R. 741, 745 (N.D.Ill. 1983), appeal dismissed, 725 F.2d 1111 (7th Cir. 1984).

Sustaining defendant's contention that they are creditors within the scope of §101(9)(A) would mean that prepetition transferees of transfers avoidable under §§544, 545, 547, 548, and 553 are entitled to notice and, presumably, to all the rights available to creditors in bankruptcy. Formal notice of bankruptcy proceedings to potential preference defendants has never been customary and perhaps never considered previous to this case. This court is confident that neither Congress nor the Bankruptcy Rules Committee

envisioned formal notice of bankruptcy proceedings to transferees of avoidable transfers or their participation in reorganization proceedings until disgorgement of the avoidable transfer. The defendants' prospective rights to file claims, §502(h), are not contingent claims within the circumscription of §101(4)(A). Hence, the defendants are not "creditors" within the scope of §101(9)(A). Further, defendants do not qualify as creditors under §101(9)(B) because to date there has been no recovery of property from them pursuant to §550. See §502(h) (a claim arising from the recovery or property under §550 shall be allowed or disallowed as if such claim had arisen prepetition).

Id. at 361. (footnote omitted). This Court agrees with the analysis above. The recent decision of Sheftelman v. Metals Corp., 839 F.2d 1383 (10th Cir. 1987) is not to the contrary. Again, Sheftelman did not involve preference defendants, but bondholders who held existing pre-petition claims. Preference defendants may not withhold their property, forcing the trustee to initiate a recovery action, while maintaining that they are contingent creditors who deserve notice of the confirmation action. A preference defendant's claim only arises upon recovery of the property. Thus, under appellants' theory, reorganization plans could only be confirmed after the conclusion of all preference actions. Such delay is contrary to the purpose of bankruptcy proceedings. Cf. In re Amarex, 74 B.R. 378, 381 (Bankr. W.D. Okla. 1987). Accordingly, the decision of the bankruptcy court will be affirmed on this basis.

#### IV

The appellants contend that the trial court erred in two findings: (1) that the debtors were insolvent on the dates of the transfers at issue and (2) that appellants received more than they would have under a Chapter 7 liquidation.

Under 11 U.S.C. §547(b)(3) the trustee must prove by a preponderance of the evidence that the challenged transfers were made while the debtor was insolvent. Under 11 U.S.C. §547(b)(5), the trustee must show by the same standard that the transfers enabled the [appellants] to receive more than they would receive if the bankruptcy case were a case under Chapter 7; if the transfer had not been made; and if the appellants had received payments of the debts as provided by the Code. (Appellants' Brief at 45). The trustee has the burden of proving these elements pursuant to 11 U.S.C. §547(g).

Title 11 U.S.C. §547(f) provides that the debtor is presumed to have been insolvent on and during the ninety days immediately preceding the filing of the bankruptcy petition. At the conclusion of the trial, the bankruptcy court found -- and the trustee does not dispute -- that the presumption of insolvency had been rebutted.

Determination of solvency is a question of fact, subject to the clearly erroneous standard. Clay v. Traders Bank of Kansas City, 708 F.2d 1347, 1350 (8th Cir. 1983). See also In re Mullet, 817 F.2d 677, 678 (10th Cir. 1987).

A finding of fact may be deemed "clearly erroneous" only if the finding is without factual support in the record, or if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

Colon-Sanchez v. Marsh, 733 F.2d 78, 81 (10th Cir.) cert. denied, 469 U.S. 855 (1984) (citations omitted).

The United States Supreme Court has stated that

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.

. . .

Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985)  
(citations omitted).

The appellants contend that the bankruptcy court admitted incompetent and irrelevant evidence on the insolvency issue. Their argument is that the successor trustee employed a theory of "retrojection" in its presentation of evidence. Retrojection involves the use of a subsequent balance sheet in order to demonstrate insolvency on some date prior to the date of the balance sheet. See, e.g. In re Kaylor Equip. and Rental, Inc., 56 B.R. 58 (Bankr. E.D.Tenn. 1985). The successor trustee denies that it employed retrojection theory, but rather that it introduced evidence that the debtors were insolvent on each day of the 90-day period.

The Court finds that the successor trustee introduced exhaustive evidence by an established accounting firm as to daily balance sheets for every day of the 90-day period. This evidence was bolstered by testimony of Harold Madigan, an independent consultant in the area of valuation of loan portfolios. (Loans receivable were the principal assets of the debtors). Contrary

evidence introduced by the appellants was found by the bankruptcy court to not be credible. Under the applicable standard, this Court cannot state that the bankruptcy court's finding of insolvency was clearly erroneous.

Regarding 11 U.S.C. §547(b)(5), the appellants place principal reliance upon In re Tenna Corp., 801 F.2d 819 (6th Cir. 1986). They argue that "the trustee must create a hypothetical Chapter 7 liquidating estate as of the filing date of the bankruptcy case and demonstrate the defendant's standing as a distributor of the estate," (Appellants' Brief at 53), which appellants assert was not done in the case at bar. Appellants focus their discussion of Tenna upon the necessity of creating a hypothetical Chapter 7 model. Actually, the Tenna court noted that "by definition, in any Chapter 11 proceeding a hypothetical liquidation must be done." Tenna, 801 F.2d at 821. Rather, the court was addressing "the narrow issue concerning the appropriate time for testing the preferential effect of a payment." Id. at 820 (emphasis added). The issue was critical in Tenna because during the Chapter 11 proceedings the debtor borrowed funds from two banks to continue its operation. As security for the loans, the bankruptcy court granted the banks super-priority liens on the debtor's property pursuant to 11 U.S.C. §364. Id. The bankruptcy court took into account the post-petition accumulated debt in making its §547(b)(5) determination. The Sixth Circuit Court of Appeals held this to be improper, ruling that the hypothetical liquidation must be made as of the date that the bankruptcy petition is filed.

In the case under review, the bankruptcy court found that the evidence establishing the debtor's insolvency on the date of the filing of the bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendant received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

(Finding of Fact 32. Findings of Fact and Conclusion of Law in Saied) (emphasis added). This finding indicates that the bankruptcy court did make its §547(b)(5) determination as of the date the bankruptcy petition was filed. Nothing before this Court indicates that the bankruptcy court took account of post-petition debt, as Tenna condemns. This Court cannot conclude that the bankruptcy court's determination was erroneous.

V

Finally, the appellants argue that the transfers in question were contemporaneous exchanges for new value, and thus exempt from the avoiding powers of the trustee pursuant to 11 U.S.C. §547(c)(1) which provides as follows:

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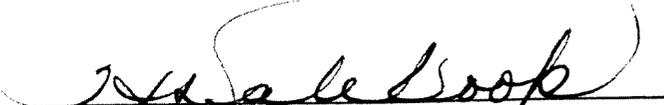
With respect to the definition of "new value," §547(a)(2) of the 1978 Bankruptcy Code provides as follows:

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It is the Order of the Court that the consolidated appeal of the appellants herein is hereby DENIED. The judgment of the bankruptcy court is hereby AFFIRMED in all respects.

IT IS SO ORDERED this 30<sup>th</sup> day of June, 1988.

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

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Hattie Lou Gesin, and LeRoy Dennis and Janet Dennis (collectively the appellants) from the judgments rendered against them and in favor of appellee R. Dobie Langenkamp, Successor Trustee of the Estates of Republic Financial Corporation (RFC) and Republic Trust & Savings Co. (RTS) (Successor Trustee), based on a finding that the monies received by the appellants from Republic Financial Corporation or Republic Trust & Savings Co. within 90 days of the filing of bankruptcy by these entities, were avoidable preferences pursuant to 11 U.S.C. §547, after a consolidated non-jury trial conducted before the Honorable Glenn E. Clark, United States Bankruptcy Judge (sitting by designation), on June 1-5, 1987.

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(D) made according to ordinary business terms;

The parties stipulate that defendants have satisfied §547(c) (2) (A), (C) and (D). However, the 1984 Act repealed §547(c) (2) (B), thereby doing away with the 45-day rule. The parties do not dispute that the defendants did not satisfy the 45-day rule. However, the defendants argue that the term "cases" in Section 553(a) of the 1984 Act does not merely refer to the filing of a bankruptcy petition, but "all actions, suits or controversies arising in or related to a case under Title 11 -- the total body of litigation related to a bankruptcy proceeding." (Appellants' Brief at 22). This argument was addressed in In re Chase & Sanborn Corp., 51 B.R. 736 (Bankr. S.D.Fla. 1985) as follows:

Defendant has argued that the effective date provision quoted above should be applied as though Congress had specified that the amendment is applicable to "adversary proceedings" filed on or after October 8, 1984 rather than bankruptcy "cases" filed after that date. This argument presupposes that Congress was

unaware of the distinct meaning each of these terms has acquired in the bankruptcy law since the 1973 adoption of the bankruptcy rules, which first introduced adversary proceedings. I reject this contention.

It is apparent from a review of the 1984 Act that the two terms are used with precision in many other provisions where the context makes it clear that the terms were intended to have their customary meaning. A similar effective date provision was contained in the Bankruptcy Reform Act of 1978, Pub.L. 94-598 §403(a), which also employed the word "case" and provided that all matters and proceedings in or relating to any such "case" would be determined under the former Act as if the 1978 amendment had not been enacted. Without dissent, that provision has been applied literally, giving the customary bankruptcy meaning to the term "case". Nicholson v. First Investment Co., 705 F.2d 410, 411 n.1 (11th Cir. 1983). There is no reason to assume less precision in the selection of the same term for the same purpose by Congress six years later. I conclude that the former 45-day provision in §547(c)(2) is applicable for the purposes of this case and, therefore this adversary proceeding.

Id. at 738. See also In re Amarex, Inc., 74 B.R. 378, 382 (Bankr. W.D.Okla. 1987). These adversary proceedings were filed in 1985. Therefore, this Court concludes that the 45-day rule applies, as the lower court found.

### III

The appellants contend that they were denied due process in that they constitute creditors of the estate and should have received notice so as to participate in the proceedings leading to confirmation of the reorganization plan. The Bankruptcy Code does recognize a claim arising from the recovery of avoided preferences, which are treated as pre-petition claims. 11 U.S.C. §502(h).

The appellants place principal reliance upon Reliable Elec. Co., Inc. v. Olson Const. Co., 726 F.2d 620 (10th Cir. 1984). In

Reliable, the appellate court held that the holder of a pre-petition unsecured claim was denied due process by not receiving adequate notice of the confirmation hearing. The appellate court affirmed the holding of the lower court that the creditor's claim was therefore not subject to the confirmed plan of reorganization.

The identical argument, including reliance upon the Reliable decision, was presented to the court in In re Southern Indus. Banking Corp., 66 B.R. 349 (Bankr. E.D.Tenn. 1986). The court stated:

[the claim at issue in Reliable differs] materially from the rights defendants assert as claims. None of the creditors in those cases asserted a claim contingent upon, or arising as a result of, the exercise of an avoidance power in bankruptcy. Instead, each of the four cases involved an identifiable creditor with a claim actually arising prepetition.

"Claim" is broadly defined in §101(4) to assure the debtor a fresh start. See H.R.Rep. No. 595, 95th Cong., 1st Sess. 309, reprinted in 1978 U.S.Code Cong. & Adm.News 5787, 5963, 6266. Congress wanted to assure that a debtor be able to obtain "the broadest possible relief in the bankruptcy court." Id. However, in a reorganization case involving an application for the appointment of a legal representative to represent the interests of individuals who may manifest asbestos-related diseases in the future, in denying the application, the court observed that: "It is not true that any conceivable claim is contingent." In re UNR Industries, Inc., 29 B.R. 741, 745 (N.D.Ill. 1983), appeal dismissed, 725 F.2d 1111 (7th Cir. 1984).

Sustaining defendant's contention that they are creditors within the scope of §101(9)(A) would mean that prepetition transferees of transfers avoidable under §§544, 545, 547, 548, and 553 are entitled to notice and, presumably, to all the rights available to creditors in bankruptcy. Formal notice of bankruptcy proceedings to potential preference defendants has never been customary and perhaps never considered previous to this case. This court is confident that neither Congress nor the Bankruptcy Rules Committee

envisioned formal notice of bankruptcy proceedings to transferees of avoidable transfers or their participation in reorganization proceedings until disgorgement of the avoidable transfer. The defendants' prospective rights to file claims, §502(h), are not contingent claims within the circumscription of §101(4)(A). Hence, the defendants are not "creditors" within the scope of §101(9)(A). Further, defendants do not qualify as creditors under §101(9)(B) because to date there has been no recovery of property from them pursuant to §550. See §502(h) (a claim arising from the recovery or property under §550 shall be allowed or disallowed as if such claim had arisen prepetition).

Id. at 361. (footnote omitted). This Court agrees with the analysis above. The recent decision of Sheftelman v. Metals Corp., 839 F.2d 1383 (10th Cir. 1987) is not to the contrary. Again, Sheftelman did not involve preference defendants, but bondholders who held existing pre-petition claims. Preference defendants may not withhold their property, forcing the trustee to initiate a recovery action, while maintaining that they are contingent creditors who deserve notice of the confirmation action. A preference defendant's claim only arises upon recovery of the property. Thus, under appellants' theory, reorganization plans could only be confirmed after the conclusion of all preference actions. Such delay is contrary to the purpose of bankruptcy proceedings. Cf. In re Amarex, 74 B.R. 378, 381 (Bankr. W.D. Okla. 1987). Accordingly, the decision of the bankruptcy court will be affirmed on this basis.

#### IV

The appellants contend that the trial court erred in two findings: (1) that the debtors were insolvent on the dates of the transfers at issue and (2) that appellants received more than they would have under a Chapter 7 liquidation.

Under 11 U.S.C. §547(b)(3) the trustee must prove by a preponderance of the evidence that the challenged transfers were made while the debtor was insolvent. Under 11 U.S.C. §547(b)(5), the trustee must show by the same standard that the transfers enabled the [appellants] to receive more than they would receive if the bankruptcy case were a case under Chapter 7; if the transfer had not been made; and if the appellants had received payments of the debts as provided by the Code. (Appellants' Brief at 45). The trustee has the burden of proving these elements pursuant to 11 U.S.C. §547(g).

Title 11 U.S.C. §547(f) provides that the debtor is presumed to have been insolvent on and during the ninety days immediately preceding the filing of the bankruptcy petition. At the conclusion of the trial, the bankruptcy court found -- and the trustee does not dispute -- that the presumption of insolvency had been rebutted.

Determination of solvency is a question of fact, subject to the clearly erroneous standard. Clay v. Traders Bank of Kansas City, 708 F.2d 1347, 1350 (8th Cir. 1983). See also In re Mullet, 817 F.2d 677, 678 (10th Cir. 1987).

A finding of fact may be deemed "clearly erroneous" only if the finding is without factual support in the record, or if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

Colon-Sanchez v. Marsh, 733 F.2d 78, 81 (10th Cir.) cert. denied, 469 U.S. 855 (1984) (citations omitted).

The United States Supreme Court has stated that

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.

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Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985)  
(citations omitted).

The appellants contend that the bankruptcy court admitted incompetent and irrelevant evidence on the insolvency issue. Their argument is that the successor trustee employed a theory of "retrojection" in its presentation of evidence. Retrojection involves the use of a subsequent balance sheet in order to demonstrate insolvency on some date prior to the date of the balance sheet. See, e.g. In re Kaylor Equip. and Rental, Inc., 56 B.R. 58 (Bankr. E.D.Tenn. 1985). The successor trustee denies that it employed retrojection theory, but rather that it introduced evidence that the debtors were insolvent on each day of the 90-day period.

The Court finds that the successor trustee introduced exhaustive evidence by an established accounting firm as to daily balance sheets for every day of the 90-day period. This evidence was bolstered by testimony of Harold Madigan, an independent consultant in the area of valuation of loan portfolios. (Loans receivable were the principal assets of the debtors). Contrary

evidence introduced by the appellants was found by the bankruptcy court to not be credible. Under the applicable standard, this Court cannot state that the bankruptcy court's finding of insolvency was clearly erroneous.

Regarding 11 U.S.C. §547(b)(5), the appellants place principal reliance upon In re Tenna Corp., 801 F.2d 819 (6th Cir. 1986). They argue that "the trustee must create a hypothetical Chapter 7 liquidating estate as of the filing date of the bankruptcy case and demonstrate the defendant's standing as a distributor of the estate," (Appellants' Brief at 53), which appellants assert was not done in the case at bar. Appellants focus their discussion of Tenna upon the necessity of creating a hypothetical Chapter 7 model. Actually, the Tenna court noted that "by definition, in any Chapter 11 proceeding a hypothetical liquidation must be done." Tenna, 801 F.2d at 821. Rather, the court was addressing "the narrow issue concerning the appropriate time for testing the preferential effect of a payment." Id. at 820 (emphasis added). The issue was critical in Tenna because during the Chapter 11 proceedings the debtor borrowed funds from two banks to continue its operation. As security for the loans, the bankruptcy court granted the banks super-priority liens on the debtor's property pursuant to 11 U.S.C. §364. Id. The bankruptcy court took into account the post-petition accumulated debt in making its §547(b)(5) determination. The Sixth Circuit Court of Appeals held this to be improper, ruling that the hypothetical liquidation must be made as of the date that the bankruptcy petition is filed.

In the case under review, the bankruptcy court found

that the evidence establishing the debtor's insolvency on the date of the filing of the bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendant received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

(Finding of Fact 32. Findings of Fact and Conclusion of Law in Saied) (emphasis added). This finding indicates that the bankruptcy court did make its §547(b)(5) determination as of the date the bankruptcy petition was filed. Nothing before this Court indicates that the bankruptcy court took account of post-petition debt, as Tenna condemns. This Court cannot conclude that the bankruptcy court's determination was erroneous.

V

Finally, the appellants argue that the transfers in question were contemporaneous exchanges for new value, and thus exempt from the avoiding powers of the trustee pursuant to 11 U.S.C. §547(c)(1) which provides as follows:

(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

With respect to the definition of "new value," §547(a)(2) of the 1978 Bankruptcy Code provides as follows:

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation;

Payment of long-term debt does not fall within this exception. See, e.g., In re Candor Diamond Corp., 44 B.R. 195 (Bankr. S.D.N.Y. 1984). The defendants' citation of In re George Rodman, Inc., 792 F.2d 125 (10th Cir. 1986) is inapposite. In Rodman the court held that a release of a materialman's lien upon an oil well in response to payment of a debt constituted "new value." The court specifically noted that Oklahoma law defines a lien as a property right. Id. at 128 n.7. Thrift certificates do not constitute property interests, but rather are evidence of underlying indebtedness. Accordingly, this argument is rejected.

It is the Order of the Court that the consolidated appeal of the appellants herein is hereby DENIED. The judgment of the bankruptcy court is hereby AFFIRMED in all respects.

IT IS SO ORDERED this 30<sup>th</sup> day of June, 1988.

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

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

FILED

JUN 30 1988

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

REPUBLIC FINANCIAL CORPORATION,  
an Oklahoma corporation,

Debtor.

P. A. HACKLER and DELORES HACKLER,  
KENNETH D. and MARY L. MOORE, and  
KEMAL SAIED and CONSTANCE SAIED,

Appellants,

vs.

R. DOBIE LANGENKAMP, Successor  
Trustee,

Appellee.

REPUBLIC TRUST & SAVINGS, d/b/a  
Western Trust and Savings Company,

Debtor.

C. A. CULP, JULIA CULP, and CULP  
DISTRIBUTING COMPANY; HATTIE LOU  
GESIN; and LEROY DENNIS and JANET  
DENNIS,

Appellants,

vs.

R. DOBIE LANGENKAMP, Successor  
Trustee,

Appellee.

No. 87-C-616-C  
No. 87-C-618-C  
No. 87-C-619-C

No. 87-C-617-C  
No. 87-C-620-C  
No. 87-C-692-C

(Consolidated Under  
No. 87-C-616-C)

O R D E R

Now before the Court for its consideration are the consolidated appeals filed by appellants P. A. Hackler and Delores Hackler, C. A. Culp, Julia Culp and Culp Distributing Company, Kenneth D. and Mary L. Moore, Kemal Saied and Constance Saied,

Hattie Lou Gesin, and LeRoy Dennis and Janet Dennis (collectively the appellants) from the judgments rendered against them and in favor of appellee R. Dobie Langenkamp, Successor Trustee of the Estates of Republic Financial Corporation (RFC) and Republic Trust & Savings Co. (RTS) (Successor Trustee), based on a finding that the monies received by the appellants from Republic Financial Corporation or Republic Trust & Savings Co. within 90 days of the filing of bankruptcy by these entities, were avoidable preferences pursuant to 11 U.S.C. §547, after a consolidated non-jury trial conducted before the Honorable Glenn E. Clark, United States Bankruptcy Judge (sitting by designation), on June 1-5, 1987.

The appellants raise five separate arguments on appeal, which shall be addressed in turn.

I.

Initially, the appellants contend that they were improperly denied a jury trial in the proceedings below. The United States Court of Appeals for the Tenth Circuit has previously addressed this issue, stating:

[t]he right to a jury trial in bankruptcy proceedings is purely statutory. There is no constitutional right to such trial as bankruptcy proceedings are equitable in nature.

In re Beery, 680 F.2d 705, 710 (10th Cir.), cert. denied, 459 U.S. 1037 (1982) (citing Katchen v. Landy, 382 U.S. 323 (1966)). However, inasmuch as the Beery decision was not rendered under the presently applicable 1984 Bankruptcy Amendments and Federal

Judgeship Act, this Court will address the issue in view of recent authority.

The relevant statutory provision is 28 U.S.C. §1411(a) which provides that the bankruptcy statutes do not affect the right of trial by jury that one may have regarding a personal injury or wrongful death tort claim. Appellants do not contend that the preference actions in question fall within this provision, and therefore effectively concede that there is at present no statutory right to jury trial available to them. The appellants contend, however, that the Seventh Amendment to the United States Constitution provides a right to a jury trial even within the bankruptcy universe. The decision in Beery, supra, did not specifically address the issue of jury trials in preference actions. There presently exists conflicting authority on the issue.

One view is that when a preference action seeks only monetary damages, it constitutes what has traditionally been characterized as an action at law, as opposed to an equitable cause of action. Under the Seventh Amendment, one is entitled to a jury trial in an action at law. See Ross v. Bernhard, 396 U.S. 531 (1970). The other view is that all bankruptcy proceedings are inherently equitable, and that thus no jury trial right exists. The 1984 Amendments divide bankruptcy jurisdiction into "core" and "non-core" proceedings. Proceedings dealing with preferences and fraudulent conveyances are denominated as "core" proceedings pursuant to 28 U.S.C. §157(b)(2)(F) and 28 U.S.C. §157(b)(2)(H), respectively. In essence, courts who take this view hold that

even a traditional legal action, by being termed a core proceeding, undergoes a conversion into an equitable proceeding to which the right to jury trial does not attach. The two views are summarized in In re Adams, Browning & Bates, Ltd., 70 B.R. 490 (Bankr. E.D.N.Y. 1987).

Upon review, this Court finds that the greater weight of support in existing authority favors the second view. In Katchen v. Landy, 382 U.S. 323 (1966), the Supreme Court stated:

"So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

Id. at 337 (quoting Barton v. Barbour, 104 U.S. (14 Otto) 126, 134 (1881)) (emphasis added). The Court also noted:

The Bankruptcy Act, passed pursuant to the power given to Congress by Art.I, §8 of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro rata share of the res.

Id. at 336 (emphasis added). This Court is aware of Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932), which contains the statement that "[s]uits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it." Id. at 94-95. In Katchen v. Landy, the Supreme Court cited Schoenthal for the proposition that a creditor "might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding". Katchen, 382 U.S. at 336, (i.e., by making a claim, one submitted oneself

to the bankruptcy court's jurisdiction under the old summary/plenary jurisdiction dichotomy.) This issue has been resolved, in those decisions which this Court views as better reasoned, by concluding that Congress has made the decision to name preference actions as "core" proceedings, thus performing the constitutional conversion from legal claim to equitable proceeding approved in Katchen. See In re Harbour, 840 F.2d 1165, 1178 (4th Cir. 1988) (core proceeding assumes historical equitable posture of all such bankruptcy proceedings); In re Chase & Sanborn Corp., 835 F.2d 1341, 1349 (11th Cir. 1988) (core proceeding is inherently equitable in nature); In re Southern Industrial Banking Corp., 66 B.R. 370, 374-75 (Bankr. E.D.Tenn.) (statement in Schoenthal that preference actions are not part of bankruptcy proceedings, "is no longer true and there is implicit congressional intent that preference actions be tried without a jury"). This Court has concluded that the appellants had no constitutional right to jury trial in these actions, and that the judgments should not be reversed on that basis.

## II

In 1984, Congress amended Title 11 of the United States Code by enacting the 1984 Bankruptcy Amendments and Federal Judgeship Act (1984 Act). Section 553(a) of the 1984 Act provides:

Except as otherwise provided in this Section the amendments made by this title shall become effective to cases filed 90 days after the date of enactment of this Act.

(emphasis added). The date of enactment was July 10, 1984. The ninetieth day after this date -- October 8, 1984 -- was a

holiday; therefore, the effective date of the amendments was October 9, 1984. The pre-1984 Act version of 11 U.S.C. §547(c) (2) provided as follows:

(c) The trustee may not avoid under this section [§547] a transfer --

(2) to the extent that such transfer was --

(A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made not later than 45 days after such debt was incurred;

(C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(D) made according to ordinary business terms;

The parties stipulate that defendants have satisfied §547(c) (2) (A), (C) and (D). However, the 1984 Act repealed §547(c) (2) (B), thereby doing away with the 45-day rule. The parties do not dispute that the defendants did not satisfy the 45-day rule. However, the defendants argue that the term "cases" in Section 553(a) of the 1984 Act does not merely refer to the filing of a bankruptcy petition, but "all actions, suits or controversies arising in or related to a case under Title 11 -- the total body of litigation related to a bankruptcy proceeding." (Appellants' Brief at 22). This argument was addressed in In re Chase & Sanborn Corp., 51 B.R. 736 (Bankr. S.D.Fla. 1985) as follows:

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unaware of the distinct meaning each of these terms has acquired in the bankruptcy law since the 1973 adoption of the bankruptcy rules, which first introduced adversary proceedings. I reject this contention.

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Id. at 738. See also In re Amarex, Inc., 74 B.R. 378, 382 (Bankr. W.D.Okla. 1987). These adversary proceedings were filed in 1985. Therefore, this Court concludes that the 45-day rule applies, as the lower court found.

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that the evidence establishing the debtor's insolvency on the date of the filing of the bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendant received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

(Finding of Fact 32. Findings of Fact and Conclusion of Law in Saied) (emphasis added). This finding indicates that the bankruptcy court did make its §547(b)(5) determination as of the date the bankruptcy petition was filed. Nothing before this Court indicates that the bankruptcy court took account of post-petition debt, as Tenna condemns. This Court cannot conclude that the bankruptcy court's determination was erroneous.

V

Finally, the appellants argue that the transfers in question were contemporaneous exchanges for new value, and thus exempt from the avoiding powers of the trustee pursuant to 11 U.S.C. §547(c)(1) which provides as follows:

(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

With respect to the definition of "new value," §547(a)(2) of the 1978 Bankruptcy Code provides as follows:

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation;

Payment of long-term debt does not fall within this exception. See, e.g., In re Candor Diamond Corp., 44 B.R. 195 (Bankr. S.D.N.Y. 1984). The defendants' citation of In re George Rodman, Inc., 792 F.2d 125 (10th Cir. 1986) is inapposite. In Rodman the court held that a release of a materialman's lien upon an oil well in response to payment of a debt constituted "new value." The court specifically noted that Oklahoma law defines a lien as a property right. Id. at 128 n.7. Thrift certificates do not constitute property interests, but rather are evidence of underlying indebtedness. Accordingly, this argument is rejected.

It is the Order of the Court that the consolidated appeal of the appellants herein is hereby DENIED. The judgment of the bankruptcy court is hereby AFFIRMED in all respects.

IT IS SO ORDERED this 30<sup>th</sup> day of June, 1988.

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

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

FILED

JUN 30 1988

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

REPUBLIC FINANCIAL CORPORATION,	)	
an Oklahoma corporation,	)	
	)	
Debtor.	)	
	)	
P. A. HACKLER and DELORES HACKLER,	)	No. 87-C-616-C
KENNETH D. and MARY L. MOORE, and	)	No. 87-C-618-C
KEMAL SAIED and CONSTANCE SAIED,	)	No. 87-C-619-C
	)	
Appellants,	)	
vs.	)	
	)	
R. DOBIE LANGENKAMP, Successor	)	
Trustee,	)	
	)	
Appellee.	)	
	)	
REPUBLIC TRUST & SAVINGS, d/b/a	)	
Western Trust and Savings Company,	)	
	)	
Debtor.	)	
	)	
C. A. CULP, JULIA CULP, and CULP	)	No. 87-C-617-C
DISTRIBUTING COMPANY; HATTIE LOU	)	No. 87-C-620-C
GESIN; and LEROY DENNIS and JANET	)	No. 87-C-692-C
DENNIS,	)	
	)	
Appellants,	)	
vs.	)	
	)	
R. DOBIE LANGENKAMP, Successor	)	(Consolidated Under
Trustee,	)	<u>No. 87-C-616-C</u> )
	)	
Appellee.	)	

O R D E R

Now before the Court for its consideration are the consolidated appeals filed by appellants P. A. Hackler and Delores Hackler, C. A. Culp, Julia Culp and Culp Distributing Company, Kenneth D. and Mary L. Moore, Kemal Saied and Constance Saied,

Hattie Lou Gesin, and LeRoy Dennis and Janet Dennis (collectively the appellants) from the judgments rendered against them and in favor of appellee R. Dobie Langenkamp, Successor Trustee of the Estates of Republic Financial Corporation (RFC) and Republic Trust & Savings Co. (RTS) (Successor Trustee), based on a finding that the monies received by the appellants from Republic Financial Corporation or Republic Trust & Savings Co. within 90 days of the filing of bankruptcy by these entities, were avoidable preferences pursuant to 11 U.S.C. §547, after a consolidated non-jury trial conducted before the Honorable Glenn E. Clark, United States Bankruptcy Judge (sitting by designation), on June 1-5, 1987.

The appellants raise five separate arguments on appeal, which shall be addressed in turn.

I.

Initially, the appellants contend that they were improperly denied a jury trial in the proceedings below. The United States Court of Appeals for the Tenth Circuit has previously addressed this issue, stating:

[t]he right to a jury trial in bankruptcy proceedings is purely statutory. There is no constitutional right to such trial as bankruptcy proceedings are equitable in nature.

In re Beery, 680 F.2d 705, 710 (10th Cir.), cert. denied, 459 U.S. 1037 (1982) (citing Katchen v. Landy, 382 U.S. 323 (1966)). However, inasmuch as the Beery decision was not rendered under the presently applicable 1984 Bankruptcy Amendments and Federal

Judgeship Act, this Court will address the issue in view of recent authority.

The relevant statutory provision is 28 U.S.C. §1411(a) which provides that the bankruptcy statutes do not affect the right of trial by jury that one may have regarding a personal injury or wrongful death tort claim. Appellants do not contend that the preference actions in question fall within this provision, and therefore effectively concede that there is at present no statutory right to jury trial available to them. The appellants contend, however, that the Seventh Amendment to the United States Constitution provides a right to a jury trial even within the bankruptcy universe. The decision in Beery, supra, did not specifically address the issue of jury trials in preference actions. There presently exists conflicting authority on the issue.

One view is that when a preference action seeks only monetary damages, it constitutes what has traditionally been characterized as an action at law, as opposed to an equitable cause of action. Under the Seventh Amendment, one is entitled to a jury trial in an action at law. See Ross v. Bernhard, 396 U.S. 531 (1970). The other view is that all bankruptcy proceedings are inherently equitable, and that thus no jury trial right exists. The 1984 Amendments divide bankruptcy jurisdiction into "core" and "non-core" proceedings. Proceedings dealing with preferences and fraudulent conveyances are denominated as "core" proceedings pursuant to 28 U.S.C. §157(b)(2)(F) and 28 U.S.C. §157(b)(2)(H), respectively. In essence, courts who take this view hold that

even a traditional legal action, by being termed a core proceeding, undergoes a conversion into an equitable proceeding to which the right to jury trial does not attach. The two views are summarized in In re Adams, Browning & Bates, Ltd., 70 B.R. 490 (Bankr. E.D.N.Y. 1987).

Upon review, this Court finds that the greater weight of support in existing authority favors the second view. In Katchen v. Landy, 382 U.S. 323 (1966), the Supreme Court stated:

"So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

Id. at 337 (quoting Barton v. Barbour, 104 U.S. (14 Otto) 126, 134 (1881)) (emphasis added). The Court also noted:

The Bankruptcy Act, passed pursuant to the power given to Congress by Art.I, §8 of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro rata share of the res.

Id. at 336 (emphasis added). This Court is aware of Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932), which contains the statement that "[s]uits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it." Id. at 94-95. In Katchen v. Landy, the Supreme Court cited Schoenthal for the proposition that a creditor "might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding". Katchen, 382 U.S. at 336, (i.e., by making a claim, one submitted oneself

to the bankruptcy court's jurisdiction under the old summary/plenary jurisdiction dichotomy.) This issue has been resolved, in those decisions which this Court views as better reasoned, by concluding that Congress has made the decision to name preference actions as "core" proceedings, thus performing the constitutional conversion from legal claim to equitable proceeding approved in Katchen. See In re Harbour, 840 F.2d 1165, 1178 (4th Cir. 1988) (core proceeding assumes historical equitable posture of all such bankruptcy proceedings); In re Chase & Sanborn Corp., 835 F.2d 1341, 1349 (11th Cir. 1988) (core proceeding is inherently equitable in nature); In re Southern Industrial Banking Corp., 66 B.R. 370, 374-75 (Bankr. E.D.Tenn.) (statement in Schoenthal that preference actions are not part of bankruptcy proceedings, "is no longer true and there is implicit congressional intent that preference actions be tried without a jury"). This Court has concluded that the appellants had no constitutional right to jury trial in these actions, and that the judgments should not be reversed on that basis.

## II

In 1984, Congress amended Title 11 of the United States Code by enacting the 1984 Bankruptcy Amendments and Federal Judgeship Act (1984 Act). Section 553(a) of the 1984 Act provides:

Except as otherwise provided in this Section the amendments made by this title shall become effective to cases filed 90 days after the date of enactment of this Act.

(emphasis added). The date of enactment was July 10, 1984. The ninetieth day after this date -- October 8, 1984 -- was a

holiday; therefore, the effective date of the amendments was October 9, 1984. The pre-1984 Act version of 11 U.S.C. §547(c)(2) provided as follows:

(c) The trustee may not avoid under this section [§547] a transfer --

(2) to the extent that such transfer was --

(A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made not later than 45 days after such debt was incurred;

(C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(D) made according to ordinary business terms;

The parties stipulate that defendants have satisfied §547(c)(2)(A), (C) and (D). However, the 1984 Act repealed §547(c)(2)(B), thereby doing away with the 45-day rule. The parties do not dispute that the defendants did not satisfy the 45-day rule. However, the defendants argue that the term "cases" in Section 553(a) of the 1984 Act does not merely refer to the filing of a bankruptcy petition, but "all actions, suits or controversies arising in or related to a case under Title 11 -- the total body of litigation related to a bankruptcy proceeding." (Appellants' Brief at 22). This argument was addressed in In re Chase & Sanborn Corp., 51 B.R. 736 (Bankr. S.D.Fla. 1985) as follows:

Defendant has argued that the effective date provision quoted above should be applied as though Congress had specified that the amendment is applicable to "adversary proceedings" filed on or after October 8, 1984 rather than bankruptcy "cases" filed after that date. This argument presupposes that Congress was

unaware of the distinct meaning each of these terms has acquired in the bankruptcy law since the 1973 adoption of the bankruptcy rules, which first introduced adversary proceedings. I reject this contention.

It is apparent from a review of the 1984 Act that the two terms are used with precision in many other provisions where the context makes it clear that the terms were intended to have their customary meaning. A similar effective date provision was contained in the Bankruptcy Reform Act of 1978, Pub.L. 94-598 §403(a), which also employed the word "case" and provided that all matters and proceedings in or relating to any such "case" would be determined under the former Act as if the 1978 amendment had not been enacted. Without dissent, that provision has been applied literally, giving the customary bankruptcy meaning to the term "case". Nicholson v. First Investment Co., 705 F.2d 410, 411 n.1 (11th Cir. 1983). There is no reason to assume less precision in the selection of the same term for the same purpose by Congress six years later. I conclude that the former 45-day provision in §547(c)(2) is applicable for the purposes of this case and, therefore this adversary proceeding.

Id. at 738. See also In re Amarex, Inc., 74 B.R. 378, 382 (Bankr. W.D.Okla. 1987). These adversary proceedings were filed in 1985. Therefore, this Court concludes that the 45-day rule applies, as the lower court found.

### III

The appellants contend that they were denied due process in that they constitute creditors of the estate and should have received notice so as to participate in the proceedings leading to confirmation of the reorganization plan. The Bankruptcy Code does recognize a claim arising from the recovery of avoided preferences, which are treated as pre-petition claims. 11 U.S.C. §502(h).

The appellants place principal reliance upon Reliable Elec. Co., Inc. v. Olson Const. Co., 726 F.2d 620 (10th Cir. 1984). In

Reliable, the appellate court held that the holder of a pre-petition unsecured claim was denied due process by not receiving adequate notice of the confirmation hearing. The appellate court affirmed the holding of the lower court that the creditor's claim was therefore not subject to the confirmed plan of reorganization.

The identical argument, including reliance upon the Reliable decision, was presented to the court in In re Southern Indus. Banking Corp., 66 B.R. 349 (Bankr. E.D.Tenn. 1986). The court stated:

[the claim at issue in Reliable differs] materially from the rights defendants assert as claims. None of the creditors in those cases asserted a claim contingent upon, or arising as a result of, the exercise of an avoidance power in bankruptcy. Instead, each of the four cases involved an identifiable creditor with a claim actually arising prepetition.

"Claim" is broadly defined in §101(4) to assure the debtor a fresh start. See H.R.Rep. No. 595, 95th Cong., 1st Sess. 309, reprinted in 1978 U.S.Code Cong. & Adm.News 5787, 5963, 6266. Congress wanted to assure that a debtor be able to obtain "the broadest possible relief in the bankruptcy court." Id. However, in a reorganization case involving an application for the appointment of a legal representative to represent the interests of individuals who may manifest asbestos-related diseases in the future, in denying the application, the court observed that: "It is not true that any conceivable claim is contingent." In re UNR Industries, Inc., 29 B.R. 741, 745 (N.D.Ill. 1983), appeal dismissed, 725 F.2d 1111 (7th Cir. 1984).

Sustaining defendant's contention that they are creditors within the scope of §101(9)(A) would mean that prepetition transferees of transfers avoidable under §§544, 545, 547, 548, and 553 are entitled to notice and, presumably, to all the rights available to creditors in bankruptcy. Formal notice of bankruptcy proceedings to potential preference defendants has never been customary and perhaps never considered previous to this case. This court is confident that neither Congress nor the Bankruptcy Rules Committee

envisioned formal notice of bankruptcy proceedings to transferees of avoidable transfers or their participation in reorganization proceedings until disgorgement of the avoidable transfer. The defendants' prospective rights to file claims, §502(h), are not contingent claims within the circumscription of §101(4)(A). Hence, the defendants are not "creditors" within the scope of §101(9)(A). Further, defendants do not qualify as creditors under §101(9)(B) because to date there has been no recovery of property from them pursuant to §550. See §502(h) (a claim arising from the recovery or property under §550 shall be allowed or disallowed as if such claim had arisen prepetition).

Id. at 361. (footnote omitted). This Court agrees with the analysis above. The recent decision of Sheftelman v. Metals Corp., 839 F.2d 1383 (10th Cir. 1987) is not to the contrary. Again, Sheftelman did not involve preference defendants, but bondholders who held existing pre-petition claims. Preference defendants may not withhold their property, forcing the trustee to initiate a recovery action, while maintaining that they are contingent creditors who deserve notice of the confirmation action. A preference defendant's claim only arises upon recovery of the property. Thus, under appellants' theory, reorganization plans could only be confirmed after the conclusion of all preference actions. Such delay is contrary to the purpose of bankruptcy proceedings. Cf. In re Amarex, 74 B.R. 378, 381 (Bankr. W.D. Okla. 1987). Accordingly, the decision of the bankruptcy court will be affirmed on this basis.

#### IV

The appellants contend that the trial court erred in two findings: (1) that the debtors were insolvent on the dates of the transfers at issue and (2) that appellants received more than they would have under a Chapter 7 liquidation.

Under 11 U.S.C. §547(b)(3) the trustee must prove by a preponderance of the evidence that the challenged transfers were made while the debtor was insolvent. Under 11 U.S.C. §547(b)(5), the trustee must show by the same standard that the transfers enabled the [appellants] to receive more than they would receive if the bankruptcy case were a case under Chapter 7; if the transfer had not been made; and if the appellants had received payments of the debts as provided by the Code. (Appellants' Brief at 45). The trustee has the burden of proving these elements pursuant to 11 U.S.C. §547(g).

Title 11 U.S.C. §547(f) provides that the debtor is presumed to have been insolvent on and during the ninety days immediately preceding the filing of the bankruptcy petition. At the conclusion of the trial, the bankruptcy court found -- and the trustee does not dispute -- that the presumption of insolvency had been rebutted.

Determination of solvency is a question of fact, subject to the clearly erroneous standard. Clay v. Traders Bank of Kansas City, 708 F.2d 1347, 1350 (8th Cir. 1983). See also In re Mullet, 817 F.2d 677, 678 (10th Cir. 1987).

A finding of fact may be deemed "clearly erroneous" only if the finding is without factual support in the record, or if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

Colon-Sanchez v. Marsh, 733 F.2d 78, 81 (10th Cir.) cert. denied, 469 U.S. 855 (1984) (citations omitted).

The United States Supreme Court has stated that

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.

. . .

Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985)  
(citations omitted).

The appellants contend that the bankruptcy court admitted incompetent and irrelevant evidence on the insolvency issue. Their argument is that the successor trustee employed a theory of "retrojection" in its presentation of evidence. Retrojection involves the use of a subsequent balance sheet in order to demonstrate insolvency on some date prior to the date of the balance sheet. See, e.g. In re Kaylor Equip. and Rental, Inc., 56 B.R. 58 (Bankr. E.D.Tenn. 1985). The successor trustee denies that it employed retrojection theory, but rather that it introduced evidence that the debtors were insolvent on each day of the 90-day period.

The Court finds that the successor trustee introduced exhaustive evidence by an established accounting firm as to daily balance sheets for every day of the 90-day period. This evidence was bolstered by testimony of Harold Madigan, an independent consultant in the area of valuation of loan portfolios. (Loans receivable were the principal assets of the debtors). Contrary

evidence introduced by the appellants was found by the bankruptcy court to not be credible. Under the applicable standard, this Court cannot state that the bankruptcy court's finding of insolvency was clearly erroneous.

Regarding 11 U.S.C. §547(b)(5), the appellants place principal reliance upon In re Tenna Corp., 801 F.2d 819 (6th Cir. 1986). They argue that "the trustee must create a hypothetical Chapter 7 liquidating estate as of the filing date of the bankruptcy case and demonstrate the defendant's standing as a distributor of the estate," (Appellants' Brief at 53), which appellants assert was not done in the case at bar. Appellants focus their discussion of Tenna upon the necessity of creating a hypothetical Chapter 7 model. Actually, the Tenna court noted that "by definition, in any Chapter 11 proceeding a hypothetical liquidation must be done." Tenna, 801 F.2d at 821. Rather, the court was addressing "the narrow issue concerning the appropriate time for testing the preferential effect of a payment." Id. at 820 (emphasis added). The issue was critical in Tenna because during the Chapter 11 proceedings the debtor borrowed funds from two banks to continue its operation. As security for the loans, the bankruptcy court granted the banks super-priority liens on the debtor's property pursuant to 11 U.S.C. §364. Id. The bankruptcy court took into account the post-petition accumulated debt in making its §547(b)(5) determination. The Sixth Circuit Court of Appeals held this to be improper, ruling that the hypothetical liquidation must be made as of the date that the bankruptcy petition is filed.

In the case under review, the bankruptcy court found

that the evidence establishing the debtor's insolvency on the date of the filing of the bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendant received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

(Finding of Fact 32. Findings of Fact and Conclusion of Law in Saied) (emphasis added). This finding indicates that the bankruptcy court did make its §547(b)(5) determination as of the date the bankruptcy petition was filed. Nothing before this Court indicates that the bankruptcy court took account of post-petition debt, as Tenna condemns. This Court cannot conclude that the bankruptcy court's determination was erroneous.

V

Finally, the appellants argue that the transfers in question were contemporaneous exchanges for new value, and thus exempt from the avoiding powers of the trustee pursuant to 11 U.S.C. §547(c)(1) which provides as follows:

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It is the Order of the Court that the consolidated appeal of the appellants herein is hereby DENIED. The judgment of the bankruptcy court is hereby AFFIRMED in all respects.

IT IS SO ORDERED this 30<sup>th</sup> day of June, 1988.

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

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(D) made according to ordinary business terms;

The parties stipulate that defendants have satisfied §547(c)(2)(A), (C) and (D). However, the 1984 Act repealed §547(c)(2)(B), thereby doing away with the 45-day rule. The parties do not dispute that the defendants did not satisfy the 45-day rule. However, the defendants argue that the term "cases" in Section 553(a) of the 1984 Act does not merely refer to the filing of a bankruptcy petition, but "all actions, suits or controversies arising in or related to a case under Title 11 -- the total body of litigation related to a bankruptcy proceeding." (Appellants' Brief at 22). This argument was addressed in In re Chase & Sanborn Corp., 51 B.R. 736 (Bankr. S.D.Fla. 1985) as follows:

Defendant has argued that the effective date provision quoted above should be applied as though Congress had specified that the amendment is applicable to "adversary proceedings" filed on or after October 8, 1984 rather than bankruptcy "cases" filed after that date. This argument presupposes that Congress was

unaware of the distinct meaning each of these terms has acquired in the bankruptcy law since the 1973 adoption of the bankruptcy rules, which first introduced adversary proceedings. I reject this contention.

It is apparent from a review of the 1984 Act that the two terms are used with precision in many other provisions where the context makes it clear that the terms were intended to have their customary meaning. A similar effective date provision was contained in the Bankruptcy Reform Act of 1978, Pub.L. 94-598 §403(a), which also employed the word "case" and provided that all matters and proceedings in or relating to any such "case" would be determined under the former Act as if the 1978 amendment had not been enacted. Without dissent, that provision has been applied literally, giving the customary bankruptcy meaning to the term "case". Nicholson v. First Investment Co., 705 F.2d 410, 411 n.1 (11th Cir. 1983). There is no reason to assume less precision in the selection of the same term for the same purpose by Congress six years later. I conclude that the former 45-day provision in §547(c)(2) is applicable for the purposes of this case and, therefore this adversary proceeding.

Id. at 738. See also In re Amarex, Inc., 74 B.R. 378, 382 (Bankr. W.D.Okla. 1987). These adversary proceedings were filed in 1985. Therefore, this Court concludes that the 45-day rule applies, as the lower court found.

### III

The appellants contend that they were denied due process in that they constitute creditors of the estate and should have received notice so as to participate in the proceedings leading to confirmation of the reorganization plan. The Bankruptcy Code does recognize a claim arising from the recovery of avoided preferences, which are treated as pre-petition claims. 11 U.S.C. §502(h).

The appellants place principal reliance upon Reliable Elec. Co., Inc. v. Olson Const. Co., 726 F.2d 620 (10th Cir. 1984). In

Reliable, the appellate court held that the holder of a pre-petition unsecured claim was denied due process by not receiving adequate notice of the confirmation hearing. The appellate court affirmed the holding of the lower court that the creditor's claim was therefore not subject to the confirmed plan of reorganization.

The identical argument, including reliance upon the Reliable decision, was presented to the court in In re Southern Indus. Banking Corp., 66 B.R. 349 (Bankr. E.D.Tenn. 1986). The court stated:

[the claim at issue in Reliable differs] material-ly from the rights defendants assert as claims. None of the creditors in those cases asserted a claim contingent upon, or arising as a result of, the exercise of an avoidance power in bankruptcy. Instead, each of the four cases involved an identifiable creditor with a claim actually arising prepetition.

"Claim" is broadly defined in §101(4) to assure the debtor a fresh start. See H.R.Rep. No. 595, 95th Cong., 1st Sess. 309, reprinted in 1978 U.S.Code Cong. & Adm.News 5787, 5963, 6266. Congress wanted to assure that a debtor be able to obtain "the broadest possible relief in the bankruptcy court." Id. However, in a reorganization case involving an application for the appointment of a legal representative to represent the interests of individuals who may manifest asbestos-related diseases in the future, in denying the application, the court observed that: "It is not true that any conceivable claim is contingent." In re UNR Industries, Inc., 29 B.R. 741, 745 (N.D.Ill. 1983), appeal dismissed, 725 F.2d 1111 (7th Cir. 1984).

Sustaining defendant's contention that they are creditors within the scope of §101(9)(A) would mean that prepetition transferees of transfers avoidable under §§544, 545, 547, 548, and 553 are entitled to notice and, presumably, to all the rights available to creditors in bankruptcy. Formal notice of bankruptcy proceedings to potential preference defendants has never been customary and perhaps never considered previous to this case. This court is confident that neither Congress nor the Bankruptcy Rules Committee

envisioned formal notice of bankruptcy proceedings to transferees of avoidable transfers or their participation in reorganization proceedings until disgorgement of the avoidable transfer. The defendants' prospective rights to file claims, §502(h), are not contingent claims within the circumscription of §101(4)(A). Hence, the defendants are not "creditors" within the scope of §101(9)(A). Further, defendants do not qualify as creditors under §101(9)(B) because to date there has been no recovery of property from them pursuant to §550. See §502(h) (a claim arising from the recovery of property under §550 shall be allowed or disallowed as if such claim had arisen prepetition).

Id. at 361. (footnote omitted). This Court agrees with the analysis above. The recent decision of Sheftelman v. Metals Corp., 839 F.2d 1383 (10th Cir. 1987) is not to the contrary. Again, Sheftelman did not involve preference defendants, but bondholders who held existing pre-petition claims. Preference defendants may not withhold their property, forcing the trustee to initiate a recovery action, while maintaining that they are contingent creditors who deserve notice of the confirmation action. A preference defendant's claim only arises upon recovery of the property. Thus, under appellants' theory, reorganization plans could only be confirmed after the conclusion of all preference actions. Such delay is contrary to the purpose of bankruptcy proceedings. Cf. In re Amarex, 74 B.R. 378, 381 (Bankr. W.D. Okla. 1987). Accordingly, the decision of the bankruptcy court will be affirmed on this basis.

#### IV

The appellants contend that the trial court erred in two findings: (1) that the debtors were insolvent on the dates of the transfers at issue and (2) that appellants received more than they would have under a Chapter 7 liquidation.

Under 11 U.S.C. §547(b)(3) the trustee must prove by a preponderance of the evidence that the challenged transfers were made while the debtor was insolvent. Under 11 U.S.C. §547(b)(5), the trustee must show by the same standard that the transfers enabled the [appellants] to receive more than they would receive if the bankruptcy case were a case under Chapter 7; if the transfer had not been made; and if the appellants had received payments of the debts as provided by the Code. (Appellants' Brief at 45). The trustee has the burden of proving these elements pursuant to 11 U.S.C. §547(g).

Title 11 U.S.C. §547(f) provides that the debtor is presumed to have been insolvent on and during the ninety days immediately preceding the filing of the bankruptcy petition. At the conclusion of the trial, the bankruptcy court found -- and the trustee does not dispute -- that the presumption of insolvency had been rebutted.

Determination of solvency is a question of fact, subject to the clearly erroneous standard. Clay v. Traders Bank of Kansas City, 708 F.2d 1347, 1350 (8th Cir. 1983). See also In re Mullet, 817 F.2d 677, 678 (10th Cir. 1987).

A finding of fact may be deemed "clearly erroneous" only if the finding is without factual support in the record, or if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

Colon-Sanchez v. Marsh, 733 F.2d 78, 81 (10th Cir.) cert. denied, 469 U.S. 855 (1984) (citations omitted).

The United States Supreme Court has stated that

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.

. . .

Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985)  
(citations omitted).

The appellants contend that the bankruptcy court admitted incompetent and irrelevant evidence on the insolvency issue. Their argument is that the successor trustee employed a theory of "retrojection" in its presentation of evidence. Retrojection involves the use of a subsequent balance sheet in order to demonstrate insolvency on some date prior to the date of the balance sheet. See, e.g. In re Kaylor Equip. and Rental, Inc., 56 B.R. 58 (Bankr. E.D.Tenn. 1985). The successor trustee denies that it employed retrojection theory, but rather that it introduced evidence that the debtors were insolvent on each day of the 90-day period.

The Court finds that the successor trustee introduced exhaustive evidence by an established accounting firm as to daily balance sheets for every day of the 90-day period. This evidence was bolstered by testimony of Harold Madigan, an independent consultant in the area of valuation of loan portfolios. (Loans receivable were the principal assets of the debtors). Contrary

evidence introduced by the appellants was found by the bankruptcy court to not be credible. Under the applicable standard, this Court cannot state that the bankruptcy court's finding of insolvency was clearly erroneous.

Regarding 11 U.S.C. §547(b)(5), the appellants place principal reliance upon In re Tenna Corp., 801 F.2d 819 (6th Cir. 1986). They argue that "the trustee must create a hypothetical Chapter 7 liquidating estate as of the filing date of the bankruptcy case and demonstrate the defendant's standing as a distributor of the estate," (Appellants' Brief at 53), which appellants assert was not done in the case at bar. Appellants focus their discussion of Tenna upon the necessity of creating a hypothetical Chapter 7 model. Actually, the Tenna court noted that "by definition, in any Chapter 11 proceeding a hypothetical liquidation must be done." Tenna, 801 F.2d at 821. Rather, the court was addressing "the narrow issue concerning the appropriate time for testing the preferential effect of a payment." Id. at 820 (emphasis added). The issue was critical in Tenna because during the Chapter 11 proceedings the debtor borrowed funds from two banks to continue its operation. As security for the loans, the bankruptcy court granted the banks super-priority liens on the debtor's property pursuant to 11 U.S.C. §364. Id. The bankruptcy court took into account the post-petition accumulated debt in making its §547(b)(5) determination. The Sixth Circuit Court of Appeals held this to be improper, ruling that the hypothetical liquidation must be made as of the date that the bankruptcy petition is filed.

In the case under review, the bankruptcy court found

that the evidence establishing the debtor's insolvency on the date of the filing of the bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendant received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

(Finding of Fact 32. Findings of Fact and Conclusion of Law in Saied) (emphasis added). This finding indicates that the bankruptcy court did make its §547(b)(5) determination as of the date the bankruptcy petition was filed. Nothing before this Court indicates that the bankruptcy court took account of post-petition debt, as Tenna condemns. This Court cannot conclude that the bankruptcy court's determination was erroneous.

V

Finally, the appellants argue that the transfers in question were contemporaneous exchanges for new value, and thus exempt from the avoiding powers of the trustee pursuant to 11 U.S.C. §547(c)(1) which provides as follows:

(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

With respect to the definition of "new value," §547(a)(2) of the 1978 Bankruptcy Code provides as follows:

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation;

Payment of long-term debt does not fall within this exception. See, e.g., In re Candor Diamond Corp., 44 B.R. 195 (Bankr. S.D.N.Y. 1984). The defendants' citation of In re George Rodman, Inc., 792 F.2d 125 (10th Cir. 1986) is inapposite. In Rodman the court held that a release of a materialman's lien upon an oil well in response to payment of a debt constituted "new value." The court specifically noted that Oklahoma law defines a lien as a property right. Id. at 128 n.7. Thrift certificates do not constitute property interests, but rather are evidence of underlying indebtedness. Accordingly, this argument is rejected.

It is the Order of the Court that the consolidated appeal of the appellants herein is hereby DENIED. The judgment of the bankruptcy court is hereby AFFIRMED in all respects.

IT IS SO ORDERED this 30<sup>th</sup> day of June, 1988.

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

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

FILED

JUN 30 1983

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

HALL, ESTILL, HARDWICK, GABLE, )  
COLLINGSWORTH & NELSON, INC., )  
a professional corporation, )

Plaintiff, )

vs. )

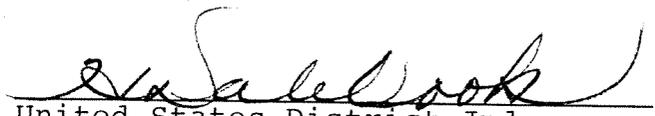
MICHAEL GALES, )

Defendant. )

Case No. 87-C-74 C

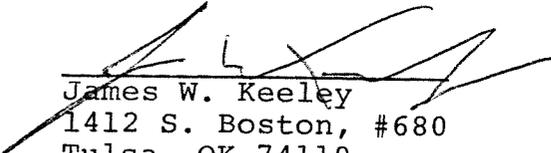
ORDER

This matter having come before this Court upon joint stipulation of the parties, and for good cause shown, the above-styled action is dismissed with prejudice.

  
United States District Judge



  
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BLACKSTOCK JOYCE POLLARD & MONTGOMERY  
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ATTORNEY FOR DEFENDANT

  
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Tulsa, OK 74119  
(918) 742-5864  
ATTORNEY FOR PLAINTIFF

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

IN RE; DURABILITY, INC. )  
 )  
 Debtor, )  
 )  
 FRED I. PALMER, SR. )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 THE FOURTH NATIONAL BANK AND )  
 TRUST COMPANY, N.A., of Tulsa, OK )  
 )  
 Appellee. )

FILED

JUN 30 1988

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

87-C-627-B

ORDER

Now before the Court is an appeal from the Bankruptcy Court, and specifically, that Court's Order of July 28, 1987, granting partial summary judgment in favor of Fourth National Bank of Tulsa ("FNB"). The Bankruptcy Court ruled that FNB has a valid, perfected, secured interest in the assets of the Debtor (Durability, Inc.) in the amount of \$1,618,331.80 and that such interest is superior to any claim of Fred I. Palmer, Sr. ("Palmer, Sr."). (R. 534.37) Palmer, Sr. now appeals, citing four errors of law, stated as follows:

1. Whether the Bankruptcy Court erred in holding that the subordination agreement between Fourth National Bank and Trust Company and Fred I. Palmer, Sr., subordinates Fred I. Palmer, Sr.'s security interest to the security interest of Fourth National Bank and Trust Company in excess of \$1,045,000.00.
2. Whether the Bankruptcy Court erred in allowing Fourth National Bank and Trust Company to tack on optional future advances on the existing indebtedness to the detriment of Fred I. Palmer, Sr.

3. Whether the Bankruptcy Court erred in not compelling Fourth National to marshal assets.
4. Whether the Bankruptcy Court erred in assuming jurisdiction of the priority dispute between Fourth National Bank and Trust Company and Fred I. Palmer, Sr.

The salient facts are as follows. Between 1983 and 1986 FNB and Palmer, Sr. made or renewed several loans to Debtor:

FNB Loans to Debtor

1. \$76,000 May 12, 1983
2. \$500,000 May 12, 1983
3. \$20,000 February 1, 1984
4. \$1,045,000 May 14, 1985
5. \$500,000 March 10, 1986
6. \$13,400 April 10, 1986

Palmer, Sr. Loans to Debtor

1. \$500,000 January 18, 1985
2. \$500,000 August , 1985
3. #200,000 February 24, 1986

In conjunction with the FNB loan of \$1,045,000 to Debtor, Palmer, Sr. executed a letter, dated May 30, 1985, addressed to FNB which states in part that,

[T]he payment of all Junior Liabilities shall be, and hereby is, postponed and subordinated to the payment in full of all Senior Liabilities, subject to a cap or ceiling of \$1,045,000.00 ...

When Debtor filed bankruptcy, FNB asserted a secured claim in the amount of \$1,618,331.80, and Palmer, Sr., asserted a secured claim in the amount of \$1,200,000.00. FNB claims a superior security interest in the total amount of Durability's debt to FNB (i.e., \$1,618.331.80). Palmer, Sr. claims that FNB's interest is superior only to the extent of \$1,045,000.00, by virtue of the "cap" language in his subordination letter.

The Bankruptcy Court, in granting FNB summary judgment, made certain findings of fact critical to its decision. The Bankruptcy Court found:

1. Prior to the FNB loan of \$1.045 million, Debtor owed FNB approximately \$600,000.
2. Thereafter, and prior to the FNB loan of \$1,045 million, Palmer, Sr. loaned Debtor \$500,000.
3. Thereafter, Debtor asked FNB for the loan of \$1,045,000. However, FNB conditioned the loan upon Palmer, Sr. subordinating his interests up to the amount of the loan.
4. It "is just not plausible under any circumstances" to believe FNB would agree to subordinate its pre-existing \$600,000 security interest beneath Palmer, Sr.'s mortgage.

The Bankruptcy Court then concluded:

1. The May 30, 1985 subordination letter from Palmer, Sr. to FNB could only be construed as subordinating Palmer, Sr.'s \$500,000 mortgage beneath FNB's \$1,045,000 loan - "and not, under any circumstances, affecting the \$600,000 previously owed by the debtor to the bank."
2. Therefore, FNB has a security interest in Debtor's assets in the amount of \$1,618,221.80, superior to that of Palmer, Sr.

In reviewing decisions of the Bankruptcy Court, factual findings must be accepted as true, unless clearly erroneous.<sup>1</sup> Bankruptcy Rule 8013; In re Mullet, 817 F.2d 677, 678 (10th Cir. 1987). Conclusions of law, however, are to be considered de novo. Id.

#### I. THE SUBORDINATION AGREEMENT

The Bankruptcy Court's findings regarding the Debtor's borrowing history is amply supported in the record and not clearly erroneous. FNB clearly did have a superior perfected

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<sup>1</sup> A finding is "clearly erroneous" only when the reviewing court after searching the entire evidence is left with the definite and firm conviction that a mistake has been committed. In re McGinnis, 586 F.2d 162, 164 (10th Cir. 1978).

security interest in the personalty of Debtor in the approximate amount of \$600,000 prior to Palmer's subordination letter. Likewise, the finding that FNB conditioned its further loan of \$1,045,000.00 on Palmer, Sr.'s subordinating his superior interest in Debtor's realty, up to the full amount of the new loan, is not clearly erroneous. Quite the opposite, it is entirely consistent with the cautious actions of a lender such as FNB.<sup>2</sup>

Neither is the Court's determination, regarding the implausibility of FNB intending to give up its \$600,000 pre-existing secured position in order to induce Palmer, Sr. to subordinate his own position clearly, erroneous.<sup>3</sup> Therefore,

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<sup>2</sup> To understand why FNB would especially want Palmer, Sr.'s subordination up to the full \$1,045,000 amount, it must be remembered that Palmer, Sr.'s \$500,000 mortgage was unrecorded. FNB could not be certain that other unrecorded security interests were not also held by Palmer, Sr. (father of Debtor's president, Fred Palmer, II).

<sup>3</sup> Appellant also argues that it was error to grant summary judgment because a genuine issue of material fact remained. In support, Appellant points to the affidavit of Palmer, Sr. as evidence that the subordination agreement was intended to "cap" Palmer, Sr.'s subordinated position to \$1,045,000.00.

The argument fails on two grounds. First, the Bankruptcy Court is not obligated to give weight to evidence which is too incredible to be accepted by reasonable minds. Selsor v. Callaghan & Co., 609 F.Supp. 1003, 1010 (N.D. Ill. 1985). The Bankruptcy Court apparently found such an explanation to be implausible, (R. 546, Transcript at 17-18) which finding is not clearly erroneous. Absent Palmer's affidavit, no genuine fact issue existed.

Second, the Bankruptcy Court found the subordination agreement to be unambiguous. Appellant agrees, describing the subordination agreement as "clear", "unambiguous", and "unmistakable." Appellant's Reply Brief, filed 2/1/88, at 4; Appellant's Brief in Chief, filed 12/23/87, at 11-12. Parol

appellant's first assertion of error is without merit.

## II. FUTURE ADVANCES

As his second assignment of error, Appellant argues that FNB should not have been permitted to "tack on optional future advances on the existing indebtedness."

Considering the question de novo, it should be noted that personal property may be pledged as security for existing and future obligations.<sup>4</sup> 12A O.S. §9-312(7) (Supp. 1988). Future advances secured by personal property retain the priority status held as of the date of the initial loan by virtue of the relation back doctrine set forth in 12A O.S. §9-312(7). First National Bank and Trust Co. of Norman, 676 P.2d 837, 841 (Okla.

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evidence may not be introduced to explain the terms of an unambiguous contract. Mercury Investment Co. v. F.W. Woolworth Co., 706 P.2d 523, 529 (Okla. 1985). Thus, Palmer, Sr.'s affidavit was of no effect and the matter was ripe for summary judgment.

Incredibly, Appellant asserts that the parol evidence rule not applicable because "Palmer, Sr. does not seek to 'contradict, change, or add to the terms of a written contract.'" Appellant's Reply Brief, filed 2/1/88, at 3. Instead, he asserts that he "merely seeks to enforce the oral subordination agreement he had" (with FNB), "... a matter not addressed within the May 30, 1985 letter." (Id.) (Emphasis added.) Such totally unsupported, after-the-fact, assertions of oral agreements are precisely the type of claim the parol evidence rule has always excluded.

In addition, the suggestion that a separate, oral agreement is the basis for Appellant's asserted priority, flies in the face of his repeated reliance on the written subordination letter. This line of argument is thus without merit.

<sup>4</sup> Where real property is pledged, however, the lender may retain its secured position only for obligatory future advances; optional advances create a security interest junior to all intervening security interests. Lech v. Ponca City Production Credit Association, 478 P.2d 347 (Okla. 1970).

1984).

Thus, when FNB made loan advances to Debtor of \$500,000 and \$13,400 on March 10, 1986 and April 10, 1986, respectively, FNB retained its security interest held since 1983 and 1984 - - when it initially lent Debtor funds and perfected its security interest. Appellant, on the other hand, did not take any secured interests in Debtor's personal property until after 1984. As a result, FNB retained its superior position by virtue of 12A O.S. §9-312(7). Therefore, Appellant's second ground is also without merit.

### III. MARSHALING OF ASSETS

As his third assignment of error, Appellant asserts the Bankruptcy Court erred in not compelling FNB to marshal assets. The equitable doctrine of marshaling rests upon the principle that a creditor finding two funds from which to satisfy the debt owed, and standing ahead of a second creditor who can look to only one of the funds, must first resort to the fund upon which he has an exclusive lien. 42 O.S. §17. If the debt is not satisfied from the first fund, the creditor may then resort to the second. Id.

Marshaling is inappropriate in this case because (1) FNB has no "exclusive fund" to look from which Appellant is barred; and (2) Debtor's properties combined did not satisfy FNB's liens.<sup>5</sup>

This ground is also without merit.

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<sup>5</sup> Appellant's argument would be economically meaningful only if he had prevailed on the subordination issue.

IV. TITLE 28, U.S.C. §157(b)

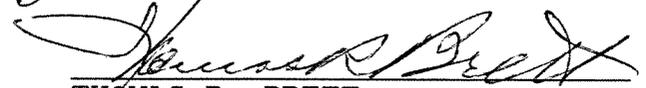
Appellant's final assignment of error is that the Bankruptcy Court erred by assuming jurisdiction of the priority dispute because 28 U.S.C. §157(b) is unconstitutional.

Appellant stakes his position solely on dicta in In re LT Ruth Coal Co. Inc., 66 BR 753, 764 (Bkrtcy. E.D. Ky. 1986). Considering the issue de novo, it is noted that the Tenth Circuit has not specifically considered a challenge to the constitutionality of §157(b). However, §157(b) has oft been cited, with approval, by the Tenth Circuit. Eg., Teton Exploration Drilling v. Bokum Resources Corp., 818 F.2d 1521, 1524 (10th Cir. 1987); In re Mullet, 817 F.2d 677, 678-79 (10th Cir. 1987); Branding Iron Motel, Inc. v. Sandlian Equity, Inc., 798 F.2d 396, n. 3 (10th Cir. 1986); Yeates v. Yeates, 807 F.2d 874, n. 1 (10th Cir. 1986); In re Reid, 757 F.2d 230, n. 5 (10th Cir. 1985).

Therefore, 28 U.S.C. §157(b) is found not to be constitutionally infirm; and Appellant's last ground is without merit.

The Court thus finds no error in the Bankruptcy Court order of July 28, 1987 granting partial summary judgment to FNB. Accordingly, the decision of the Bankruptcy Court is, hereby, **AFFIRMED.**

Dated this 30<sup>th</sup> day of June, 1988.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

**JUN 30 1988**

FEDERAL DEPOSIT INSURANCE )  
CORPORATION, in its corporate )  
capacity, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
RELL SCHWAB, JR., an individual; )  
VICTORY NATIONAL BANK OF NOWATA, )  
a national banking association; )  
COFFEYVILLE STATE BANK, a Kansas )  
corporation; and THE FEDERAL LAND )  
BANK OF WICHITA, a federally )  
chartered corporation pursuant to )  
the Farm Credit Act, )  
 )  
Defendants. )

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

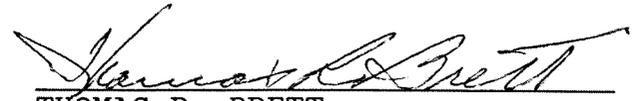
No. 87-C-677-B

**O R D E R**

This matter comes before the Court on the Plaintiff's Motion for Summary Judgment against Defendant Rell Schwab, Jr. The Court has examined the file in this matter and finds that the Defendant Rell Schwab, Jr. has failed to respond to the Motion for Summary Judgment filed March 24, 1988. In accord with Rule 14(a) of the Rules of the United States District Court for the Northern District of Oklahoma, the Court finds the Defendant, Rell Schwab, Jr.'s failure to respond to the motion as constituting a confession of the matters raised by the pleadings. Therefore the Court grants the Plaintiff's Motion for Summary Judgment against the Defendant Rell Schwab, Jr. The Plaintiff is ordered to prepare and file a proposed Judgment in keeping with this order which reflects the exact indebtedness due and interest to date. The Plaintiff should file the proposed Judgment within ten days of the date of this

order.

IT IS SO ORDERED this 30<sup>th</sup> day of June, 1988.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



FILED

JUN 30 1988

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

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

CATHY A. REAVIS,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO. 87-C-250-E
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	
	)	
v.	)	
	)	
GEORGE REAVIS and LARRY R. SAUNDERS,	)	
	)	
Additional Defendants on Counterclaim	)	

DEFAULT JUDGMENT

It appearing to the Court that additional defendant on counterclaim, Larry R. Saunders has failed to answer or otherwise plead, JUDGMENT is hereby entered for the United States of America and against Larry R. Saunders in the amount of \$71,489.33, plus interest from date of assessment to payment as provided by law.

SIGNED this 29 day of June, 1988.

S/ JAMES O. ELISON

UNITED STATES DISTRICT JUDGE



APPROVALS:

CURTISS MORRIS

*Curtiss Morris*  
Plaintiff - Pro Se

JOHN H. LIEBER

*John Lieber*  
Attorney for Defendants

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

**FILED**

TOMMY REDMON,

Plaintiff,

v.

LIEUTENANT WILLIAM REAVES and  
DR. BARNES,

Defendants.

JUN 30 1988

86-C-959-B

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

ORDER

Plaintiff filed this action pursuant to 42 U.S.C. §1983, seeking relief for alleged violations of his civil rights by officials of the Tulsa County Jail. The Court ordered Defendants to submit a Special Report, setting out the facts and circumstances surrounding each of Plaintiff's allegations and staying Defendants' Motion to Dismiss and/or for Summary Judgment and Plaintiff's Motion for Appointment of Counsel and for Evidentiary Hearing. The Special Report was filed on October 19, 1987, and the various motions are now before the Court for consideration.

The allegations set out in Plaintiff's Petition may be generally summarized as follows: (1) complaints about prison conditions (bedding, towels, hygiene articles); (2) complaints about medical care (denial thereof); and (3) complaints about access to legal materials (the law library). Defendants have moved to dismiss or, in the alternative, for summary judgment based on the Special Report.

Plaintiff fails to address Defendants' Motion to Dismiss or for Summary Judgment as required by Fed.R.Civ.P. 56 (e).

Instead, Plaintiff simply reasserts his claim of denial of access to legal materials, and asks the court to appoint counsel as a consequence of this denial. Plaintiff also requests an evidentiary hearing, and or appointment of a handwriting analyst, implying that jail documents bearing his signature have been forged or otherwise altered.

Upon consideration, the court finds Plaintiff's assertions to be without merit; consequently, appointment of counsel is not justified. See United States v. Masters, 484 F.2d 1251, 1253 (10th Cir. 1973). In the judgment of this Court, Plaintiff's failure to properly respond, and the authorities set out below require a finding that Defendants' Motion to Dismiss or for Summary Judgment be granted.

#### COUNT I

In order to establish a claim under 42 U.S.C. §1983, Plaintiff must show that some person, acting under color of state law, deprived him of a right protected by the Constitution. Gomez v. Toledo, 446 U.S. 635 (1980). Section 1983 claims must be predicated on a substantive right; mere speculation that some right has been impaired will not suffice. Holms v. Finney, 631 F.2d 150 (10th Cir. 1980). Thus, "constitutional rights allegedly invaded, warranting an award of damages must be specifically identified." Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981; Brice v. Day, 604 F.2d 664 (10th Cir. 1979), cert. den. 444 U.S. 1086 (1980). In Count I of the Complaint, Plaintiff fails to specify the invasion of a particular

constitutional right, instead, merely setting out conclusory allegations of delayed provision of bedding and personal hygiene items. No facts are recited which would signal the impairment of an identifiable constitutional right. Moreover, review of the Special Report indicates Plaintiff's claim in Count I is frivolous.

Plaintiff alleges that upon entering the Tulsa County Jail his personal hygiene items were taken from him. He further asserts that he requested such items, but did not receive them for over a week, thereby forcing him to attend court in the interim without having brushed his teeth or having shaved. However, the evidence does not support Plaintiff's contentions. If, as he claims, he entered the jail with his own personal hygiene items, these would have been listed on the property and clothing report. No such entry was made. (See Special Report, Exhibit "A"). Even assuming Plaintiff did enter the jail with such items, there would have been nothing compelling their confiscation. According to jail officials, inmates in the Tulsa County Jail are customarily allowed to retain possession of personal hygiene items issued by other correctional facilities. (Special Report at 2.)

Plaintiff, having been previously incarcerated in the Tulsa County Jail, would have been familiar with established operational procedures; therefore, he would have been aware that hygiene items are routinely provided to indigent inmates upon request. Had Plaintiff in fact requested such items, he would

likely have received them at that time, as such requests are generally filled on a same-day basis. (Special Report at 3.) However, there is no record that Plaintiff ever requested such items prior to July 22, 1986, the date he actually received them. (Affidavit of Lt. William T. Reaves, Special Report, Exhibit "C".) Thus, it appears that the allegations in Count I are totally without merit.

As for Plaintiff's complaint of denial of bedding and towels, the Special Report indicates that Plaintiff would likely have been provided a blanket, sheet and towel no later than 1:00 p.m. on July 17, 1986. Thus, Plaintiff would have been without bedding and towel for no more than eighteen (18) hours. (Special Report at 3.) A §1983 cause of action simply does not lie for such trivial invasions of recognized rights. Brown v. Bigger, 622 F.2d 1025, 1027 (1980). The allegations of Count I are thus frivolous.

#### COUNT II

In Count II of the Complaint, Plaintiff asserts he has been denied access to the law library at the Tulsa County Jail, thereby frustrating his constitutional right of access to the courts. This right "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828 (1971). The Tulsa County Jail requires inmates to fill out a library request form, setting out the materials

they wish to examine. This allows library officials to ensure that the materials are available for viewing during a prisoner's visit to the law library.

In the instant case, Plaintiff filled out such a form, but the librarian (understandably) was unable to process it without further information from the Plaintiff. (Special Report, Exhibit "E".) Before the necessary additional information was received and the requested materials made available, Plaintiff was returned to the Department of Corrections. Despite Plaintiff's allegations to the contrary, these facts do not establish any substantial deprivation of a constitutional right.

Prison regulations which reasonably limit the times, places and manner in which inmates engage in legal research and preparation of legal papers do not rise to violations of constitutionally protected rights so long as the regulations do not frustrate access to the courts. Twyman v. Crisp, 584 F.2d 353, 357 (10th Cir. 1978). The procedures established at the Tulsa County Jail are reasonable and not unduly burdensome; thus, they meet the standard set out in Twyman. Moreover, even assuming the converse were true, Plaintiff was represented by counsel during court appearances he made while incarcerated in the Tulsa County Jail. Having had the benefit of the assistance of counsel, Plaintiff was clearly not denied access to the courts. See, Bounds, supra. Thus, Plaintiff's allegation does not state a claim upon which relief can be granted pursuant to 42 U.S.C. §1983.

### COUNT III

Plaintiff's allegations in Count III pertain to his medical care, or denial thereof, during his incarceration in the jail. The Supreme Court has stated that insufficiency of medical treatment will not constitute a violation of an inmate's Eighth Amendment right against cruel and unusual punishment unless there has been "deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 104 (1976). Negligence or malpractice will not suffice to sustain a claim under 42 U.S.C. §1983. Smart v. Villar, 547 F.2d 112 (10th Cir. 1976). Plaintiff must allege and prove exceptional circumstances and conduct so grossly incompetent, inadequate or excessive so as to shock the conscience or to be intolerable to basic fairness. Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974). Plaintiff's allegations are examined in this light.

Plaintiff alleges in Count III that he was admitted to the jail carrying prescription medicine for an eye ailment, and that said medicine was taken from him by jail officials, who then refused to administer the medication for several days. Plaintiff asserts that jail officials were fully aware of his eye problem, given his previous incarceration at the Tulsa County Jail, and that their refusal to administer this medication constituted an unconstitutional denial of medical care.

It is true that a claim of interference by prison officials with prescribed medical treatment is cognizable under §1983. Twyman v. Crisp, 584 F.2d at 354-55. However, the undisputed

evidence does not reflect Defendants' deliberate defiance of a medical order.

While the evidence does show that Plaintiff was carrying medication upon his arrival, (see Special Report, Exhibit "F"), the reasons for its non-administration are somewhat different than those alleged by Plaintiff. There was a problem with the prescription information on the container itself, the label being unreadable. The prescription, therefore, had to be verified. (Special Report at 5.) Clearly, inmates cannot claim a constitutional right to remain in possession of, or be administered, medication which has not been properly prescribed. Similarly, careful medical procedure dictates that exact instructions for the use of any such medication be obtained, in order that it be properly administered. The evidence shows that said medications were administered to Plaintiff immediately following the verification of the prescription information. (Special Report at 5; see also, Exhibit "F".) Given these undisputed facts, the Court finds no deliberate indifference to Plaintiff's serious medical needs constituting cruel and unusual punishment.

Therefore, it is hereby ORDERED that Counts I and II of Plaintiff's Complaint be dismissed as frivolous, pursuant to 28 U.S.C. §1915(d), and, summary judgment be entered in favor of Defendants and against Plaintiff as to Count III of the

Complaint. Furthermore, Plaintiff's Motion for an evidentiary hearing and appointment of a handwriting expert are, hereby, denied.

It is so ORDERED this 30 day of June,  
1988.

  
\_\_\_\_\_  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**FILED**

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

JUN 30 1988

CAROLYN DUE DOYLE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 JEANNE PARKS CHELSEA, )  
 )  
 Defendant. )

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

No. 88-C-008-B

O R D E R

This matter comes before the Court on Plaintiff Carolyn Sue Doyle's Motion to Dismiss Defendant Jean Parks Chelsea's Counterclaim for lack of subject matter jurisdiction.

Plaintiff's Complaint originally was brought against Jeanne Parks Chelsea ("Chelsea") for unpaid overtime under 29 U.S.C. §216(b). Chelsea counterclaimed based on a promissory note in default by Plaintiff in favor of Chelsea. Both parties agree the two claims do not arise from the same transaction. Chelsea argues the permissive Counterclaim could be brought in federal court because it was a liquidated defensive set-off to the original claim, citing Curtis v. J. E. Caldwell, 86 F.R.D.454, 457 (E.D.Pa. 1980). See also, Binnick v. Avco Financial Services of Nebraska, Inc., 435 F.Supp. 359, 366 (D.Neb. 1977); Fraser v. Astra Steamship Corp., 18 F.R.D. 240, 242 (S.D.N.Y. 1955); 6 Wright & Miller, Federal Practice & Procedure, Civil, §1422 at 122 (1971). Since that time, Plaintiff has dismissed Chelsea from the lawsuit. Chelsea's claim therefore cannot be a mere set-off. Since Chelsea has failed to plead jurisdiction for her claim, the Counterclaim is hereby dismissed.

IT IS SO ORDERED this 29<sup>th</sup> day of June, 1988.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

SAFEWAY STORES, INCORPORATED )  
a Maryland corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
SOUTHLAND ASSOCIATES, an )  
Oklahoma partnership, )  
 )  
Defendant. )

No. 85-C-533-E

JUN 29 1983  
JACK C. SILVER, CLERK  
U.S. DISTRICT COURT

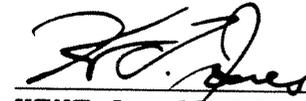
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) and (c), Federal Rules of Civil Procedure, the undersigned parties hereby dismiss the above-captioned action and their claims and counter-claims asserted therein, all with prejudice. Each party will bear its own costs.

  
L. E. STRINGER  
KEVIN D. GORDON

-Of the Firm-  
CROWE & DUNLEVY  
A Professional Corporation  
1800 Mid-America Tower  
20 North Broadway  
Oklahoma City, Oklahoma 73102  
(405) 235-7700

ATTORNEYS FOR PLAINTIFF  
SAFEWAY STORES, INCORPORATED

  
KENT L. JONES  
WILLIAM G. BERNHARDT  
Hall, Estill, Hardwick,  
Gable, Golden & Nelson  
4100 Bank of Oklahoma Tower  
One Williams Center  
Tulsa, Oklahoma 74172  
(918) 588-2700

ATTORNEYS FOR DEFENDANT  
SOUTHLAND ASSOCIATES

FILED

JUN 28 1988

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

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

ALTA R. DOBSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. C-88-345-C
	)	
J & J PIANO COMPANY and	)	
FARMERS INSURANCE COMPANY, INC.	)	
	)	
Defendants.	)	

*Notice of* DISMISSAL WITHOUT PREJUDICE

Comes now the Plaintiff, Alta R. Dobson, and hereby dismisses the above entitled cause as to the Defendant, Farmers Insurance Company, Inc., only without prejudice.

ALTA R. DOBSON, Plaintiff,

*Robert W. Thompson*

---

ROBERT W. THOMPSON (OBA #12514)  
Attorney for Plaintiff  
P. O. Box 385  
Stroud, Oklahoma 74079  
918/968-3232

FARMERS INSURANCE COMPANY, INC.

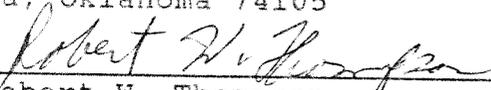
*Robert Taylor*

---

ROBERT TAYLOR  
ATTORNEY FOR DEFENDANT  
Knowles and King  
603 Expressway Tower  
2431 East 51st Street  
Tulsa, Oklahoma 74105

CERTIFICATION OF MAILING

I, Robert W. Thompson, hereby certify that on the 28 day of ~~May~~ June, 1988, I mailed, via U. S. Mail, with sufficient postage thereof, a true and correct copy of the above Dismissal Without Prejudice, to Jeffrey A. King, Goree, King, Rucker and Finnerty, Southern Oaks Office Park, 7335 South Lewis, Suite 306, Tulsa, Oklahoma 74136 and Robert Taylor, Knowles and King, 603 Expressway Tower, 2431 East 51 Street, Tulsa, Oklahoma 74105

  
Robert W. Thompson

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

**F I L E D**

JUN 28 1988

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

JAMES E. GUTHRIE, ET AL., )

Plaintiffs, )

vs. )

K. J. SAWYER, ET AL., )

Defendants. )

No. 87-C-283-E

O R D E R

The Court has for consideration the Findings and Recommendations of the Magistrate filed February 25, 1988. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed and adopted by the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment should be granted as to all counts of Plaintiffs' complaint; further it is unnecessary to rule on additional motion filed by the parties. Defendants are to prepare and file an appropriate form of judgment by July 15, 1988.

It is so Ordered this 27<sup>th</sup> day of June, 1988.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

FILED

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

JUN 28 1988

CLAYTON COLLINSWORTH, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CHICAGO PNEUMATIC TOOL, ET AL., )  
 )  
 Defendants. )

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

No. 86-C-160-E

JUDGMENT

This action came on for hearing before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff Clayton Collinsworth take nothing from the Defendant R. A. Young & Sons, that the action against such Defendant only be dismissed on the merits, and that the Defendant R. A. Young & Sons recover of the Plaintiff Clayton Collinsworth its costs of action.

DATED at Tulsa, Oklahoma this 27<sup>th</sup> day of June, 1988.

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

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

GUESS ?, INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
RANDY'S SILK SCREENING INC. )  
OF TULSA, et al., )  
 )  
Defendants. )

Case No. 87-C-191-C

**FILED**

JUN 27 1988

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

STIPULATION OF DISMISSAL

Plaintiff Guess ?, Inc., and Defendant Linda Blackburn d/b/a Pride Enterprises, hereby stipulate pursuant to Federal Rule of Civil Procedure 41(a)(1)ii) that Defendant Linda Blackburn d/b/a Pride Enterprises may be dismissed from the above-styled action pursuant to the settlement entered into between the parties.

DATED this 7 day of June, 1988.



ROY J. DAVIS, ESQ.  
GARY S. CHILTON, ESQ.

of

ANDREWS DAVIS LEGG BIXLER  
MILSTEN & MURRAH  
500 West Main  
Oklahoma City, Oklahoma 73102  
Telephone: (405) 272-9241

ATTORNEYS FOR PLAINTIFF  
GUESS ?, INC.



A. CARL ROBINSON  
ROBINSON, LOCKE, GAGE,  
FITE & WILLIAMS  
P. O. Box 87  
Muskogee, Oklahoma 74402-0087

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

**F I L E D**

JUN 27 1988

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

WATIE WALKINGSTICK, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BURLINGTON NORTHERN RAILROAD, )  
 a Delaware corporation; and )  
 BROTHERHOOD OF RAILWAY CARMEN OF )  
 THE UNITED STATES AND CANADA, )  
 AFL-CIO/CLC, an unincorporated )  
 association, )  
 )  
 Defendants. )

No. 87-C-947-B

ORDER

Upon stipulation of the parties and for good cause shown, plaintiff's causes of action against both defendants, Burlington Northern Railroad Company and Brotherhood of Railway Carmen of The United States and Canada AFL-CIO, are hereby dismissed with prejudice to the refiling of such actions.

IT IS SO ORDERED this 27<sup>th</sup> day of June, 1988.

S/ THOMAS R. BRETT

\_\_\_\_\_  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

F I L E D

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

JUN 27 1988

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

WALDRON FOREST PRODUCTS, INC., )  
a corporation, )

Plaintiff, )

v. )

GREGORY SUTTON, an individual, )

Defendant. )

Case No. 87-C-765-B

JOURNAL ENTRY

On ~~May~~ <sup>June 27<sup>th</sup></sup> 1988, the above captioned case came on before the undersigned Judge with respect to defendant's consent to judgment.

The parties hereto, by their signatures below, have agreed that judgment be entered in this case in favor of Waldron Forest Products, Inc., and against Gregory Sutton in the amount of Fourteen Thousand Two Hundred Forty-nine Dollars (\$14,249.00) at the rate of 10% per annum from June 1, 1988, until paid. This amount includes court costs and attorney fees. The Court, having reviewed the pleadings on file, finds that judgment should be entered on behalf of Plaintiff in the amount as stated above.

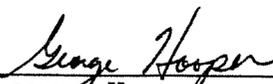
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Waldron Forest Products, Inc., be granted judgment against the defendant Gregory Sutton in the amount of Fourteen Thousand Two Hundred

Forty-nine Dollars (\$14,249.00) plus interest at the rate of 10% per annum from June 1, 1988, until paid.

S/ THOMAS R. BRETT

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

APPROVED AS TO CONTENT  
AND FORM:

  
\_\_\_\_\_  
George Hooper  
Black, Hooper, Brooks &  
Bodenhamer, P.A.  
4310 East 31st Street  
Suite 600  
Tulsa, Oklahoma 74135

Attorney for Defendant  
Gregory Sutton

  
\_\_\_\_\_  
Gregory Sutton

  
\_\_\_\_\_  
John R. Decker  
Brune, Pezold, Richey &  
Lewis  
700 Sinclair Building  
Six East Fifth Street  
Tulsa, Oklahoma 74103

Attorney for Plaintiff  
Waldron Forest Products, Inc.

  
\_\_\_\_\_  
Patrick Hunter  
Waldron Forest Products, Inc.

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

WILLIE B. HOSKINS,

Plaintiff,

v.

OTIS R. BOWEN, M.D,  
SECRETARY OF HEALTH AND HUMAN  
SERVICES,

Defendant.

No. 87-C-345-B

**FILED**

JUN 27 1988

ORDER

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

This matter comes before the Court on Plaintiff's Objection to the Report of the United States Magistrate. For the reasons set forth below, the Court hereby overrules the objection.

This claim is pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. §405(g) concerning judicial review of the decision of the Secretary of Health and Human Services which denied Plaintiff's application for disability benefits.

Plaintiff filed applications for disability insurance benefits (SSD), 42 U.S.C. §416(i) and for supplemental security income benefits (SSI), 42 U.S.C. §1381(a) alleging disability due to high blood pressure and an enlarged heart beginning on October 31, 1984 (later amended to July 10, 1984).

All benefits were denied. Upon reconsideration, benefits were again denied. Plaintiff requested an administrative hearing on both SSI and SSD claims. An Administrative Law Judge determined Plaintiff was not disabled under the Social Security Act definition. Plaintiff requested a review of that decision and the Appeals Council denied the request. Plaintiff appeals to this

court. Magistrate John Leo Wagner affirmed the Administrative Law Judge's decision. Plaintiff objects to the report of the Magistrate claiming the report is not based on substantial evidence.

Plaintiff is a thirty-six year old man with a ninth grade education. He has been diagnosed as suffering from a history of palpitations-arrhythmias, probable hypertensive/alcoholic cardiomyopathy, alcoholism, gastritis, inadequate personality, and borderline intellectual functioning with a full scale I.Q. of 72. Plaintiff has worked as a kitchen helper, janitor, furniture mover, hospital food server, a yard worker, and for the Housing Authority. He has not worked since October of 1984 because of his physical problems (shortness of breath, dizziness, digestive problems and heart palpitations).

The sole issue here for the Court to determine is whether substantial evidence existed to support the denial of benefits. Plaintiff cites Frey v. Bowen, 816 F.2d 508 (10th Cir. 1987), which holds the established rule in this circuit is that the Secretary must give substantial weight to the testimony of a claimant's treating physician, unless good cause is shown to the contrary. Magistrate Wagner allowed the Secretary's findings to stand based on Richardson v. Perales, 402 U.S. 389, 401 (1971), which defines substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Plaintiff's first assertion is that there is a prima facie case based on the facts and medical evidence of disability due to

alcoholism. Alcoholism can constitute a disability if it prevents a claimant from engaging in substantial gainful activity. Ferguson v. Schweiker, 641 F.2d 243 (5th Cir. 1981). The Administrative Law Judge found that although Plaintiff has suffered from alcoholism, "the evidence in the record is persuasive that when claimant is not currently under the influence of alcohol, he does not have any significant physical or mental residuals from chronic alcoholism." Plaintiff's medical reports prepared by Drs. Calhoun, Farrar and Merriman did not indicate any physical problems that would prevent Plaintiff from engaging in substantial employment. However, Plaintiff's treating physician concluded that the physical damage from alcohol use precluded gainful activity.

Plaintiff asserts that the Administrative Law Judge erred in not giving substantial weight to Dr. Wright's findings. Magistrate Wagner affirmed the Administrative Law Judge's opinion because Dr. Wright's report was brief, conclusory and unsupported by specific medical evidence and therefore may be weighed accordingly. The Magistrate relied on Mongeur v. Heckler, 722 F.2d 1033 (2nd Cir. 1983), which sets forth "It is an accepted principle that the opinion of a treating physician is not binding if it is contradicted by substantial evidence." The medical reports of Drs. Calhoun, Farrar and Merriman contradicted Dr. Wright's opinion as well as did psychologist Dr. Smith's report which found that the alcohol abuse was in remission, Plaintiff's thought processes were logical and systematic, he had the ability to read and write and to understand job instructions, calculate simply, sustain work

performance, cope with work pressures, and the ability to get along with co-workers and supervisors.

Plaintiff also asserts that the Administrative Law Judge erred by not combining all of the Plaintiff's impairments. The Administrative Law Judge and Magistrate both considered the claimant's impairments in combination and held that Plaintiff does not qualify under the combination of impairments portion of the Social Security regulations.

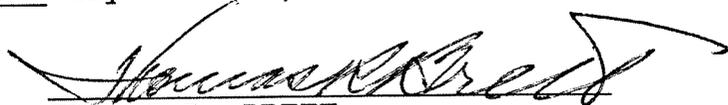
Thirdly, the Plaintiff asserts that the Administrative Law Judge ignored the finding of Dr. Wright. However, as discussed earlier, Dr. Wright's opinion was brief, conclusory and unsupported by medical evidence according to the Magistrate.

Plaintiff next asserts that the Administrative Law Judge did not adequately question a vocational expert concerning the effects of alcoholism on the Plaintiff's ability to work. Magistrate Wagner determined that the scope of the Administrative Law Judge's questions were adequate. Although the expert did not specify a job Plaintiff could perform, the Administrative Law Judge determined that Plaintiff was able to perform his past relevant work, and other work not involving heavy exertion or average to high intelligence. The Magistrate found that the Administrative Law Judge did not commit error by failing to rule in accordance with the vocational expert.

The Court here finds Magistrate Wagner's ruling free of error based on the facts and evidence presented to the Secretary of Health and Human Services, Administrative Law Judge and Magistrate

Wagner. Magistrate Wagner based his decision on sufficient evidence. Dr. Wright's opinion was contradicted by adequate medical reports which determined that Plaintiff was capable of performing gainful employment. Therefore, Plaintiff is not entitled to benefits based on a disability and the Plaintiff's objection to the Magistrate's report is overruled. The Court adopts the Findings of the Magistrate.

IT IS SO ORDERED, this 27<sup>th</sup> day of June, 1988.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE





---

Joseph H. Bocock, OBA No. 0906  
Henry D. Hoss, OBA No. 11354  
McAFEE & TAFT  
A Professional Corporation  
10th Floor, Two Leadership Square  
Oklahoma City, Oklahoma 73102  
Telephone: (405) 235-9621

OF COUNSEL:

McAFEE & TAFT  
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10th Floor, Two Leadership Square  
Oklahoma City, Oklahoma 73102  
Telephone: (405) 235-9621

ATTORNEYS FOR DEFENDANTS  
TED A. CRUCHON AND  
PRUDENTIAL-BACHE SECURITIES, INC.

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

FILED

JUN 27 1988

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

REUBEN T. DIXON and IRENE )  
DIXON, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
GOLDEN RULE INSURANCE COMPANY, )  
et al., )  
 )  
Defendants. )

Case No. 87-C-252-B

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Stipulation of Dismissal With Prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure entered into by all parties to this action,

IT IS HEREBY ORDERED that this action be and it hereby is dismissed with prejudice.

S/ THOMAS R. BRETT

---

UNITED STATES DISTRICT JUDGE

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

FILED

JUN 27 1988

HOUSEHOLD BANK, a Federal  
Savings Bank,

Plaintiff,

vs.

HELMUT MAYER and ERNI MAYER,  
husband and wife,

Defendants.

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

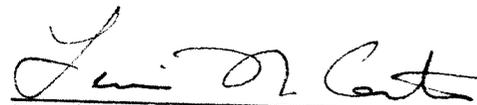
Case No. 87-C-458-E

VOLUNTARY DISMISSAL OF THIRD  
CAUSE OF ACTION WITH PREJUDICE

Plaintiff hereby voluntarily dismisses its third cause of  
action with prejudice to its being refiled, in accordance with  
the judgment and decree of foreclosure entered in the above case.

DOERNER, STUART, SAUNDERS,  
DANIEL & ANDERSON

By



Lewis N. Carter  
(OBA No. 1524)  
1000 Atlas Life Building  
Tulsa, Oklahoma 74103  
(918) 582-1211

Attorneys for Plaintiff,  
Household Bank

Assented to:

JONES, GIVENS, GOTCHER,  
BOGAN & HILBORNE

By



Thomas L. Vogt  
3800 First National Tower  
Tulsa, Oklahoma 74103  
Attorneys for Defendants,  
Helmut Mayer and Erni Mayer

*Entered Copy*

FILED

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

JUN 25 1987

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

PAUL WM. POLIN &	)
MARSHA POLIN,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
JEWS FOR JESUS a/k/a	)
HINENI MINISTRIES,	)
	)
Defendant.	)

No. 87-C-38-C

O R D E R

Now before the Court for its consideration is the motion to dismiss of the defendant. The plaintiff having responded, the issues are now ready for the Court's determination.

The plaintiffs are the parents of Robin Polin ("Robin"), who was raised in the Jewish faith. In their first cause of action, the plaintiffs allege that, while Robin was under eighteen years of age, the defendant used various means to convince Robin to leave her home and parents. The plaintiffs allege that the defendant's actions constitute enticement of a child, in violation of 76 O.S. §8. In the second cause of action, brought by plaintiff Paul Polin individually, he alleges that the defendant caused (1) an advertisement to be published in the Tulsa World and Tulsa Tribune newspapers, (2) letters to be mailed to various parts of the United States, and (3) a newsletter to be mailed to various parts of the United States, all of which contained false

statements regarding Paul Polin and cast him in a false light in the public eye.

In its motion to dismiss, the defendant raises five separate arguments which shall be addressed in turn. First, the defendant asserts that this action should be dismissed because the plaintiffs filed a prior federal court action against the present defendant and other defendants which was dismissed for lack of diversity.<sup>1</sup> In one order, the district court referred to the plaintiffs' "bad faith failure" to amend their complaint. The defendant argues that this Court should now use such reference as a basis to dismiss the present action and assess costs against the plaintiffs. This argument is patently meritless. The plaintiffs have begun a new action which shall be judged on its merits; if costs were to be awarded regarding the previous action, it was for that district court to do so.

Second, the defendant asserts that this Court lacks personal jurisdiction over the defendant. The question of whether a federal court has in personam jurisdiction over a nonresident defendant in diversity cases is determined by the law of the forum state. Yarbrough v. Elmer Bunker & Associates, 669 F.2d 614 (10th Cir. 1982). The applicable provision of Oklahoma law is 12 O.S. §2004(F), which states the following: "A court of this state may exercise jurisdiction on any basis consistent with

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<sup>1</sup>The parties do not dispute that complete diversity exists as the Complaint now stands. Plaintiffs are residents of Oklahoma, and the defendant is a California corporation.

the Constitution of this state and the Constitution of the United States." The Oklahoma long-arm statutes upon which defendant relies have now been repealed. As to their first cause of action, the plaintiffs have alleged purposeful contacts by the defendants with Robin in Oklahoma, aimed at enticing Robin to leave her home. Regarding their second cause of action, the plaintiffs have attached to their Complaint copies of the newspaper advertisements published in Tulsa, Oklahoma newspapers. Small print at the top of the advertisement provides the reader with the defendant organization's name and address. The plaintiff has also presented a copy of a letter written to Robin in Oklahoma by a member of defendant organization. The letter is on defendant's letterhead. Such allegations of contacts, which the Court must take as true in the context of a motion to dismiss, are sufficient to confer personal jurisdiction over the defendant. See, e.g., Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1172 (5th Cir. 1985) (Even a single purposeful contact is sufficient to satisfy the due process requirement of "minimum contacts" when the cause of action arises from the contact); First American First, Inc. v. Nat'l Assoc. of Bank Women, 802 F.2d 1511, 1517 (4th Cir. 1986) (Proper for Virginia district court to exercise jurisdiction over action involving allegedly defamatory letters mailed from Illinois throughout the country, when their intended effect was aimed at forum state).

Third, defendant asserts that plaintiffs' first cause of action fails to state a claim upon which relief can be granted. 76 O.S. §8 provides in pertinent part as follows:

The rights of personal relation forbid:

...

2. the abduction or enticement of a child from a parent, ....

The defendant contends that its representatives did not meet Robin until she was over eighteen years of age. The defendant relies upon 10 O.S. §10, which provides in pertinent part that the authority of a parent ceases when a child attains majority. Therefore, defendant contends, it cannot be held to have enticed a child. The plaintiff responds that defendant's representatives encountered Robin prior to her eighteenth birthday, and therefore may be liable under 76 O.S. §8, despite the fact that Robin did not leave home until after her eighteenth birthday. No definition of child appears in 76 O.S. §8 or in the Oklahoma Statutes. The standard which the Court must employ in reviewing a motion to dismiss for failure to state a claim is quite high.

[I]t must appear beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true. All reasonable inferences must be indulged in favor of the plaintiff, ... and the pleadings must be liberally construed.

Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984) (citations omitted). Under this standard, the Court cannot say that the plaintiff has failed to state a cause of action.

Fourth, the defendant contends that the Complaint fails to state a claim upon which relief can be granted in its second cause of action. The same high standard quoted above applies to this aspect of defendant's motion. Here, defendant relies upon

McCormick v. Oklahoma Publishing Co., 613 P.2d 737 (Okla. 1980), which holds that an action based upon invasion of privacy does not lie when the disclosed information is a matter of public record. The plaintiff responds that not all the statements complained of contained in defendant's newspaper advertisements, letters, and newsletter were based on public records, and that many statements were in fact false. Again, the Court cannot say that the plaintiff has failed to state a claim.

Fifth, the defendant contends that this action is barred by the statute of limitations. In the plaintiffs' prior federal action, the district court entered an order dismissing the plaintiffs' first amended complaint on October 7, 1985. The plaintiffs filed a motion to reconsider on October 16, 1985, which was denied on January 17, 1986. The defendant cites 12 O.S. §100 which provides as follows:

If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fail in such action otherwise than upon the merits, the plaintiff, or, if he should die, and the cause of action survive, his representatives may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.

Both parties apparently agree that the time limit for originally commencing the action has expired. The present action was filed on January 16, 1987, and defendant contends this was well over one year from October 16, 1985, and that plaintiff's action is therefore barred. Defendant responds that the proper measuring date is January 17, 1986, when its motion to reconsider was

denied. The Court has discovered no authority under the Oklahoma statute or analogous statutes from other states. A motion to reconsider may be characterized as a motion to alter or amend judgment under Rule 59(e) F.R.Cv.P. A timely Rule 59(e) motion tolls the time for filing a notice of appeal in federal court. Skagerberg v. Oklahoma, 797 F.2d 881, 883 (10th Cir. 1986). Further, 12 O.S. §100 is remedial and should be liberally construed. C & C Tile Co., Inc. v. Indep. School Dist. No. 7 of Tulsa County, 503 P.2d 554, 559 (Okla. 1972). With such construction in mind, the Court holds that the timely filing of the motion to reconsider tolled the running of the one-year limitation of 12 O.S. §100 and renders the present Complaint timely.

Accordingly, it is the Order of the Court that the defendant's motion to dismiss is hereby denied.

IT IS SO ORDERED this 24 day of June, 1987.

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

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 24 1988

R.M. BROOKER, et al. )

Plaintiffs, )

v. )

UTICA BANKSHARES CORP., et al. )

Defendants. )

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

No. 86-C-108-C

REVISED FINAL ORDER APPROVING  
SETTLEMENT AND DISMISSAL WITH PREJUDICE

This matter has come before the Court on the application of Plaintiff Class and Defendants Utica Bankshares Corporation and Victor Thompson (collectively "Utica") for approval of the settlement set forth in a Settlement Agreement of the above-captioned Class Action. The Court has considered all papers filed and proceedings had herein, including the objections of the Samuel Roberts Noble Foundation ("Noble"), and otherwise has been fully informed in the premises. It is therefore,

ORDERED, ADJUDGED, AND DECREED THAT:

1. This Court has jurisdiction over the subject matter of this litigation and all actions within this litigation and over all parties to this litigation, including all members of the Class.

2. For purposes of the settlement between Plaintiff Class and Utica and effectuating and enforcing the terms and conditions of the Settlement Agreement, the Court certifies this Action as a Class Action, pursuant to Rule 23(b), F.R.Civ.P., on behalf of all persons or entities who were class members ("the Class");

viz. purchasers for value, in market transactions, of Utica Bankshares Corp. common stock during the period between July 8, 1982 up to March 31, 1983.

3. This Court hereby approves the Settlement, finding that its terms are, in all respects, fair, reasonable, adequate, and in the best interest of the Class.

4. Other than any individual claims of those persons identified in Exhibit 1 hereto, who duly requested exclusion from the Class, this Court dismisses this Action with prejudice as to each and every claim, demand, right, action, and cause of action set forth in the Complaint, without costs to any of the settling parties as against the other, except as provided in the Settlement Agreement and Plan of Distribution.

5. All members of the Class, other than those listed in Exhibit 1, are barred and enjoined from asserting, commencing, prosecuting, or continuing, whether directly, indirectly, derivatively, or representatively, against Utica, any and all claims, demands, liabilities, rights, actions, and causes of action, known or unknown, whether individual, class, derivative, or representative, that Plaintiffs, the Class, or any member or members of the Class, have, had, or in the future might have based on, arising out of, in connection with, or in relation to this Action or the facts underlying it.

6. The notice of Temporary Class Certification and Settlement given to the Class, as set forth in the Order of this Court entered September 18, 1987 was the best notice practicable under the circumstances. It included individual notice to all members

of the Class who could be identified through reasonable effort. The notice provided due and adequate notice of these proceedings and the proposed settlement to all persons entitled to such notice. The notice satisfied the requirements of Rule 23(c)(2) and 23(e), F.R.Civ.P., and the requirements of due process of law.

7. The September 17, 1987 Order also specified that class members were required to submit their claims on a Proof of Claim form in accordance with specified procedures to be eligible to receive distribution from the Settlement Fund created by the parties.

8. The Court has read and considered the parties' proposed Plan of Distribution of the Settlement Fund, the pleadings and evidence in support thereof and the objections of Noble, which this Court overruled by an Order filed on June 17, 1988. The Court finds that the Plan of Distribution is fair, reasonable, adequate and in the best interest of class members. The Settlement Fund shall be distributed in accordance with the Plan of Distribution, with accumulated interest apportioned according to the distribution of the Settlement Fund principal. In addition, the separate Attorneys' Fees Fund with accrued interest will be paid to Boraks & Leckar, P.C. in accordance with the Settlement Agreement.

9. Without affecting the finality of this Order in any way, this Court hereby retains continuing jurisdiction over the parties respecting such matters as properly come before it, until the final order contemplated hereby has become effective and each

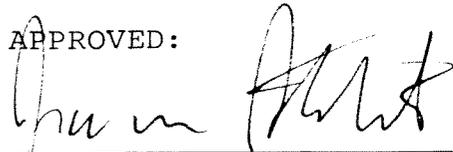
and every act agreed to be performed by the parties has been performed.

(Signed) H. Dale Cook

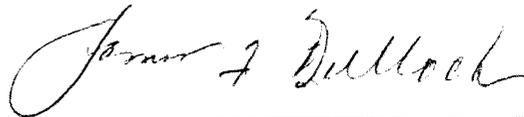
United States District Judge

Dated: June 24, 1988

APPROVED:



James M. Sturdivant  
GABLE & GOTWALS  
20th Floor Fourth National Bldg.  
Tulsa, Oklahoma 74119  
918/582-9201



James F. Bullock  
PRAY, WALKER, JACKMAN,  
WILLIAMSON & MARLAR  
900 Oneok Plaza  
Tulsa, Oklahoma 74103  
918/584-4136

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

_____	)	
R.M. BROOKER, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 86-C-108-C
	)	
UTICA BANKSHARES CORP., et al.	)	
	)	
Defendants.	)	
_____	)	

EXHIBIT 1 TO FINAL ORDER APPROVING  
SETTLEMENT AND DISMISSAL WITH PREJUDICE

REQUESTS FOR EXCLUSION:

Bob W. Owen  
Wanda J. Owen  
2223 S. Delaware Place  
Tulsa, Oklahoma 74114  
(7 shares)

Estate of Wheeler  
Betty Wheeler, Exec.  
2 5th Avenue; Apt. 20M  
New York, New York 10011  
(26 shares)



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

JUN 24 1988

RECEIVED  
JUN 24 1988  
Hall Estill

MORTGAGE CLEARING CORPORATION, )

Plaintiff, )

vs. )

TERRITORY SAVINGS AND LOAN )  
ASSOCIATION and the FEDERAL )  
SAVINGS AND LOAN INSURANCE )  
CORPORATION, )

Defendants. )

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

Case No. 88-C-157-B

State Court Action  
Case No. CJ-87-1338

STIPULATION OF DISMISSAL

COMES NOW the Federal Savings and Loan Insurance Corporation as Receiver for Territory Savings and Loan Association ("FSLIC") and Mortgage Clearing Corporation, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, enters this Stipulation of Dismissal. In support FSLIC states:

1. On January 29, 1988 the Federal Home Loan Bank Board ("FHLBB") appointed FSLIC as receiver for Defendant Territory Savings and Loan Association ("Territory") pursuant to 12 U.S.C. § 1464 and 12 C.F.R. §§ 547.1, et seq.

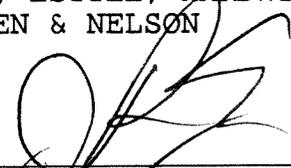
2. Pursuant to 12 C.F.R. §§ 548.2 and 549.3, et seq., FSLIC, as receiver, shall defend, and otherwise participate on behalf of Territory in any legal proceeding by and against Territory.

3. FSLIC, hereby dismisses, without prejudice, the counterclaim filed by Territory on 5/4/87.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON

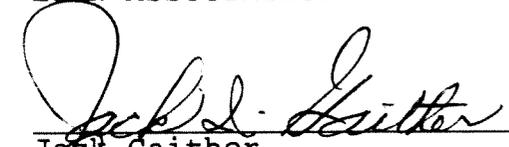
By



---

William D. Nay  
Jeffrey R. Schoborg  
4100 Bank of Oklahoma Tower  
One Williams Center  
Tulsa, Oklahoma 74172  
(918) 588-2696

ATTORNEYS FOR FEDERAL SAVINGS AND  
LOAN INSURANCE CORPORATION AS  
RECEIVER FOR TERRITORY SAVINGS &  
LOAN ASSOCIATION



---

Jack Gaither  
Law Building, Suite 100  
500 West 7th Street  
Tulsa, Oklahoma 74119

ATTORNEY FOR MORTGAGE CLEARING  
CORPORATION

CERTIFICATE OF MAILING

I the undersigned certify that on the 24 day of June, 1988, a true and correct copy of the above and foregoing was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

Jack Gaither  
Law Building, Suite 100  
500 West 7th Street  
Tulsa, Oklahoma 74119

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 24 1988

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

IN THE MATTER OF THE TAX )  
INDEBTEDNESS OF BUEL H. AND )  
PEGGY NEECE, )

Nos. M-1455-C  
M-1456-C

NOTICE OF DISMISSALS

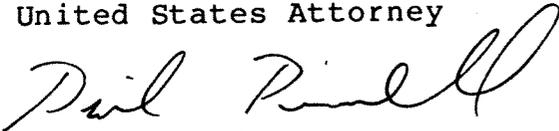
The United States of America, having previously filed an application requesting authorization for Connie Medlock, a Revenue Officer of the Internal Revenue Service, to enter certain premises and to execute a warrant, would show the Court that said warrant was returned with a notation that the warrant was executed on June 15, 1988 by Connie Medlock, Revenue Officer with the Internal Revenue Service.

Accordingly, the United States gives notice of its dismissal pursuant to Rule 41, Federal Rules of Civil Procedure, of the above styled actions without prejudice.

Dated this 24<sup>th</sup> day of June, 1988.

Respectfully submitted,

TONY M. GRAHAM  
United States Attorney

  
PHIL PINNELL  
Assistant United States Attorney  
3600 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

IN THE MATTER OF THE TAX )  
INDEBTEDNESS OF BUEL H. AND )  
PEGGY NEECE, )

Nos. M-1455-C  
M-1456-C

FILED  
JUN 24 1988

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

NOTICE OF DISMISSALS

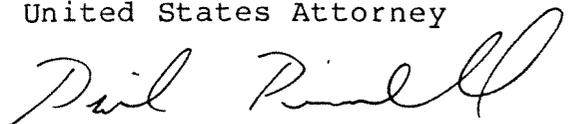
The United States of America, having previously filed an application requesting authorization for Connie Medlock, a Revenue Officer of the Internal Revenue Service, to enter certain premises and to execute a warrant, would show the Court that said warrant was returned with a notation that the warrant was executed on June 15, 1988 by Connie Medlock, Revenue Officer with the Internal Revenue Service.

Accordingly, the United States gives notice of its dismissal pursuant to Rule 41, Federal Rules of Civil Procedure, of the above styled actions without prejudice.

Dated this 24<sup>th</sup> day of June, 1988.

Respectfully submitted,

TONY M. GRAHAM  
United States Attorney



PHIL PINNELL  
Assistant United States Attorney  
3600 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 ROBERT H. KELLY; KAREN E. KELLY; )  
 COUNTY TREASURER, Craig County, )  
 Oklahoma, and BOARD OF COUNTY )  
 COMMISSIONERS, Craig County, )  
 Oklahoma, )  
 )  
 Defendants. )

FILED

JUN 24 1988

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

CIVIL ACTION NO. 88-C-186-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23<sup>rd</sup> day  
of June, 1988. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Nancy Nesbitt Blevins, Assistant United States  
Attorney; the Defendants, County Treasurer, Craig County,  
Oklahoma, and Board of County Commissioners, Craig County,  
Oklahoma, appear by David R. Poplin, Assistant District Attorney,  
Craig County, Oklahoma; and the Defendants, Robert H. Kelly and  
Karen E. Kelly, appear by their attorney James W. Keeley.

The Court being fully advised and having examined the  
file herein finds that the Defendants, Robert H. Kelly and  
Karen E. Kelly, acknowledged receipt of Summons and Complaint on  
March 11, 1988; that Defendant, County Treasurer, Craig County,  
Oklahoma, acknowledged receipt of Summons and Complaint on  
February 24, 1988; and that Defendant, Board of County  
Commissioners, Craig County, Oklahoma, acknowledged receipt of  
Summons and Complaint on February 29, 1988.

It appears that the Defendants, County Treasurer, Craig County, Oklahoma, and Board of County Commissioners, Craig County, Oklahoma, filed their Answer herein on March 2, 1988; and that the Defendants, Robert H. Kelly and Karen E. Kelly, filed their Answer herein on March 16, 1988, but have agreed to judgment in the following particulars.

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

Lot 2, in Block 3, in Neill Addition, a Subdivision in Craig County, Oklahoma, according to the recorded Plat thereof, of file and of record in the office of the County Clerk of Craig County, Oklahoma.

The Court further finds that on October 31, 1984, the Defendants, Robert H. Kelly and Karen E. Kelly, executed and delivered to Victor Federal Savings & Loan Association their mortgage note in the amount of \$50,000.00, payable in monthly installments, with interest thereon at the rate of thirteen percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Robert H. Kelly and Karen E. Kelly, executed and delivered to Victor Federal Savings & Loan Association, a mortgage dated October 31, 1984, covering the above-described property. Said mortgage was recorded on November 1, 1984, in Book 343, Page 709, in the records of Craig County, Oklahoma.

The Court further finds that on October 31, 1984, Victor Federal Savings & Loan Association assigned the above-described mortgage to Stockton, Whatley, Davin & Company. Said Assignment of Mortgage was recorded on November 1, 1984, in Book 343, Page 713, in the records of Craig County, Oklahoma, and was re-recorded on January 24, 1985, in Book 345, Page 456, in the records of Craig County, Oklahoma.

The Court further finds that on February 10, 1987, Stockton, Whatley, Davin & Company assigned the above-described mortgage to the Administrator of Veterans Affairs. Said Assignment of Mortgage was recorded on April 28, 1987, in Book 358, Page 413, in the records of Craig County, Oklahoma.

The Court further finds that the Defendants, Robert H. Kelly and Karen E. Kelly, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Robert H. Kelly and Karen E. Kelly, are indebted to the Plaintiff in the principal sum of \$54,791.10, plus interest at the rate of 8.5 percent per annum from July 1, 1987 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Craig County, Oklahoma, claim no right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Robert H. Kelly and Karen E. Kelly, in the principal sum of

\$54,791.10, plus interest at the rate of 8.5 percent per annum from July 1, 1987 until judgment, plus interest thereafter at the current legal rate of 7.20 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Craig County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Robert H. Kelly and Karen E. Kelly, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

*JAMES O. ELLISON*

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM  
United States Attorney

*Nancy Nesbitt Blevins*  
\_\_\_\_\_  
NANCY NESBITT BLEVINS  
Assistant United States Attorney

*James W. Keeley*  
\_\_\_\_\_  
JAMES W. KEELEY  
Attorney for Defendants,  
Robert H. Kelly and Karen E. Kelly *KK*

*David R. Hoplin*  
\_\_\_\_\_  
DAVID R. HOPLIN  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Craig County, Oklahoma

NNB/css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CHARLES WAYNE COLEMAN; PAULA L. )  
 COLEMAN a/k/a PAULA LORENE )  
 COLEMAN; RALPH GRABEL, Trustee; )  
 COUNTY TREASURER, Tulsa County, )  
 Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma; and STATE OF OKLAHOMA )  
 ex rel. OKLAHOMA TAX COMMISSION, )  
 )  
 Defendants. )

FILED

JUN 24 1988

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

CIVIL ACTION NO. 88-C-0004-C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23<sup>rd</sup> day  
of June, 1988. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Nancy Nesbitt Blevins, Assistant United States  
Attorney; the Defendants, County Treasurer, Tulsa County,  
Oklahoma, and Board of County Commissioners, Tulsa County,  
Oklahoma, appear by Doris L. Fransein, Assistant District  
Attorney, Tulsa County, Oklahoma; the Defendant, Ralph Grabel,  
Trustee, appears pro se; the Defendant, State of Oklahoma ex rel.  
Oklahoma Tax Commission, appears by its attorney Robert B.  
Struble; and the Defendants, Charles Wayne Coleman and Paula L.  
Coleman, appear not, but make default.

The Court being fully advised and having examined the  
file herein finds that the Defendants, Charles Wayne Coleman and  
Paula L. Coleman, acknowledged receipt of Summons and Complaint

on January 7, 1988; that the Defendant, Ralph Grabel, Trustee, acknowledged receipt of Summons and Complaint on January 16, 1988; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Amended Complaint on February 23, 1988; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 5, 1988; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 7, 1988.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers herein on January 27, 1988, and their Answers to Amended Petition on February 22, 1988; that the Defendant, Ralph Grabel, Trustee, filed his Answer herein on January 22, 1988; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer and Cross-Petition herein on March 18, 1988; and that the Defendants, Charles Wayne Coleman and Paula L. Coleman, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Thirty (30), Block Five (5), GARNETT PARK ADDITION, an Addition in the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 31, 1984, the Defendants, Charles Wayne Coleman and Paula L. Coleman, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, their mortgage note in the amount of \$50,000.00, payable in monthly installments, with interest thereon at the rate of thirteen percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Charles Wayne Coleman and Paula L. Coleman, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated May 31, 1984, covering the above-described property. Said mortgage was recorded on June 5, 1984, in Book 4794, Page 2468, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Charles Wayne Coleman and Paula L. Coleman, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Charles Wayne Coleman and Paula L. Coleman, are indebted to the Plaintiff in the principal sum of \$50,606.15, plus interest at the rate of 13 percent per annum from August 8, 1986 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property

which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$484.00, plus penalties and interest, for the year of 1987. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$27.00 which became a lien on the property as of 1986-1987. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, claims no right, title, or interest in the subject real property.

The Court further finds that the Defendant, Ralph Grabel, Trustee, claims no right, title, or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the subject real property by virtue of Tax Warrant No. ITI87005820 in the amount of \$86.70, plus penalties and interest accrued and accruing. Said tax warrant was recorded on August 7, 1987, in Book 5044, Page 836 in the records of Tulsa County, Oklahoma

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, Charles Wayne Coleman and Paula L. Coleman, in the principal sum of \$50,606.15, plus interest at the rate of 13 percent per annum from August 8, 1986 until judgment, plus

interest thereafter at the current legal rate of 7.20 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$484.00, plus penalties and interest, for ad valorem taxes for the year of 1987, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$27.00 for personal property taxes for the years of 1986-1987, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Ralph Grabel, Trustee, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment for Tax Warrant No. ITI87005820 in the amount of \$86.70, plus penalties and interest accrued and accruing. Said tax warrant was recorded on August 7, 1987, in Book 5044, Page 836 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for

the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$484.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of the Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$27.00, personal property taxes which are currently due and owing;

Fifth:

In payment of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, in the amount of \$86.70, plus penalties and interest accrued and accruing, for Tax Warrant No. IT187005820.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

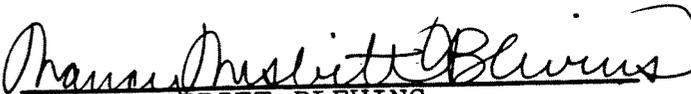
(Signed) H. Dale Cook

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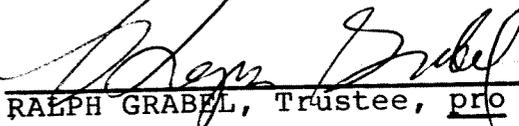
UNITED STATES DISTRICT JUDGE

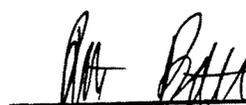
APPROVED:

TONY M. GRAHAM  
United States Attorney

  
\_\_\_\_\_  
NANCY NESBITT BLEVINS  
Assistant United States Attorney

  
\_\_\_\_\_  
DORIS L. FRANSEIN  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

  
\_\_\_\_\_  
RALPH GRABEL, Trustee, pro se

  
\_\_\_\_\_  
ROBERT B. STRUBLE  
Attorney for Defendant,  
State of Oklahoma ex rel.  
Oklahoma Tax Commission

NNB/css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENRICO MATTIONI AND JUANITA  
MATTIONI, husband and wife,

Plaintiffs,

v.

JEAN GOODSON,

Defendant.

Case No. 87-C-984-C

FILED

JUN 24 1988

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

STIPULATION AND ORDER  
FOR DISMISSAL

The parties to this litigation including the plaintiffs, Enrico Mattioni and Juanita Mattioni, and the defendant, Jean Goodson, hereby stipulate that the captioned cause of action should be and hereby is DISMISSED with prejudice.

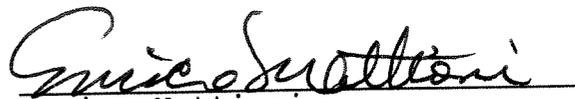
The parties further stipulate that each party to this litigation shall bear its own cost and attorneys' fees.

NOW THEREFORE, by virtue of and upon reviewing the parties' stipulation, this Court FINDS that the above styled action should be and hereby is DISMISSED with prejudice. Each party shall bear its own cost and attorneys' fees.

(Signed) H. Dale Cook

United States District Judge

Approved:

  
Enrico Mattioni

  
Juanita Mattioni

Larry L. Oliver & Associates, P.C.

By 

Larry L. Oliver  
Gregory P. Robinson  
2211 East Skelly Drive  
Tulsa, Oklahoma 74105-5913

Attorneys for the Plaintiffs

  
Jean Goodson

Holliman, Langholz, Runnels & Dorwart

By 

Keith F. Sellers  
Darrell G. Ford  
Suite 700 Holarud Building  
Ten East Third Street  
Tulsa, Oklahoma 74103

Attorneys for the Defendant

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

JUN 24 1988

ARTHUR D. PEPIN and ARROW-  
PEPIN VENTURES, an Oklahoma  
General Partnership,

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

Plaintiffs,

vs.

No. 88-C-6-E

CITIZENS NATIONAL BANK OF  
DRUMRIGHT, OKLAHOMA, TEDAN  
BROTHERS, an Oklahoma General  
Partnership, BOB POUND, and  
ARROW PRODUCTION COMPANY,

Defendants,

vs.

ARTHUR D. PEPIN; ARROW-PEPIN  
VENTURES, an Oklahoma  
General Partnership; ARROW  
PRODUCTION COMPANY, an  
Oklahoma corporation;  
TEDAN BROTHERS, an Oklahoma  
General Partnership;  
BOB POUND; WILLIAM S.  
SCHLUNEGER; and BRIGID F.  
SCHLUNEGER,

Third-Party Defendants.

JUDGMENT

NOW on this 23<sup>d</sup> day of June, 1988, this matter comes on for hearing. The Plaintiff, Arthur D. Pepin and Arrow-Pepin Ventures, an Oklahoma General Partnership composed of Arthur D. Pepin and Arrow Production Company, appear by and through their attorney of record Randall G. Vaughan. Defendant Arrow Production Company, an Oklahoma corporation, and Third-Party Defendants, William B. Schluneger and Brigid F. Schluneger, appear by and through their attorney

of record Robert G. Green. Defendant Federal Deposit Insurance Corporation appears by and through its attorney of record Larry D. Thomas. Defendant Tedan Partners, an Oklahoma General Partnership composed of Teddy D. Mitchell and Dan P. O'Toole, appears by and through its attorney of record Victor L. Hunt. Defendant Bob Pound appears not, having disclaimed any and all interest to the property which is the subject of this action.

The Court, having reviewed the pleadings filed herein and received the stipulations of the parties, finds as follows:

PARTIES AND JURISDICTION

1. On April 20, 1987, Arthur D. Pepin ("Pepin"), individually, and as a general partner of Arrow-Pepin Ventures, commenced this action by filing a Petition in the District Court of Creek County, State of Oklahoma, styled Arthur D. Pepin and Arrow-Pepin Ventures v. Citizens Bank of Drumright, Oklahoma, Tedan Brothers, Bob Pound and Arrow Production Company, No. C-87-227 for the purpose of quieting title to certain oil and gas leasehold estates located in Creek County.

2. Citizens Bank, Drumright, Oklahoma ("Citizens") filed an Answer and Counterclaim seeking in personam judgments against Arrow Production Company ("Arrow"), William B. Schluneger and Brigid F. Schluneger on various past due promissory notes, in rem judgments against certain

personalty and oil and gas leasehold estates located in Creek County, State of Oklahoma, and for the foreclosure sale of interests in the mortgaged property.

3. Tedan Partners, an Oklahoma General Partnership, filed an Answer and Counterclaim claiming an interest in the leasehold estates and for an in personam judgment against Arrow on a promissory note.

4. Bob Pound filed an Answer to Plaintiffs' Petition disclaiming any interest in and to the Masterson Lease and Chisholm Lease as more specifically described below.

5. Defendant Arrow, and Third-Party Defendants, William B. Schluneger, and Brigid F. Schluneger filed their Entry of Appearance but did not answer the Plaintiffs' Petition or Counterclaims of the Co-Defendants.

6. On September 24, 1987, the Oklahoma State Banking Commissioner ("Commissioner") closed Citizens, and assumed exclusive custody and control of the property and affairs of Citizens. The Commissioner subsequently tendered to the Federal Deposit Insurance Corporation ("FDIC"), appointment as Liquidating Agent of Citizens, and the FDIC accepted the appointment and thereby became empowered to proceed as if it were the Commissioner, with all of the corresponding powers and privileges pursuant to Okla. Stat. tit. 6, §1205(b). Certain assets of Citizens, including the notes and mortgages which were the subject of Citizens' Counterclaim, were sold and transferred by the FDIC Liquidating

Agent, pursuant to agreements approved by the District Court of Creek County, Oklahoma. The assets comprising the claims of Citizens in this action were transferred to the FDIC in its corporate capacity.

7. Upon Application and Order to the District Court of Creek County, the FDIC was substituted as Defendant in place of Citizens. FDIC timely filed its Petition for Removal pursuant to 12 U.S.C. §1819 and 28 U.S.C. §1441.

8. This Court has subject matter jurisdiction of all claims raised between these parties.

#### FACTS

9. On or about October 1, 1985, Pepin and Arrow formed Arrow-Pepin Ventures, an Oklahoma General Partnership (the "Partnership") for the purpose of drilling, exploring, and reworking a certain oil and gas leasehold estate located in Creek County, Oklahoma, known as the Bruce Pool Prue Sand Unit and zones lying thereunder. The Partnership Agreement provided in part that should Pepin contribute 100% of the cost to develop a new well, then his share of the profits or losses would be 80% and Arrow's share would be 20%.

10. On or about October 24, 1985, Arrow sold and conveyed to Pepin Oil Ventures, a Florida General Partnership, an undivided one-half working interest equivalent to a .40000 net revenue interest in and to the oil and gas leasehold estate known as the Bruce Pool Prue Sand Unit covering the following described property:

Section 2-17N-9E: SW/4 SW/4 SW/4;  
Section 3-17N-9E: E/2 and SW/4 and SE/4 NW/4  
and S2 SW/4 NW/4 and NE/4 SW/4  
NW/4 and SE/4 NW/4 NW/4 and  
S/2 NE/4 NW/4;  
Section 4-17N-9E: S/2 SE/4 NE/4 and NE/4 SE/4  
and N/2 SE/4 SE/4;  
Section 10-17N-9E: NE/4 and W/2 SE/4 and E/2  
NW/4 and E/2 NW/4 NW/4 and  
E/2 SW/4 NW/4 and NE/4 SW/4  
and E/2 SE/4 SW/4;  
Section 11-17N-9E: W/2 W/2 NW/4;

and containing 1,130.36 acres, more or less, and all other zones underlying the Prue Sand in which Arrow owned an interest. The Bruce Pool Prue Sand Unit consists of twenty-six (26) separate tracts. At the time of conveyance, Arrow owned a working interest in all zones underlying the Bruce Pool Prue Sand Unit in the following described property:

- Tract #1 - NW/4 NE/4 (Lot 2) of  
Sec. 3-T17N-R9E, 40.19 acres;
- Tract #5 - SE/4 NW/4 of Sec.  
3-T17N-R9E, 40 acres;
- Tract #6 - SE/4 NE/4 of Sec.  
3-T17N-R9E, 40 acres;
- Tract #11 - NW/4 NE/4 SW/4 of Sec.  
3-T17N-R9E, 10 acres;
- Tract #12 - E/2 NE/4 SW/4 and SW/4 NE/4 SW/4  
of Sec. 3-T17N-R9E, 30 acres;
- Tract #22 - E/2 NE/4 and NW/4 SE/4 of Sec.  
10-T17N-R9E, 120 acres;
- Tract #23 - W/2 W/2 NW/4 of Sec.  
11-T17N-R9E, 40 acres;
- Tract #25 - W/2 NE/4 SW/4 and SE/4 NE/4 SW/4  
and E/2 SE/4 SW/4 of Sec. 10-T17N,R9E,  
50 acres;

Tract #26 - NE/4 NE/4 SW/4 of Sec.  
10-T17N-R9E, 10 acres.

The zones underlying the Prue Sand in the above-described Tracts are also known as the "Indian Lease Deep Rights". The Assignment was recorded in the Creek County Clerk's Office on November 7, 1985, at Book 196, Pages 1095-1096.

11. On or about October 1, 1985, Pepin purchased all right, title, and interest to the equipment used in the operations of the Bruce Pool Prue Sand Unit from Arrow.

12. Two wells were completed by the Partnership on the following described property at depths below the Prue Sand:

N/2 NW/4 SW/4 of Section 3, T-17-N,  
R-9-E.

The wells are known as the Masterson 9-1 and Masterson 9-2. The oil and gas leasehold estate is known as the Masterson Lease. Pepin contributed all costs in the drilling and completion of the wells.

13. The Masterson 9-1 and Masterson 9-2 wells were drilled by the Partnership pursuant to a farmout agreement acquired by Arrow. Upon completion of the wells, title to the zones underlying the Bruce Pool Prue Sand was conveyed by L. B. Jackson Company and Trustees of the Arthur O. Olson Trust to Arrow. The assignments were filed in the Office of the County Clerk for Creek County at Book 197, Page 913 and Book 197, Page 912, respectively. L. B. Jackson Company reserved an undivided 4% X 8/8 overriding

royalty interest free of all costs of operation except payment of gross production taxes. The working interest was also subject to a  $1/16 \times 8/8$  overriding royalty interest in favor of H. F. Wilcox Oil and Gas Company. Arrow did not subsequently assign to Pepin an 80% working interest in the wells as contemplated by the division set forth in the Partnership Agreement.

14. One well was completed by the Partnership on the following described property:

SW/4 NE/4 SW/4 of Section 3, T-17-N,  
R-9-E.

The well is known as the Chisholm 12-1. The oil and gas leasehold estate is known as the Chisholm Lease. Pepin contributed all costs in the drilling and completion of the well.

15. Pursuant to an agreement between Pepin Oil Ventures and Pepin, Pepin acquired the rights to drill the Chisholm 12-1 on an Indian Lease Deep Rights Tract. Pepin and Arrow contemplated that Pepin would receive an assignment equivalent to an 80% working interest. Subsequent to completion of the Chisholm 12-1, Arrow did not assign an additional interest in the well to Pepin to establish title as contemplated by the division set forth in the Partnership Agreement.

16. On or about October 18, 1985, Arrow assigned to Tedan Partners ("Tedan") a  $2\% \times 8/8$  carried working interest, free and clear of all costs and production except

taxes, in and to the Bruce Pool Prue Sand Unit, and agreed to convey a 2% X 8/8 carried working interest in the Indian Lease Deep Rights Tracts described above upon establishing production on a per well basis. The assignment was recorded in the Office of the County Clerk for Creek County in Book 196, Page 1097.

17. The FDIC, Arrow, William B. Schluneger, and Brigid F. Schluneger have agreed to the disposition of all the collateral securing the notes set forth in the FDIC's Counterclaim, that all proceeds from said collateral have been, or will be, applied to the Note Indebtedness as set forth in the FDIC's Counterclaim, that the proceeds received and applied are not disproportionate to the value of the collateral, and that the proceeds are insufficient to retire the Note Indebtedness.

18. The Court finds that all of the allegations of the counterclaim of the FDIC are true and that the FDIC is entitled to judgment as follows:

(a) On the first cause of action against Arrow and William B. Schluneger, jointly and severally, in the amount of \$138,057.00, together with accrued interest thereon in the sum of \$53,022.56 as of June 10, 1988, plus interest continuing to accrue on the unpaid indebtedness from said date, at the per diem rate of \$56.57, until the date of judgment, post-judgment interest at the highest lawful rate, a reasonable attorneys' fee in the amount of \$2,000.00, plus court costs and all accruing costs of this action.

(b) On the second cause of action, FDIC, Arrow, William B. Schluneger and Brigid F. Schluneger agree that FDIC's claim shall be dismissed without prejudice.

(c) On the third cause of action against Arrow and William B. Schluneger, jointly and severally, in the amount of \$142,977.98, together with accrued interest thereon in the sum of \$25,290.46 as of June 10, 1988, plus interest continuing to accrue on the unpaid Indebtedness from said date, at the per diem rate of \$53.62, until the date of Judgment, post judgment interest at the highest lawful rate, a reasonable attorneys' fee in the amount of \$2,000.00, expenses of \$52.00, plus court costs and all accruing costs of this action.

(d) On the fourth cause of action against Arrow and William B. Schluneger, jointly and severally, in the amount of \$8,205.38, together with accrued interest thereon in the sum of \$2,629.72 as of June 10, 1988, plus interest continuing to accrue on the unpaid Indebtedness from said date, at the per diem rate of \$3.36, until the date of Judgment, post judgment interest at the highest lawful rate, a reasonable attorneys' fee in the amount of \$2,000.00, plus court costs and all accruing costs of this action.

(e) On the fifth cause of action against Arrow and William B. Schluneger, jointly and severally, in the amount of \$28,896.92, together with accrued interest thereon in the sum of \$8,518.51 as of June 10, 1988, plus interest continuing to accrue on the unpaid Indebtedness from said date, at the per diem rate of \$8.03, until the date of Judgment, post judgment interest at the highest lawful rate, a reasonable attorneys' fee in the amount of \$2,000.00, expenses of \$59.00, plus court costs and all accruing costs of this action.

(f) On the sixth cause of action FDIC, Arrow, William B. Schluneger and Brigid F. Schluneger agree that FDIC's claim shall be dismissed without prejudice.

19. The Court finds that all of the allegations of the Counterclaim of Tedan Partners are true and that Tedan Partners is entitled to judgment against Arrow in the

amount of \$25,000, together with accrued interest thereon in the sum of \$4,166.67 as of June 18, 1988, plus interest continuing to accrue on the unpaid indebtedness from said date at the per diem rate of \$6.84 until the date of judgment, post dated interest at the highest lawful rate, a reasonable attorneys' fee in the amount of \$2,535.00, plus court costs and all accruing costs of this action.

DETERMINATION OF OWNERSHIP

20. The Court hereby finds that record title in and to the oil and gas leasehold estate underlying the Prue Sand and covering the N/2 NW/4 SW/4 of Section 3, Township 17 North, Range 9 East, Creek County, Oklahoma, (the "Masterson Lease") is as follows:

<u>OWNER</u>	<u>WORKING INTEREST</u>	<u>NET REVENUE INTEREST</u>
Arrow	.20000	.1545000
Pepin	.80000	.6180000
H. F. Wilcox Oil & Gas Co.	.00000	.0625000
L.B. Jackson Co.	.00000	.0400000
Royalty Owners	.00000	.1250000

21. The Court hereby finds that record title in and to the oil and gas leasehold estate underlying the Prue Sand and covering the SW/4 NE/4 SW/4 of Section 3, Township 17 North, Range 9 East, Creek County, Oklahoma, (the "Chisholm Lease") is as follows:

<u>OWNER</u>	<u>WORKING INTEREST</u>	<u>NET REVENUE INTEREST</u>
Arrow	.20000	.1550000
Pepin	.80000	.7000000
Tedan Partners	.00000	.0200000
Royalty Owner	.00000	.1250000

22. The Court hereby finds that Arthur D. Pepin is the owner of all right, title, and interest in and to all equipment, pipe, casing, and other personalty used in the operations of the Bruce Pool Prue Sand Unit and located thereon.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that record title in and to the oil and gas leasehold estate underlying the Prue Sand and covering the N/2 NW/4 SW/4 of Section 3, Township 17 North, Range 9 East, Creek County, Oklahoma (the "Masterson Lease") is as follows:

<u>OWNER</u>	<u>WORKING INTEREST</u>	<u>NET REVENUE INTEREST</u>
Arrow	.20000	.1545000
Pepin	.80000	.6180000
H. F. Wilcox		
O&G Co.	.00000	.0625000
L.B. Jackson	.00000	.0400000
Royalty Owners	.00000	.1250000

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that record title in and to the oil and gas leasehold estate underlying the Prue Sand and covering the SW/4 NE/4 SW/4 of Section 3, Township 17 North, Range 9 East, Creek County, Oklahoma, (the "Chisholm Lease") is as follows:

<u>OWNER</u>	<u>WORKING INTEREST</u>	<u>NET REVENUE INTEREST</u>
Arrow	.20000	.1550000
Pepin	.80000	.7000000
Tedan Partners	.00000	.0200000
Royalty Owner	.00000	.1250000

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Arthur D. Pepin is the owner of all right, title, and interest in and to all equipment, pipe, casing, and other personalty used in the operations of the Bruce Pool Prue Sand Unit and located thereon.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is rendered for the Federal Deposit Insurance Corporation and against Arrow Production Company and William B. Schluneger in accordance with the findings set forth above.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is rendered for Tedan Partners and against Arrow Production Company in accordance with the findings set forth above.

  
 JAMES O. ELLISON  
 UNITED STATES DISTRICT JUDGE

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

JUN 24 1988 *ag*

EDWARD JAMES REED, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 T.J. STENDEL, )  
 )  
 Defendant. )

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

87-C-567-C

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate filed June 7, 1988 in which the Magistrate recommended that the Defendant's Motion for Summary Judgment be granted.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby is affirmed.

It is, therefore, Ordered that the Defendant's Motion for Summary Judgment be granted.

Dated this 23 day of June, 1988.

*H. Dale Cook*  
H. DALE COOK, CHIEF  
UNITED STATES DISTRICT JUDGE



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

FILED

JUN 24 1988

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

\_\_\_\_\_  
JOHN JOURNEYCAKE,  
                                  Plaintiff,  
  
vs.  
  
BARBER-COLMAN COMPANY,  
a Delaware corporation,  
  
                                  Defendant.  
\_\_\_\_\_

Case No. 87-C-1088-E

ORDER

THIS MATTER comes on for hearing and upon regular assignment on the Joint Motion for Dismissal, the Court after reviewing the Court file, hearing statements of counsel, finds the Motion meritorious and grants said Motion and hereby dismisses the case at bar with prejudice, each party to be responsible for their own costs and to hold the other party harmless from the same.

S/ JAMES O. ELLISON

\_\_\_\_\_  
JUDGE OF THE UNITED STATES  
DISTRICT COURT

Eric W. Spooner  
OBA #10478  
407 Center Office Building  
707 South Houston Avenue  
Tulsa, Oklahoma 74127  
(918) 587-5518

Mary J. Rounds  
HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON  
Attorney for Defendant  
4100 Bank of Oklahoma Tower  
Tulsa, Oklahoma 74172

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THERON RAY SWEAT; JUANITA )  
 MAXINE SWEAT; FREEDLANDER, )  
 INC., The Mortgage People; )  
 COUNTY TREASURER, Mayes County, )  
 Oklahoma; and BOARD OF COUNTY )  
 COMMISSIONERS, Mayes County, )  
 Oklahoma, )  
 )  
 Defendants. )

FILED

JUN 24 1988

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

CIVIL ACTION NO. 87-C-1057-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23<sup>rd</sup> day  
of June, 1988. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Phil Pinnell, Assistant United States Attorney;  
the Defendants, County Treasurer, Mayes County, Oklahoma, and  
Board of County Commissioners, Mayes County, Oklahoma, appear by  
Charles A. Ramsey, Assistant District Attorney, Mayes County,  
Oklahoma; and the Defendants, Freedlander, Inc., The Mortgage  
People; Theron Ray Sweat; and Juanita Maxine Sweat, appear not,  
but make default.

The Court being fully advised and having examined the  
file herein finds that the Defendants, Theron Ray Sweat and  
Juanita Maxine Sweat, acknowledged receipt of Summons and  
Complaint on April 17, 1988; that Defendant, County Treasurer,  
Mayes County, Oklahoma, acknowledged receipt of Summons and

Complaint on February 23, 1988; and that Defendant, Board of County Commissioners, Mayes County, Oklahoma, acknowledged receipt of Summons and Complaint on December 21, 1987.

It appears that the Defendants, County Treasurer, Mayes County, Oklahoma, and Board of County Commissioners, Mayes County, Oklahoma, filed their Answer, Cross-Claim, and Counter-Claim herein on February 26, 1988; that the Plaintiff, United States of America, filed its Answer to Counterclaim on March 1, 1988; that Joseph D. Purcell, attorney for Defendant, Freedlander, Inc., The Mortgage People, filed an Entry of Appearance herein on January 19, 1988, on its behalf, but failed to answer and default has therefore been entered by the Clerk of this Court on May 20, 1988; that Defendants, Theron Ray Sweat and Juanita Maxine Sweat, have failed to answer and their default has therefore been entered by the Clerk of this Court on May 20, 1988.

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

Lot Number One (1) of TURNER HEIGHTS, a Subdivision in Mayes County, Oklahoma, according to the Official, Recorded Plat and Survey thereof;

AND,

A part of the unplatted part of TURNER HEIGHTS more particularly described as follows: Beginning at the Southeast corner of said Lot 1; Thence run North 200 Feet; Thence East 70 Feet; Thence South 200 Feet; Thence West 70 Feet to the Point of Beginning;

AND,

A tract, piece, or parcel of land lying and being situated in the SW/4 NE/4 SW/4 of Section 34, Township 20 North, Range 19 East of the Indian Base and Meridian more particularly described as follows, to-wit: Commencing at the Southwest Corner of said 10 Acres; Thence North along the West Line of said 10 Acres a distance of 199 Feet 6 Inches to a point; Thence in a southeasterly direction 283 Feet more or less to a point on the South line of said 10 Acre Tract a distance of 204 Feet East of the Southwest Corner; Thence West along the South line of said 10 Acre Tract a distance of 204 Feet to the point of beginning.

The Court further finds that on August 26, 1983, the Defendants, Theron Ray Sweat and Juanita Maxine Sweat, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, their mortgage note in the amount of \$32,000.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Theron Ray Sweat and Juanita Maxine Sweat, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated August 26, 1983, covering the above-described property. Said mortgage was recorded on August 29, 1983, in Book 615, Page 499, in the records of Mayes County, Oklahoma.

The Court further finds that the Defendants, Theron Ray Sweat and Juanita Maxine Sweat, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has

continued, and that by reason thereof the Defendants, Theron Ray Sweat and Juanita Maxine Sweat, are indebted to the Plaintiff in the principal sum of \$32,436.62, plus interest at the rate of 12.5 percent per annum from September 1, 1986 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, claim no right, title, or interest in the subject real property.

The Court further finds that Defendant, Freedlander, Inc., The Mortgage People, is in default, and has no right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Theron Ray Sweat and Juanita Maxine Sweat, in the principal sum of \$32,436.62, plus interest at the rate of 12.5 percent per annum from September 1, 1986 until judgment, plus interest thereafter at the current legal rate of \_\_\_\_\_ percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Freedlander, Inc., The Mortgage People and County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Theron Ray Sweat and Juanita Maxine Sweat, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

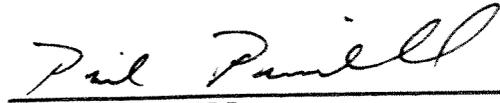
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

JAMES O. ELISON

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM  
United States Attorney



---

PHIL PINNELL  
Assistant United States Attorney



---

CHARLES A. RAMSEY  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Mayes County, Oklahoma

PP/css

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

FILED

JUN 24 1988

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

JONATHAN HAMILTON WILSON, a )  
minor, deceased, by and )  
through his personal )  
representative, LESTER WILSON; )  
and KIT WILSON and LESTER )  
WILSON, individually, )

Plaintiffs, )

-vs- )

SEARS ROEBUCK AND COMPANY, )  
and CHAMBERLAIN MANUFACTURING )  
CORPORATION, )

Defendants. )

No. 86-C-865-E

ORDER OF DISMISSAL WITH PREJUDICE  
UPON STIPULATION BY PARTIES

Upon stipulation of the parties hereto, based upon a showing that the above-captioned matter has been compromised and settled, said matter and cause is hereby dismissed with prejudice to any future filing thereof.

It is further ordered, subject to contempt proceedings for violation thereof, that plaintiffs and their attorneys comply and adhere to any written confidentiality agreements executed in conjunction with said compromise.

**S/ JAMES O. ELLISON**

Honorable James O. Ellison  
District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**

NORTHERN DISTRICT OF OKLAHOMA

**JUN 23 1988**

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

FEDERAL DEPOSIT INSURANCE CORP., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BJ & ASSOCIATES, et al, )  
 )  
Defendants. )

Case No. 87-C-577-B

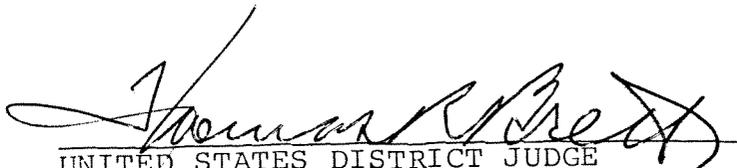
ADMINISTRATIVE CLOSING ORDER

Judy & Jim D. Payne

The Defendant/ having filed its petition in bankruptcy and these proceeding being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other prupose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 23<sup>rd</sup> day of JUNE, 1988.

  
UNITED STATES DISTRICT JUDGE  
THOMAS R. BRETT

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

FILED

JUN 23 1988

ROBERT BRISCO,

Plaintiff,

v.

AMERICAN AIRLINES,

Defendants.

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

No. 88-C-117-B

O R D E R

This matter comes before the Court on the Defendant's Motion for Summary Judgment filed May 3, 1988. The defendant seeks judgment for the reason that the Court lacks subject matter jurisdiction to hear this matter. As such, the Court will convert the Motion for Summary Judgment to a Motion to Dismiss for lack of subject matter jurisdiction. For the reasons set forth below, the motion is granted.

Plaintiff brings this 42 U.S.C. §2000e-5 claim on the basis of race discrimination arising from his employment with the Defendant American Airlines, Inc. The Defendant has answered the pro se complaint and has filed the instant motion urging that the Plaintiff has failed to comply with the 90-day period in which to file his complaint as required by 42 U.S.C. §2000e-5(f)(1). Defendant argues in its motion that the complaint was filed on the ninety-seventh day after the Plaintiff had received his right-to-sue letter from the EEOC and therefore the Court does not have jurisdiction of this matter. 42 U.S.C. §2000e-5(f)(1) provides in pertinent part:

". . . the Commission . . . shall so notify the

person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (1) by the person claiming to be aggrieved. . ."

It is clear upon a review of the file in this matter that the Plaintiff filed his complaint 97 days after receiving notice of his right-to-sue letter from the EEOC. The Plaintiff in his Reply does not take issue with the Defendant's assertion that his complaint is outside the 90-day filing requirement. The Tenth Circuit Court of Appeals has held that the 90-day filing requirement is jurisdictional subject to equitable modification only in unusual circumstances. Carlile v. South Routt School Dist., 652 F.2d 981 (10th Cir. 1981), and Noe v. Ward, 754 F.2d 890 (10th Cir. 1985). The Court finds that the facts of this case do not merit an equitable tolling of the filing requirement. It appears that the Plaintiff merely was tardy in filing the suit without excuse.

The Plaintiff in his Reply indicates that his delay was based upon his desire and efforts to obtain appointed counsel to represent him. Plaintiff sought such aid by his application for leave to file action under Title VII of the Civil Rights Act without payment of fees, costs or security, and by letter dated May 4, 1988 to the Court asking for court-appointed counsel. The Court finds no basis for equitable tolling as both applications were made beyond the 90-day filing period. Plaintiff also asserts that his notice of right-to-sue indicated that appointment of counsel was possible in a Title VII case. While the notice of right-to-sue letter does inform the Plaintiff of a possibility of

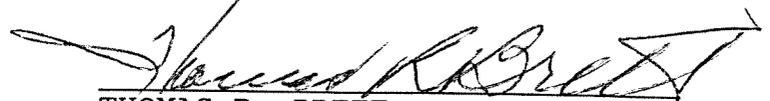
appointment of counsel, the letter also makes clear that such a request should be made timely. The paragraph concerning attorney representation provides in part:

"If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form or manner it requires. Your request to the U.S. District Court should be made well in advance of the end of the 90-day period mentioned above..."

In view of the Plaintiff's untimely complaint and his untimely application for appointment of counsel, the Court finds that it is without subject matter jurisdiction and therefore grants the Defendant's Motion to Dismiss. See, Wong v. Bon Marche, 508 F.2d 1249 (9th Cir. 1975), and Bolling v. City and County of Denver, Colorado, 790 F.2d 69 (10th Cir. 1986).

The Defendant's motion to dismiss for lack of subject matter jurisdiction is granted. This action is dismissed with prejudice.

DATED this 23<sup>rd</sup> day of June, 1988,



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**JUN 23 1988**

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

\_\_\_\_\_  
JOSEPH PAPP, et al, )  
 )  
Plaintiffs, )  
 )  
-vs- )  
 )  
UNIVERSAL POWER CONCEPTS, INC., )  
 )  
Defendants, )  
\_\_\_\_\_

Case Number 88-C-148 B

ORDER OF DISMISSAL

Now, on the 23<sup>rd</sup> day of June, 1988, comes on for hearing, instanter, the request of the Defendant, Buck Willis, through his attorney, Stephen R Young, to dismiss him as a Defendant in the above styled case.

After hearing the statements of counsel, and reviewing the file herein, the Court finds that the Defendant, Buck Willis, filed herein on March 7th, 1988, his " Motion to Dismiss For Failure To State A Claim Upon Which Relief May Be Granted And Integrated Memorandum Of Authorities", and that the attorney for said Defendant certified that he mailed a copy of said Motion to the attorney for the Plaintiff.

The Court further finds that the Plaintiffs have wholly failed to responded to said Motion, although directed to do so within five days of June 10th, 1988, which Order was given at a scheduling conference on said date.

The Court further finds that this action should be dismissed as to the Defendant, Buck Willis, only.

IT IS THEREFORE ORDERED that the Plaintiff's cause of action

against the Defendant, Buck Willis, is dismissed.

Prepared by:

Stephen R Young,  
Attorney for Defendant,  
Buck Willis  
3311 East 30th St.,  
Tulsa, Okla 74114  
OBA #9972

S/ THOMAS R. BRETT

---

JUDGE

CERTIFICATE OF MAILING

The undersigned certifies that he mailed a copy of the foregoing on the \_\_\_ day of June, 1988 to: John Thomas Hall, attorney for Plaintiffs, 3010 S Harvard, Ste 100, Tulsa, Okla 74114, and to David M Nichols, Attorney at Law, 2627 East 21st St, Tulsa, Okla 74114, and to Gene M Kelly, Attorney at Law, 302 S Cheyenne, Tulsa, Okla 74103.

---

Stephen R Young,  
Attorney at Law

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

FILED  
JUN 22 1988

Jack L. E. Clark  
U.S. DISTRICT COURT

SHEET METAL J.A.C. TRAINING SCHOOL, )  
INC., a corporation; THE NATIONAL )  
TRAINING FUND FOR THE SHEET METAL )  
AND AIR CONDITIONING INDUSTRY, a )  
trust, JAMES E. ROTH and EDWARD J. )  
CARLOUGH, two of the present trustees )  
thereof, )

Plaintiffs, )

v. )

BRIAN GRIFFIN, )

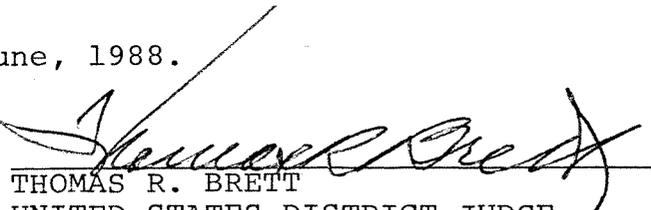
Defendant. )

No. 87-C-814-B

J U D G M E N T

In accord with the jury verdict rendered this date, Judgment is hereby entered in favor of the Defendant, Brian Griffin, and against the Plaintiffs, Sheet Metal J.A.C. Training School, Inc., a corporation; The National Training Fund for the Sheet Metal and Air Conditioning Industry, a trust, James E. Roth and Edward J. Carlough, two of the present trustees thereof, with the Plaintiffs to take nothing on their claim. Costs are assessed against the Plaintiffs. Any claim for attorney fees should be filed in accord with Local Rule 6 of the Rules of the United States District Court for the Northern District of Oklahoma.

DATED this 22nd day of June, 1988.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

PERFECT INVESTMENTS, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 AETNA CASUALTY & SURETY COMPANY, )  
 )  
 Defendant. )  
 )  
 vs. )  
 )  
 WADE FARNAN, )  
 )  
 Third Party )  
 Defendant )  
 )  
 and )  
 )  
 FEDERAL DEPOSIT INSURANCE )  
 CORPORATION, )  
 )  
 Intervenor, )

Case No. 86-C-369-C

FILED

JUN 22 1988

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

ORDER FOR DISBURSEMENT OF FUNDS  
AND DISMISSAL WITH PREJUDICE

Upon the Joint Motion of the Federal Deposit Insurance Corporation and Perfect Investments for Disbursement of Funds and Dismissal with Prejudice and for good cause shown,

IT IS ORDERED that the Court Clerk shall disburse funds paid into Court by Aetna Casualty and Surety Company by paying the Federal Deposit Insurance Corporation

OK-NR71

ZSZ/06-88387A/lmc

\$8,000.00, and by paying Perfect Investments, Inc. \$8,000.00.

IT IS FURTHER ORDERED that upon disbursement of such funds in accordance with this Order the above-entitled cause is dismissed with prejudice, all parties to bear their own costs, including attorney's fees.



H. DALE COOK  
UNITED STATES DISTRICT JUDGE

IN THE U.S. DISTRICT COURT  
NORTHERN DISTRICT

FILED

JUN 22 1988

L. D. DENNIS,  
PLAINTIFF,

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

V.

CASE NO. 88 C 462 B

ROBERT BOSTON,  
DEFENDANT.

MOTION TO DISMISS

PLAINTIFF, ON HIS OWN MOTION, REQUESTS DISMISSAL  
WITHOUT PREJUDICE, OF THE ABOVE ENTITLED CAUSE, UNDER  
THE RULE OF OWN VOLITION, AS DESCRIBED UNDER THE  
FEDERAL RULES OF CIVIL PROCEDURE.

June 18, 1988

RESPECTFULLY,  
Larry W. Dennis  
510 SO. DENVER  
TULSA, OKLAHOMA  
74103

CERTIFICATE OF SERVICE

I, STATE FOR THE RECORD, THAT I HAVE MAILED A  
COPY OF THIS PETITION TO THE DEFENDANT.

June 18, 1988

Larry W. Dennis

IN THE U.S. DISTRICT COURT  
NORTHERN DISTRICT OKLA

LARRY D. DENNIS  
PLAINTIFF,

v.

CASE NO. 88 C 462 B

ROBERT BOSCH,  
DEFENDANT.

FILED

JUN 30 1988

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

ORDER GRANTING DISMISSAL

THE PLAINTIFF HAS MOTIONED THIS COURT FOR  
VOLUNTARY DISMISSAL, IT APPEARS HE SHOULD RECEIVE  
THE RELIEF REQUESTED, THEREFORE IT IS

ORDERED, THIS CAUSE OF ACTION, IS TO BE  
DISMISSED FORTHWITH, WITHOUT PREJUDICE.

6-29-88

DATE

S/ THOMAS R. BRETT

U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CHARLES ELMO KEMPEL a/k/a )  
 CHARLES E. KEMPEL; )  
 LINDA JOYCE KEMPEL a/k/a )  
 LINDA KEMPEL; SECURITY BANK )  
 AND TRUST COMPANY OF MIAMI, )  
 OKLAHOMA a/k/a SECURITY BANK )  
 AND TRUST COMPANY; COUNTY )  
 TREASURER, Ottawa County, )  
 Oklahoma; and BOARD OF COUNTY )  
 COMMISSIONERS, Ottawa County, )  
 Oklahoma, )  
 )  
 Defendants. )

FILED

JUN 22 1988

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

CIVIL ACTION NO. 88-C-332-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22<sup>nd</sup> day  
of June, 1988. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Peter Bernhardt, Assistant United States  
Attorney; the Defendants, County Treasurer, Ottawa County,  
Oklahoma, and Board of County Commissioners, Ottawa County,  
Oklahoma, appear by Gary L. Hobough, Assistant District Attorney,  
Ottawa County, Oklahoma; and the Defendants, Charles Elmo Kempel  
a/k/a Charles E. Kempel, Linda Joyce Kempel a/k/a Linda Kempel,  
and Security Bank and Trust Company of Miami, Oklahoma a/k/a  
Security Bank and Trust Company, appear not, but make default.

The Court being fully advised and having examined the  
file herein finds that the Defendants, Charles Elmo Kempel a/k/a

Charles E. Kempel and Linda Joyce Kempel a/k/a Linda Kempel, acknowledged receipt of Summons and Complaint on April 22, 1988; that Defendant, Security Bank and Trust Company of Miami, Oklahoma a/k/a Security Bank and Trust Company, acknowledged receipt of Summons and Complaint on April 8, 1988; that Defendant, County Treasurer, Ottawa County, Oklahoma, acknowledged receipt of Summons and Complaint on or about April 14, 1988.

It appears that the Defendants, County Treasurer, Ottawa County, Oklahoma, and Board of County Commissioners, Ottawa County, Oklahoma, filed their Answer herein on June 2, 1988; and that the Defendants, Charles Elmo Kempel a/k/a Charles E. Kempel, Linda Joyce Kempel a/k/a Linda Kempel, and Security Bank and Trust Company of Miami, Oklahoma a/k/a Security Bank and Trust Company, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 19, 1986, Charles Elmo Kempel and Linda Joyce Kempel filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 86-03190. On April 20, 1987, these Defendants received a discharge in the United States Bankruptcy Court for the Northern District of Oklahoma.

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

Lots 7, 8, 9 and 10, in Block 6, in the TYDINGS ADDITION to the City of Miami, Ottawa County, Oklahoma, according to the recorded plat thereof.

The Court further finds that on February 20, 1976, Charles Elmo Kempel and Linda Joyce Kempel executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, their mortgage note in the amount of \$12,800.00, payable in monthly installments, with interest thereon at the rate of 8.75 percent per annum.

The Court further finds that as security for the payment of the above-described note, Charles Elmo Kempel and Linda Joyce Kempel executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated February 20, 1976, covering the above-described property. Said mortgage was recorded on February 26, 1976, in Book 359, Page 156, in the records of Ottawa County, Oklahoma.

The Court further finds that the Defendants, Charles Elmo Kempel a/k/a Charles E. Kempel and Linda Joyce Kempel a/k/a Linda Kempel, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Charles Elmo Kempel a/k/a Charles E. Kempel and Linda Joyce Kempel a/k/a Linda Kempel, are indebted to the Plaintiff in the principal sum of \$10,303.77, plus interest at the rate of 8.75 percent per annum from April 1, 1986 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, claim no right, title, or interest in the subject real property.

The Court further finds that the Defendant, Security Bank and Trust Company of Miami, Oklahoma a/k/a Security Bank and Trust Company, is in default and has no right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against Defendants, Charles Elmo Kempel a/k/a Charles E. Kempel and Linda Joyce Kempel a/k/a Linda Kempel, in the principal sum of \$10,303.77, plus interest at the rate of 8.75 percent per annum from April 1, 1986 until judgment, plus interest thereafter at the current legal rate of 7.20 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Security Bank and Trust Company of Miami, Oklahoma a/k/a Security Bank and Trust Company and County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise

and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

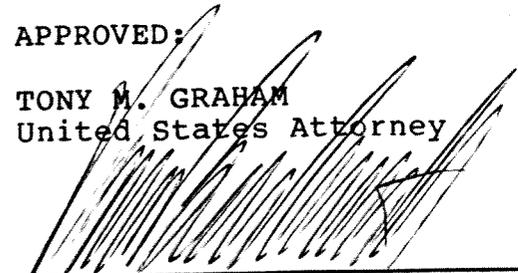
S/ THOMAS R. BRETT

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UNITED STATES DISTRICT JUDGE

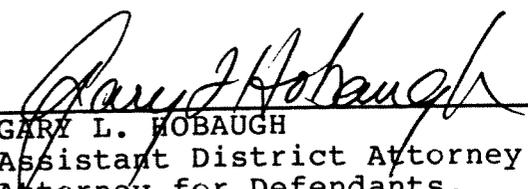
APPROVED:

TONY M. GRAHAM  
United States Attorney



---

PETER BERNHARDT  
Assistant United States Attorney



---

GARY L. HOBAUGH  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Ottawa County, Oklahoma

PB/css

ejj

OBA #8382

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

**F I L E D**

**JUN 22 1988**

WILLIAM E. BOBACK, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CREEK COUNTY SPEEDWAY, INC., )  
 )  
 Defendant, )  
 )  
 vs. )  
 )  
 INTERNATIONAL INSURANCE )  
 COMPANY, )  
 )  
 Garnishee. )

No. 88-C-126-B Jack C. Silver, Clerk  
 U.S. DISTRICT COURT  
 Creek County  
 Case No. C-87-55-D  
 State of Oklahoma  
 (removed to Federal Court  
 by Garnishee)

ORDER DISMISSING GARNISHMENT WITH PREJUDICE

Upon Application of the parties, the above styled garnish-  
ment action is hereby dismissed with prejudice. Each party to  
pay his own costs.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

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

FILED

JUN 28 1988

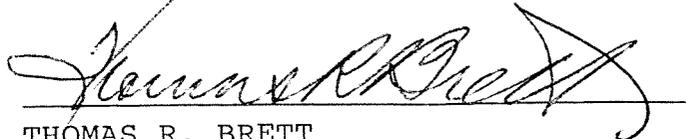
Jack C. Silver, Clerk  
U.S. DISTRICT COURT

BRIAN HADDEN, )  
 )  
Plaintiff, )  
 )  
v. ) No. 87-C-135-B  
 )  
STATE FARM FIRE AND )  
CASUALTY COMPANY, )  
 )  
Defendant. )

J U D G M E N T

In accord with the jury verdict rendered June 21, 1988, Judgment is hereby entered in favor of the Plaintiff, Brian Hadden, and against the Defendant, State Farm Fire and Casualty Company, in the amount of Thirteen Thousand and No/100 Dollars (\$13,000.00), with post-judgment interest at the rate of 7.20% per annum to run from the date of judgment. The Plaintiff is entitled to the costs of this action. Any application for attorney fees should be filed in accord with Local Rule 6 of the Rules of the United States District Court for the Northern District of Oklahoma.

DATED this 22nd day of June, 1988.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MARION W. QUINTON, JR., )  
 )  
 Defendant. )

FILED

JUN 22 1988

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

CIVIL ACTION NO. 87-C-669-C

ORDER OF DISMISSAL

Now on this 22 day of June, 1988, it appears  
that the Defendant in the captioned case has not been located  
within the Northern District of Oklahoma, and therefore attempts  
to serve Marion W. Quinton, Jr., have been unsuccessful.

IT IS THEREFORE ORDERED that the Complaint against  
Defendant, Marion W. Quinton, Jr., be and is dismissed without  
prejudice.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

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

FILED

JUN 22 1988

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

RIC OCASEK, ZOMBA ENTERPRISES, INC., )  
BARRY EASTMOND MUSIC, BLUE SEAS )  
MUSIC, INC., JAC MUSIC CO., INC. )  
AND BROCKMAN MUSIC, )

Plaintiffs, )

vs. )

BEST SHOT, INC., BRUCE KIRALY )  
AND ARTHUR UNDERWOOD, )

Defendants. )

Civil Action No.  
87-C-609 C

STIPULATION AND ORDER OF DISMISSAL

NOW ON this 22 day of June, 1988, the  
above matter comes before the Court, the parties appear by their  
counsel of record as indicated by the approvals to this pleading.

All parties stipulate and agree that all claims made herein  
should be dismissed with absolute prejudice.

Having reviewed the file and being duly advised in the  
premises, it is by the Court considered, ordered, adjudged and  
decreed that the claims made herein should be and the same are  
hereby dismissed with absolute prejudice.

IT IS SO ORDERED.

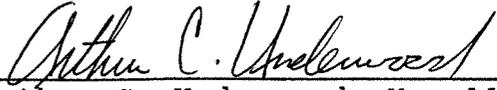
DATED this 22 day of June, 1988.

(Signed) H. Dale Cook

United States District Judge

SUBMITTED AND APPROVED BY:

ARTHUR C. UNDERWOOD, P.C.



Arthur C. Underwood, No. 11073  
7935 E. Prentice Avenue, #400  
Englewood, Colorado 80111  
(303) 721-9863  
Attorney for Defendants

PIERCE, COUCH, HENDRICKSON,  
JOHNSTON & BAYSINGER

---

James E. Golden  
1109 N. Francis  
Oklahoma City, Oklahoma 73106  
(405) 235-1611  
Attorney for Plaintiff

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

GLORIA DILLARD,

Plaintiff,

vs.

OTIS R. BOWEN, M.D.,  
Secretary of Health and  
Human Services,

Defendant.

FILED

JUN 22 1988

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

CIVIL ACTION NO. 88-C-282-C

O R D E R

Upon Motion of the Defendant, Secretary of Health and Human Services, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Secretary for the purpose of evaluating the credibility of Plaintiff's subjective symptoms pursuant to Luna v. Secretary of Health and Human Services, 834 F.2d 161 (10th Cir. 1987).

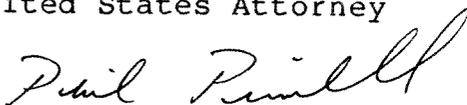
Dated this 22 day of June, 1988.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM  
United States Attorney



PHIL PINNELL  
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CLARA GRIMMETT,

Plaintiff,

vs.

OTIS R. BOWEN, M.D.,  
Secretary of Health and  
Human Services,

Defendant.

FILED

JUN 22 1988

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

CIVIL ACTION NO. 88-C-0048-C

ORDER

Upon Motion of the Defendant, Secretary of Health and Human Services, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Nancy Nesbitt Blevins, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Secretary for the purpose of evaluating the credibility of Plaintiff's subjective symptoms pursuant to Luna v. Secretary of Health and Human Services, 834 F.2d 161 (10th Cir. 1987) and for the purpose of a neurological consultive examination with regard to Plaintiff's left arm and hand.

Dated this 22 day of June, 1988.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM  
United States Attorney

  
NANCY NESBITT BLEVINS  
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HUMPHREY G. LAMFU; SONYA E. )  
 LAMFU; GILCREASE HILLS )  
 HOMEOWNERS ASSOCIATION; )  
 COUNTY TREASURER, Osage County, )  
 Oklahoma; and BOARD OF COUNTY )  
 COMMISSIONERS, Osage County, )  
 Oklahoma, )  
 )  
 Defendants. )

FILED

JUN 22 1988

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

CIVIL ACTION NO. 88-C-0030-C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22<sup>nd</sup> day  
of June, 1988. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Peter Bernhardt, Assistant United States  
Attorney; the Defendants, County Treasurer, Osage County,  
Oklahoma, and Board of County Commissioners, Osage County,  
Oklahoma, appear by Larry D. Stuart, District Attorney, Osage  
County, Oklahoma; and the Defendants, Humphrey G. Lamfu, Sonya E.  
Lamfu, and Gilcrease Hills Homeowners Association, appear not,  
but make default.

The Court being fully advised and having examined the  
file herein finds that the Defendant, Gilcrease Hills Homeowners  
Association, acknowledged receipt of Summons and Complaint on  
January 18, 1988; that Defendant, County Treasurer, Osage County,  
Oklahoma, acknowledged receipt of Summons and Complaint on

January 19, 1988; and that Defendant, Board of County Commissioners, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on January 22, 1988.

The Court further finds that the Defendants, Humphrey G. Lamfu and Sonya E. Lamfu, were served by publishing notice of this action in the Pawhuska Daily Journal-Capital, a newspaper of general circulation in Osage County, Oklahoma, once a week for six (6) consecutive weeks beginning March 22, 1988, and continuing to April 26, 1988, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Humphrey G. Lamfu and Sonya E. Lamfu, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Humphrey G. Lamfu and Sonya E. Lamfu. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Administrator of Veterans Affairs, and its attorneys, Tony M. Graham, United

States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as the subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, filed their Answer herein on January 27, 1988; and that the Defendants, Humphrey G. Lamfu, Sonya E. Lamfu, and Gilcrease Hills Homeowners Association, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Nineteen (19), Block Twelve (12), GILCREASE HILLS VILLAGE 1, Blocks 7 thru 14, a Subdivision in Osage County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on December 12, 1984, the Defendants, Humphrey G. Lamfu and Sonya E. Lamfu, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, their mortgage note in the

amount of \$62,500.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Humphrey G. Lamfu and Sonya E. Lamfu, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated December 12, 1984, covering the above-described property. Said mortgage was recorded on December 18, 1984, in Book 0667, Page 527, in the records of Osage County, Oklahoma.

The Court further finds that the Defendants, Humphrey G. Lamfu and Sonya E. Lamfu, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Humphrey G. Lamfu and Sonya E. Lamfu, are indebted to the Plaintiff in the principal sum of \$62,744.83, plus interest at the rate of 12.5 percent per annum from August 1, 1986 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, Gilcrease Hills Homeowners Association, is in default and has no right, title, or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, has a lien on the property which is the subject matter

of this action by virtue of personal property taxes in the amount of \$36.14 plus penalties and interest which became a lien on the property as of 1987. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against Defendants, Humphrey G. Lamfu and Sonya E. Lamfu, in the principal sum of \$62,744.83, plus interest at the rate of 12.5 percent per annum from August 1, 1986 until judgment, plus interest thereafter at the current legal rate of 7.20 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Gilcrease Hills Homeowners Association, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have and recover judgment in the amount of \$36.14 plus penalties and interest for personal property taxes for year of 1987, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, in the amount of \$36.14 plus penalties and interest for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

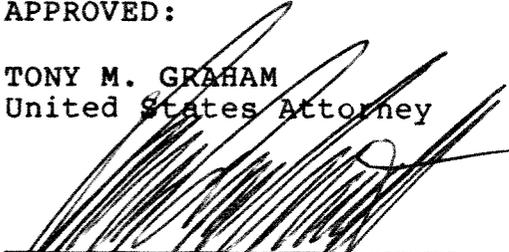
(Signed) H. Dale Cook

---

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM  
United States Attorney



---

PETER BERNHARDT  
Assistant United States Attorney

*Larry D. Stuart by John S. Bygg. Assist. District Attorney*  
LARRY D. STUART  
District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Osage County, Oklahoma

PB/css

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

FILED  
JUN 22 1988

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

CHARLES B. HUMPHREY d/b/a )  
HUMPHREY OIL INTERESTS, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
SOUTHERN NATURAL GAS COMPANY, )  
 )  
Defendant. )

CASE NO. 87-C-996 C

AGREED ORDER FOR DISMISSAL WITH PREJUDICE

Came on to be heard the Joint Stipulation of Plaintiff and Defendant for Dismissal with Prejudice, and the Court, after consideration of such Motion, is of the opinion that such Motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all causes of action asserted by Plaintiff against Defendant in the above-referenced case are hereby dismissed, with prejudice to the refiling of same. All costs of suit shall be taxed against the party incurring same.

DATED this 22 day of June, 1988.

(Signed) H. Dale Cook

H. DALE COOK  
United States District Judge

APPROVED AS TO FORM:



Richard M. Kirwan  
State Bar No. 11537300  
Payne & Vendig  
3800 First RepublicBank Center-  
Tower II  
Dallas, Texas 75201

ATTORNEY FOR PLAINTIFF



R. Wilson Montjoy II  
BRUNINI, GRANTHAM, GROWER & HEWES  
1400 Trustmark Building  
Post Office Drawer 119  
Jackson, Mississippi 39205

ATTORNEY FOR DEFENDANT

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

BRIAN STARNES )

Plaintiff(s), )

vs. )

No. 87-C-936-C )

FDIC, et al )

Defendant(s). )

**FILED**

**JUN 22 1988**

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

JUDGMENT DISMISSING ACTION  
BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

Dated this 22 day of June, 19 88.

  
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 23 1988

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

GAIL PACKARD, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 87-C-79-E  
 )  
 SHELTER INSURANCE COMPANY, )  
 a Missouri corporation, )  
 )  
 Defendant. )

J U D G M E N T

This action came on for trial before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff take nothing from the Defendant, Shelter Insurance Company, a Missouri corporation, that the action be dismissed on the merits, and that the Defendant Shelter Insurance Company, a Missouri corporation recover of the Plaintiff Gail Packard its costs of action.

ORDERED this 22<sup>d</sup> day of June, 1988.

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

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

HERSHEL DEAN ASHLOCK, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 JAMES SAFFLE, Warden, Oklahoma )  
 State Penitentiary Ex Parte, The )  
 State of Oklahoma, )  
 )  
 Defendant. )

JUN 21 1988

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

87-C-555-B

ORDER

Now before the Court is the Petition for Writ of Habeas Corpus of Hershel Dean Ashlock. In his Petition, Ashlock attacks the judgments and sentences in District Court of Tulsa County, Oklahoma, Case Nos. CRF 73-1024 and CRF 73-841. Ashlock was charged with the crimes of Larceny of a Motor Vehicle and Leaving the Scene of an Accident Involving Personal Injury, pled guilty to both, and sentenced to two (2) years in prison on both to run concurrently.

Petitioner did not appeal either judgment or sentence, but applied for post-conviction relief, raising as grounds for relief: (1) the trial court's acceptance of his guilty pleas "without a genuine inquiry as to my understanding of my waiver of my Sixth Amendment Right of Right to Counsel"; and (2) the state's failure to keep a plea agreement. Both the trial court (R. 49-50) and the Oklahoma Court of Criminal Appeals (R. 75-76) denied the application on its merits.

Thereafter, Petitioner raised several similar and additional issues in a second application for post-conviction relief (R. 77-

110). The second application, however, was denied by the trial court without addressing the merits because of a state procedural bar (R. 113). Petitioner did not perfect an appeal from the second denial (R. 135).

Ashlock now raises two substantial grounds for federal habeas relief: (1) ineffective assistance of counsel at the plea and sentencing stage; and (2) invalid guilty plea.

This Court must presume correct the factual determinations made by the state courts. 28 U.S.C. §2254(d). Section 2254(d) applies to cases in which a state court of competent jurisdiction has made a determination after a hearing on the merits of a factual issue and evidenced by a written opinion. Sumner v. Mata, 449 U.S. 539, 546 (1981).

The trial court, in its order denying post-conviction relief, found that Ashlock was represented by counsel at the time he entered his guilty pleas. At the date of sentencing, subsequent to the guilty plea, Ashlock was not represented by counsel. The trial court found, however, that Ashlock was advised of his right to have counsel present, and further advised him that sentencing could be delayed if necessary. (R. 49-50). The trial court further found that Ashlock voluntarily and intelligently waived his right to counsel.

Petitioner does not argue that any of the seven enumerated factors in §2254(d) are present which would cast doubt on the validity of the state court's findings.

A review of the sentencing transcript indicates that the record is not "silent" as to the waiver, (e.g., Tucker v. Anderson, 483 F.2d 423 (10th Cir. 1973)), but records the colloquy between the Court and Defendant as to these issues. (Tr. 6-7, attached as exhibit to Response.) Petitioner's waiver of counsel at sentencing, in light of the foregoing, is knowing and intelligent. See, Adams v. U.S., 317 U.S. 269, 279 (1942) (an accused "may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open.") Petitioner's Sixth Amendment ground is thus without merit.

In support of Petitioner's assertion that his guilty pleas were invalid, he alleges the absence of counsel, an erroneous understanding of the law, the influence of drugs, and an erroneous assumption regarding a plea agreement. The Court of Criminal Appeals found that Petitioner was represented by counsel and that he made valid waivers of his rights in open court. (R. 75-76) Petitioner does not specify what he believes to have been "an erroneous understanding of the law", nor does he specify what influence (if any) the referred-to drugs had on his ability to comprehend the import of the proceedings. Finally, Petitioner alleges that he believed a plea bargain had been struck for "a probated or suspended sentence". It is not denied that the prosecution recommended Ashlock serve at least two (2) years. The state trial court found specifically, however, that the Assistant District Attorney did not offer a plea agreement of a

suspended sentence (R. 50). Petitioner has not shown why the state court findings should not be presumed correct. Therefore, the presumption of correctness pursuant to 28 U.S.C. §2254(d) will be applied and Petitioner's attacks on the validity of his guilty pleas are found to be without merit.

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

Dated this 21<sup>st</sup> day of June,  
1988.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

SDC/jch

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

FILED

JUN 21 1988

SCOTT ALAN FOWLER and DEBRA  
FOWLER, individually and as  
husband and wife,

Plaintiffs,

vs .

McDONALD'S CORPORATION, a  
Delaware corporation,

Defendant.

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

No. 87-C-886-E

ORDER OF DISMISSAL

NOW on this 21<sup>st</sup> day of June, 1988, upon the written application of the Plaintiffs, Scott Alan Fowler and Debra Fowler, and the Defendant, McDonald's Corporation, for a Dismissal With Prejudice of the Complaint of Fowler v. McDonald's, and all causes of action therein, the court having examined said Application finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the court to dismiss said Complaint with prejudice to any future action. The court being fully advised in the premises finds that said settlement is in the best interest of the Plaintiffs, and that said Complaint should be dismissed pursuant to said Application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the Complaint and all causes of action of the Plaintiffs, Scott Alan Fowler and Debra Fowler, against the Defendant, McDonald's Corporation,

be and the same hereby are dismissed with prejudice to any future action.

BY JAMES O. ELSON

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

APPROVALS:

ROBERT C. PAYDEN

*R.C. Payden*  
Attorney for Plaintiffs

SCOTT D. CANNON

*Scott D Cannon*  
Attorney for Defendant

?FP.19

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

FILED

JUN 21 1988

LEWIS D. PRUETT, JUANITA J. )  
PRUETT, and BERT PRUETT, a minor, )  
by and through his next friend, )  
LEWIS D. PRUETT, )

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

Plaintiffs, )

v. )

No. 85-C-1103-E

JIMMY KISSEE and KISSEE MOTOR )  
COMPANY, a corporation, )

Defendants. )

JOURNAL ENTRY OF JUDGMENT

On May 19, 1988, this matter came on for trial. Plaintiffs were all present and were represented by their attorney, Patrick E. Carr. Defendant, Jimmy Kissee, was present and was represented by his attorney, James K. Secrest, II.

A jury of six people was sworn to try the cause and the evidence was presented.

On May 23, 1988, the parties, having rested, presented closing arguments and the Court instructed on the law.

The jury then completed its deliberations and returned a verdict for Plaintiffs as follows:

1. Lewis Pruett, in the amount of \$21,284.05;
2. Juanita Pruett, in the amount of \$173,37.47;
3. Bert Dean Pruett, in the amount of \$11,608.00;
4. Juanita and Lewis Pruett, jointly, in the amount of \$5,837.30.

It is the finding of the Court that judgment should be entered upon the jury's verdict.

It is the further finding of the Court that prejudgment interest should be added to these amounts calculated at the rate of 9.95 percent per annum from December 13, 1985, the date the complaint was filed, until May 23, 1988, the date the jury returned its verdict.

It is, therefore, the further finding of the Court that the sum of \$5,175.43 prejudgment interest should be added to the jury verdict in favor of Lewis Pruett, that the sum of \$42,075.79 prejudgment interest should be added to the jury verdict in favor of Juanita Pruett, that the sum of \$2,822.60 prejudgment interest should be added to the jury verdict in favor of Bert Dean Pruett, and that the sum of \$1,419.40 prejudgment interest should be added to the joint award in favor of Juanita Pruett and Lewis Pruett.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED this 23rd day of May, 1988, that Plaintiff, Lewis Pruett, have and take judgment against Defendant, Jimmy Kisse, in the sum of \$26,459.48.

IT IS FURTHER, ORDERED, ADJUDGED, AND DECREED this 23rd day of May, 1988, that Plaintiff, Juanita Pruett, have and take judgment against Defendant, Jimmy Kisse, in the sum of \$215,113.26.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED this 23rd day

of May, 1988, that Plaintiff, Bert Dean Pruett, have and take judgment against Defendant, Jimmy Kissee, in the sum of \$14,430.60.

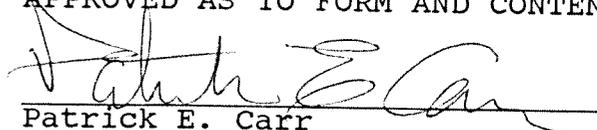
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED this 23rd day of May, 1988, that Juanita Pruett and Lewis Pruett jointly take judgment against the Defendant, Jimmy Kissee, in the further sum of \$7,256.70.

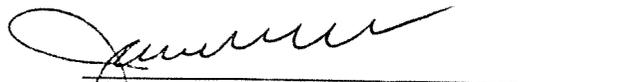
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED this 23rd day of May, 1988, that each of the Plaintiffs to have and take additional judgment against the Defendant, Jimmy Kissee, for costs.

S/ JAMES O. BLISSE

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

  
Patrick E. Carr  
Attorney for Plaintiffs

  
Attorney for Defendant  
Jimmy Kissee

Entered copy

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

TOMMY REDMON, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 TULSA COUNTY DISTRICT COURT )  
 JUDGE JAY C. DALTON, et al, )  
 )  
 Defendants. )

87-C-240-E

FILED  
JUN 21 1988  
Jack C. Silver, Clerk  
U.S. DISTRICT COURT

ORDER

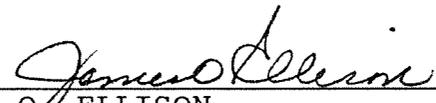
The Court has for consideration the Report and Recommendation of the Magistrate filed May 27, 1988 in which the Magistrate recommended that: (1) Defendant Honorable Jay Dalton's Motion to Dismiss or for Summary Judgment be granted; (2) Defendant H.I. Aston's Motion for Judgment on the Pleadings be granted; (3) Defendant Donna Priore's Motion to Dismiss or in the Alternative, Motion for Summary Judgment be granted; and (4) Defendants Linda Reaves, James Saffle, Jim Suter, and William Yeager's Joint Motion to Dismiss be granted and the action against each of these four Defendants dismissed pursuant to Rule 12(b)(6) Fed..Civ.P. The Magistrate further recommended that Plaintiff's Motion to Amend Complaint should be granted and Plaintiff permitted to amend his complaint to add as a defendant, Marcel Brown; Amendment to be accomplished within twenty (20) days hereof.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby is affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate are hereby adopted as set forth above; that the actions against Defendants Dalton, Aston, Priore, Reaves, Saffle, Suter and Yeager be dismissed, and that Plaintiff have twenty (20) days from this date to amend his Complaint to add one Marcel Brown and thereafter cause service to be made in accord with the Fed.R.Civ.P. Failure to amend within this period will result in dismissal of the action altogether.

Dated this 20<sup>th</sup> day of June, 1988.

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