

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

McNabb Coal Company, Inc.)
)
 Plaintiff,) Civil Action
)
 v.) No. 88-C-281-E
)
 MANUEL LUJAN, Secretary of the)
 Interior, et al.)
)
 Defendants.)

JUDGMENT

Pursuant to the court's Order filed April 28, 1989, and pursuant to Fed. R. Civ. P. 58, is it hereby adjudged and decreed:

(1) The decision of the Secretary of the Interior in McNabb Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 101 IBLA 282 (1988) is affirmed.

(2) McNabb Coal Co., Inc., is permanently enjoined from engaging in coal mining at its mine near Catoosa, Oklahoma, until it obtains a valid permit for surface coal mining operations as required by the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1201 et seq.), and until the reclamation fee debt adjudged in paragraph (4) below is paid.

(3) The claim of McNabb Coal Co., Inc. for a refund of reclamation fees is dismissed with prejudice and plaintiff will take nothing on said claim.

(4) McNabb Coal Co., Inc. shall pay to defendant, on defendant's counter-claim for reclamation fees, the principal sum of \$122,965.90, plus pre-judgment interest and penalties, accrued

under 30 C.F.R. § 870.15, in the sum of \$18,807.64, for a total of \$141,773.54. Post-judgment interest shall accrue on the pre-judgment total at the rate of 9.51 percent per annum until the debt is paid.

(5) McNabb Coal Co., Inc. is permanently enjoined to reclaim, to the standards of the Oklahoma Permanent Regulatory Program, all lands mined for coal after June 1, 1983. Such reclamation shall be completed no later than November 1, 1989 (exclusive of vegetation maintenance and other maintenance requirements), and shall be accomplished to the reasonable satisfaction of the Secretary's representatives in the Office of Surface Mining Reclamation and Enforcement; Provided, that any area brought under a valid permit and properly bonded for continued coal mining operations by November 1, 1989, shall be excluded from the reclamation deadline imposed by this judgment, and shall be governed by the mining and reclamation plan under the new permit.

(6) McNabb Coal Co., Inc. shall pay the defendant's costs in this action.

JAMES O. ELLISON

JAMES O. ELLISON
United States District Judge

I concur in () oppose (✓)
this form of judgment.

Paul Pennington AUSA 5/30/89/p
for Ken Ray Underwood
Counsel for McNabb Coal Co., Inc.

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

FILED

SEP 9 1988

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

ALLSTATE INSURANCE COMPANY,

Plaintiff,

v.

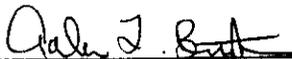
No. 89-C-167-E

BARBARA SUE GODFREY; BETTY J. FLYNT; and
DALE LEE GODFREY,

Defendant.

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Allstate Insurance Company, by and through its attorney of record, Galen L. Brittingham of the law firm of Thomas, Glass, Atkinson, Haskins, Nellis & Boudreaux, and hereby dismisses with prejudice Plaintiff's declaratory judgment action against the Defendants, Barbara Sue Godfrey, Betty J. Flynt and Dale Lee Godfrey.



GALEN L. BRITTINGHAM, attorney for
Plaintiff



JOHN GLADD, SR., attorney for
Defendant, Dale Lee Godfrey



JACK MANER, attorney for Defendants,
Barbara Sue Godfrey and Betty J.
Flynt

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 29 1989

DA

CLERK
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIE MAE WILSON; JOHNNIE L.
WILSON; COUNTY TREASURER, Tulsa
County, Oklahoma; and BOARD OF
COUNTY COMMISSIONERS, Tulsa
County, Oklahoma,

Defendants.

CIVIL ACTION NO. 89-C-047-B ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29th day
of Sept., 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, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by Carl Robinson, Assistant District Attorney,
Tulsa County, Oklahoma; and the Defendants, Willie Mae Wilson and
Johnnie L. Wilson, appear not, but make default.

The Court being fully advised and having examined the
file herein finds that Defendant, County Treasurer, Tulsa County,
Oklahoma, acknowledged receipt of Summons and Complaint on
January 25, 1989; and that Defendant, Board of County
Commissioners, Tulsa County, Oklahoma, acknowledged receipt of
Summons and Complaint on January 24, 1989.

The Court further finds that the Defendants, Willie Mae Wilson and Johnnie L. Wilson, were served by publishing notice of this action in the Tulsa Daily Business Journal & Legal Record, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 5, 1989, and continuing to July 10, 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, Willie Mae Wilson and Johnnie L. Wilson, 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 abstractor filed herein with respect to the last known addresses of the Defendants, Willie Mae Wilson and Johnnie L. Wilson. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and

identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to the subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on February 13, 1989; and that the Defendants, Willie Mae Wilson and Johnnie L. Wilson, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Twenty-three (23), Block Seven (7), New Haven Addition, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on September 19, 1986, the Defendants, Willie Mae Wilson and Johnnie L. Wilson, 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 \$22,050.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Willie Mae Wilson and Johnnie L. Wilson, 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 September 19, 1986, covering the above-described property. Said mortgage was recorded on September 23, 1986, in Book 4971, Page 1118, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Willie Mae Wilson and Johnnie L. Wilson, 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, Willie Mae Wilson and Johnnie L. Wilson, are indebted to the Plaintiff in the principal sum of \$21,827.26, plus interest at the rate of 10 percent per annum from June 1, 1988 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against Defendants, Willie Mae Wilson and Johnnie L. Wilson, in the principal sum of \$21,827.26, plus interest at the rate of 10 percent per annum from June 1, 1988, until judgment, plus interest thereafter at

the current legal rate of 8.19 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, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

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

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SEP 26 1989

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 FOUR THOUSAND DOLLARS)
 (\$4,000.00) IN UNITED)
 STATES CURRENCY,)
 and)
 ONE 1984 LINCOLN TOWNCAR,)
 VIN 1LNBP96FXEY648860,)
)
 Defendants.)

UNITED STATES DISTRICT COURT

Civil Action No.
89-C-799-B

ORDER DISMISSING CLAIMS AND DECREE OF FORFEITURE

IT NOW APPEARS that the claims filed in the administrative action have been fully compromised and settled. Such settlement more fully appears by the written Stipulation For Compromise entered into between the Claimant, Vernon Jackson, and the United States of America on the 27th day of September, 1989, and filed herein, to which Stipulation For Compromise reference is hereby made and is incorporated herein. Therefore, the claims in the administrative action should be dismissed with prejudice.

IT FURTHER APPEARS that no other claims to said property have been filed since such property was seized.

NOW, THEREFORE, on motion of Catherine J. Depew, Assistant United States Attorney for the Northern District of Oklahoma, and with the consent of Vernon Jackson, it is

ORDERED that the claims of Vernon Jackson in the administrative actions be, and the same hereby are, dismissed with prejudice, and it is

FURTHER ORDERED AND DECREED that the defendant vehicle be, and it hereby is condemned as forfeited to the United States of America for disposition according to law, and it is

FURTHER ORDERED AND DECREED that One Thousand Dollars (\$1,000.00) in United States Currency be, and hereby is, forfeited to the United States of America and shall remain in the custody of the United States Marshal for disposition according to law, and that Three Thousand Dollars (\$3,000.00) shall be returned to the claimant by the United States Marshal.

IT IS FURTHER ORDERED that the bonds posted by Vernon Jackson in the administrative actions, in the amounts of \$950.000 and \$400.00 be, and they are, hereby forfeited to the United States of America for disposition according to law.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

CJD/ch

Calvin Davies, a/k/a Calvin Robert Davies, for the principal amount of \$27,625.00, plus accrued interest of \$1,227.76 as of February 28, 1989, plus interest thereafter at the rate of 4 percent per annum until judgment, plus interest thereafter at the current legal rate of 8.19 percent per annum until paid, plus costs of this action.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

cen

IN THE UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 1 1986

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

TERRY RACICOT,

Plaintiff,

vs.

Case No. 89-C-391-B

OKLAHOMA STATE UNIVERSITY, a
member of The Oklahoma State
System of Higher Education;

THE OKLAHOMA STATE REGENTS
FOR HIGHER EDUCATION;

CLYDE B. JENSEN, Ph.D.,
in his official capacity as
President of the College of
Osteopathic Medicine of
Oklahoma State University;

JACK R. WOLFE, D.O., in his
official capacity as Dean
of Academic Affairs of the
College of Osteopathic Medicine
of Oklahoma State University;

Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated by the Plaintiff, Terry Racicot, and the Defendants, the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges, Oklahoma State University, Clyde B. Jensen, Jack R. Wolfe (the preceding Defendants shall be collectively referred to hereafter as the "OSU Defendants") and the Oklahoma State Regents for Higher Education, that the above entitled action be dismissed with prejudice pursuant to

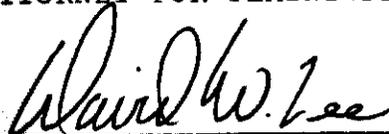
Rule 41 (a)(1)(ii) of the Federal Rules of Civil Procedure.

Respectfully submitted,



KATHY EVANS BORCHARDT
403 South Cheyenne Avenue
Adams Building, Suite 410
Tulsa, OK 74103
(918) 585-1271

ATTORNEY FOR PLAINTIFF



DAVID W. LEE
McKenzie & Sykora
300 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, OK 73102
(405) 232-3722

ATTORNEY FOR THE OSU DEFENDANTS



GUY HURST
Office of the Attorney General
420 West Main, Room 550
Oklahoma City, OK 73102

ATTORNEY FOR THE DEFENDANT,
OKLAHOMA STATE REGENTS FOR
HIGHER EDUCATION

ejj

OBA # 5092

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

FILED
SEP 27 1989

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

CLIFFORD WEAVER AND ARMEDA
WEAVER, husband and wife,

Plaintiffs,

Case No. 89-C-183-B

vs.

STATE FARM FIRE AND CASUALTY
COMPANY, a corporation, and
MIKE AUSTIN, an individual,

Defendants.

ORDER OF DISMISSAL

NOW, on this 27th day of Sept., 1989, upon the written Application of the parties for a Dismissal With Prejudice of the Complaint and all causes of action, the Court having examined said Application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said Application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiffs filed herein against the Defendant be and the same are hereby dismissed with prejudice to any future action.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

1989 *dt*

STANLEY RAY KELLEY,
Plaintiff,
vs.
RON CHAMPION, Warden, et al.,
Defendants.

By Clerk, Clerk
of the Court

No. 88-C-1481-E ✓

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate filed February 16, 1989. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that Plaintiff Kelley's Petition for a Writ of Habeas Corpus must be and is hereby denied.

ORDERED this 27th day of September, 1989.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

1989

JOSEPH PAQUETTE,

Plaintiff,

vs.

OKLAHOMA FIXTURE COMPANY,
et al.,

Defendants.

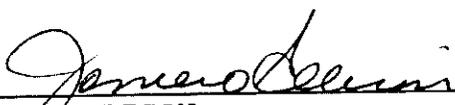
No. 88-C-442-E

JUDGMENT

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

IT IS THEREFORE ORDERED that the Plaintiff Joseph Paquette take nothing from the Defendants Oklahoma Fixture Company and Painter's Local Union 1895 of Tulsa, Oklahoma, that the action be dismissed on the merits, and that the Defendants recover of the Plaintiff Paquette their costs of action.

ORDERED this 26th day of September, 1989.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

EDWARD H. BEARS,)
)
 Plaintiff,)
)
 and)
)
 ALAN BIRD,)
)
 Intervenor,)
)
 vs.) No. 88-C-355-E
)
 THE BOARD OF COUNTY)
 COMMISSIONERS OF ROGERS COUNTY,)
 OKLAHOMA and)
 BUCK JOHNSON, SHERIFF OF)
 ROGERS COUNTY, OKLAHOMA,)
)
 Defendants.)

DISMISSAL WITH PREJUDICE

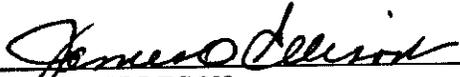
NOW on this 26th day of Sept, 1989, the above
entitled cause comes on before me, the undersigned Judge, upon
the Stipulation of Dismissal signed by the Plaintiff, Intervenor
and Defendants. The Court, having examined such Stipulation of
Dismissal, being advised that the parties had settled this
matter, and approving the terms of said settlement hereby orders,
adjudges and decrees that the above styled and numbered cause be,
and the same is hereby dismissed with prejudice to refiling same.

IT IS SO ORDERED.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

ORDERED this 26th day of September, 1989.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

PHILLIP JAMES GUERRA,
Plaintiff,

vs.

BOARD OF COUNTY
COMMISSIONERS OF TULSA
COUNTY, OKLAHOMA, a Political
Subdivision; SCOTT ORBISON,
in his Official Capacity as Tulsa
County Election Board Secretary;
and HARMON MOORE, JR.,

Defendants.

No. 87-C-286-E

ORDER OF DISMISSAL

NOW on this 25th day of Sept, 1989, there comes on for consideration the Joint Stipulation for **Dismissal** filed by the attorneys for the plaintiff and defendant Harmon Moore, Jr., and for **good cause** shown,

IT IS HEREBY ORDERED that this matter be dismissed **without prejudice** as to defendant Harmon Moore, Jr., only, with each party to pay their own attorney's fees and costs.

United States District Judge

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

FILED
SEP 26 1989

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

CITICORP NEVADA CREDIT,
INC.,

Plaintiff,

v.

No. 89-C-150-B ✓

Z-MOORE ENTERPRISES
d/b/a BURGER KING,
a general partnership,
MOORE-ZINDEL d/b/a BURGER
KING #4800, a general
partnership, Z-MOORE, P.C.,
a general partnership,
BRUCE C. ZINDEL,
CHARLES W. MOORE,
M. JOYCE MOORE, and
BANK OF OKLAHOMA, N.A.
and BANK OF OKLAHOMA,
CLAREMORE,

Defendants.

AGREED JUDGMENT

Plaintiff, by counsel, and defendants, by counsel,
hereby agree to the entry of judgment in favor of plaintiff
on its first amended complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that
the plaintiff, Citicorp Nevada Credit, Inc., is granted:

1. Judgment **against** Z-Moore Enterprises d/b/a
Burger King, Z-Moore, P.C., Charles W. Moore and Bruce
Zindel, jointly and severally in the amount of \$167,311.83,
plus 12% interest from March 14, 1989, until paid; and

2. Judgment **declaring** that the plaintiff is
entitled to the immediate possession of the collateral

described in Count I of its first amended complaint, and that plaintiff has a first, valid, and superior security interest covering the aforesaid collateral; and

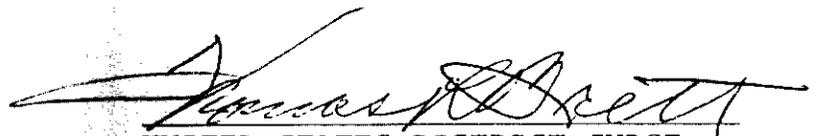
3. Judgment declaring that Bank of Oklahoma, Claremore has a second, valid security interest in the collateral described in Count I of the first amended complaint; and

4. Judgment against Moore-Zindel d/b/a Burger King #4800, Charles W. Moore, M. Joyce Moore and Bruce Zindel, jointly and severally, in the amount of \$197,239.60, plus 13.51% interest from March 31, 1989, until paid; and

5. Judgment declaring that plaintiff is entitled to immediate possession of the collateral described in Count II of its first amended complaint and that plaintiff has a first, valid, and superior security interest covering the aforesaid collateral; and

6. Judgment declaring that Bank of Oklahoma, N.A. has a second, valid security interest in the collateral described in Count II of the first amended complaint.

Date: Sept. 26th, 1989

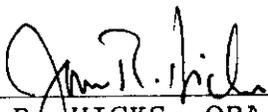

UNITED STATES DISTRICT JUDGE

AGREED TO:


MACK J. MORGAN III, OBA 6397

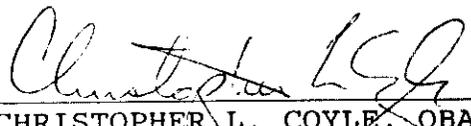
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(405) 235-7700
ATTORNEY FOR PLAINTIFF


JAMES R. HICKS, OBA 11345

-Of the Firm-

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(918) 592-2424
ATTORNEY FOR DEFENDANTS Z-MOORE
ENTERPRISES d/b/a BURGER KING,
MOORE-ZINDEL d/b/a BURGER KING #4800,
Z-MOORE, P.C., BRUCE ZINDEL, CHARLES
W. MOORE AND M. JOYCE MOORE


CHRISTOPHER L. COYLE, OBA 1979

-Of the Firm-

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(918) 583-1232
ATTORNEY FOR DEFENDANTS BANK
OF OKLAHOMA, N.A. AND BANK OF
OKLAHOMA, CLAREMORE

168.89B.MJM

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

TRANSWESTERN MINING COMPANY,)
a Nevada corporation,)

Plaintiff,)

vs.)

Case Number 88-C-1220-B

WAYMON W. BEAN and SHARON A.)
BEAN, husband and wife;)
MELVIN D. MATTIX and MARY)
EARLENE MATTIX, husband and)
wife, d/b/a D&E OIL COMPANY;)
DAVID GUNSBURG; FOREST OIL)
CORPORATION; L. D. COOK;)
GLENN B. SCHUBER; SEVENTY-ONE,)
INC.; FOREST PRODUCING)
CORPORATION; E.D. WOODARD;)
SUPERIOR OIL & GAS COMPANY;)
JUPITER OIL COMPANY; PRODUCERS)
PIPELINE COMPANY; ALLUWE OIL)
COMPANY; WILLIAMSPORT OIL &)
GAS COMPANY; MILAM SUPPLY)
COMPANY; A. W. STOREY;)
NICHOLAS B. V. FRANCHOT;)
and PREMIER PETROLEUM COMPANY,)
and their unknown heirs,)
successors, devisees,)
trustees, administrators,)
executors, and assigns,)
immediate and remote,)

Defendants.)

FILED

SEP 26 1989

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

JUDGMENT

Pursuant to the Order granting Plaintiff's Motion for Summary Judgment against Defendants Waymon W. Bean and Sharon A. Bean ("Bean") on Plaintiff's claims arising under the October 30, 1987 Promissory Note, Collateral Assignment of Interest in Oil and Gas Leases, and Subordination and Service Agreement, the

Court finding that Defendants Bean have breached all of such agreements and are in default thereunder, and pursuant to the Order granting default judgment against the remaining Defendants, the Court finds that judgment should be entered in favor of Plaintiff, and it is, therefore,

ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff shall be and is hereby granted judgment against the Defendants Waymon W. Bean and Sharon A. Bean, husband and wife, jointly and severally, in the principal amount of \$200,000.00, and accrued interest through August 31, 1989, in the amount of \$27,728.76, and interest accruing thereafter at the rate of ten percent (10%) per annum, until paid in full, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff shall be and is hereby granted judgment against all Defendants that the Plaintiff's October 30, 1987 Collateral Assignment of Interest in Oil and Gas Leases (hereinafter called "Mortgage") be foreclosed on the following oil and gas leases and related personal property located in Nowata County, Oklahoma, and more particularly described as follows, to-wit:

A. L. LAWRENCE LEASE:

The S/2 of the SW/4 of the SE/4 of Section 30, Township 25 North, Range 17 East, and the NW/4 of the NW/4 of the NE/4 of Section 31, Township 25 North, Range 17 East; and the NW/4 of the SE/4 of the SW/4, and the E/2 of the SE/4 of the SW/4, and the N/2 of the SW/4 of the SE/4 of Section 30, Township 25 North,

Range 17 East, and the E/2 of the SE/4 of the NW/4, and the E/2 of the NE/4 of the SW/4, and the SW/4 of the NE/4, and the N/2 of the SE/4 of Section 30, Township 25 North, Range 17 East, and the SW/4 SE/4 of SW/4 of Section 30, Township 25 North, Range 17 East, containing 250 acres, more or less, including, without limitation, the oil and gas lease dated July 2, 1909, from Adeline L. Lowrance, as lessor, to David Gunsburg, as lessee, and filed in the office of the Nowata County Clerk on July 2, 1909, in Book 38, Page 142, and the oil and gas lease dated July 2, 1909, from Elmer P. Merritt, as lessor, to David Gunsburg, as lessee, and filed in the office of the Nowata County Clerk on July 2, 1909, in Book 38, Page 143.

HOHMAN PURCHASE LEASE:

N/2 of the SW/4, and the SW/4 of the NW/4, and the SE/4 of SE/4 of the NW/4, of Section 29, Township 25 North, Range 17 East, and the NW/4 of the SE/4 of Section 29, Township 25 North, Range 17 East, and SE/4 of the NE/4 of Section 30, Township 25 North, Range 17 East, containing 210 acres, more or less, including, without limitation, the oil and gas lease dated September 1, 1935, from Wiser Oil Company, as lessor, to Forest Producing Corporation, as lessee, and filed in the office of the Nowata County Clerk on February 26, 1936, in Book 261, Page 70, and the oil and gas lease dated September 1, 1935, from Wiser Oil Company, as lessor, to Forest Producing Corporation, as lessee, and filed in the office of the Nowata County Clerk on February 26, 1936, in Book 261, Page 69.

NADIE LEE MEHLIN LEASE:

S/2 of the NE/4 of Section 29, Township 25 North, Range 17 East, containing 80 acres, more or less, including, without limitation, the oil and gas lease dated October 15, 1904, from Charles H. Mehlin as Guardian of Nadie Lee Mehlin, as lessor, to Jupiter Oil Company, as lessee, and filed in the office

of the Nowata County Clerk on July 10, 1909,
in Book 48, Page 549.

JAMES G. MEHLIN LEASE:

NE/4 of the SE/4 of Section 29, Township 25 North, Range 17 East, containing 40 acres, more or less, including, without limitation, the oil and gas lease dated May 4, 1905, from William J. Langley, as lessor, to Jupiter Oil Company, as lessee, and filed in the office of the Nowata County Clerk on July 10, 1909, in Book 48, Page 539.

GALER #3 LEASE:

The W/2 of the SE/4 of the NW/4 of Section 29, Township 25 North, Range 17 East, containing 20 acres, more or less, including, without limitation, the oil and gas lease dated July 19, 1909, from Ethel R. Gourd, as lessor, to F. W. Galer, as lessee, and filed in the office of the Nowata County Clerk on July 19, 1909, in Book 38, Page 459.

HENRY STANFIELD #1 LEASE:

S/2 of the SW/4, and the N/2 of the S/2 of the SE/4 of Section 29; and the SE/4 of the SE/4 of Section 30, and the N/2 of the NE/4 of the NE/4, and the NE/4 of the NW/4 of the NE/4 of Section 31; and the NW/4 of the NW/4 of Section 33, and the SW/4 of the NW/4 of the SW/4, and the SW/4 of the SW/4 of Section 28, all in Township 25 North, Range 17 East, containing 280 acres, more or less, including, without limitation, the oil and gas lease dated June 29, 1946, from W. G. Phillips and Rande H. Phillips, and J. B. Milam and Elizabeth P. Milam, as lessors, to Forest Oil Corporation, as lessee, and filed in the office of the Nowata County Clerk on July 13, 1946, in Book 305, Page 299.

JESSIE R. GOURD LEASE:

The NW/4 of the NW/4 of the SW/4, and the SW/4 of the SE/4 of the SW/4 of Section 28, Township 25 North, Range 17 East, containing

20 acres, more or less, including, without limitation, the oil and gas lease dated December 20, 1919, from F. W. Calvert and Irma B. Calvert, as lessors, to Alluwe Oil Company, as lessee, and filed in the office of the Nowata County Clerk on December 26, 1919, in Book 158, Page 538.

JAMES E. MILAM LEASE:

The E/2 of the SE/4 of the SW/4, and the SW/4 of the SE/4, and the W/2 of the SE/4 of the SE/4 of Section 28, Township 25 North, Range 17 East, containing 80 acres, more or less, including, without limitation, the oil and gas lease dated June 27, 1905, from James E. Milam, as lessor, to Milam Supply Company, as lessee, and filed in the office of the Nowata County Clerk on February 15, 1912, in Book 64, Page 178, and the oil and gas lease dated October 2, 1913, from William G. Milam and Sarah E. Milam, as lessors, to Williamsport Oil & Gas Company, as lessee, and filed in the office of the Nowata County Clerk on October 4, 1913, in Book 94, Page 339.

C. S. CLARK LEASE:

S/2 of the NE/4; and the N/2 of the NE/4, and E/2 of the NW/4 all in Section 33, Township 25 North, Range 17 East, containing 240 acres, more or less, including, without limitation, the oil and gas lease dated April 25, 1916, from William A. Clark as Guardian of Clarinda S. Clark, a minor, as lessor, to Wiser Oil Company, as lessee, and filed in the office of the Nowata County Clerk on June 7, 1916, in Book 116, Page 274, the oil and gas lease dated September 9, 1913, from Lucy J. Clark, as lessor, to A. W. Storey, as lessee, and filed in the office of the Nowata County Clerk on October 2, 1913, in Book 94, Page 288, and the oil and gas lease dated April 9, 1915, from William A. Clark, as Guardian of Mary L. Clark, a minor, as lessor, to Wiser Oil Company, as lessee, and filed in the office of the Nowata County Clerk on April 15, 1915, in Book 105, Page 194,

together with the rights incident thereto and the personal property thereon, appurtenant thereto, or used or obtained in connection therewith, including, without limitation, all pump jacks, equipment, fixtures, tanks, tools, tubing, and all other types of personal property. (Hereinafter all of the above-described oil and gas leases, rights, and personal property shall be referred to as "Property".)

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff's Mortgage be foreclosed and the Property described above sold according to law, to satisfy the indebtedness hereinabove set forth, that the proceeds of such sale, after payment of the costs of the sale, should be distributed to the Plaintiff as hereinafter provided.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above-described Mortgage of Plaintiff is a valid first mortgage superior to the interests of all others on the Property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that a special execution and order of sale and foreclosure shall issue, commanding the Sheriff of Nowata County to levy upon the Property, and after having the same appraised as provided by law, shall proceed to advertise and sell the same as provided by law, and such Sheriff shall apply the proceeds arising from such sale as follows:

1. In payment of the costs of such sale and of this action;

2. In payment to Plaintiff the principal sum of \$200,000.00, together with interest thereon through August 31, 1989, in the amount of \$27,728.76, plus interest accruing thereafter at the rate of ten percent (10%) per annum from August 31, 1989, until paid in full, plus the costs of this action;

3. The residue, if any, shall be held by the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that from and after the sale of the above-described Property and after the confirmation of such sale by the Court, the Plaintiff and Defendants, and each of them, shall be forever barred and foreclosed of and from any claim or lien upon or adverse to the right and title of the purchaser of such sale, excepting, however, the rights of Transwestern under the Subordination and Service Agreement, and the Plaintiff and Defendants herein, and all persons claiming by, through or under them since the commencement of this action are hereby perpetually enjoined and restrained from ever setting up or asserting any lien upon the right, title, equity or interest in and to the Property adverse to the right or title of the purchaser at such sale if, as to the sale of the Property, the same be had and confirmed, excepting, however, the rights of Transwestern under the Subordination and

Service Agreement, and that upon application by the purchaser, the Clerk of the Court shall issue a writ of assistance to the Sheriff of Nowata County, who shall, thereupon and forthwith, place such purchaser in full and complete possession and enjoyment of the premises.

Dated this 26th day of September, 1989.

S/ THOMAS R. BRETT
HON. THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By: Richard H. Foster
Kevin C. Coutant (OBA #1953)
Richard H. Foster (OBA #3055)
1000 Atlas Life Building
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for the Plaintiff
Transwestern Mining Company

BAKER & BAKER

By: Jay C. Baker
Jay C. Baker
1850 South Boulder Avenue
Tulsa, Oklahoma 74119
(918) 587-1168

Attorneys for Defendants
Waymon W. Bean and Sharon A. Bean

2. For judgment on Bank of the Lakes' Fourth Cause of Action in the principal amount of \$22,630.42, plus interest accruing after May 24, 1989, at the rate of 20% per annum until paid, plus the costs of this action, including a reasonable attorney's fee of \$500.00.

3. For judgment on Bank of the Lakes' Fifth Cause of Action in the principal amount of \$28,608.00, plus accrued interest of \$2,187.69 through April 1, 1988, plus interest accruing after April 1, 1988, at the rate of 20% per annum until paid, plus the costs of this action, including a reasonable attorney's fee of \$500.00.

4. For judgment on Bank of the Lakes' Sixth Cause of Action in the principal amount of \$2,155.16, plus interest accruing after July 23, 1988, at the rate of 19% per annum until paid, plus the costs of this action, including a reasonable attorney's fee of \$500.00.

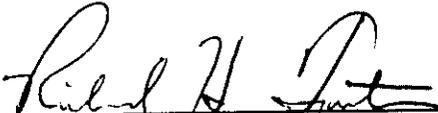
Dated this 25th day of September, 1989.

JAMES O. ELLISON

HON. JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

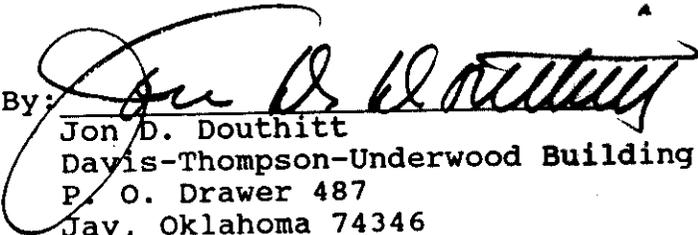
APPROVED:

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By: 
Robert F. Biolchini (OBA #800)
Richard H. Foster (OBA #3055)
1000 Atlas Life Building
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for the Defendant
Bank of the Lakes

DAVIS & THOMPSON

By: 
Jon D. Douthitt
Davis-Thompson-Underwood Building
P. O. Drawer 487
Jay, Oklahoma 74346
(918) 253-4298

Attorneys for Defendants
Charles Gary James and
Patricia K. James

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA SEP 28 1989

ARTIE JEAN WHITE,)
)
 Plaintiff,)
)
 vs.)
)
 PRINCIPAL FINANCIAL GROUP,)
 INC. and METAL DYNAMICS)
 CORPORATION,)
)
 Defendants.)

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

No. 89-C-232-B ✓

ORDER

This matter comes on for consideration upon Defendant Metal Dynamics Corporation's ("MDC") Motion to Dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Plaintiff initiated this action in state court on January 17, 1989. Defendant Principal Financial Mutual Life Insurance Company' removed this action to this court on March 28, 1989.

Plaintiff's petition contains the following claim against MDC:

"Defendant, METAL DYNAMICS CORPORATION, was negligent in failing to meet the requirements THE PRINCIPAL FINANCIAL GROUP, in providing coverage for employees.

"Defendants have refused to pay life insurance proceeds and Defendant, THE PRINCIPAL FINANCIAL GROUP has denied coverage."

In various briefs and responses it appears Plaintiff's claim, if any, against MDC is a negligent failure to notify the insurance

'Plaintiff's state court petition incorrectly named as a defendant Principal Financial Group, Inc.; Principal Mutual Life Insurance Company ("Principal Mutual") has voluntarily appeared by its answer filed April 19, 1989.

carrier, Principal Mutual, that Plaintiff's deceased husband had returned to work (with MDC) thereby, presumably, reinstating or recovering Plaintiff's deceased husband with some type of insurance coverage.² None of the foregoing has been pleaded by Plaintiff against MDC (if, in fact, this is the basis of the "claim"). Plaintiff's petition was filed January 17, 1989. MDC's Motion to Dismiss was filed May 2, 1989. Plaintiff failed to timely respond and the Court granted Plaintiff, on June 11, 1989, permission to file a response which has been considered by the Court.

The Court concludes the Plaintiff has, as the initial pleading now stands, failed to state a claim upon which relief can be granted.³ The Court further concludes Plaintiff's petition as to MDC should be and the same is DISMISSED, without prejudice.

IT IS SO ORDERED this 26th day of September, 1989.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

²Plaintiff's response indicates insurance coverage was denied based on MDC's failure to notify Principal Mutual.

³Fed.R.Civ.P. 12(b)(6).

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

FILED

SEP 22 1989

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

SUNBELT SAVINGS, a Federal Savings and Loan Association,)

Plaintiff,)

vs.)

TASTEMAKERS, JOHN G. ARNOLD, JR., MARGOT RHODES ARNOLD, JOHN R. WOOLMAN, DEBORAH WOOLMAN, and WOOLMAN PROPERTIES, INC.,)

Defendants,)

and)

101st and DELAWARE DEVELOPMENT COMPANY, an Oklahoma corporation,)

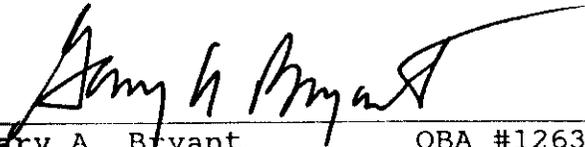
Additional Defendant.)

Case No. 88-C-1332-C

STIPULATION FOR DISMISSAL WITH PREJUDICE

Chisholm Federal Savings and Loan Association ("Chisholm"), substituted plaintiff herein, successor in interest to Sunbelt Savings, and Federal Savings and Loan Insurance Corporation, as receiver for Sunbelt Savings, and defendants, Tastemakers, an Oklahoma general partnership, John G. Arnold, Jr., Margot Rhodes Arnold, John R. Woolman, Deborah Woolman, Woolman Properties, Inc., and 101st and Delaware Development Company, an Oklahoma corporation, hereby stipulate, pursuant to Rule 41, Federal Rules of Civil Procedure, that the above and foregoing action, and all claims and counterclaims made therein, may be dismissed with prejudice to refileing, and each party hereto shall bear its own costs and attorneys' fees.

Handwritten mark

By: 

Gary A. Bryant

OBA #1263

Of the Firm:

MOCK, SCHWABE, WALDO, ELDER,
REEVES & BRYANT

A Professional Corporation

Fifteenth Floor

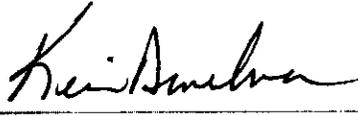
One Leadership Square

211 North Robinson

Oklahoma City, OK 73102

(405) 235-5500

ATTORNEYS FOR CHISHOLM FEDERAL
SAVINGS AND LOAN ASSOCIATION

By: 

John B. Heatly

Of the Firm:

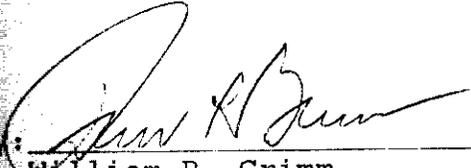
Fellers, Snider, Blankenship,
Bailey & Tippens

2400 First National Center

Oklahoma City, OK 73102

(405) 232-0621

ATTORNEYS FOR FEDERAL SAVINGS AND
LOAN INSURANCE CORPORATION

By: 
William R. Grimm

Of the Firm:
Barrow, Gaddis, Griffith & Grimm
Suite 300
610 S. Main Street
Tulsa, OK 74119-1224
(918) 584-1600

ATTORNEYS FOR TASTEMAKERS, an
Oklahoma general partnership,
JOHN G. ARNOLD, JR., MARGOT RHODES
ARNOLD, JOHN R. WOOLMAN, DEBORAH
WOOLMAN, WOOLMAN PROPERTIES, INC.,
and 101st AND DELAWARE DEVELOPMENT
COMPANY, an Oklahoma corporation

1332 c

IT IS SO ORDERED THIS 29 day of Sept, 1989.


UNITED STATES DISTRICT JUDGE

SEP 21 1989

DISTRICT COURT

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

RIMER PLUMBING,

Plaintiff,

vs.

MARATHON PETROLEUM CO.,

Defendant.

No. 89-C-32-E ✓

FILED

1989

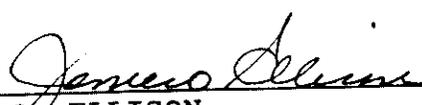
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 25th day of September, 1989.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

CREEK COUNTY LUMBER COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 SOONER SUPPLIES, INC.,)
)
 Defendant,)
)
 vs.)
)
 NATHANIEL KIRKWOOD,)
)
 Third-Party Defendant.)

No. 89-C-204-E

SEP 21 1989

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 25th day of September, 1989.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

James O. Ellison
Judge

United States District Court

Northern District of Oklahoma

333 West Fourth, Room 4-500

United States Courthouse

Tulsa, Oklahoma 74103

September 26, 1989

(918) 581-7981
(FCS) 736-7981

TO: COUNSEL/PARTIES OF RECORD
RE: CASE NO. 89-C-562-E^{✓ad} - EDWARD S.
SCOTT, III V. RON CHAMPION, ET AL.

This is to advise you that Judge James O. Ellison entered the following Minute Order this date in the above case:

Plaintiff's Motion to Dismiss Amended Petition is granted.

Very truly yours,



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

_____ Counsel Notified

Clerk to Notify

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

F I L E D

SEP 26 1989

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

GERALDINE PARKER,

Plaintiff,

v.

JACK TAR VILLAGE RESORTS,

Defendant.

No. 89-C-245-B ✓

ORDER

This matter comes on for consideration upon the Special Appearance and Motion to Dismiss (for lack of jurisdiction over Defendant) filed by Jack Tar Village Resorts.¹ Defendant seeks, in the alternative, summary judgment if the Court determines jurisdiction exists over the Defendant.

Plaintiff visited, on August 3, 1988, the Jack Tar Village Grand Bahama Hotel located on Grand Bahama Island in the Commonwealth of the Bahamas. While at the hotel Plaintiff rented a bicycle from the hotel which Plaintiff alleges was defective and dangerous. As a result of the defective and dangerous condition of the bicycle, Plaintiff had an accident injuring her ankle and leg, and seeks damages.

By deposition and affidavits before the Court it is without dispute the hotel visited by Plaintiff in August 1988 was then owned by Grand Bahama Hotel Company, a Delaware corporation, with its principal place of business in Dallas, Texas. The Defendant,

¹The correct name of the Defendant is Jack Tar Village Resorts, Inc. Plaintiff's petition failed to denominate Defendant's legal status other than being "a business entity."

Jack Tar Village Resorts, Inc., is an affiliated company to Grand Bahama Hotel Co., Inc., both being owned by Consolidated Investment Services, Inc., a Nevada corporation, with its principal place of business in South Dakota. Consolidated, in turn, is owned by a holding company, Sammons Enterprises, Inc., a Delaware corporation, with its principal place of business in Dallas, Texas.

It is undisputed that Defendant does advertising for Grand Bahama Hotel Co., Inc., but in no way has any ownership of, control over, financial interest in, or management responsibility regarding the hotel Plaintiff visited in August 1988. While the Court concludes the Defendant has sufficient contacts with the State of Oklahoma and particularly the Northern District of Oklahoma, through its advertising efforts and otherwise, to confer personal jurisdiction,² it does not follow that Plaintiff has sufficiently pled a cause of action against this Defendant. In short, the Plaintiff has sued, as it turns out, the wrong defendant.

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.

²Burger King Corp. v. Rudzewicz, 105 S.Ct. 2174 (1985); World-Wide Volkswagen Corp. v. Woodson, 100 S.Ct. 559 (1980).

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, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "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).

It is horn-book law that a plaintiff cannot recover, for an injury allegedly sustained by a dangerous and defective instrumentality, from a defendant who does not own, control, manage or otherwise have responsibility regarding such instrumentality.

The Court concludes summary judgment should be and the same is hereby GRANTED in favor of Defendant.

IT IS SO ORDERED this 26 day of September, 1989.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ISAAC WALKER,
a/k/a Issac Walker,
a/k/a Issac B. Walker,

Defendant.

SEP 25 1989

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

) CIVIL ACTION NO. 88-C-1557-B

DEFAULT JUDGMENT

This matter comes on for consideration this 25th day
of Sept., 1989, the Plaintiff appearing by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Catherine J. Depew, Assistant United States
Attorney, and the Defendant, Isaac Walker, a/k/a Issac Walker,
a/k/a Issac B. Walker, appearing not.

The Court being fully advised and having examined the
court file finds that Defendant, Isaac Walker, a/k/a Issac
Walker, a/k/a Issac B. Walker, was served with Summons and
Complaint on August 9, 1989, by service upon his mother, an
adult who resides with him at the same residence. The time
within which the Defendant could have answered or otherwise
moved as to the Complaint has expired and has not been extended.
The Defendant has not answered or otherwise moved, and default
has been entered by the Clerk of this Court. Plaintiff is
entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the
Plaintiff have and recover judgment against the Defendant,

Isaac Walker, a/k/a Issac Walker, a/k/a Issac B. Walker, for the principal amount of \$1,421.00, plus accrued interest of \$780.28 as of September 9, 1988, plus interest thereafter at the rate of 3 percent per annum until judgment, plus interest thereafter at the current legal rate of 8.19 percent per annum until paid, plus costs of this action.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

cen

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
ROBERT B. SUTTON,)
)
Defendant.)

FILED
SEP 25 1989
U.S. DISTRICT COURT

CIVIL ACTION NO. 89-C-454-C

ORDER

Good cause having been shown, it is hereby ORDERED,
ADJUDGED AND DECREED that the above-referenced action is hereby
dismissed without prejudice.

Dated this 22 day of September, 1989.


UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DWIGHT A. INGRAM,)
)
 Defendant.)

F I L E D

SEP 25 1989 *CS*

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

CIVIL ACTION NO. 89-C-395-B ✓

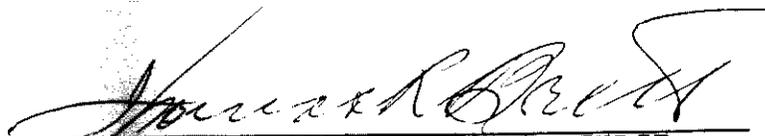
DEFAULT JUDGMENT

This matter comes on for consideration this 25 day
of Sept., 1989, the Plaintiff appearing by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Catherine J. Depew, Assistant United States
Attorney, and the Defendant, Dwight A. Ingram, appearing not.

The Court being fully advised and having examined the
court file finds that Defendant, Dwight A. Ingram, was served
with Summons and Complaint on August 22, 1989, by service upon
Nancy Kelly at his residence, pursuant to his request. The time
within which the Defendant could have answered or otherwise
moved as to the Complaint has expired and has not been extended.
The Defendant has not answered or otherwise moved, and default
has been entered by the Clerk of this Court. Plaintiff is
entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the
Plaintiff have and recover judgment against the Defendant,

Dwight A. Ingram, for the principal amount of \$2,000.00, plus costs of this action.


UNITED STATES DISTRICT JUDGE

cen

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

FILED

SEP 20 1989 *WJ*

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 -vs-)
)
 KELLI D. DAVIS,)
 CSS 515 44 1279)
)
 Defendant,)

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

CIVIL NUMBER 89-C-495 E ✓

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, United States of America, by and through its attorney, Herbert N. Standeven, District Counsel, Department of Veterans Affairs, 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
Department of Veterans Affairs
125 South Main Street
Muskogee, OK 74401
Phone: (918) 687-2191

By: *Lisa A. Settle*
LISA A. SETTLE, Attorney

CERTIFICATE OF MAILING

This is to certify that on the _____ day of _____, 1989, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: KELLI D. DAVIS, at P.O. Box 1398, Mannford, OK 74044.

Lisa A. Settle
LISA A. SETTLE, Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NATIONAL PRODUCT GROUP, INC.)

Plaintiff,)

v.)

RED LINE SYNTHETIC OIL CORP.)

Defendant.)

87-C-246-E

FILED

SEP 22 1989

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

JUDGMENT

Plaintiff NATIONAL PRODUCT GROUP, INC. ("National"), having filed its original complaint on April 7, 1987 and First Amended Complaint on August 21, 1987; defendant RED LINE SYNTHETIC OIL CORP. ("Red Line"), having filed its answer and counterclaim on July 5, 1988; plaintiff and defendant having agreed upon a basis for settlement of this action and having stipulated to the entry of judgment; and it appearing that no notice of hearing upon entry of such judgment need be given;

NOW, THEREFORE, upon the stipulation by plaintiff and defendant and upon consideration of all the papers on file herein, it is ordered and adjudged that:

1. This is an action for trademark infringement, unfair competition and declaratory relief, arising under the trademark laws of the United States (the Lanham Act), state statutes and common law.

2. This Court has original jurisdiction over plaintiff's federal claims pursuant to 15 U.S.C. § 1125(a) and 28 U.S.C. §§ 1338(a), 1331(a), 1332(a) and 15 U.S.C. § 1114.

3. This Court has personal jurisdiction over defendant for the purpose of this action only and for the purpose of enforcing this judgment.

4. The parties have agreed to settle their dispute by:

(a) plaintiff acknowledging that Red Line is the exclusive owner of all rights in and to the RED LINE and RED LINE SYNTHETIC OIL CORP. marks ("Red Line Marks") for motor oils, transmission fluids, fuel additives and all other lubricants and automotive care products; (b) plaintiff and defendant entering into a stipulated dismissal in Red Line Synthetic Oil Corp. v. National Product Group, Inc., Cancellation Proceeding No. 15,580 pending in the United States Patent and Trademark Office before the Trademark Trial and Appeal Board following the assignment to Red Line all right, title, and interest of National to the United States Trademark Registration No. 1,331,577 of the "REDLINE plus DESIGN" mark for "motor oils;" (c) plaintiff ceasing all use of the "REDLINE" and "REDLINE plus DESIGN" marks ("National Marks") and any mark confusingly similar to the Red Line Marks, including any mark containing the words "RED LINE" or "REDLINE" for motor oils, transmission fluids, fuel additives and all other lubricants and automotive care products; (d) Red Line consenting to the use by National of the National Marks for retail gasoline service station services and retail gasoline only in conjunction

with convenience stores in certain states, and National agreeing to grant to Red Line a license in those states to use the Red Line Marks for racing gasoline, diesel and alcohol fuels; and (e) National consenting to the use by Red Line of the Red Line Marks for racing gasoline, diesel and alcohol fuels.

5. All claims presented by plaintiff's complaint and amended complaint and defendant's counterclaim shall be dismissed with prejudice as settled pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

6. The plaintiff and defendant have waived notice of entry of this judgment and the right to appeal therefrom or to contest its validity.

Dated: _____

9/21/89

S/ JAMES O. ELISON

UNITED STATES DISTRICT JUDGE

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

FILED

SEP 22 1989

John E. Silver, Clerk
U.S. DISTRICT COURT

PACCAR FINANCIAL CORP., a)
Washington corporation,)
)
Plaintiff,)
)
vs.)
)
MID-AMERICA RECOVERY, INC.,)
an Oklahoma corporation, and)
GLEN L. LAWRENCE, an)
individual,)
)
Defendants.)

Case No. 89-C-306-B

AGREED ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN REPLEVIN

CAME ON before the Court the date below written the Plaintiff's Motion for Partial Summary Judgment in Replevin (the "Motion") filed July 28, 1989. The Court, having reviewed the briefs and evidence submitted by the parties and being fully advised in the premises, finds that the Motion should be granted so that the Plaintiff may conduct a public sale of the two subject truck tractors (the "Equipment") and determine whether any deficiency remains to be the subject of the claim for debt.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Partial Summary Judgment in Replevin is granted; that the Plaintiff has a superior right to possession as to the Equipment; and that the Plaintiff is authorized to foreclose thereon in accordance with the subject Equipment

Lease Agreements and, if applicable, Okla. Stat. tit. 12A,
§ 9-504 (1981).

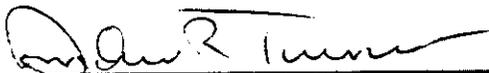
The case shall proceed for determination of all other
facts and issues raised by the pleadings in this action.

Dated this 22nd day of Sept, 1989.

S/ THOMAS R. BRETT

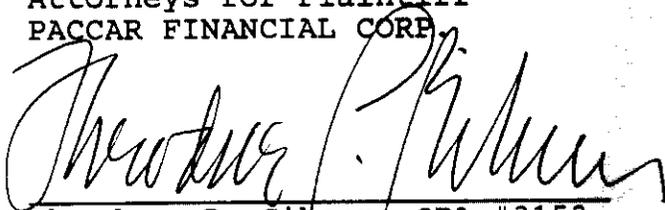
Hon. Thomas R. Brett
U.S. District Judge

Approved by:



Andrew R. Turner, OBA #9125
of
CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Plaintiff
PACCAR FINANCIAL CORP.



Theodore P. Gibson, OBA #3153
210 Park Centre Building
Tulsa, Oklahoma 74103
(918) 585-1181

Attorney for Defendants

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

FILED

SEP 22 1989

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

JACKIE W. BARNES,

Plaintiff,

vs.

THE UNIVERSITY OF TULSA,

Defendant.

Case No. 89-C-236 E

ORDER OF PARTIAL DISMISSAL AND REMAND

NOW on this 13th day of September, 1989, there comes on for hearing before me, the undersigned Judge of the United States District Court, the Plaintiff's Motion to Dismiss in the above-styled and numbered matter. The Plaintiff appears in person and by and through her attorneys of record, Vandivort & Associates, Inc., by Richard E. Elsea, and the Defendant appears by and through its attorneys of record, Boesche, McDermott & Eskridge by R. David Whitaker. The Court, having reviewed the file and pleadings in this matter, having heard the arguments of counsel and being fully advised in the premises, finds as follows:

1. Plaintiff's cause of action for wrongful discharge and bad faith, based on the alleged violation of the alleged public policy against discharge to prevent eligibility to participate in, or vesting of rights to, retirement, health, and other benefit plans, including any claim for punitive damages arising thereunder, shall be dismissed with prejudice.

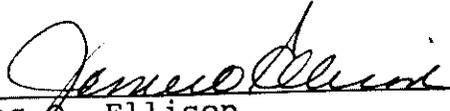
2. The dismissal with prejudice set forth in paragraph 1, above, is limited to the cause of action described therein, and

shall not be construed to extend to any other claim which Plaintiff has made, or may at some future date make, against Defendant.

3. Plaintiff's remaining cause of action set forth in her Petition on file in this matter, based on breach of contract, shall be remanded to the Tulsa County District Court for further proceedings under Tulsa County District Court case number CJ 89-00364.

4. Defendant is not entitled to an award of attorney fees or costs as a condition of granting this partial dismissal and remand; however, this order shall not limit the authority of the District Court of Tulsa County, State of Oklahoma, to award attorney's fees to either party for work performed prior to remand, should the District Court deem it appropriate at a later date.

IT IS THEREFORE THE ORDER of this Court that Plaintiff's cause of action for wrongful discharge and bad faith, based on the violation of the alleged public policy against discharge to prevent eligibility to participate in, or vesting of rights to, retirement, health, and other benefit plans, including any claim for punitive damages arising thereunder, is hereby dismissed with prejudice; and that Plaintiff's remaining cause of action is remanded to the Tulsa County District Court for further proceedings under Tulsa County District Court case number CJ 89-00364.


James P. Ellison
United States District Court
Judge

APPROVED AS TO FORM:

VANDIVORT & ASSOCIATES, INC.
Attorneys for Plaintiff,
Jackie W. Barnes

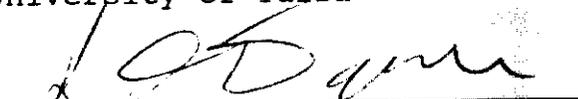
By:



Richard E. Elsea
OBA #10285
Mid-Continent Building
Suite 425
401 S. Boston Avenue
Tulsa, OK 74103-4017
(918) 584-7700

BOESCHE, McDERMOTT & ESKRIDGE
Attorneys for Defendant,
The University of Tulsa

By:



R. David Whitaker
OBA #10520
800 Oneok Plaza
100 W. 5th Street
Tulsa, OK 74103
(918) 583-1777

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

RICHARD H. HUGHES, Trustee for
the Hinderliter Pension Plan
and Trust; RICHARD H. HUGHES,
an individual,

Plaintiff,

vs.

CONSOLIDATED COMMUNICATIONS
NETWORK, INC., a Utah
corporation; RONALD L. SHAFFER,
an individual; JOHN E. SHAFFER,
an individual; TIMOTHY H.
SHAFFER, an individual;
FREDERICK I. SHAFFER, III, an
individual; FREDERICK I.
SHAFFER, JR., an individual;
KENNETH L. MICK, an
individual; GARY L. DINGES, an
individual,

Defendants.

Case No. 89-C-048-E B

SEP 22 1989
JACK G. SILVER, CLERK
U.S. DISTRICT COURT

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Richard H. Hughes, by and through
his attorney of record, P. Gae Widdows, and dismisses the above
cause in its entirety with prejudice of only Defendant, Kenneth
L. Mick.

DATED this 22nd day of September, 1989.
Respectfully submitted,

HOWARD AND WIDDOWS, P.C.

By: P. Gae Widdows
P. Gae Widdows
O.B.A.#9585
2021 South Lewis, Suite 570
Tulsa, Oklahoma 74104
(918) 744-7440

FILED

SEP 22 1989

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

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

ALAN L. ROODHOUSE,
Plaintiff,

v.

No. 88 C 1460E

MID-STATES AIRCRAFT ENGINES,
INC.
Defendant.

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on for consideration after a settlement conference held by the Honorable John Leo Wagner, U.S. Magistrate. The Court finds that as a result of the conference, the parties have entered into a settlement of the matter. The settlement was reached with the express understanding that neither party admitted the others allegations and that the settlement should not be deemed to be an admission. For good cause shown, it is hereby,

ORDERED, that the case be and it is hereby dismissed with prejudice, with each party bearing their respective costs.

S/ JAMES O. ELLISON

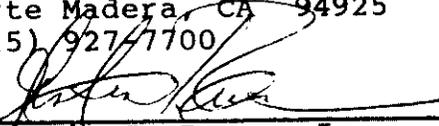
U.S. District Judge

Dated this 22nd day of September, 1989.

Approved and Agreed:

PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
Kevin M. Abel, OBA #104
900 Oneck Plaza
Tulsa, Oklahoma 74103
(918) 584-4136

REID, AXELROD & RUANE
770 Tamalpais Drive
Corte Madera, CA 94925
(415) 927-7700

By 
Martin T. Ruane, Jr.

Daniel F. Allis, OBA# 00242
ALLIS & CREVELING
2nd Floor, Professional Center
1408 S. Denver
Tulsa, OK 74119
(918) 582-5444

LAW FIRM OF EDWARD A. McCONWELL
Edward A. McConwell
6701 W. 64th Street, Suite 210
Overland Park, KS 66202
(913) 262-0605

By 
Edward A. McConwell

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

F I L E D

SEP 22 1989 *JK*

Steven Martin Banks

Plaintiff(s),

vs.

Bob Hughes

Defendant(s).

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

No. 88-C-1545-E ✓

ORDER

Rule 35(a) of the Rules of the United States District Court for the Northern District of Oklahoma provides as follows:

(a) In any case in which no action has been taken by the parties for six (6) months, it shall be the duty of the Clerk to mail notice thereof to counsel of record or to the parties, if their post office addresses are known. If such notice has been given and no action has been taken in the case within thirty (30) days of the date of the notice, an order of dismissal may in the Court's discretion be entered.

In the action herein, notice pursuant to Rule 36(a) was mailed to counsel of record or to the parties, at their last address of record with the Court, on August 11, 1989. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 22^d day of September, 1989.

James O. Silver
UNITED STATES DISTRICT JUDGE

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

SEP 22 1989

JACK D. SIMEN, CLERK
U.S. DISTRICT COURT

SHIRLEY R. CARR,

Plaintiff,

vs.

No. 88-C-1542-C

STATE OF OKLAHOMA, EX REL.
DEPARTMENT OF HUMAN SERVICES,
and WESLEY E. JOHNSON,
Individually and as a
professional corporation,

Defendants.

ORDER

Now before the Court for its consideration is the appeal by the plaintiff, Shirley R. Carr, of the Magistrate's recommendations of June 12, 1989.

Plaintiff's complaint sets forth a civil rights cause of action brought pursuant to 42 U.S.C. §1981 and 42 U.S.C. §2000e-5 for alleged racial discrimination and infliction of emotional distress by plaintiff's employer, the Oklahoma Department of Human Services (DHS). Plaintiff also alleges that defendant Wesley Johnson has violated an employment contract entered into with her. Movant contends 42 U.S.C. §1981 action is barred by the Eleventh Amendment and 12 O.S. §95(3), and that action alleged under 42 U.S.C. §2000e-5 is untimely filed and is barred by 42 U.S.C. §2000e-5(f). The Magistrate, in his recommendation to this Court, found that the circumstances of this case and applicable law would

warrant the dismissal of plaintiff's pendent state claim and the granting of the motion of defendant DHS to dismiss. The Magistrate determined, considering all of the facts and circumstances, that the immunity provided by the Eleventh Amendment had not been expressly waived, and therefore barred the plaintiff's cause of action for intentional infliction of emotional distress by DHS. The Magistrate determined §1981 claims to be analogous to §1983 claims as actions for injury to personal rights, and therefore the two-year limitation in 12 O.S. §95(3) is applicable. Since no specific promotion denial was alleged within this two-year limitation period, the Magistrate found that plaintiff's first and second cause of actions under §1981 are barred by 12 O.S. §95(e). The Magistrate also determined that plaintiff's claim of employment discrimination presented no equitable circumstances which would toll the limitations period, thereby justifying the untimely filing of plaintiff's action under Title VII, 42 U.S.C. 2000e, and therefore barred the plaintiff's cause of action under 42 U.S.C. 2000e-5(f).

The Court has independently reviewed the pleadings and briefs of the parties and the case file and finds that the recommendation of the Magistrate is reasonable under the circumstances of this case and consistent with applicable law. However, in addition to the recommendation of the Magistrate, this Court finds Goodman v. Lukins Steel Co., 482 U.S. 656 (1987), to be controlling in finding §1981 claims to be injuries to personal rights for statute of limitations purposes.

Therefore, premises considered, it is the Order of the Court that the motion of the defendant, DHS, to dismiss is hereby GRANTED. The Court affirms the findings and recommendation of the Magistrate entered into on June 12, 1989, in addition to the finding of this Court.

IT IS SO ORDERED this 22 day of September, 1989.



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

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

TRANSPower CONSTRUCTORS, a
Division of Harrison International
a South Carolina corporation,

Plaintiff,

vs.

GRAND RIVER DAM AUTHORITY, an
Oklahoma public corporation, and
THE BENHAM GROUP, INC.,
a Delaware corporation,

Defendants.

FILED

SEP 22 1989

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

Case No. 86-C-14-E

**JUDGMENT IN FAVOR OF PLAINTIFF TRANSPower CONSTRUCTORS
AND AGAINST DEFENDANT GRAND RIVER DAM AUTHORITY
FOR ATTORNEYS' FEES**

On the 14th day of September, 1989, there came on for consideration the Plaintiff Transpower Constructors' Application to Tax Attorney's Fees as Costs as against the Defendant Grand River Dam Authority. Plaintiff Transpower Constructors appeared by its counsel, Sidney G. Dunagan, Esquire and Edward H. Tricker, Esquire; the Defendant Grand River Dam Authority appeared by its counsel, Rodney A. Edwards, Esquire and Robert S. Erickson, Esquire.

Following opening remarks by this Court and counsel for each of the parties, the Court heard sworn testimony from the lead trial counsel for Plaintiff Transpower Constructors and expert witness testimony from James A. Knox, Esquire, of Dallas, Texas. Further, the Court heard sworn testimony of Dallas E. Ferguson, Esquire, of Tulsa, Oklahoma, on behalf of the Defendant Grand River Dam Authority. The testimony and evidence related to the reasonableness and necessity of the attorney, paralegal and attorney staff time consumed in Plaintiff Transpower Constructors' action against the Defendant Grand River Dam Authority and Defendant The Benham Group, Inc.

Upon the conclusion of the testimony submitted by each of the parties, and the Court's carefully and fully reviewing the exhibits admitted into evidence during the

course of the hearing, the Court's consideration of the stipulations of the parties made during the hearing, and the Court's fully reviewing the Briefs and Affidavits submitted by each of the parties, the Court FINDS as follows:

1. The parties hereto stipulated the hourly rates charged by counsel, paralegals, and law clerks for the Plaintiff were reasonable.

2. The parties hereto stipulated the time expended by local counsel, Gable & Gotwals, was reasonable and necessary.

3. The parties hereto stipulated the total number of hours expended by counsel, paralegals, and law clerks for Plaintiff Transpower Constructors in pursuing its claims against both Defendants was reasonable and necessary; however, Defendant GRDA objected to and did not stipulate to attorney and paralegal time expended in research and pleading preparation relating to certain venue matters, time expended for certain travel, and time entries which were insufficient to determine the activity being performed.

4. The parties hereto stipulated Plaintiff Transpower Constructors is entitled to an attorney's fee from the Defendant Grand River Dam Authority pursuant to Okla. Stat. tit. 12, § 936 (1981).

5. The stipulations of the parties should be accepted by the Court.

6. The time expended by counsel for Plaintiff Transpower Constructors in researching and preparing a Motion and Brief pertaining to a venue matter is not properly taxable as reasonably and necessarily incurred in this action and, therefore, \$3,610 should be deducted from Plaintiff Transpower Constructors' Application as a result thereof.

7. Time and billing entries made by counsel for Plaintiff Transpower Constructors which are identified only as "preparation of claim," without further explanation of the amount of time expended, is not a sufficient entry to permit such time to be considered as taxable costs and, therefore, \$11,708 should be deducted from Plaintiff Transpowers Constructors' Application as a result thereof.

8. The time expended in traveling out-of-state by counsel and their staffs on behalf of Plaintiff Transpower Constructors, which travel would not have been necessarily incurred had Plaintiff retained lead counsel located in the forum, should not be considered a taxable cost and, therefore, \$11,593 should be deducted from Plaintiff Transpower Constructors' Application as a result thereof.

9. With the exception of the aforementioned attorney time which should be deducted from Plaintiff Transpower Constructors' Application, Plaintiff's Transpower Constructors' Application to Tax Attorneys' Fees as Costs should be granted in all other respects.

10. The time expended by Plaintiff Transpowers Constructors in preparing its case against the Defendant Grand River Dam Authority would have been necessarily incurred whether or not its agent in the administration of the contract at issue, Defendant The Benham Group, Inc., was a party to this litigation. The evidence presented by Plaintiff Transpower Constructors at the trial of this case, over which the undersigned presided, and as the evidence presented at this hearing reiterated, showed that the negligent acts of the Defendant The Benham Group, Inc., which caused damage to Plaintiff Transpower Constructors, were breaches of the contract between the Defendant Grand River Dam Authority and the Plaintiff Transpower Constructors. The time expended by counsel for Plaintiff Transpower Constructors in discovering and presenting evidence of negligent acts of the Defendant GRDA's agent is properly taxable against the GRDA.

11. Plaintiff Transpower Constructors should be awarded an attorney's fee against the Defendant Grand River Dam Authority in the sum of \$319,700.

12. The Plaintiff Transpower Constructors' Application for post-judgment interest on the attorneys' fee awarded herein is taken under advisement and a separate ruling thereon will be made.

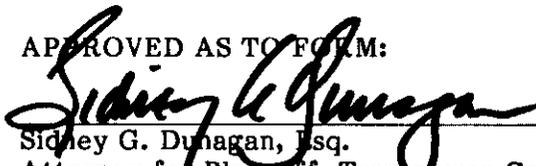
IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff Transpower Constructors have judgment in its favor and against the Defendant Grand River Dam Authority in the sum of \$319,700 for Plaintiff Transpower Constructors' attorneys' fees incurred herein.

Dated this 21st day of Sept., 1989.

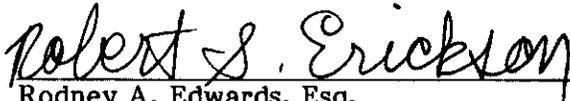
S/ JAMES O. ELLISON

United States District Judge

APPROVED AS TO FORM:



Sidney G. Dunagan, Esq.
Attorney for Plaintiff, Transpower Constructors



Rodney A. Edwards, Esq.
Attorney for Defendant, Grand River Dam Authority

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

SEP 22 1989

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

SHIRLEY R. CARR,

Plaintiff,

vs.

No. 88-C-1542-C

STATE OF OKLAHOMA, EX REL.
DEPARTMENT OF HUMAN SERVICES,
and WESLEY E. JOHNSON,
Individually and as a
professional corporation,

Defendants.

ORDER

Now before the Court for its consideration is the appeal by the plaintiff, Shirley R. Carr, of the Magistrate's recommendations of June 12, 1989.

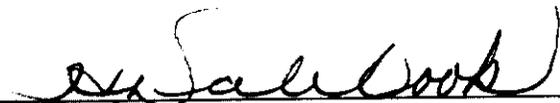
Plaintiff's complaint sets forth a civil rights cause of action brought pursuant to 42 U.S.C. §1981 and 42 U.S.C. §2000e-5 for alleged racial discrimination and infliction of emotional distress by plaintiff's employer, the Oklahoma Department of Human Services (DHS). Plaintiff also alleges that defendant Wesley Johnson has violated an employment contract entered into with her. Movant contends 42 U.S.C. §1981 action is barred by the Eleventh Amendment and 12 O.S. §95(3), and that action alleged under 42 U.S.C. §2000e-5 is untimely filed and is barred by 42 U.S.C. §2000e-5(f). The Magistrate, in his recommendation to this Court, found that the circumstances of this case and applicable law would

warrant the dismissal of plaintiff's pendent state claim and the granting of the motion of defendant DHS to dismiss. The Magistrate determined, considering all of the facts and circumstances, that the immunity provided by the Eleventh Amendment had not been expressly waived, and therefore barred the plaintiff's cause of action for intentional infliction of emotional distress by DHS. The Magistrate determined §1981 claims to be analogous to §1983 claims as actions for injury to personal rights, and therefore the two-year limitation in 12 O.S. §95(3) is applicable. Since no specific promotion denial was alleged within this two-year limitation period, the Magistrate found that plaintiff's first and second cause of actions under §1981 are barred by 12 O.S. §95(e). The Magistrate also determined that plaintiff's claim of employment discrimination presented no equitable circumstances which would toll the limitations period, thereby justifying the untimely filing of plaintiff's action under Title VII, 42 U.S.C. 2000e, and therefore barred the plaintiff's cause of action under 42 U.S.C. 2000e-5(f).

The Court has independently reviewed the pleadings and briefs of the parties and the case file and finds that the recommendation of the Magistrate is reasonable under the circumstances of this case and consistent with applicable law. However, in addition to the recommendation of the Magistrate, this Court finds Goodman v. Lukins Steel Co., 482 U.S. 656 (1987), to be controlling in finding §1981 claims to be injuries to personal rights for statute of limitations purposes.

Therefore, premises considered, it is the Order of the Court that the motion of the defendant, DHS, to dismiss is hereby GRANTED. The Court affirms the findings and recommendation of the Magistrate entered into on June 12, 1989, in addition to the finding of this Court.

IT IS SO ORDERED this 22 day of September, 1989.



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

plaintiff to take the deposition of Mr. Farlow until September 12, 1989.

IT IS SO ORDERED.

S/ JAMES O. ELLISON

Judge for the U.S. District Court

Approved:



Sheldon E. Morton, attorney for plaintiff.



Thomas M. Ladner, attorney for defendant.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JIM L. HERRON, et al.,)
)
 Defendants.) CIVIL ACTION NO. 89-C-590-B

NOTICE OF DISMISSAL

Plaintiff, the United States of America, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, hereby gives notice that the Defendant, Jim L. Herron, is hereby dismissed with prejudice from this foreclosure action according to Rule 41(a)(1) of the Federal Rules of Civil Procedure. The Plaintiff would further advise the Court that the Defendant, Jim L. Herron, has disclaimed any interest in the subject property and Plaintiff does not wish to seek a deficiency judgment against Defendant, Jim L. Herron.

UNITED STATES OF AMERICA

TONY M. GRAHAM
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF MAILING

This is to certify that on the 21st day of September, 1989, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to:

Jim L. Herron
6654 South Utica Place
Tulsa, OK 74136

Ronald Main
810 South Cincinnati, Suite 400
Tulsa, OK 74119

Stephen A. Schuller, Esq.
Property Ventures of Louisiana, Inc.
610 South Main Street, Suite 300
Tulsa, OK 74119

J. Dennis Semler
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, OK 74103


Assistant United States Attorney

PP/css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 21 1989

CLERK
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

MILTON S. ALLEN,)

Defendant.)

CIVIL ACTION NO. 89-C-526-C ✓

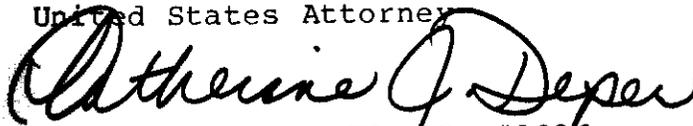
NOTICE OF DISMISSAL

COMES NOW the United States of America by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Catherine J. Depew, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice and without costs.

Dated this 21st day of September, 1989.

UNITED STATES OF AMERICA

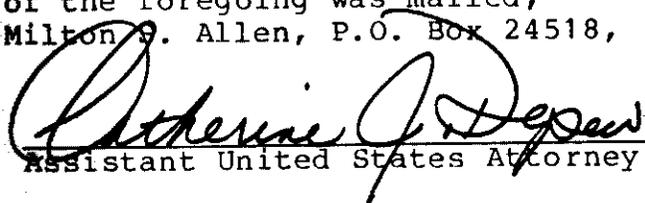
TONY M. GRAHAM
United States Attorney



CATHERINE J. DEPEW, OBA #3836
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of September, 1989, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Milton S. Allen, P.O. Box 24518, Louisville, Kentucky 40224.


Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JIM L. HERRON, et al.,

Defendants.

SEP 21 1990

A. C. Silver, Clerk
DISTRICT COURT

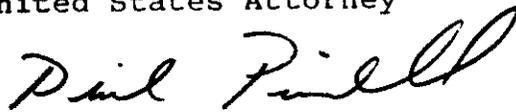
CIVIL ACTION NO. 89-C-601-C ✓

NOTICE OF DISMISSAL

Plaintiff, the United States of America, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, hereby gives notice that the Defendant, Jim L. Herron, is hereby dismissed with prejudice from this foreclosure action according to Rule 41(a)(1) of the Federal Rules of Civil Procedure. The Plaintiff would further advise the Court that the Defendant, Jim L. Herron, has disclaimed any interest in the subject property and Plaintiff does not wish to seek a deficiency judgment against Defendant, Jim L. Herron.

UNITED STATES OF AMERICA

TONY M. GRAHAM
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

10

10

CERTIFICATE OF MAILING

This is to certify that on the 21st day of September, 1989, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to:

Jim L. Herron
6654 South Utica Place
Tulsa, OK 74136

Ronald Main
810 South Cincinnati, Suite 400
Tulsa, OK 74119

Stephen A. Schuller, Esq.
Property Ventures of Louisiana, Inc.
610 South Main Street, Suite 300
Tulsa, OK 74119

J. Dennis Semler
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, OK 74103


Assistant United States Attorney

PP/css

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

SEP 21 1989

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

T. D. WILLIAMSON, INC.,

Plaintiff,

vs.

DWANE ODELL LAYMON, and
ELECTRONIC PIGGING SYSTEMS,
INC., an Oklahoma corporation,

Defendant.

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No. 83-C-84-C

ORDER

Before the Court for its consideration are the parties' objections to the Special Master's Proposed Findings of Fact and Conclusions of Law. At a hearing on June 2, 1989, the parties presented arguments in support of their objections. Having heard these arguments, and reviewed the hearing transcripts, the parties' briefs and the applicable statutory and case law, the Court is now ready to rule upon those objections.

In its decision of April 30, 1986, the Court found the defendants had infringed plaintiff TDW's patent on a device known as a caliper pig, used for measuring and reporting on the internal geometry of pipelines. An injunction prohibiting the defendants from further use of defendant EPS' infringing version of a caliper pig was issued on May 8, 1986. After the appellate court affirmed the determination of liability against the defendants, the Court appointed a Special Master, pursuant to F.R.Cv.P. 53(a), to

determine and report on damages due TDW as a result of defendants' infringement. In hearings, lasting ten days the Master received and considered evidence from the parties pertaining to the damages for infringement claimed by TDW. The Master issued proposed findings of fact and conclusions of law on July 28, 1988. TDW has objected to one finding of fact made by the Master. Defendants have lodged seventeen objections to the Master's findings and conclusions.

The Court's scope of review concerning the Master's proposed findings of fact is limited. F.R.Cv.P. 53(e)(2) requires the Court to accept those findings "unless clearly erroneous". A factual finding cannot be deemed "clearly erroneous" unless it stems from a mistaken view of the law or unless, despite its support by substantial evidence, the Court is thoroughly convinced after a consideration of the evidence that a mistake has been made. McGraw Edison Company v. Central Transformer Corp., 196 F.Supp. 664, 666-67 (E.D.Ark. 1961), aff'd 308 F.2d 70 (8th Cir. 1962). The party objecting to the Master's findings carries the burden of proving them to be clearly erroneous. Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. N.L.R.B., 547 F.2d 575, 580 (D.C. Cir. 1976).

The Court will first consider TDW's single objection, and then turn to defendants' seventeen objections.

I. PLAINTIFF'S OBJECTION TO PROPOSED FINDING OF FACT.

TDW's only objection is to the Master's Finding of Fact 30, in which the Master concluded that TDW was not entitled to damages

from jobs performed in Venezuela in 1986 by EPS' infringing pig embodiment. In support of his conclusion, the Master noted that the sensory "fingers" of the pig were manufactured in Venezuela, and that the pigs EPS shipped down to Venezuela were used for other types of pipeline operations, such as cleaning and batching jobs, as well as geometric surveys of the pipeline interiors.

TDW argues that the Master erred in not finding EPS' Venezuela jobs were infringing uses of TDW's patent under 35 U.S.C. §271(f)(1). That statute, enacted in 1984, provides

Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

The Master recognized that this section imposed liability for infringement when the components of a patented invention are not combined in the United States, and concluded that the defendants were liable for damages under §271(f)(1). See Conclusion of Law 17. TDW argues that that conclusion of law is at odds with the Master's Finding of Fact 30 and asks this Court to correct that Finding of Fact and award TDW damages for defendants' use of the infringing pig in Venezuela after 1984.

The caselaw interpreting 35 U.S.C. §271(f) is limited, and no decisions were found that were dispositive of TDW's objection. The evidence supports the Master's finding that only the sensory fingers were manufactured in Venezuela, in order to meet a requirement of the Venezuelan government as a condition of the defendants performing jobs there. See Record, vol.III, p.609,

ln.7-21. The evidence is unrefuted that the majority of the components of defendants' pig bodies, minus the sensory fingers, were supplied from the defendants' offices and were shipped from Tulsa to the job sites in Venezuela. Defendant Laymon testified that defendants shipped their pigs sufficiently assembled so that EPS' technicians could complete the assembly at the job site in about two hour's time.

Defendants pin their argument for precluding the application of §291(f)(1) to EPS' Venezuelan jobs upon the term "actively induce" in that subsection. Defendants reason that EPS escapes liability under that section because it did not "actively induce" some third party to combine the sensory fingers with the infringing pig body; according to defendants, they cannot "actively induce" themselves to combine the fingers with the infringing pig body. Defendants point to the legislative history of §271(f) that states that the term "actively induce" was drawn from §271(b), which provides that whoever actively induces patent infringement is liable as an infringer. However, defendants ignore the preceding sentence in the legislative history, which states that

[i]n order to be liable as an infringer under paragraph (f)(1), one must supply or cause to be supplied "all or a substantial portion" of the components in a manner that would infringe the patent if such a combination occurred within the United States.

Patent Law Amendments, Pub.L. No.99-68, 1985
U.S.Code Cong. & Admin. News (98 Stat.) at 5828.

The legislative history noted that §271(f) was intended to prevent copiers from avoiding U. S. patents by supplying components of a patented product in this country so that the assembly of the components may be completed abroad. Id. This section of the

patent law amendment was proposed in response to the U. S. Supreme Court's decision in Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972), which created a loophole in prior patent law, allowing copiers to avoid liability for products patented in the United States, by shipping the patented components for combination in foreign countries.

Defendants' claim of required "active inducement" for liability under §271(f)(1) is not supported by that subsection's legislative history. It is unreasonable that Congress, in attempting to close the loophole for infringement created by the Deepsouth decision, would create another loophole allowing infringers to eschew dealing with foreign parties in order to avoid liability for "active inducement", as defendants now claim. Rather than a limiting factor for liability under §271(f)(1), the legislative history suggests the phrase, "actively induce" was intended to broaden the basis for liability, extending it to cover both those who actually supply the components as well as those (contributory infringers) who cause others to supply components.

Defendants contend that the Court's construction of §271(f)(1) makes subsection (f)(2) superfluous. The legislative history of §271(f) explains the difference between subsections (f)(1) and (f)(2):

Under paragraph (f)(1) the components may be staple articles or commodities of commerce which are also suitable for substantial noninfringing use, but under paragraph (f)(2) the components must be especially made or adapted for use in the invention. The passage in paragraph (f)(2) reading "especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use" comes from existing section 271(c) of the patent law, which governs contributory infringement. Paragraph (f)(2), like existing subsection 271(c), requires the infringer to have knowledge that the component is specially made or adopted. Paragraph (f)(2) also contains a further requirement that

infringers must have an intent that the components will be combined outside of the United States in a manner that would infringe if the combination occurred within the United States.

Although the Master did not reference Finding of Fact 30 to §271(f), it appears that he may have misconstrued §271(f)(1), in finding no infringement by the defendants on the Venezuelan jobs. The Master included in his finding that components of the defendants' pigs were used for other pipeline purposes, such as cleaning and batching jobs, and not solely for caliper surveys of the pipeline. Although the Master did not clarify the meaning he intended in making that finding, it is possible that he regarded defendants' components as staple articles or commodities of commerce, since they could be used for other pipeline uses, and thus excused defendants' infringing uses of those components in Venezuela. However, the legislative history quoted above makes clear that one can be liable as an infringer under §271(f)(1), even if the components are staple articles or commodities of commerce suitable for noninfringing use. Thus, defendants' use of infringing pig components in cleaning and batching jobs in Venezuela does not excuse their liability under §271(f)(1).

Defendants admit that they shipped all components of their infringing pig, except the sensory fingers, from Tulsa to Venezuela in 1986 for a caliper pig survey of a pipeline there. The combination of these components in Venezuela with the sensory fingers, equally infringed TDW's patent as did defendants' use of those combined components in the United States. The Court finds that the law as stated in §271(f)(1), and the evidence presented

here, does not support the Master's finding of fact 30. That finding of non-infringement of TDW's patent and the denial of lost profits to TDW from defendants' 1986 Venezuelan job is clearly erroneous. The Court thus finds that TDW's objection to finding of fact 30 should be sustained.

II. DEFENDANTS OBJECTIONS.

A. Defendants' claim that TDW did not show detailed computations of lost profits.

Defendants object to the Master's award of lost profits to TDW (finding of fact 34), claiming that TDW failed to carry its burden to show "detailed computations" of its lost profits. Defendants claim that TDW had to show both (1) an "established firm fixed price at which it actually sold its services during the relevant time period", and (2) the contribution margin percentage to be multiplied against that established firm, fixed price. Defendants' objections to Special Master's Proposed Findings of Fact and Conclusions of Law [hereinafter cited as Defendants' Objections], p.2.

In Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152 (6th Cir. 1978), under the test for damages in the form of lost profits, a plaintiff must show, among other elements, detailed computations as to the loss of profits. Id. at 1156. However, defendants cited no authority to support the rule they claim, and no such rule was located in the case or statutory law, mandating a showing of "established firm fixed prices" by the plaintiff. In contrast it has been stated that a "patent owner's burden of proof

is not absolute, but one of reasonable probability." King Instrument Co. v. Otari Corp., 767 F.2d 853, 863 (Fed.Cir. 1985). "The determination of a damage award is not an exact science." Id. Nor must a plaintiff prove the amount of lost profits with "unerring precision". Bio-Rad Laboratories v. Nicolit Instrument Corp., 739 F.2d 604, 616 (Fed.Cir. 1984). The patentee must show a reasonable probability that, but for the infringement, it would have made the sales that were made by the infringer. Milgo Electronic v. United Bus. Communications, 623 F.2d 645, 662 (10th Cir. 1980).

TDW presented an expert witness and one of its employees to testify concerning the computations made regarding its loss of profits. The Master evidently considered these witnesses' calculations to be detailed enough to satisfy the Panduit test. Defendants do not appear to be challenging the detail of TDW's calculations as to their sufficiency. Rather, the substance of defendants' objections is their assertion that TDW did not present evidence of a fixed pricing system which it consistently followed in making its bids on pipeline calipering jobs. Defendants point to testimony indicating that TDW bid prices both higher and lower from those set forth on its price or cost lists. Defendants object to the Master's calculation of lost profits according to TDW's price quote list, in his finding of fact 33.

While a court's calculation of damages cannot be based upon speculation or guess, the court can use evidence which shows "the extent of damages as a matter of just and reasonable inference,

although the result be only approximate." Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931). "The wrongdoer is not entitled to complain that [the damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." Id. Once it has chosen an accounting method, the court has discretion in choosing the figures or charts from which to determine the amount of damages. Paper Converting Machine v. Magna-Graphics, 745 F.2d 11, 22 (Fed.Cir. 1984). The Court may thus fashion a "yardstick" from evidence presented by the parties to measure the patentee's lost profits. See Kori Corp. v. Wilco Marsh Buggies & Draglines, 761 F.2d 649, 654 (Fed.Cir. 1985) (infringer's profits used as "yardstick" for measurement of patentee's lost profits).

TDW put into evidence the price and cost lists it used during the relevant period to calculate its basis for caliper job quotes to customers; the lists were formatted according to such factors as the pipe diameter, length of pipeline to be calipered, the contents of the pipeline, and whether the job was in the U.S. or overseas, in order to estimate an initial, basic price. See Pl.E. 94, 95, and 96. TDW sometimes raised its quoted price from that basic price because of factors such as extra days required for some jobs. On other bids, TDW lowered its quoted bid from that provided on the applicable price or cost list in order to encourage use of the caliper pig service or because of competition from defendant EPS. In the damages hearing TDW only used the price and/or cost

list to calculate what it would have bid for the domestic and foreign caliper jobs that EPS performed; TDW added no factors to raise or lower that basic price. The Master used the applicable price lists to compute TDW lost income from the 27 jobs in the United States and Canada that EPS performed. The Master's use of this "yardstick" does not appear to the Court to be clearly erroneous, and defendants have not convinced the Court of any clear error in the Master's reliance upon TDW's price lists.

B. Defendants' claim that TDW failed to show demand for its patented pig.

Defendants claim that TDW should not be awarded lost profits for the reason that TDW failed to show any demand for the caliper pig claimed in TDW's patent. Defendants base this argument upon testimony they elicited during the damages hearing, which they claim demonstrates that the commercially valuable feature of the patented pig was the ability to provide the customer with a written record of the defects located along the length of the pipeline. Defendants attribute this ability solely to the pig's odometer wheels, which they contend are covered by another TDW patent, and not the patent in issue here. Defendants argue that since the odometer wheel is not covered by the caliper pig patent, TDW cannot recover damages on that pig; TDW did not show a demand for a caliper pig constructed without odometer wheels to locate dents and other deviations along the pipeline. TDW admits that the odometer wheels are covered by a separate patent, but argues that the caliper pig patent indicated the odometer wheels in the patent

drawings and describes the use of the odometer wheels as a means to move the recording tape in accordance with the pig's travel through the pipeline.

The patented pig's inventor testified that the caliper pig would not work without an odometer wheel, unless something else to track the location in the pipeline in correlation with the deviation measurement was substituted for the wheel. VerNooy, vol.I, p.95, ln.15-25. TDW's witness, David Atwood, agreed with the statement that a pig could be designed to use something other than the dual odometer wheel method, used by TDW and EPS. Atwood, vol.VI, p.1112, ln.6-13. Both Atwood and VerNooy stated that the earliest versions of the caliper pig used a clock driven mechanism which recorded that pig's travel through the pipeline in relation to time elapsed, rather than distance traveled. VerNooy, vol.I, p.95, ln.15-25; Atwood, vol.VI, p.1112, ln.6-10.

In its drawings and descriptions thereof, TDW's patent refers to the use of an odometer wheel in the caliper pig in combination with a stepper motor, which drives the suggested recording means in the form of a strip chart. TDW's patent suggests the odometer wheel as a preferred embodiment in the caliper pig to correlate the measurement of deviations with their location in the pipeline, but as TDW's witnesses indicated, the odometer wheel is not the only possible embodiment by which this correlation could be made. Courts have been cautioned not to limit the claimed invention to preferred embodiments or specific examples in the specification. Lemelson v. United States, 752 F.2d 1538, 1552 (Fed.Cir. 1985).

Similarly, "an inventor's decision to manufacture and market one embodiment of his invention obviously does not limit the patent to that embodiment." Velo-Bind, Inc. v. Minn. Mining & Mfg. Co., 647 F.2d 965, 969 (9th Cir. 1981). Defendants' arguments, crediting the separately-patented odometer wheel as giving the caliper pig commercial value and creating a demand for the pig's services does not create a justification for a denial of damages to TDW. Undoubtedly, a pig with odometer wheels, but none of the patented sensory apparatus to detect and measure pipeline defects, will not have much more demand for its services than as a dummy pig.

Additionally, the Master concluded it was appropriate to apply the "entire market value rule" and not attempt to apportion damages as resulting from the patented and unpatented portions of the infringing pig, since the patented portion was crucial to its operation. Conclusion of Law 12. That rule allows "the recovery of damages based upon the value of the entire apparatus containing several features, even though only one feature is patented." Paper Converting Machine Co. v. Magna Graphics Corp., 745 F.2d 11, 22 (Fed.Cir. 1984). The determining factor is whether the patentee or its licensee can normally anticipate the sale of the unpatented components together with the patented components. Id. at 23. Another court applied the rule even when only some of the elements of the infringing device were covered by the patent claims, since such unpatented elements would be routinely purchased by the accused infringer's customers when such customers purchased the infringing device which included elements of the claims of the

patent in suit. ACF Industries v. Midway Fishing Tool Co., 2 USPQ2d 1767, 1770 (C.D.Cal. 1986).

In Kori Corp. v. Wilco March Buggies and Draglines, 761 F.2d 649 (Fed.Cir. 1985), the defendants were found to have infringed the plaintiff's patent on a device called an Amphibious Marsh Craft, and described as an improved pontoon type, endless-track amphibious vehicle to be operated in swamps. The appellate court quoted with approval the trial court's conclusion that it found no evidence that the unpatented upper portions of the vehicle had been or could have been used independently of its patented pontoon structure. Id. at 656. From that, the appellate court concluded that the plaintiff would have normally anticipated the sale of an entire vehicle, including both the patented and unpatented components, and awarded damages based on the entire market value of the infringing machines. Id.

Applying the entire market value rule here, the fact that the odometer wheel is not specifically included in the claims of TDW's caliper pig patent, does not cause TDW to forfeit a showing of demand for its patented pig. TDW's patent envisioned in the patent drawings and description the use of the odometer wheel as one possible method to correlate the recording mechanism's record in relation with the pig's movement through the pipeline. Although the caliper pig patent focused its claims upon the unique, protected, full-circle caliper sensory devices of the pig, the odometer wheel was referred to in the patent as a means to provide a location track against which deviations detected by the sensory

apparatus could be compared. While the separately-patented odometer wheel could have been used in another of TDW's pigs, TDW chose to include it as a preferred embodiment in tracking the distance traveled by its caliper pig. In selling the pig's services as being able to detect and provide a record of deviations in the pipeline, TDW could have normally anticipated its customers' use of its entire caliper pig, including both the patented sensory features and the separately-patented odometer wheel.

It was established in the liability phase of this lawsuit that defendants' infringing pig had a virtually identical sensory apparatus to TDW's caliper pig. Defendant Laymon has admitted the use of odometer wheels on the infringing pig. As in the ACF Industries decision above, the entire market value rules applies here, since defendants' customers, in using the services of the infringing pig, were using a device which incorporated elements of the claims of the TDW caliper pig patent, as well as the separately-patented odometer wheels.

C. Defendants' claim that TDW failed to show that the Kopp pig was not an acceptable, noninfringing substitute in the Western Hemisphere.

Defendants object to the Master's Findings of Fact 13, 14, and 15, in which the Master concluded that Kopp A.G. or Kopp International did not perform any caliper survey jobs with the Kopp pig in North or South America prior to June, 1987, and that the Kopp pig was not an acceptable, noninfringing substitute for TDW's caliper pig during the relevant period in those two continents.

Defendants' objection focuses upon the application of the term "acceptable substitute" to a caliper pig manufactured by the Kopp A.G. Company, headquartered in West Germany. Defendants contend that the Kopp pig was "available" in that Kopp could have bid on and performed caliper survey jobs in North and South America during the relevant period. Defendants' contention is based upon their claim that the Kopp pig was used elsewhere in the world during the relevant period, and thus could have been as easily shipped for use in North and South America as well. According to defendants, such "availability" of the Kopp pig makes it an "acceptable substitute" for TDW's caliper pig.

Defendants cite the decision in Hughes Tool Company v. G. W. Murphy Industries, Inc., 491 F.2d 923 (5th Cir. 1973), as support for their contention that an "acceptable substitute" does not have to be actually used, as long as it is available for use. In the portion of Hughes, relied upon by the defendants, the Fifth Circuit stated that

the noninfringing Reed two-piece seal was available as a viable alternative. To be sure, the two-piece seal was less efficient than the one-piece seal and cost more to manufacture and install. Moreover, the two-piece seal was never put into actual production. Nevertheless, Reed's two-piece seals were marketable; Reed sold approximately 40 bits containing the two-piece seals made in its research department.

Id. at 930-31.

The subsequent decision in Panduit Corp. v. Stahlin Bros. Fibre Works, 575 F.2d 1152 (6th Cir. 1978), required a plaintiff to demonstrate an absence of "acceptable, noninfringing substitutes" as one element to recover damages, rather than the lack of an available, "viable alternative" of the Hughes decision.

Id. at 1156. The Panduit test appears to require actual use of the substitute product and not merely its "availability"; the court there identified an "acceptable substitute" as one which customers in general were "willing to buy in place of the infringing product" and stated that "[a] product lacking the advantages of that patented can hardly be termed a substitute "acceptable" to the customer who wants these advantages." Id. at 1162.

Further review of the case law does not convince the Court that a product's mere "availability" qualifies it as an "acceptable substitute". In Radio Steel & Mfg. Co. v. MTD Products, Inc., 788 F.2d 1554 (Fed. Cir. 1986), the patented product was described by the court as "a new and improved complete wheelbarrow", having advantages superior to other wheelbarrows available on the market. The appellate court rejected the infringer's argument that other available wheelbarrows on the market were acceptable substitutes, when those had none of the advantages of the patented product. Id. at 1556.

The Court is unpersuaded by the defendants' argument that the Kopp pig's "availability" suffices for "acceptability" as a substitute under the Panduit test. More than speculation that the Kopp pig "could have been used" in North or South America during the relevant period must be shown to overturn the Master's finding of fact on the Kopp pig as an acceptable substitute. From its review of the evidence, the Court finds no reason to disturb the Master's finding of fact on this point. The deposition testimony of the Kopp Americas International president showed that that

corporation was first incorporated in mid-1984, and ran its first caliper pig survey in June, 1987 in Venezuela and in September, 1987 in North America, more than a year after the relevant period. See Wells, V.III, p.446, lines 11-12; p.447, lines 1-25; p.449, lines 1-8. That same testimony did not indicate whether Kopp Americas' bids for caliper survey work were made within the relevant period. No evidence affirmatively established Kopp's performance of jobs in North or South America during the relevant period to contradict the Master's findings.

D. Defendants' claim that TDW failed to show that defendants' "External Finger" Pig design was not available during the relevant period.

Although the Master did not make a specific finding concerning the availability of defendants' "external finger" pig design during the relevant period, defendants contend that they had the design for that variation of a caliper pig as early as 1982, before they made their first caliper pig survey with the infringing pig. According to defendants, the fact that this alternate design for a caliper pig was available to them before their use of the infringing pig, causes their conversion to that alternate design a few days after being enjoined from using the infringing pig to be strong evidence that the alternate design was an acceptable, noninfringing substitute for TDW's patented pig.

No statutory or case law was located which supported defendants' position. In leading up to their statement of the above "rule", defendants cite the decision of Smith International,

Inc. v. Hughes Tool Co., 229 USPQ2d 81 (C.D.Cal. 1986). That case does not support the defendants' argument, but rather, undermines it, by reference to the decision in Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152 (6th Cir. 1978).¹ In Panduit, the court stated that

[t]he post-hoc circumstances that Stahlin, when finally forced to obey the court's injunction, was successful in "switching" customers to a noninfringing product, does not destroy the advantage-recognition attributable to the patent over the prior 15 years. * * * That Stahlin's customers, no longer able to buy the patented product from Stahlin, were able to buy something else from Stahlin, does not establish that there was on the market during the period of infringement a product which customers in general were, in the master's words, "willing to buy in place of the infringing product". Moreover, Stahlin's "switching" occurred years after the date on which the determination of available substitutes must focus, i.e. the date of first infringement.

Id. at 1162 [emphasis original].

That defendants could easily switch to their alternate pig design because that design was drawn up before they infringed TDW's patent, has little significance. The date of defendants' "switching" to the "external finger" pig design occurred in May, 1986, four years after 1982, when defendants began infringing TDW's patent.

Further, defendants' argument that their "external finger" pig is a noninfringing substitute ignores the fact that this Court has not yet decided whether that pig infringes TDW's patent. That question is before the Court on TDW's Citation for Contempt.

¹Additionally, the Court notes that the district court's judgment in that case was vacated and the case was remanded with instructions to dismiss the complaint because the case became moot on appeal. See Smith International Inc. v. Hughes Tool Co., 839 F.2d 663, 664 (Fed.Cir. 1988).

E. Defendants claim that TDW, as a nonmanufacturing patent holder, failed to join its licensee in the lawsuit, which thus precludes TDW's recovery of lost profits.

Defendants object to Findings of Fact 5, 6 and 7, in which the Master found that TDW owned the patent in suit and was empowered to sue for damages resulting from infringement of the patent in suit. The Master also found that TDW had two wholly owned subsidiaries, TDW Services and TDW U.K., Ltd., and that TDW's and its two wholly owned subsidiaries' financial statement were and are reported on a consolidated financial basis. Finding of fact 8.

A review of the hearing transcript shows that the Master's findings of fact 5-8 were supported by the evidence offered by TDW's president, A. B. Steen, as well as by other TDW witnesses who testified about TDW's and its subsidiaries' structure, consolidation of financial statements and TDW's reasons for entering into license agreements only with its foreign-based subsidiaries for use of TDW's patents. A. B. Steen, vol.I, p.198, ln.6-25; p.199, ln.10-25; p.200, ln.5-11; p.202, ln.1-21.

In support of their argument, defendants mischaracterize finding of fact 8, in the following manner:

the Special Master found that Plaintiff (TDW), a nonmanufacturing patent holder, was entitled to recover lost profits without joining in this litigation its (oral) licensee because under the federal and state tax laws, the financial statements of Plaintiff and its licensee were reported on a consolidated basis and the profits and losses of Plaintiff's licensees affected the profits and losses of Plaintiff on a dollar-for-dollar basis.

Defendants' Objections, p.22.

Finding of fact 8 only addresses the consolidated nature of the financial statements reported by TDW and two subsidiaries, TDW Services, Inc. (an Oklahoma corporation) and TDW U.K., Ltd. (a London-based subsidiary), and the fact that the losses and profits of those two subsidiaries affected the profits and losses of TDW on a dollar-for-dollar basis. Contrary to defendants' characterization, the Master did not find that TDW was a nonmanufacturing patent holder or that tax laws allowed TDW to recover lost profits without joining an oral licensee. The Master did not address the licensee status of any of TDW's subsidiaries in his proposed findings and conclusions. Defendants thus impute findings to the Master which he did not make, and then attempt to persuade the Court of the error of that imputed finding.

Defendants also base their objection upon "rules" governing whether lost profits should be awarded to nonmanufacturing patent holders and their licensees, which have been developed through certain decisions. Defendants cite the following "rules" as applicable to the present case:

1. Where the patentee did not himself manufacture the patented product, he is not entitled to recover lost profits. [emphasis added] (citing *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 219 USPQ 679 (Fed.Cir. 1983)).
2. Lost profits are available only to a manufacturing patentee. [emphasis added] (citing *Kori Corp. v. Wilco Marsh Buggies*, 217 USPQ 1302, 1305 (E.D.La. 1982), aff'd 761 F.2d 649 (Fed.Cir. 1985)).

3. A nonmanufacturing patent holder is entitled to recover only a reasonable royalty unless the patent holder joins his exclusive licensee in the litigation. (citing Del Mar Avionics v. Quinlan Instrument Co., 836 F.2d 1320 (Fed.Cir. 1987)).

4. A nonmanufacturing patentee is entitled to recover lost profits if it joins its exclusive licensee under the patent. (citing Bott v. Four Star Corp., 807 F.2d 1567 (Fed.Cir. 1986)).

5. Where the patentee did not himself manufacture the patented product and granted nonexclusive licenses, he was not entitled to recover lost profits. (citing Hanson, supra).

In reviewing the case law cited by the defendants, it appears that defendants have in some cases stretched a factual circumstance into some of the above "rules", without a supporting legal conclusion by the courts. In the other cases cited by defendants, no such rule was suggested by the court and no applicable factual or legal circumstance in the cited decision was readily apparent as the source of defendants' quoted "rule". Additionally, in characterizing TDW as a nonmanufacturing patent holder, defendants apparently overlooked testimony by TDW's president, A. B. Steen, indicating TDW's ownership of a manufacturing plant in Tulsa, which makes at least some of the components comprising the caliper pig. Steen admitted that TDW farms out the manufacture of certain electronic components of the caliper pig. See Steen, vol.II, p.289, ln.7-25; p.290, ln.11-12; p.303, ln.13.25.

In the Hanson decision, cited by defendants as support for "rules" 1 and 5, the court there did not state such a "rule of law", nor did the facts of Hanson obviously lead one to conclusions such as those stated by defendants in their objection. Likewise, no support for "rule" 2 was found in the trial and appellate courts' decisions in Kori. As to defendants' "rule" 3, the DelMar court noted that "[t]he general rule for determining actual damages to a patentee that is itself producing the patented item is to determine the sales and profits lost to the patentee because of the infringement." 836 F.2d at 1326. Defendants evidently construe the quoted sentence as the basis for a rule that nonmanufacturing patentees can only recover a reasonable royalty. The DelMar decision does not make any reference to nonmanufacturing patentees or to licensees, and does not state any rules on a restriction of patentees to reasonable royalties instead of lost profits. Similarly, no such "rule" as cited by defendants appears in the Bott decision. There, the appellate court remanded the issue of whether the patentee's exclusive licensee would have competed for the infringer's business. 807 F.2d at 1570-71. The Bott decision makes no reference to an issue of proper joinder of the exclusive licensee to the patent holder's claim for lost profits.

Defendants point to TDW's lack of a license with its subsidiary, TDW Services, and characterize that subsidiary as an oral, nonexclusive licensee. In arguing that TDW is not entitled to lost profits because of TDW Services' lack of a written exclusive license, defendants place reliance on the decision in

Baumstimler v. Rankin, 677 F.2d 1061 (5th Cir. 1982) as being on "all fours" with the facts in the present case. Baumstimler was the patent holder and the president of a company which manufactured the patented device and exploited the patents assigned to Baumstimler. Baumstimler and his wife were the only shareholders in his company. The company was dismissed as a party before trial for lack of a property interest in the patents, which Baumstimler had not assigned to the company, and had not entered into a licensing agreement. After a jury awarded damages for lost profits, the appellate court questioned the award of damages to Baumstimler when his company, which had used the patent but had no property interest in it, was not a party to the decision. The appellate court noted that since Baumstimler did not manufacture, sell or use the patented invention, which was exploited instead by his company, Baumstimler technically had no lost profits.

The precedential effect claimed for the Baumstimler decision is weakened, however, by the appellate court's remand for determination of, among other issues, the effect, if any, of the company's lack of a license with Baumstimler and its relationship to Baumstimler had on the determination of damages. To date, no decision on remand has been reported, leaving this issue open. However, even if that issue had been decided by now, the Court questions whether the fact of TDW's manufacturing of components for its patented pig would place this case on "all fours" with the Baumstimler facts.

F. Defendants claim that TDW failed to show that gauging pigs and dummy pigs are not acceptable noninfringing substitutes.

Defendants object to the Master's finding of fact 12(a)(1)(3), in which the Master found that gauging pigs and dummy pigs were not acceptable noninfringing substitutes for TDW's patented caliper pig. Defendants complain that the Master's findings are a result of his attributing values accruing solely from the use of odometer wheels on the patented pig. According to defendants, the absence of the separately patented odometer wheels would render the patented device to be essentially performing the same function as the dummy pig or gauging pig. This argument is based on the same premise argued by defendants in section B. above, and which the Court did not find persuasive.

As noted previously, a patent holder must prove the absence of acceptable noninfringing substitutes. Panduit, 575 F.2d at 1156. However, the "[m]ere existence of a competing device does not make that device an acceptable substitute." TWM Mfg. Co., Inc. v. Dura Corp., 789 F.2d 895, 901 (Fed.Cir. 1986). When none of the alleged substitutes have all the beneficial characteristics of the patented device, it is reasonable to determine that there are no acceptable substitutes. Id. The "acceptable substitute" element should be considered, but viewed of limited influence where the infringer knowingly made and sold the patented product for years while ignoring the substitute. Panduit, 575 F.2d at 1162 n.9.

The evidence at the damages hearing showed that gauging pigs and dummy pigs were non-infringing, but were not clearly acceptable substitutes for the patented pig. Testimony indicated that gauging plates were still being used in newly constructed pipelines, but witnesses noted that pipelines were indicating a preference for using caliper pigs to run in newly constructed pipelines. Kinnear, vol.IX, p.1738, ln.17-21; Fears, v.IX, p.1681, ln.8-9. Unlike gauging pigs, caliper pigs could be used in operating pipelines, without having to empty the pipeline contents. Gauging pigs were also likely to become stuck in the line; some pipeline companies considered it cheaper to use caliper pigs, considering the costs of excavating the pipeline to retrieve the gauging pig.

Dummy pigs are shaped like a corrosion detection tool, and are run with the purpose of ensuring that the expensive corrosion detection tool will not become stuck in the pipeline. The only location tracking ability to identify defects possessed by a gauging or dummy pig is if the pig becomes stuck in the pipeline, which must be then excavated to recover the pig and investigate that cause of the pig stopping. The presence and location of smaller defects which the gauging and dummy pigs were able to pass by are not located by these two types of pigs. The evidence thus showed that gauging pigs and dummy pigs, while used for some purposes in pipelines, do not offer all of the advantages or perform the same functions as the patented caliper pig.

Defendants assert the existence of newly discovered evidence regarding, in part, the acceptability of gauging pigs as a substitute for the caliper pig. Defendants' claimed evidence is a paper, published in 1987 in a collection of essays on pipeline pigging, written by TDW employee Geoffrey Guy Trenchard Blanford. In that paper, Blanford stated the "most serious competitor" to TDW's caliper pig "is the simple gauging plate". See Def.E.A to Motion and Brief to Receive Newly Discovered Evidence. Defendants construe this single sentence in Blanford's paper as an impeachment of Blanford's testimony given at the damages hearing regarding the limitations in using a gauging pig.

The Court, however, does not view that single sentence, taken out of context, to impeach Blanford's testimony at the hearing to warrant reversing the Master's findings on gauging pigs. The remainder of that paragraph and the following one indicate again the limited knowledge and the hazards that are provided in running a gauging pig through a pipeline. Even if that single sentence afforded sufficient impeachment value against Blanford's testimony, there was ample testimony and other evidence, presented at trial and the damages hearing, concerning the inadequacies of the gauging pigs for the purposes for which caliper pigs are used, to support the Master's findings. Having reviewed the defendants' "new" evidence, against the hearing transcripts and exhibits concerning gauging pigs, the Court finds no clear error in the Master's finding that gauging pigs are not acceptable substitutes for TDW's caliper pigs.

G. Defendants' claim that the AMSI, Vetco, Rosen and Transcanada tools were acceptable, noninfringing substitutes for TDW's caliper pig.

Defendants object to Findings of Fact 12(b), 18 and 19 in which the Master found that certain tools offered by other pipeline service companies were not acceptable, noninfringing substitutes for the patented caliper pig. Defendants complain that the Master mischaracterized the use of these tools as primarily corrosion detectors, rather than as caliper survey instruments.

Defendants' argument depends, again in part, on their equation of "availability" to acceptability as a noninfringing substitute under the Panduit test. Defendants thus contend that these tools were "available" on the market during the relevant period and had the ability, similar to that of the TDW caliper pig, to detect and provide a location record of dents and other deformations in a pipeline. As discussed above, the Court is not convinced that mere "availability" of a device is tantamount to its "acceptability" as a substitute for the patented device. Nor can a product be considered an acceptable substitute when it does not possess all the beneficial characteristics of the patented device, but is either different or inferior to that device. TWM Mfg. Co., Inc. v. Dura Corp., 789 F.2d 895, 901 (Fed.Cir. 1986); Central Soya Co. Inc. v. Geo. A. Hormel & Co., 723 F.2d 1573, 1579 n.4 (Fed.Cir. 1983). Devices which may indicate distortions in a pipeline's geometry, but are not the equivalent of the caliper pig, are deemed to be outside the relevant "minimarket" for caliper survey services

in determining TDW's lost profits. See Yarway Corp. v. Eur-Control USA, Inc., 775 F.2d 268, 276 (Fed.Cir. 1985). Further, the "acceptability" of the alleged substitutes must be questioned when the defendants ignored the "availability" of those substitutes in "designing around" the TDW patent. See Panduit, 575 F.2d at 1152 n.9.

The patentee's burden in demonstrating an absence of acceptable substitutes is not stringent.

The patent holder does not need to negate all possibilities that a purchaser might have bought a different product or might have foregone the purchase altogether. The "but for" rule only requires the patentee to provide proof to a reasonable probability that the sale would have been made but for the infringement.

Paper Converting Machine, 745 F.2d at 21
[emphasis original].

The AMSI tool, for example, was developed to detect pipeline corrosion, and only incidentally may detect dents and other deformations in the pipeline geometry. The testimony of AMSI's president indicated the tool's main use was for corrosion detection, rather than its caliper survey abilities. No recognition of AMSI's caliper capabilities over its corrosion detection uses in the pipeline field was evident from testimony presented at the damages hearing.

Similarly, the use of a Rosen geometric pig during the relevant period was not clearly established by the evidence. An employee of the U. S. company with rights to use the Rosen technology testified that the first use of the Rosen pig in the United States was made in 1987, a year after the relevant period. See Lewis, vol.VIII, p.1569, ln.1-11. That same witness noted that

the Rosen geometric pig had been used in pipelines in the North Sea, Europe and the Middle East, but did not say when those jobs were performed. Id. p.1568, ln.20-25. Although Rosen's pig was first shown at trade shows in 1982, and Rosen advertised its geometric pig in the United States, Lewis also testified that he would not include Rosen as among the companies performing caliper survey work before 1987. Id. p.1569, ln.14-20; p.1585, ln.13-21. Defendant Laymon admitted that he had no knowledge of any caliper jobs performed by a Rosen pig during the relevant period. See Laymon, vol.III, p.631.

Testimony indicated that the Transcanada tool was first used in 1972 to detect construction damage on new pipelines such as dents and deformations, as well as detecting internal corrosion of the pipeline. See French, vol.VIII, p.1374. The Transcanada ID tool worked on a magnetic flux principle. A former employee of Transcanada testified that the ID tool was used for caliper work within Transcanada's own pipeline system, and was used on one yearly U. S. pipeline job from 1981-85. Id. p.1388, 1412. However, one drawback to the use of the ID tool was that it cost nearly twice as much as a caliper survey offered by TDW. Id. p.1404, 1420-21. One of defendants' witnesses questioned whether a tool using flux leakage principles to detect and locate dents was acceptable to a pipeline customer wanting to locate dents, when the flux leakage tools cost so much more to run than a caliper pig. See Casey, vol.VIII, p.1467, ln.20-25.

Evidence from the damages hearing clearly demonstrated that C. E. Vetco had performed only one caliper survey job during the relevant period, on the Aliesco pipeline job in Alaska. See Atwood, vol.V, p.817, ln.14-18. C. E. Vetco developed its caliper pig for the 48" diameter Aliesco line. Id. C. E. Vetco has not developed that caliper tool in other sizes for use in other pipelines, because its engineers have determined that the design of that caliper pig is not economically feasible to be used in any other pipeline. Id. vol.VI, p.1121, ln.12-21. C. E. Vetco has called both TDW and EPS to bid on caliper survey jobs. Id. p.1123, ln.10-13.

Testimony from several pipeline industry witnesses indicated that they considered only TDW and defendant EPS to offer a caliper pig survey services during the relevant period. See Wells, vol.III, p.452; Dunham, vol.VIII, p.1601, ln.20-25; Bateman, vol.VIII, p.1646-47; Griffin, vol.IX, p.1715, ln.16-17.

Defendants also claim the existence of newly discovered evidence which allegedly impeaches the testimony of one of TDW's witnesses concerning acceptable substitute devices in the relevant period. Defendants point to a paper in a collection of essays on pipeline pigging, published in 1987, and written by a TDW employee, Geoffrey Guy Trenchard Blanford. In his paper, Blanford stated that six companies were known competitors in that they offered a form of pipeline inspection device "competing" with TDW's caliper pig. Among the companies Blanford named as "competitors" with TDW were C. E. Vetco, Kopp, Rosen and Transcanada. Defendants contend

that Blanford's statements regarding TDW's competition in caliper surveys contradicts Blanford's testimony given at the damages hearing regarding the lack of acceptable substitutes for TDW's caliper pig during the relevant period.

From its review of Blanford's testimony and the defendants' "new" evidence, the Court is not persuaded that the "new" evidence constitutes an impeachment of Blanford's previous testimony. Blanford's paper points out drawbacks and inadequacies of the "competing" devices as compared to TDW's caliper pig. The Court finds no obvious inconsistencies between Blanford's paper and his hearing testimony to cast doubt upon that testimony. However, even if Blanford's testimony were thus discredited, the Court finds ample evidence from the testimonies of pipeline company representatives and representatives from the Kopp, Rosen, Transcanada and C. E. Vetco companies to support the Master's finding that the devices contended to be in "competition" with TDW's caliper pig were not "acceptable substitutes" for that device during the relevant period.

H. Defendants claim that TDW did not show a demand in the marketplace for their patented pig as commercialized.

Defendants object to the Master's finding that TDW had shown a demand for its caliper pig services. Finding of Fact 9. Defendants contend that the evidence demonstrated that TDW's pig was held in low repute in the pipeline industry, and cite several instances in which the TDW pig performed unsatisfactorily, giving inaccurate results and requiring that the pig be run through the

line twice. Defendants assert the poor reputation and unreliability in results of the TDW pig are reasons why there was no demand for TDW's services during the relevant period.

Under Panduit, the demand element "concerns only the manufacturing/marketing capability of the patentee to meet the demand. The demand which a patentee must have the capacity to meet is measured by the total sales, by the patentee and the infringer, of the patented product." Datascope Corp. v. SMEC, Inc., 11 USPQ2d 1321, 1324 (Fed.Cir. 1989) [emphasis original]. From the Court's review of the evidence, the Master's finding as to demand for the patented pig was factually supported and without error. That evidence showed the need for the patented caliper pig was perceived nearly twenty years ago by the inventor, an employee of TDW, and TDW promoted the pig's use by the pipeline industry. The evidence also showed that TDW was recognized in the pipeline service field for its caliper surveys. When defendant Laymon left TDW's employ, he apparently realized the demand created by the patented pig, since in "designing around" the TDW patent, he retained essentially the same features in his infringing device. The number of defendants' jobs using the infringing devices containing the patented feature is compelling evidence of the demand for the product. See Gyromat Corp. v. Champion Spark Plug Co., 735 F.2d 549, 552 (Fed.Cir. 1984). Defendants presented no evidence of specially designed features on their infringing device which would

overcome the problems defendants allege caused TDW's customers or potential customers to turn to EPS for better caliper services.

I. Defendants claim TDW did not show that the Green caliper pig was not an acceptable noninfringing substitute for the patented pig.

Defendants complain that TDW put on no evidence, and the Master made no finding of fact regarding Green's patented caliper pig as an acceptable noninfringing substitute for TDW's patent caliper pig. Defendants admit that the Green pig was never actually commercially produced, but contend that its design was similar to TDW's pig. Green's patent having expired during the relevant period, defendants argue that that pig design was available for other companies' competing use in the caliper pig services market.

Once again, defendants' "availability" argument in finding an "acceptable substitute" must be rejected. In the case of Green's pig design, defendants' contentions of "availability" are unconvincing, as there apparently was no commercial embodiment of Green's design advertised or available and put in use during the relevant period. None of the pipeline customer witnesses called by the defendants mentioned their consideration of the Green pig design in the general area of pipeline caliper survey services or in contracting for such services.

Additionally, the fact that Green's patent expired a year before the defendants built their first pig weakens their argument of the design's acceptability as a substitute for TDW's caliper

pig, when defendants "designed around" TDW's patented product rather than the "available" Green pig design.

III. DEFENDANTS' OBJECTIONS AS TO AWARDS OF LOST PROFITS FOR PARTICULAR JOBS.

A. Defendants' claim that TDW is not entitled to lost profits on any survey jobs defendants performed for Laurel Pipeline.

Defendants object to Finding of Fact 21, in which the Master found, by implication, that each of the four caliper survey jobs defendants performed for the Laurel Pipeline Company would have been performed by TDW, but for the infringement of the defendants. In support of this objection, defendants claim the applicability of a rule denying the patentee lost profits on jobs where the customer would not have used the patentee or the patented product, regardless of the infringer's activity. Defendants point to the testimony of Laurel Pipeline representatives, who, after experiencing unsatisfactory survey results from TDW's caliper pig, refused to use TDW's or any similar caliper pig to survey their lines.

Defendants cite the district court decision in Datascope Corp. v. SMEC, Inc., 5 USPQ2d 1963 (D.N.J. 1988), as support for the rule that a customer's preference for the infringing device denies to the patentee lost profits attributable to that customer. The recent reversal of that decision precisely on the point argued by defendants has been noted by this Court. In reversing the lower court, the Federal Circuit stated

We note, first, the logical error in considering the preference of customers for the infringer as a source of supply. That preference, if it exists, bears no relevance to element three of the Panduit test, which concerns only the manufacturing/marketing capability of the patentee to meet the demand. The demand which a patentee must have the capacity to meet is measured by the total sales, by the patentee and the infringer, of the patented product.

Datascope Corp. v. SMEC Inc., 11 USPQ2d 1321, 1324 (Fed.Cir. 1989) [emphasis original].

Contrary to defendants' assertions, the evidence supports the implication in the Master's Finding of Fact 21 that, but for the defendants' infringement, TDW would have performed the four caliper survey jobs for Laurel Pipeline. The representative for Laurel testified that the decision to use EPS instead of TDW was made without his knowledge, and defendants' pigs were run in Laurel's lines despite his objections to using any caliper survey device similar to TDW's patented pig. See Kinnear, vol.IX, p.1734, ln.6-25; p.1735, ln.1-9. This same witness testified that he saw no particular characteristic of EPS' infringing pig to cause it to perform more accurately than TDW's patented device. Id. at p.1749, ln.7-10. The evidence demonstrates that Laurel, as a previous customer of TDW, in seeking caliper survey services, was thus able to turn to defendants' infringing device as an immediate alternative to TDW's pig. From this it can only be concluded that but for the defendants' infringement, TDW would have performed the caliper survey jobs for Laurel Pipeline Company, who sought those services during the relevant period.

B. Defendants claim that the Master mistakenly included a bend detector job as an internal geometry survey in calculating TDW's lost profits.

Defendants object to the Master's inclusion of what they allege is primarily a bend detector job they performed in Canada in 1986, in the calculation of lost profits to TDW. See Pl.E.32. Because the Master excluded defendants' bend detector jobs from the calculation of lost profits (Finding of Fact 29), defendants argue that the inclusion of the one bend detector job in TDW's lost profits is error.

The testimony of Defendant Laymon at the damages hearing was contradictory as to the nature of the job described in Pl.E.32. Defendant Laymon at one point in his testimony admitted that Exh.32 pertained to an internal assembly job in Canada with total revenues of \$26,616.80. Laymon, vol.III, p.591, ln.8-12. Later, defendant Laymon testified that Exh.32 pertained to a bend detector job performed after another company's dummy tool had been bent in the customer's pipeline. Id. p.707, ln.11-17.

Def.E.238A contains two spread sheets entitled "What TDW would have bid on EPS jobs." A special category, entitled "Bend Detector Jobs" is included in those two charts. Pl.E.32 is not claimed by the defendants as a bend detector job on Def.E.238A, although other jobs are claimed as such.

Pl.E.32 is an invoice from EPS and other related paperwork dated April 1986, and shows that both bend location and a geometric survey were offered and billed in April, 1986. The description of work performed on the invoice is stated to be to "bend locate & gauge 133 Miles x 20 inch diameter pipeline". Defendant Laymon's

testimony and thus was in a better position to determine the credibility of his testimony on this point. See McGraw Edison Company v. Central Transformer Corp., 196 F.Supp. 664 (E.D.Ark. 1961), aff'd 308 F.2d 70 (8th Cir. 1962) ("the Court is more reluctant to overturn the Master's findings where such findings are based upon conflicting testimony of witnesses who have been seen and heard by the Master ...").

C. Defendants claim TDW cannot recover damages on two Canadian jobs performed in 1982, before TDW actually charged defendants with infringement.

Defendants' objection to the Master's inclusion of lost profits for two jobs performed in Canada in 1982, is based on defendants' argument that TDW failed to mark its caliper pig with the word, "Patented" or the abbreviation "Pat." as required by statute, and thus failed to give notice to defendants and the public about the patented status of the caliper pig. Defendants maintain that TDW's failure to mark its pig excludes any damages for patent infringement occurring before an actual charge of infringement to defendants was made by TDW. Defendants contend that the actual charge of notification from TDW was not provided to defendants until November 30, 1982, and thus the two Canadian jobs defendants performed prior to November, 1982 should not be included in the calculation of lost profits to TDW.

TDW offered into evidence three letters sent between its counsel and defendants and defendants' counsel. Pl.E.161-163. On June 18, 1982, TDW counsel Johnson sent letters to defendant Laymon

and former EPS partner Lanny Potts, informing them of TDW's awareness of EPS' contract with a Canadian pipeline for a caliper survey, using a device similar to TDW's caliper pig. Johnson's letter specifically informed the EPS partners of the patent numbers of TDW's caliper pig patents in Canada and the U.S., and that use of EPS' device would be an unauthorized use of devices covered by those patents. Johnson closed the letters by warning of TDW's intent to seek an injunction and damages for any past or potential infringements. Counsel for EPS, Dorman, responded to Johnson's letter on June 23, on behalf of Laymon and Potts, stating that EPS had avoided infringement by designing around TDW's patent.

In his finding of fact 31, the Master concluded that TDW counsel's letter of June 15 and 18, 1982 to Potts and Laymon constituted a notice of infringement of TDW's patent. The Master also held Johnson's letters constituted a notice of infringement within the meaning of 35 U.S.C. §287. The Master's conclusion of a sufficient notice of infringement was based upon his finding that Dorman's letter of June 23, 1982 responded to Johnson's earlier letters by asserting that EPS had not infringed TDW's patent. The Master drew the inference from Dorman's response that EPS regarded Johnson's letters of June 15 and 18 as charges of infringement.

It is undisputed that TDW did not mark the patented pig as required by §287 (although TDW argues that since only TDW handles the caliper pigs in providing survey services, no member of the public can be misled by the lack of a "patent" marking on each of its pigs). The issue then is the sufficiency of notice of

infringement provided defendants by TDW counsel on June 15 and 18, 1982. Dorman's letter of June 23, 1982 responds to the two letters, by offering assurances that the defendants had avoided infringement by designing around TDW's patent. "When one acknowledges for his adversary that the adversary is claiming infringement, the law most certainly does not compel the patent owner to repeat it any more explicitly." Livesay Window Company v. Livesay Industries, 251 F.2d 469, 475 (5th Cir. 1958).

Defendants characterize Johnson's two letters as "cautionary" and therefore not an actual notice of infringement. That the two letters may be phrased in terms of defendants' future infringement is explained in the letters' first paragraph, where Johnson states his learning of a future pipeline survey with devices which had been described as similar to that covered by TDW's patent. The effect of TDW's warning of infringement is not lessened because the act of infringement has not yet occurred; no law requires an infringement to have taken place prior to an effective notice of infringement. 35 U.S.C. §287 only requires proof that the infringer was notified of infringement and continued to infringe thereafter. Armstrong v. Motorola, 374 F.2d 764 (7th Cir. 1967). The notice provision of §287 is satisfied if the infringer was given the same information as the statute requires for patent marking, which need only contain the word "patent" or its abbreviation, and the patent number. Id. The second paragraph of Johnson's June 1982 letters clearly recites the word "patent" in connection with the patent numbers for TDW's Canadian and U.S.

patents on the caliper pig. Additionally, TDW warned defendants in its intention to "aggressively" seek legal remedies against them. A charge of infringement, as was recognized in Dorman's response, would seem readily apparent in TDW's threat of court action.

Defendants contend the recent decision in Refac Electronics Corp. v. A & B Beacon Business Machines Corp., 8 USPQ2d 2028 (S.D.N.Y. 1988), supports their argument that Johnson's letters were an insufficient notice of infringement. However, the Court's review of that decision reveals differences in the letters sent in Refac and those at issue here. The letters sent by Refac omitted mention of the particular infringing device sued upon; the eleven devices listed in the Refac letters were wholly different in nature from that sued upon so that the accused infringer could not be said to have had notice of the patentee's intent to include that device among those listed in the letters charging infringement. Id. at 2030. The accused infringer's response letter requested further information about the devices alleged to be infringing, and did not acknowledge Refac's accusation of infringement. Id. at 2029. In contrast, Johnson's June 18, 1982 letters to Laymon and Potts specifically mentioned defendants' proposed use of a device to perform pipeline caliper surveys in Canada, and warned of the likelihood for infringement of TDW's caliper pig patents in Canada and the U.S. upon the use of defendants' device. No possibility thus existed here for confusion by the defendants about which devices Johnson's letters intended to cover. This was evidenced

by Dorman's June 23 response letter, which did not request further information from Johnson about what devices he meant, but instead denied infringement and asserted defendants' intentional avoidance of infringement by designing around the TDW caliper pig patent.

D. Defendants' claim that TDW cannot recover damages for foreign jobs performed prior to November 8, 1984.

Defendants object to the Master's inclusion of lost profits for jobs defendants performed in Canada and Italy prior to November 8, 1984. The Master's inclusion of lost profits for these jobs was based upon his Finding of Fact 24 that defendants shipped their infringing pig components from the United States to the foreign job site. The Master also found that after completing these foreign jobs, defendants shipped the pig's disassembled components back to Tulsa for use on subsequent foreign or U.S. jobs.

In their assertions of error, defendants place much emphasis in their argument regarding the unassembled state in which their pigs were shipped to foreign job sites. Defendants contend that their pigs were not assembled in the United States before July, 1983. Defendants do not cite any evidentiary support for this contention and the Court's review of the record found no evidence indicating when defendants first assembled their infringing pigs in the United States. Likewise, defendants' contention that their first two jobs were performed in 1982 in Canada, without assembling their pig anywhere but at the Canadian job site, is also without evidentiary support in the record, as reviewed by the Court. After

reviewing the record, the Court finds no clear error in the Master's Finding of Fact 24.

In their reply brief, defendants also apparently object to the Master's Conclusion of Law 16. There, the Master held the defendants' reliance upon Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972), was misplaced, in that Deepsouth's products were never assembled in the U.S. and thus avoided infringement. Defendants point out that in Deepsouth, there were sales and assembly in the United States of devices which were held to infringe, but that the unassembled components sold in foreign countries were held not to infringe. Defendants may be correct in this characterization of the Deepsouth decision; however, the Court finds their reliance upon Deepsouth is misplaced for reasons in addition to that stated by the Master.

The facts surrounding the defendants' operation of their caliper survey business distinguish the instant case sufficiently from that of the infringer in Deepsouth to cause this Court to question Deepsouth's applicability. In Deepsouth, the infringing units remained unassembled for shipment to foreign purchasers, who assembled and used the infringing device overseas. The Deepsouth defendant apparently had no further involvement with an infringing unit, once it was shipped to the foreign purchaser. In Deepsouth, the Supreme Court noted that the return of the foreign-purchased infringing devices for subsequent use in the U.S. would not allow the defendant to escape liability for infringement: "[c]ertainly if Deepsouth's conduct were intended to lead to use of patented

deveiners inside the United States its production and sales activity would be subject to injunction as an induced or contributory infringement." Id. at 526.

In the present case, however, defendants' conduct in shipping their pigs overseas in less than operable condition was intended to lead to defendants' continued use of their infringing devices within the United States. Defendant Laymon established that after performing caliper survey jobs in Canada and Italy, defendants brought the pigs back to the U.S. for future survey jobs in the U.S. and overseas. See Laymon, vol.III, p.605, ln.13-24; vol.X, p.1947, ln.2-7. Defendant Laymon also testified that in the first years of EPS' operation, EPS had only three recording instruments, and thus could not perform caliper survey jobs in the U.S. if the recorders were shipped overseas with the pigs; therefore the EPS technicians hand-carried the recorders to foreign job sites and then back to the U.S. Id. at p.1883, ln.1-6. Laymon also noted that the same pig components are used in defendants' pigs to perform survey jobs in both the U.S. and foreign countries. Id. vol.III, p.605, ln.17-24; vol.X, p.1945, ln.16-17. Components of the infringing pig are maintained and stored unassembled at defendants' offices in Tulsa; defendants compile pig components as needed for a particular job. Id. p.1960, ln.1-6. For both U.S. and foreign survey jobs, defendants basically ship their pigs in the same manner, reserving final, albeit minor, assembly and adjustments to the pig to be done at the job site. Id. p.1889, ln.12-22; p.1884, ln.15-23.

Unlike the defendant in Deepsouth, defendants did not intend to make a one-time sale to foreign purchasers of their infringing device; defendants instead sold their use of the infringing devices to pipeline customers in the U.S. and in foreign countries. Defendants' rotation of the infringing devices between foreign and U.S. survey jobs as needed enabled defendants to exploit opportunities for survey jobs in the U.S. as well as overseas. Defendants' overseas use of their infringing pigs thus cannot be as neatly separated from their infringing activities in the U.S. as was the case in Deepsouth. While perhaps not following the same reasoning as used by the Master in proposed Conclusion of Law 16, the Court, after de novo review of that Conclusion, is nevertheless unpersuaded by the defendants' arguments of Deepsouth's applicability to the facts of this case.

E. Defendants' claim that TDW cannot recover lost profits on survey jobs lost to defendants unless TDW can show that it was the second lowest bidder.

No decision or statute was located which cited such a rule requiring a showing of a second lowest bidder. The decision cited by defendants as support for the stated "rule", Leesona Corp. v. U.S., 599 F.2d 958 (Ct.Cl. 1979), does not set forth such a rule. Leesona also is distinguishable on its facts from this case or any other case involving damages assessment against a private infringer, rather than the United States. The federal government issued to Leesona a negotiated contract letter for procurement of batteries, on which Leesona had a patent. The government soon

thereafter withdrew the letter contract and sought bids from Leesona and several other companies for the batteries. The lowest bidder received the contract, and began manufacturing the batteries under Leesona's patent, furnished by the government. Leesona was the second lowest bidder, and sued the government for infringement of its patent.

As the Court of Claims pointed out, the theory for recovery against the government for patent infringement is not analogous to that in litigation between private parties; the government's infringement is deemed a "taking" of the patent license under an eminent domain theory, rather than under patent infringement damages statutes. Id. at 964. The federal government procurement and contract bid procedures also cannot be compared to the contract dealings between private companies.

Defendants also suggest that the Master did not consider the rule that where a patent owner and the accused infringer had a number of competitors bidding for jobs, the patent holder must show that he bid on all lost sales he claims to have lost. See Defendants' Objections, p.64 (citing Milgo Electronic v. United Bus. Communication, 623 F.2d 645 (10th Cir. 1980)).

However, as the Milgo decision indicated,

[n]either the trial court nor the appellate court can demand absolute proof that purchasers of the infringing product would have bought the patent-holder's product instead. It is impossible and therefore unnecessary for the patent-holder to negate every possibility that the purchasers might not have bought another product. The plaintiff's burden of proof is not absolute, but rather one of reasonable probability.

Id. at 663.

In Milgo, the patentee and the infringer were deemed to be the only "viable" competitors in the marketplace, and the court there held it "unnecessary for the [patentee] to prove that he bid or at least solicited bids on every infringing sale in order to recover lost profits for these sales." Id. at 664. The evidence here does not support defendants' contention that "important" competitors existed during the relevant period who bid against defendants and TDW for caliper survey jobs during the relevant period. Instead, the evidence indicates that TDW and defendant EPS were considered to be the primary "viable" competitors offering pipeline internal geometry caliper surveys during the relevant period. For many of the same reasons that the Court has found these other alleged "important" bidders to have non-acceptable substitutes for the patented device, the Court finds that the presence of the alleged bidding competition was negligible, and thus does not require TDW to show that it bid on all jobs in order to receive lost profits on the jobs performed by the defendants.

F. Defendants' claim that TDW cannot recover lost profits on 6" diameter pipeline surveys.

Defendants object to the Master's inclusion in his calculation of lost profits of three survey jobs EPS performed on 6" diameter pipelines. Defendants' objection is based upon their contention that TDW took its 6" caliper pig off the market in 1981 and instituted a company policy forbidding further use of the 6" pig, because of customer complaints and dissatisfaction with the results obtained from that particular size of pig. Despite the alleged

company policy, defendants also contend that TDW used its 6" pig on a pipeline survey job in Australia in 1983, with such poor results that TDW was "thrown off" that job. According to defendants' witness, TDW then reinstated its policy of not providing 6" caliper pig surveys. See Beach, vol.XI, p.2005, ln.1-11.

At the damages hearing, TDW presented evidence showing that it had used its 6" caliper pig to perform several caliper survey jobs during the relevant period when defendants contended that TDW had withdrawn the 6" pig. See Pl.E.159. In response, defendants charge that TDW used its 6" pig on those several jobs in violation of its own company policy, without approval of TDW management, and with knowledge of the 6" pig's faulty design, thereby perpetrating a fraud upon the public. According to defendants, "principles of equity" should prevent TDW from recovering lost profits on EPS' 6" survey jobs in view of TDW's practice of a "fraud" upon the public and TDW's customers with its 6" pig.

Defendants did not specify the "principles of equity" supporting their argument. The Court must therefore infer that defendants' reliance is upon the "clean hands" doctrine, which bars relief sought by a plaintiff whose prior conduct had violated some legal or equitable principle.

If the Court's inference is correct, several problems are apparent in defendants' assertion of the "clean hands" doctrine to deny TDW lost profits on the three 6" jobs. It is questionable whether TDW's use of its 6" pig was even a "violation" of its own

company policy and without the knowledge of its management; no evidence clearly established such alleged "nefariousness" within TDW's operations. See Nike, Inc. v. Rubber Mfrs. Ass'n., Inc., 509 F.Supp. 919, 926 (S.D.N.Y. 1981) ("clear, unequivocal, and convincing evidence" required to establish the defense of unclean hands). Even if such intracorporate "infractions" were established, the Court fails to see how such can be labeled as a violation of a legal or equitable principle serious enough to invoke penalties against TDW under the "clean hands" doctrine. The evidence does not show a "bad intent" on the part of TDW, which is necessary to invoke the doctrine. See Wells Fargo & Co. v. Stagecoach Properties, Inc., 685 F.2d 302, 308 (9th Cir. 1982) (bad intent is the essence of unclean hands defense). Finally, the Court questions whether defendants can invoke that doctrine here, as defendants assert damage to TDW's customers and the public, but not to themselves, from TDW's alleged "fraudulent" use of its 6" pig. "The maxim of unclean hands is not applied where plaintiff's misconduct is not directly related to the merits of the controversy between the parties, but only where the wrongful act in some measure affects the equitable relations between the parties in respect of something brought before the court for adjudication. The alleged wrongdoing of the plaintiff does not bar relief unless the defendant can show he has personally been injured by the plaintiff's conduct." Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 863 (5th Cir. 1979).

The Court, from its examination of the evidence, finds no evidence of a "fraud on the public" practiced by TDW with regard to its 6" caliper pig, nor clear error on the part of the Master in awarding TDW lost profits on the defendants' three 6" survey jobs. TDW's evidence demonstrated that it had the ability to perform 6" caliper survey jobs during the relevant period.

G. Defendants' claim that TDW should not recover damages for a job performed after the relevant period with EPS' "external finger assembly" pig.

Defendants complain of the Master's inclusion in the lost profits calculations of a job³ they contend was performed after the relevant time period with their other caliper pig embodiment. That embodiment used an "external finger assembly" instead of the "internal finger assembly" found to be an infringement by this Court on April 30, 1986.

Defendant EPS' invoices and job paperwork on this one job clearly indicate that part of the caliper survey work performed by defendants took place between April 21 through May 2, 1986. Defendant Laymon has conceded that this part of the job was performed with the infringing "internal finger assembly" caliper pig. See Laymon, vol.III, p.570, ln.16-25.

However, defendants claim that the second part of the job, covering the period from May 3-14, 1986, was performed with the "external finger assembly" pig after the relevant period. The EPS

³Defendants' objection was actually directed toward the inclusion of two EPS jobs files, corresponding to P.L.E.15&16, in the Master's calculations of lost profits to TDW. However, in Finding of Fact 26, the Master excluded the job in P.L.E.16 from the lost profits calculations as a bend detector job.

invoice and job paperwork covering this part of the job do not indicate whether an internal or external finger assembly was used after April 30, 1986. Defendant Laymon testified that that job was performed with the "external finger assembly". See Id. vol.III, p.659, ln.14-21. Defendant Laymon also testified that he was advised of the Court's infringement finding on May 1, 1986, and that he immediately made arrangements to have a new finger assembly manufactured for the pig on this job. Laymon testified that he also spent that day and the next looking for casters or rollers to attach to the ends of the modified finger assembly; however, he was unsuccessful in finding anything in stock and readily available for use on the pig on the job in progress. Id. vol.III, p.578-79. Laymon's testimony was not definite as to when the "external finger assembly" was actually put on the pig in use on the job and no documentation was available to pinpoint when Laymon sent the finished "external finger assembly" to be used on that job. See Id. vol.III, p.571-72.

Defendants produced the job file to TDW, identifying it as a job using the infringing internal finger assembly. See Id. vol.III, p.564, 657. Defendants now claim it inequitable for the Master to penalize them for their inadvertent production of their mislabeled file. However inadvertent defendants' mislabeling may have been, any penalty created by that mistake should not be assessed against TDW, since "any adverse consequences must rest on the infringer when the ability to ascertain lost profits is due to the infringer's own failure to keep accurate or complete records."

Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056, 1065 (Fed.Cir. 1983) (citing Milgo, 623 F.2d at 665). Aside from that question, the Court does not find the Master's identification of both parts of this particular job as performed by the infringing internal finger assembly to be clearly erroneous. Defendants could not furnish evidence, either by testimony or by document, of a precise date to prove if and when they switched to the external finger assembly on this job. Lacking such evidence, the Master could not apportion the damages between the usage of the infringing finger assembly and the alleged use of the external finger assembly.

H. Defendants' claim that TDW's conduct during lawsuit justifies a denial of prejudgment interest to TDW.

Defendants complain that the Master's award of prejudgment interest to TDW is an abuse of discretion. Defendants contend that many of TDW's actions taken during this litigation were contrary to what TDW knew or should have known of the "actual" or "true" facts, and were taken intending to "punish" defendants by forcing them to incur increased time and expenses to defend against TDW's claim for damages.

In 1983, the Supreme Court set forth the standard for the award of prejudgment interest under 35 U.S.C. §284, noting that such interest should ordinarily be awarded where necessary to afford a plaintiff full compensation for infringement of the patent. General Motors Corp. v. Devex Corp., 461 U.S. 648, 655 (1983). However, the Court also indicated that prejudgment interest is not required to be awarded on every determination of

infringement, but may be limited or denied, in circumstances such as when a patent owner is responsible for undue delay in prosecuting the lawsuit, or in "other circumstances". Id. at 656-57.

Defendants contend the "other circumstances" language of Devex applies to TDW's prosecution of its damages claim. This contention is premised on defendants' conclusion that TDW pursued its claim for damages, despite knowing (or that it should have known) that it could not prevail on such a claim. Defendants essentially impute to TDW the "knowledge" that each of defendants' sixteen objections, discussed above, would be sustained.

No court has yet given definition to the term "other circumstances" to illustrate situations justifying denials of prejudgment interest. In Devex, the Supreme Court found no unnecessary delay on the part of the plaintiff there, indicating that the plaintiff "had done no worse than fully litigate its claims, achieving a large judgment in its favor." Id. at 657. The Court here similarly finds TDW's prosecution of its claim for damages to be "no worse" than was that of the plaintiff in Devex, in seeking to prove its damages from defendants' infringement of TDW's patent. The record does not demonstrate TDW's possession of "knowledge" or an intent to "punish" defendants through their expenditure of time and money, as alleged by defendants. Defendants have not supplied the Court with any evidence to support their allegations of TDW's "knowledge" and intent to punish them,

to warrant a finding that the Master's award of prejudgment interest is an abuse of discretion.

Conclusion

In summary, then, the Court finds as follows:

1. Plaintiff TDW's objection to the Special Master's Proposed Finding of Fact 30 is hereby SUSTAINED.

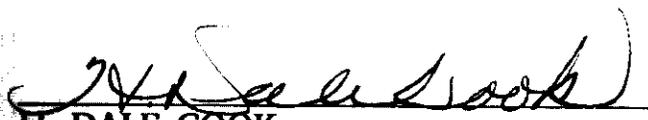
In calculating lost profits due TDW for defendants' 1986 caliper survey job in Venezuela, the Court has attempted to use the same methodology used by the Master. Using Pl.E.96, TDW's Cost List, and referring to the third page, headed "Foreign-Products/New Construction", the Court noted from Pl.E.33 that the 1986 Venezuela survey was for 119 miles of 26" diameter pipeline carrying natural gas. Using the chart on page three of Pl.E.96, the amount for that length and size of pipeline and product is listed at \$14,392. Multiplying that amount by the 51% contribution margin as set out by the Master for 1986, the Court arrived at an amount of \$7,339.00 to represent lost profits to TDW on the 1986 Venezuelan job represented in Pl.E.33.

Plaintiff TDW and defendants shall have ten days after the date of this Order to submit to the Court any correction to its calculations of lost profits as set forth above. Such correction must be substantiated with appropriate documentation, evidence, and applicable legal authority, if any.

2. Defendants' seventeen objections to the Special Master's Proposed Findings of Fact and Conclusions of Law are hereby OVERRULED.

3. All Proposed Findings of Fact and Conclusions of Law submitted by the Special Master, with the exception of Finding of Fact 30 as noted above, have been reviewed by the Court and are hereby ACCEPTED AND ADOPTED by the Court, pursuant to F.R.Cv.P. 53(3)(2).

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


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

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

FILED

SEP 21 1989 *CA*

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

ROSE MARIE STARRETT,
Plaintiff,

vs.

ROBERT E. WADLEY, *et al.*,
Defendants.

No. 84-C-695-B ✓

JUDGMENT

Judgment is hereby entered in favor of the plaintiff, Rose Marie Starrett, and against defendant Board of County Commissioners of Creek County, Oklahoma, in the total amount of One Hundred Sixty Thousand Dollars (\$160,000.00), without interest, for personal injuries, said sum including the sum of One Hundred Ten Thousand Dollars (\$110,000.00) for attorney fees and costs.

DATED this 21 day of September, 1989.

Thomas R. Brett
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

VIRGINIA SMITH,
a/k/a Virginia O. Smith,
Defendant.

FILED

SEP 21 1989

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

CIVIL ACTION NO. 88-C-1631-B

DEFAULT JUDGMENT

This matter comes on for consideration this 21st day of Sept, 1989, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Catherine J. Depew, Assistant United States Attorney, and the Defendant, Virginia Smith, a/k/a Virginia O. Smith, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Virginia Smith, a/k/a Virginia O. Smith, was served with Summons and Complaint on June 6, 1989. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant,

Virginia Smith, a/k/a Virginia O. Smith, for the principal amount of \$2,700.00, plus accrued interest of \$671.67 as of December 6, 1988, plus interest thereafter at the rate of 3 percent per annum until judgment, plus interest thereafter at the current legal rate of 7.75 percent per annum until paid, plus costs of this action.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

cen

Entered

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

MARIHA WELLS,

Plaintiff,

vs.

Case No. 89-C-414-C

FEDERAL DEPOSIT INSURANCE
CORPORATION, in its
corporate capacity and/or in its
capacity as liquidation agent for
Stillwater Community Bank,
Stillwater, Oklahoma;
STATE OF OKLAHOMA, ex rel.,
STATE BANKING COMMISSIONER;
DAN TAYLOR, individually and/or
as an employee of the Federal
Deposit Insurance Corporation
in any capacity; and
JOHN AND JANE DOES,
individually and/or in their
capacity as employees of the
Federal Deposit Insurance
Corporation in any capacity,

Defendants.

**FILED
IN OPEN COURT**

SEP 21 1989

Jack C. Silver
Clerk, U. S. District Court

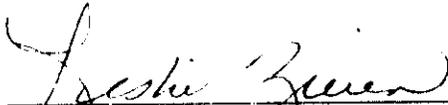
**STIPULATION OF DISMISSAL OF THE STATE OF
OKLAHOMA, EX REL., STATE BANKING COMMISSION, ONLY**

COMES NOW the Plaintiff, Martha Wells, pursuant to Federal Rules of Civil Procedure, Rule 41 (A)(1)(ii), and dismisses all claims against the State of Oklahoma, ex rel., State Banking Commissioner, without prejudice to the filing of a future action. That all current parties, who have entered an appearance in the above styled action, i.e., the Federal Deposit Insurance Corporation, in its corporate capacity and/or in its capacity as liquidation agent for Stillwater Community Bank, Stillwater, Oklahoma, the State of Oklahoma, ex rel., State Banking Commissioner, and John and Jane Does, individually and/or in their capacity as employees of the Federal Deposit Insurance Corporation in any capacity, stipulate to said dismissal.



MICHAEL J. EDWARDS, OBA #2644
P. O. Box 52278
Tulsa, Oklahoma 74152
(918) 745-0077
Attorney for Plaintiff

APPROVED:



LESLIE ZIEREN, OBA #9999

800 OneOk Plaza
100 West 5th Street
Tulsa, Oklahoma 74103

Attorney for FDIC, in its corporate
Capacity and/or in its capacity as liquidating
agent for Stillwater Community Bank, Stillwater,
Oklahoma, and Defendants, John and Jane Does



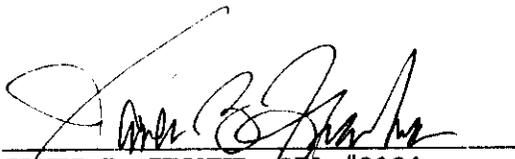
PHIL PINNELL, OBA #7169

Assistant United States Attorney

TONY M. GRAHAM, United States Attorney

3600 U.S. Courthouse
Tulsa, Oklahoma 74103

Attorneys for Dan Taylor and John and Jane Does



JAMES B. FRANKS, OBA #3104

Assistant Attorney General

ROBERT H. HENRY, Attorney General of Oklahoma

Chief, Tort & Contract Litigation Division

420 West Main, Suite 550

Oklahoma City, Oklahoma 73102

Attorneys for State of Oklahoma, ex rel.,

State Banking Commissioner

Entered

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

MARTHA WELLS,)
)
 Plaintiff,)
)
 vs.)
)
 FEDERAL DEPOSIT INSURANCE)
 CORPORATION, as Liquidating)
 Agent for STILLWATER)
 COMMUNITY BANK,)
 STILLWATER, OKLAHOMA;)
 STATE OF OKLAHOMA, ex rel.,)
 STATE BANKING COMMISSIONER;)
 DAN TAYLOR, individually and/or)
 as employee of the Federal)
 Deposit Insurance Corporation,)
 as Liquidating Agent for)
 Stillwater Community Bank,)
 Stillwater, Oklahoma; and)
 JOHN AND JANE DOES,)
 individually and/or in their)
 capacity as employees of the)
 Federal Deposit Insurance)
 Corporation, as Liquidating)
 Agents for Stillwater)
 Community Bank, Stillwater,)
 Oklahoma,)
)
 Defendants.)

Case No. 89-C-659-C

**FILED
IN OPEN COURT**

SEP 21 1989

Jack C. Silver
Clerk, U. S. District Court

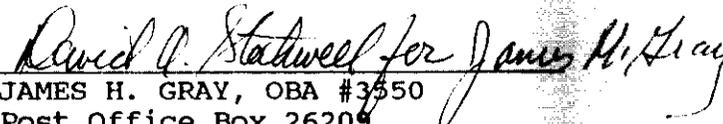
STIPULATION OF DISMISSAL OF THE STATE OF
OKLAHOMA, EX REL., STATE BANKING COMMISSION, ONLY

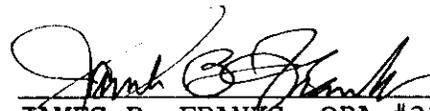
COMES NOW the Plaintiff, Martha Wells, pursuant to Federal Rules of Civil Procedure, Rule 41 (A)(1)(ii), and dismisses all claims against the State of Oklahoma, ex rel., State Banking Commissioner, without prejudice to the filing of a future action. That all current parties, who have entered an appearance in the above styled action, i.e., the Federal Deposit Insurance Corporation, in its corporate capacity and/or in its capacity as liquidation agent for Stillwater Community Bank, Stillwater, Oklahoma, the State of Oklahoma,

ex rel., State Banking Commissioner, and John and Jane Does, individually and/or in their capacity as employees of the Federal Deposit Insurance Corporation in any capacity, stipulate to said dismissal.


MICHAEL J. EDWARDS, OBA #2644
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Tulsa, Oklahoma 74152
(918) 745-0077
Attorney for Plaintiff

APPROVED:


JAMES H. GRAY, OBA #3550
Post Office Box 26209
Oklahoma City, Oklahoma 73126
Attorney for FDIC, Dan Taylor and
John and Jane Does


JAMES B. FRANKS, OBA #3104
420 West Main, Suite 550
Oklahoma City, Oklahoma 73102
Attorney for State of Oklahoma

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

F I L E D

SEP 21 1989

TRANSWESTERN MINING COMPANY,)
a Nevada corporation,)

Plaintiff,)

vs.)

WAYMON W. BEAN and SHARON A.)
BEAN, husband and wife,)
et al.,)

Defendants.)

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

Case Number 88-C-1220-B

ORDER

Upon the Motion of Plaintiff Transwestern Mining Company for entry of default judgment against Defendants Melvin D. Mattix and Earlene Mattix, husband and wife, d/b/a D&E Oil Company; David Gunsburg; L. D. Cook; Glenn B. Schuber; Seventy-One, Inc.; Forest Producing Corporation; E. D. Woodard; Superior Oil & Gas Company; Jupiter Oil Company; Alluwe Oil Company; Williamsport Oil & Gas Company; Milam Supply Company; A. W. Storey; and Nicholas B. V. Franchot; and their unknown heirs, successors, devisees, trustees, administrators, executors, and assigns, immediate and remote the Court finds:

1. That Defendants Melvin D. Mattix and Earlene Mattix, d/b/a D&E Oil Company, Glenn B. Schuber, and Seventy-One, Inc., were served with the Summons and Petition on September 14, 1988.

2. That such four Defendants are not infants or other incompetent.

3. That the remaining above-named Defendants were served solely by publication, and for that reason, the Court examined the Affidavit of Richard H. Foster filed herein on September 21, 1989.

4. That applicable publication notice was duly published three times in the Nowata Star, a weekly legal newspaper published in Nowata County, Oklahoma, on March 16, 23, and 30, 1989, all of which appears from the Affidavit of Publication filed herein.

5. After conducting a judicial inquiry into the sufficiency of Plaintiff's search to determine the names and whereabouts of the Defendants that are served herein by publication, and based upon the evidence adduced, the Court finds that Plaintiff has exercised due diligence and has conducted a meaningful search of all reasonably available sources at hand. The Court approves the publication notice given herein as meeting both statutory requirements and the minimum standards of state and federal due process.

6. That the time within which the above-named Defendants must answer the Complaint has expired.

7. That the Plaintiff is entitled to default judgment against such Defendants and it is, therefore,

ORDERED that Plaintiff Transwestern Mining Company should be granted default judgment on all of its foreclosure claims herein

against the above-named Defendants. Counsel for Plaintiff shall prepare and submit an appropriate judgment.

Dated this 21 day of September, 1989.



HON. THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By: Richard H. Foster
Kevin C. Coutant (OBA #1953)
Richard H. Foster (OBA #3055)
1000 Atlas Life Building
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for the Plaintiff
Transwestern Mining Company

BAKER & BAKER

By: Jay C. Baker
Jay C. Baker
1850 South Boulder
Tulsa, Oklahoma 74119
(918) 587-1168

Attorneys for the Defendants
Waymon W. Bean and Sharon A. Bean

FILED

SEP 21 1989

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

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

ZOLA FAYE MARTIN,

Plaintiff,

v.

GOLDEN RULE INSURANCE COMPANY,

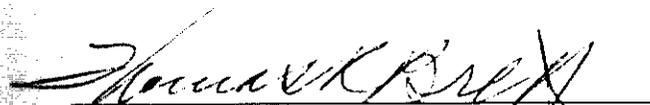
Defendant.

Case No. 89-C-528-B

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Stipulation between the parties, this Court hereby dismisses the above-captioned matter with prejudice.

IT IS ORDERED this 21 day of ^{Sept.} ~~August~~ 1989.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

SEP 21 1989

DA

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

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

DONALD J. WILSON, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 GREAT WESTERN ENERGY)
 CORPORATION, et al.,)
)
 Defendant.)

Case No. 87-C-173-B ✓

ORDER VACATING ORDER OF DISMISSAL
AND REOPENING CASE

The Court is presented with the Application to Enter Final Judgment filed by Chrysler Capital Corporation on August 15, 1989. The Application requests that the Court vacate its February 24, 1988 Judgment Dismissing Action by Reason of Settlement, reopen the case on the grounds that settlement has not been completed, and enter an agreed judgment in favor of Chrysler and against Thomas A. Layon and Elizabeth A. Cronin Layon.

The Court finds that:

1. In the February 24, 1988 order of dismissal, the Court retained jurisdiction to vacate that order and reopen the case upon cause shown that settlement has not been completed.

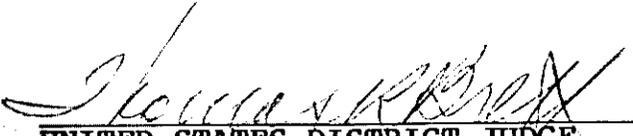
2. A copy of the Application was served on the Layons' attorney of record on August 15, 1989, as shown by the certificate of service appended to the Application. More than fifteen days have passed since the Application was served, and no objection or response has been filed by the Layons.

3. Pursuant to Rule 15, Local Rules of the United States District Court for the Northern District of Oklahoma, failure to object to the Application constitutes a waiver of objection and confession of the matters raised by the Application.

4. The matters recited in the Application as to failure of the settlement constitute sufficient cause to vacate the order of dismissal and reopen this case.

IT IS THEREFORE ORDERED that the February 24, 1988 Judgment Dismissing Action by Reason of Settlement is hereby vacated and this action is reopened as to the claims of Chrysler Capital Corporation against Thomas A. Layon and Elizabeth A. Cronin Layon, and judgment should be entered as agreed in favor of Chrysler Capital Corporation and against Thomas A. Layon and Elizabeth A. Cronin Layon.

Dated: September 21, 1989.


UNITED STATES DISTRICT JUDGE

FILED

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

SEP 27 1989

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

DARRYL S. HAYES,)
)
Plaintiff,)

vs.)

No. 89-C-382-B

THE CITY OF NOWATA, a Political)
Subdivision of the State of)
Oklahoma; JACK HUGHES, an)
individual and as City Manager of)
the City of Nowata; JAY ROBERTSON,)
an individual and as Mayor of the)
City of Nowata; THE COUNTY OF)
NOWATA, an Oklahoma State Political)
Subdivision; HAROLD LAY, Ex-Sheriff)
of Nowata County and as an in-)
dividual; ED HAWN, Ex-Deputy of)
Nowata County and as an individual;)
HARIS STANART, an individual and as)
County Commissioner of Nowata)
County; JACK C. DUGGER, an in-)
dividual and as County Commissioner)
of Nowata County; PHILLIP W. MOORE,)
an individual and as County)
Commissioner of Nowata County; and)
WILLIAM CODY, Ex-Undersheriff and)
Chief of Police of Nowata County)
and as an individual,)
)
Defendants.)

ORDER

This matter comes on for consideration upon the Motion to Dismiss filed by Defendant City of Nowata (City) based on Plaintiff's alleged failure to state sufficiently a cause of action against City under 42 U.S.C. § 1983 (the federal jurisdictional predicate) and further the alleged failure to plead jurisdictional grounds for the Court to consider Plaintiff's pendent state claims.

Plaintiff, a former patrolman, acting police chief, and captain (in that order) of the City of Nowata Police Department,

sues the City of Nowata, its city manager (Hughes), its mayor (Robertson), its chief of police (Cody), the County of Nowata, its three county commissioners (Stanart, Dugger and Moore), ex-sheriff of Nowata County (Lay), and ex-deputy sheriff of Nowata County (Hawn)' alleging, in multiple causes of action (and individual counts therein), that he was denied a grievance hearing when he was demoted from acting police chief to a lesser position²; generally some or all of these Defendants defamed him by false and erroneous reports and statements, causing him to suffer professionally and personally; that the City, through the city officials Hughes and Robertson, breached its employment contract with Plaintiff and constructively discharged him in violation of public policy.

City moves to dismiss primarily on the basis of Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978).

By the Plaintiff's own acknowledgment, Monell teaches a Plaintiff must show an unconstitutional policy, statement, ordinance, regulation or decision, formally adopted and promulgated by the governing body itself, or a department or agency thereof, in order to establish actionable conduct. Also, when governmental conduct reflects "practices of (state) officials so permanent and well-settled as to constitute a 'custom or usage' with the force

¹These individual defendants held these positions during the times in issue in this suit.

²The pleadings and briefs are unclear whether captain or assistant police chief.

of law," that governmental entity is or may be liable. 436 U.S. 691 [citing and quoting Adickes v. S. H. Kress & Company, 398 U.S. 144 (1970)]. The custom and usage will be attributed to the government body itself when the "duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the . . . governing body that the practices have become customary among its employees." Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987); Watson v. City of Kansas City, Kansas, 857 F.2d 690 (10th Cir. 1988).

Plaintiff's Complaint against the City of Nowata, when measured by the Monell standard fails to plead actionable conduct under § 1983.³ Contrary to pleading a custom and usage with the force of law, of sufficient duration and frequency to establish actual or constructive knowledge, the Court concludes Plaintiff's Complaint recites a short episodic political/personal feud between and among the governing officials of Nowata City and County. The Court is of the opinion and, so rules, that Plaintiff has failed to plead a § 1983 claim against the City of Nowata and his § 1983 claim should be dismissed.

The pendent state claims pled by Plaintiff against the City should likewise be dismissed. Plaintiff's dispute over his grievance denial, relating to his demotion, and his breach of contract dispute with the City, are state matters. The Court concludes the City of Nowata, with no federal claims pending

³42 U.S.C. § 1983.

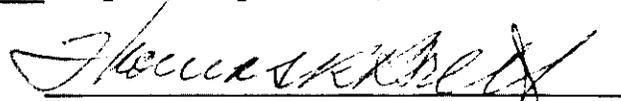
against it in this suit, should not be required to defend Plaintiff's state claims in the case at bar.

Therefore, all claims by Plaintiff against the City of Nowata should be and the same are hereby DISMISSED.

The parties shall adhere to the following scheduling order:

December 6, 1989	Exchange all witnesses' names and addresses, including experts, in writing. Any witness who appears on the list whose deposition has not been taken, state briefly the subject of that witness' testimony.
December 20, 1989	Discovery to be complete. (See Local Rule 11).
January 3, 1990	Dispositive motions.
January 17, 1990	Responses.
January 29, 1990	Replies.
February 16, 1990	Pre-Trial Conference and Hearing on Motions at 2:30 P.M.

IT IS SO ORDERED this 21 day of September, 1989.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

J I L E E

20

EDWARD PARSON and CHARLENE PARSON,)

Plaintiffs,)

vs.)

TIM JAMES, an individual; GARY ROHR,
an individual; and CITY OF CLAREMORE,
a municipal corporation,)

Defendants.)

No. 89-C-287-B

U.S. District Court
Northern District of Oklahoma

O R D E R

This matter comes on for consideration based upon the Motion to Dismiss filed by Defendants Tim James, Gary Rohr and The City of Claremore (City). Defendants' motion addresses the three count Complaint *seriatim*.

Count I alleges the Plaintiffs were in their car, speeding towards the Claremore Indian Hospital, with a Tulsa police escort, at 2 A.M., because Plaintiff Charlene Parsons was pregnant, in labor and child birth was imminent; that the Tulsa police escort left Plaintiffs at the edge of the City of Claremore; that the individual Defendants (Claremore police officers) had set up a road block (for reasons not yet apparent) and fired upon and hit Plaintiffs' car as Plaintiffs approached the road block (again, for reasons not yet apparent). Plaintiffs, in Count I, sue under 42 U.S.C. § 1983 and United States Constitutional Amendments 4 and 14.

Defendants, in their Motion to Dismiss, allege the general rules of notice pleading do not apply to civil rights violations and complaints; therefore, a Plaintiff must state with specificity

which constitutional rights were violated, and these Plaintiffs have not done so in Count I. The Court concludes that Count I, viewed in the light most favorable to Plaintiffs¹, sufficiently pleads a § 1983 action, under the United States Constitution, Amendments 14 (denial of due process)² and, arguably, Amendment 4 (excessive use of deadly force). Plaintiffs' Count I allegation as to Amendment 5 is, however, misplaced and will be therefore DISMISSED.

As to Count II, Defendants charge that Plaintiff Charlene Parson has failed to specify which tort she is pursuing under the state tort statute.³ Plaintiff plainly adopts, in her Count II allegations, all of Count I wherein it is alleged Defendants were grossly negligent in their actions of setting up the roadblock and firing upon and hitting Plaintiffs' vehicle. Defendants further claim under the Governmental Tort Claims Act they are accorded certain exceptions which preclude Plaintiff's cause of action, principally discretionary acts of employees. The Court concludes the Plaintiff's Count II allegations (incorporating the gross

¹Eastwood v. Dept. of Corrections of State of Oklahoma, 846 F.2d 627 (10th Cir. 1988).

²Hewitt v. City of Truth or Consequences, 758 F.2d 1375 (10th Cir. 1985).

³51 O.S. 151 *et seq.*, Governmental Tort Claims Act.

negligence allegations contained in Count I) are sufficient to withstand Defendants' Motion to Dismiss⁴ and so rules.

As to Count III, Defendants charge that Plaintiff Edward Parson is not a claimant under the Governmental Tort Claims Act and therefore has no pendent state tort claim against these Defendants.⁵ Also, spouses of civil rights victims are not entitled to bring ancillary claims for loss of consortium,⁶ which Plaintiffs' concede in their response filed June 12, 1989 (p. 7). The Court is of the opinion that Plaintiff Edward Parson is not a claimant under the Governmental Tort Claims Act and therefore has no pendent state tort claim against these Defendants.

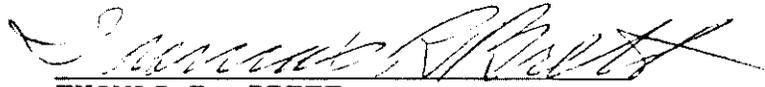
The Court therefore concludes that the Plaintiffs' Count I claim as to the Fifth Amendment to the United States Constitution be and it is hereby DISMISSED; that Defendants' Motion to Dismiss as to the remaining claims in Count I are hereby DENIED; that the Defendants' Motion to Dismiss as to Count II is hereby DENIED; that the Defendants' Motion to Dismiss as to Count III is hereby SUSTAINED.

⁴Hewitt v. City of Truth or Consequences, *supra*.

⁵Plaintiff Edward Parson may be a "potential claimant" under the Governmental Tort Claims Act but he has failed to allege he filed a claim and has been denied, a prerequisite under 51 O.S. 151 *et seq.*

⁶Jenkins v. Carruth, 583 F.Supp. 613 (E.D.Tenn. 1982) *aff'd*, 734 F.2d 14 (6th Cir. 1984).

IT IS SO ORDERED this 19th day of September, 1989.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IT IS FURTHER ORDERED that this case is set for a status/schedule conference on October 12, 1989 at 2:30 p.m.

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

SEP 20 1990

MOSE STEPHENS, JR.,
Petitioner,
vs.
JAMES BLODGETT, ET AL.,
Respondents.

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

No. 89-C-279-C

ORDER

Before the Court for its consideration is the objection of petitioner Mose Stephens, Jr., to the Report and Recommendations of the Magistrate. The Magistrate has recommended that petitioner's writ of habeas corpus be denied.

Petitioner, an inmate in a federal correctional institution in the State of Washington, brought this action pursuant to 28 U.S.C. §2255. Petitioner seeks a release from custody at the correctional institution. He alleges that he was convicted and sentenced on information of a California charge that was ultimately dismissed and thus was invalid. Petitioner contends that evidence of the tainted California charge based on a search warrant that was quashed was used to illegally obtain his conviction. He believes that this evidence was improperly admitted at his trial under Federal Rules of Evidence 404(b), Evidence of Other Crimes.

The Magistrate found that these issues have already been properly settled on direct appeal. The transcript submitted to the

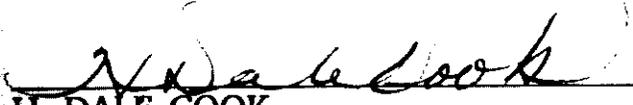
Tenth Circuit Court of Appeals reveals that the evidence regarding the 1982 California narcotics activities of petitioner was only admitted as to Count Three of the Indictment to prove the element of continuing narcotics violations. When raised on appeal, the Tenth Circuit found that the evidence in the search warrant was properly admitted and that no error occurred.

Once an issue has been determined on direct appeal, it cannot be relitigated in a collateral attack under §2255. Baca v. United States, 383 F.2d 154 (10th Cir. 1967), cert. denied, 390 U.S. 929 (1968). Therefore these issues should not be relitigated in this Court.

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

It is therefore Ordered that the petition of Mose Stephens, Jr. for habeas corpus relief is hereby DENIED.

IT IS SO ORDERED this 20th day of September, 1989.


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

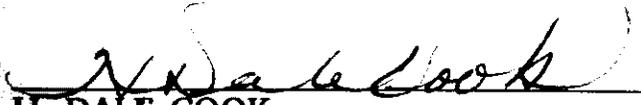
Tenth Circuit Court of Appeals reveals that the evidence regarding the 1982 California narcotics activities of petitioner was only admitted as to Count Three of the Indictment to prove the element of continuing narcotics violations. When raised on appeal, the Tenth Circuit found that the evidence in the search warrant was properly admitted and that no error occurred.

Once an issue has been determined on direct appeal, it cannot be relitigated in a collateral attack under §2255. Baca v. United States, 383 F.2d 154 (10th Cir. 1967), cert. denied, 390 U.S. 929 (1968). Therefore these issues should not be relitigated in this Court.

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

It is therefore Ordered that the petition of Mose Stephens, Jr. for habeas corpus relief is hereby DENIED.

IT IS SO ORDERED this 20th day of September, 1989.


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

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

SEP 29 1989

U.S. DISTRICT COURT

ALLYNE L. SMITH,

Plaintiff,

vs.

Case No. 89-C-347-E

DEAN WITTER REYNOLDS INC.,

a corporation, and

R. P. ELL, a/k/a

RICK ELL, an individual,

Defendants.

TIME STUDY CASE

Record Time Spent by Judge or Magistrate

STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, ALLYNE L. SMITH, and dismisses
the above styled case with prejudice.

APPROVED:



Chris Economou
1227 South Frisco
Tulsa, Oklahoma 74119
(918) 587-2278
Attorney for Plaintiff



Scott Savage
320 South Boston
Suite 920
Tulsa, Oklahoma 74103
Attorney for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered a copy of the above Dismissal to Mr. Scott Savage, Attorney at Law, 320 South Boston, Suite 920, Tulsa, Oklahoma 74103, on the 20th day of September, 1989.


Chris Economou

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

RALPH JOHN FEUERBORN, SR.,)
LAURA FEUERBORN and THE)
AMERICAN INSURANCE COMPANY,)
a New Jersey corporation,)
Plaintiffs,)

VS.)

STOOPS EXPRESS, INC.,)
and SAM GUY, an individual,)
Defendants,)

No. 87-C-159-C

EVAN AQUILLA JONES IV,)
TRAILINER CORPORATION,)
and DARRELL WILSON)
Third-Party)
Defendants.)

PACCAR, INC., d/b/a KENWORTH)
CORPORATION; HOLLAND HITCH,)
INC.; OZARK KENWORTH, INC.,)
THE TRAVELERS INDEMNITY)
COMPANY, and INTEGRAL)
INSURANCE COMPANY,)
Additional)
Defendants and)
Third Party)
Defendants.)

ORDER OF DISMISSAL

This matter comes on for hearing on the Joint Stipulation of the Plaintiffs, Ralph John Feuerborn, Sr., Laura Feuerborn and The American Insurance Company, and Defendants, Paccar, Inc., d/b/a Kenworth Corporation, Holland Hitch, Inc., and Ozark Kenworth, Inc., for a dismissal with prejudice of the above captioned cause. The Court, being fully advised, having reviewed the Stipulation, finds that the parties herein have entered into a compromise settlement covering all claims involved

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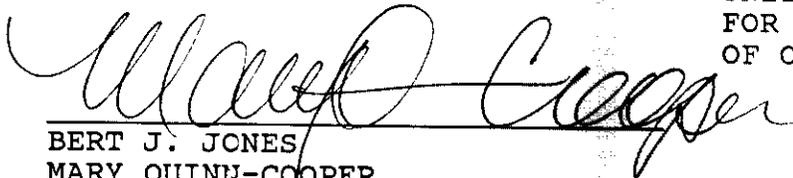
in this action, which this Court hereby approves, and that the above entitled cause should be dismissed with prejudice to the filing of a future action pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause be and is hereby dismissed with prejudice to the filing of a future action, the parties to bear their own respective costs.

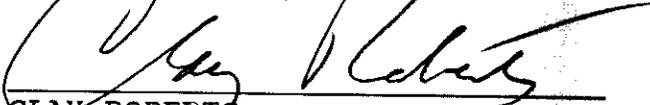
Dated this 19th day of September, 1989.



H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA



BERT J. JONES
MARY QUINN-COOPER
ATTORNEYS FOR PACCAR, INC.
d/b/a KENWORTH CORPORATION,
HOLLAND HITCH, INC., and
OZARK KENWORTH, INC.



CLAY ROBERTS
RICHARD MARRS

AND



RICHARD CARPENTER
DON HAMMER

ATTORNEYS FOR PLAINTIFFS

8175P15

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

IN RE:)
)
HAROLD WAYNE BURLINGAME)
and BARBARA JEAN)
BURLINGAME,)
)
Debtors,)
)
BANCFIRST,)
)
Appellant,)
)
vs.)
)
HAROLD WAYNE BURLINGAME)
AND BARBARA JEAN)
BURLINGAME,)
)
Appellees.)

Case No. 88-02062-C
Chapter 11

FILED

SEP 1 1988

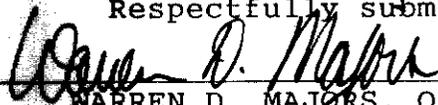
Jack C. Silver, Clerk
U.S. DISTRICT COURT

No. 89-C-546-C ✓

STIPULATION OF DISMISSAL

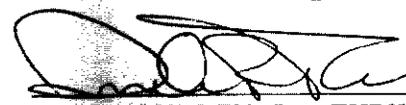
Comes now the Appellant, BancFirst, successor in interest to Federal National Bank of Shawnee, and the Appellees, Harold Wayne Burlingame and Barbara Jean Burlingame, and stipulate to a dismissal without prejudice of the above-captioned case, each party to bear their own costs and attorney's fees.

Respectfully submitted,



WARREN D. MAJORS, OBA #5637
LARRY GLENN BALL, OBA #12205
OF

SPRADLING, ALPERN, FRIOT & GUM
101 Park Avenue
Suite 700
Oklahoma City, OK 73102
405/272-0211
Attorneys for Appellant



ANDREW R. TURNER, OBA #9125
CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103
918/586-5711
Special Bankruptcy Counsel
to Debtors

bl

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ajg

OBA #5026

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

RALPH JOHN FEUERBORN, SR.;
LAURA FEUERBORN and THE
AMERICAN INSURANCE COMPANY,
a New Jersey Corp.,

Plaintiff,

vs.

No. 87-C-159-C ✓

STOOPS EXPRESS, INC.; OZARK
KENWORTH, INC.; SAM GUY, an
Individual; PACCAR INC.;
HOLLAND HITCH, INC.; THE
TRAVELERS INDEMNITY COMPANY;
and THE INTEGRAL INSURANCE
COMPANY,

Defendants,

EVAN AQUILLA JONES IV;
TRAILINER CORPORATION;
DARRELL WILSON and
ROADRUNNER LEASING, INC.,

Third Party
Defendants.

FILED
SEP 19 1989
Jack C. Allen, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE OF
EVAN AQUILLA JONES, IV, TRAILINER CORPORATION
AND THE INTEGRAL INSURANCE COMPANY

On this 19 day of Sept, 1989, the
Application for an Order of Dismissal with Prejudice pursuant to
Rule 41 of the Federal Rules of Civil Procedures filed by
plaintiffs, Ralph John Feuerborn, Sr., Laura Feuerborn, and The
American Insurance Company and Defendants, Evan Aquilla Jones, IV,
Trailer Corporation and The Integral Insurance Company came on

before the court for hearing. The court finds that the plaintiffs have settled all issues with these defendants and therefore, said application should be and is sustained. The court further finds that there still remains issues between the plaintiffs and Paccar, Inc., Kenworth Corporation, Holland Hitch, Inc., Ozark Kenworth, Inc., and that those parties are not included within the terms of this application.

IT IS THEREFORE, ORDERED AND ADJUDGED, that all of plaintiffs' claims against Evan Aquilla Jones, IV, Trailiner Corporation and The Integral Insurance Company are hereby ordered dismissed with prejudice.


HONORABLE H. DALE COOK, JUDGE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

SEP 19 1989

U.S. DISTRICT COURT

JILL FORESTER-GIACOMINO, and)
GARY DILLEY, Personal)
Representative of the Estate of)
Samuel Paul Jones, Deceased,)
Plaintiff,)

v.)

Case No. 89-C-149-C ✓

THE PRUDENTIAL INSURANCE)
COMPANY OF AMERICA,)
a/k/a THE PRUDENTIAL,)
a/k/a THE PRUDENTIAL INSURANCE)
COMPANY OF AMERICA)
NORTHEASTERN GROUP OPERATIONS,)
GROUP CLAIM LIFE DIVISION,)
and DOROTHY D. JONES,)
Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties to this action, Jill Forester-Giacomino and Gary Dilley, Personal Representative of the Estate of Samuel Paul Jones, Deceased, Plaintiffs, The Prudential Insurance Company of America, a/k/a The Prudential, a/k/a The Prudential Insurance Company of America Northeastern Group Operations, Group Claim Life Division, and Dorothy D. Jones, Defendants, by and through their respective counsel of record, hereby stipulate, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, to the dismissal of the above-styled and numbered cause with prejudice, for the reason that the same has been settled.

Respectfully submitted,



James R. Eagleton, OBA #2584
HOUSTON AND KLEIN, INC.
320 South Boston, Suite 700
Tulsa, Oklahoma 74103
(918) 583-2131
Attorneys for the Plaintiffs



Elsie C. Draper
Joel R. Hogue
Michael G. Daniel
GABLE & GOTWALS
2000 Fourth National Bank Bldg.
Tulsa, Oklahoma 74119-1217
Attorneys for the Defendant,
The Prudential Insurance
Company of America



Richard D. Beeby
3010 South 94 East Avenue
Tulsa, Oklahoma 74129
Attorney for the Defendant,
Dorothy D. Jones

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

FILED

SEP 19 1989

WILLIAM D. BRUNER, CLERK
U.S. DISTRICT COURT

MAXINE S. SMITH,
Plaintiff,

vs.

SKAGGS ALPHA BETA, INC.,
Defendant.

No. 88-C-1480-C

ORDER OF DISMISSAL

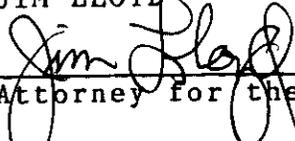
NOW on this 19 day of Sept, 1989, upon the written application of the Plaintiff, Maxine S. Smith, and the Defendant, Skaggs Alpha Beta, Inc., for a Dismissal With Prejudice of the Complaint of Smith v. Skaggs, and all causes of action therein, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action. The Court being fully advised in the premises finds said settlement is to the best interest of the parties and that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action therein, be and the same hereby are dismissed with prejudice to any future action.

(Signed) H. Dale Cook

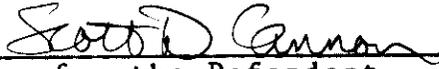
JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

JIM LLOYD



Attorney for the Plaintiff

SCOTT D. CANNON



Attorney for the Defendant

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

DEWAYNE ALLEN BOYD,

Plaintiff,

vs.

RON CHAMPION, ET AL.,

Defendants.

No. 88-C-662-C

9-19-89

ORDER

Before the Court is the objection by plaintiff Dewayne Allen Boyd to the Report and Recommendation of the Magistrate.

Plaintiff seeks habeas relief asserting that the trial court committed fundamental error by erroneously instructing the jury that plaintiff's punishment was subject to enhancement under 21 O.S. §51(B) (20 years), as opposed to 21 O.S. §801 (10 years to life). Boyd's conviction was affirmed on appeal September 11, 1987.

In January 1988, the Court of Criminal Appeal held, in an unrelated case, that it was in error for trial courts to employ 21 O.S. §51(B) instead of 21 O.S. §801 for persons, such as Boyd, charged with robberies with dangerous weapons.

The respondents argue that the Court should not permit habeas corpus relief relying on Wainwright v. Sykes, 433 U.S. 72 (1977). Under Wainwright respondents assert Boyd has failed to show cause

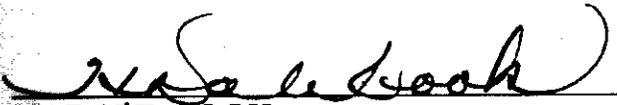
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for, and prejudice from, his failure to raise the issue on direct appeal.

The Magistrate relied on Dugger v. Adams, 109 S.Ct. 1211 (1989) wherein the Supreme Court concluded that a subsequent change in the law does not provide cause for a defendant's failure to challenge the trial court's instruction in accordance with state procedures.

After de novo review of the record, the Court concludes that, because the state courts have denied Boyd relief on procedural grounds, and because Boyd has not shown adequate cause for the default, plaintiff's habeas corpus petition is hereby DENIED.

IT IS SO ORDERED this 15th day of September, 1989.


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

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

SEP 19 1989

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

SCOTT MARTIN, TRUSTEE,

Plaintiff,

vs.

PACIFIC INSURANCE COMPANY,

Defendant.

No. 85-C-977-C

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

The above-styled action was brought to recover a business interruption loss claimed to be owed under a fire insurance policy issued by defendant, Pacific Insurance Company (Pacific) to Mid-Region Petroleum Company, Inc. (MRP).

The case was tried to the Court, and evidence was presented from April 13, to April 15, 1987. At the conclusion of the trial, the Court found that MRP had sustained no actual loss under the policy and granted judgment in favor of Pacific. On appeal, the United States Court of Appeals for the Tenth Circuit reversed, instructing the Court to employ the policy formula as interpreted in United Land Investors, Inc. v. Northern Ins. Co., of Am., 476 So.2d 432 (La.Ct.App. 1985). On April 26, 1989, the Court granted the parties thirty days to file supplemental findings of fact and

conclusions of law, supplemental briefs if desired, together with those trial exhibits which the parties believed supported their proposed calculations. The Court has reviewed all pertinent material, and now enters the following Findings of Fact and Conclusions of Law in accordance with Rule 52 F.R.Cv.P., as follows:

Findings of Fact

1. The plaintiff, Scott Martin, is the duly appointed and qualified and acting Trustee for the Chapter 11 Bankruptcy Estate of MRP.

2. The defendant, Pacific, is a corporation with its principal place of business in the State of California, and is doing business within the State of Oklahoma. This Court has jurisdiction pursuant to 28 U.S.C. §1332. The plaintiff is an Oklahoma citizen, the defendant is a California citizen, and the amount in controversy exclusive of interest and costs is greater than \$10,000.

3. Prior to bankruptcy, MRP purchased a business earnings policy from Pacific to protect the earnings of MRP in the event of a business interruption. Such policy was in full force and effect at all times pertinent to this lawsuit.

4. On October 13, 1983, an accidental fire caused physical damage to property at MRP's Port of Catoosa facility. This fire caused a suspension in MRP's business operations.

5. The Court finds that MRP used due diligence and dispatch, as required under the policy, to rebuild the damaged property and that the "suspension period" used by MRP's accountants in calculating the business earnings loss was a reasonable duration.

6. The Court further finds that the fire caused a suspension in the business of MRP from October 13, 1983 through December 31, 1983, and that any delay in the repair of the facility was a result of conditions which were not the fault of MRP personnel.

7. The Court further finds that the parties intended the insurance policy to cover losses MRP would suffer in the event of a business shut-down, even if MRP was operating at a deficit at the time the business interruption occurred.

The insurance policy provides in pertinent part as follows:

Section I - Description of Coverage:

1. When this policy covers EARNINGS, this company shall be liable for the ACTUAL LOSS SUSTAINED by the Insured resulting directly from necessary interruption of business caused by damage to or destruction of real or personal property by the peril(s) insured against, during the term of this policy, on the premises described, but not exceeding the reduction in Earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been damaged or destroyed Due consideration shall be given to the continuation of normal charges and expenses, including payroll expense, to the extent necessary to resume operations of the Insured with the same quality of service which existed immediately preceding the loss.

....

3. Earnings: For the purpose of this insurance "Earnings" are defined as the sum of:

A. Total net profit, B. Payroll expenses, C. Taxes, D. Interest, E. Rents, and F. All other operating expenses earned by the business.

The parties agree that, because MRP was operating at a loss at the time of the fire, net profit is zero.

The parties further agree that the total operating expenses (payroll, taxes, interest, rents and other expenses) were \$1,235,120.

The amount of loss as testified by defendant's expert and adopted by plaintiff is \$837,720. (See Transcript, p.262 ln.1-2; Plaintiff's Supplemental Findings of Fact and Conclusions of Law at 2).

Subtracting the amount of loss from the total operating expenses results in a "reduction of earnings" figure of \$397,400. This may also be referred to as total gross sales.

The next step is to deduct the amount of "noncontinuing expenses". This refers to expenses that the insured business incurs during normal operations which, because of the work stoppage, it does not need to incur during the interruption. Eastern Associated Coal Corp. v. Aetna Casualty & Sur. Co., 632 F.2d 1068, 1077 (3rd Cir. 1980), cert. denied, 451 U.S. 986 (1981). The plaintiff argues that this figure is \$127,511; defendant contends that it is \$585,348.¹

In construing contractual language identical to that involved here, the Third Circuit stated:

The word "necessarily" permits the insurance company to challenge the insured's decision to continue an expense. However, the policy's statement that:

¹In its Order and Judgment, the Tenth Circuit Court of Appeals cited plaintiff's contention as \$157,453 (Order and Judgment at 7 n.2). The Court takes the figure above from plaintiff's supplemental findings of fact and conclusions of law.

Due consideration shall be given to the continuation of normal charges and expenses, including payroll, expense, to the extent necessary to resume operations of the Assured with the same quality of service which existed immediately preceding the loss.

limits the insurer's right to assert that an expense, which was continued, was not necessary.

Eastern Associated Coal, 632 F.2d at 1077 n.15.

Thus, the burden is on the insurer to demonstrate that the expense should be classified as noncontinuing.

The difference in amounts results from the following items:

Officers' salaries	179,387
Legal expenses	11,238
Travel and entertainment	29,857
Utilities	46,848
Depreciation	190,507

The Court finds that legal expenses and utilities clearly fall within the definition of continuing expenses. As for officers' salaries, the defendant contends that this item should not be included because it was not actually incurred by the plaintiff. No evidence was presented at trial to this effect. In Assoc. Photographers v. Aetna Cas. & Sur. Co., 677 F.2d 1251 (8th Cir. 1982), the court cited an example of noncontinuing expenses as salaries of hourly workers. Id. at 1255 n.7. Thus, it appears that officers' salaries are properly characterized as a continuing expense. See also National Union Fire Ins. Co. v. Scandia of Hialeah, Inc., 414 So.2d 533 (Fla. Dist. Ct. App. 1982). Depreciation is also properly so characterized. See Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp., 64 F.2d 347 (4th Cir.), cert. denied, 289 U.S. 762 (1933). However, the Court has found no authority for

characterizing travel and entertainment expenses as continuing expenses. Therefore, these will not be included.

Accordingly, the Court's calculation of noncontinuing expenses is \$157,368.

Subtracting \$157,368 from the reduction of earnings figure of \$397,400 produces a total of \$240,032.

This figure must be further reduced by the amount of actual earnings during suspension. There is a vast disparity between the parties on this point. Plaintiff contends that there were actual sales of \$228,902 during the suspension period. Defendant asserts that the proper figure is \$1,348,588 (total sales of \$1,345,629 added to other income of \$2,959).² Plaintiff's expert explained the disparity by opining that defendant's accountants had included sales which had taken place months earlier and for which MRP merely acted as a "storage agent" during the period of interruption. (See Transcript, pp.205-06). Defendant made no effort to rebut this testimony. The Court adopts plaintiff's figure of \$248,215. The defendant has also not specifically contested plaintiff's calculation from this base figure to a net earning figure of \$15,786.09.

Deducting this amount renders an insurable earnings recovery of \$224,245.91.

To the extent that these Findings of Fact constitute Conclusions of Law, they shall be so considered.

²In its Order and Judgment, the Tenth Circuit states that "Pacific calculated actual sales during the interruption period of \$1,209,417" (Order and judgment at 7 n.2). Actually, this figure is Pacific's calculation of cost of sales.

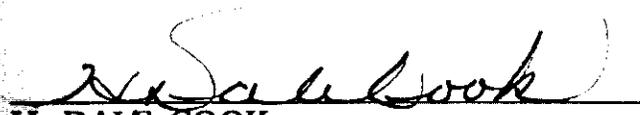
Conclusions of Law

1. The Court concludes that insurable loss for the fire occurring at Mid-Region Petroleum, Inc., is \$224,245.91, and that Judgment for plaintiff should be entered in such amount.

2. The Court further concludes that under Oklahoma law an insurance claim bears interest at 15% per annum from the date the loss was payable. 36 O.S. §3629. The Court concludes that Mid-Region submitted its claim on November 12, 1984. Allowing a reasonable period of time for analysis, defendant should have paid the plaintiff for its insurable loss no later than December 1, 1984. Therefore, the judgment against the defendant should bear interest at the rate of 15% per annum from December 1, 1984 to the date of judgment and at the post judgment rate of interest thereafter.

3. Under Oklahoma law, the insured is entitled to a reasonable attorney fee as the prevailing party. The plaintiff is hereby allowed to file an Application for Attorney Fee in accordance with the Rules for the District Court for the Northern District of Oklahoma. 36 O.S. §3629.

IT IS SO ORDERED this 19th day of September, 1989.



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

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

SEP 10 1989

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

SCOTT MARTIN, TRUSTEE,)
)
)
Plaintiff,)
)
vs.)
)
PACIFIC INSURANCE COMPANY,)
)
)
Defendant.)

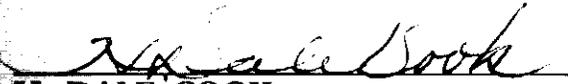
No. 85-C-977-C

JUDGMENT

This action came on for trial before the Court and the issues having been duly tried and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, Scott Martin, Trustee, recover of the defendant, Pacific Insurance Company, the sum of \$224,245.91 with interest at 15% per annum from December 1, 1984 to the date of judgment, post-judgment interest of 7.75% per annum, reasonable attorney fees, and his costs of action.

IT IS SO ORDERED this 19th day of September, 1989.



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

ajg

OBA #8382

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

FARMERS INSURANCE COMPANY,
INC.,

Plaintiff,

vs.

CLYDE A. KEIZOR, CAROLYN
KEIZOR, TOMMY WILSON,
TED WILSON, ALBERTA WILSON
and STATE FARM FIRE AND
CASUALTY COMPANY,

Defendants.

Case No: 89-C-401C

FILED
SEP 19 1989
Jack C. ... Clerk
U.S. DISTRICT COURT

ORDER DISMISSING TED WILSON AND ALBERTA WILSON *only*

Pursuant to Plaintiff's Application, the Court hereby
Dismisses, without prejudice, the Plaintiff's Claim against Ted
Wilson and Alberta Wilson. Each party to bear their own costs.

Dated this 19th day of Sept, 1989.

[Signature]
UNITED STATES DISTRICT JUDGE

12

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 19 1989

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ONE PARCEL OF REAL PROPERTY,)
 WITH BUILDINGS, APPURTENANCES,)
 AND IMPROVEMENTS, KNOWN AS)
 ROUTE 3, BOX 128-A,)
 ANTLERS, PUSHMATAHA, OKLAHOMA;)
 and)
 ONE 1966 CESSNA 310 AIRCRAFT,)
 REGISTRATION NUMBER N917MB;)
 and)
 ONE 1968 CESSNA 310 AIRCRAFT,)
 REGISTRATION NUMBER N5770M;)
 and)
 ONE 1969 CESSNA 310 177B)
 AIRCRAFT, REGISTRATION)
 NUMBER N30713,)
)
 Defendants.)

Civil Action No. 89-C-372-B ✓

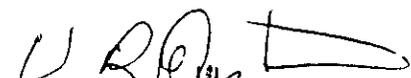
STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the Plaintiff, United States of America, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Catherine J. Depew, Assistant United States Attorney, and the Claimants Elmer E. Hunt and Donald D. Hunt hereby stipulate to dismissal against the Defendant Property known as

1968 Cessna 310-P
Registration Number N5770M
Serial Number 310P0070
White with Maroon Trim
Fixed Wing Multiengine,

without prejudice and without costs, pursuant to the terms and conditions of the Release of Claim of Seized Property and Indemnity Agreement entered into by and between the parties on the 13th day of September, 1989.

TONY M. GRAHAM
United States Attorney


HARRISON R. WINSTON
Attorney for Claimants
Elmer E. Hunt and
Donald D. Hunt


CATHERINE J. DEPEW OBA #3836
Assistant United States Attorney
3600 United States Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103
(918) 581-7463

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

HERMAN E. ROBERTSON

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

89-C-676-C

SEP 18 1989

J. C. [unclear], Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate filed August 24, 1989 in which the Magistrate recommended that the Petition be dismissed, without prejudice to its refiling upon a showing that Petitioner has exhausted his state-based remedies.

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

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

It is, therefore, Ordered that the Petition is dismissed, without prejudice to its refiling upon a showing that Petitioner has exhausted his state-based remedies.

Dated this 18th day of Sept, 1989.


H. DALE COOK, CHIEF
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PIPELINE INDUSTRY PENSION FUND,)
)
 Plaintiff,)
 vs.)
)
 OPAL E. BLACK GREGORY)
 and)
 MINNIE L. BLACK,)
)
 Defendants.)

CASE NO. 89-C-464C

FILED

SEP 18 1989

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

ORDER

This matter having come before the Court upon Motion by the Plaintiff, Pipeline Industry Pension Fund, to dismiss, and the Court being fully and sufficiently advised;

IT IS ORDERED that said Motion be, and hereby is, granted and that the above-styled action be, and hereby is, dismissed as settled.

W. S. [Signature]
JUDGE

Sept 18, 1989
DATE

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

ANTHONY LEE,

Plaintiff,

vs.

CITY OF TULSA, a municipal
corporation, and JOEL SPITLER,

Defendants.

No. 89-C-102-C

FILED

SEP 18 1989

John C. Spitzer, Clerk
U.S. DISTRICT COURT

CONSENT DECREE

The above-named Plaintiff filed his amended complaint herein alleging violations of his civil rights and asserting pendent tort issues cognizable under the laws of the State of Oklahoma and seeking compensatory damages, punitive damages, and attorney fees. The Plaintiff, by and through his attorney of record James Garland, III, and the Defendant City of Tulsa, by and through its attorney Martha Rupp Carter, have each consented to the entry of this consent decree without trial and without adjudication of any issue of fact or law arising herein.

The Court, having fully considered the matter and being duly advised, orders, adjudges and decrees as follows.

1. This Court has jurisdiction over the subject matter of this action and the parties hereto. Plaintiff's complaint properly states a claim for relief against the consenting Defendant, City of Tulsa, Oklahoma pursuant to the provisions of the Governmental Tort Claims Act as codified at Okla. Stat. tit. 51, §§151, et seq. (Supp. 1988).

2. The Defendant City of Tulsa, Oklahoma, a municipal

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

FEDERAL DEPOSIT INSURANCE
CORPORATION, acting in its
corporate capacity,

Plaintiff,

vs.

Case No. 88-C-0044-C

CREEK COUNTY WELL SERVICE,
INC., an Oklahoma corporation;
R. A. SELLERS, III; R. A.
SELLERS, JR., and LEE I.
LEVINSON,

Defendants.

FILED

SEP 18 1989

Paul J. Styer, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE - SIXTH COUNT

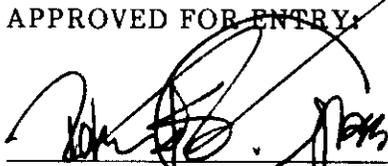
NOW came on before the Court the **Stipulation of Dismissal With Prejudice - Sixth Count** filed herein by the Plaintiff and **Defendant** Lee I. Levinson; and the Court FINDS that good cause and sufficient grounds have been stated in support of such Stipulation of Dismissal - Sixth Count; and it is therefore **ORDERED** that this action be and the same is hereby dismissed as to the claim for money judgment set forth in the Sixth Count of the FDIC's Complaint, filed with the Court **January 19, 1988**, together with any and all amendments to the Sixth Count, **with prejudice** to the rights of Plaintiff and Defendant, Lee I. Levinson, to refile and reassert their claims raised herein under the Sixth Count at any time in the future with each of the parties bearing its own costs, including attorney's fees, incurred herein.

IT IS SO ORDERED AND DATED this 18 day of Sept., 1989.

(Signed) H. Dale Cook

UNITED STATES DISTRICT COURT JUDGE

APPROVED FOR ENTRY:



Robert S. Glass (OBA No. 10824)
GABLE & GOTWALS, INC.
2000 Fourth National Bank Bldg.
Tulsa, Oklahoma 74119
(918) 582-9201

COUNSEL FOR FEDERAL DEPOSIT
INSURANCE CORPORATION, acting
in its corporate capacity



Lee I. Levinson, Defendant

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

SEP 18 1989

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

JESS EVANS and AMY EVANS,)
)
 Plaintiffs,)
)
 vs.)
)
 UTAH MORTGAGE LOAN CORPORATION,)
 a Utah corporation, ET AL.,)
)
 Defendants.)

No. 89-C-23-C

ORDER

Now before the Court for its consideration is the objection of defendant Allstate Insurance Company (Allstate) to the Report and Recommendation of the United States Magistrate filed on June 16, 1989. The Magistrate recommended that the plaintiffs' motion to remand be granted and that the case be remanded to state court.

This civil action was initially filed in state court on May 23, 1986. The United States of America, ex rel. National Flood Insurance Program, removed the case to federal court, where it was assigned case number 86-C-640-B. Plaintiffs then dismissed the United States and moved to add Oklahoma resident Lawrence Marion Clark as a party defendant. Judge Brett approved the joinder and, finding diversity jurisdiction lacking, remanded the action by Order of June 24, 1987. Clark was dismissed from the state court action by court order on December 22, 1988. On January 12, 1989, Allstate filed a Petition for removal (agreed to by all defendants). The Petition alleged that, with the dismissal of

Clark, diversity jurisdiction once again existed. Further, Allstate alleged that Clark had been fraudulently joined before Judge Brett solely to destroy diversity.

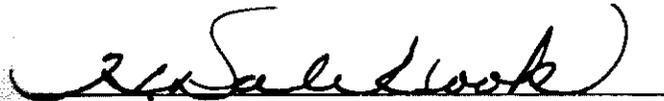
Plaintiff moved to remand and Allstate responded. The Magistrate did not address the fraudulent joinder issue, but concluded that the action should be remanded. He found that the recently amended 28 U.S.C. §1446(b), which provides in pertinent part that "a case may not be removed on the basis of jurisdiction conferred by section 1332 [diversity] of this title more than one year after the commencement of the action" applies retroactively to pending cases, citing Phillips v. Allstate Ins. Co., 702 F.Supp. 1466 (C.D.Cal. 1989). Since this action commenced on May 23, 1986, the Magistrate found that remand was in order.

Allstate does not object to the Magistrate's conclusion of retroactivity, but objects on the ground that he did not consider the issue of fraudulent joinder. Although the Magistrate did not so state, he had an excellent reason for not discussing the issue: it has been waived. Judge Brett's Order of remand in 86-C-640-B specifically states that no defendant objected to joinder of Clark. Further, Judge Brett examined the record and stated his conclusion that Clark was an indispensable party who was not joined solely to effectuate a remand. The removing party who claims fraudulent joinder must plead such with particularity and prove such by clear and convincing evidence. Spence v. Flynt, 647 F.Supp. 1266, 1271 (D.Wyo. 1986). See also McLeod v. Cities Service Gas Co., 233 F.2d 242, 246 (10th Cir. 1956). Far from meeting its burden of proof,

Allstate apparently acquiesced in the motion. The time to raise fraudulent joinder was then, not now. Moreover, the issue was adjudicated and ruled upon by Judge Brett, and is now closed. The Court also agrees with the Magistrate's conclusion as to retroactivity. Accordingly, his Report and Recommendation is affirmed.¹

It is the Order of the Court that pursuant to 28 U.S.C. §1447(c) the motion of the plaintiffs to remand is hereby granted and this action is remanded to the District Court of Tulsa County, Oklahoma.

IT IS SO ORDERED this 18th day of September, 1989.


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

¹Allstate protests that the Magistrate raised the retroactivity issue *sua sponte*. This is entirely consistent with a federal court's responsibility as to subject matter jurisdiction. *See, e.g., Strange v. Arkansas-Oklahoma Gas Corp.*, 534 F.Supp. 138, 139 (W.D.Ark. 1981).

blacks were included in the jury panel; and (3) ineffective assistance of counsel.

In his first ground for relief, petitioner claims that he was allowed only five peremptory jury challenges, instead of the nine provided for by statute.² The trial transcript at pages 136 and 137 reflects that the court limited both the petitioner and the state to five peremptory challenges.³ It appears from the record

² The court notes that the statute petitioner is referring to is 22 O.S. § 655. The statute, prior to being amended in 1975, read as follows:

In all criminal cases the prosecution and the defendant are each entitled to the following peremptory challenges: **Provided, That** if two or more defendants are tried jointly they shall join in their challenges.

First. In capital offenses, nine jurors each.

Second. For offenses punishable by imprisonment in the State Prison, five jurors each.

Third. In other prosecutions, three jurors each.

The statute, as amended, reads as follows:

In all criminal cases the prosecution and the defendant are each entitled to the following peremptory challenges: **Provided, that** if two or more defendants are tried jointly they shall join in their challenges; **provided, that** when two or more defendants have inconsistent defenses they shall be granted separate challenges for each defendant as hereinafter set forth.

First. In prosecutions for first degree murder, nine jurors each.

Second. In other felonies, five jurors each.

Third. In all nonfelony prosecutions, three jurors each.

³ The trial transcript in pertinent part reads as follows:

MR. COWAN: No, not yet, Your Honor. Do we have nine or five in this-
- (Tr. p. 136).

THE COURT: I'm sorry. I can't hear you.

MR. COWAN: You said he only has one more.

THE COURT: Yes.

MR. COWAN: We don't have nine challenges?

THE COURT: I don't think so.

MR. COWAN: Okay, that is the law in capital cases, but--

that the trial court was under the mistaken belief that only in capital offenses would each party be entitled to nine peremptory challenges. The court was unaware that 22 O.S. § 655 was amended in 1975 to grant nine peremptory challenges in prosecutions for first degree murder, whether the death penalty was sought or not. Petitioner's counsel, Russell C. Miller, was also unaware of the change in the statute and failed to interpose an objection.

The court recognizes the long held view that the peremptory challenge is a necessary part of trial by jury. See, Lewis v. United States, 146 U.S. 370, 376 (1892). The challenge is "one of the most important of the rights secured to the accused". Pointer v. United States, 151 U.S. 396, 408 (1894). "The denial or impairment of the right is reversible error without a showing of prejudice." Swain v. State of Alabama, 380 U.S. 202, 219 (1965).

The quote from Swain, id., was cited by the Supreme Court in Ross v. Oklahoma, 487 U.S. ___, 108 S.Ct. 2273, 2279, 101 L.Ed.2d 80 (1988), but the judges in Ross went on to say:

[T]he Swain Court cited a number of federal cases and observed: 'The denial or impairment of the right is reversible error without a showing of prejudice.' But even assuming that the Constitution were to impose this same rule in state criminal proceedings, petitioner's due process challenge would nonetheless fail. Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise.

THE COURT: You're not asking for the death penalty.

MR. COWAN: Okay.

THE COURT: Okay. (Tr. p. 137).

(Citations omitted.)

Therefore, the court finds that petitioner has failed to raise a federal question entitling him to federal habeas relief in his first ground for relief. Traditionally, habeas corpus has been used by a prisoner to attack the fact or length of his confinement for the purpose of obtaining immediate or more speedy release from confinement. See, Preiser v. Rodriguez, 411 U.S. 475, 494 (1973). The power of a federal habeas corpus court is limited to violations of federal constitutional and statutory standards and questions of state law are not cognizable. See, Engle v. Isaac, 456 U.S. 107 (1982).

In his second ground for relief, petitioner claims that no blacks were included in the jury panel.

The Supreme Court in Swain v. Alabama, supra, addressed the defendant's claim that he was denied blacks on his jury. The Court stated in pertinent part:

But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tried him nor on the venire or jury roll from which petit jurors are drawn.... Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.... We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%.... Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by the petitioner in this case.

Swain, supra, at 208-209.

The court has carefully reviewed the record and transcripts of the trial proceedings and finds that there is no evidence to support the petitioner's claim that no blacks were included in the jury panel. There is no evidence of whether there were any blacks on the petitioner's jury or in the veniremen, no objection was raised by petitioner at the trial as to jury composition, and no evidence is presented of how many blacks lived in the area or were on the jury roll and a disparity between these. Under Swain v. Alabama, 380 U.S. 202 (1965), rejected in part, Batson v. Kentucky, 476 U.S. 79 (1986), the case which is applicable⁴, petitioner has the burden of proof to establish that the composition of a jury purposefully excluded members of his race and petitioner in no way has met this burden and is not entitled to relief on his second claim.

In his third ground for relief, petitioner claims that he was denied effective assistance of counsel by his trial attorney's failure to object to the alleged absence of blacks or ethnic groups as prospective jurors or on the jury panel, and counsel's failure to object to the court's ruling that petitioner was only entitled to five peremptory jury challenges.

⁴ The court notes that under Batson, supra, petitioner's burden would be to show he is a member of a cognizable racial group, that the prosecutor exercised peremptory challenges to remove from the venire members of his race, and that these facts raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the jury on account of their race. Under Batson, the petitioner could rely on the fact that peremptory challenges permit those to discriminate who are of a mind to do so. Batson was not decided at the time of petitioner's trial, and the Supreme Court held in Griffith v. Kentucky, 479 U.S. 314 (1987), that Batson only applied retroactively to cases pending on direct review or not yet final. Allen v. Hardy, 478 U.S. 255 (1986), had previously held that the Batson ruling was not available to petitioners on federal habeas corpus review of their convictions.

The Supreme Court in Kimmelman v. Morrison, 477 U.S. 365 (1986), held that an ineffective assistance of counsel claim may be brought for the first time collaterally. The Kimmelman Court explained its rationale as follows:

Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. (Citations omitted).

Id. at 378. See also, Osborn v. Shillinger, 861 F.2d 612, 622-623 (10th Cir. 1988). Moreover, "ineffective claims are ordinarily inappropriate to raise on direct appeal because they require additional fact-finding." Id. at 623.

In Strickland v. Washington, 466 U.S. 668 (1984), the Court announced a two-prong test to determine if counsel's performance was deficient. The Court held:

First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

After carefully reviewing the record in this case, the court concludes that counsel's performance was not deficient by his failure to object to the alleged absence of blacks or other ethnic groups on the jury or the venire. Petitioner did not have a constitutional right to a jury with blacks or other ethnic groups. He only had a right to a fair and impartial jury. See, Irwin v. Dowd, 366 U.S. 717 (1961). The record clearly reflects that counsel conducted a proper inquiry of the veniremen to determine any prejudice which they might have as a result of his client being black. The transcript shows that the following questions were asked of potential jury members:

MR. MILLER: [I] need to know if there is anyone on this jury that will have difficulty sitting on this case for the sole reason that the defendant is black. Is there anyone on this jury who has any kind of bias against a black Defendant? Do any of you associate with black people on a day-to-day basis? (Tr. p. 60).

MR. MILLER: Is there anyone on the jury panel who would not hold the State of Oklahoma to the same burden of proof in this case as you would if it were a white Defendant? Does the fact that the deceased person, and this person, the fact that he was black, would that make any of you any difference at all? You can judge the case on the merits from the evidence, is that correct? (Tr. p. 61).

In addition, petitioner has failed to show that he was prejudiced by counsel's failure to object to the composition of the jury or the venire. The Court in Strickland, supra, stated that the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, at 2068. Petitioner's only allegation of prejudice is that there were no

blacks on his jury. The Magistrate finds that petitioner has failed to show that he was denied a fair and impartial jury. Therefore, petitioner is not entitled to relief on this claim.

Petitioner further claims that he was denied effective assistance of counsel by his trial counsel's failure to object to the court's ruling that petitioner was only entitled to five peremptory jury challenges.

The court finds that under the first prong of Strickland, supra, counsel's performance was deficient by his failure to object to the court limiting petitioner to five peremptory jury challenges. Counsel should have known that the statute had been amended to grant nine peremptory challenges in prosecutions for first degree murder.

Under the second prong of Strickland, supra, petitioner is required to show that counsel's error prejudiced his ability to receive a fair trial. Petitioner alleges that he could have changed the outcome of his trial if he could have exercised his additional peremptory challenges. (See, Petitioner's Brief in support of post-conviction relief, p. 1, Case No. CRF-83-83). The pertinent part of the transcript dealing with the members of the jury which petitioner would have excluded reads as follows:

MR. COWAN: Now mention has been made by Mr. Miller that the Defendant in this case is black, and as he also mentioned, also Mr. Abraham was black, the deceased, and will you give just as much respect to the rights and to the right to live and the right to a fair trial, whatever right it might be, just as much to a person of the black race as to people of your own race?

THE PROSPECTIVE JUROR: (Mrs. Osburn) Yes, Sir.

MR. COWAN: And you will, in no way, that won't enter into your deliberations in any way, will it?

THE PROSPECTIVE JUROR: (Mrs. Osburn) No, Sir. (Tr. pp. 92-93).

Petitioner asserts that "[t]his line of questioning was discriminatory and highly prejudicial and petitioner did not have a single challenge left to excuse this juror from the jury panel." (See, Petitioner's Brief in support of post-conviction relief, p. 1, Case No. CRF-83-83).

The court finds this argument to be unpersuasive. The record clearly reflects that the prosecutor conducted a proper inquiry of the prospective juror to determine any prejudice which she might have as a result of the petitioner (defendant) and victim being black. Furthermore, the record reflects that petitioner had only exercised one peremptory challenge up to this point. Therefore, petitioner's claim that he did not have a challenge left to excuse this juror is without merit.

Petitioner further asserts that he was unable to remove a juror who was related to a law enforcement officer because of the lack of nine peremptory challenges. (See, Petitioner's Brief in support of post-conviction relief, p. 1, Case No. CRF-83-83). The pertinent part of the transcript reads as follows:

MR. MILLER: Mr. Christopher, I believe you indicated that you were relate[d]?

THE PROSPECTIVE JUROR: (Mr. Christopher) Yes, Sir. One of my wife's cousins is a detective in Sand Springs.

MR. MILLER: What is his name?

THE PROSPECTIVE JUROR: (Mr. Christopher) Mike Silver.

MR. MILLER: Do you have any close contact with him?

THE PROSPECTIVE JUROR: (Mr. Christopher) No, Sir, I've never spoke to him, I don't believe. (Tr. p. 72).

The court finds that the record does not support the petitioner's claim. At this point in the voir dire, petitioner had not exercised any of his peremptory challenges. Therefore, it cannot be said that petitioner could not have removed this juror if he wanted to.

Finally, petitioner claims that he was unable to remove a juror who allegedly thought that the police tell the truth all the time. (See, Petitioner's Brief in support of post-conviction relief, p. 2, Case No. CRF-83-83). The pertinent part of the transcript reads as follows:

MR. MILLER: Now, you heard the list of Witnesses read. Now there were several police officers whose names were on there. Now I need to know if there is anyone on the jury panel at this time that assumes that simply because a police officer is testifying, he is automatically telling the truth. Is there anyone on the jury panel right now that thinks that a policeman always tells the truth, just because he is a policeman? Mrs. Clark.

THE PROSPECTIVE JUROR: (Mrs. Beverly Clark) Yes, Sir. (Tr. p. 62).

MR. MILLER: Would you make that assumption, that just because a police officer happens to tell a story from the Witness stand, that he is automatically telling the truth?

THE PROSPECTIVE JUROR: (Mrs. Beverly Clark) Not necessarily.

MR. MILLER: Would you listen to what any of the police officers say and think about what they say?

THE PROSPECTIVE JUROR: (Mrs. Beverly Clark) Yes.

MR. MILLER: And when all of the evidence is in, will you then make up your mind as to who is lying and who is telling the truth, if anyone is lying? I am not saying that necessarily they are, but you will be cautious, will you?

THE PROSPECTIVE JUROR: (Mrs. Beverly Clark) Yes, I will. (Tr. p. 63).

Once again, the record does not support the petitioner's contention. At this point in the voir dire, petitioner had not exercised any of his peremptory challenges.

Based on the above, the court finds that petitioner has failed to show that counsel's error prejudiced his ability to receive a fair trial and therefore is not entitled to relief on his third claim.

In conclusion, the court finds that the application of petitioner Rawshall White for a writ of habeas corpus pursuant to 28 U.S.C. §2254 should be and is denied.

Dated this 19th day of September, 1989.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

CRAWFORD ENTERPRISES, INC.,)

Plaintiff,)

v.)

83-C-859-C

DAVID L. HOWARD, d/b/a M&H)
GATHERING, INC.,)

Defendant,)

ELI MASSO,)

Garnishee.)

SEP 13 1988

U.S. DISTRICT COURT

ORDER

The court has for consideration the Report and Recommendation of the Magistrate filed August 14, 1988, in which the Magistrate made recommendations on plaintiff's Motion for Entry of Judgment and for Vacation of Attorney's Fee Award and Garnishee Eli Masso's Objection to Entry of Judgment and Motion to Reconsider Order. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

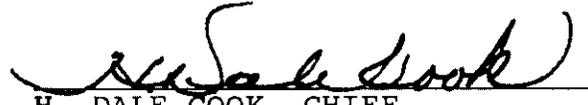
After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate should be and hereby is affirmed.

It is therefore Ordered that judgment is granted in favor of plaintiff and against Eli Masso, Garnishee, in the sum of \$5,620.91 on plaintiff's garnishment affidavit. It is further Ordered that the Judgment awarding attorney's fees and costs of \$20,000.00 in favor of Eli Masso and against plaintiff is vacated and the Court Clerk is directed to pay over to plaintiff the sum which it

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deposited with the Court Clerk on November 25, 1986, together with interest accrued thereon since that date.

Dated this 18th day of September, 1989.

A handwritten signature in cursive script, appearing to read "H. Dale Cook", written over a horizontal line.

H. DALE COOK, CHIEF
UNITED STATES DISTRICT JUDGE

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

SEP 18 1988

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

ADESCO, INC., an Oklahoma
corporation,

Plaintiff,

vs.

HERITAGE LIFE INSURANCE COMPANY,
an Arizona corporation, et al.,

Defendants.

No. 87-C-827-C

ORDER

Now before the Court for its consideration is the application of defendant Heritage Life Insurance Company (Heritage) for attorney fees.

Heritage argues that it is entitled to fees under the Oklahoma Deceptive Trade Practices Act (the Act). 78 O.S. §54(b) provides:

In any action instituted under the provisions of this act, the court may, in its discretion, award reasonable attorneys' fees to the prevailing party. If in any such action the court finds either (1) that the defendant has willfully engaged in a deceptive trade practice or (2) that the plaintiff has acted in bad faith in instituting the action, the court shall award reasonable attorneys' fees to the prevailing party.

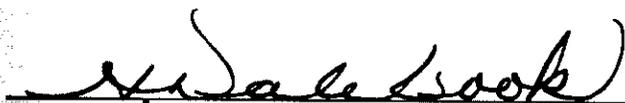
(footnote omitted).

Plaintiff's third cause of action was labelled as one for unfair competition, not one under the Act. Summary judgment was granted on that basis. Heritage should not now be permitted to characterize a cause of action as falling within a statute which permits recovery of attorney fees.

Assuming arguendo that §54(b) were applicable the Court finds, on the record presented, that fees should not be awarded.

It is the Order of the Court that the application of defendant Heritage Life Insurance Company for attorney fees is hereby DENIED.

IT IS SO ORDERED this 18th day of September, 1989.



H. DALE COOK

Chief Judge, U. S. District Court

FILED

SEP 18 1988

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

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

EAZOR SPECIAL SERVICES, INC.,)
a Pennsylvania corporation,)
)
Plaintiff,)
)
vs.)
)
BEVERAGE PRODUCTS CORPORATION,)
an Oklahoma corporation,)
)
Defendant.)

Case No. 88-C-1510E ✓

STIPULATION OF DISMISSAL

Eazor Special Services, Inc., by and through its counsel,
and Beverage Products Corporation, by and through its counsel,
pursuant to the provisions of Fed. R. Civ. P. 41(a)(1), hereby
stipulate to a dismissal with prejudice to any subsequent
refiling of the Petition for Indebtedness filed by the Plaintiff
herein.

GASAWAY & LEVINSON

DOERNER, STUART, SAUNDERS
DANIEL & ANDERSON

By Ronald C. Bennett
Ronald C. Bennett (OBA#711)
P.O. Box 14070
Tulsa, OK 74159

By James P. McCann
James P. McCann (OBA#5865)
1000 Atlas Life Bldg.
Tulsa, OK 74103
(918) 582-1211

Attorneys for Eazor Special
Services, Inc.

Attorneys for Beverage Products
Corporation

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

FILED

SEP 18 1989 *dst*

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

W. DAVID MORRIS, et al.,)

Plaintiffs,)

vs.)

No. 88-C-649-E ✓

FEDERAL SAVINGS & LOAN)
INSURANCE CORPORATION, et al.,)

Defendants,)

and

HELEN CRAWFORD,)

Third-Party Plaintiff,)

vs.)

AMERICAN CASUALTY COMPANY OF)
READING, PENNSYLVANIA,)

Third-Party Defendant.)

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this

order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 18th day of September, 1989.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

FILED

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

SEP 18 1989

TED and DANA HOLMAN,
Plaintiffs,

vs.

FARMERS ALLIANCE MUTUAL
INSURANCE COMPANY,
Defendant.

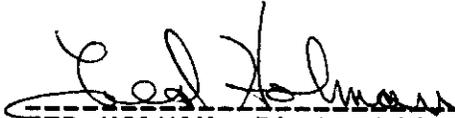
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Jack C. Silver, Clerk
U.S. DISTRICT COURT

Case No. 88-C-1548-B

DISMISSAL WITH PREJUDICE

COMES NOW Plaintiffs, Ted and Dana Holman, and Defendant, Farmers Alliance Mutual Insurance Company, and moves the Court dismiss the above styled cause, by stipulation of the parties; each party to be responsible for their respective costs incurred.



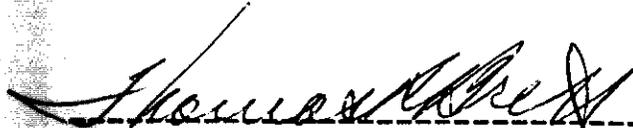
TED HOLMAN, Plaintiff



FARMERS ALLIANCE MUTUAL INS. CO.
Defendant



DANA HOLMAN, Plaintiff



UNITED STATES DISTRICT JUDGE

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

MICHAEL PRATT; DERRICK McINTURF,)
JO ANN ALRED; MICHAEL MOORE,)
JO LOUISE GRAVES, LEE ANN MOORE,)
and JOSEPH COULTER,)

Plaintiffs,)

vs.)

CHARLES CRAWFORD; DAVID PILLARS;)
JAMES CARNLEY, d/b/a M & J's)
Market; J. F. STOABS & SONS,)
INC.; d/b/a Save A Dollar Store;)
PAUL O'KEEFE and CITY OF HOMINY,)
OKLAHOMA,)

Defendants.)

No. 89-C-050-B

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

FILED

SEP 13 1989

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

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the Joint Stipulation of Dismissal filed by the plaintiffs, the Court dismisses, with prejudice, their Complaint against the defendants, with each party being responsible for their costs and attorney fees incurred herein.

Dated this 18 day of Sept., 1989.


United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

CIVIL ACTION NO. 89-C-148-C

FIFTEEN THOUSAND NINE)
HUNDRED AND FIFTY-TWO)

DOLLARS (\$15,952.00))

IN U. S. CURRENCY,)

and)

ONE MEN'S STEEL AND GOLD)

ROLEX WATCH,)

Defendants.)

F I L E D

SEP 18 1989

Judith S. ...
CLERK OF COURT

JUDGMENT OF FORFEITURE

This cause having come before this Court upon Plaintiff's Application filed herein, and being otherwise fully apprised in the premises, it is hereby

ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the defendant properties and against all persons interested in such properties, and that the said property be, and the same is, hereby forfeited to the United States of America for disposition by the United States Marshal according to law.

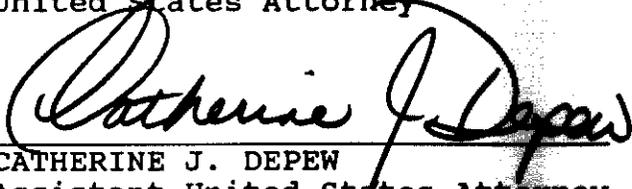
(Signed) H. Dale Cook

H. DALE COOK, CHIEF JUDGE OF THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

APPROVED:

UNITED STATES OF AMERICA

TONY M. GRAHAM
United States Attorney

A handwritten signature in cursive script, reading "Catherine J. DePew". The signature is written in black ink and is positioned above a horizontal line.

CATHERINE J. DEPEW
Assistant United States Attorney

CJD/ch