FILED

JUN 30 1989

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

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

COUNTY LINE INVESTMENT COMPANY and WAGCO LAND DEVELOPMENT, INC.,	)	
Plaintiffs,	)	
vs.	)	Case No. 88-C-550-E
CALVIN L. TINNEY,	)	
Defendant.	)	

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiffs County Line Investment Company and Wagco Land Development, Inc. take nothing from the Defendant Calvin Tinney, that the action be dismissed on the merits, and that the Defendant Calvin Tinney recover of the Plaintiffs his costs of action.

Dated at Tulsa, Oklahoma, this 29TH day of June, 1989.

JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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FILED

JUN 30 1989

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

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

MICHAEL SHACKLE, Plaintiff, vs. RYDER TRUCK RENTAL, INC., a subsidiary of Ryder System, Inc., a Florida corporation, KEN MIDDLETON, JIM McCARTHY, and DICK DICKERSON, Defendants.	)	Case No. 88-C-795-E

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff Michael Shackle take nothing from the Defendants Ryder Truck Rental, Inc., Ken Middleton, Jim McCarthy, and Dick Dickerson, that the action be dismissed on the merits, and that the Defendants recover of Plaintiff their costs of action.

Dated at Tulsa, Oklahoma, this 29TH day of June, 1989.

JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

DORIS L. HERNANDEZ,	)	
Plaintiff,	)	
vs.	)	Case No. 88-C-432-B
TECHNICAL METALS, INC.,	)	
Defendant.	)	

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, DORIS L. HERNANDEZ, and the Defendant, TECHNICAL METALS, INC., and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, dismiss, with prejudice, the above styled cause of action.

ATTORNEYS FOR PLAINTIFF,
DORIS L. HERNANDEZ

Jeff Nix
624 East Archer
Tulsa, Oklahoma 74103

ATTORNEYS FOR DEFENDANT,
TECHNICAL METALS, INC.

Stephen L. Andrew
McCORMICK, ANDREW & CLARK
A Professional Corporation
Suite 100, Tulsa Union Depot
111 East First Street
Tulsa, Oklahoma 74103
(918) 583-1111

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

FILED
JUN 30 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

LARRY L. CHANEY,	)	
Plaintiff,	)	
v.	)	88-C-1306-B
RON CHAMPION, CHARLIE ARNOLD, RAINS, CAROL AND JOHNNY LONG,	)	
Defendants.	)	

ORDER

Now before the Court for consideration is the Defendants' joint Motion to Dismiss for failure to state a claim upon which relief can be granted.

Plaintiff filed this action pursuant to 42 U.S.C. §1983 alleging an intentional deprivation of personal property by prison employees without due process of law.[1]

Specifically, Plaintiff seeks to have returned to him a Magnavox television, and an Alverez Guitar which Defendants claim were confiscated as contraband. Although Plaintiff's property has not yet been destroyed, this is much like the recent case of Durre v. Dempsey, 869 F.2d 543 (10th Cir. 1989) where a prisoner brought a §1983 action seeking damages as a result of a Department of Corrections officer confiscating and destroying the prisoner's personal property without due process.

---

[1] He also complained of a denial of the right of access to the Courts by virtue of the prison's taking from Plaintiff a multi-volume criminal trial transcript necessary for an unrelated appeal of Plaintiff's conviction. The defendants were, on January 30, 1989, ordered to return said transcript and Defendants have done so.

Durre held that, "the intentional deprivation of property is not a fourteenth amendment violation if adequate state post-deprivation remedies are available" (at 547) (citing Hudson v. Palmer, 468 U.S. 517, 533 (1984).) Thus, the inquiry must center on the available remedies under Oklahoma law. In Womack v. City of Oklahoma City, 726 P.2d 1178 (Okla. 1986), the Oklahoma Supreme Court upheld a Plaintiff's right to sue a political subdivision (a municipality) in replevin, notwithstanding the raising of a sovereign immunity defense, and, non-compliance with Oklahoma's Governmental Tort Claims Act (51 O.S. §§1151 et seq.).

Womack held,

> At common law a replevin action tested only the defendant's right to possession of the property at the time the action was commenced. Our statutory replevin action through founded upon a person's wrongful detention of another's personal property is not one for settlement of a tort claim. Rather, its gravamen is vindication of the plaintiff's proprietary interest in immediate possession.

(Footnote omitted) (at 1181.)

Thus, notwithstanding the state Governmental Tort Claims Act and its concomitant exemption from liability for the "operation or maintenance of any prison, jail or correctional facility" (51 O.S. §155(23)), **Plaintiff does have an adequate remedy under state law in the form of a replevin action.** Womack, 726 P.2d at 1181.

Therefore, Plaintiff's Complaint fails to state a claim for relief under §1983 and Defendants' Motion is **granted.**

It is Ordered that this action be dismissed.

Dated this 30th day of June, 1989.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 30 1989

Jack C. Silver,
U. S. DISTRICT COURT

COC ENERGY, INC. and FINANCIAL MINERAL CORPORATION, Plaintiffs,	)	
and	)	
THE CHASE MANHATTAN BANK, N.A., Intervenor,	)	
vs.	)	Case No. 84-C-292C
EL PASO NATURAL GAS COMPANY, Defendant.	)	

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to F.R.C.P. 41(a)(1)(ii), COC Energy, Inc., Financial Mineral Corporation, The Chase Manhattan Bank, N.A. and El Paso Natural Gas Company, being all of the parties to this case, hereby stipulate to the dismissal of this case with prejudice.

Malcolm E. Rosser IV
Of BOESCHE, McDERMOTT & ESKRIDGE
800 Oneok Plaza, 100 W. 5th St.
Tulsa, Oklahoma 74103
(918) 583-1777
ATTORNEYS FOR PLAINTIFFS,
COC ENERGY, INC. and
FINANCIAL MINERAL CORPORATION
and INTERVENOR THE CHASE
MANHATTAN BANK, N.A.

J. Kevin Hayes
William G. Bernhardt
Of HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700
ATTORNEYS FOR DEFENDANT
EL PASO NATURAL GAS COMPANY

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

FILED
JUN 30 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

INDUSTRIAL ELECTRIC ENGINEERING & TESTING COMPANY,	)	
Plaintiff,	)	
vs.	)	No. 87-C-906-E
HONEYWELL INC., et al.,	)	
Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

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 THEREFORE 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, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 29th day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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FILED

JUN 30 1989

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

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

WESLEY RAY HAMMONS,	)	
Plaintiff,	)	
vs.	)	No. 87-C-486-E
BURLINGTON NORTHERN RAILROAD, et al.,	)	
Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

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 THEREFORE 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, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 29th day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 30 1989

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

CB

LUC J. VAN RAMPELBERG, Plaintiff,	)	
v.	)	Complaint no: 89-C-407-E
U.S.A., et al., Defendant.	)	

ORDER.

It is hereby ordered that the above-captioned action be dismissed without prejudice.

TIME STUDY CASE
Record Time Spent by Judge or Magistrate

U.S. District Judge.

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

JUANITA CRAWFORD, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MELVIN T. (BUCK) CRAWFORD, DECEASED, Plaintiff,	
vs.	
UNITED STATES OF AMERICA, Defendant,	
vs.	
DALE HAIR AND MILTON GUINN, Additional Defendants on Counterclaim	

FILED
JUN 30 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

No. 87-C-232-E

FINAL JUDGMENT

This action, having come on for trial on May 15, 1989, and the issues having been duly tried to a jury and a verdict rendered on May 23, 1989, it is hereby

ORDERED, ADJUDGED AND DECREED that the United States of America have and recover judgment in the sum of $135,729.59 from the Estate of Melvin T. (Buck) Crawford as represented by Juanita Palmer, the administratrix, plus interest as allowed by law from the date of assessment. Such sum represents the amount of penalties assessed under Section 6672 of the Internal Revenue Code of 1954, (26 U.S.C.) for the unpaid withholding taxes of Mid-States Health Foundation, Inc. It is further

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendant Milton E. Guinn and against the Defendant United States of America on Defendant United States of America's Counterclaim against the Defendant Guinn. It is further

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendant Dale Hair and against the Defendant United States of America on Defendant United States of America's Counterclaim against the Defendant Hair.

ORDERED, this _____ day of June, 1989.

James O. Ellison
Judge
United States District Court

APPROVED AS TO FORM:

CHRISTOPHER S. COLE
Attorney, Tax Division
Department of Justice
Room 5B31, 1100 Commerce
Dallas, Texas 75242-0599
(214) 767-0293
ATTORNEY FOR UNITED STATES

JAMES E. POE
740 Granston Building
111 West 5th. Street
Tulsa, Oklahoma 74103
ATTORNEY FOR PLAINTIFF

JAMES L. EDGAR
Edgar, East & Associates
2606 G. South Sheridan
Tulsa, Oklahoma 74129
ATTORNEY FOR MILTON E. GUINN

STEVEN V. BUCKMAN
Suite 660 Park Centre
525 South Main
Tulsa, Oklahoma 74103
ATTORNEY FOR DALE HAIR

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. CHESTER B. JACKSON; MAXINE M. JACKSON; W. C. FRIMAN; W. P. SAWYER; GILCREASE HILLS HOMEOWNERS ASSOCIATION; COUNTY TREASURER, Osage County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, Defendants.	)	FILED JUN 29 1989 Jack C. Silver, Clerk U.S. DISTRICT COURT CIVIL ACTION NO. 89-C-241-C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29 day of June, 1989. 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, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, appear by John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma; and the Defendants, Chester B. Jackson, Maxine M. Jackson, W. C. Friman, W. P. Sawyer, Gilcrease Hills Homeowners Association, appear not, but make default.

The Court being fully advised and having examined the file herein finds that the Defendants, Chester B. Jackson and Maxine M. Jackson, acknowledged receipt of Summons and Complaint on April 19, 1989; that Defendant, W. C. Friman, acknowledged receipt of Summons and Complaint on April 3, 1989; that

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Defendant, W. P. Sawyer, acknowledged receipt of Summons and Complaint on April 3, 1989; that Defendant, Gilcrease Hills Homeowners Association, was served with Summons and Complaint on May 5, 1989; that Defendant, County Treasurer, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on April 5, 1989; and that Defendant, Board of County Commissioners, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on or about April 6, 1989.

It appears that the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, filed their Answer on April 18, 1989; and that the Defendants, Chester B. Jackson, Maxine M. Jackson, W. C. Friman, W. P. Sawyer, 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 Ten (10), Block Nine (9), GILCREASE HILLS, VILLAGE I, BLOCKS 7 THRU 14, a Subdivision in Osage County, Oklahoma.

The Court further finds that on April 15, 1985, the Defendants, Chester B. Jackson and Maxine M. Jackson, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of

$62,600.00, payable in monthly installments, with interest thereon at the rate of 12.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Chester B. Jackson and Maxine M. Jackson, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated April 15, 1985, covering the above-described property. Said mortgage was recorded on April 16, 1985, in Book 0674, Page 038, in the records of Osage County, Oklahoma.

The Court further finds that the Defendants, Chester B. Jackson and Maxine M. Jackson, 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, Chester B. Jackson and Maxine M. Jackson, are indebted to the Plaintiff in the principal sum of $78,015.00, plus interest at the rate of 12.5 percent per annum from April 1, 1988 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, W. C. Friman, W. P. Sawyer, and Gilcrease Hills Homeowners Association, are in default and have 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, 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, Chester B. Jackson and Maxine M. Jackson, in the principal sum of $78,015.00, plus interest at the rate of 12.5 percent per annum from April 1, 1988 until judgment, plus interest thereafter at the current legal rate of 8.85 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, W. C. Friman, W. P. Sawyer, Gilcrease Hills Homeowners Association, and County Treasurer and Board of County Commissioners, Osage 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, Chester B. Jackson and Maxine M. Jackson, 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 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.

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney

JOHN S. BOGGS, JR., OBA #
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Osage County, Oklahoma

PP/css

JBS/sl

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

FILED
JUN 29 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

JIMMIE R. WILLIAMS, Co-Independent Executor of the Estate of J.S. WILLIAMS, JR., Deceased,	)	
Plaintiff,	)	
vs.	)	Case No.: 89 C 448 C
ELWIN L. WAGG, and GLIDEWELL DISTRIBUTING COMPANY, INC., an Arkansas corporation,	)	
Defendants.	)	

ORDER

THERE CAME ON for hearing, pursuant to regular assignment, the Defendant Elwin L. Wagg's Motion to Dismiss. Plaintiff is represented by attorney Leonard M. Logan, IV of Logan, Lowry, Johnston, Switzer, West & McGeady. The Defendant, Elwin L. Wagg is represented by John B. Stuart, of Knight, Wagner, Stuart & Wilkerson.

The Court finds, pursuant to announcement and agreement of counsel that the Motion to Dismiss on behalf of the Defendant, Elwin L. Wagg, can be and the same should be sustained and the case dismissed with prejudice as to Elwin L. Wagg.

IT IS SO ORDERED, ADJUDGED AND DECREED.

H. DALE COOK
U.S. District Court Judge

APPROVAL AS TO FORM AND CONTENT:

LEONARD M. LOGAN, IV
Attorney for Plaintiff

JOHN B. STUART
Attorney for Defendant,
Elwin L. Wagg

SDC/jch

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

FILED

JUN 29 1989

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

FRANK MYERS, Plaintiff, vs. AMERICAN STORES d/b/a SKAGGS ALPHA BETA, Defendant.	)	No. 89-C-3-C

ORDER

NOW on this 29 day of June, 1989, this matter comes on before the undersigned Judge for hearing of the Stipulation of Dismissal previously filed herein. The Court finds that said case should be dismissed with prejudice and the same is hereby granted.

IT IS SO ORDERED.

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

APPROVALS AS TO FORM AND CONTENT:

JAMES E. LOWELL

Attorney for the Plaintiff

SCOTT D. CANNON

Attorney for the Defendant

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

FILED
JUN 29 1989
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOSEPH A. YELENCSICS, Executor of the Estate of Joseph Yelencsics, Deceased,	)	
Plaintiff,	)	
v.	)	No. 88-C-1490-B
SUSANNA E. JOHNSON and JAMES E. JOHNSON, individually and as the General Partner of NORTHEAST MALL, a Limited Partnership,	)	
Defendants.	)	

ORDER DISMISSING COMPLAINT

Now this 29th day of June, 1989, there came on for consideration the motion of the Defendant Susanna E. Johnson to dismiss the Second Amended Complaint filed herein on the ground and for the reason that diversity of citizenship is lacking between the Plaintiff Joseph A. Yelencsics, Executor of the Estate of Joseph Yelencsics, Deceased, and Defendant James E. Johnson, individually and as the General Partner of Northeast Mall, a Limited Partnership, in that both are residents and citizens of the State of New Jersey. The Plaintiff, Joseph A. Yelencsics, Executor, filed his Complaint on October 28, 1988, seeking, *inter alia,* partition of the 4,000 acre Honey Creek Ranch located in Delaware County, Oklahoma, within the Northern District of Oklahoma. Plaintiff alleged that he was a resident of the State of New Jersey, and named a single Defendant, Susanna E. Johnson, who was alleged to be a resident and citizen of Florida. An Amended Complaint was filed November 9, 1988, same Plaintiff, same

Defendant. Two additional counts were added to the original two counts.

The Defendant filed her answer on December 6, 1988, stating that her Honey Creek Ranch interest had been conveyed to Northeast Mall, a New Jersey limited partnership. Thereafter, on March 15, 1989, the Plaintiff filed his Second Amended Complaint adding as a party Defendant James E. Johnson, individually and as the General Partner of Northeast Mall, a Limited Partnership. On March 20, 1989, Susanna E. Johnson filed her motion to dismiss citing the lack of diversity of citizenship between the Plaintiff, Joseph A. Yelencsics, Executor, and the new Defendant, James E. Johnson, in that both were citizens and residents of New Jersey.

From the evidential matter submitted to the Court in support of the motion to dismiss, it appears that James E. Johnson is a resident and citizen of the State of New Jersey and has been such for the past immediate several years, including the critical times in question. The Court finds that James E. Johnson's permanent address is 884 Breezy Ocean Drive, Toms River, New Jersey, that he has filed State of New Jersey income tax returns for the years 1987 and 1988 paying substantial amounts of tax therein each year; that he has been registered to vote in the State of New Jersey since February, 1948, and that he has voted in the State of New Jersey at least for the years 1985, 1986, 1987 and 1988. The Court further finds that James E. Johnson does not receive his mail at his residence on Breezy Ocean Drive in Toms River, New Jersey but

rather receives his mail at a post office box in Beachwood, New Jersey.

The Court further finds that on two separate occasions (deposition taken 2-8-88 and affidavit given 4-11-89) James E. Johnson has stated under oath that his permanent address is 884 Breezy Ocean Drive, Toms River, New Jersey; that on one occasion, (April 6, 1988) he stated in a deposition that he was "domicide" in Florida and was living in Florida at that time. The Court finds that Johnson's statement of April 1988 is not consistent with the evidence presented and indicates a confusion on his part as to temporary residency and permanent domicile.

The Court further finds that James E. Johnson is the general partner of Northeast Mall (Exhibit B - Defendant Susanna E. Johnson's Motion to Dismiss).

A partnership, for purposes of determining diversity jurisdiction, is deemed to be a citizen of each state of which its general partners are citizens. Rocket Oil & Gas Co. v. Arkla Exploration (W.D.Okl. 1977), 435 F.Supp. 1303, and cases cited therein. Thus the citizenship of James E. Johnson, the sole general partner, is deemed to be the citizenship of Northeast Mall. Both Plaintiff and Movant agree with this conclusion.

A district court may consider evidence on the question of jurisdiction by affidavits or otherwise to determine factually the jurisdictional dispute. Butler v. Pollard, E.D.Okla. 1979, 482 F.Supp. 847. While diversity jurisdiction in federal courts is determined from the allegations of the Complaint, Whitelock v.

Leatherman, (10th Cir. 1972), 460 F.2d 507, a diversity action should be dismissed if at any time it becomes apparent there is a lack of diversity. Bradbury v. Dennis, (10th Cir. 1962), 310 F.2d 73, *cert. denied,* 372 U.S. 928, 83 S.Ct. 874, 9 L.Ed. 2d 733 (1964); Wilson v. Pickens, (W.D. Okla. 1977), 444 F.Supp. 53.

Where a plaintiff's jurisdictional allegations are challenged the burden of proof rests with the challenging defendant to show by a preponderance of the evidence lack of diversity of citizenship. Wilson v. Pickens, supra; Butler v. Pollard, supra.

The Court concludes in the present case that movant Susanna E. Johnson has shown, by a preponderance of the evidence, a lack of diversity of citizenship in that Plaintiff Joseph A. Yelencsics and Defendant James E. Johnson are both citizens of and domiciled in the State of New Jersey.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Complaint be and the same is hereby dismissed without prejudice.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
JUN 28 1989
CLERK

CUE HENDERSON, ET AL.,, Plaintiffs,	)	
vs.	)	No. 87-C-313-C
NEWELL MANUFACTURING COMPANY, ET AL., Defendants.	)	

ORDER

Now before the Court for its consideration is the objection of defendant Mueller Engineering, Inc. (Mueller) to the Report and Recommendation of the United States Magistrate entered on November 18, 1988.

In this negligence action, Mueller moved for summary judgment. The Magistrate recommended that it should be granted as to all issues except whether Mueller properly instructed plaintiff regarding the removal of metal fragments from the automobile shredder involved herein. Mueller objects, on the ground that a subsequent deposition demonstrates that the deceased was a laborer, while Mueller only sought to instruct operators of the equipment. Plaintiffs have not responded to Mueller's objection.

From the record presented, the Court finds that there is no genuine issue of material fact as to whether Mueller owed a duty to the deceased. Accordingly, summary judgment is appropriate.

It is the Order of the Court that the motion of defendant Mueller Engineering, Inc. for summary judgment is hereby granted in all respects.

It is the further Order of the Court that the motion of plaintiffs to dismiss Mueller Engineering, Inc. without prejudice is hereby declared moot.

IT IS SO ORDERED this 27th day of June, 1989.

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

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

JUN 28 1989

CUE HENDERSON, ET AL.,,	)	
Plaintiffs,	)	
vs.	)	No. 87-C-313-C
NEWELL MANUFACTURING COMPANY, ET AL.,	)	
Defendants.	)	

JUDGMENT

This matter came before the Court for consideration of defendant Mueller Engineering Inc.'s motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendant Mueller Engineering, Inc., and against the plaintiff.

IT IS SO ORDERED this 27th day of June, 1989.

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

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FILED

JUN 28 1989

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

4011-070

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAKO, INC., an Oklahoma Corporation, et al.,	)	
Plaintiffs,	)	
vs.	)	
THE SOUTHLAND CORPORATION, et al.,	)	
Defendants.	)	No. 89-C-456-B

DISMISSAL PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 41(a)(1)

COME NOW the Plaintiffs, Circle-7 Foods, Inc., Circle-7 Petroleum, Ltd., and Jim L. Treat, pursuant to Federal Rule of Civil Procedure 41(a)(1), dismiss with prejudice their claims against the Defendants, The Southland Corporation and Citgo, Inc.

FRASIER & FRASIER

By: _____
James E. Frasier
James C. Garland
Suite 100
1700 Southwest Boulevard
Tulsa, OK 74107
(918) 584-4724

Attorneys for Plaintiffs

CERTIFICATE OF MAILING

I do certify that on the 28 day of June, 1989, I mailed a true and correct copy of the foregoing Dismissal to the following:

Graydon Dean Luthey, Jr., Esq.
38th Floor - First National Building
Tulsa, OK 74101

Richard B. Noulles, Esq.
Gable & Gotwals
2000 Fourth National Bank Bldg.
Tulsa, OK 74119

James E. Frasier, Esq.
James C. Garland, Esq.
Frasier & Frasier
Suite 100
1700 Southwest Boulevard
Tulsa, OK 74107

with postage thereon prepaid.

Wm. Brad Heckenkemper

WBH/pb
P1:MSD

TIME STUDY CASE
Record Time Spent by Judge or Magistrate

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

FILED
JUN 27 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

TRICO INDUSTRIES, INC., a California corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 89-C-348-B
GRAYFOX OPERATING CO., an Oklahoma corporation,	)	
Defendant.	)	

PLAINTIFF'S DISMISSAL WITHOUT PREJUDICE

Plaintiff TRICO INDUSTRIES, INC. hereby dismisses this action without prejudice, pursuant to Fed.R.Civ.Pro. 41(a)(i).

JOHN E. BARRY
ANDREW R. TURNER

By: _____
Andrew R. Turner, OBA No. 9125

2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Plaintiff
TRICO INDUSTRIES, INC.

OF COUNSEL:

CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 1989, a true and correct copy of the above and foregoing PLAINTIFF'S DISMISSAL WITHOUT PREJUDICE was mailed with proper postage thereon, to:

Philip R. Campbell
1208 Utica Tower
1924 South Utica
Tulsa, Oklahoma 74104

Andrew R. Turner

RECEIVED JUN 2 0 1989

FILED
JUN 27 1989
CLERK
COURT

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

JIM L. TREAT, an individual, et al.,	
Plaintiffs,	
vs.	Case No. 89-C-456B
THE SOUTHLAND CORPORATION, et al.,	
Defendants.	

DISMISSAL PURSUANT TO FED.R.CIV.P. 41(a)(1)

COMES NOW the Plaintiffs Jim L. Treat, Circle-7 Foods, Inc., and Circle-7 Petroleum, Ltd. and, pursuant to Federal Rule of Civil Procedure 41(a)(1), dismiss their claims against LMS Holding Company and Petroleum Marketing Company.

FRASIER & FRASIER

By: _____
James L. Frasier
James Clinton Garland
Suite 100, 1700 Southwest Blvd.
Tulsa, OK 74107
(918) 584-4724

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF MAILING

On this 27th day of June, 1989, I hereby certify that a true and correct copy of the foregoing instrument was mailed to the following attorneys of record:

William Brad Heckenkemper
Barrow, Wilkinson, Gaddis, Griffith & Grimm
Suite 300, 610 Main Street
Tulsa, Oklahoma 74119

Richard B. Noulles
Gable & Gotwals
2000 4th National Bank Building
Tulsa, Oklahoma 74119

James Clinton Garland
Frasier & Frasier
Suite 100, 1700 Southwest Boulevard
Tulsa, Oklahoma 74107

Graydon Dean Luthey, Jr.

FILED

JUN 26 1989

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

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

IN RE:	)	
ROBERTS, REBECCA and ANTHONY,	)	Bky. No. 88-01681-C Chapter 7
Debtors.	)	
REBECCA AND ANTHONY ROBERTS,	)	Adv. No. 88-0188-C
Plaintiffs/Appellees,	)	
v.	)	89-C-46-B
INTERNAL REVENUE SERVICE,	)	
Defendant/Appellant.	)	

ORDER

Now before the court is the appeal of the Internal Revenue Service ("IRS") of the Order of the U. S. Bankruptcy Court for the Northern District of Oklahoma dated January 13, 1989, which found, in an adversary proceeding filed by the debtors, that penalties on nondischargeable taxes could be discharged under the Bankruptcy Code.

The facts as stipulated to by the parties are briefly as follows. The debtors owe a debt in an unspecified amount to the defendant for income taxes, penalties, and interest for the tax years 1982 and 1983. The debtors failed to file tax returns for either of those years prior to the filing of their petition[1] in bankruptcy. A case is presently pending before the United States Tax Court regarding these taxes, penalties, and interest entitled Anthony Jerome Roberts v. Commissioner of Internal Revenue, Docket No. 11002-88, which case has been stayed pursuant to 11 U.S.C. § 362 pending resolution of the instant dispute.

1/ Filed June 10, 1988.

The taxes themselves are exempt from discharge pursuant to § 523(a)(1)(B)(i) since the debtors failed to file a tax return for either of the subject years. Section 523(a)(1)(B)(i) specifically exempts from discharge an income tax for which a return was not filed. The only issue therefore before the court was whether the assessed penalties, which are predicated on the nondischargeable tax claims, are themselves exempt from discharge.

In his Memorandum Decision and Order of January 13, 1989, Judge Covey found the following statutes in the Bankruptcy Code material to the case:

11 U.S.C. § 523(a)(7)(A)(B):

> A discharge under section 727 ... of this title does not discharge an individual debtor from any debt -
>
> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty -
>
> (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
>
> (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

11 U.S.C. § 523(1)(A)(B)(i):

> (1) for a tax
>
> (A) of the kind ... specified in section 507(a)(7)
>
> (B) with respect to which a return, if required--
>
> (i) was not filed; or ....

11 U.S.C. § 507(a)(7)(A)(i):

> (a) The following expenses and claims have priority in the following order: ...
>
> (7) Seventh, allowed unsecured claims of governmental units; only to the extent that such claims are for-- ...
>
> (A) a tax on or measured by income or gross receipts--
>
> (i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition....

The Bankruptcy Judge then found as follows:

> Under this convoluted statutory scheme, penalties in general are nondischargeable.... There are, however, limited exceptions to this general rule and these exceptions are stated in 523(a)(7)(A)(B). Stated in simple English subsections (A) and (B) provide for the following taxes to be dischargeable:
>
> > Subsection (A) -- penalties on taxes which are <u>not</u> mentioned in 523(a)(1). By looking at § 523(a)(1) and then § 507(a)(7) we find that the kinds of taxes <u>not</u> mentioned in § 523(a)(1) are non-income taxes due and payable more than three years before bankruptcy and for which a return was filed. The penalties in the instant case are for income taxes due and payable more than three years before bankruptcy for which no return was filed. It is clear that subsection (a) has no application to the present case.
> >
> > Subsection (B) -- penalties on taxes that are over three years old at the time the petition for relief was filed.
>
> If the penalties in the instant case come within either of these exceptions they are dischargeable. There is nothing in the code that says that if the penalties do not come within the

provisions of subsection (A) they cannot become dischargeable within the provisions of subsection (B). Also there is nothing in the code that says the penalties in order to be dischargeable must come within the provisions of both subsections.

This second exception (subsection (B)) to the general nondischargeability rule does clearly apply and does make the penalties in the instant case dischargeable. This subsection states without ambiguity or equivocation that penalties on taxes that are over three years old are dischargeable. Plain and simple.

The IRS argues that this Court should hold that if the taxes are nondischargeable, as they are in the instant case, the penalties predicated thereon are nondischargeable. The IRS cites two cases to support its argument and unquestionably these decisions do just that. In re Carlton, 19 B.R. 73 (D.N.M. 1982) and Cassidy v. Commissioner of Internal Revenue Service, 814 F.2d 477 (7th Cir. 1987).

This Court believes that the argument of the IRS and the cases which support it are clearly wrong. The IRS contends that because the penalties in the instant case are not dischargeable pursuant to subsection (A) they are nondischargeable. This is a nonsequitur. Just because penalties are not dischargeable under subsection (A) does not mean they cannot be dischargeable under subsection (B). The two subsections operate independent of each other. The debtors need only prove that the penalties in question come under one of the subsections to prevail. There is nothing in the code to suggest that if the taxes are not dischargeable pursuant to subsection (A) they cannot be dischargeable pursuant to subsection (B).

In the instant case the penalties in question clearly refer to transactions or events that happened more than three years prior to the filing of the petition and are therefore covered by subsection (B) and are dischargeable.

The district court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. §

158(a).[1] Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate review of bankruptcy rulings with respect to findings of fact. In re: Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. In re: Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988); In re: Mullett, 817 F.2d 677, 679 (10th Cir. 1987). This appeal challenges the legal conclusion drawn from the facts presented at trial, so de novo review is proper.

Having reviewed carefully the pleadings in this case, the Memorandum Decision and Order of the Bankruptcy Judge, and the applicable law, the court makes the following findings.

Courts have held that, although the language of 11 U.S.C. § 523(a)(7)(A) is circuitous, it requires that tax penalties be treated the same as related underlying tax liability, as this is consistent with the legislative history of the section. In re Carlton, 19 B.R. 73, 74-75 (D.C.N.M. 1982); Cassidy v. Commissioner, 814 F.2d 477, 480-481 (7th Cir. 1987).

---

[1] 28 U.S.C. § 158(a) reads as follows:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title [28 USCS § 157]. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

The court finds that the legislative history shows that Congress intended penalties to be treated the same as the underlying tax. Section 523(a)(7) reflects the Senate version of the statute which was introduced and eventually passed. The Notes of the Senate Committee on the Judiciary, Sen. Rept. No. 95-989, state:

> Paragraph (7) makes nondischargeable certain liabilities for penalties including tax penalties if the underlying tax with respect to which the penalty was imposed is also non-dischargeable (Sec. 523(a)(7).... This provision differs from the bill as introduced, which did not link the nondischarge of a tax penalty with the treatment of the underlying tax. The amended provision reflects the existing position of the Internal Revenue Service as to tax penalties imposed by the Internal Revenue Code [Title 26] (Rev. Rul. 68-574, 1968-2 Cum. Bull. 595).

However, the court observes that what the Congress intends and what it does by way of legislative enactment are not always consistent. Carlton and Cassidy notwithstanding, the Court concludes that the Bankruptcy Court view of §523(a)(7)(A) and (B), while perhaps not as pellucid as presented, is the better treatment of that language. Any other ruling totally neglects Section (B), having the effect of rewriting the section judicially to comport with Congress' expressed legislative intent.

This is because, under the Carlton, Cassidy view, Section (A) always settles the issue. Either the tax in question (to which the penalty relates) is of a kind specified in paragraph 1 (523(a)(1) and 507(a)(7)) or it is not. If it is, the penalty is not dischargeable; if it is not, the penalty is dischargeable. Such

a view makes Section (B) surplusage.

Another approach to Sections (A) and (B) is to assume, arguendo, that Congress had reversed the sequence of the sections, as follows:

> (A) imposed with respect to a transaction or event that occurred three years before the date of filing of the petition; or
>
> (B) relating to a tax of a kind not specified in paragraph 1 of this subsection.

Would an examining judge, finding the event was more than 3 years old, end his search with Section (A)? The court thinks so, since it definitely applies. Conversely, would not the examiner, if the event was <u>less</u> than three years old, go on to Section (B) to test applicability? The answer must be yes.

Lastly, and perhaps most importantly, the court examines the disjunctive "or." If this word has any meaning, and it does, this gives full effect to Section B as enacted. The choice is either (A) <u>or</u> (B); the choice is not if (A) applies do not look at (B).

<u>In re Longley</u>, 66 B.R. 237 (B.C.N.D. OH. 1986) gives full treatment to the word "or," yet winds up by not following its own advice. At 240, the <u>Longley</u> court correctly determines the "or" that separates (i), (ii) and (iii) of 11 U.S.C. §507(a)(7)(A) means <u>any</u> of the three categories are available simply because of the word "or." But, at 243, it holds the word "or," as used in 523(a)(7)(A) and (B), does not have such disjunctive interpretation.

The correct use of the disjunctive "or" means any of the categories the word separates may apply. The sequence of choices does not control the selection.

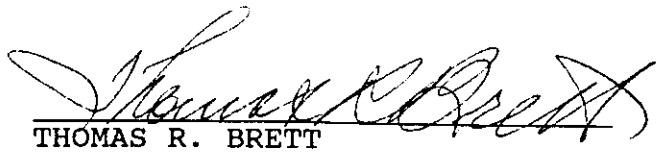
Congress evidently intended to have penalties treated in the same manner as the related tax. But the way Sections (A) and (B) of 523(a)(7) are written does not get the job done.[1] As Justice Sutherland observed in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578 (1937):

> "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation." Ibid. at 404.

The Longley court states that it "cannot and will not write the law" which is a proper attitude for courts to take. Yet by fulfilling an admittedly rather obvious congressional intent, by giving enacted words a meaning not actually stated, is to rewrite the law. Absent the congressional intent, there would be little question what the plain words of (A) and (B) say and mean.

IT IS ORDERED that the Bankruptcy Court's decision of January 13, 1989, is hereby AFFIRMED.

DATED this 26th day of June, 1989.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

---

[1]"There is no good in railing at us. You should rail at the legislature. The judges have no option in the matter. They are bound, hand foot, by the shackles of a statute." Cardozo: *Law and Literature,* 106.

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

FILED

JUN 23 1989

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

STARLAH NOWLIN,	)	
Plaintiff,	)	
vs.	)	No. 88-C-40-E
GULF INSURANCE COMPANY,	)	
Defendant.	)	

JUDGMENT

This action came on for consideration 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 THEREFORE ORDERED that the Plaintiff Starlah Nowlin take nothing from the Defendant Gulf Insurance Company, that the action be dismissed on the merits, and that the Defendant Gulf Insurance Company recover of the Plaintiff Starlah Nowlin its costs of action.

ORDERED this 22d day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED
JUN 23 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

SOONER BONDING AGENCY, INC., successor in interest to DONALD P. HAVENAR, Plaintiff, vs. ALLEGHENY MUTUAL CASUALTY COMPANY, Defendant.	)	No. 88-C-1237-E

AND

SOONER BONDING AGENCY, INC., successor in interest to DONALD P. HAVENAR, Plaintiff, vs. INTERNATIONAL FIDELITY INSURANCE COMPANY, Defendant.	)	No. 88-C-1238-E

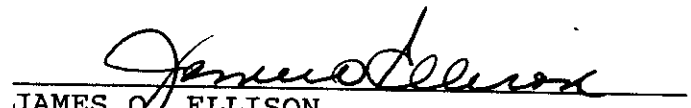
ADMINISTRATIVE CLOSING ORDER

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 THEREFORE 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, order, judgment, or for any

other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 22d day of June, 1989.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED
JUN 23 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

SOONER BONDING AGENCY, INC., successor in interest to DONALD P. HAVENAR, Plaintiff, vs. ALLEGHENY MUTUAL CASUALTY COMPANY, Defendant.	)	No. 88-C-1237-E

AND

SOONER BONDING AGENCY, INC., successor in interest to DONALD P. HAVENAR, Plaintiff, vs. INTERNATIONAL FIDELITY INSURANCE COMPANY, Defendant.	)	No. 88-C-1238-E

ADMINISTRATIVE CLOSING ORDER

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 THEREFORE 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, order, judgment, or for any

other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 22d day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

FILED

JUN 23 1989

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

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

MICHAEL SHACKLE, Plaintiff, vs. RYDER TRUCK RENTAL, INC., a subsidiary of RYDER SYSTEM INC., a Florida corporation, KEN MIDDLETON, JIM MCCARTHY, and DICK DICKERSON, Defendants.	)	Case No. 88-C-795-E

ORDER

NOW on this 22d day of June, 1989, comes on for consideration the above styled matter and the Court, being fully advised in all premises finds that Defendants have moved for summary judgment on Plaintiff's five remaining causes of action. Plaintiff belatedly urged that, as Defendants' Motion for Summary Judgment was filed one day late, on April 19, 1989, but was hand-delivered to Plaintiff's counsel on that date, such motion should not be considered by this Court. The Court may, in its discretion, overlook minor timeliness problems, where, as here, no prejudice has been incurred by the complaining party. See Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 515 (3rd Cir. 1988). This Court finds that Plaintiff's counsel received the Motion for Summary Judgment via the hand-delivery prior to the date on which he would normally have received it through the mails and thus no prejudice was incurred. Plaintiff's Motion To Limit Consideration of Defendants' Motion for Summary Judgment is therefore denied.

Defendants urge that summary judgment should be granted to them on Plaintiff's claims for promissory estoppel, breach of implied contract, intentional infliction of emotional distress, prima facie tort and negligent entrustment. Plaintiff fails to respond to the motion concerning the claims for intentional infliction of emotional distress, prima facie tort or negligent entrustment. This Court has examined the merits of Defendant's arguments with regard to those claims and finds that summary judgment may properly be granted as to those issues without further discussion. The two remaining claims for promissory estoppel and breach of implied contract will be discussed below.

PROMISSORY ESTOPPEL

Defendants assert that summary judgment is proper on Plaintiff's theory of promissory estoppel under the undisputed facts of record in the case. In Oklahoma, the elements of a claim for promissory estoppel which must be met include the following:

1) False representation or concealment of facts;
2) Actual or constructive knowledge of facts by one to be estopped;
3) Other party's lack of knowledge or means to obtain knowledge of real facts;
4) Made with intention that representation be acted upon; and
5) Other party must have reasonably relied on or acted upon representation to his detriment.

Burdick v. Independent School Dist. No. 52 of Oklahoma County, 702 P.2d 48 (Okla. 1985). To meet the element of concealment, Plaintiff alleges that Defendant Ryder attempted to conceal the

true impact of the Company Handbook upon the Shop Rules. Viewing the facts in the light most favorable to Plaintiff, it is clear that Ryder at most failed to communicate with some employees regarding the status of the Handbook and the Shop Rules. Other employees were fully cognizant of and conversant about the Handbook and Shop Rules. Accepting, for purposes of this motion, that Plaintiff was not apprised of the existence of the Handbook and did not take part in employee discussions regarding such Handbook, still no deliberate concealment sufficient to meet Plaintiff's burden on this element can be shown. Thus Defendant's Motion for Summary Judgment on Plaintiff's claim for promissory estoppel may properly be granted.

BREACH OF IMPLIED CONTRACT

It is axiomatic that in order to prevail on a claim for breach of implied contract, Plaintiff must establish that such an implied contract existed. Plaintiff urges that the letter promising "maximum job security" regardless of the decertification election results should be viewed as an offer of employment. Such an interpretation falls outside the bounds of common sense. Ryder was providing its employees with its position regarding the election and perhaps even lobby in favor of the result allegedly desired by Ryder. In no way can this be viewed as constituting additional offers of employment with the current employees. Thus, as no implied contract was created, no claim for breach of such implied contract can be successfully maintained. Plaintiff, as an at-will employee remained subject to termination at any time for any reason not violative of public policy. See Burk v. K-Mart Corp., No.

67,785 (Okla. Feb. 7, 1989).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion To Limit Consideration of Defendants' Motion for Summary Judgment should be and is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment should be and is hereby granted as to all remaining causes of action. This case will accordingly be dismissed and all scheduled dates stricken.

JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

00032/CH

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA,

UNITED STATES OF AMERICA, Plaintiff, vs. ONE PARCEL OF REAL PROPERTY WITH BUILDINGS, APPURTENANCES, AND IMPROVEMENTS KNOWN AS ROUTE 3, BOX 128-A, ANTLERS, PUSHMATAHA, OKLAHOMA, et al., Defendants.	)	CIVIL ACTION NO. 89-C-372-B

FILED

JUN 23 1989

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

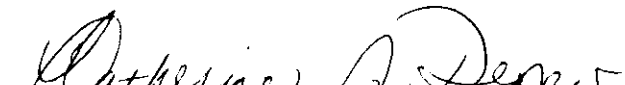
NOTICE OF DISMISSAL

Plaintiff, the United States of America, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Catherine J. Depew, Assistant United States Attorney, hereby gives notice that a portion of the Defendant properties that is the subject of this action is hereby dismissed without prejudice, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, more specifically the Defendant property described as:

All contents of the Defendant
real property known as Route 3
Box 128-A, Antlers, Pushmataha.
County, Oklahoma, valued at less
than $1,000.00.

Respectfully submitted,

TONY M. GRAHAM
United States Attorney



CATHERINE J. DEPEW, OBA #3836
Assistant United States Attorney
3600 U. S. Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103

CJD/ch

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. ROGER LEE DAVIS I; WILLIAM R. SATTERFIELD d/b/a 2867 EAST 43rd STREET, N., INVESTMENT COMPANY; SHERRY THOMAS, Tenant; CLINTON RICE, Tenant; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED JUN 22 1989 Jack C. Silver, Clerk U.S. DISTRICT COURT CIVIL ACTION NO. 88-C-538-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22d day of June, 1989. 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, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Carl Robinson, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, William R. Satterfield d/b/a 2867 East 43rd Street, N., Investment Company, appears by his attorney Randy A. Rankin; and the Defendants, Roger Lee Davis I, Sherry Thomas, Tenant, and Clinton Rice, Tenant, appear not, but make default.

The Court being fully advised and having examined the file herein finds that the Defendant, William R. Satterfield d/b/a 2867 East 43rd Street, N., Investment Company, was served

with Summons and Complaint on July 20, 1988; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on June 21, 1988; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on June 14, 1988.

The Court further finds that the Defendants, Roger Lee Davis I, Sherry Thomas, Tenant, and Clinton Rice, Tenant, were served by publishing notice of this action in the Tulsa Daily Business Journal & Legal Record, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 25, 1988, and continuing to November 29, 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, Roger Lee Davis I, Sherry Thomas, Tenant, and Clinton Rice, Tenant, 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, Roger Lee Davis I, Sherry Thomas, Tenant, and Clinton Rice, Tenant. 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 Phil Pinnell, 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 to the subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers herein on July 5, 1988; that the Defendant, William R. Satterfield d/b/a 2867 East 43rd Street, N., Investment Company, filed his Answer herein on August 9, 1988; and that the Defendants, Roger Lee Davis I, Sherry Thomas, Tenant, and Clinton Rice, Tenant, 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-Two (32), Block Six (6), LAKE-VIEW HEIGHTS AMENDED ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on August 25, 1978, the Defendant, Roger Lee Davis I, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, his mortgage note in the amount of $10,350.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Roger Lee Davis I, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, a mortgage dated August 25, 1978, covering the above-described property. Said mortgage was recorded on September 5, 1978, in Book 4351, Page 466, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 28, 1978, Roger Lee Davis I conveyed the above-described property to 2867 E. 43rd St., N., Investment Company by General Warranty Deed which was recorded on October 2, 1978, in Book 4356 at Page 828 in the records of Tulsa County, Oklahoma. The Plaintiff did not release the Defendant, Roger Lee Davis I, from his personal liability thereon.

The Court further finds that the Defendant, William R. Satterfield d/b/a 2867 East 43rd Street, N., Investment Company, states in his Answer filed herein on August 9, 1988, that William R. Satterfield d/b/a 2867 East 43rd Street, N., Investment Company is the record title holder of the subject property.

The Court further finds that the Defendants, Roger Lee Davis I and William R. Satterfield d/b/a 2867 East 43rd Street, N., Investment Company, 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, Roger Lee Davis I and William R. Satterfield d/b/a 2867 East 43rd Street, N., Investment Company, are indebted to the Plaintiff in the principal sum of $9,858.14, plus interest at the rate of 9.5 percent per annum from August 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, Sherry Thomas, Tenant, and Clinton Rice, Tenant, are in default and have no right, title, or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa 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 in rem against Defendants, Roger Lee Davis I and William R. Satterfield d/b/a 2867 East 43rd Street, N., Investment Company, in the principal sum of $9,858.14, plus interest at the rate of 9.5 percent per annum from August 1, 1987 until judgment, plus interest thereafter at the current legal rate of 8.85 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, Sherry Thomas, Tenant; Clinton Rice, Tenant; and County Treasurer 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 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.

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney

CARL ROBINSON, OBA #10164
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

RANDY A. RANKIN, OBA #
Attorney for Defendant,
William R. Satterfield d/b/a
2867 East 43rd Street, N., Investment Company

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 22 1989

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

UNITED STATES OF AMERICA, Plaintiff, vs. PUBLIC SERVICE COMPANY OF OKLAHOMA, et al., Defendants.	)	Civil Action No. 85-C-380-R

ORDER DISMISSING ACTION WITH PREJUDICE

This matter comes on before the Court upon the joint motion of the Plaintiff, United States of America, acting on behalf of the United States Postal Service, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, Public Service Company of Oklahoma, by William C. Anderson and G. Michael Lewis of Doerner, Stuart, Saunders, Daniel and Anderson, to dismiss this action with prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

The Court having examined the file and being fully advised finds that the Page Belcher Federal Building ("the building") has undergone the contamination assessment studies specified below:

ENTITY CONDUCTING STUDY	DATE OF TEST	AREAS TESTED	TOXICANTS TESTED FOR
National Institute for Occupational Safety and Health (NIOSH)	04/85	Building Surfaces and Air	Polychlorinated Biphenals (PCBs); Polychlorinated Dibenzofurans(PCDFs); Polychlorianted Dibenzo-p-dioxins (PCDDs)

ENTITY CONDUCTING STUDY	DATE OF TEST	AREAS TESTED	TOXICANTS TESTED FOR
National Institute for Occupational Safety and Health (NIOSH)	02/86	Building Surfaces and Air	PCBs, PCDFs and PCDDs
IT Corporation (PSO's consultant)	02-03/86	Building Surfaces and Air	PCBs, PCDFs and PCDDs

The Court further finds that USA contracted with Versar, Inc. to compile and evaluate the data available through the contamination studies, develop cleanup specification and oversee the decontamination of the building.

The Court further finds that USA and PSO entered into an agreement on June 4, 1987 specifying terms for the cleanup of the building and allocating initial responsibilities for payment.

The Court further finds that USA accepted the bid of SOS, Inc. for decontamination of surface areas of the building in excess of the recommended exposure limits set forth in the NIOSH Health Hazard Evaluation Report, HETA, 85-289-1738, of October 1986.

The Court further finds that the initial cleanup activity began in May of 1987 and was completed in December of 1987.

The Court further finds that in February of 1988, Versar, Inc. tested the air and surfaces of the building for PCBs, PCDDs and PCDFs.

The Court further finds that additional cleanup was performed in the transformer vault, combustion air tunnel, duct work on the second floor from air handling unit number 85 and some recleaning in the heating, ventilation and air conditioning (HVAC) systems during June through August of 1988.

The Court further finds that the areas subject to the additional cleaning were retested by Versar and the results of this testing are included in Versar Draft Test Reports dated April 21, 1988 and December 7, 1988. The reports have been reviewed by representatives of the U.S. Postal Service, PSO, and NIOSH resulting in the consensus that PCB and PCDD/PCDF levels have been lowered to an acceptable level in compliance with the NIOSH Health Hazard Evaluation Report, HETA 85-289-1738.

The Court further finds that the results of the February 1988 air test conducted by Versar indicated that the levels of airborne PCBs had been drastically reduced to a level well below the NIOSH recommended exposure limit and confirmed the low levels of PCDDs and PCDFs in the building air well below the NIOSH recommended guidelines.

The Court further finds that pursuant to Section 14 of the June 4, 1987 agreement between USA and PSO, Versar developed a test plan for the retesting of the building air and the air samples for PCBs, PCDDs and PCDFs were collected during February of 1989.

The Court further finds that test results of the February 1989 air sampling reconfirmed that the levels of PCBs,

PCDDs and PCDFs in the building are well below the recommended exposure limits and guidelines set forth by NIOSH.

The Court further finds that the surfaces and the air of the building have been decontaminated in full compliance with NIOSH Health Hazard Evaluation Report, HETA 85-289-1738 and that NIOSH's independent review of the decontamination data indicates that the building is clean in accordance with the NIOSH guidelines and in full compliance with the NIOSH guidelines recommended exposure limits.

The Court further finds that based upon the certification tests there is no further need for surface or air testing in the building.

The Court further finds that USA and PSO have negotiated a settlement upon terms acceptable to both parties and that this action should accordingly be dismissed with prejudice as to all Defendants.

The Court further finds that the Co-Defendants, Westinghouse Electric Corporation, General Electric Company and Monsanto Company do not object to and concur in the dismissal of this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that in accordance with the findings above this action is dismissed with prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, with all parties to bear their own costs and attorneys' fees.

DATED this 22 day of June, 1989.

David L. Russell

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

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

NORMAN ROSS FILLMORE, Petitioner, vs. RON CHAMPION and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	}	No. 88-C-466-C

FILED

JUN 23 1989

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

ORDER

Before the Court for its consideration is the objection filed by the petitioner to the Report and Recommendation of the Magistrate. The Magistrate has recommended that petitioner's writ of habeas corpus be denied.

Petitioner seeks federal habeas corpus relief pursuant to 28 U.S.C. §2254 on the ground that the Oklahoma Department of Corrections has incorrectly computed his statutory good time credits and he is therefore being illegally detained.

The Magistrate relied on an audit and affidavit from the Offender Records Manager at the Department of Corrections which indicated that petitioner has 685 days left to serve on his sixty-year sentence after consideration of all credits allowable. The Offender Records Manager's Affidavit includes an explanation of the good time credits lost by petitioner.

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Petitioner objects to the Magistrate's reliance on the Records Manager's computation of statutory work credits that were awarded for prisoners received prior to September 8, 1976.

The Court has independently reviewed the record and finds that the Report and Recommendation of the Magistrate is supported by applicable law. The Magistrate's Report and Recommendation is affirmed and adopted as the Findings and Conclusions of this Court.

It is therefore Ordered that petitioner's application for habeas corpus pursuant to 28 U.S.C. §2254 is hereby DENIED.

IT IS SO ORDERED this 21st day of June, 1989.

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

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

JOSEPH MACASTLE JACKSON, Petitioner, vs. RON CHAMPION and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	}	No. 88-C-1470-C

FILED
JUN 22 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the objection by petitioner, Joseph Macastle Jackson, to the Findings and Recommendations of the Magistrate wherein the Magistrate recommended that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be denied.

Following a jury trial, petitioner was convicted in Oklahoma County District Court of First Degree Murder and Conspiracy to Commit First Degree Murder. Petitioner's conviction and sentence was affirmed by the Oklahoma Court of Criminal Appeals.

Petitioner seeks federal habeas corpus relief on the ground that he was denied his right to due process because the jury was allowed to separate after final submission of the case. The morning after separation, one of the jurors was seen reading a newspaper at the courthouse which contained information allegedly prejudicial to the petitioner.

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The Magistrate found that petitioner had not demonstrated that the trial court's decision to allow the jury to separate was so fundamentally unfair as to amount to a violation of due process.

The Court has independently reviewed the record and applicable law. Under Oklahoma law, after final submission of a case to the jury, separation of the jury or any other action subjecting them to outside influence is presumed to prejudice defendant and the burden is placed on the State to prove otherwise. Lusty v. State of Oklahoma, 542 P.2d 545 (Ok.Cr.App. 1975).

The State offers the written opinion of the appellate court wherein the court made the following factual determinations: (1) the trial court sternly admonished the jury as to the seriousness and importance of their duty before allowing them to separate; (2) the trial judge admonished the jury nine times not to discuss the case with anyone; (3) there was no proof that a juror had actually seen or read an article about petitioner; (4) the verdict as to the co-defendant was identical although the co-defendant had not been mentioned in the article. Jackson v. State of Oklahoma, 741 P.2d 875 (Ok.Cr.App. 1987)

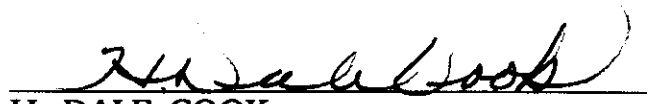
Following a complete hearing and decision on the merits of a criminal case in a state court of competent jurisdiction, the factual determination of the state court is to be afforded the presumption of correctness in a habeas corpus proceeding. 28 U.S.C. §2254(d). Petitioner offered no evidence that these factual findings are erroneous. Defendant has met its burden in showing that petitioner was not prejudiced by failure of the trial court

to sequester the jury after final submission of the case to the jury. Further, there is no constitutional right to jury sequestration. Young v. Alabama, 443 F.2d 856 (5th Cir. 1971), cert. denied, 405 U.S. 976 (1972).

The Findings and Recommendation of the Magistrate are affirmed and adopted as the Findings and Conclusions of this Court.

It is the Order of the Court that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 is hereby DENIED.

IT IS SO ORDERED this 21st day of June, 1989.



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

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

PATRICIA L. FISHER and GREGORY B. FISHER, wife and husband,	)	
Plaintiffs,	)	
vs.	)	No. 88-C-1043-C
ALLIED CORPORATION, a Delaware corporation; DIAMOND SHARMROCK CHEMICALS COMPANY, a Delaware corporation, formerly DIAMOND SHAMROCK CORPORATION, a Delaware corporation,	)	
Defendants.	)	

FILED

JUN 22 1989

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

ORDER OF DISMISSAL WITH PREJUDICE

Upon Joint Stipulation for Dismissal With Prejudice by the parties, it is hereby ordered that this cause be dismissed with prejudice to the plaintiffs' right to re-assert any claim which was or could have been asserted in said cause.

H. Dale Cook
United States District Judge

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

FILED

JUN 22 1989

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

JOE L. BLANTON,	}	
Petitioner,	}	
vs.	}	No. 87-CR-118-C
UNITED STATES OF AMERICA,	}	No. 88-CR-061-C No. 88-C-1643-C
Respondent.	}	

ORDER

Before the Court is the objection by petitioner Joe L. Blanton to the Report and Recommendation of the United States Magistrate. The Magistrate has recommended that petitioner's motion under 28 U.S.C. §2255 be denied for failure to raise on direct appeal the issues contained within his motion.

Petitioner has raised the following grounds for relief:

1. The trial court erred in imposing a three-year term of supervised release following a five-year term of imprisonment for conspiracy in case No. 88-CR-61-C.

2. The trial court violated the ex post facto clause in applying the guidelines of the Sentencing Reform Act of 1984, in case No. 88-CR-61-C.

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3. The trial court erred in finding petitioner guilty of aiding and abetting in Count Two of the Indictment in case no. 87-CR-118-C.

4. The Indictment in case No. 87-CR-118-C is inadequate to inform petitioner of the charges to which he pled guilty and protect and provide him with safeguards against double jeopardy.

5. The trial court failed to comply with the explicit mandates of federal rules of criminal procedure, Rule 11(c)(1) in accepting petitioner's plea of guilty.

6. The trial court failed to comply with the explicit mandates of federal rules of criminal procedure, Rule 11 and subparts (E)(1)(a) and (f) in accepting petitioner's plea of guilty.

7. There cannot be a valid conviction for conspiracy involving petitioner and an undercover government informant in case No. 88-CR-61-C because it takes two persons to conspire and a government informant is not a true conspirator.

8. The United States Probation Officer, Christi Williams, and the Assistant United States Attorney, Kenneth P. Snoke, violated federal rules of criminal procedure, Rule 32, denying the petitioner due process and equal protection of the law under the provisos of the Sixth and Fourteenth Amendments of the United States Constitution.

9. Movant was denied reasonably effective assistance of counsel at critical stages of the proceedings in the instant causes.

10. Sentencing of defendant under the provisions of the new Sentencing Guidelines was in error in view of the unconstitutionality of the Sentencing Reform Act of 1984, effective November 1, 1987.

11. The evidence in the instant case established entrapment as a matter of fact and law.

The Court has independently reviewed the grounds for relief raised by petitioner in his motion. Under applicable case law, the Court concludes that grounds three through eleven are precluded from review in a federal habeas corpus proceeding for failure of petitioner to raise these issues on direct appeal after sentencing on September 15, 1988. As stated in Peoples v. United States, 365 F.2d 284 (10th Cir. 1966):

> Section 2255 may not be used as a substitute for a direct appeal. It is only where the judgment was rendered without jurisdiction, the sentence imposed was not authorized by law, or there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, that a motion to vacate will lie under §2255.

Id. 365 F.2d at 285.

Therefore the only issues which have not been waived and are available for collateral attack are those contained in grounds one and two of petitioner's motion.

Petitioner Joe L. Blanton was indicted in the Northern District of Texas, case No. 88-CR-61-C, in a superceding indictment filed on March 3, 1988. On May 18, 1988 Blanton pled guilty to Count One of the superceding indictment which charged Conspiracy to Defraud the United States and the Internal Revenue Service from January 1, 1986 until January 27, 1988, in violation of 18 U.S.C.

§371. The government moved and the Court dismissed the remaining Counts at the time of sentencing.

Blanton was also indicted in the Northern District of Oklahoma on August 5, 1987, case No. 87-CR-118-C. On May 18, 1988, Blanton pled guilty to Counts One and Two pursuant to a plea agreement. Count One charged him with Conspiracy to Defraud the United States and the Internal Revenue Service, from March 11, 1986 until October 24, 1986, in violation of 18 U.S.C. §371. Count Two charged him with False Material Statements to the IRS and Scheming to Conceal Material Fact from the IRS, on April 4, 1986 in violation of 18 U.S.C. §1001 and 2.

In case No. 88-CR-61-C, Blanton was sentenced on September 15, 1988 to a term of imprisonment not to exceed five years followed by a three-year term of supervised release. Petitioner argues that the Court had no authority to impose a term of supervised release following imprisonment for conspiracy.

Petitioner's contention is without merit. Since the conspiracy operated past November 1, 1987, the Sentencing Reform Act of 1984 is applicable. Further, applying the Sentencing Reform Act to a conspiracy case such as the one at bar does not violate the ex post facto clause. See U.S. v. Gasparotti, No. 88-94-1 (E.D.Pa. Dec. 19, 1988). Under the Sentencing Guidelines, imposition of a term of supervised release is mandatory. See §5D3.1(a) United States Sentencing Commission Guidelines.

Therefore the issues raised in grounds one and two of petitioner's motion are without merit.

Accordingly, it is the Order of the Court that the motion of the petitioner, Joe L. Blanton, under 18 U.S.C. §2255 to vacate, set aside or correct sentence, is hereby DENIED.

IT IS SO ORDERED this 22nd day of June, 1989.

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

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

FILED
JUN 19 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

KENNAMETAL INC.,	)	
Plaintiff,	)	
vs.	)	No. 87-C-319-E
TOOL SERVE, INC.,	)	AND 89-C-29-E
Defendant.	)	(Consolidated)

FILED
JUN 22 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

JUDGMENT

Plaintiff is granted judgment against Defendant on Defendant's Complaint filed under Case Number 89-C-29-C and consolidated herein. Plaintiff is awarded its costs which are part of 89-C-29-C and to this action subsequent to January 27, 1989.

ORDERED this 16th day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 22 1989

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

JAMES A. MURRAY, Plaintiff, vs. CHRISTENSEN & COMBS CORP., JAMES P. CHRISTENSEN and CLINT COMBS, Defendants.	)	Case No. 87-C-236-E

ORDER

COMES NOW for consideration the Joint Motion for Administrative Closure, and for good cause shown, the Court FINDS AND ORDERS as follows:

1. The settlement agreement, the terms of which are set forth in the Joint Motion, is hereby approved

2. This action is administratively closed until May 30, 1992 without prejudice to the right of Plaintiff, James A. Murray, to reopen this action on or before that date in accordance with the settlement agreement, the principal terms of which are set forth in the Joint Motion for Administrative Closure.

3. If no motion to reopen or motion to extend the administrative closure is filed on or before May 30, 1992, Plaintiff's claims against the Defendants which are asserted, or which could have been asserted, in this action, are hereby dismissed with prejudice on that date, with each party to bear its own attorney's fees, costs and expenses.

4. If any motion to reopen is filed on or before May 30, 1992, the Court shall set this matter on its trial docket.

DATED this 22 day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

JWR/04-89355A/al

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

FILED

JUN 22 1989

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

ALFRED E. FIELDS and JUDITH A. FIELDS, husband and wife, Plaintiff,	)	
v.	)	No. 84-C-718-E
PERRY WILLIAMS, ET AL., Defendants.	)	

ORDER

OF DISMISSAL

It appearing to the Court that the Plaintiff's Application for Citation for Indirect Contempt has been fully settled, adjusted, and compromised, and based on stipulation; therefore,

IT IS ORDERED, ADJUDGED AND DECREED, that the above-referenced action be, and hereby is, dismissed without cost to either party and with prejudice to the Plaintiff.

Dated this 19th day of June, 1989.

JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

P. Thomas Thornbrugh

P. Thomas Thornbrugh
Attorney for Plaintiff

Kevin L. Ward

Kevin L. Ward
Attorney for Defendants

156-52/KLW/dlb

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

FILED
JUN 19 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

KENNAMETAL INC.,	)	
Plaintiff,	)	
vs.	)	No. 87-C-319-E
TOOL SERVE, INC.,	)	AND 89-C-29-E
Defendant.	)	(Consolidated)

FILED
JUN 22 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

JUDGMENT

Plaintiff is granted judgment against Defendant on Defendant's Complaint filed under Case Number 89-C-29-C and consolidated herein. Plaintiff is awarded its costs which are part of 89-C-29-C and to this action subsequent to January 27, 1989.

ORDERED this 16th day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

Entered

FILED

JUN 22 1989

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

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

RAYMOND SNYDER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 88-C-1500-C
	)	
ONEOK, INC., ET AL.,	)	
	)	
Defendants.	)	

ORDER

Now before the Court for its consideration are the objections of plaintiff and defendant Peat, Marwick Main & Co. (Peat Marwick), to the Report and Recommendation of the United States Magistrate filed on March 28, 1989.

Plaintiff, who purchased 200 shares of Oneok stock on July 13, 1987, purports to represent a class comprised of all persons who purchased Oneok stock from October 21, 1986 to December 7, 1987.

He alleges that, during the class period, defendants (Oneok, Inc., various directors of Oneok, and Peat Marwick as auditor) engaged in a course of conduct designed to deceive purchasers of Oneok stock, essentially by failing to disclose or misrepresenting the impact on Oneok's financial condition of ongoing take-or-pay litigation.

The claims involve: securities fraud under §§10(b) and 20 of the Securities Exchange Act of 1934 (i.e., 15 U.S.C. §78j(b) and

15 U.S.C. §78t(a)), and Rule 10b-5 (17 C.F.R. §240.10b-5); aiding and abetting securities fraud; conspiracy to commit securities fraud; Racketeer Influenced and Corrupt Organizations Act (RICO); and pendent state law claims. Defendant Peat Marwick moved to dismiss all claims against it. The Oneok directors and Douglas Ann Newsom moved to dismiss the RICO claim, which was not asserted against Oneok itself.

The various recommendations of the Magistrate and objections thereto will be discussed below. Much of the discussion involves Rule 9(b) F.R.Cv.P. which provides in pertinent part that in all averments of fraud, the circumstances constituting fraud shall be stated with particularity, but that knowledge may be averred generally. The parties have, quite properly, devoted much attention to decisions of district courts, particularly the Western District of Oklahoma. Lest there be any doubt, it should be noted that the doctrine of stare decisis does not compel one district court judge to follow the decision of another. Starbuck v. City and County of San Francisco, 556 F.2d 450, 457 n.13 (9th Cir. 1977), cited with approval in Willner v. Budig, 848 F.2d 1032, 1035 (10th Cir. 1988). However, this Court may consider such a decision for its persuasive value. Thus, the only mandatory authority on this Court is Seattle-First Nat. Bank v. Carlstedt, 800 F.2d 1008 (10th Cir. 1986), in which the court stated "we hold that in this circuit the particularity requirement of Rule 9(b) is applicable generally in securities fraud cases." Id. at 1010. The court went on to note the "liberal approach" it has taken regarding such

claims, and "the importance of reading Rule 9(b) in conjunction with the pleading requirements of Rule 8 ...." Id. at 1011. The Court will now address the specific objections.

A. Securities Fraud Claim

The Magistrate found that the Complaint sufficiently stated a claim against Peat Marwick as a primary violator. In objection, Peat Marwick relies upon decisions from the Southern District of New York involving similar claims against auditors. That district has adopted an extraordinarily detailed pleading requirement for such claims, requiring plaintiff to allege with particularity (a) the manner in which any financial statement calculation did not conform with generally accepted accounting principles, (b) what procedures the accounting firm was under a duty to perform and did not perform, and (c) how non-performance rendered the auditor's report false. See, e.g., Weinberger v. Kendrick, 451 F.Supp. 79 (S.D.N.Y. 1978). Peat Marwick asserts that the Magistrate misunderstood the respective roles of management and auditor and that the Report's failure to insist upon the above requirements render it erroneous.

Plaintiff has referred to the following statement in Citizens State Bank v. Fed. Dep. Ins. Corp., 639 F.Supp. 758 (W.D.Okla. 1986):

> Defendants rely heavily on cases from the Second Circuit, especially the Southern District of New York, that have developed extremely stringent pleading requirements. However, such a return to "fact pleading" is far greater than that required in most circuits, including our own, where Rule 9(b) must be read in conjunction with Rule 8's policy of "notice pleading".
>
> Id. at 762 (citations omitted).

Peat Marwick distinguishes this decision, as well as Seattle-First Nat. Bank, supra, by noting that they did not involve claims against auditors. However, in Farlow v. Peat Marwick Mitchell & Co., 666 F.Supp. 1500 (W.D.Okla. 1987), a case which did involve claims against auditors, the court did not adopt the heightened pleading standard, but rather indicated that it was following the teaching of the Seattle-First decision. Id. at 1506. The Court is persuaded that the "auditor-as-defendant" elaboration on Rule 9(b) adopted by the Southern District of New York has not been approved by a court in this circuit, and would be rejected by the Tenth Circuit Court of Appeals if it were. See Lewis v. Berry, 101 F.R.D. 706, 709 (W.D.Wash. 1984) (rejecting notion that professionals, such as Arthur Andersen & Co., are entitled to greater particularity than other defendants in fraud allegation). Thus, the Court affirms the Magistrate on this point.

B. Conspiracy Claim

In Eastwood v. Nat. Bank of Commerce, Altus, 673 F.Supp. 1068 (W.D.Okla. 1987), the court concluded that "the elements of secondary liability for aider and abettor liability or conspiracy liability must be pleaded with the particularity required by Rule 9(b) F.R.Cv.P." 673 F.Supp. at 1082. As to conspiracy specifically, the court said that the essential elements were (1) a primary violation of Rule 10b-5 by another; (2) an agreement between the alleged conspirator and the primary violator to violate Rule 10b-5 or engage in some conduct in violation of Rule 10b-5; and (3) an act committed by the alleged conspirator in substantial furtherance

of the conspiracy. Id. at 1081-82. Conclusory allegations that one conspired are not enough. Id. at 1080.

The Magistrate found that the Complaint satisfied the requirements of pleading a conspiracy claim. Regarding the element of agreement, he found that "[t]he agreement is implied by the retention of Peat Marwick by Oneok, Inc. to provide it with auditing and accounting services ...." (Report at 5). Peat Marwick objects on the ground that the retention as an auditor does not constitute an agreement to violate the securities laws. The Court agrees. The essence of a conspiracy is an agreement to violate the law. Plaintiff has failed to allege such an agreement, and it may not be implied from a facially innocent agreement to provide accounting services. Thus, the conspiracy claim fails.

C. **Aiding and Abetting Claim**

The essential elements of a claim for aider and abettor liability for violations of Rule 10b-5 are (1) a primary violation of Rule 10b-5 by another; (2) knowledge of the violation by the alleged aider and abettor; and (3) substantial assistance by the aider and abettor. Eastwood, 673 F.Supp. at 1081. The Magistrate found that the Complaint adequately stated a claim.

In objecting, Peat Marwick relies upon the following passage from Farlow v. Peat, Marwick, Mitchell & Co., 666 F.Supp. 1500, 1506 (W.D.Okla. 1987):

> A plaintiff's case against an aider, abettor or conspirator may not rest on a conclusory allegation that defendant had knowledge of the fraudulent activity of the primary violator. The plaintiff must support these allegations with "some reason to conclude that the defendant has thrown in his lot with the primary violators." Barker v. Henderson, 797 F.2d 490 (7th Cir. 1986).

Peat Marwick contends that the Complaint does not identify some reason to conclude that Peat Marwick has "thrown in its lot" with the primary violators, and thus should be dismissed. What the Farlow court regards as "some reason" is reflected in its statement that the complaint before it contained no factual allegations that Peat Marwick gained by bilking the buyers, or that Peat Marwick received sale proceeds or fees for advice, or that it reviewed or approved any materials used in the sale apart from the financial statements it certified. 666 F.Supp. at 1506. This Court is persuaded that such factual materials are matters of evidence, not pleading. The decision upon which Farlow relies for its "thrown in his lot" language, Barker v. Henderson, 797 F.2d 490 (7th Cir. 1986), is an appellate review of a grant of summary judgment, not dismissal on the pleadings. See also Roberts v. Peat, Marwick, Mitchell & Co., 857 F.2d 646, 653 (9th Cir. 1988). The Farlow court noted the decision in Windon Third Oil and Gas Drilling Partnership v. Fed. Dep. Ins. Corp., 805 F.2d 342 (10th Cir. 1986), which holds that a failure to disclose material information is actionable only when one is under a duty to do so. However, since the existence of a duty to disclose hinges on the circumstances of the case, the determination of the duty's existence cannot be made on the pleadings. Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045 (11th Cir. 1986), cert. denied, 480 U.S. 946 (1987). To the extent that Farlow is contrary to this reasoning, the Court departs from it. See also In re Storage Technology Corp. Securities Lit, 630 F.Supp. 1072, 1076 (D.Colo. 1986).

As to both the securities fraud claim and the aiding and abetting claim, Peat Marwick refers to the principle that "[a]llegations based on information and belief usually do not satisfy the particularity requirement, unless accompanied by a statement of the facts upon which the belief is founded, but the rule may be relaxed as to matters peculiarly within the opposing party's knowledge." 5 C.Wright & A.Miller, Federal Practice and Procedure, §1298 at 416 (1969) (footnotes omitted).

The Magistrate found that the Complaint was adequate on this point. Initially, Peat Marwick notes that plaintiff has, rather inartfully, based virtually his entire Complaint on information and belief. Thus, it could be said that the Complaint contains no independent facts which could form a basis for belief. The Court believes that such a construction, in this case, would be hypertechnical. Clearly, from the detailed citations to the financial statements involved herein, plaintiff does have personal knowledge as to these items. The Court considers these as supporting facts, although they are not labelled as such. See Lewis v. Berry, 101 F.R.D. 706, 709 (W.D.Wash. 1984). The Court agrees with Peat Marwick that paragraphs 28 through 33, referring to events after Peat Marwick issued its audit reports and after plaintiff purchased his stock are not properly considered. However, paragraphs 39 through 48 specifically detail alleged misstatements in the financial reports. Paragraph 49 alleges that Peat Marwick knew of these misstatements when it certified the reports. The fact that Peat Marwick is not mentioned in paragraphs 39-48 is irrelevant.

A roughly similar pleading was before the court in Oleck v. Fischer, 401 F.Supp. 651 (S.D.N.Y. 1975). The court stated:

> It specifies a statement alleged to be misleading, the manner in which it is alleged to be misleading and the categories of information it misrepresented. More than this is not required.
>
> Id. at 655.

It is not necessary for plaintiff to allege evidentiary details that will be used to support a claim of fraud at a later date. Banowitz v. State Exchange Bank, 600 F.Supp. 1466, 1469 (N.D.Ill. 1985). This matter is not free from doubt. However, a Rule 9(b) motion should not be granted unless absolutely necessary to protect the purposes underlying its particularity requirement. Resler v. Financial Group, Inc., 668 F.Supp. 1454, 1457 (W.D.Okla. 1985). The Court cannot conclude that this is such an instance.

Control Person Liability

The Magistrate found that plaintiff had failed to allege a sufficient claim for control person liability against Peat Marwick under 15 U.S.C. §78t(a).

The plaintiff merely alleges the conclusion in paragraph 11 of the Complaint that Peat Marwick was a "controlling person". No facts are alleged which would even support an inference of such control. The Magistrate correctly distinguished Sharp v. Coopers & Lybrand, 457 F.Supp. 879 (E.D.Penn. 1978), aff'd, 649 F.2d 175 (3rd Cir. 1981), cert. denied, 455 U.S. 938 (1982), as a case involving control of an accounting firm over its employee, not its client. The Court believes that the proper analysis is set forth in In re Com. Oil/TESORO Petro. Sec. Litig., 484 F.Supp. 253, 268-269 (W.D.Tex. 1979). There is no authority for the proposition

that an accounting firm's status as auditor for a company makes tenable an unsupported allegation that it is a controlling person as to that company. Accordingly, the Report will be affirmed on this point.

RICO Claim

The Magistrate recommended that plaintiff's RICO claim be dismissed. To survive a Rule 12(b)(6) motion, a civil RICO claim must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Cayman Exploration Corp. v. United Gas Pipe Line Corp., (10th Cir.) (April 26, 1989) (slip op. at 11). The Magistrate found that plaintiff failed to allege a pattern of racketeering activity. Plaintiff objects, arguing that "he has alleged ongoing fraudulent activity consisting of more than one act or scheme with more than one objective." (Plaintiff's Objection at 7).

The United States Supreme Court has stated:

> The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one racketeering activity and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.
>
> Sedima S.P.L.R. v. Imrex Co., Inc., 473 U.S. 479, 496 n.14 (1985) (quoting S.Rep. No. 91-617, p.158 (1969) [emphasis in Court's opinion].

The United States Court of Appeals for the Tenth Circuit has taken a cautious approach to the issue, deciding what was not a pattern of racketeering activity, rather than setting forth an affirmative definition. See Garbade v. Great Divide Min. and Mill. Corp., 831 F.2d 212, 214 (10th Cir. 1987). In language applicable here, the

court stated in Torwest DBC, Inc. v. Dick, 810 F.2d 925, 929 (10th Cir. 1987) that

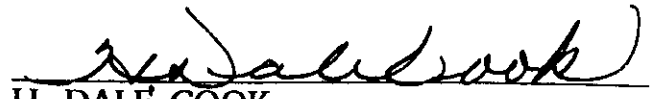
> [T]o achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished.

The Court agrees with the Magistrate that the plaintiff's Complaint merely alleges a series of "sporadic acts" with the single objective of "artificially inflat[ing] the market price of Oneok stock ...." (Report at 10). Accepting the allegations as true, as the Court must in reviewing a motion to dismiss, the Court finds that no pattern of racketeering activity has been alleged. Accordingly the RICO claim will be dismissed.

It is the Order of the Court that the motion of Peat Marwick to dismiss is hereby granted as to the claims of conspiracy to commit securities fraud, control persons liability and RICO, and is hereby denied as to the claims of securities fraud and aiding and abetting securities fraud.

It is the further Order of the Court that the motions of Oneok directors and Douglas Ann Newsom to dismiss the RICO claim are hereby granted.

IT IS SO ORDERED this 22nd day of June, 1989.



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

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 21 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

TRINITY BROADCASTING CORPORATION, a Michigan corporation, Plaintiff, vs. REECE MORREL, DONALD HERROLD, and J. CHARLES SHELTON, Defendants,	Case No. 83-C-642-C
and TRINITY BROADCASTING CORPORATION, a Michigan corporation, vs. LEE R. ELLER and LEECO OIL COMPANY, an Oklahoma corporation, Defendants.	Case No. 82-C-1188-C (Consolidated)

STIPULATION FOR DISMISSAL

IT IS HEREBY STIPULATED that the above-styled action be dismissed with prejudice and without cost to any party.

DATED this 21st day of June, 1989.

BREWSTER, SHALLCROSS AND RIZLEY

By Robert S. Rizley

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 2 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

TRINITY BROADCASTING CORPORATION, a Michigan corporation, Plaintiff, vs. REECE MORREL, DONALD HERROLD, and J. CHARLES SHELTON, Defendants,	Case No. 83-C-642-C
and	
TRINITY BROADCASTING CORPORATION, a Michigan corporation, vs. LEE R. ELLER and LEECO OIL COMPANY, an Oklahoma corporation, Defendants.	Case No. 82-C-1188-C (Consolidated)

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TGM211-37

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

FILED
JUN 20 1990
Jack C. Silver, Clerk
U.S. DISTRICT COURT

PATRICIA I. CADDELL, Plaintiff,	)	
vs.	)	No. 88-C-1662-C
FORD MOTOR CREDIT COMPANY, a foreign corporation, Defendant.	)	

JOINT STIPULATION OF DISMISSAL

It is hereby stipulated by and between the Plaintiff, Patricia I. Caddell, by her attorney, Steven R. Hickman, and Defendant, Ford Motor Credit Company, by its attorney, Thomas G. Marsh, that the above-styled and captioned matter, may be, and the same is hereby dismissed with prejudice against each other, without costs to either party.

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Tulsa, Oklahoma 74101
Attorneys for Plaintiff,
Patricia I. Caddell

Thomas G. Marsh (OBA #5706)
MARSH & SHACKLETT, P.C.
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(918) 587-0141
Attorneys for Defendant, Ford
Motor Credit Company

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

BUDDY RAY POTTER, Petitioner, v. RON CHAMPION AND THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	)	87-C-954-E

JUN 19 1989

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

ORDER

The court has for consideration the Findings and Recommendations of the Magistrate filed May 17, 1989, in which the Magistrate recommended that petitioner's application for habeas corpus relief pursuant to 42 U.S.C. § 2254 be denied. 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 Findings and Recommendations of the Magistrate should be and hereby are affirmed.

It is therefore Ordered that petitioner Buddy Ray Potter's application for habeas corpus relief pursuant to 42 U.S.C. § 2254 is denied.

Dated this 16th day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED
JUN 19 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

EDDIE LEE WRIGHT, Petitioner,	)	
v.	)	87-C-1042-B
TED WALLMAN, et al, Respondents.	)	

ORDER

Now before the court is petitioner Eddie Lee Wright's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted in Tulsa County District Court, Case Nos. CRF-81-115, CRF-81-757, and CRF-81-116, of two counts of Burglary in the Second Degree and one count of Feloniously Pointing a Weapon, and sentenced to six years on each count to run concurrently. The convictions were not appealed.

Petitioner filed a Petition for Post-Conviction Relief under the Oklahoma Post-Conviction Procedure Act, 22 O.S. § 1080 et seq. The petition was denied by the trial court on 9/30/87, and the denial was affirmed by the Oklahoma Court of Criminal Appeals in Case No. PC-87-831.

Petitioner now seeks federal habeas relief on the alleged ground that he is incarcerated in violation of his due process and equal protection rights, in that the trial court: (1) failed to advise him of his fundamental rights, such as right to a jury or nonjury trial, right to confront his accusers, and the right against compulsory self-incrimination, and the consequences of his plea; (2) failed to make a record that the plea was knowingly and voluntarily made; (3) failed to make a record that the

prisoner was in fact competent to enter his plea; (4) failed to make a record that it had a basis in fact for its findings of guilty; and (5) failed to comply with plea agreement for making the sentences received in Tulsa County run concurrently with a prior sentence received in Beckham County. Petitioner also alleges that the trial court did not address the merits of his claim during post-conviction proceedings, and the state failed to provide a transcript of the trial at the post-conviction proceedings.

In an order dated 4/25/88, the Magistrate found that resolution of the issues raised in this case required an examination of the transcript of the Tulsa County Sentencing hearing in Case Nos. CRF-81-115, CRF-81-757, and CRF-81-116 and ordered respondents to produce such transcript within ninety (90) days.

On 10/19/88 attorney for respondents responded that attempts had been made to obtain the court reporter's notes of the sentencing hearing in order to create a transcript. After discussions with the Tulsa County Court Administrator, the court reporter, and personnel in the judge's chambers, who conducted a search through records at the Tulsa County Courthouse and at the Tulsa County Courthouse warehouse, attorney for respondents informed the court that the reporter's notes could not be located.

In an Order dated 2/21/89, the Magistrate required respondents to produce sworn affidavits from Judge Dalton, the

prosecuting attorney who appeared at the sentencing hearing in these cases, and Steve Lowery, who represented petitioner at the hearing. The affidavits were to recite what occurred at the sentencing hearing, specifically: 1) whether petitioner was advised of his fundamental rights, including the right to trial, to confront his accusers, and against compulsory self-incrimination; 2) whether petitioner was told the consequences of his plea; 3) whether the judge found that the plea was knowing and voluntary; 4) whether a determination was made of petitioner's competency; 5) whether the judge had a basis in fact for the finding of guilt; and 6) whether the judge ordered the sentences to run concurrently with a sentence imposed in Beckham County as provided in the plea agreement.

The court has reviewed the sworn affidavits which have been produced. Judge Jay D. Dalton stated as follows in his affidavit dated 4/3/89:

> In reference to State of Oklahoma vs. Eddie Lee Wright, Cases No. CRF-81-115, CRF-81-116, and CRF-81-757, the Court Reporter's notes were either lost or destroyed making absolute recall of the sentencings impossible. However, as a rule, in all cases, I advise the Defendant of his fundamental rights, including the right to trial, to confront his accusers and against compulsory self-incrimination; advise Defendant of the consequences of his plea; find if the plea is knowing and voluntary; make a determination of Defendant's competency; give a basis in fact for finding of guilt. In regard to running the sentences concurrent with the sentence imposed in Beckham County, it was not stated so on the Judgement [sic] and Sentence in each case so I would therefore assume that they did not run concurrently with Beckham County.

Robert S. Lowery, attorney of record for petitioner in the cases involved, stated in his affidavit dated 3/20/89 as follows:

1. That the Defendant was advised of all of his rights.

2. That the Defendant was told and was aware of the consequences of his plea[.]

3. That the Judge found that the plea was both knowledgeable and voluntary.

4. That the Judge found that the Defendant was competent and was aware of what was going on.

5. That the Judge had a basis for finding the Defendant guilty.

6. That the sentences were to run concurrent with sentences in another county. The specific county I do not remember.

Gary D. McCurdy stated in his affidavit dated 4/17/89 as follows:

> (1) That I was, on the 4th day of May, 1982, a duly qualified and acting Assistant District Attorney for the Tulsa County District Attorney's Office.
>
> (2) That I was present on the 4th day of May, 1982, in my capacity as Assistant District Attorney, in the courtroom of District Judge Jay D. Dalton and did represent the State of Oklahoma, during the plea and sentencing of the Defendant Eddie Lee Wright on Case Numbers CRF-81-115, CRF-81-116 and CRF-81-757.
>
> (3) That I have no independent recall of this matter, but I have reviewed copies of these files provided to me by the Tulsa County District Attorney's Office.
>
> (4) That I have no independent recall as to whether or not Judge Dalton advised the Defendant of his fundamental rights, including right to trial, to confront his accusers and against compulsory self-incrimination and that files provided by the Tulsa County District Attorney's Offices do not reflect whether or not these rights

were explained to the Defendant. I can state, however, that Judge Dalton's plea and sentencing hearings regularly included these explanations of rights.

(5) That I have no independent recall as to whether or not Judge Dalton advised the Defendant of the consequences of his plea of guilty and that the files provided by the Tulsa County District Attorney's Office do not reflect whether or not the Defendant was advised of these consequences. I can state, however, that Judge Dalton's plea and sentencing hearings regularly included an explanation of the consequences of a plea of guilty.

(6) That I have no independent recall as to whether or not Judge Dalton found the Defendant's plea to be knowing and voluntary and that the files provided by the Tulsa County District Attorney's Office do not reflect whether or not the Defendant's plea was found to be knowing and voluntary. I can state, however, that Judge Dalton's plea and sentencing hearings regularly included such findings.

(7) That I have no independent recall as to whether or not Judge Dalton determined the Defendant to be competent and the files provided by the Tulsa County District Attorney's Office do not reflect whether or not this determination was made. I can state, however, that Judge Dalton's plea and sentencing hearings regularly included a determination of competency of the Defendant.

(8) That I have no independent recall as to whether or not Judge Dalton found a factual basis for finding the Defendant guilty and the files provided by the Tulsa County District Attorney's Office to [sic] not reflect whether or not a factual basis for the finding of guilt was determined. I can state, however, that Judge Dalton's plea and sentencing hearings regularly included a finding of a factual basis for findings of guilt.

(9) That I have no independent recall as to whether or not Judge Dalton ordered the sentences from Tulsa County to run concurrently with a sentence imposed in Beckham County. I can state, however, that the files provided by the Tulsa County District Attorney's Office do not reflect,

> in my minutes, that the Tulsa County sentences were to run concurrently with Beckham County. I can also state that the notes in the District Attorney's file reflect a plea agreement which does not indicate that the Tulsa County sentences should run concurrently with a sentence in Beckham County.

The Tenth Circuit in Gallegos v. Cox, 358 F.2d 703, 704 (10th Cir. 1966), found that if a transcript is unavailable through no fault of the state, a court may rely on the presumption that a defendant's attorney adequately protected his rights, and cited Norvell v. State of Illinois, 373 U.S. 420 (1963), as support. This position was reiterated a year later in Guerra v. Rodriguez, 372 F.2d 472, 473 (10th Cir. 1967).

The Fifth Circuit has examined the effect of unavailable transcripts in several cases. In Clayton v. Blackburn, 578 F.2d 117, 120 (5th Cir. 1978), the court found it "troubling" that the state had misplaced or lost the defendant's guilty plea transcript notes. Where no transcript was available, the full rights provided to one pleading guilty by the Supreme Court in Boykin v. Alabama, 395 U.S. 238 (1969), were not protected and the finality of convictions was not assured. Id. But the Clayton Court said:

> However, it is still the petitioner's burden in a habeas proceeding to demonstrate, at least prima facie, those facts that establish a constitutional violation. In deciding whether the petitioner's testimony alone meets that burden, and whether the state violated its duty in not making a transcript available, all of the facts must be considered, including any delay by the petitioner in seeking relief and his opportunities for earlier applications.

Id. The Clayton Court found that, while the state may have been responsible for losing the defendant's transcript, where the defendant himself had no specific recollection of the events surrounding his guilty plea, the state's error was "not so egregious a breach of duty as to relieve the petitioner of his initial burden of proof." Id. In addition, the petitioner had been represented by counsel and thus would have been able to contest any unfairness in his conviction on direct appeal. The court found that insufficient evidence had been provided by the defendant suggesting that he had been deprived of his rights when he pled guilty.

In a later case, Walker v. Maggio, 738 F.2d 714, 717 (5th Cir. 1984), the court quoted from Clayton, supra, and found that the state's failure to locate a transcript after eight years was not "an egregious breach of its duty".

The court finds that the affidavits filed in this case clearly establish that there is no merit to petitioner's claims that his due process and equal protection rights were violated in that the trial court: (1) failed to advise him of his fundamental rights, such as right to a jury or nonjury trial, right to confront his accusers, and the right against compulsory self-incrimination, and the consequences of his plea; (2) failed to make a record that the plea was knowingly and voluntarily made; (3) failed to make a record that the prisoner was in fact competent to enter his plea; and (4) failed to make a record that it had a basis in fact for its findings of guilty.

There is a conflict in the affidavits as to whether the court complied with the plea agreement to make the sentences run concurrently with a sentence received in Beckham County, in that petitioner and his attorney claim they were to be so, while the district attorney and judge do not remember this and the records existing do not reflect this. The court relies on the presumption presented in Gallegos, supra, that petitioner's attorney adequately protected his rights at the sentencing and therefore that the sentences awarded by the [Tulsa County] court were properly in agreement with the plea bargain and should be served consecutively with the Beckham County sentence. The court also concludes that the state's error in losing the transcript notes of the sentencing hearing after seven years was not an egregious breach of duty. The petitioner has failed to meet his burden to establish that his rights were violated as to the plea bargain and sentence received. Therefore, he is entitled to no relief as to his claims of denial of due process and equal protection at the sentencing hearing.

Finally, petitioner claims that the trial court did not address the merits of his claim during post-conviction proceedings and the state failed to provide a transcript of the trial at the post-conviction proceedings. Errors occurring in state post-conviction proceedings are not sufficient to raise a federally cognizable issue as to the underlying state criminal conviction. Such claims represent an attack on a proceeding that is collateral to the detention of the prisoner and not on the

detention itself. Bradshaw v. State of Oklahoma, 398 F.Supp. 838, 843 (E.D.Okla. 1975); Williams v. State of Missouri, 640 F.2d 140, 144 (8th Cir. 1981). Thus, petitioner is entitled to no relief as to his claims regarding the post-conviction proceedings.

For the foregoing reasons, the court finds that petitioner's application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 should be and hereby is denied.

Dated this 19th day of June, 1989.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
JUN 19 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

PEGGY J. NEECE and BUEL H. NEECE, Plaintiffs, vs. INTERNAL REVENUE SERVICE OF THE UNITED STATES OF AMERICA, et al., Defendants.	)	No. 88-C-1320-E

JUDGMENT

This action came before the Court, Honorable James O. Ellison, District Judge, presiding, on the parties' cross motions for summary judgment. Upon consideration,

IT IS THEREFORE ORDERED that the Plaintiffs Peggy J. Neece and Buel H. Neece take nothing from the Defendants Internal Revenue Service of the United States of America, United States of America and First National Bank of Turley, N.A., that the action be dismissed on the merits, and that the Defendants recover of the Plaintiffs their costs of action.

ORDERED this 16TH day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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JKS/dkf a:fisher.2

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

PATRICIA L. FISHER and GREGORY B. FISHER, Wife and Husband,	)	
Plaintiffs,	)	
vs.	)	No. 88-C-1043-C
ALLIED CORPORATION, a Delaware Corporation; DIAMOND SHAMROCK CHEMICALS COMPANY, a Delaware Corporation, formerly DIAMOND SHAMROCK CORPORATION; ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation;	)	
Defendants.	)	

FILED
JUN 19 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

Notes Diamond Shamrock Chemicals

ORDER OF DISMISSAL

Upon the application of the Defendant, Diamond Shamrock Chemicals Company, and for good cause shown, this action is dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

APPROVED:

William C. Sellers
Attorney for Plaintiff
Patricia Fisher

Ronald Horgan
Attorney for Plaintiff
Gregory B. Fisher

James K. Secrest, II
Attorney for Defendant
Diamond Shamrock Chemicals Company

MAY 30 1989

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FILED

JUN 16 1989

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

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

GENERAL SIGNAL CORPORATION, Plaintiff,	)	Case No. 88-C-1361B
v.	)	
ELECTRICAL POWER SYSTEMS, INC., Defendant.	)	

STIPULATION FOR DISMISSAL

Plaintiff, General Signal Corporation, and Defendant, Electrical Power Systems, Inc., stipulate that the above entitled action be discontinued and dismissed with prejudice and each party shall pay its respective costs and attorneys' fees.

NICHOLS, WOLFE, STAMPER, NALLY & FALLIS, INC.

By: _____
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John R. Davis
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Tulsa, Oklahoma 74103
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ATTORNEYS FOR PLAINTIFF
GENERAL SIGNAL CORPORATION

CONNER & WINTERS

By: _____
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(918) 586-8955

ATTORNEYS FOR DEFENDANT
ELECTRICAL POWER SYSTEMS, INC.

FILED

JUN 19 1989

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

ORDER

Based on the foregoing stipulation of the parties, it is ordered that the above-entitled action be discontinued and dismissed with prejudice and each party shall pay its respective costs and attorneys' fees.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 16 1989

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

DIVISION NO. 892 OF THE AMALGAMATED TRANSIT UNION, HENRY HORN, STANLEY ALLEN, CHARLES LANKFORD, HERBERT FOSTER, DOVIE BLEDSOE, AND HUGH ROBERTSON,

Plaintiff,

vs.

METROPOLITAN TULSA TRANSIT AUTHORITY, a Public Trust Authority, HAROLD MONTGOMERY, TOM ATKINSON, JIMMY WILLIAMS, J. L. TARPLEY, RICK TAYLOR, AND ATE MANAGEMENT AND SERVICE COMPANY, INC., A Delaware Corproation,

Defendants.

Case No. 88-C-191-B

STIPULATED JUDGMENT OF DISMISSAL

Upon consideration of the Stipulation for Entry of Judgment submitted by all parties to this action, and in view of the parties' resolution of the issues raised in the above styled cause of action herein with the advise and assistance of counsel, it is hereby

ORDERED that this action be dismissed without prejudice, each party to bear its own attorneys fees and costs.

SO ORDERED this 16th day of June, 1989.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
JUN 16 1993
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

LOWRANCE INVESTMENT CO., INC., and BRUCE F. JOHNSON, Plaintiffs,	}	
vs.	}	No. 88-C-777-C
OKLAHOMA LAND AND CATTLE COMPANY, Defendant.	}	

ORDER

Before the Court is the motion of defendant Oklahoma Land and Cattle Company for summary judgment. The parties have filed with the Court a joint stipulation of uncontroverted facts with supporting exhibits, and based thereon defendant asserts it is entitled to summary judgment as a matter of law.

The joint stipulation of uncontroverted facts is as follows:

1. Plaintiff Lowrance Investment Co. (LIC) is a Kansas corporation, with R. D. Lowrance as its sole shareholder.

2. R. D. Lowrance is a resident of the State of Kansas.

3. Plaintiff Bruce Johnson is an individual and a resident of the State of Illinois.

4. Defendant Oklahoma Land and Cattle Co. (OLC) is an Oklahoma corporation with its principal place of business in Bartlesville, Oklahoma.

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5. Stephen Adams (Adams) was president and chairman of the board of OLC during the relevant time period of the transaction to sell certain ranch property.

6. On September 25, 1987, the parties entered into a real estate sales contract wherein LIC and Johnson agreed to purchase, and OLC agreed to sell, the Sand Creek and Bird Creek Ranches situated in Osage County, Oklahoma.

7. The purchase price was $4,600,000.00 with a closing date of January 7, 1988.

8. At the time the contract was entered into, the sum of $460,000.00 was deposited as earnest money by LIC and Johnson.

9. Of such earnest money deposit, plaintiff LIC contributed the sum of $230,000.00, and plaintiff Johnson contributed the remaining portion thereof in the amount of $230,000.00.

10. Paragraph 4A of the contract provides, in part:

> Provided, however, that should the transaction contemplated herein fail to close due to no fault of the Seller, then, in that event, Seller shall be entitled to retain said earnest money deposit, and all accumulated interest, as and for liquidated damages, as set forth hereinafter in this Agreement.

11. Paragraph 10 of the contract provides:

> DEFAULT BY THE BUYERS: If Buyers shall fail or refuse to complete this transaction after full performance by Seller, this Agreement may be terminated at the option of Seller. Upon such determination, the earnest money referred to in paragraph 4(a) and all interest thereon, shall be retained by Seller as agreed liquidated damages, and not as penalty, the actual amount of damages being impossible to ascertain, and this Agreement shall become void.

12. Paragraph 11 of the contract provides:

> DEFAULT BY THE SELLER: If the Seller shall fail or refuse to complete this transaction after full performance by Buyers, then, in that event, Buyers shall be entitled to the return of the earnest money, and interest thereon, as set forth in paragraph 4(a), and this Agreement shall be deemed terminated, null and void.

13. During 1987 and 1988, R. D. Lowrance and several businesses controlled by him were involved in Chapter 11 proceedings in the Bankruptcy Court for the District of Kansas. LIC was not involved in the bankruptcy nor under the jurisdiction of the Bankruptcy Court.

14. Adams became aware of the bankruptcy proceedings in late December, 1987, or early January, 1988.

15. R. D. Lowrance was notified by David B. King of the firm Brewer, Worten, Robinett, Johnson, Worten & King, attorneys handling the real estate transaction for OLC, that Oklahoma law precluded a foreign corporation from owning, farming or ranching land within Oklahoma.

16. At the request of plaintiffs, King caused to be incorporated under Oklahoma law a domestic corporation known as Lowrance Land and Cattle Company to take title to the real property covered by the subject contract. The Certificate of Incorporation for such corporation was issued on February 9, 1988.

17. In order to form this corporation, the closing date of the contract was extended, by agreement, to January 21, 1988.

18. On January 20, 1988, another amendment to the real estate contract was executed between the parties extending the closing date to March 10, 1988.

19. On March 3, 1988, Robert D. Lowrance applied to the United States Bankruptcy Court for the District of Kansas at Topeka for authority to purchase the Bird Creek and Sand Creek Ranches, then owned by OLC, for the sum of $4,600,000.00; to conclude such

transaction on or before March 10, 1988; and to finance such purchase through (i) an agreement with the Federal Land Bank (FLB) under which LIC and Lowrance would assume a secured note originally executed by OLC in favor of FLB in the amount of $2,100,000.00, (ii) pay to OLC the sum of $1,000,000.00, in cash at closing, and (iii) the execution of a note by LIC and by Lowrance personally in favor of OLC in the amount of $1,000,000.00, with one-half the principal amount thereof being payable within ten days of a final, non-appealable Order Approving Debtor's Plan of Reorganization, such note to be secured by a second mortgage upon the two ranches involved.

20. Prior to the closing date of March 10, 1988, the United States Bankruptcy Court for the District of Kansas, entered two orders dated March 7, 1988, which specifically prevented R. D. Lowrance or any entity owned in whole or in part or controlled by him from taking any course of action outside the normal and ordinary course of the debtors' business; to refrain from taking any action to consummate the closing of the real estate contract which is the subject matter of this action; and preventing, until further order of the Court, distribution of any portion of the earnest money deposit previously paid by the plaintiffs.

21. On March 11, 1988, the parties met to discuss possible solutions in light of the Bankruptcy Court's Order.

22. During or shortly after conclusion of the meeting of March 11, 1988, a summary of the discussions among the various

persons present at that meeting, referred to as a "talk sheet", was prepared.

23. On March 22, 1988, Robert D. Lowrance filed in the Kansas bankruptcy proceeding an "Amended Application for Authority to Enter into a Lease Purchase Option Regarding the Bird Creek and the Sand Creek Ranches".

24. On March 25, 1988, a hearing was held in the United States Bankruptcy Court for the District of Kansas at Topeka upon certain motions filed by OLC and the Debtors in such bankruptcy proceeding to vacate or modify the Court's earlier Orders of March 8, 1988. Several witnesses testified under oath during this hearing. At the conclusion thereof, the Bankruptcy Judge stated that he would take the various issues raised by such motions under advisement, but ordered that the Court's earlier Orders of March 7, 1988, be withdrawn, insofar as they pertained to the $230,000.00 earnest money deposit previously paid by plaintiff Johnson, and that such portion of the earnest money deposit be paid out of escrow, together with interest accrued thereon.

25. On April 4, 1988, Robert D. Lowrance filed in the Kansas bankruptcy proceeding two separate documents entitled "Memorandum In Opposition to Turning Over $230,000.00 to Oklahoma Land and Cattle Company", each of which essentially opposed distribution to OLC of the remaining portion of such earnest money deposit, in the amount of $230,000.00, previously paid by LIC and Lowrance. These documents claim that the subject real estate contract is "void and

unenforceable, and request that the sum of $230,000.00 be returned to Lowrance."

26. On May 5, 1988, OLC entered into a written Grazing Lease Agreement covering the two ranches in question with plaintiff Johnson as lessee. The term of such Lease was a period of six months, beginning April 15, 1988 and ending October 15, 1988. Lessee agreed to pay to OLC an annual rental based upon $7.00 per acre, or the sum of $150,820.67, at the time the Lease was executed. Such Lease Agreement places a limit upon the maximum number of cattle to be grazed upon the leased premises and the weight of such cattle at the time they were placed thereon, provides for maintenance of existing fences and improvements by lessee, and for a "hold over" rental in the amount of $2.00 per acre per month in the event lessee should continue to occupy the leased premiss, or any portion thereof, after expiration of the primary term of the Lease Agreement.

27. By Order dated June 22, 1988, the Bankruptcy Judge of the United States Bankruptcy Court for the District of Kansas entered an Order in the collateral bankruptcy proceeding vacating the remaining portion of the Court's earlier Orders of March 8, 1988, requiring retention of funds in escrow, and prohibiting disposition thereof. Under the Order of June 22, 1988, the Bankruptcy Court vacated its earlier restraint upon distribution by the escrow agent of the remaining $230,000.00 earnest money deposit previously paid by plaintiff LIC and Lowrance. In this Order, the Bankruptcy Court essentially concluded, first, that

plaintiff LIC was not a debtor under the Court's jurisdiction. Secondly, the Court concluded that plaintiff LIC was not an "alter ego" of any debtor in the bankruptcy proceeding and that the $230,000.00 earnest money deposit paid by LIC "... did not necessarily derive from funds secured to [the FDIC, a creditor in the Bankruptcy proceeding]". Finally, the Bankruptcy Court concluded that defendant OLC "... had no reason to believe LIC was in a bankruptcy proceeding or that it was in any way affected by the provisions of the bankruptcy code."

28. On August 4, 1988, the Bankruptcy Judge for the United States Bankruptcy Court for the District of Kansas, upon Debtor's motion to dismiss, entered an Order bearing the same date dismissing, with prejudice, the four separate Chapter 11 bankruptcy cases in which Robert D. Lowrance, Mark W. Lowrance and the related business entities of Robert D. Lowrance involved herein as debtors.

29. In September, 1988, OLC contracted with a third party for the sale of the Sand Creek, Bird Creek and three other ranches owned by OLC, together with improvements and certain equipment. That real estate contract was closed on January 7, 1989, at which time a total purchase price of approximately $14,000,000.00 was paid for the five ranch properties owned by OLC.

30. Other than the real estate sales contract entered into between the parties which constitutes the subject matter of this action, and the subsequent contract between OLC and a third party in September 1988, OLC received no other offers to purchase the Sand Creek or Bird Creek Ranches separately.

31. At the time the subject contract was executed, the Sand Creek and Bird Creek Ranches were subject to certain mortgage indebtedness incurred by OLC in favor of FLB. Some time after October 14, 1987, Lowrance, in a discussion with the president of FLB, requested that he and Johnson be permitted to assume a portion of this mortgage indebtedness. Thereafter, Lowrance discussed several proposed refinancing/assumption arrangements with the FLB president. The FLB eventually agreed that Lowrance and plaintiff Johnson would be permitted to assume an amount equal to $3,000,000.00 of the existing mortgage indebtedness upon the two ranches, but that Lowrance would have been required to personally guarantee his, as well as Johnson's, portion of such obligation. Lowrance tentatively agreed, but proposed that he be permitted to assume an amount equal to $3,250,000.00 of such obligation. No final agreement was ever reached between Lowrance and FLB concerning such refinancing/assumption arrangement.

Plaintiffs instituted this action on August 2, 1988 originally seeking damages for breach of contract, specific performance and injunctive relief. On February 28, 1989 plaintiffs filed a second amended complaint limiting their action to declaratory relief seeking return of the earnest money paid ($460,000.00) under the real estate contact. Plaintiffs seek return of the earnest money under two legal theories: impossibility of performance and unenforceability of the liquidated damage provision under Oklahoma law.

Impossibility of Performance

Plaintiffs assert that prior to the date of closing for the real estate transaction, March 10, 1988, the United States Bankruptcy Court for the District of Kansas entered two Orders which specifically prevented R. D. Lowrance or any entity owned in whole or in part or controlled by R. D. Lowrance to take any cause of action outside the normal and ordinary scope of the debtor's business, and to refrain from taking any action to consummate the closing of the real estate contract which is the subject matter of this action. Plaintiff LIC asserts the result of the Bankruptcy Court's Orders was to render impossible performance of the real estate contract. Thereby plaintiff's failure to perform is legally deemed to be excused and plaintiffs are entitled to return of the earnest money.

The Court finds plaintiffs' agreement is without legal merit. Only R. D. Lowrance was involved in the bankruptcy proceeding; and, thus only R. D. Lowrance was subject to the Bankruptcy Court's Order. Johnson recognized this fact and forfeited his portion of the earnest money deposit in an attempt to avoid full personal liability for non-performance under the contract. Only the $230,000.00 which was originally tendered by LIC is now in dispute. However, R. D. Lowrance is seeking the recovery of the full $460,000.00 upon the premise that since he personally was prevented

temporarily from closing the transaction by Order of the Kansas Bankruptcy Court, performance under the contract was excused.[1]

It has been a long standing rule of law that performance of a contract is not excused where the difficulty of performance arises from financial difficulty or economic hardship. Clements v. Jackson County Oil & Gas Co., 161 P.216 (Okla. 1916). Financial inability of a party to perform a contract will not excuse its performance, rather it must appear that the thing to be done cannot be accomplished by any means. Kansas Oklahoma & G. Ry. Co. v. Grand Lake Grain Co., 434 P.2d 153, 157 (Okla. 1967). Where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused. Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 612 f.n.6 (2nd Cir. 1979) citing 407 E. 61st St. Garage, Inc. v. Savoy Corp., 23 N.Y.2d 275, 281 (1968). (emphasis added).

R. D. Lowrance voluntarily initiated the bankruptcy proceeding. He is therefore estopped from using the bankruptcy proceedings to justify repudiation of his contractual obligations. A condition or circumstance created by a party's own economically motivated action cannot be a basis for reliance on the impossibility defense. Rivas Paniagua, Inc. v. World Airways, Inc., 673 F.Supp.708, 713 (S.D.N.Y. 1987).

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[1]*The Order of the Bankruptcy Court, upon which Lowrance relies in support of the impossibility of performance argument, was entered on March 8, 1988, later lifted as to Johnson, and vacated in its entirety on June 22, 1988. The entire bankruptcy proceeding was dismissed by motion of R. D. Lowrance on August 5, 1988.*

The ultimate determination of excuse due to impossibility of performance is a question of law. Golsen v. ONG Western, Inc., 756 P.2d 1209, 1222 (Okla. 1988). The Court finds and concludes that the defense of impossibility of performance is unavailable to LIC. Since R. D. Lowrance initiated the bankruptcy action which ultimately resulted in his inability to perform his contractual obligation, his performance is not legally excused.

Unenforceability of the Liquidated Damage Provision

In the alternative, plaintiffs allege that the liquidated damages provision of the real estate contract is void and unenforceable pursuant to 15 O.S. §215(B), which provides:

> A provision in a real estate sales contract, providing for the payment of an amount which shall be presumed to be the amount of damages sustained by a breach of such contract, shall be held valid and not a penalty, when such amount does not exceed five percent (5%) of the purchase price. In the event such amount exceeds five percent (5%) of the purchase price, such provision shall be held invalid and a penalty unless the party seeking to uphold the provision establishes that such amount is reasonable.

Plaintiffs allege that the liquidated damages provision is a penalty and invalid under Oklahoma law because the amount to be forfeited exceeds five percent of the purchase price, and that the forfeiture amount is unreasonable.

Defendant OLC submitted an affidavit executed by Gary L. Pettus, a certified public accountant, who served as an accountant for OLC. The affidavit accounts for the "actual loss" sustained by OLC occasioned by plaintiffs' failure to close the contract on March 10, 1988 until such time that defendant closed a contract with another buyer on January 7, 1989. The damage is estimated to have been $1,105,674.00. This sum consists of: lost interest income on the sales proceeds; additional interest charges incurred

to the mortgagee; additional ranch operational expenses; and the differential in the net sales proceeds. These calculations also allow for credit to plaintiffs for interest income earned on the $460,000.00 earnest money and lease payment made by Johnson under the Grazing Lease.

Plaintiffs challenge the Pettus affidavit by arguing that since there existed no other offers to purchase the property from March 10, 1988 until defendant contracted with the Mormon Church in September 1988, defendant would not have been relieved of the operational and debt expenses of the ranchers during that period. Plaintiffs' argument is without merit. The only reason defendants incurred operational and debt expense after March 10, 1988 is because plaintiffs repudiated the contract. Had the closing occurred, defendants' expenses regarding the property would have terminated. Defendants successfully mitigated the damages occasioned by plaintiffs' breach by procuring a third party to purchase the ranches. Any damages (expenses) occurring between March 10, 1988 and the date of closing with the third-party purchaser are permissible items of damages to consider retrospectively in determining whether the $460,000.00 required earnest money was reasonable.

Further, during the spring of 1988, following the failure of plaintiffs to close the contract, OLC offered the Sand Creek and Bird Creek Ranches for sale at the same price for which it had previously agreed to sell the properties to plaintiffs. OLC received no other offers to purchase the Bird Creek and Sand Creek

Ranches separately. The only offer it received was from the Mormon Church to purchase all the ranches owned by OLC. Since OLC received no other offers to purchase the land except the offer from the Mormon Church, the purchase price, per acre, agreed upon by the Mormon Church and OLC reasonably represents the fair market value of the property and can be used to measure actual damages sustained by defendant OLC.

A liquidated damage provision in a real estate contract that is in excess of five percent of the contract price is not void if the sum contained in the contract is reasonable and was not clearly ascertainable at the time of contracting. The burden of establishing that the damages were difficult of ascertainment rests on the party seeking the enforcement of the liquidated damage clause. The fact that the parties have expressly stated in the contract that the damages are difficult to determine does not shift the burden of proof on this issue. Waggoner v. Johnston, 408 P.2d 761, 768 (Okla. 1965). The purpose of the Legislature in enacting the statute was to prevent the obtaining of unfair advantage by contracting in advance for excessive damages. Id.

Whether a forfeiture provision in excess of five percent imposed a penalty or provided for liquidated damages can be determined:

> from the language and subject mater of the contract, the evident intent of the parties and all the facts and circumstances under which the contract was made. The most important facts to be considered are whether the damages were difficult to ascertain, and whether the stipulated amount is a reasonable estimate of probable damages or is reasonably proportionate to the actual damage sustained at the time of the breach.
>
> Waggoner v. Johnston, supra at 769, citing Lorraine Petro. Co. v. Bartlett, 280 P.286.

The Court finds from the stipulated facts that the nature of the property in question made it extremely difficult to establish its value with any degree of certainty at the time the contact was entered into.

Based on the affidavit of Gary L. Pettus, the actual damages sustained by OLC was far in excess of the stipulated figure contained in the contract. When the property was subsequently sold, it was for less than the amount plaintiffs had agreed to pay. There were other expenses incurred as a result of the breach. The stipulated figure was reasonable when considered in relation to the actual loss sustained. In this case, the parties were of equal footing, were experienced business people, and their agreement expressly states that the stipulated amount was to be considered as "liquidated damages, and not as penalty."

In considering a motion for summary judgment, the Court is to examine the pleadings and all other evidence submitted in support and in opposition to the motion. The affidavit of Gary Pettus offered by the defendant has not been impeached by contradictory evidence. Therefore, the Court concludes from the evidence submitted, under the circumstances of this case viewed in light of the stipulated facts, that the forfeiture provision did not impose a penalty but was a valid liquidated damages provision, and enforceable.

It is the Order of the Court that the motion for summary judgment brought by the defendant Oklahoma Land and Cattle Company

against the plaintiffs Lowrance Investment Co., Inc. and Bruce F. Johnson is hereby GRANTED.

IT IS SO ORDERED this 16th day of June, 1989.

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

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

JUN 16 1989

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

LOWRANCE INVESTMENT CO., INC., and BRUCE F. JOHNSON,	)	
Plaintiffs,	)	
vs.	)	No. 88-C-777-C
OKLAHOMA LAND AND CATTLE COMPANY,	)	
Defendant.	)	

JUDGMENT

This matter came before the Court for consideration of defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendant, Oklahoma Land and Cattle Company, and against the plaintiffs, Lowrance Investment Co., Inc., and Bruce F. Johnson.

IT IS SO ORDERED this 16th day of June, 1989.

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

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

FILED
JUN 16 1989
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

DICK RALLS, Plaintiff,	)	
vs.	)	No. 89-C-111-C
ADESCO, INC., ET AL., Defendants.	)	

Closed Paganis only

ORDER

Now before the Court for its consideration is the motion of defendant K. George Paganis to dismiss for insufficiency of service of process.

Plaintiff attempted to serve K. George Paganis by mailing the summons to a business address by certified mail. An employee of the business signed the certified mail receipt. That employee has executed an affidavit which states that she was not authorized by Paganis as his agent for service of process. Under both Rule

4(d)(1) F.R.Cv.P. and 12 O.S. §2004(C)(c)(1), service was thus insufficient.

It is the Order of the Court that the motion of defendant Paganis to dismiss for insufficiency of service of process is hereby granted. Said dismissal is without prejudice to further attempts at service.

IT IS SO ORDERED this 16 day of June, 1989.

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

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

JUN 16 1989

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

PETER J. McMAHON, Petitioner, vs. H. N. SCOTT and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents.	}	No. 88-C-360-C

ORDER

Before the Court is the objection to the Report and Recommendation of the United States Magistrate filed by the respondents.

This is a federal habeas corpus action filed by an inmate in the custody of the Oklahoma Department of Corrections, pursuant to 28 U.S.C. §2254. Petitioner alleges that he was denied protection of the due process clause in his parole revocation proceedings. Petitioner listed thirteen grounds of error in the proceedings. The Magistrate found that petitioner's rights were violated when his request for appointment of counsel for his executive parole revocation hearing was denied.

Respondents object to the Magistrate's recommendation by asserting that since there was no colorable claim that petitioner had not committed the crime with which he was charged, the decision as to whether to appoint counsel for petitioner was discretionary, citing Gagnon v. Scarpelli, 411 US. 778 (1973).

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The Court has independently reviewed the record, briefs, caselaw and statutory authority and after careful consideration finds and concludes as follows.

This case involves a State parolee facing revocation proceedings under the jurisdiction of the Oklahoma Pardon and Parole Board. Under Oklahoma law, 57 O.S. §349.3, a parolee has certain rights with respect to a hearing on his status. They include:

> The parolee --
>
> 1. Shall have reasonable notice in writing of the nature and content of the allegations to be made, including notice that its purpose is to determine whether there is probable cause to believe that he has committed a violation that may lead to a revocation of parole or probation;
>
> 2. Shall be permitted to advise with any persons whose assistance he reasonably desires, prior to the hearing;
>
> 3. Shall have the right to confront and examine any persons who have made allegations against him, unless the hearing officer determines that such confrontation would present a substantial present or subsequent danger of harm to such person or persons; and
>
> 4. May admit, deny or explain the violation alleged and may present proof, including affidavits and other evidence, in support of his contention. A record of the proceedings shall be made and preserved. (Emphasis added).

A petitioner's right to appointment of counsel is not absolute. Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985). However, fundamental fairness requires appointment of counsel in the proper case. Barton v. Malley, 626 F.2d 151 (10th Cir. 1980). In Barton, the Circuit Court found that where the parole violations were admitted and the petitioner was "capable of speaking effectively for himself" the Parole Board did not abuse its discretion in denying appointment of counsel.

However, in the case before this Court, petitioner McMahon did not admit the parole violations. In fact, he specifically denied

them and attempted to provide evidence contrary to that offered by the State. McMahon requested assistance of counsel prior to the hearing, renewed his request at the hearing and at no time intentionally waived his previous requests.

Under the circumstances of this case, and in light of the factors enumerated in Gagnon v. Scarpelli, supra, as applied by the Circuit Court in Barton v. Malley, supra, this Court concludes that the Pardon and Parole Board abused its discretion in not providing petitioner with assistance of counsel.

Accordingly, the Court hereby affirms the Magistrate's recommendation and remands this case to the Pardon and Parole Board. The Pardon and Parole Board is hereby Ordered to appoint counsel to represent petitioner, Peter J. McMahon. Petitioner is to receive a new probable cause hearing, to be followed by a new executive revocation hearing if probable cause is found. Petitioner is to remain in State custody pending the determination of his parole hearing.

IT IS SO ORDERED this 16th day of June, 1989.

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

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

FILED

JUN 16 1989

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

CHAMPLIN REFINING COMPANY, Plaintiff,	)	
vs.	)	No. 88-C-633-E
W. E. ALLFORD, INC., et al., Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

The Defendants W. E. Allford, Inc., Larry Allford, and Gayle E. Allford having filed their petitions in bankruptcy and these proceedings 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 purpose required to obtain a final determination of the litigation.

If, within thirty (30) 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.

ORDERED this 15th day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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FILED

JUN 16 1989

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

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

COUNTY LINE INVESTMENT COMPANY and WAGCO LAND DEVELOPMENT, INC.,	)	
Plaintiffs,	)	
vs.	)	Case No. 88-C-550-E
CALVIN L. TINNEY,	)	
Defendant.	)	

ORDER

NOW on this 15th day of June, 1989, comes on for consideration the above styled matter and the Court, being fully advised in all premises finds that Defendant Tinney has moved for summary judgment on issues of consistency with the National Contingency Plan, unclean hands, & unjust enrichment. This Court finds disingenuous the argument in favor of unclean hands and will not grant summary judgment upon this basis. The other grounds which Defendant urges, however, are more credible and require extensive analysis.

CONSISTENCY WITH THE NATIONAL CONTINGENCY PLAN

Plaintiffs are seeking to recover on three claims arising out of the closure of a sanitary landfill called D&N Landfill. This landfill was operated on property currently owned by Wagco. The first and second claims arise under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9607, with the first claim being a private cost recovery action under §107 and the second being a contribution claim under §113(f).

In order to recover under CERCLA, plaintiffs must establish that their response is consistent with the National Contingency Plan. 42 U.S.C. §9607(a)(4)(B). State of Colo. v. Idarado Min. Co., 707 F.Supp. 1227 (D.Colo. 1989); Artesian Water Co. v. Government of New Castle County, 659 F.Supp. 1269, 1291 (D.Del. 1987). The National Contingency Plan ("NCP") regulates the manner in which response actions are to be evaluated when hazardous substances are released into the environment. Evaluation for conformity with the NCP at this stage of the proceedings is proper, in order to determine whether Plaintiffs are entitled to recover any of their response costs and to avoid useless trial of the case at a later juncture, should Plaintiffs fail to show the requisite consistency. Although Plaintiffs have cited a number of cases in which courts have ruled that summary judgment could not be granted, close scrutiny of those cases reveals that an insufficient factual record existed on which to judge consistency. Such is not the case here, and the Court finds the issue to be ripe for determination.

Plaintiffs urge that their closure, post-closure maintenance and monitoring of the landfill comprises a remedial action under CERCLA. While some portions of the NCP are voluntary, others are mandatory in order to lead to action considered remedial under CERCLA. See §300.71(a)(2)(ii)(B). Among other items, parties must precede any such remedial action by performance of a Remedial Investigation/Feasibility Study ("RI/FS") to "determine the nature and extent of the threat presented by the release and to evaluate proposed remedies." 40 C.F.R. §300.68(d) (1986). The RI/FS must also include "sampling, monitoring, and exposure assessment," along

with "the gathering of sufficient information to determine the necessity for and proposed extent of remedial action." Id. The action taken by Plaintiffs does not rise to this level. The uncontroverted facts reflect that Plaintiffs caused to be performed on the property a metal detector survey and a trenching and sampling event in 1986. Additionally, the testimony of Mr. Truby, who developed the Remedial Action/Closure for Plaintiffs, reveals that numerous activities required by the NCP were not carried out. This Court finds that Plaintiffs' actions are insufficient to achieve compliance with the NCP as regards the RI/FS.

Under the NCP, parties are required to provide "an opportunity for appropriate public comment concerning the selection of a remedial action consistent with §300.67(d)." 40 C.F.R. §300.71(a)(2)(ii)(D). No such period of public comment was provided by Plaintiffs. Section 300.71(a)(2)(ii)(C) requires private party remedial actions to be cost-effective. No such showing has been made that the action taken was in fact cost-effective. Thus this Court finds that Plaintiffs' actions fail to be consistent with the required portions of the NCP, thus rendering Plaintiffs incapable of recovering the costs expended by them in clean-up of the landfill. Summary judgment must therefore be granted to Defendant on Plaintiffs' first and second causes of action. Such action is consistent with guiding principles of environmental law and

> amply demonstrates the difference between an action for response costs under CERCLA and an action for damages in tort. Limiting recovery of the costs . . . ensures that responsible parties will be liable under CERCLA only for necessary costs of response. Permitting

> recovery in any other circumstances would invite suits for a broad range of economic losses and ultimately transform CERCLA into a toxic tort statute. Congress did not intend for CERCLA, a narrowly drawn federal remedy, to make injured parties whole or to be a general vehicle for toxic tort actions. Unless Congress sees fit to provide such a remedy, full compensation for hazardous waste harms will in most instances remain the province of state law.

Artesian Water, supra, at 1299-1300.

UNJUST ENRICHMENT

Plaintiffs' third cause of action is a state law claim for unjust enrichment. Under this theory, Plaintiffs would be entitled to recover the "benefit" Defendant received by virtue of not having to expend clean-up costs. However when, as here, the benefit is gratuitously granted or involuntarily acquired by a defendant, liability is not imposed. See Woodruff v. New State Ice Co., (10th Cir. 1952). Defendant Tinney urges that no benefit was conferred upon him, as Tinney was never deemed liable for the closure of D&N Landfill under Oklahoma sanitary landfill regulations or CERCLA. Defendant cites, in his reply brief, a case persuasive to this Court for its analysis of the state law unjust enrichment claim. Smith Land Improvement Corporation v. Rapid-American Corporation, Case No. 86-0116 (M.D. PA Sept. 21, 1987), rev'd on other grounds, 851 F.2d 86 (3rd Cir. 1988). Additionally pertinent to determination of the instant case is the fact that Defendant Tinney never requested or authorized Plaintiffs to take any action or expend any amounts on his behalf. Based upon the above and foregoing, this Court finds that the granting of summary judgment to Defendant on Plaintiff's third cause of action is appropriate

at this time.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Tinney's Motion for Summary Judgment is granted in its entirety and this case should be and is hereby dismissed.

JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 16 1989

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

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

EUGENE T. FOUST, et al., Plaintiffs,	)	
vs.	)	No. 88-C-809-E
GINA M. CHOROST, et al., Defendants.	)	

ORDER OF DISMISSAL

The Court has for consideration the Amended Report and Recommendation of the Magistrate filed January 30, 1989, in which the Magistrate recommended that all Defendants' Motions to Dismiss be granted. The Court has also carefully reviewed the arguments and authorities set forth by Plaintiffs in their Response to the Report and Recommendation.

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all Defendants' Motions to Dismiss and the application for Order Granting Defendants' Motion to Dismiss of Defendants Roberts, Chorost, Scott Smith, and Gibson are granted and this action is dismissed. In light of such order, Plaintiffs' Motions fora temporary restraining order and/or preliminary injunction and related motions to dispense with security requirement are moot. Defendants Best and Department of Human Services' motion to file

their brief out of time is also moot.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this case should be and is hereby dismissed with prejudice.

ORDERED this 15th day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

FILED

JUN 16 1989

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

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

ALYCE BRYANT, et al., Plaintiffs,	)	
vs.	)	No. 88-C-1200-E
SHEARSON/AMERICAN EXPRESS, et al., Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

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 THEREFORE 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, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 15th day of June, 1989.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

FILED

JUN 16 1989

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

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

ATLAS TOWER CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Civil No. 88-C1359-E

ORDER

This matter having come on upon defendant's Motion to Dismiss and plaintiff's counsel having advised Magistrate Wagner that there would be no opposition to the motion, it is hereby

ORDERED, pursuant to Rule 15(A), Local Rules of the United States District Court for the Northern District of Oklahoma, that the motion to dismiss is GRANTED.

SIGNED this 15th day of June, 1989.

UNITED STATES DISTRICT JUDGE

Presented by:

MICHAEL D. POWELL
Trial Attorney, Tax Division
U.S. Department of Justice
Room 5B31, 1100 Commerce St.
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ATTORNEY FOR UNITED STATES

sec/MPAF1/AtlasTower/1.1b

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

FILED
JUN 16 1989
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JAMES S. BEARD, Plaintiff, vs. TOWN OF SOUTH COFFEYVILLE, OKLAHOMA; MAYOR GEORGE ELLIOTT; TRUSTEE JIM ELLIOTT; and RICKY LONG, Defendant.	)	Case No. 88-C-1571-B

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff, James Sanford Beard ("Beard") and the defendants, the Town of South Coffeyville, Oklahoma, (the "Town") Mayor George Elliott ("G. Elliott"), Trustee Jim Elliott ("J. Elliott) and Ricky Long ("Long") advises the Court of a settlement between the parties in which the plaintiff has agreed and does hereby dismiss with prejudice his case against the Town, G. Elliott, J. Elliott and Long. Pursuant to the settlement, and Rule 41(a)(1)(ii), Fed. R. Civ. P., the parties jointly stipulate that Beard's claims against the Defendants be dismissed with prejudice.

Dated this 16 day of June, 1989.

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Mayor George Elliott,
Trustee Jim Elliott and
Ricky Long

MSR/Beard-JS