

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

FILED

JUL 14 1989

CLERK
U.S. DISTRICT COURT

HARLEY H. GRAY,)

Plaintiff,)

vs.)

No. 88-C-597-B

INDEPENDENT SCHOOL DISTRICT)

NO. 1 OF WASHINGTON COUNTY,)

OKLAHOMA, a/k/a TRI-COUNTY)

AREA VOCATIONAL TECHNICAL)

SCHOOL; its Board of)

Education, C.R. SHRIVER,)

President, in his official)

capacity; JIM QUINLAN,)

Vice-President, in his)

official capacity; JACK)

GORDON, Clerk, in his)

official capacity; JOHN)

SCOTT, in his official)

capacity; DARREL FRY,)

in his official capacity,)

and, its Superintendent,)

K.W. PHELPS, in his official)

capacity and individually,)

Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties herein and state that the above entitled cause has been settled among the parties hereto and as a result thereof, it is stipulated by said parties that this action is hereby dismissed with prejudice to the re-filing of same.

Harley H. Gray 7.14.89

HARLEY H. GRAY, Plaintiff

Marilyn J. Barringer

MARILYN BARRINGER, OBA# 11057
4901 Richmond Square, Ste. 104
Oklahoma City, OK 73118
(405) 840-3101
ATTORNEY FOR PLAINTIFF

Michael A. Mannes

MICHAEL A. MANNES, OBA# 5668
1510 North Klein
Oklahoma City, OK 73106
(405) 524-2400
ATTORNEY FOR DEFENDANTS

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

F I L E D

JUL 14 1989

RICHARD J. STILLINGS, as)
Trustee of the Restated RJS)
Resources, Inc. Pension Trust,)

Plaintiff,)

vs.)

CENTRAL BANK OF TULSA, et al.,)

Defendants.)

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

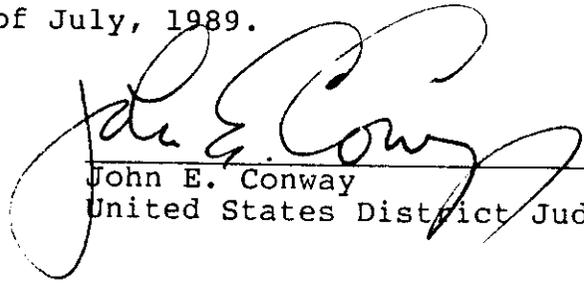
No. 84-C-1010-Conway ✓

ORDER OF DISMISSAL

This matter comes before the Court upon the Application of Plaintiff for an Order of Dismissal of this action with prejudice to the refiling thereof. The Court being fully advised in the premises, finds that said Application should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that this action be and it is hereby dismissed with prejudice to the refiling thereof, with each party to bear its own costs herein.

DATED this 14th day of July, 1989.



John E. Conway
United States District Judge

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

FILED

JUL 13 1989

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

ORS CORPORATION, an Oklahoma
corporation, UENTECH, an Oklahoma
corporation, and ORS DEVELOPMENT
CORPORATION, an Oklahoma
corporation,

Plaintiffs,

vs.

WALTER L. MAGUIRE a/k/a
WALTER L. MAGUIRE, SR.; et al,

Defendants.

WALTER L. MAGUIRE a/k/a
WALTER L. MAGUIRE, SR.;
WALTER L. MAGUIRE, JR. a/k/a
TERRY MAGUIRE; THE MAGUIRE
FOUNDATION, INC., a Connecticut
Corporation; UNITERRA CORPORATION,
a Nevada Corporation; and PREMIER
TITLE AND MORTGAGE COMPANY, INC.,
a Connecticut corporation,

Defendants and
Counterplaintiffs,

vs.

ROBERT A. ALEXANDER, JR.; J. L.
DIAMOND; V. E. GOODWIN; HOMER L.
SPENCER, JR.; DON EVE; JOHN CARL
WOOD; MICHAEL ROGERS; ROBERT
TIPS; JACK PAGE; SUSAN PALMER;
RICHARD COWAN, ROBERT CASE; ORS
CANADA, LTD., a Canadian
Corporation; and EOR, LTD., a
Canadian Corporation,

Additional
Counterdefendants,

Case No. 87-C-426-E

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

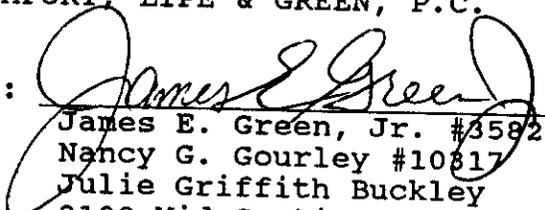
COME NOW the Plaintiffs, ORS Corporation, Uentech Corporation
and ORS Development Corporation, by and through their undersigned

counsel, and the Additional Counterdefendant, Robert A. Alexander, Jr., by and through his undersigned counsel, and stipulate that their respective claims against each other in this litigation are hereby dismissed each against the other without prejudice.

DATED this 13th day of July, 1989.

Respectfully submitted,

COMFORT, LIPE & GREEN, P.C.

By: 

~~James E. Green, Jr. #3582~~
Nancy G. Gourley #10817
Julie Griffith Buckley
2100 Mid-Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 599-9400

ATTORNEYS FOR PLAINTIFFS

CRAWFORD, CROWE, BAINBRIDGE,
LITCHFIELD & HARRIS

By: 

~~B. Hayden Crawford~~
Robert L. Bainbridge
1714 First National Bldg.
Tulsa, OK 74103

ATTORNEYS FOR ROBERT A.
ALEXANDER, JR.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 1989, a true and correct copy of the within and foregoing document was mailed to the following with proper postage thereon fully prepaid:

Claire V. Eagan, Esq.
HALL, ESTILL, HARDWICK
GABLE, GOLDEN & NELSON
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, OK 74172
ATTORNEYS FOR DEFENDANTS
AND COUNTERPLAINTIFFS

William J. Doyle, III, Esq.
2520 Mid-Continent Tower
401 South Boston Avenue
Tulsa, OK 74103
ATTORNEY FOR ADDITIONAL
COUNTERDEFENDANTS, V. E.
GOODWIN and RICHARD COWAN

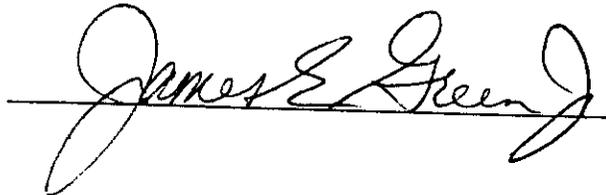
Michael L. Seymour, Esq.
1717 East 15th Street
Tulsa, OK 74104
ATTORNEYS FOR ADDITIONAL
COUNTERDEFENDANTS, DON EVE
and HOMER L. SPENCER, JR.

R. Thomas Seymour, Esq.
230 Mid-Continent Tower
401 South Boston Avenue
Tulsa, OK 74103
ATTORNEY FOR ADDITIONAL
COUNTERDEFENDANT, ROBERT TIPS

Stephen B. Riley, Esq.
CHAPEL, WILKINSON, RIGGS & ABNEY
502 West Sixth Street
Tulsa, OK 74119-1010
ATTORNEYS FOR ADDITIONAL
COUNTERDEFENDANT JAMES LEE
DIAMOND

Bert C. McElroy, Esq.
2520 Mid-Continent Tower
401 South Boston Avenue
Tulsa, OK 74103
ATTORNEYS FOR ADDITIONAL
COUNTERDEFENDANT, ROBERT B.
CASE

Fred C. Cornish, Esq.
CORNISH & RENBARGER
917 Kennedy Building
Tulsa, OK 74103
ATTORNEYS FOR ADDITIONAL
COUNTERDEFENDANTS JOHN CARL
WOOD and MICHAEL ROGERS



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

FILED

OXY USA INC.,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES DEPARTMENT OF)
 ENERGY,)
)
 Defendant.)

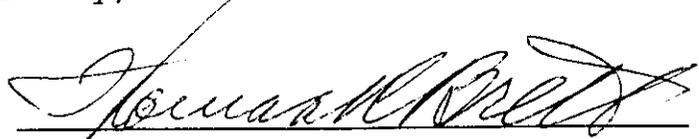
JUL 13 1989
Mark C. Silver, Clerk
U.S. DISTRICT COURT

No. 88-C-541-B

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, United States Department of Energy, and against the Plaintiff, OXY USA, Inc. Costs are assessed against the Plaintiff and each party is to pay its respective attorneys' fees.

DATED this 13th day of July, 1989.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

F I L E D

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

JUL 13 1989
Jack C. Silver, Clerk
U.S. DISTRICT COURT

OXY USA INC.,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES DEPARTMENT OF)
 ENERGY,)
)
 Defendant.)

No. 88-C-541-B

O R D E R

This matter comes before the Court upon Defendant's Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56. Plaintiff filed this action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, as amended, to obtain several documents regarding a consent decree entered into between the Economic Regulatory Administration ("ERA") of the Department of Energy and Chevron, U.S.A., Inc., as successor to Gulf Oil Corporation.¹ The Court notes the Affidavit of Courtney Blake and the Vaughn Index provide sufficient facts to enable this Court to make an informed decision without requiring an *in camera* review of the documents.

The relevant facts are as follows: In 1987, Plaintiff filed a Freedom of Information Act request seeking documents relating to a then-proposed consent order between the Economic Regulatory Administration and Chevron, U.S.A., as successor in interest to

¹Oxy chose not to pursue its challenge to the adequacy of the DOE's search for documents. Oxy's Response at p. 4. As such, the Court will limit its discussion to the documents in question.

Gulf Oil Corporation, relating to Gulf's sales of price-controlled crude oil to another oil company not a party to this action. After an administrative appeal, this action was commenced to compel disclosure of 19 documents withheld in their entirety and one document withheld in part. Documents 1 through 4 are handwritten notes by ERA's attorneys; document 5 is a letter which has been released in full with the exception of one sentence; documents 6 through 10 are drafts of a Proposed Remedial Order which was never issued; documents 11 through 19 are drafts of a Consent Order entered into between Chevron and the Department of Energy, a final copy of which has been released to Plaintiff; and Document 20 is an internal memorandum evaluating the agency's negotiations with Chevron regarding the Proposed Consent Order published on that date in the Federal Register, the litigation risks, and the reasonableness of the settlement.

Documents 1 through 4 are the handwritten notes of two of ERA's attorneys taken in meetings between Gulf/Chevron and ERA and contain the attorneys' mental impressions of the meeting.

"[A]ny attorney's notes or working papers which relate to litigation decisions or to possible settlement discussions pertaining to foreseeable litigation are protected under the attorney work-product privilege. *See, Coastal States Gas Corp. v. Department of Energy*, 617 F.2d at 865; *Kent Corp. v. N.L.R.B.*, 530 F.2d at 623; *Herbert v. Lando*, 73 F.R.D. 387, 402 (S.D.N.Y. 1977), *rev'd on other grounds*, 441 U.S. 153 (1979)."

Cities Service Co. v. Federal Trade Commission, 627 F.Supp. 827, 832 (D.D.C. 1984). Although the notes were written during meetings

with Gulf/Chevron, the weighing and sifting of relevant facts as highlighted in the attorneys' notes constitute work product.

"To provide an opponent the opportunity to examine notes taken by an attorney during negotiation or settlement discussions would unnecessarily impinge upon the 'zone of privacy' which an attorney has 'within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories.'" (citations omitted).

Cities Service at 834. Furthermore, the notes can be characterized as predecisional and deliberative and should be exempt from disclosure. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

Document 20 and one sentence of Document 5 are being withheld because they allegedly contain an attorney's opinion of a proposed consent order and the potential risks of litigation. These documents clearly relate to prospective litigation and to possible settlement decisions and should also be protected from disclosure for the same reasons as Documents 1 through 4.

Documents 6 through 10 are preliminary drafts and a final, yet incomplete, draft of a Proposed Remedial Order ("PRO"). Although the PRO was a final draft, it contained several blank spaces and was never signed or issued in final form. These were enforcement documents and were prepared in anticipation of litigation and became moot once Gulf/Chevron agreed to the Proposed Consent Order ("PCO").

"Documents that are nonfinal drafts, by their very nature, are typically predecisional and deliberative materials because they reflect a tentative view and are subject to later

revision."

Burke Energy Corp. v. Dept. of Energy, 583 F.Supp. 507, 513 (D. Kan. 1984); Exxon Corp. v. Department of Energy, 585 F.Supp 690 (D.D.C. 1983); Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 866 (D.C.Cir. 1980). In Burke, the court specifically concluded that drafts of a consent order and a remedial order were exempt by virtue of the government's deliberative process. Therefore, documents 6 through 10 are also exempt from disclosure.

The same deliberative process analogy applies to documents 11 through 19, which are the drafts of the Proposed Consent Order, the final version of which is publicly available and has been provided to Oxy. Oxy argues, however, the drafts should also be released because several of the drafts may have been shown to Gulf/Chevron before the final Consent Order was signed.² Such an argument, however, denies the deliberative and predecisional nature of Consent Orders because such orders necessarily require negotiation between the parties and constitutes a proper disclosure without waiving the privilege. Burke v. Dept. of Energy, at 513; Cooper v. Department of Navy, 558 F.2d 274 (5th Cir. 1977).

"The [predecisional] exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents

²Documents 11 through 14, 17 and 18 are drafts of the Consent Order with handwritten alterations. These alterations were incorporated into the next succeeding document; e.g. Document 12 incorporates the handwritten alterations in Document 11. Documents 11 through 18, without the handwritten alterations, may have been provided to Chevron. The handwritten notes apparently were added after meeting with Chevron in an effort to reach an agreeable Consent Order. Document 19 is the complete but unexecuted copy of the final Consent Order.

which reflect the personal opinions of the writer rather than the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position."

Coastal States, at 866; Burke, *supra*. Additionally, the ERA does not need to show the extent to which the draft differs from the final document because to do so would expose what occurred in the deliberative process between the draft's creation and the final document's issuance. Exxon Corp. v. Department of Energy, 585 F.Supp. 690, 698 (D.D.C. 1983).

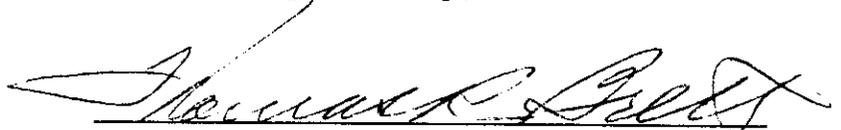
"It would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency He would get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate 'on wits borrowed from the adversary.' ... Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, *and on what terms they may be settled...* Any litigants who face litigation of a commonly recurring type ... have an acute interest in keeping private the manner in which they conduct and settle recurring legal disputes." (emphasis added).

Federal Trade Commission v. Grolier, Inc., 103 S.Ct. 2209, 2216 (1983) (Brennan, J. concurring) (citations omitted); Cities Service Co. v. F.T.C., 627 F.Supp. 827, 832 (D.D.C. 1984). In this instance, the ERA would be faced with divulging its negotiation strategies if it were forced to reveal the evolution of a consent decree. Therefore, documents 11 through 19 were properly exempt from disclosure because they were draft documents and are protected

by the work-product doctrine and the predecisional / deliberative process privileges.

It is therefore Ordered that Defendant's Motion for Summary Judgment be SUSTAINED and the documents not be released to OXY USA, Inc.

IT IS SO ORDERED, this 13th day of July, 1989.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUL 13 1989 dt

DOYLE RICE,)
)
 Plaintiff,)
)
 vs.)
)
 DR. LINDSAY BURBANK, et al.,)
)
 Defendants.)

No. 89-C-168-E ✓

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

ORDER

Defendants move this Court for dismissal on the grounds that the Court lacks personal jurisdiction over them. Defendants' motions are sustained for the following reasons. A brief history of the facts will be helpful to understand the Court's reasoning.

Elans Special, a horse owned by Burbank and trained by Buchanan, won the 1987 All American Futurity race run on September 7, 1987 in Ruidoso Downs, New Mexico. Plaintiff's horse, Elaina Rae, finished second. Following an investigation by the New Mexico State Racing Commission into illicit drug administration, the Commission ruled in January 1988 that the drug oxymorphone had been administered to Elans Special before the trials and the finals of the All American Futurity. The Commission suspended Buchanan's training license. The official order of finish and the purse distribution were not, however, changed. Plaintiff claims fraud and unjust enrichment in the use of illicit drugs which enabled Elans Special to win the 1987 All American Futurity. Defendant Burbank is alleged to be a Florida resident. His only contact with

H2

Oklahoma is that mares in whom Burbank owns an interest are occasionally bred with a stallion stationed at Guthrie, Oklahoma. The stallion was allegedly moved from Canadian, Texas to Guthrie by order of the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division. Defendant Buchanan is alleged to be a Texas resident who is licensed by the State of Oklahoma to participate in horse racing. Plaintiff does not allege that this cause of action arose in Oklahoma or that any of Defendants' alleged Oklahoma activities are connected with this cause of action.

It is clear from Plaintiff's allegations that neither Defendant has contacts with Oklahoma that are so continuous or systematic as to subject him to Oklahoma's general jurisdiction. Jurisdiction thus turns on whether the Court may exercise specific jurisdiction, that is whether the nature and quality of Defendants' contacts with Oklahoma, in relation to this claim are such that the exercise of jurisdiction would not violate due process.

To make this determination the Court must analyze more than minimum contacts and purposeful availment. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985) (cited in Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1419 & n. 6 (10th Cir. 1988)). As Burger King points out, minimum contacts must be evaluated "in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" 471 U.S. at 476, 105 S.Ct. at 2184 (citing International Shoe Co. v. Washington, 326 U.S. 310, 320,

66 S.Ct. 154, 160 (1945)). As cited by Plaintiff, and the Court in its previous Order, the Ninth Circuit has articulated a three-part test for specific jurisdiction:

- (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
- (2) The claim must be one which arises out of or results from the defendant's forum-related activities.
- (3) Exercise of jurisdiction must be reasonable.

Data Disc, Inc. v. Systems Tech. Assocs. Inc., 557 F.2d 1280, 1287 (1977) (cited in Order, p. 3).¹ Each Defendant will be addressed in turn.

Lindsay Burbank:

The Court finds that Defendant Burbank has not purposefully availed himself of the privilege of conducting activities in this forum. The occasional breeding of mares, in which Burbank owns an interest, to a stallion stationed at Guthrie, Oklahoma does not constitute purposeful availment especially in light of the fact, undisputed by Plaintiff, that the stallion was moved from Canadian, Texas to Oklahoma by persons other than Burbank. Burbank's contact with Oklahoma is fortuitous and not purposeful. Assuming arguendo

¹The Tenth Circuit recognized this test in Rambo, although it did not reach the third element under the facts of that particular case. 839 F.2d at 1419 & n. 6.

that it constituted purposeful availment, the activity bears no relation to this case. The Court concludes, therefore, that it lacks jurisdiction over Burbank.

John Buchanan:

Plaintiff alleges that Defendant Buchanan was licensed as a trainer in 1986 by the Oklahoma Racing Commission, and was so licensed during 1987 when this claim arose. This is the only basis on which Plaintiff claims Oklahoma jurisdiction over Buchanan.

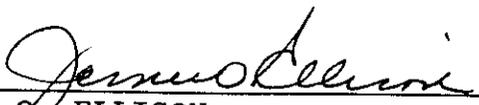
The fact of Buchanan's license is not enough, alone, to confer jurisdiction over Buchanan. Plaintiff makes no other allegations on which this Court could find jurisdiction over Buchanan. This situation is analogous to those in which jurisdiction formerly was premised on the registration of a foreign corporation to do business in the forum state. Those so-called "consent statutes" do not provide jurisdiction over a non-resident; the landmark decision of Shaffer v. Heitner dispensed with the notion that a state could exercise jurisdiction based on the fact of "presence" or the power over the property of a non-resident. 433 U.S. 186, 97 S.Ct. 2569 (1977). As the Court stated: all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny. 433 U.S. at 212, 97 S.Ct. at 2584.

In sum, the nature and quality of the Defendants' contacts with Oklahoma, in relation to this claim, do not meet the minimum requirements of due process. The Court cannot conclude that, on the whole, the Defendants' contacts with Oklahoma are such that

Defendants should reasonably anticipate being sued here. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567 (1980). Defendant Burbank's contact with Oklahoma is more fortuitous than purposeful. Defendant Buchanan's 1986 license is not the equivalent of presence within Oklahoma. Even assuming, moreover, that these activities constitute purposeful availment, the other two prongs of the specific jurisdiction test are not met here. This claim arose in New Mexico, out of activities allegedly occurring in New Mexico. New Mexico has a much greater interest in exercising jurisdiction over Defendants than Oklahoma. C.f., Easing Corp. v. Harrows Ltd., 790 F.2d 978, 983-984 (1st Cir. 1986) (due process satisfied when defendant sent telex containing an allegedly fraudulent misrepresentation to forum). For the above reasons this Court will not exercise jurisdiction in this case and Defendants' Motion to Dismiss is granted.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss is granted.

ORDERED this 13TH day of July, 1989.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

JUL 13 1989 *dst*

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 -vs-)
)
 LOREN B. MASON,)
 441604117)
)
 Defendant,)

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

CIVIL NUMBER 89-C-497 E ✓

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, United States of America, by and through its attorney, Herbert N. Standeven, District Counsel, Veterans Administration, Muskogee, Oklahoma, and voluntarily dismisses said action without prejudice under the provisions of Rule 41(a)(1), Federal Rules of Civil Procedure.

Respectfully Submitted,

UNITED STATES OF AMERICA

Herbert N. Standeven
District Counsel
Veterans Administration
125 South Main Street
Muskogee, OK 74401
Phone: (918) 687-2191

By:

[Signature]
LISA A. SETTLE, VA Attorney

CERTIFICATE OF MAILING

This is to certify that on the _____ day of July, 1989, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: LOREN B. MASON, at Route 1, Box 70-AA, Mounds, OK 74047.

[Signature]
LISA A. SETTLE, VA Attorney

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

FILED

JUL 12 1999

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

ORS CORPORATION, an Oklahoma corporation,)
UENTECH, an Oklahoma corporation, and ORS)
DEVELOPMENT CORPORATION, an Oklahoma)
corporation,)

Plaintiffs,)

v.)

No. 87-C-426-E ✓

WALTER L. MAGUIRE a/k/a WALTER L. MAGUIRE, SR.;)
et al.,)

Defendants,)

WALTER L. MAGUIRE a/k/a WALTER L. MAGUIRE, SR.;)
WALTER L. MAGUIRE, JR. a/k/a TERRY MAGUIRE;)
THE MAGUIRE FOUNDATION, INC., a Connecticut)
corporation; UNITERRA CORPORATION, a Nevada)
corporation; and PREMIER TITLE AND MORTGAGE)
COMPANY, INC., a Connecticut corporation,)

Defendants/Counterplaintiffs,)

v.)

ROBERT A. ALEXANDER, JR., J. L. DIAMOND,)
V. E. GOODWIN, and HOMER L. SPENCER, JR.,)
DON EVE, JOHN CARL WOOD, MICHAEL ROGERS,)
ROBERT TIPS, JACK PAGE, SUSAN PALMER,)
RICHARD COWAN, ROBERT CASE, ORS CANADA, LTD.)
a Canadian corporation, and EOR, LTD, a)
Canadian corporation,)

Additional Counterdefendants.)

STIPULATION OF DISMISSAL

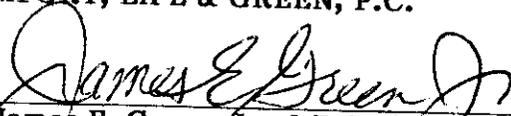
The undersigned parties, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal with prejudice of all claims between and among them in this action.

137

Respectfully submitted,

COMFORT, LIPE & GREEN, P.C.

By


James E. Green, Jr., O.B.A. #3582
Nancy G. Gourley, O.B.A. #10317
2100 Mid-Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma 74103
(918)599-9400

ATTORNEYS FOR PLAINTIFFS, ORS
CORPORATION, UENTECH and ORS
DEVELOPMENT CORPORATION and
ADDITIONAL COUNTERDEFENDANTS,
ORS CANADA, LTD. and EOR, LTD.

-and-

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By

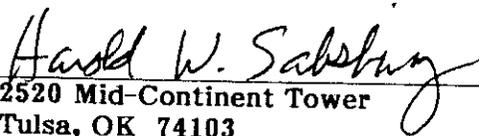

Claire V. Eagan, O.B.A. #554
Susan L. Jackson, O.B.A. #11365
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR DEFENDANTS/
COUNTERPLAINTIFFS

-and

WILLIAM J. DOYLE, III

By


2520 Mid-Continent Tower
Tulsa, OK 74103
(918) 583-7766

ATTORNEY FOR ADDITIONAL
COUNTERDEFENDANT, V. E. GOODWIN

-and-

MICHAEL L. SEYMOUR

By 
1717 East 15th Street
Tulsa, OK 74104
(918) 749-1202

ATTORNEY FOR ADDITIONAL
COUNTERDEFENDANTS, HOMER L.
SPENCER, JR. and DON EVE

-and-

CHAPEL, WILKINSON, RIGGS & ABNEY

By 
Stephen B. Riley
502 West Sixth Street
Tulsa, OK 74119-1010
(918) 587-3161

ATTORNEYS FOR ADDITIONAL
COUNTERDEFENDANT, J. L. DIAMOND

-and-

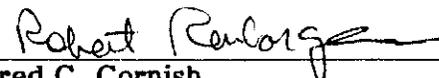
BERT C. McELROY

By 
2520 Mid-Continent Tower
Tulsa, OK 74103
(918) 583-7766

ATTORNEY FOR ADDITIONAL
COUNTERDEFENDANT, ROBERT CASE

-and-

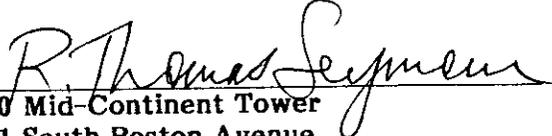
CORNISH & RENBARGER

By 
Fred C. Cornish
Robert Renbarger
917 Kennedy Building
321 S. Boston
Tulsa, OK 74103
(918) 583-2284

ATTORNEYS FOR ADDITIONAL
COUNTERDEFENDANTS, JOHN CARL
WOOD and MICHAEL ROGERS

-and-

R. THOMAS SEYMOUR

By 
230 Mid-Continent Tower
401 South Boston Avenue
Tulsa, OK 74103
(918) 583-5791

**ATTORNEY FOR ADDITIONAL
COUNTERDEFENDANT, ROBERT H. TIPS**

JHP/kgh

FILED

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

JUL 12 1989

8

SHELTER GENERAL INSURANCE
COMPANY, a Missouri
Corporation,

Plaintiff,

vs.

RON HOLMAN, LINDA HOLMAN,
RON HOLMAN CONSTRUCTION,
INC., JOE LESTER, JIM D.
PARKER, and JEANA PARKER,

Defendants.

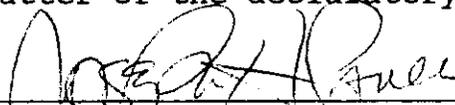
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

No. 88-C-1585-E ✓

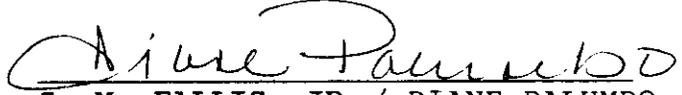
JOINT DISMISSAL WITH PREJUDICE

Comes now the plaintiff and defendants and would hereby jointly agree to dismiss all claims relating to any insurance policy contractual responsibilities and rights. Each party will bear its own attorney fees and expenses.

WHEREFORE, premises considered, these parties do respectfully dismiss all causes of action pending against each other relating to the subject matter of the declaratory judgment.



JOSEPH H. PAULK,
Attorney for Plaintiff,
Shelter General Insurance Company



S. M. FALLIS, JR. / DIANE PALUMBO
Attorney for Defendants,
Ron Holman, Linda Holman, Ron
Holman Construction, Inc.



P. THOMAS THORNBRUGH,
Attorney for Defendants,
JIM D. PARKER and JEANA PARKER

JHP/kg

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

SHELTER INSURANCE COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 DEAN RODGERS and PEARL)
 RODGERS, individually and as)
 parents and natural guardians)
 of DEAN RODGERS, JR., a)
 minor, and DUIT CONSTRUCTION)
 CO., INC.,)
)
 Defendants.)

F I L E D

JUL 12 1989

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

No. 88-C-1543E

JOINT DISMISSAL WITH PREJUDICE

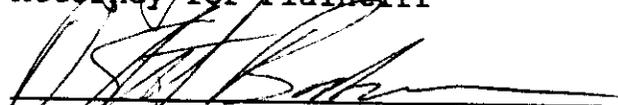
Comes now the respective parties and do hereby agree to dismiss this action with prejudice to the rights of any party to pursue the others relating to this incident and resulting insurance claim dated May 5, 1988. This Dismissal not only includes all proceedings to be decided in this matter but all future actions alleging intentional acts and/or negligence between defendants, Duit Construction, Rodgers, and plaintiff, Shelter Insurance Company.

WHEREFORE, premises considered, these parties would voluntarily dismiss this action with prejudice and costs to be born by the respective parties.

Respectfully Submitted,



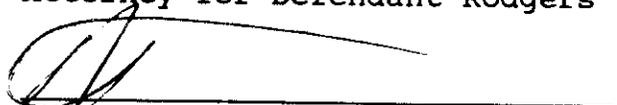
JOSEPH H. PAULK,
Attorney for Plaintiff



D. STUART BASHAM,
Attorney for Defendant,
Duit Construction Company



WALTER D. HASKINS,
Attorney for Defendant Rodgers



HOWARD S. MILLER

FILED

JUL 12 1989 *JS*

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA Jack C. Silver, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DEERE AND COMPANY, NIPAK,)
 INC., and KAISER ALUMINUM)
 AND CHEMICAL CORPORATION,)
)
 Defendants.)

Civil Action No. 82-C-268-E ✓

CONSENT DECREE

84



TABLE OF CONTENTS

	<u>Page</u>
I. JURISDICTION	3
II. PARTIES	3
III. BINDING EFFECT	3
IV. PURPOSE	4
V. DEFINITIONS	5
VI. OBLIGATIONS FOR THE REMEDIAL ACTION	6
VII. WORK TO BE PERFORMED	9
VIII. REIMBURSEMENT OF THE UNITED STATES FOR ITS COSTS	10
IX. REPORTING AND APPROVALS/DISAPPROVALS	11
X. PROJECT COORDINATOR	13
XI. SITE ACCESS	15
XII. ASSURANCE OF ABILITY TO COMPLETE WORK	16
XIII. COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS	16
XIV. SUBMISSION OF DOCUMENTS, SAMPLING, AND ANALYSIS	17
XV. RETENTION OF RECORDS	19
XVI. RESPONSE AUTHORITY	19
XVII. COVENANT NOT TO SUE	20
XVIII. FORCE MAJEURE	23
XIX. DISPUTE RESOLUTION	24
XX. FORM OF NOTICE	25
XXI. MODIFICATION	27
XXII. ADMISSIBILITY OF DATA	27
XXIII. EFFECTIVE DATE	27

	<u>Page</u>
XXIV. STIPULATED PENALTIES	27
XXV. OTHER CLAIMS	28
XXVI. CONTINUING JURISDICTION	28
XXVII. TERMINATION	28
XXVIII. SECTION HEADINGS	29
XXIX. PUBLIC NOTICE AND COMMENT	29

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) Civil Action No. 82-C-268-E
)
 DEERE AND COMPANY, NIPAK,)
 INC., and KAISER ALUMINUM)
 AND CHEMICAL CORPORATION,)
)
 Defendants.)

CONSENT DECREE

WHEREAS, the United States of America ("United States"), on behalf of and at the request of the Secretary of the Army, filed on March 5, 1982, a complaint in this matter pursuant to common law and the Rivers and Harbours Act, 33 U.S.C. § 401 et seq., for injunctive relief and the recovery of response costs that have been and will be incurred by the United States in response to releases and threatened releases of polychlorinated biphenyls ("PCBs") from an agricultural chemical facility owned successively by Deere and Company ("Deere"), Nipak, Inc. ("Nipak"), and Kaiser Aluminum and Chemical Corporation ("Kaiser") near the town of Pryor, Oklahoma;

WHEREAS, by order dated July 13, 1985, the Court allowed the United States to file its First Amended Complaint in this matter pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), at § 107(a), 42 U.S.C. § 9607(a);

WHEREAS, the United States filed simultaneous with the lodging of this Consent Decree its Motion For Leave To File The

Second Amended Complaint, and the Second Amended Complaint, pursuant to §§ 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607;

WHEREAS, the Settling Defendants deny any and all legal or equitable liability under any federal or State statute, regulation, ordinance, or common law for any response costs or damages caused by the storage, treatment, handling, or disposal activities at the Pryor Plant, or actual or threatened release of PCBs from the Pryor Plant, or for any other reason;

WHEREAS, pursuant to § 122 of CERCLA, 42 U.S.C. § 9622, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), the United States and the Settling Defendants have each stipulated and agreed to the making and entry of this Consent Decree prior to the taking of any testimony, based upon the pleadings herein, and without any admission of liability or fault as to any allegation or matter arising out of the pleadings of any party or otherwise;

WHEREAS, the United States and the Settling Defendants agree that settlement of this matter and entry of this Consent Decree is made in good faith in an effort to avoid further expensive and protracted litigation, without any admission as to liability for any purpose and that, with the exception of this proceeding and any other proceeding contemplated by this Consent Decree, this Consent Decree (including Appendices) shall not be admissible in any judicial or administrative proceeding;

WHEREAS, each undersigned representative of the parties to the Consent Decree certifies that he or she is fully

authorized to enter into the terms and conditions of this Decree and to execute and legally bind such party to this document.

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED as follows.

I. JURISDICTION

The Court has jurisdiction over the subject matter of this action and the signatories to this Consent Decree pursuant to §§ 106, 107, and 113 of CERCLA, 42 U.S.C. §§ 9606, 9607, and 9613, and 28 U.S.C. § 1345.

II. PARTIES

The parties to this Consent Decree are the United States and the Settling Defendants.

III. BINDING EFFECT

A. This Consent Decree shall apply to and be binding upon the United States and the Settling Defendants, and upon the Settling Defendants' officers, directors, agents, trustees, servants, employees, successors, assigns, attorneys, and all persons, firms, and corporations acting under the control or direction of the Settling Defendants. The Settling Defendants shall provide a copy of this Consent Decree, as lodged, and shall provide all relevant additions to the Consent Decree, as appropriate, to each person, including all contractors and subcontractors, retained to perform any activity required by this Decree, and shall condition any contract for work under this Decree upon compliance with this Consent Decree.

B. The Settling Defendants shall pay for and implement the Remedial Action as provided in Section VI of this Consent Decree.

C. In the event of the inability to pay or insolvency of one of the Settling Defendants, regardless of whether or not that Settling Defendant enters into formal bankruptcy proceedings, or if for any other reason one of the Settling Defendants does not participate in the implementation of the Remedial Action, the remaining Settling Defendant agrees and commits to complete the Remedial Action and activities provided for in this Consent Decree.

D. The parties agree, and the Court finds, that the remedy selected by the Record of Decision (Appendix A) attains all legally applicable or relevant and appropriate standards, requirements, criteria, or limitations within the meaning of § 121(d)(2)(A) of CERCLA, 42 U.S.C. § 9621(d)(2)(A).

IV. PURPOSE

The purpose of this Consent Decree is to serve the public interest by protecting the public health, welfare, and the environment from releases and threatened releases of PCBs at or from the Pryor Creek Site by the implementation of remedial actions and post closure operation, monitoring, and maintenance by the Settling Defendants, and to settle claims of the United States against the Settling Defendants as stated in the United States' Original Complaint, First Amended Complaint, and Second Amended Complaint.

V. DEFINITIONS

Except as provided otherwise below, this Consent Decree incorporates the definitions set out in § 101 of CERCLA, 42 U.S.C. § 9601. In addition, whenever the following terms are used in this Consent Decree, the definitions specified below shall apply:

"Appendix A" means the Record of Decision, as amended.

"Appendix B" means the legal description of "Pryor Creek Site" or "the Site", as hereinafter defined.

"Appendix C" means those documents referred to in Section VII.

"Closure Report" means a documented report consisting of the sequence of construction events, the final as built plans, and PCB sampling data obtained by the Settling Defendants and the COE demonstrating PCB soils remaining at the Site met the Remedial Workplan objective.

"Consent Decree" or "Decree" means this Consent Decree, along with all plans, schedules, attachments, and appendices that are attached or submitted pursuant hereto after requisite approval by the COE.

"Contractor" means the company or companies retained by the Settling Defendants to undertake and complete the Remedial Action. Each contractor and subcontractor shall be qualified to do those portions of the Remedial Action for which it is retained.

"Corps" or "COE" means the United States Army Corps of Engineers.

"Costs" means all oversight, administrative, response, removal, and remedial expenses directly incurred or to be directly incurred by the United States as a result of its ownership of the Pryor Creek Site.

"EPA" means the United States Environmental Protection Agency.

"Future Liability" means liability arising after the COE's certification of completion of Remedial Construction.

"Pryor Plant" means the agricultural chemical plant located near Pryor, Oklahoma owned and operated successively by Deere, Nipak, and Kaiser.

- "Pryor Creek Site" or "the Site" means the area adjacent to the Pryor Plant which contained PCBs as described in the Final Report/Feasibility Study. PCB Contamination at Ft. Gibson Lake. U.S. Army COE. May 1988.
- "National Contingency Plan" shall be used as that term is defined in { 105 of CERCLA, 42 U.S.C. { 9605.
- "Oversight" means the United States' inspection of work required of the Settling Defendants by this Consent Decree and verification of the adequacy of performance of activities and reports of the Settling Defendants as required under the terms of this Consent Decree.
- "RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. { 6901 et seq.
- "Record of Decision" or "ROD" means the document signed by the District Engineer on September 30, 1988, as amended April 18, 1989, which describes the Remedial Action to be conducted at the Site, and attached hereto as Appendix A.
- "Remedial Action" means the implementation and conduct of the remedy at the Pryor Creek Site in accordance with Section III hereof, the Record of Decision and the Remedial Workplan, and the Closure Report.
- "Remedial Workplan" or "Workplan" means the closure plan developed by the Settling Defendants which defines a scope of work Quality Assurance/Quality Control Plan, Health and Safety Plan, Spill Prevention Control and Countermeasure Plan, and Revegetation Plan that will lead to development of a final closure report that will provide the remaining soils at the Site are less than 10 ppm PCB based on the approved gridding and sampling plan.
- "Response Costs" means all administrative, enforcement, investigative, remedial, and removal costs incurred by the Settling Defendants.
- "Settling Defendants" means Deere & Company and all subsidiaries, parents, affiliates, and related companies of Deere, and Nipak, Inc. and all subsidiaries, parents, affiliates, and related companies of Nipak, and their respective successors and assigns.
- "State" means the State of Oklahoma.

VI. OBLIGATIONS FOR THE REMEDIAL ACTION

- A. The Settling Defendants shall perform the Remedial Action and shall be responsible for one hundred percent (100%) of

the total Response Costs. In the event of the insolvency or other inability of one of the Settling Defendants to implement the activities required by this Consent Decree, the remaining Settling Defendant shall complete all such activities in accordance with the Decree.

B. Notwithstanding any approvals that may be granted by the United States or other governmental entities, the Settling Defendants shall assume any and all liability arising from or relating to their acts or omissions or the acts or omissions of any of their contractors, subcontractors, or any other person acting on their behalf in the performance of the Remedial Action or their failure to perform fully or complete the Remedial Action. The Settling Defendants shall require the Contractor to obtain such insurance coverage as is reasonable and customary and cause the United States to be endorsed therein as an additional named insured.

C. The Settling Defendants shall design, implement, and complete the Remedial Action in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan (hereinafter "National Contingency Plan"), 40 C.F.R. part 300, and with the standards, specifications, and schedule of completion set forth herein. The Court finds and the parties agree that the Record of Decision, as set forth in Appendix A, and the Remedial Action, as set forth in this Decree, are consistent with the National Contingency Plan.

D. In the event the COE determines that the Settling Defendants have failed to implement the Remedial Action as

required by this Decree, the United States may perform such portions of the Remedial Action as may be necessary. Prior to such performance, the United States will provide the Settling Defendants' Project Coordinator with 30 days advance notice of intent to perform a portion of or all of the Remedial Action. If the Settling Defendants disagree with the United States' determination, the Settling Defendants must, within 30 days of the notice, invoke the Dispute Resolution provisions of this Decree.

E. All activities undertaken by the Settling Defendants pursuant to this Consent Decree shall be undertaken in accordance with the requirements of all applicable State and federal laws, regulations, and permits. The United States has determined that the obligations and procedures authorized under this Consent Decree are consistent with its authority under applicable law.

F. The United States has determined that no federal, State, or local permit is required for work conducted entirely onsite. The Settling Defendants shall, however, obtain all permits or approvals necessary for offsite work under federal, State, or local laws and shall submit timely applications and requests for any such permits and approvals.

G. The Settling Defendants shall include in all contracts or subcontracts entered into for work required under this Consent Decree provisions stating that such contractors or subcontractors, including their agents and employees, shall perform all activities required by such contracts or subcontracts in compliance with all applicable laws and regulations. This

Consent Decree is not, nor shall it act as, nor is it intended by the parties to be, a permit issued pursuant to any federal statute or regulations.

VII. WORK TO BE PERFORMED

A. The Settling Defendants shall, with COE's approval, select a qualified and responsible Contractor to conduct the Remedial Action.

B. The Remedial Action will consist of implementation of a Remedial Workplan approved by COE which will define a turnkey performance based scope of work that will result in definition and removal of PCB contaminated soils followed by a closure report documenting successful removal of soils with greater than 10 ppm PCB.

All work performed by the Settling Defendants shall be performed by qualified contractors in accordance with the schedules set forth in the documents attached in Appendix C or as set forth below. (Except where noted otherwise, all dates referred to in this Decree or any attachments to the Decree are calendar days; however, should a deadline fall on a weekend or a holiday, the deadline should be construed to continue to the next business day):

1. Contractor shall commence Remedial Action activities upon signature of this Consent Agreement or signature of the ROD, whichever occurs later.

2. The Settling Defendants shall conduct the Remedial Action activities in accordance with the schedule included in Appendix C.

3. Upon completion of the Remedial Action, the Settling Defendants shall submit to the COE a Closure Report that documents that PCBs are below the action threshold of 10 ppm and includes a certification of completion from a professional engineer registered in the State that work has been completed in compliance with the terms of the Remedial Workplan. The certification of completion shall include verification that all remedial equipment has been dismantled and removed from the Site. The Final Closure Report shall include documentation of compliance with the terms of the Remedial Design QA/QC Plan, the final as built plans and other conditions contained in the Remedial Design Workplan.

4. Within 15 days of receipt of the certification of completion from the Settling Defendants as required by subparagraph 3, the COE shall inspect the Site to verify that the Remedial Construction has been completed.

VIII. REIMBURSEMENT OF THE UNITED STATES FOR ITS COSTS

1. Within 30 days of final approval and entry of the Consent Decree, the Settling Defendants shall pay the sum of Fifty Thousand Dollars (\$50,000) to the United States in full satisfaction of Costs incurred by the United States in connection with the Site. Such payment by the Settling Defendants is not a penalty, fine, or monetary sanction of any kind, but is reimbursement to the United States and is in full settlement of its claims for all Costs incurred by the United States relating to the Pryor Creek Site through final Remedial Action.

2. Payment shall be in the form of checks totaling \$50,000, made payable to:

Finance and Accounting Officer
USAED, Tulsa

and mailed postage prepaid, addressed as follows:

USAED Tulsa
Tulsa District
U.S. Army Corps of Engineers
P.O. Box 61
Tulsa, Oklahoma 74121-0061
Attn: Finance and Accounting Office

IX. REPORTING AND APPROVALS/DISAPPROVALS

A. Monthly progress Reports:

1. The Settling Defendants shall provide written progress reports to the COE on a monthly basis. These progress reports shall describe the actions that have been taken toward achieving compliance with this Consent Decree, including a general description of Remedial Action activities commenced or completed during the reporting period, Remedial Action activities projected to be commenced or completed during the next reporting period, and any problems that have been encountered or are anticipated by the Settling Defendants in commencing or completing the Remedial Action activities. These progress reports are to be submitted to the COE by the 10th of each month for work done the preceding month and planned for the current month.

2. If a progress report submitted by the Settling Defendants is substantively deficient, the COE shall notify the Settling Defendants within 8 workdays of receipt of such progress report by the COE. The notice shall include a description of the deficiencies.

3. Within 10 workdays of receipt by the Settling Defendants of a notice of deficiency of a progress report, the Settling Defendants shall make the necessary changes and resubmit the progress report to the COE.

4. If a resubmitted progress report is substantively deficient, or if the Settling Defendants fail to submit any progress report in accordance with the schedule set forth above, then the Settling Defendants shall be considered to be out of compliance with this Consent Decree.

B. Other Reports, Plans, and Other Items:

1. Any reports, plans, specifications (including discharge or emission limits), schedules, appendices, and attachments required by this Decree are, upon approval by the COE, incorporated into this Consent Decree. Any noncompliance with such the COE approved reports, plans, specifications (including discharge or emission limits), schedules, appendices, and attachments shall be considered a failure to comply with this Consent Decree.

2. If the COE disapproves any plans, reports (other than monthly progress reports, which are covered by Section IX.A., above), or other items required to be submitted to the COE for approval by this Decree, then the Settling Defendants shall have 30 days from the receipt of such disapproval to correct any deficiencies and resubmit the plan, report, or item for COE approval.

3. Any disapprovals by the COE shall include an explanation of why the plan, report, or item is being disapproved.

4. The Settling Defendants must address each of the COE's comments and resubmit to the COE the previously disapproved plan, report, or item with the required changes within the deadline set forth herein.

5. If any plan, report, or item is substantively deficient after one resubmission, then the Settling Defendants shall be deemed to be out of compliance with this Consent Decree. Any such determination of non-compliance with which the Settling Defendants disagree shall be deemed a dispute and subject to the provisions of Section XIX (Dispute Resolution).

X. PROJECT COORDINATOR

A. Within 20 days of the effective date of this Consent Decree, the COE and the Settling Defendants shall each designate a Project Coordinator to monitor the progress of the Remedial Action and to coordinate communication between the COE and the Settling Defendants. The COE Project Coordinator does not have the authority to modify this Consent Decree.

B. The COE Project Coordinator shall also have the authority to require a cessation of the performance of the Remedial Action or any other activity at the Site that, in the opinion of the COE Project Coordinator, may present or contribute to an endangerment to public health, welfare, or the environment or cause or threaten to cause the release of PCBs from the Site. In the event the COE Project Coordinator suspends the Remedial Action or any other activity at the Site, the parties shall, with the approval of the Court, extend the compliance schedule of this Consent Decree as appropriate for a period of time equal to the

time of the suspension of Remedial Action or other activities plus reasonable additional time for resumption of activities. If the COE Project Coordinator suspends the Remedial Action or any other activity for any of the reasons set forth in this Paragraph B and those reasons are due to the acts or omissions of the Settling Defendants, the Contractor, or anyone else acting on the Settling Defendants' behalf, then any extension of the compliance schedule shall be at COE's discretion, subject to Dispute Resolution procedures if invoked by the Settling Defendants.

C. The Project Coordinators do not have the authority to modify in any way the terms of this Decree, including any Attachment.

D. The absence of the COE Project Coordinator from the Site shall not be cause for stoppage of the work.

E. The COE and the Settling Defendants have the right to change their respective Project Coordinators. Such a change shall be accomplished by notifying the other party in writing at least seven calendar days prior to the change.

F. The Settling Defendants' Project Coordinator may assign other representatives, including other contractors, to serve as a Site Representative for oversight of performance of daily operations during remedial activities.

G. The COE Project Coordinator may assign other representatives, including other COE employees or contractors, to serve as a Site Representative for oversight of performance of daily operations during remedial activities. The Site Representative has only the authority to be present and observe performance of

the Remedial Action. The COE shall notify the Settling Defendants' Project Coordinator of the identity and presence of a designated Site Representative at the Site.

H. Prior to invoking formal Dispute Resolution procedures, any disputes arising between the COE Site Representative and Settling Defendants or their contractors which cannot be resolved, shall be referred to the COE Project Coordinator.

XI. SITE ACCESS

A. During the effective period of this Decree, the United States, the COE, the State, and their representatives, including contractors, shall have access at all times to the Site and any contiguous property owned or controlled by the Settling Defendants or Kaiser for purposes of conducting any activity authorized by this Decree, including but not limited to:

1. Monitoring the progress of activities relating to this Decree and the Remedial Action;
2. Verifying any data or information submitted to the COE;
3. Obtaining samples at the Site; and
4. Inspecting and copying records, operating logs, contracts, or other documents required to assess the Settling Defendants' compliance with the Decree.

Any person obtaining access pursuant to this provision who goes on the Site or any contiguous property shall comply with all applicable provisions of the Worker Health and Safety Plan as submitted in the workplans required by this Decree and reviewed by the COE.

B. During the effective period of this Decree, the Settling Defendants, the Settling Defendants' Project Coordinator, the Contractor, and any subcontractor shall have access at all times to the Site for the purpose of carrying out the Remedial Action.

XII. ASSURANCE OF ABILITY TO COMPLETE WORK

The Settling Defendants shall demonstrate their ability to complete the Remedial Action and to pay all claims that arise from the performance of the Remedial Action by presenting to the COE for approval, within 30 days after the effective date of this Decree, internal financial information sufficient to satisfy the COE that the Settling Defendants have assets sufficient to make it unnecessary to require additional assurances. The COE shall have 90 days from the receipt of the information to make a determination of the adequacy of the financial assurance and to communicate that determination to the Settling Defendants.

XIII. COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS

A. All activities undertaken by the Settling Defendants pursuant to this Consent Decree shall be undertaken in accordance with the requirements of all applicable local, State and federal laws and regulations, and this Decree shall in no way relieve the Settling Defendants of their obligation to comply with such laws and regulations governing their performance of the Remedial Action. In addition, this Decree is not, nor shall it act as, nor is it intended by the parties to be, a permit issued pursuant to any federal or State statute or regulation.

B. The parties recognize that it may be necessary for the Settling Defendants to apply for and obtain certain permits or governmental approvals in order to implement the Remedial Action. The Settling Defendants agree that, if any such permit or approval is required, they will submit complete permit applications or requests for approval in a timely fashion and will provide any supplemental information within a timeframe that would permit the Remedial Action to proceed in a manner contemplated by the schedules in Appendix C and herein and in accordance with applicable statutory, regulatory and procedural requirements.

C. The parties contemplate that all permits or other approvals required to implement the Remedial Action will be identified in the Remedial Workplan required under Section VII of this Decree.

D. Nothing in this Section shall excuse any delay in completing the Remedial Action in accordance with the schedule(s) established pursuant to this Consent Decree.

E. The parties agree that the Settling Defendants will direct their Contractor to arrange for the storage, treatment, disposal, or transportation for disposal or treatment in compliance with the applicable provisions of the RCRA, implemented by regulations promulgated at 40 C.F.R. Parts 261, 262, 263, 264, 265.

XIV. SUBMISSION OF DOCUMENTS, SAMPLING, AND ANALYSIS

A. Beginning with the calendar quarter during which this Decree is entered, the Settling Defendants shall submit a quality

assurance report to the COE on a quarterly basis by the 12th calendar day of the month following each quarter. This report shall contain information that demonstrates that the Settling Defendants are complying with the QA/QC Plans attached to this Decree.

B. Any analytical or design data generated or obtained by the Settling Defendants that are related to the Pryor Creek Site shall be provided to the COE within seven days of any request by the COE for such data.

C. COE employees and the COE's authorized representatives shall have the right to take splits of any samples obtained by the Settling Defendants or anyone acting on the Settling Defendants' behalf at the Pryor Creek Site during the implementation of the Remedial Action.

D. During the performance of the Remedial Action, the Settling Defendants shall give the COE seven days notice of any sampling conducted by the Settling Defendants or anyone acting on their behalf. Before the disposal of any such sample, the COE shall be given 30 days notice and an opportunity to take possession of all or a portion of such sample.

E. All data, factual information, and documents submitted by the Settling Defendants to the COE pursuant to this Consent Decree shall be subject to public inspection. The Settling Defendants shall not assert a claim of confidentiality regarding any hydrogeological or chemical data, any data submitted in support of a remedial proposal, or any other scientific or engineering data.

XV. RETENTION OF RECORDS

The Settling Defendants shall preserve and retain all records and documents now in their possession or control that relate in any manner to the Pryor Plan or Pryor Creek Site, regardless of any document retention policy to the contrary, for six years after the completion of the Remedial Action.

Until completion of the Remedial Action and termination of this Consent Decree, the Settling Defendants shall preserve, and shall instruct the Contractor, the Contractor's subcontractors, and anyone else acting on the Settling Defendants' behalf at the Pryor Creek Site to preserve (in the form of originals or exact copies, or in the alternative, microfiche of all originals) all records, documents, and information of whatever kind, nature, or description relating to the performance of the Remedial Action at the Pryor Creek Site. Upon the completion of the Remedial Action copies of all such records, documents, and information shall be delivered to the COE Project Coordinator.

XVI. RESPONSE AUTHORITY

Except as provided in Section XVIII herein, nothing in this Consent Decree shall be deemed to limit the response authority of the COE under § 104 or § 106 of CERCLA, 42 U.S.C. §§ 9604 and 9606, or under any other federal response authority. Nothing in this Consent Decree shall alter the applicable legal principles governing judicial review of the COE's Record of Decision concerning remedial activity with respect to the Pryor Creek Site.

XVII. COVENANT NOT TO SUE

A. Except as specifically provided in subparagraph C, the United States covenants not to sue the Settling Defendants for all claims included in the United States' Original Complaint, the First Amended Complaint, and the Second Amended Complaint, including any and all civil liability to the United States for causes of action arising under §§ 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), and § 7003 of RCRA, 42 U.S.C. § 6973, relating to the Pryor Creek Site.

B. With respect to Future Liability, this covenant not to sue shall take effect upon certification by the COE of the Completion of Remedial Action. Nothing in this Consent Decree is intended to increase the liability of the Settling Defendants beyond that set out at 42 U.S.C. 9601, et seq., with respect to future recontamination, if any, by adjacent landowners (currently Kaiser).

C. The Settling Defendants hereby covenant not to sue the United States for any claims related to or arising from the Pryor Creek Site, the Remedial Action, or this Consent Decree, including any direct or indirect claims for reimbursement from the Hazardous Substance Superfund, 42 U.S.C. § 9611. Nothing in this Consent Decree shall be deemed to constitute pre-authorization by the United States of a claim against the Hazardous Substance Superfund.

D. Deere hereby covenants not to sue Nipak and Nipak hereby covenants not to sue Deere for any claims described in subparagraph A or for any claims related to or arising from the

Pryor Creek Site, the Remedial Action, or this Consent Decree. However, this covenant not to sue shall not apply in the event and to the extent that one of the Settling Defendants is required to pay more than its share of the Response Costs as set forth in Section VI.A.

E. Except as provided in subparagraph F, the United States reserves the right to institute proceedings in this action or in a new action (1) seeking to compel the Settling Defendants to perform additional response work at the Site or (2) seeking reimbursement of the United States' response costs, if:

1. Prior to COE certification of completion of Remedial Action--(a) conditions at the Site, previously unknown to the United States, are discovered after the lodging of this Consent Decree, or (b) information is received, in whole or in part, after the lodging of this Consent Decree, and these previously unknown conditions or this information indicate that the Remedial Action is not protective of human health and the environment;

2. Subsequent to COE certification of completion of Remedial Action--(a) conditions at the Site, previously unknown to the United States, are discovered after the certification of completion of Remedial Action by the COE, or (b) information is received, in whole or in part, after the certification of completion by the COE, and these previously unknown conditions or this information indicates that the Remedial Action is not protective of human health and the environment.

F. The parties agree that thermal destruction of PCB contaminated soils in accordance with the provisions of this

Consent Decree and in accordance with COE approved workplans, such that the resulting ash may be delisted as a hazardous waste under the Resource Conservation and Recovery Act, is a permanent remediation technology eligible for a special covenant not to sue under Section 122 of the Act. Accordingly, consistent with Section 122(f)(2)(B) of the Act, as amended, upon completion of the Remedial Action, the United States shall provide to the Settling Defendants a special covenant not to sue for future liability under Sections 106 and 107 of the Act with respect to the portion of the Remedial Action which involves the thermal treatment of PCB contaminated soils.

G. The United States' right to institute proceedings in this action or in a new action seeking to compel the Settling Defendants to perform additional response work at the Site or seeking reimbursement of the United States for response costs at the Site, may only be exercised where the conditions in subparagraph E are met.

H. Notwithstanding any other provision in this Consent Decree, the covenant not to sue set forth in subparagraph A shall not relieve the Settling Defendants of their obligation to meet and maintain compliance with the requirements set forth in this Consent Decree including the Record of Decision and Remedial Design Workplan for the Site which are incorporated herein.

I. The provisions of subparagraph A herein shall not apply to the following claims:

1. Claims based on a failure by the Settling Defendants to meet the requirements of this Decree;

2. Claims based on the Settling Defendants' liability arising from the past, present, or future disposal of PCBs outside of the Pryor Creek Site;

3. Claims for costs incurred by the United States as a result of the failure of the Settling Defendants to meet the requirements of Section VII of this Decree or the ROD;

4. Claims based on liability for PCBs removed from the Site; and

5. Claims based on criminal liability.

XVIII. FORCE MAJEURE

A. "Force Majeure" for purposes of this Decree is defined as any event arising from causes beyond the control of the Settling Defendants that delays or prevents the performance of any obligation under this Decree. "Force Majeure" shall not include increased costs or expenses of the Remedial Action or failure to apply for any required approvals or to provide all required information therefor in a timely manner.

B. When circumstances are occurring or have occurred that delay the completion of any phase of the Remedial Action, whether or not due to a "Force Majeure" event, the Settling Defendants shall promptly (in no event later than 15 days from the time the Settling Defendants obtain information indicating a delay has been or will be encountered) supply a written notice as set forth in Section XXI of this Consent Decree which includes a detailed explanation of the reason(s) for and the anticipated duration of any such delay, the measures taken and to be taken by the Settling Defendants to prevent or minimize the delay, and the

timetable for implementation of such measures. Failure to notify in accordance with Section XX of this Consent Decree in writing within the required 15 days shall constitute a waiver of any claim for "Force Majeure."

C. If the United States agrees that a delay is or was attributable to a "Force Majeure" event, the parties shall modify the applicable schedule to provide such additional time as may be necessary to allow the completion of the specific phase of the Remedial Action and/or any succeeding phase of the work affected by such delay, for a period equal to the actual duration of the delay.

D. If the United States and the Settling Defendants cannot agree as to whether the reason for the delay was a "Force Majeure" event, then the dispute shall be resolved by reference to the Dispute Resolution clause of this Decree and the Settling Defendants shall have the burden of demonstrating that the event was a "Force Majeure" event, that the delay was caused by the "Force Majeure" event, and that the duration of the delay is or was warranted under the circumstances.

XIX. DISPUTE RESOLUTION

A. In the event that the parties cannot resolve any dispute arising under this Decree or from the implementation of this Decree, then the interpretation advanced by the United States shall be considered binding unless the Settling Defendants invoke the Dispute Resolution provisions of this Section.

B. Any dispute arising under this Decree or from the implementation of this Consent Decree shall in the first instance

be the subject of informal negotiations between the United States and the Settling Defendants. Such period of informal negotiations shall commence upon the transmission by the Settling Defendants to the COE of written notification of the invocation of Dispute Resolution. Informal negotiations shall not extend beyond 30 days, unless the parties agree otherwise.

C. At the termination of unsuccessful informal negotiations, should Settling Defendants choose not to follow the United States' position, the Settling Defendants shall file with the Court a petition which shall describe the nature of the dispute and include a proposal for its resolution.

The United States shall have 30 days to respond to the petition. In any such dispute, the Settling Defendants shall have the burden of (1) showing that their proposal is more appropriate than the proposal of the United States to fulfill the terms, conditions, requirements, and goals of this Consent Decree and (2) demonstrating that their proposal is not inconsistent with the National Contingency Plan, will abate PCBs at the Site, and will protect public health, welfare, and the environment from the release or threat of release of PCBs at the Site.

D. Any dispute regarding the Record of Decision shall be governed by CERCLA.

XX. FORM OF NOTICE

The original or a copy of all communications between the Settling Defendants, the Contractor, and the COE, shall be sent to at least the Settling Defendants and the COE.

When notification to or communication with the United States, the COE, or the Settling Defendants is required by the terms of this Consent Decree, it shall be in writing, mailed postage prepaid, and addressed as follows:

As to the United States:

Chief
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
P. O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

As to the COE:

Col. Frank M. Patete
Tulsa District Engineer
Tulsa District
U.S. Army Corps of Engineers
P.O. Box 61
Tulsa, Oklahoma 74121-0061

As to the Settling Defendants:

Mr. Ralph Grotelueschen
Deere and Company
John Deere Road
Moline, Illinois 61265-8098

John S. Athens, Esq.
Conner & Winters
2400 First National Tower
Tulsa, Oklahoma 74103

J. Michael Medina, Esq.
Holliman, Langholz, Runnels
& Dorwart
700 Holarud Building
10 E. Third St.
Tulsa, Oklahoma 74103

Any submission to the COE for approval made pursuant to this Consent Decree shall be made to the addresses shown above and shall be made by express mail or some equivalent delivery service.

XXI. MODIFICATION

Except as provided for herein, there shall be no modification of this Consent Decree without written approval of all parties to this Consent Decree and the Court.

XXII. ADMISSIBILITY OF DATA

In the event that the Court is called upon to resolve a dispute concerning implementation of this Consent Decree, the parties waive any evidentiary objection to the admissibility into evidence of data gathered, generated, or evaluated pursuant to and consistent with this Decree.

XXIII. EFFECTIVE DATE

This Consent Decree is effective upon the date of its approval and entry by the Court.

XXIV. STIPULATED PENALTIES

A. The Settling Defendants shall pay the following stipulated civil penalties for failure to complete on-site remediation (excluding submission of closure report) by November 1, 1990:

Day 1 through 30: \$ 250 per day
Day 31 through 90: \$ 500 per day
Day 91 and beyond: \$1,000 per day

B. The United States reserves its rights to seek such penalties and injunctive relief as may be available to it by law for failure to comply with any of the terms of this Consent Decree.

XXV. OTHER CLAIMS

A. Nothing in this Consent Decree shall constitute or be construed as a covenant not to sue with respect to, or a release from any claim, cause of action, or demand in law or equity against any person, firm, partnership, or corporation not a signatory to this Consent Decree.

B. The Settling Defendants waive their rights to assert any claim against the Hazardous Substances Superfund, 42 U.S.C. § 9611, that is related to any of their past costs or costs incurred in performing the Remedial Action, and nothing in this Consent Decree is or shall be construed as pre-authorization of a claim against the Hazardous Substances Superfund.

XXVI. CONTINUING JURISDICTION

The Court specifically retains jurisdiction over both the subject matter of and the Parties to this action for the duration of this Consent Decree for the purposes of issuing such further orders or directions as may be necessary or appropriate to construe, implement, modify, enforce, terminate, or reinstate the terms of this Consent Decree or for any further relief as the interest of justice may require.

XXVII. TERMINATION

When the Settling Defendants believe that they have completed the requirements of this Consent Decree, they shall submit a report to the United States to that effect. Thereafter, the parties will jointly apply to the Court for an order terminating

this Consent Decree. The Consent Decree shall terminate upon entry of such Order by the Court.

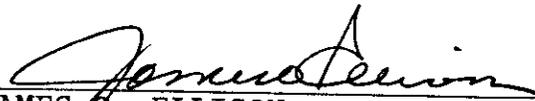
XXVIII. SECTION HEADINGS

The Section headings set forth in this Decree and its Table of Contents are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Decree.

XXIX. PUBLIC NOTICE AND COMMENT

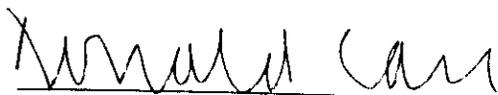
The parties acknowledge that final approval and entry of this Consent Decree by the Court is subject to the public notice and comment requirements of § 122(i) of CERCLA, 42 U.S.C. § 9622(i), and 28 C.F.R. § 50.7.

EXECUTED in multiple counterparts this 12th day of ~~April~~ ^{July}, 1989.



JAMES D. ELLISON
United States District Judge

FOR THE UNITED STATES:



DONALD A. CARR
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Bruce C. Buckheit
BRUCE C. BUCKHEIT
Senior Counsel,
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

TONY M. GRAHAM
United States Attorney
Northern District of Oklahoma

By: Nancy Nesbitt Blevins
NANCY NESBITT BLEVINS
Assistant United States Attorney
3600 United States Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103

Frank M. Patete
COL. FRANK M. PATETE, Commander
U.S. Army Engineer
District, Tulsa

FOR DEERE AND COMPANY:

John S. Athens
JOHN S. ATHENS

CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103

FOR NIPAK, INC.:

Michael Medina
J. MICHAEL MEDINA

HOLLIMAN, LANGHOLZ, RUNNELS &
DORWART
Suite 700
10 E. 3rd St.
Tulsa, Oklahoma 74103

APPENDIX A
Amended Record of Decision
Remedial Alternative Selection

SITE NAME AND LOCATION

The PCB-contaminated site is in the flood pool of Fort Gibson Lake in Section 33, T. 21 N., 19E., Mayes County, about 3 miles south of the city of Pryor, Oklahoma.

DESCRIPTION OF SELECTED REMEDY

Reference is made to my Record of Decision (ROD) dated September 30, 1988 (encl 1), regarding the subject site. At that time thermal separation/offsite incineration was recommended as the preferred treatment, and off-site land disposal as the alternative, should thermal separation fail to meet the remediation selection criteria set forth in 40 CFR Section 300.68 (i)(1).

During the latter stages of implementation, information in regard to thermal separation indicated that its cost was such that it exceeded the cost for incineration. During the same period, information was developed showing that another thermal technology previously unavailable has become available. The technology of onsite incineration of PCB contaminated material is presently available locally and offered at a cost that is substantially below its original estimated cost and which is competitive with offsite land disposal.

This alternative, which was originally eliminated from detailed consideration because of unavailability, cost, and issues of additional public coordination, has become both available and economically competitive in the several months since the original ROD was published.

The technology would provide for permanent destruction of PCBs at the least cost. It also eliminates concern for possible contamination by spill during transportation posed by technologies involving offsite treatment or disposal.

During additional coordination with public agencies concerning thermal separation technology, it was learned that no additional permits would be required. Those agencies expressed general approval of onsite thermal treatment so long as it met extant Federal standards and minimized exposure to hazardous materials. Onsite incineration would provide for destruction of PCBs to the extent that the treated soil would meet the applicable or relevant and appropriate environmental requirement for the site, in this case, PCB concentrations less than 10 parts per million in the treated soil.

DECLARATION

I have determined that onsite thermal separation/offsite incineration is no longer the least costly alternative which permanently destroys PCBs. Therefore, I have determined, based upon recent information regarding availability, cost, efficiency,

and public health that onsite thermal destruction of PCBs by incineration provides the least costly permanent remedial action, and is the appropriate action to remedy the PCB contamination situation at the Fort Gibson Lake site.

18 Apr 1989
Date



Frank M. Patete
Colonel, Corps of Engineers
District Engineer

RECORD OF DECISION
REMEDIAL ALTERNATIVE SELECTION

SITE NAME AND LOCATION

The PCB-contaminated site is in the flood pool of Fort Gibson Lake in section 33, T. 21 N., R. 19 E., Mayes County, about 3 miles south of the city of Pryor, Oklahoma.

DOCUMENTS REVIEWED

I have reviewed the following documents describing the probable source of contamination, the extent of contamination, and the analysis of the technical feasibility and cost effectiveness of remedial alternatives.

Phase I Remedial Investigation Draft Report, March 1987

Preliminary Report for the Feasibility Study, September 1987

Final Report for the Feasibility Study, May 1988

Administrative record for the PCB-contaminated site

REMEDIAL ALTERNATIVES EVALUATED

Nine remedial alternatives were evaluated on the basis of technical feasibility, institutional requirements, environmental acceptability, public health criteria, and cost effectiveness. Four were dropped from further study for various reasons: chemical dechlorination, biodegradation, on-site incineration, and no action. Feasible alternatives were on-site containment, off-site incineration, off-site land disposal, a combination of off-site incineration/off-site disposal, and on-site thermal separation/off-site incineration.

DESCRIPTION OF SELECTED REMEDIES

On site thermal separation/off-site incineration is the recommended remedy upon documentation of separation efficiency of the specific site soils. This remedial action is recommended because it is the least costly alternative and incineration permanently destroys PCBs. Off-site land disposal is the recommended alternative should thermal extraction efficiency not meet the required cleanup level of 10 parts per million PCBs. Off-site disposal meets the remediation selection criteria set forth in 40 CFR Section 300.68(i)(1) which requires selection of a cost-effective remedial alternative that effectively mitigates and minimizes threats to and provides protection of public health and the environment.

PUBLIC NOTICE AND COMMENTS

Copies of the final report were furnished to interested agencies and organizations for review and comments. The comment period was from 25 May to 10 June 1988. In addition, copies of the report were sent to the city of Pryor and placed in City Hall and the public library for review during business hours. Copies were also available for review in the Public Affairs Office of the Tulsa District. Public notices were placed in the Tulsa Tribune, Tulsa World, and Pryor Times and run for 3 consecutive days advising the public of the locations and availability of the reports. Only the Oklahoma Department of Wildlife Conservation (ODWC) furnished written comments. The ODWC stated that it had "no specific comments other than to agree that the selected plan insure that the potential threat to human health is removed."

DECLARATION

I have determined that the selected remedies are consistent with the guidelines set forth in the Comprehensive Environmental

APPENDIX B

Pryor Creek Site Legal Description

A specific site owned by the United States of America, consisting of greater than one (1) but less than two (2) acres, approximately rectangular in shape, lying within the Northeast 1/4 of the Southwest 1/4 of the Northwest 1/4 (NE/4 SW/4 NW/4) of Section 33, Township 21N, Range 19E, located in Mayes County, Oklahoma, further delineated by markers placed at the corners of the contaminated area, plus those adjacent areas found to exceed 10 PPM PCB during the remediation activity. This description is subject to a detailed survey to be conducted by COE at its sole expense within 30 days of the filing of this Decree. Such survey shall be mailed to all parties in accordance with Section XX of this Consent Decree.

APPENDIX C - p. 2

PROPOSED ON-SITE SCHEDULE FOR REMEDIATION ACTIVITIES*
FORT GIBSON LAKE, OKLAHOMA

ACTIVITY	Week 1 6/11	Week 2 6/18	Week 3 6/25	Week 4 7/2	Week 5 7/9	Week 6 7/16	Week 7 7/23	Week 8 7/30	Week 9 8/6	Week 10 8/13	Week 11 8/20	Week 12 8/27	Week 13 9/3
SITE PREPARATION													
Operator Orientation & Medical Exams													
Security Fence													
Utility Hookups													
Office Trailer On Site													
Decontamination Trailer On Site													
Surveying													
Ditch & Berm													
Uproot Trees & Wash Roots													
Excavation													
Sampling & Analysis to Determine If Depth of Excavation is Sufficient													
INCINERATION													
Erect Incineration Equipment Onsite													
Mechanical Startup													
Incineration													
Sampling & Analysis of Ash													
Decontamination of Equipment													
Transport All Equipment Offsite													
SITE RESTORATION													
Return Decontaminated Soil to Excavated Area													
Lay Topsoil													
Seed													
SITE REMEDIATION COMPLETE													

*Schedule is based on 1589 tons (1186 yds³) of soil. Incineration operations for the anticipated average (i.e., greater than 1589 tons) will be completed by 10/15/89.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 vs.)
)
 LLOYD H. CHARLES; WENDI E.)
 CHARLES; COUNTY TREASURER,)
 Creek County, Oklahoma; BOARD)
 OF COUNTY COMMISSIONERS, Creek)
 County, Oklahoma,)
)
 Defendants.)

FILED

JUL 13 1989

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

CIVIL ACTION NO. 89-C-213-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12th day
of July, 1989. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendants, County Treasurer, Creek County,
Oklahoma, and Board of County Commissioners, Creek County,
Oklahoma, appear not, having previously filed their Disclaimer;
and the Defendants, Lloyd H. Charles and Wendi E. Charles,
appear not, but make default.

The Court being fully advised and having examined the
file herein finds that the Defendant, Lloyd H. Charles, was
served with Summons and Complaint on June 2, 1989; that the
Defendant, Wendi E. Charles, acknowledged receipt of Summons and
Complaint on April 15, 1989; that Defendant, County Treasurer,
Creek County, Oklahoma, acknowledged receipt of Summons and
Complaint on March 20, 1989; and that Defendant, Board of County
Commissioners, Creek County, Oklahoma, acknowledged receipt of
Summons and Complaint on March 20, 1989.

It appears that the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, filed their Disclaimer on March 24, 1989; and that the Defendants, Lloyd H. Charles and Wendi E. Charles, 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 Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

That portion lying East of State Road No. 48 of the North Half of the South Half of Lot One (1), also known as the NW/4 NW/4 of Section Nineteen (19), Township Eighteen (18) North, Range Nine (9) East, Creek County, Oklahoma.

The Court further finds that on October 29, 1981, the Defendants, Lloyd H. Charles and Wendi E. Charles, 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 \$36,100.00, payable in monthly installments, with interest thereon at the rate of 15.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Lloyd H. Charles and Wendi E. Charles, 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 October 29, 1981, covering the above-described

property. Said mortgage was recorded on November 3, 1981, in Book 108, Page 2234, in the records of Creek County, Oklahoma.

The Court further finds that the Defendants, Lloyd H. Charles and Wendi E. Charles, 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, Lloyd H. Charles and Wendi E. Charles, are indebted to the Plaintiff in the principal sum of \$36,206.63, plus interest at the rate of 15.5 percent per annum from September 1, 1987 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, disclaim any 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, Lloyd H. Charles and Wendi E. Charles, in the principal sum of \$36,206.63, plus interest at the rate of 15.5 percent per annum from September 1, 1987 until judgment, plus interest thereafter at the current legal rate of 8.16 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Creek 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, Lloyd H. Charles and Wendi E. Charles, 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.

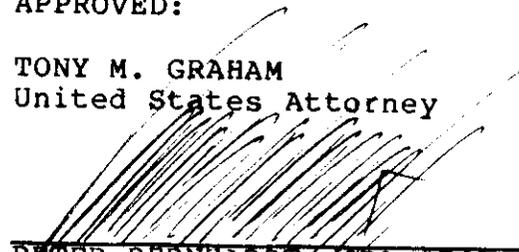
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney

Judgment of Foreclosure
Civil Action No. 89-C-213-B

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

FILED
JUL 11 1989

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

WILLIAM J. "SMOKEY" LEE,
Petitioner,
vs.
FRANK THURMAN, et al.,
Defendants.

No. 84-C-546-C

ORDER

Now before the Court for its consideration are the objections of petitioner to the Findings and Recommendation of the United States Magistrate filed on March 8, 1989.

The Magistrate has recommended that petitioner's motion for writ of habeas corpus be denied. The Court has independently reviewed the case file and finds that the recommendation of the Magistrate is reasonable under the circumstances of this case and consistent with applicable law.

It is the Order of the Court that the motion of petitioner for writ of habeas corpus is hereby DENIED.

IT IS SO ORDERED this 11 day of July, 1989.


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

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

FILED

JUL 11 1989

KENNETH G. ALEXANDER
and GRACE ALEXANDER,

Plaintiffs,

vs.

LONG JOHN SILVER'S, INC., and
DELTA CATFISH PROCESSORS, INC.,

Defendants.

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

No. 88-C-670-B

ORDER

This matter comes before the Court on the Defendant Delta Catfish Processors, Inc.'s (Delta) Motion for Summary Judgment against the Plaintiffs and also Delta's Motion for Summary Judgment against Defendant and Cross-Claimant Long John Silver's, Inc. Plaintiffs initiated this action against Long John Silver's, Inc. alleging in the first cause of action that fish prepared and sold by Long John Silver's and consumed by Plaintiffs caused Plaintiff Kenneth G. Alexander to become ill from food poisoning due to salmonella/shigella bacteria. In the second and third causes of action Plaintiff Kenneth G. Alexander ~~sues~~ ^{sues} Delta Catfish Processors, Inc. for being allegedly negligent jointly with Long John Silver's, and under a product liability theory against both Defendants. The fourth cause of action is brought by Plaintiff Grace Alexander, who alleges a loss of consortium.'

'It is unclear against whom Plaintiff Grace Alexander seeks recovery. She alleges "the defendants'" negligence caused her injury yet seeks judgment against "defendant".

On the afternoon of September 5, 1986, Kenneth G. Alexander's father-in-law purchased from Long John Silver's three boxes of fried fish which included catfish and a second variety of fish which was either cod or perch. The fish was consumed by Plaintiffs and their family members, all of whom became ill approximately five hours later. Plaintiffs' family members recovered from their illness the next day as did Grace Alexander but Plaintiff Kenneth G. Alexander remained ill for approximately two to three days.

Delta Catfish Processors, Inc. provided Long John Silver's with all of the catfish sold by the latter but another independent supplied the perch or cod. In its answer Long John Silver's denied liability and cross-claimed against Delta Catfish Processors, Inc. upon a theory that the catfish furnished by Delta contained salmonella or shigella bacteria and was the sole cause of Plaintiffs' injury, and on a further theory of contractual indemnification. Delta answered denying liability and cross-claimed against Long John Silver's on the theory that had the fish been properly cooked by Long John Silver's according to the latter's own manual there would have been no opportunity for salmonella or shigella bacteria being present. The manual calls for frying fish at 350° for 5 minutes which applies to all categories of fish including catfish.

Plaintiff Kenneth G. Alexander has testified that he was uncertain whether the second variety of fish was cod or perch. He further testified that he did eat catfish and at least one other variety of fish on the day in question.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential

to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, Plaintiff "must establish that there is a genuine issue of material facts..." Plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Under the second cause of action, Plaintiff Kenneth G. Alexander alleges Delta, along with Long John Silver's, was negligent in "food processing and preparation and in preserving and keeping said catfish." No evidence has been presented nor is it an undisputed fact that Delta is in the business of selling food to the general public. The second cause of action fails to properly allege any significant act or duty on Delta's part that would give rise to liability. All of the processing, preparation, preserving

and keeping of the catfish is the business of Long John Silver's once the catfish product has been delivered to Long John Silver's by Delta.

Another theory upon which Plaintiffs seek recovery from Delta Catfish Processors, Inc. is products liability. To sustain an action for products liability a plaintiff must prove the product caused the injury, in this case, the catfish. The mere possibility the catfish might have caused the injury is insufficient. Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

Plaintiff Kenneth G. Alexander has testified that he ate both varieties of fish on the day in question. No evidence has been submitted to indicate that the salmonella or shigella bacteria, if in fact it even came from any fish, came from the catfish.

If Plaintiffs were victims of salmonella or shigella bacterial poisoning there are several plausible explanations as to the source. Plaintiffs' own family surroundings or family members could have contaminated the fish product prior to Plaintiffs consuming the same. It is possible that the salmonella or shigella bacteria, if present within the systems of Plaintiffs and their family, could have come from other food consumed by Plaintiffs prior to eating the fried fish. Under the proof offered it has been established that salmonella and shigella bacteria have an incubation period of sufficient length that tainted food consumed by the Plaintiffs on the day previous to the fish consumption could have caused the food poisoning.

As to Defendant Delta it is elemental that Plaintiffs establish a sufficient showing that the catfish consumed by them caused the injuries complained of. Since it was equally possible that the other variety of fish or perhaps some other food consumed by the Plaintiffs caused the food poisoning, the Plaintiffs have failed to meet the necessary test. Long John Silver's, in its cross-complaint against Delta, is subject to the same burden of proof as are Plaintiffs. It is equally likely that the cod or perch contained salmonella or shigella bacteria as the catfish supplied by Delta. That being the case, both the Plaintiffs and Long John Silver's have not overcome the burden placed upon them by Delta's Motions for Summary Judgment. Kirkland v. General Motors Corp., supra. Long John Silver's, under the facts now before the Court, has not established that the catfish had any "defect" which could trigger the indemnification contract between it and Delta for any loss arising therefrom. Nor can Long John Silver's establish such at trial. This is because there is no possibility of proof available to show which fish (catfish or cod or perch) was tainted with the salmonella/shigella bacteria, if in fact any of the fish was so tainted.

This is not to say Plaintiffs might not recover from Long John Silver's upon trial if appropriate medical testimony is forthcoming. Long John Silver's cooked and sold both kinds of fish, catfish and cod/perch (whichever). A trier of fact could decide that Plaintiffs' illness was caused by the fish; yet it will never be possible to establish that it is more likely than not that

the catfish caused the illness. Thus there is no possibility of proof of a "defect" in the catfish even if a trier of fact ultimately decides "the fish" was the proximate cause of the Plaintiffs' illness, thereby creating liability on the part of Long John Silver's.

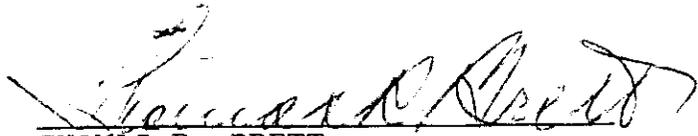
A mere speculation as to one of the possible causes of the food poisoning from salmonella/shigella bacterial poisoning is insufficient to take this case beyond the threshold of Celotex. Plaintiffs have the burden of coming forward with evidence to establish their theory that the catfish: (1) contained salmonella/shigella bacteria; and (2) that the Plaintiffs had this particular food poisoning, beyond the realm of possibility and into the realm of probability. Plaintiffs wholly failed the first part.

"In a case of this kind, a verdict for plaintiff cannot be predicated upon conjecture or speculation relating to the issue of negligence. Instead there must be substantial evidence tending to show the acts of negligence pleaded in the complaint; and there must also be evidence tending to show that such negligence proximately caused the damage to the complainant. Negligence as the proximate cause of damage may be established by permissible inferences, but the inference must be based upon something other than mere conjecture or speculation. It does not suffice to introduce evidence tending to show facts which are simply consistent with negligence but suggest with equal force an inference of the nonexistence of negligence. The inference of negligence must be the more probable and more reasonable inference to be drawn from the evidence. Evidence which presents a mere choice of probabilities relating to negligence as the proximate cause of damage create only conjecture or speculation on which a verdict for plaintiff cannot stand. The evidence must bring the theory of plaintiff to the level and dignity of a probable cause." [citations omitted].

McCready v. United Iron and Steel Co., 272 F.2d 700, 702 (10th Cir. 1959). Where the Plaintiff fails to meet that burden, "'there can be no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex at 323.

IT IS THEREFORE ORDERED that the Defendant Delta's Motion for Summary Judgment against the Plaintiffs be and the same is hereby sustained and the case dismissed as to Delta on Plaintiffs' claims. IT IS FURTHER ORDERED that the Delta's Motion for Summary Judgment as to the cross-claim of Long John Silver's, Inc. be sustained and the case be and the same is hereby dismissed as to Delta on Long John Silver's cross-claim against Delta.

IT IS SO ORDERED this 11th day of July, 1989.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

STUDY CASE FILED

Time spent by Judge or Magistrate

JUL 10 1989

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

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

PATRICK G. WALTERS, C.P.A., INC.

PLAINTIFF

v.

No. 89 C 360 C ✓

UNITED STATES OF AMERICA

DEFENDANT

ORDER OF DISMISSAL

On this 10 day of June, 1989, is presented to the Court the Motion of plaintiff, Patrick G. Walters, C.P.A., Inc., to dismiss without prejudice complaint filed herein against the United States of America on April 28, 1989, and the Court finds that such Motion should be granted.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED that the complaint of plaintiff, Patrick G. Walters, C.P.A., Inc., filed herein on April 28, 1989, against the United States of America be dismissed without prejudice.

IT IS SO ORDERED.


Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 10 1986

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

EM NOMINEE PARTNERSHIP CO.,)
a general Partnership,)
et al.,)
)
Plaintiff,)
v.)
)
MOBIL OIL CORPORATION,)
a Corporation,)
)
Defendant.)

Case No. 86-C-952-B

ORDER OF DISMISSALS WITH PREJUDICE

This matter comes before the Court on the Stipulation of Dismissals With Prejudice of the parties in the above referenced action. The Court finds that Plaintiffs' claim and Defendants' counterclaim should both be dismissed with prejudice to the refiling thereof.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

563JCC89A

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES POSTAL SERVICE,)
)
Plaintiff,)
)
vs.)
)
DAVID WHARRAM d/b/a)
)
CONSUMER GROUP PROMOTION CENTER)
)
WESTERN AND NEVADA MARKETING,)
)
Defendant.)

FILED
JUL 20 1989
JAMES C. SHAW, Clerk
U.S. DISTRICT COURT

Civil Action No. 89-C-523-B

AGREED PRELIMINARY INJUNCTION

The parties hereby stipulate and agree that a Preliminary Injunction should be issued herein under 39 U.S.C. § 3007 to preserve the status quo during the conduct of administrative proceedings under 39 U.S.C. § 3005. It is therefore, by the Court this 10th day of July, 1989,

ORDERED that a Preliminary Injunction be, and it is hereby issued, directing the United States Postal Service to detain the Defendant's incoming mail addressed to:

PROMOTION CENTER
8336 East 73rd
Tulsa, OK 74133

CONSUMER GROUP PROMOTION CENTER
WESTERN AND NEVADA MARKETING
4828 South Peoria
Suite 211-213
Tulsa, Oklahoma 74105

during the pendency of the administrative proceedings under 39 U.S.C. § 3005 and any judicial review thereof;

AND IT IS FURTHER ORDERED that the detained mail may be opened to examination by Defendant and that such portions of the detained mail as are clearly not connected with the alleged unlawful activity shall be delivered to the Defendant.

S/ THOMAS R. BRETT

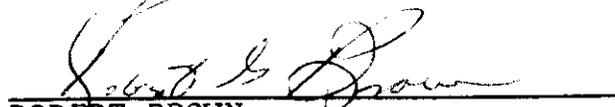
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney



NANCY NESBITT BLEVINS, OBA # 6634
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



ROBERT BROWN
Attorney for Defendant
David Wharram d/b/a
Consumer Group Promotion Center
Western and Nevada Marketing

FILED

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

JUL 10 1989

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

BETTY WAGNER,
Plaintiff,

No. 89-C-147 B

vs.

ORDER

JACK JEZEK and SHEARSON
LEHMAN HUTTON, INC.,

Defendants.

Upon the Motion of plaintiff Betty Wagner,
IT IS ORDERED that the above-entitled action be dismissed with
prejudice at plaintiff's costs.

DATED this 10th day of ~~June~~ ^{July}, 1989.

BY THE COURT:


U.S. District Judge

FILED

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

JUL 10 1989

SHIMANO INDUSTRIAL COMPANY
LIMITED

Plaintiff,

v.

BRUNSWICK CORPORATION and
ZEBCO CORPORATION

Defendants.

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

Civil Action No. 89-C-88-B

STIPULATION AND CONSENT DECREE FOR DISMISSAL WITH PREJUDICE

The parties hereto, by their respective counsel, having represented to the Court that all issues raised in the Amended Complaint and Answer thereto have been compromised and settled:

IT IS HEREBY ORDERED:

1. That the case is dismissed with prejudice.

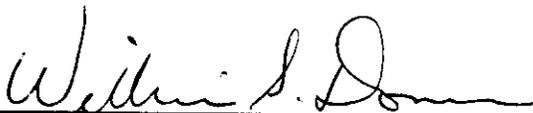
2. That SHIMANO INDUSTRIAL COMPANY LIMITED, BRUNSWICK CORPORATION and ZEBCO CORPORATION are each to bear their own costs and attorneys fees.

S/ THOMAS R. BRETT

United States District Judge

ENTERED July 10th, 1989

APPROVED AS TO FORM:



William S. Dorman
1146 East 64th Street
Tulsa, Oklahoma 74136
(918) 747-1080

 for Roy C. Breedlove

Roy C. Breedlove
JONES, GIVENS, GOTCHER, BOGAN &
HILBORNE
3800 First National Tower
Tulsa, Oklahoma 74103



Thomas P. Pavelko
Thomas J. D'Amico
STEVENS, DAVIS, MILLER & MOSHER
515 North Washington Street
Alexandria, Virginia 22314
(703) 549-7200

Attorneys for Brunswick
Corporation and Zebco Corporation

Attorneys for Shimano Industrial
Company Limited

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

BETTY L. BELL, individually and
in her capacity as administrator
and personal representative of
the estate of her deceased son,
MARTIN EUGENE KING, and JOSEPH
EDWIN KING, RODGER ALLEN KING
and ROBERTA SNODGRAS,

Plaintiffs,

vs.

THE CITY OF LOCUST GROVE,
OKLAHOMA, and CATHERINE BALLOU,

Defendants.

FILED

JUL 10 1989

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

v
No. 88-C-120-B

J U D G M E N T

In accordance with the Order entered May 24, 1989, IT IS
HEREBY ORDERED AND ADJUDGED that judgment be entered in favor of
the Defendants, City of Locust Grove, Oklahoma, and Catherine
Ballou, and against the Plaintiffs, Betty L. Bell, individually and
in her capacity as administrator and personal representative of the
estate of her deceased son, Martin Eugene King, and Joseph Edwin
King, Rodger Allen King and Roberta Snodgras, and the Plaintiffs
are to take nothing on their federal claims herein. Each side is
to pay its respective attorney fees, but costs are assessed against
the Plaintiffs if timely applied for under local rule.

DATED this 10th day of July, 1989.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MARK A. PESTEL a/k/a MARK ALLEN)
 PESTEL a/k/a MARK PESTEL;)
 DEBORAH E. PESTEL a/k/a DEBORAH)
 PESTEL a/k/a DEBORAH E. SWARER;)
 COUNTY TREASURER, Osage County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Osage County,)
 Oklahoma,)
)
 Defendants.)

FILED

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

CIVIL ACTION NO. 89-C-056-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10th day
of July, 1989. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Nancy Nesbitt Blevins, Assistant United States
Attorney; the Defendants, County Treasurer, 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, Mark A.
Pestel a/k/a Mark Allen Pestel a/k/a Mark Pestel and Deborah E.
Pestel a/k/a Deborah Pestel a/k/a Deborah E. Swarer, appear not,
but make default.

The Court being fully advised and having examined the
file herein finds that the Defendant, County Treasurer, Osage
County, Oklahoma, acknowledged receipt of Summons and Complaint
on January 30, 1989; and that Defendant, Board of County

Commissioners, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on January 25, 1989.

The Court further finds that Defendants, Mark A. Pestel a/k/a Mark Allen Pestel a/k/a Mark Pestel and Deborah E. Pestel a/k/a Deborah Pestel a/k/a Deborah E. Swarer, were served by publishing notice of this action in the Pawhuska Journal-Capital, a newspaper of general circulation in Osage County, Oklahoma, once a week for six (6) consecutive weeks beginning April 1, 1989, and continuing to May 6, 1989, 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, Mark A. Pestel a/k/a Mark Allen Pestel a/k/a Mark Pestel and Deborah E. Pestel a/k/a Deborah Pestel a/k/a Deborah E. Swarer, 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, Mark A. Pestel a/k/a Mark Allen Pestel a/k/a Mark Pestel and Deborah E. Pestel a/k/a Deborah Pestel a/k/a Deborah E. Swarer. 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 through the Farmers Home Administration, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Nancy Nesbitt Blevins, 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, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, filed their Answer herein on February 1, 1989; and that the Defendants, Mark A. Pestel a/k/a Mark Allen Pestel a/k/a Mark Pestel and Deborah E. Pestel a/k/a Deborah Pestel a/k/a Deborah E. Swarer, 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:

West 30 feet of Lot 7, and the East 40 feet of Lot 8, in Block 4, in Russell Addition to Skiatook, Osage County, Oklahoma according to the recorded Plat thereof.
Subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations and mineral conveyances of record.

The Court further finds that on August 5, 1982, Mark A. Pestel and Deborah E. Pestel executed and delivered to the United States of America, acting through the Farmers Home Administration, their mortgage note in the amount of \$38,000.00, payable in monthly installments, with interest thereon at the rate of 13.25 percent per annum.

The Court further finds that as security for the payment of the above-described note, Mark A. Pestel and Deborah E. Pestel executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated August 5, 1982, covering the above-described property. Said mortgage was recorded on August 5, 1982, in Book 620, Page 937, in the records of Osage County, Oklahoma.

The Court further finds that on August 5, 1982, Mark A. Pestel and Deborah E. Pestel executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on July 16, 1984, Mark Pestel and Deborah Pestel executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on June 24, 1985, Mark A. Pestel and Deborah E. Pestel executed and delivered to the United States of America, acting through the Farmers Home Administration, a Reamortization and/or Deferral Agreement pursuant to which the entire debt due on that date was made principal.

The Court further finds that on June 24, 1985, Mark A. Pestel and Deborah E. Pestel executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on June 13, 1986, Mark Pestel executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on May 14, 1987, Mark Pestel executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendants, Mark A. Pestel a/k/a Mark Allen Pestel a/k/a Mark Pestel and Deborah E. Pestel a/k/a Deborah Pestel a/k/a Deborah E. Swarer, 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, Mark A. Pestel a/k/a Mark Allen Pestel a/k/a Mark Pestel and Deborah E. Pestel a/k/a Deborah Pestel a/k/a Deborah E. Swarer, are indebted to the Plaintiff in the principal sum of \$38,020.47, plus accrued interest in the amount of \$3,419.62 as of October 18, 1988, plus interest accruing thereafter at the rate of 13.25 percent per annum or \$13.8019 per day until judgment,

plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements and the reamortization and/or deferral agreement of \$8,936.33, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$296.93, plus penalties and fees, for the year 1988. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$28.83 for the year 1986, \$31.56 for the year 1987, and \$30.21 for the year 1988, plus penalties and fees. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against Defendants, Mark A. Pestel a/k/a Mark Allen Pestel a/k/a Mark Pestel and Deborah E. Pestel a/k/a Deborah Pestel a/k/a Deborah E. Swarer, in the principal sum of \$38,020.47, plus accrued interest in the amount of \$3,419.62 as of October 18, 1988, plus interest

accruing thereafter at the rate of 13.25 percent per annum or \$13.8019 per day until judgment, plus interest thereafter at the current legal rate of 8.10 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements and the reamortization and/or deferral agreement of \$8,936.33, plus interest on that sum at the current legal rate of 8.10 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have and recover judgment in the amount of \$296.93, plus penalties and fees, for ad valorem taxes for the year 1988, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have and recover judgment in the amount of \$28.83 for the year 1986, \$31.56 for the year 1987, and \$30.21 for the year 1988, plus penalties and fees, for personal property taxes, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

In payment of Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, in the amount of \$296.93, plus penalties and fees, for ad valorem taxes which are presently due and owing on said real property;

Third:

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

Fourth:

In payment of Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, in the amount of \$28.83 for the year 1986, \$31.56 for the year 1987, and \$30.21 for the year 1988, plus penalties and fees, for personal property taxes which are currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under

and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

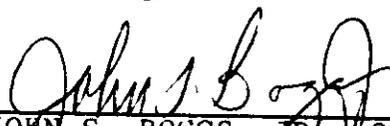
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney


NANCY NESBITT BLEVINS, OBA #6634
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

NNB/css

FILED
JUL 10 1989

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

CRAWFORD ENTERPRISES MANUFACTURING,
INC.,

Plaintiff,

v.

RYDER/P-I-E NATIONWIDE, INC.,

Defendant.

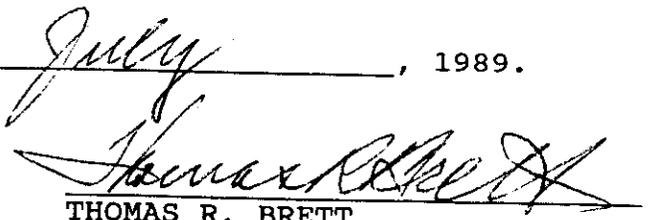
Jack C. Silver, Clerk
U.S. DISTRICT COURT

No. 84-C-395-B

AMENDED JUDGMENT

In keeping with the Findings of Fact, Conclusions of Law, and Supplemental Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED AND ADJUDGED the Plaintiff, Crawford Enterprises Manufacturing, Inc., have judgment against the Defendant, Ryder/P-I-E Nationwide, Inc., in the amount of Four Hundred Seventeen Thousand Two Hundred Seventy-Eight and 20/100 Dollars (\$417,278.20), plus pre-judgment interest of Seventy-Five Thousand Two Hundred Forty-Three and 23/100 Dollars (\$75,243.23) through July 3, 1985, for a total judgment of Four Hundred Ninety-Two Thousand Five Hundred Twenty-One and 43/100 Dollars (\$492,521.43), plus interest thereon from July 3, 1985 at the rate of 7.70% and the costs of this action.

DATED this 10th day of July, 1989.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

JUL 10 1989

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

LUC J. VAN RAMPENBERG,
Plaintiff,
v.
U.S.A., et al.,
Defendant.

Complaint no: 88-C-379-B

ORDER.

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

This 10th day of ~~June~~ July, 1989


U.S. DISTRICT JUDGE.

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

JAMES EDWARD GOOCH and
CATHERINE M. GOOCH,

Plaintiffs,

vs.

HOME OWNERS WARRANTY
CORPORATION and HOW
INSURANCE COMPANY,

Defendants,

and

N. D. HENSHAW, BARBARA F. HENSHAW,
DARRELL G. JENKINS and BARBARA J.
JENKINS d/b/a HOLLYWOOD HOMES
CONSTRUCTION,

Additional Defendants.

Case No. 89-C-202-B

FILED

JUL 10 1989

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

O R D E R

Pursuant to the Application of Plaintiffs, Home Owners
Warranty Corporation is dismissed, without prejudice.

S/ THOMAS R. BRETT

Thomas R. Brett
United States District Judge

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

FILED

JUL 7 1989

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

MAC COLBERT,

Defendant and Third-Party Plaintiff,

v.

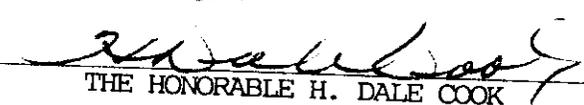
LANDMARK AMERICAN INSURANCE COMPANY, a
foreign corporation,

Third-Party Defendant.

No. 88-C-1669-C

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 7 day of July, 1989, it appearing to the Court that this
matter has been compromised and settled, this case is herewith dismissed with
prejudice to the refiling of a future action.


THE HONORABLE H. DALE COOK

DEH/al
113-45

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

FILED

JUL -7 1989

CLERK
U.S. DISTRICT COURT

CHARLES ECKELT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
et al.,

Defendants.

No. 87-C-1013-C

ORDER

Now before the Court for its consideration is the objection of defendant Marjorie Herrell to the Report and Recommendation of the United States Magistrate filed on October 17, 1988.¹

As related in the Magistrate's Report, plaintiff obtained a state court judgment against defendant Herrell on April 22, 1987. Plaintiff thereafter garnished Herrell's bank account. Herrell filed a claim for exemption, asserting that certain funds were proceeds of two Osage Indian headrights.² The state judge upheld

¹On January 19, 1989, the Magistrate filed a "corrected" Report, correcting two misnomers. These corrections do not affect the substance of his ruling.

²A "headright" is the right to receive trust funds and mineral interests at the end of the trust period ... and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estate and the interest on the trust funds. *Logan v. Andrus*, 457 F.Supp. 1318, 1320, n.2 (N.D.Okla. 1978).

36

the exemption claim, and the matter is on appeal through the state appellate system.

Plaintiff filed the present action, seeking a declaratory judgment that the headrights themselves are not exempt from state garnishment statutes, and further asking this Court to order sale of the headrights. The Magistrate addressed the merits in his Report, but this Court raises, sua sponte, the question of subject matter jurisdiction. See McAlester v. United Air Lines, 851 F.2d 1249, 1252 (10th Cir. 1988).

It is axiomatic that the Declaratory Judgment Act confers no additional subject matter jurisdiction on the federal courts. McGrath v. Weinberger, 541 F.2d 249, 252 n.4 (10th Cir. 1976). An independent jurisdictional basis must exist. In the Complaint, plaintiff cites as such basis 28 U.S.C. §1331 (i.e., federal question). The Court believes that such assertion is incorrect. Plaintiff seeks merely to execute on a state court judgment, which is clearly a matter governed by state law. Any claim of exemption under federal statutes dealing with Indian land is a defense which may be asserted by Herrell. The United States Supreme Court has recently reiterated that

the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law.

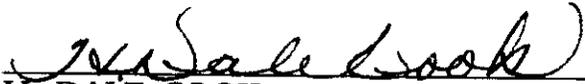
Okla. Tax Com'n v. Graham, 109 S.Ct. 1519, 1521 (1989).

See also Madsen v. Prudential Fed. Sav. & Loan Ass'n., 635 F.2d 797, 803 (10th Cir. 1980), cert. denied, 451 U.S. 1018 (1981).

This Court lacking subject matter jurisdiction, the action must be dismissed.

It is the Order of the Court that this action is hereby dismissed sua sponte.

IT IS SO ORDERED this 7th day of July, 1989.



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

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

FILED

JUL 7 1989

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

HAGAN PLUMBING COMPANY, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)

vs.)

Case No. 87-C-1051-C ✓

VANGUARD PLASTICS, INC.;)
ADMIRAL MARINE; SHELL CHEMICAL)
COMPANY; and CELANESE)
CORPORATION,)
)
Defendants.)

and)

ADMIRAL MARINE,)
)
Defendant/Third)
Party Plaintiff,)

vs.)

PLAST-A-MATIC CORPORATION,)
)
Third-Party)
Defendant.)

ORDER OF DISMISSAL

NOW, on this 7 day of July, 1989, the Court being advised that a compromise settlement having been reached between the Plaintiff, the named Defendants, the named Third-Party Defendants, and those parties stipulating to a dismissal with prejudice, the Court orders that all claims in the captioned case be dismissed with prejudice.


UNITED STATES DISTRICT JUDGE

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

FILED

JUL -7 1989

mu

CLERK
U.S. DISTRICT COURT

NATHANIEL C. CARLIS, JR.,

Plaintiff,

vs.

SEARS ROEBUCK AND COMPANY,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

No. 89-C-184-C ✓

ORDER

Now before the Court for its consideration is the motion of the defendant to dismiss.

Plaintiff brings this action solely alleging a violation of the public policy exception to the employment-at-will rule recognized in Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). Plaintiff generally asserts that he was discharged by defendant on account of handicap and on account of race, in violation of 25 O.S. §1302, and its federal counterparts.

Defendant argues that this particular common law tort claim is preempted by the existence of an administrative and/or judicial remedy, as represented by the federal statutes. The Burk court did not expressly discuss such preemption. However, the court stated that it has adopted the exception in a narrow class of cases. Id. at 28. This Court must conclude that, in view of the multitude of lawsuits alleging violations of statutory prohibitions of discrimination, a failure to recognize preemption would result in

the public policy exception being asserted in an expansive class of cases. Such a result is directly contrary to the court's language in Burk.

Federal courts have been wary of a plaintiff utilizing 42 U.S.C. §1983 to circumvent comprehensive statutory schemes. See generally Zombro v. Baltimore City Police Dept., 868 F.2d 1364 (4th Cir. 1989). Similarly, a plaintiff should not be permitted to use the public policy exception for the same purpose.

It is the Order of the Court that the motion of the defendant to dismiss is hereby GRANTED.

IT IS SO ORDERED this 7th day of July, 1989.


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

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

FILED

JUL 07 1989

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

COMPRESSOR SERVICES, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 RODNEY D. WOODS, et al.,)
)
 Defendants.)

Case No. 88-C-1324-B

DISMISSAL

STATE OF OKLAHOMA)
) ss.
 COUNTY OF TULSA)

COMES NOW the defendant, Prudential Insurance Company of America, and hereby dismisses its Counter-Claim in the above cause with prejudice, as to the plaintiff, Compressor Services, Inc.

Dated this 7th day of July, 1989.

GABLE & GOTWALS
Attorneys for Defendant,
Prudential Insurance Company
of America

By: Deborah J. Spencer
Elsie Draper (OBA #)
Deborah J. Spencer (OBA #13354)
2000 4th National Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201

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

FILED

JUL 06 1989

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

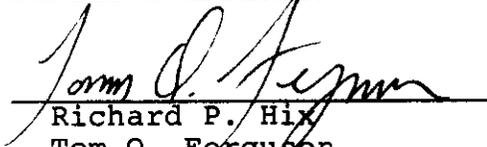
PUBLIC SERVICE COMPANY OF
OKLAHOMA,)
)
)
Plaintiff,)
)
)
vs.)
)
)
WAGNER & BROWN II, FALSE RIVER)
LIMITED and GERALD ADKINS,)
)
)
Defendants and Third-Party)
Plaintiffs,)
)
)
vs.)
)
)
TRANSOK, INC.,)
)
)
Third Party Defendant.)

Case No. 89-C-030-E

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rules of Civil Procedure Rule 41, the parties hereby stipulate that Plaintiffs' claims, and Defendants/ Third Party Plaintiffs' claims and counterclaims are hereby dismissed with prejudice. The parties agree that they shall bear their own respective attorneys' fees and costs incurred in connection with this action.

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By 
Richard P. Hix
Tom Q. Ferguson
1000 Atlas Life Building
Tulsa, Oklahoma 74103
(918) 582-1211

Ralph E. Simon, Jr.
Transok, Inc.
P. O. Box 3008
Tulsa, Oklahoma 74101
(918) 583-1121

H. Ward Camp III
P. O. Box 3008
Tulsa, Oklahoma 74101
(918) 561-9224

Attorneys for Plaintiff
Public Service Company of
Oklahoma and Transok, Inc.
Third Party Defendant.

SHANNON, GRACEY, RATLIFF &
MILLER

By *Janie L. Frank*
Kleber C. Miller
B. Frank Cain
Janie L. Frank
2200 First City Bank Tower
201 Main Street
Fort Worth, Texas 76102-9990

HOLLIMAN, LANGHOLZ, RUNNELS &
DORWART
J. Michael Medina
10 East 3rd Street
Tulsa, Oklahoma 74103-3695

Attorneys for Wagner & Brown II,
False River Limited, and
Gerald Adkins

FILED
JUL 06 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
Jack C. Silver, Clerk
DISTRICT COURT

S. C. COSTA COMPANY, INC.,
Plaintiff,
vs.
AMERICAN TRUSTEE, INC., a
corporation, RICHARD L.
ANDERSON, MARGARET S. BUVINGER,
RUSSELL DORR, PAUL H. MOCK,
T.M. "BUD" MONTGOMERY, DAVID E.
NORRIS, DON R. OWEN, CREEKE
SPEAKE, JR., EDMOND SYNAR,
HOWARD W. WILSON, ARTHUR A.
WALLACE, ROBERT S. KERR, JR.,
FRANCIS S. IRVINE, AND HORACE
RHODES,
Defendants.

Case No. 88 C-306-B

DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, S. C. Costa Company, Inc. and
dismisses without prejudice the Defendants, Robert S. Kerr, Jr.,
Horace Rhodes, and Francis S. Irvine from the above-styled cause
of action. The case will proceed against all other Defendants.

Therese Buthod
Therese Buthod, OBA #10752
James R. Gotwals, OBA #3499
JAMES R. GOTWALS & ASSOCIATES, INC.
Attorneys for the Plaintiff
S. C. Costa Company, Inc.
525 South Main, Suite 1130
Tulsa, Oklahoma 74103
(918) 599-7088

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 6 day of July 1989, a true and correct copy of the above and foregoing document was mailed with correct and proper postage affixed thereon to:

Gene Buzzard, Esq.
GABLE & GOTWALS
2000 Fourth National Bank Bldg.
15 West 6th Street
Tulsa, Oklahoma 74119

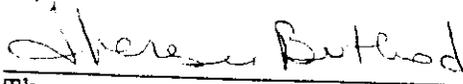
Attorney for all remaining Defendants

John Hermes, Esq.
MCAFEE AND TAFT
10th Floor
Two Leadership Square
Oklahoma City, Oklahoma 73102

Attorney for Robert S. Kerr, Jr.

C. Raymond Patton, Jr., Esq.
HOUSTON AND KLEIN
Suite 700, 320 South Boston Ave.
Tulsa, Oklahoma 74103

Attorney for Defendants, Horace Rhodes and Francis Irvine



Therese Buthod

misstatements constitute fraud, fraudulent concealment and negligent misrepresentation.

The Court has reviewed the arguments presented and the applicable authorities and finds as follows.

First, Greer's claim for negligent misrepresentation should be dismissed as to Shapiro and Herzfeld & Rubin. The long-standing general rule is that an attorney cannot be liable for the consequences of his or her professional negligence to anyone other than the attorney's client, absent special circumstances. National Savings Bank v. Ward, 100 U.S. 195 (1879); Thomas Fruit Co. v. Levergood, 135 Okla. 105, 274 P. 471 (1929); Anderson v. Canady, 37 Okla. 171, 131 P. 697 (1913). The special circumstances recognized have included cases in which the Court found that Plaintiff was a third-party beneficiary of the relationship between attorney and client, or was otherwise in privity of contract with them. E.g., Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, cert.denied 368 U.S. 987 (1961). This rule has been further relaxed in California. In the case of Costello v. Wells Fargo Bank, 258 Cal.App.2d 90, 65 Cal.Rptr. 612 (1968) the California Court of Appeals recognized that an attorney may be liable for negligence to a third party. The Court stated that the determination of whether liability would be imposed in a particular case is a policy matter, involving the balancing of a number of factors, including:

- (1) the extent to which the transaction was intended to affect the Plaintiff;

- (2) the foreseeability of harm to Plaintiff;
- (3) the degree of certainty that Plaintiff suffered injury;
- (4) the closeness of the connection between the conduct and the injury suffered; and
- (5) the policy of preventing future harm.

This rule has most often been applied in the situation where an attorney's negligence in drafting a will harms the interests of an intended beneficiary, e.g. Donald v. Garry, 19 Cal.App.3d 769, 97 Cal.Rptr. 191 (1971). The rule has not been applied in circumstances such as these, where the question is whether an attorney owes any duty to his or her adversary. The Tenth Circuit more recently has reaffirmed the rule that no duty runs from an attorney to the attorney's adversary. Tappen v Ager, 599 F.2d 376, 379; see also, Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 750 P.2d 118 (N.M. 1988). Thus, despite the persuasive reasoning of the California courts, the absence of authority in this jurisdiction compels this Court to rule that Greer's negligent misrepresentation claim fails as a matter of law.

On the other hand, Greer has stated a claim for fraud. The question whether Greer justifiably relied on the Defendants' statements is a question of fact. Likewise, the damages claimed are not so speculative as to preclude them as a matter of law. Further, Plaintiff's factual allegations are sufficient to allege that despite the exercise of reasonable diligence Greer did not discover the fraud until October 16, 1986, and therefore, the two-year statute of limitations was tolled until that date.

IT IS THEREFORE ORDERED that the motion to dismiss of Myron Shapiro and Herzfeld & Rubin is granted as to Greer and Greer's claim for negligent misrepresentation and is denied as to Greer and Greer's claim for fraud and fraudulent concealment.

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

WILLIAM S. ATHERTON,)
)
 Plaintiff,)
)
 vs.)
)
 JOHN A. CHANIN and JAMES Y.)
 AGENA,)
)
 Defendants.)

No. 88-C-1558-E ✓

FILED
JUL 5 1989 *alt*

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

ORDER

Plaintiff, William S. Atherton (Atherton), moves the Court for reconsideration. On March 8, 1989 the Court dismissed Plaintiff's complaint for lack of personal jurisdiction over Defendants. The Court has reconsidered its previous order, and in so doing, has reviewed again the briefs of the parties and the authorities presented. The Court has further reviewed additional authorities.

Plaintiff argues that the quantity and quality of Defendants' contacts with Oklahoma give the Court personal jurisdiction over Defendants. The Court previously found these contacts too casual to confer jurisdiction (Order p. 3). Accepting Plaintiff's alleged facts, the Defendants represented Plaintiff, who resides in Oklahoma, and an Oklahoma corporation, for over two years in Hawaii litigation. Defendants communicated frequently by telephone and letter with Atherton, either directly or through Oklahoma counsel. Defendants sent bills for services to and received payment from Oklahoma.

It is evident that these activities are not so persuasive,

systematic, or continuous to subject Defendants to Oklahoma's general jurisdiction. There are no allegations in this case that either of the two Defendants have the continuous and systematic contacts with Oklahoma that would permit the exercise of general jurisdiction. Each of the alleged contacts is related to Defendants' representation of Plaintiff in the Hawaii litigation. Jurisdiction thus turns on whether the Court may exercise specific jurisdiction, that is, whether the nature and quality of Defendants' contacts with Oklahoma, in relation to this claim, confer jurisdiction over Defendants.

To make this determination the Court must analyze more than minimum contacts and purposeful availment. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985) (cited in Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1419 & n. 6 (10th Cir. 1988)). As Burger King points out, minimum contacts must be evaluated "in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" 471 U.S. at 476, 105 S.Ct. at 2184 (citing International Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S.Ct. 154, 160 (1945)). As cited by Plaintiff, and the Court in its previous Order, the Ninth Circuit has articulated a three-part test for specific jurisdiction:

- (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the

benefits and protections of its laws.

(2) The claim must be one which arises out of or results from the defendant's forum-related activities.

(3) Exercise of jurisdiction must be reasonable.

Data Disc, Inc. v. Systems Tech. Assocs. Inc., 557 F.2d 1280, 1287 (1977) (cited in Order, p. 3).¹

The question whether a nonresident attorney's representation of a resident constitutes "purposeful availment of the privilege of conducting activities in the forum" is one not answered uniformly. On the one hand, Colorado found personal jurisdiction over a nonresident attorney when the attorney (1) accepted employment of a Colorado individual, or corporation; (2) conferred and corresponded via telephone and the mails with the Colorado client; and (3) accepted a substantial fee for the representation. Scheuer v. District Court, 684 P.2d 249, 252 (Colo. 1984); see also, Miceli v. Stromer, 675 F.Supp. 1559 (D. Colo. 1987) (case for jurisdiction is even stronger when the attorney actively solicits the business of Colorado clients). On the other hand, various courts have declined to exercise specific jurisdiction in the same circumstances. Keith v. Frieberg, 492 F.Supp. 65 (D. Neb. 1980) (even assuming the parties had contact via the telephone from Nebraska about Plaintiff's South Dakota personal injury action, these were not significant enough contacts where the

¹The Tenth Circuit recognized this test in Rambo, although it did not reach the third element under the facts of that particular case. 839 F.2d at 1419 & n. 6.

case arose in South Dakota, attorneys maintained office only in South Dakota and never met with Plaintiff in Nebraska); Stonecipher v. Sexton, 54 FRD 435, 440 (D. Kan. 1972) (no evidence that attorney solicited business, practiced law, or performed professional services in Kansas forum). No single conclusion can be drawn from these cases except that courts place varying degrees of emphasis on similar factors when weighing an attorney's contacts with the forum. The one similarity among these cases is that courts will exercise personal jurisdiction when an attorney has actively solicited business in the forum. Miceli, 675 F.Supp. at 1563; Stonecipher 54 FRD at 440; see also, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 100 S.Ct. 559, 566 (1980); Continental American Corp. v. Camera Controls Corp., 692 F.2d 1309, 1313 (10th Cir. 1982) (Defendant corporation purposefully sought the contractual relationship and the consequences in the forum were foreseeable). Indeed, this Court cannot envision a more compelling paradigm of purposeful activity.

In this case Plaintiff's allegations are that Defendants entered into an agreement with him for legal representation; the parties had numerous contacts, personally or through local counsel, via the telephone and mails; statements for legal services were mailed to Tulsa and payment for those services were mailed from Tulsa and drawn on account Plaintiff maintains in Tulsa; and Defendants have received more than \$7,000 from Plaintiff in payment for those services. Accepting these allegations as true, and after attempting to distill the reasoning from other, similar cases into

a useful guide for this Court, the Court must conclude that Defendants have not purposefully availed themselves of the privilege of conducting activities in this forum. They were engaged by Plaintiff to represent him in Hawaii litigation, arising from events in Hawaii. Although Defendants' representation continued for several years, it was limited to the one action in Hawaii. There is no allegation that they actively solicited representation of Plaintiff in Oklahoma, or that they performed legal services in Oklahoma.

The Court reaches this conclusion not simply because the Defendants lack certain contacts that this Court, agreeing with other courts, thinks are important to confer jurisdiction. These contacts with Oklahoma have significance only if the Court can conclude that, on the whole, the contacts are such that Defendants should reasonably anticipate being sued here.² As the Supreme Court has said, "... the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the Defendants' conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there" [citations omitted]. World-Wide Volkswagen, 444 U.S. at 297, 100 S.Ct. at 567. The Defendants' alleged negligence admittedly has an "effect" in Oklahoma and therefore, might have been "foreseeable". Nevertheless, to use foreseeability as a crutch to confer

²The Court thus makes no generalizations about what act or combination of acts will satisfy due process in other cases.

jurisdiction here would be to exceed the limits of foreseeability's usefulness in a due process analysis. Thus, the agreement for legal representation, the correspondence, and the payment for services, which can confer jurisdiction in some cases, are not sufficient here when the Court asks whether Defendants could reasonably anticipate being sued in Oklahoma by those activities.

Finally, even assuming that the Court found Defendants to have purposefully availed themselves of activities in Oklahoma, the Court finds that the exercise of jurisdiction would not be reasonable. This is, in one sense, where the limits of foreseeability and reasonableness overlap. The allegedly tortious acts were committed in Hawaii. Hawaii, moreover, has a much greater interest in exercising jurisdiction over the Defendants than Oklahoma, in light of the allegations that Defendants negligently misrepresented the terms of the settlement, resulting in a federal district court in Hawaii ordering settlement consistent with those representations. c.f., Ealing Corp. v. Harrods Ltd., 790 F.2d 978, 983-984 (1st Cir. 1986) (due process satisfied when Defendant sent telex containing an allegedly fraudulent misrepresentation to forum). For the above reasons this Court will not exercise jurisdiction in this case and Defendants' motion to dismiss is granted.

As stated in the previous order the Court need not reach the other grounds raised by Defendants as a basis for dismissal.

IT IS THEREFORE ORDERED that Plaintiff's motion to reconsider is granted; the Court has reconsidered its previous order granting

Defendants' motion to dismiss, and

IT IS FURTHER ORDERED that Defendants' motion to dismiss is granted.

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
JUL 5 1989

HARRY ROBINSON, et al.,)
)
 Plaintiffs,)
)
vs.)
)
VOLKSWAGENWERK AG, et al.,)
)
 Defendants.)

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

No. 88-C-367-E
and 88-C-1435-E
Consolidated

ORDER

This matter is before the Court upon the motion of Myron Shapiro and Herzfeld & Rubin to dismiss the claims of Greer & Greer ("Greer") against them. Greer asserted these claims in a separate complaint, filed as Case No. 88-C-1435-E, which has now been consolidated with Case No. 88-C-367-E, in which Greer is a Defendant. The motion is granted in part and denied in part for the following reasons.

Greer claims that in the underlying lawsuit Defendants tortiously interfered with Greer's representation of its client, that in reliance on the representations made by Shapiro, and Herzfeld & Rubin, acting within the scope of their agency as agents for Volkswagenwerk AG, Greer filed an Amended Complaint in the underlying lawsuit substituting Audi NSU Union for Volkswagenwerk AG as Defendant. Greer alleges that these representations misstated the legal relationship between Audi and Volkswagenwerk AG, and as a result Greer's clients lost the underlying manufacturer's products liability suit. Greer claims that these

misstatements constitute fraud, fraudulent concealment and negligent misrepresentation.

The Court has reviewed the arguments presented and the applicable authorities and finds as follows.

First, Greer's claim for negligent misrepresentation should be dismissed as to Shapiro and Herzfeld & Rubin. The long-standing general rule is that an attorney cannot be liable for the consequences of his or her professional negligence to anyone other than the attorney's client, absent special circumstances. National Savings Bank v. Ward, 100 U.S. 195 (1879); Thomas Fruit Co. v. Levergood, 135 Okla. 105, 274 P. 471 (1929); Anderson v. Canady, 37 Okla. 171, 131 P. 697 (1913). The special circumstances recognized have included cases in which the Court found that Plaintiff was a third-party beneficiary of the relationship between attorney and client, or was otherwise in privity of contract with them. E.g., Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, cert.denied 368 U.S. 987 (1961). This rule has been further relaxed in California. In the case of Costello v. Wells Fargo Bank, 258 Cal.App.2d 90, 65 Cal.Rptr. 612 (1968) the California Court of Appeals recognized that an attorney may be liable for negligence to a third party. The Court stated that the determination of whether liability would be imposed in a particular case is a policy matter, involving the balancing of a number of factors, including:

- (1) the extent to which the transaction was intended to affect the Plaintiff;

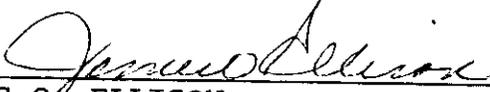
- (2) the foreseeability of harm to Plaintiff;
- (3) the degree of certainty that Plaintiff suffered injury;
- (4) the closeness of the connection between the conduct and the injury suffered; and
- (5) the policy of preventing future harm.

This rule has most often been applied in the situation where an attorney's negligence in drafting a will harms the interests of an intended beneficiary, e.g. Donald v. Garry, 19 Cal.App.3d 769, 97 Cal.Rptr. 191 (1971). The rule has not been applied in circumstances such as these, where the question is whether an attorney owes any duty to his or her adversary. The Tenth Circuit more recently has reaffirmed the rule that no duty runs from an attorney to the attorney's adversary. Tappen v Ager, 599 F.2d 376, 379; see also, Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 750 P.2d 118 (N.M. 1988). Thus, despite the persuasive reasoning of the California courts, the absence of authority in this jurisdiction compels this Court to rule that Greer's negligent misrepresentation claim fails as a matter of law.

On the other hand, Greer has stated a claim for fraud. The question whether Greer justifiably relied on the Defendants' statements is a question of fact. Likewise, the damages claimed are not so speculative as to preclude them as a matter of law. Further, Plaintiff's factual allegations are sufficient to allege that despite the exercise of reasonable diligence Greer did not discover the fraud until October 16, 1986, and therefore, the two-year statute of limitations was tolled until that date.

IT IS THEREFORE ORDERED that the motion to dismiss of Myron Shapiro and Herzfeld & Rubin is granted as to Greer and Greer's claim for negligent misrepresentation and is denied as to Greer and Greer's claim for fraud and fraudulent concealment.

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

JUL 03 1989

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

ALAN TATUM and PATRICIA TATUM,

Plaintiffs,

vs.

THE RAY STEPHENS COMPANY,
a Texas Corporation, d/b/a
SUNBELT AUTOMATIC FIRE
PROTECTION,

Defendant,

and

AETNA CASUALTY & SURETY COMPANY,
a foreign corporation,

Intervenor.

No. 88-C-565-E ✓

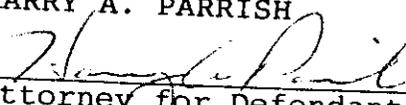
STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, Alan Tatum and Patricia Tatum, individually and as husband and wife, the Defendant, The Ray Stephens Company, a Texas Corporation, d/b/a Sunbelt Automatic Fire Protection, and the Intervenor, Aetna Casualty & Surety Company, a foreign corporation, and pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure, hereby stipulate to dismissal with prejudice of all claims involved herein, with each party to bear their own costs.

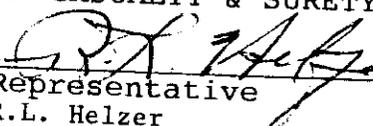
RICHARD A. GANN

Richard A. Gann
Attorney for Plaintiffs

HARRY A. PARRISH


Attorney for Defendant

AETNA CASUALTY & SURETY COMPANY

By: 
Representative
R.L. Helzer