

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

FILED

MAR 10 1992

Richard L. ... Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TOOTLEVISION BROADCASTING)
COMPANY, a Cherokee Indian)
Minority partnership, and)
HARRY VIRGIL TOOTLE, and)
CHARLES KIRK TOOTLE,)

Plaintiffs,)

vs.)

No. 91-C-530-B

TULSA CABLE TELEVISION, INC.,)
d/b/a UNITED ARTISTS CABLE OF)
OKLAHOMA, an Oklahoma corporation,)
and BILL HOAGLAND, KAREN HARTLEY)
and MADIE HELLMAN, individually)
and as Agents and Employees of)
TULSA CABLE TELEVISION, INC.,)
d/b/a UNITED ARTISTS CABLE OF)
OKLAHOMA,)

Defendants.)

ORDER

Before the Court for decision is Defendants' Motion to Dismiss Plaintiffs' Complaint and Plaintiffs' Motion to Join Additional Parties and to Allow Amendment to Complaint. On Friday, March 6, 1992, the Court held a hearing concerning said motions. Prior to the hearing, by way of an Order of February 26, 1992, the Court directed the individual Plaintiffs, Harry Virgil Tootle and Charles Kirk Tootle, to obtain counsel of record or indicate their desire to proceed *pro se*. The Court also directed the partnership entity, Tootlevision Broadcasting Company, to obtain counsel of record before the March 6, 1992 hearing. At the hearing the Plaintiff, Harry Virgil Tootle, appeared and announced the case would proceed only by way of him as a Plaintiff because the other two

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nonappearing Plaintiffs did not have sufficient funds to properly prosecute the action. Thus, the action of Plaintiffs, Tootlevision Broadcasting Company, a Cherokee Indian minority partnership, and Charles Kirk Tootle, is hereby dismissed without prejudice and the Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Joining Additional Parties and to Allow Amendment of the Complaint proceeds relative to the allegations of the Plaintiff, Harry Virgil Tootle.

Plaintiff's Complaint commences by alleging various quotations from the First and Fifth Amendments to the United States Constitution, jurisdictional statutes of the United States Code, Civil Rights Statutes of 42 U.S.C. §§ 1983, 1985(3) and 1986, and the Code of Federal Regulations relative to actions filed due to violations of Title VI of the Communications Act.

The Plaintiff, Harry Virgil Tootle, also alleges that he is engaged in the sole proprietorship television broadcasting business, licensed by the FCC to broadcast on VHF TV Channel 4 in and around Tulsa, Oklahoma with assigned call sign K04NZ. It is alleged the Defendant, Bill Hoagland, is the manager of Tulsa Cable Television, Inc., Karen Hartley is the marketing manager, and Madie Hellman is a senior vice-president and general counsel for United Artists Entertainment Company, parent company, of Tulsa Cable Television, Inc. It is alleged that Hoagland, Hartley and Hellman acted individually and on behalf of Tulsa Cable Television to deprive Plaintiff of his property, liberty, and guaranteed First Amendment constitutional rights.

It is further alleged that the Defendant, Tulsa Cable Television, Inc., has obtained the nonexclusive right to construct, operate and maintain a Community Antenna Television System (CATV) to serve the citizens of Tulsa, Oklahoma by and under the authority of the Tulsa Municipal Code ordinance. Various code ordinance sections regarding operational standards, general requirements, and standards of good engineering practice for testing and maintenance of the cable television system in Tulsa, Oklahoma are alleged. It is also generally alleged that the Defendants have not complied with the alleged Tulsa City Ordinances which demonstrates bad faith and gross misrepresentation. The thrust of the Plaintiff's Complaint in Count 1 is that the Plaintiff has developed locally produced programming and the Defendants have wrongfully denied local television stations access for his programming. In Count 2 of the Complaint Harry Virgil Tootle alleges the Defendants have conspired to discriminate against the Plaintiff's broadcasting facilities in not permitting access to Plaintiff's programming, and as a result Plaintiff's First Amendment rights have been violated with Plaintiff suffering damages totalling \$85,000,000.00.

At the hearing on March 6, 1992, Harry Virgil Tootle stated that he was not claiming a violation of the "must carry" theory of the Complaint originally alleged; i.e., that the Defendant, Tulsa Cable Television, Inc., failed to make available cable capacity for Plaintiff's proposed programming. Plaintiff stated that the thrust of his allegations is set out in the proposed amendment which is that the Defendant violated the Tulsa Municipal Code which states

that a cable licensee who takes by assignment shall become responsible for full performance of all conditions of the cable granting ordinance. This is tantamount to an admission on Plaintiff's part that the first Complaint does not state a cause of action against the named Defendants so Plaintiff proposes to add additional parties and make an amendment to the original Complaint. In the Plaintiff's proposed Amendment to the Complaint, he attempts to add Defendants, Fred A. Vierra, Stephen M. Brett, each individually and as agents and employees of Tulsa Cable Television, Inc., d/b/a United Artists Cable of Oklahoma; the City of Tulsa, Rodger A. Randle (Mayor of City of Tulsa), Ed Koepsel (Administrative Aide to the Mayor of the City of Tulsa), and Neal E. McNeill (Tulsa City Attorney), each individually and as agents and employees of the City of Tulsa. In the proposed Amendment the Plaintiff alleges that the Defendants violated the Sherman Act and the Clayton Act by conspiring to engage in monopolistic and unfair competition practices.

It is further alleged that acquisition and ownership of the cable system by Tulsa Cable Television, Inc. unlawfully performed and violated the Tulsa Municipal Code, Title 15, Section 819, which provides that any entity that takes by way of assignment from a grantee of the rights and privileges under the ordinance licensing the cable television system, must agree in writing with the City to become responsible for the full performance of all conditions contained in the ordinance.

Regarding the City of Tulsa and the alleged City of Tulsa

officials, the proposed Amendment to the Complaint states:

"6. Whereas, the plaintiffs filed a formal and written complaint of Municipal violation to the City of Tulsa on June 10, 1991 and personally delivered said complaint to the offices of defendants Neal McNeill, Ed Koepsel, and Rodger Randle with the result of this issue being ultimately ignored, and the only action taken was to provide assistance to Tulsa Cable in preparing the groundwork for voter approval of changing the Tulsa Municipal Ordinance, which was rejected by Tulsa voters on November 12, 1991.

"7. Additionally, it is alleged that Tulsa City Attorney Neal McNeill further did conspire to deprive the plaintiffs of their Constitutional [sic] rights by his willful negligence of even 'mentioning' this matter to his subordinate who investigates matters of Municipal Code violations."

In Paragraph 8 the Plaintiff concludes the proposed Amendment to Complaint by stating:

"WHEREFORE, the defendants' actions have caused the plaintiffs much mental anguish, loss of home and business, near impotence, and undue economic hardship on the plaintiffs' TV stations within and outside the State of Oklahoma, and together with the allegations made in the original Complaint, brings this case well within the Federal jurisdiction and venue of the Northern District of Oklahoma, with sufficient detail to give defendants fair notice, claims, and allegations sufficient to state a cause of action for the plaintiffs and against the defendants and each of the defendants."

The issue thus becomes whether or not Plaintiff's proposed amendment to the Complaint adding the new parties should be permitted or whether Defendants' Opposition thereto should be sustained.

The contents of the Complaint are to be viewed in the light

most favorable to the nonmovant and this is particularly so when the Plaintiff is a nonlawyer. See, Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Woodall v. Foti, 648 F.2d 268, 271 (5th Cir. 1981). Thus, the Court should examine the Plaintiff's proposed Amendment to the Complaint under the concept of liberal pleading requirements where a *pro se* litigant is involved. However, amendment to the pleadings should be refused when it appears to a certainty that plaintiff could not prevail and amendment would be futile. See, McKinney v. State of Okla., Dept. of Human Services, 925 F.2d 363, 365 (10th Cir. 1991); Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988); Havas v. Thornton, 609 F.2d 372, 376 (9th Cir. 1979); Prezzi v. Schelter, 469 F.2d 691, 692 (2nd Cir. 1972), *cert. den.*, 411 U.S. 935 (1973); Bonanno v. Thomas, 309 F.2d 320 (9th Cir. 1962); Feinberg v. Leach, 243 F.2d 64 (5th Cir. 1957); C. Wright & A. Miller, Federal Practice & Procedure: § 1357, p. 365.

The Plaintiff's proposed Amendment alleges no facts that would constitute an antitrust violation, facts relating to a violation of the alleged assignment ordinance, or any other actionable misconduct by Defendants. Plaintiff fails to allege the conduct evidencing their participation in the purported conspiracy or identify the specific persons and their conspiratorial conduct. Some reasonable specificity of the conduct amounting to an antitrust violation is required. The rationale for this requirement is set forth in C. Wright and A. Miller, Federal Practice & Procedure: § 1228 at page 217 as: (i) "the inherent complexity of

the issues involved"; (ii) "the frequently speculative nature of the damages"; (iii) "the possibility that the availability and attractiveness of a treble damage remedy would lead to the abusive use of the action"; and (iv) "long and costly pretrial procedures and trials" that are attendant to antitrust claims. Numerous courts have dismissed or not permitted the filing of actions that merely allege generally violations of the antitrust laws of the United States. Marrese v. Interqual, Inc., 748 F.2d 373, 379 (7th Cir. 1984), *cert. den.*, 472 U.S. 1027 (1985); Central Savings & Loan Association of Chariton, Iowa v. Federal Home Loan Bank, Bd., 422 F.2d 504, 509 (8th Cir. 1970); Northland Equities, Inc. v. Gateway Center Corp., 441 F.Supp. 259, 264 (E.D. Pa. 1977); and Bader v. Zurich Gen. Acc. & Liab. Ins. Co., 12 F.R.D. 437, 439 (S.D.N.Y. 1952).

In reference to Plaintiff's attempt to join additional parties defendant, the City of Tulsa and the city officials, it appears this effort is made to provide for the necessary state action of the initial Complaint allegations regarding the various federal civil rights statutes. The effort fails, however, because there are no factual allegations in the purported amendment giving rise to actionable conduct against either the City of Tulsa or the officials of the City of Tulsa. Further, Okla. Stat. tit. 51 § 155 creates immunity for such city officials in stating the following:

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provisions, ordinance, resolution, rule, regulation or written

policy;

5. Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;

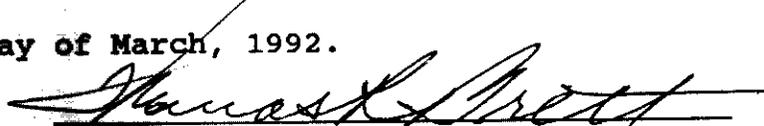
* * *

12. Licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority; . . .

The above cited Oklahoma statute expressly prohibits claims against the City of Tulsa and its officials for failing to enforce a municipal ordinance, if in fact such conduct occurred.

A thorough reading of the Plaintiff's alleged Complaint and proposed Amendment reveals that no facts have been asserted which state a claim for relief against the original Defendants or the proposed new Defendants. The allegations of both the Complaint and the proposed Amendment thereto fail to state a claim under the federal antitrust laws, the various civil rights statutes, or the federal constitutional provisions referenced by Plaintiff. Plaintiff's allegations are basic conclusions of law absent factual allegations supporting a viable cause of action. Therefore, Plaintiffs' Motion to Join Additional Parties and Motion to Allow Amendment to Complaint is hereby OVERRULED, and further Defendants' Motion to Dismiss With Prejudice is SUSTAINED.

DATED this 10th day of March, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

VACUUM AND PRESSURE TANK TRUCK)
SERVICES, INC.,)
)
Plaintiff,)
)
vs.) Case No. 91-C-620-B
) (formerly 91-C-620-C)
ST. PAUL INSURANCE COMPANY,)
)
Defendant.)

**STIPULATION OF VOLUNTARY DISMISSAL
WITHOUT PREJUDICE**

COME NOW the parties to the above styled action, Vacuum & Pressure Tank Truck Services, Inc. and St. Paul Insurance Company and pursuant to and in accordance with Rule 41(a)(1), Federal Rules of Civil Procedure, hereby stipulate to the dismissal without prejudice of the above styled action.

Respectfully Submitted,

DOYLE & HARRIS



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Michael D. Davis, OBA #11282
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Attorneys for Plaintiff



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SIEGFL
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Tulsa, OK 74103-5118

Attorney for Defendant

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

FILED

MAR 10 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA CABLEVISION CORP.,
an Oklahoma corporation,

Plaintiff,

v.

MISSION CABLE COMPANY, L.P.,
a Delaware limited partnership,

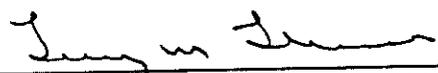
Defendant.

No. 91-C-372-B

STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff Oklahoma Cablevision Corp. and Defendant Mission Cable Company, L.P., by and through their respective counsel of record, hereby stipulate and agree that this matter shall be and hereby is dismissed with prejudice, each party to bear its own costs and fees herein.

Respectfully submitted,



Terry M. Thomas, OBA #8951
~~NORMAN & WOHLGEMUTH~~ Moyers, Martin, et al
~~2900 Mid-Continent Tower~~ 320 S. Boston Bldg.
Tulsa, Oklahoma 74103 Suite 920
(918) ~~583-7571~~ 582-5281

Attorneys for Plaintiff,
Oklahoma Cablevision Corp.



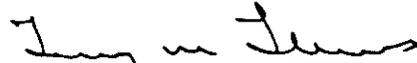
Thomas G. Ferguson, Jr., OBA #2878
KIMBALL, WILSON, WALKER & FERGUSON
301 N.W. 63rd, Suite 400
Oklahoma City, Oklahoma 73116
(405) 843-8855

Attorneys for Defendant,
Mission Cable Company, L.P.

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of ^{March} ~~February~~, 1992, a true and correct copy of the above and foregoing instrument was mailed, with proper postage thereon, to:

Thomas G. Ferguson, Jr., Esq.
301 N.W. 63rd, Suite 400
Oklahoma City, OK 73116



Terry M. Thomas

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

FRED BROOKSHIRE and JACKIE
BROOKSHIRE, husband and
wife,

Plaintiffs,

vs.

MENTOR CORPORATION,
a Minnesota corporation,

Defendant.

Case No. 91-C-623-B

ORDER GRANTING APPLICATION FOR A
DISMISSAL WITH PREJUDICE

Upon written application of the parties for an order of dismissal with prejudice of the complaint and all causes of action, the Court, having examined said application, finds that said parties have requested the Court to dismiss the complaint with prejudice to any future action, and the Court having been fully advised in the premises, finds that said complaint should be dismissed. 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 further action.

DATED this 10th day of March, 1992.

JUDGE, UNITED STATES DISTRICT COURT

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

FILED

MAR 10 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

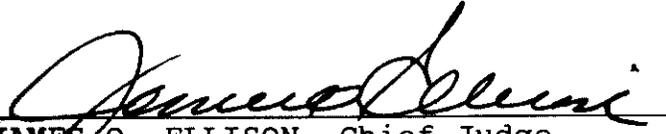
DANNY L. MITTS,)	
)	
Plaintiff,)	
)	
vs.)	No. 91-C-469-E
)	
WAL-MART STORES, INC.,)	
)	
Defendants.)	

ORDER

By Stipulations filed of record, Plaintiff and Defendant Wal-Mart and Plaintiff and Defendant Prescolite, respectively, request an Order dismissing Plaintiff's cause of action against each Defendant without prejudice. Having reviewed the record the Court believes that an Order of Dismissal is appropriate and further finds that Motion for Transfer filed by Defendant Prescolite should be denied as moot.

IT IS THEREFORE ORDERED that Plaintiff's cause of action against Defendant Wal-Mart and Defendant Prescolite are dismissed without prejudice; Defendant Prescolite's Motion to Transfer is denied as moot.

ORDERED this 9th day of March, 1992.


 JAMES O. ELLISON, Chief Judge
 UNITED STATES DISTRICT COURT

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

IN RE:)

ROBERT RAY HARRISON and)
FRANKEY DAYLENE HARRISON,)

Debtors.)

AGRICREDIT CORPORATION,)

Appellant,)

v.)

ROBERT RAY HARRISON and)
FRANKEY DAYLENE HARRISON,)

Appellees.)

Bky. No. 91-00529-W

FILED
MAR 09 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 91-C-770-B ✓

ORDER

This order pertains to the appeal of Agricredit Corporation ("Agricredit") from the Final Order Confirming the Debtors' First Amended Chapter 12 Plan of the Bankruptcy Court for the Northern District of Oklahoma entered on September 23, 1991.

Agricredit financed the purchase by debtors of numerous items of farm equipment in 1986 and 1987. The debtors subsequently defaulted on the indebtedness and Agricredit instituted a replevin action in the District Court of Ottawa County, Oklahoma. On October 19, 1989, Agricredit replevied all the collateral. The debtors responded with a breach of warranty counterclaim against Agricredit and a third party petition against Massey-Ferguson, the manufacturer. The state court dismissed the counterclaim against Agricredit on July 19, 1991. Agricredit claims that the debtors have deliberately held up the state court proceedings by refusing to answer interrogatories, requiring the trial settings to be postponed several times. Trial is now set for March, 1992. The collateral has not been

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sold.

The debtors filed their joint bankruptcy petition on February 22, 1991, stating that they were "family farmers", had been engaged in a "farming operation" since 1986, and were eligible for relief under Chapter 12 of the Bankruptcy Code, 11 U.S.C. §§ 1201-1231. As a creditor of the bankrupt estate, Agricredit filed its Proof of Claim, pursuant to 11 U.S.C. § 501(A), on April 30, 1991, specifying their claim as a "secured claim" in the amount of \$34,083.12. The debtors did not object to this claim and it was deemed allowed pursuant to § 502(A).

The debtors filed their First Amended Chapter 12 Plan of Reorganization ("Plan") on May 24, 1991, providing for payment of administrative claims and secured claims, but paying nothing to Agricredit. The Plan indicated that Agricredit's claim was satisfied in full by its replevin of the collateral. Agricredit filed an objection to confirmation of the Plan on July 3, 1991.

A hearing on the confirmation of the Plan was held on July 24, 1991. Agricredit offered evidence that the Plan lacked feasibility under 11 U.S.C. § 1225(a)(6) and violated the "best interest of the creditors" test under 11 U.S.C. § 1225(a)(4). Although the Plan paid nothing to unsecured creditors, the court found "[t]hat all of the parties will receive as much if not more than they would receive in a liquidation. And that the objection of First National Bank of Vinita is overruled, and the objection of Agricredit is overruled.... (Record on Appeal, Document No. 59, Transcript of Confirmation Hearing, p. 75, lines 18-21). Agricredit now appeals the Bankruptcy Court's Order Confirming [the Debtors'] Plan entered on September 23, 1991.

Agricredit raises one issue on **appeal**: whether the Plan complies with 11 U.S.C. § 1225(a)(4), referred to as the "best interest of the creditors" test, requiring the debtor to show that the holder of each unsecured claim will receive more under the Plan, on a present value basis, than the holder would have received in a liquidation under Chapter Seven. Agricredit claims that this **question** is one of law and therefore is subject to de novo review. Hall v. Vance, 887 F.2d 1041 (10th Cir. 1989). Robert and Frankey Harrison ("Appellees") contend that the **question** is one of fact and should not be set aside unless clearly erroneous. In re: Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983).

The appropriate standard of **review** is de novo. This is not because, as appellant contends, there are no facts in **dispute**. De novo is the correct standard because Agricredit's status, based on undisputed facts, is determined by law. It is clear from the record that the bankruptcy judge **applied** the correct test to Agricredit's "secured" claim when he determined that the claim **had been** satisfied by the surrender of the collateral under 11 U.S.C. § 1225(a)(5).

Section 1225 of Title 11 of the **Bankruptcy** Code lists the requirements for approval of a Chapter 12 plan. Subsection (a)(4) provides for unsecured claims, while subsection (a)(5) provides for secured claims:

(a) Except as provided in **subsection** (b), the court shall confirm a plan if:

(4) the value, as of **the effective** date of the plan, of property to be distributed under the plan on **account** of each allowed unsecured claim is not less than the amount that **would be paid** on such claim if the estate of the debtor were liquidated under **chapter 7** of this title on such date;

(5) with respect to **each** allowed secured claim provided for by the plan--

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder....

Title 11 of the United States Code, § 506(a), limits the secured creditor to the value of the security.¹

In the Order Confirming Plan at page eleven (Record on Appeal, Document No. 55), the judge stated: "Agricredit Acceptance Corp., has filed a secured claim in the amount of \$34,083.12. Debtor has surrendered all property securing this claim pre-petition. By virtue thereof, this creditor[']s claim has been fully satisfied and therefore, this creditor shall not receive any payments through this Plan either as a secured creditor or unsecured creditor."

Agricredit claims that it had a contingent unsecured claim for the deficiency that exists between the underlying debt of \$34,083.12 owed by debtors and the eventual sale

¹ Title 11 of the United States Code, § 506(a) states as follows:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

price of the collateral. However, under the Bankruptcy Court's Standing Order, specifically dealing with motions under 11 U.S.C. § 506, any motion to value secured claims must be filed not later than ten (10) days following the conclusion of the meeting of creditors, which in this case was held on March 27, 1991. Agricredit failed to file a motion to value its secured claim pursuant to § 506 and did not assert an unsecured claim until the Plan was confirmed on July 24, 1991. The effect of the confirmation pursuant to 11 U.S.C. § 1227 was to bind the debtors and each creditor whether or not their claims were provided for by the Plan and whether or not they had objected to, accepted, or rejected the Plan. Agricredit is attempting to be excepted from that binding effect by this appeal.

By failing to move to value its secured claim and to file an unsecured claim in a contingent amount, Agricredit is estopped to appeal the final order confirming the Plan. It is ordered that the Bankruptcy Court's decision of September 23, 1991, be and hereby is affirmed.

Dated this 9 day of Mar, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

MAR -9 1992

REGISTRAR CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

GENERAL ELECTRIC CAPITAL CORPORATION, a New York corporation,

Plaintiff,

vs.

Case No. 90-C-962-B

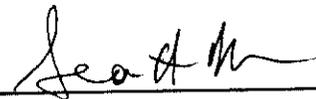
VOGUE R.V. SALES OF CALIFORNIA, INC., an Oklahoma corporation; ITT COMMERCIAL FINANCE CORPORATION, a Nevada corporation; and TRANSAMERICA COMMERCIAL FINANCE CORPORATION, a Delaware corporation,

Defendants.

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiff General Electric Capital Corporation and Defendants Vogue R.V. Sales of California, Inc. and Transamerica Commercial Finance Corporation (the only parties remaining in this action), by and through their attorneys of record, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal without prejudice of this case, with each party to bear its own costs.

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SEAN H. McKEE

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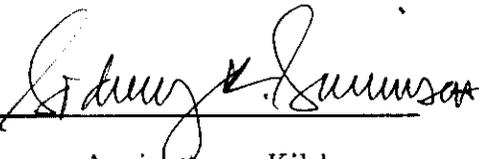
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T. P. HOWELL

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Attorneys for JOSEPH Q. ADAMS
TRUSTEE FOR VOGUE R. V. SALES OF
CALIFORNIA, INC.

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

IN RE:)

LIFELINE HEALTHCARE)
GROUP, LTD.,)

Debtor.)

JEAN M. ANDERSON,)

Appellant,)

v.)

LIFELINE HEALTHCARE)
GROUP, LTD.,)

Appellee.)

Bky. No. 90-02601-W

Case No. 91-C-810-B

FILED

MAR 09 1991

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This order pertains to the appeal of Jean M. Anderson from the "Order on the Special Master's Motion for Authority to Terminate Profit Sharing Plan, to Approve Accounting and Authorizing Final Distribution to Profit Sharing Funds" of the United States Bankruptcy Court for the Northern District of Oklahoma entered on October 11, 1991.

The Debtor corporation in this matter, Lifeline Healthcare Group Ltd. ("Lifeline"), was controlled and operated by its President, Michael Lynn Anderson ("Michael"). Lifeline included a wholly owned subsidiary called Lifeline Homecare Services, Inc. ("LHS"). In 1985, LHS established the Lifeline Healthcare Services Inc. Employee Profit Sharing Trust ("Plan"). As of September 1990, Michael's interest in the Plan was approximately \$88,700.00. His wife had a separate account.

On May 30, 1990, Michael's wife, Jean Marie Anderson ("Jean Marie"), filed a divorce petition in Creek County District Court, Case No. D-90-191. (Exhibit 1 in Jean

Marie's Appendix of Exhibits ("Appendix")). On the same day, the district court issued a Temporary Order restraining Michael from "selling, transferring, encumbering, secreting, alienating or otherwise in any manner disposing of any property held in the name of either Plaintiff or Defendant or in which either of said parties may claim an interest, except for the purpose of complying with the order of this Court." (Exhibit 2 in Appendix).

On September 6, 1990, Lifeline commenced a voluntary Chapter Eleven proceeding and C. Raymond Patton, Jr. was appointed as a Special Master for Lifeline. Jean Marie became a claimant in the bankruptcy, filing seven separate proofs of claim and/or interest, including a claim to a marital interest in Michael's portion of the Plan.

On October 4, 1990, the Creek County District Court issued a Modified Temporary Order in the divorce case, again restraining Michael from selling, transferring or otherwise encumbering assets. (Exhibit 3 in Appendix). Four months later, on February 7, 1991, Lifeline filed in the bankruptcy proceedings a Motion for Approval of Stipulation of Settlement and Release (Re: Michael L. Anderson). (Exhibit 4 in Appendix). The motion stated that Michael had settled certain claims asserted against him by the Securities and Exchange Commission ("SEC") and by Lifeline in Case No. 89-C-964-B in the United States District Court for the Northern District of Oklahoma. Michael had entered into an agreement which provided for the assignment to the Special Master of his interest in the Plan. Pursuant to the terms and conditions of the agreement, he agreed "to waive any right, title or interest he may have to any monies or securities held in the profit sharing trust." (Stipulation of Settlement and Release, Exhibit A to Exhibit 4 in Appendix). The Stipulation provided that:

The SEC has reached settlement agreements with both Michael and Jamco. In accordance with the CONSENT AND UNDERTAKING OF MICHAEL AND JAMCO, the Special Master has determined that the terms of the SEC settlements with Michael and Jamco adequately benefit and protect Lifeline and its shareholders. The settlement set forth below, between the Special Master, Michael and Jamco is entered on behalf of Lifeline and its subsidiaries as a means of settling any and all claims whatsoever between the parties and to set forth the terms of Michael's rights to the Lifeline Homecare Profit Sharing Trust.

As to Jean Marie's claim to Michael's shares of the Plan, the agreement provided:

The Special Master acknowledges the claim of Jean Marie to the Profit Sharing Trust in accordance with the divorce proceedings pending in the District Court in and for Creek County, State of Oklahoma styled: Anderson v. Anderson, Case No. D-90-191. The Special Master disputes any claim of Jean Marie to this asset or any other asset of Lifeline.

A copy of the motion, together with a copy of the Bankruptcy Court's Standing Order Regarding Notice and Opportunity for Hearing, was mailed to all creditors, interest holders and other parties in interest, including Jean Marie and her divorce attorney, Richard Wagner, II. No objection to the settlement was made by Jean Marie or any other party. On February 25, 1991, the Special Master filed a Plan of Reorganization and Disclosure Statement. (Exhibit 5 in Appendix). The settlement was approved by an Order entered March 4, 1991.

On April 5, 1991, an Amended Disclosure Statement for the Special Master's Plan of Reorganization for Lifeline Healthcare Group, Ltd. ("Disclosure Statement") was filed. (Exhibit 6 in Appendix). The Special Master's Plan of Reorganization for Lifeline Healthcare Group, Ltd. ("Reorganization Plan") and the Disclosure Statement provided that the property of the estate would be vested in the Special Master free and clear of all claims of creditors and equity security holders. (Exhibit 6 in Appendix, Article VIII, p. 29, and

Reorganization Plan, Exhibit 5 in Appendix, Article VII, p. 26).

The Reorganization Plan was **binding** upon all creditors and interest holders of Lifeline, including Jean Marie. (Exhibit 6 in Appendix, Article VIII, p. 32, Exhibit 5 in Appendix, Article VII, p. 27). The Reorganization Plan, Disclosure Statement, Order Approving Disclosure Statement and **Fixing** Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof **and** a ballot for voting on the Reorganization Plan were mailed to Jean Marie and her attorney. (Exhibit 5 to Appellee's Answer Brief). Jean Marie cast her ballot on the Reorganization Plan and voted to accept the plan. (Exhibit 6 to Appellee's Answer Brief). The Reorganization Plan was confirmed on May 24, 1991 (Exhibit 7 to Appellee's Answer Brief) **and** found as follows on page 3:

The Court specifically finds that notice of the bankruptcy case, the deadline for filing claims, and an opportunity to be heard and to participate in the plan of reorganization herein **and** to assert any claim against the Debtor or to receive any distribution from the Debtor has been afforded to all creditors and holders of interests in the Debtor including, without limitation, creditors holding claims against the Debtor by virtue of losses sustained in the trading of securities of the above Debtor. All such persons are specifically bound by the provisions of the plan, as amended, and are forever barred from asserting any claims arising prior to the date of entry hereof against the Debtor or other persons as provided by the plan, as amended.

On August 12, 1991, the Special Master filed his Motion for Authority to Terminate Profit Sharing Plan, to Approve Accounting and Authorize Final Distribution of Profit Sharing Funds, seeking authorization to dissolve the profit sharing plan and distribute its assets, including Michael's former interest in the funds pursuant to the settlement. (Exhibit 8 in Appendix). Jean Marie filed the **only** objection to this motion on September 18, 1991, asserting that her marital interest in Michael's portion of the Plan survived its assignment to the estate and its vesting in the Special Master free and clear of her claim. She claimed

that the order of the Divorce Court **restraining** Michael from transferring the property prevented the assignment.

On August 29, 1991, the Creek County District Court issued its "Findings of Fact, Conclusions of Law and Proposed Order of the Court." (Exhibit 7 in Appendix). The court stated as a finding of fact that there was "some possibility of the recovery of additional assets of the marriage from the following sources: (1) An interest in the corporate stock of Lifeline Homecare and related **companies** and (2) A profit sharing plan of Lifeline Homecare" In this order, the court awarded Jean Marie, as "her sole and separate property 7. Any and all of the **profit sharing** plan of Lifeline Homecare which may hereafter be recovered, except such **portion** thereof as the parties' minor children may be entitled."

The Transcript of the Bankruptcy Court's ruling on October 3, 1991 concerning the motion of the Special Master to **terminate** the Plan and distribute its funds shows that the Bankruptcy Court concluded that the **Disclosure** Statement fully and completely disclosed the fact that the settlement money was to be treated as property of the estate (p. 40, l. 24 to p. 41, l. 5), the use of the settlement **proceeds** was integral to the Reorganization Plan and affected thousands of creditors (p. 41, ll. 6-14), Jean Marie knew at all times what was happening in the bankruptcy case as to Michael's interest in the Profit Sharing Plan (p. 42, ll. 12-14), the state court **merely** acknowledged a possible future recovery for Jean Marie as to the Plan, but made no **findings** of law in that regard (p. 42, l. 18 to p. 43, l. 9), the Reorganization Plan would **not work** without the settlement funds (p. 43, ll. 16-19) and Jean Marie consented to **the disposition** of the Profit Sharing Plan and was

therefore precluded and estopped from relitigating the issue (p. 44, 11. 14-20).

After consideration of the exhibits, pleadings and arguments of counsel, the court entered the order of October 11, 1991, the subject of this appeal, granting the Special Master's Motion, rejecting Jean Marie's claim, and authorizing the Special Master's use of the monies free and clear of any claim of Jean Marie. (Exhibit 9 in Appendix).

Jean Marie contends that, by virtue of the state court ruling in Jean Marie's divorce case, Jean Marie's right, title and interest to the Plan was prior to the interest of the Debtor estate. She claims that the Creek County District Court had exclusive jurisdiction to determine the priority of interests with respect to the Profit Sharing Plan, and the funds were never an asset of the bankruptcy estate. Jean Marie points out that the language of the settlement agreement concerning the Plan states on page 3 as follows: "Michael agrees to waive any right, title or interest he may have to any monies or securities held in the profit sharing trust." This agreement was entered into on September 6, 1990 and Bankruptcy Court approval was sought on February 7, 1991, but Jean Marie notes that it had not yet been determined by the Divorce Court that Michael had any interest in the profit sharing plan.

Moreover, the Special Master admitted notice of, and acknowledged, Jean Marie's claim to the profit sharing plan in the body of the settlement agreement, but failed to intervene in the divorce case or commence an adversary proceeding in the bankruptcy case under Bankruptcy Rule 7001. Therefore, Jean Marie alleges the Special Master was estopped to deny her interest and entitlement to the funds. Jean Marie contends that her failure to object to the Plan and related Disclosure Statement did not result in her implicit

waiver of any right, or interest in the plan, because she had no obligation to object when the Creek County District Court had already assumed exclusive jurisdiction to resolve her interest.

The Special Master argues that the settlement agreement effectively disposed of Jean Marie's interest. An interpretation that Michael had no interest in the Plan funds would void the consideration for the settlement agreement. Even if the agreement by Michael was a violation of the district court's restraining order, he contends that it was valid subject to sanctions by the district court for violation of that order. The Special Master argues that Jean Marie's approval of the Plan precluded and estopped her from asserting an interest in the funds at this time and that the Bankruptcy Court had jurisdiction over them because Jean Marie filed her claim to a marital interest "pursuant to Oklahoma law" in Michael's share of the fund with the Bankruptcy Court (Exhibit 1 to Appellee's Answer Brief).

The district court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate review of bankruptcy rulings with respect to findings of fact. In re: Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. In re: Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988); In re: Mullett, 817 F.2d 677, 679 (10th Cir. 1987). This appeal challenges the legal conclusion drawn from the facts presented at trial, so de novo review is proper.

A creditor subjects herself to the equitable power of the Bankruptcy Judge when she

files a proof of claim against the bankruptcy estate. Bayless v. Crabtree Through Adams, 108 B.R. 299, 304 (W.D. Okla. 1989), aff'd, 930 F.2d 32 (10th Cir. 1990). Under bankruptcy law, a Reorganization Plan may provide for retention by the debtor of all or any part of property of the estate, for the sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property, or the satisfaction or modification of any lien. 11 U.S.C. § 1123(a)(5).

The profit sharing funds at issue were part of the Debtor's estate when the bankruptcy proceeding was instituted. Legal title was held by the Debtor's profit sharing trust, and Michael and Jean Marie had equitable title to part of the funds by virtue of their vested interests. What Jean Marie claims, and Michael transferred in the settlement agreement, is an equitable interest in the funds, not legal title to them.

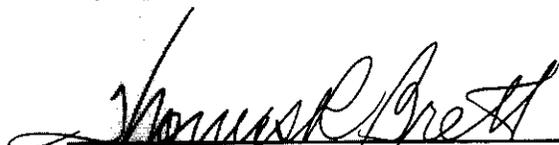
Jean Marie submitted herself and her claims, including her claim to a marital interest in Michael's equitable title to some of the profit sharing funds in the estate, to the Bankruptcy Court by filing her seven claims. The Bankruptcy Court had jurisdiction to determine those claims and distribute the property of the debtor's estate. The Reorganization Plan disposed of her claims, and she consented to this disposition by raising no objections and voting to accept the Reorganization Plan. When the plan was confirmed, her equitable interest was terminated in favor of the Special Master, who then held the profit sharing monies in fee.

The Creek County District Court awarded her "any and all of the profit sharing plan of Lifeline Homecare which may hereafter be recovered," (emphasis added) recognizing

that this was a contingency, not a **certainty**. The Reorganization Plan emphasized the importance of the proceeds for the **payment** of administrative expenses as an integral part of the reorganization. The **Bankruptcy Court** properly found that Jean Marie was precluded and estopped from collaterally attacking the disposition of funds under the Reorganization Plan she approved. No remainder or **residue** of the Profit Sharing Plan exists to which the order of the Creek County District Court can apply.

It is ordered that the Bankruptcy Court's decision of October 3, 1991 be and hereby is affirmed.

Dated this 9th day of Mar, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
MAR 11 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DOBIE LANGENKAMP,)
)
 Plaintiff,)
)
 v.)
)
 DOLLIE RAPP, et al,)
)
 Defendants.)

91-C-267-B

ORDER

This order addresses Defendants Dollie Rapp's, Allan Rapp's and Debra Penix's Motion for Withdrawal of Reference (docket #1). Defendants seek withdrawal of the reference to the United States Bankruptcy Court and demand trial by jury before the District Court.

Upon review, the undersigned finds that Defendants' Motion should be and hereby is denied.

Two cases govern. They are: *In Re Kaiser Steel Corporation*, 911 F.2d 380, 398 (10th Cir. 1990) and *In Re Caesar C. Latimer*, 918 F.2d 136, 138 (10th Cir. 1990). To avoid waiver of right to trial by jury the party seeking a jury trial must combine his/her request for a jury trial with a request for transfer to the district court. *In Re Latimer, supra* (10th Cir. 1990). Bankruptcy Rule 9015(b) and Rule 38(b), Fed.R.Civ.P. require jury demands to be served withⁱⁿ ten days after service of the "last pleading directed to such issue." *In Re Kaiser Steel Corporation, supra* (10th Cir. 1990).

In the case at bar, Defendants filed their Answer on November 28, 1986. No

3

CLERK
T.M.P.

simultaneous motion to withdraw the reference or transfer the case was made. Such motion was here made some four and one-half years later, on April 23, 1991. Applying the court's holdings in *Re Kaiser* and *In Re Latimer*, above, the court can only conclude that the request to withdraw the reference is not timely made, hence must be denied. Defendants have waived their right to trial by jury by failing to make a timely demand to withdraw the reference from the Bankruptcy Court.

SO ORDERED THIS 9th day of March, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 9 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JAMES OLIVER DESMOND,)
)
Plaintiff,)
)
V.)
)
TULSA HOUSING AUTHORITY,)
et al.,)
)
Defendant.)

No. 92-C-121-E

ORDER

The Court has before it for consideration Plaintiff's Motion for Stay of Execution of an order issued by the lower court on February 7, 1992. The Court not being apprised of the issues or of its jurisdiction hereby denies the motion.

IT IS THEREFORE ORDERED that Plaintiff's, James O. Desmond, motion for stay of execution be and the same is hereby denied.

SO ORDERED this 9th day of March 1992.


CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

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

FILED

MAR 6 1992 *dl*

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

FEDERAL DEPOSIT INSURANCE
CORPORATION, in its
corporate capacity,

Plaintiff,

vs.

No. 90-C-89-E

ROBERT J. MORRISON, JR.,
et al.,

Defendant and
Third Party Plaintiffs,

vs.

FEDERAL DEPOSIT INSURANCE
CORPORATION, as receiver for
First National Bank and Trust
Company of Oklahoma City,
Oklahoma,

Third Party Defendant.

ORDER
AND
JUDGMENT

NOW the Plaintiff's Motion for Summary Judgment comes on for consideration before the Honorable James O. Ellison, Chief Judge of the United States District Court for the Northern District of Oklahoma. After examining said Motion for Summary Judgment and Defendant's Reply to Plaintiff's Motion for Summary Judgment, the Court finds that for good cause shown, Plaintiff's Motion for Summary Judgment should be granted.

The Court bases its ruling on the 12 U.S.C. §1823(e) guidelines. The Renewal Promissory Note executed by Plaintiff and Defendant is the only instrument which satisfies all four requirements under 12 U.S.C. §1823(e). All other instruments

and/or documents presented before the Court fail under 12 U.S.C. §1823(e). Accordingly, Plaintiff is only required, under 12 U.S.C. §1823(e), to honor said Renewal Note.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment be granted.

So ORDERED this 6th day of March, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED
MAR 06 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LOYD I. REYNOLDS, an individual,)
and LINDA K. REYNOLDS, an)
individual,)
)
Plaintiffs,)
)
vs.)
)
J. T. SMITH, an individual, and)
COBRA MANUFACTURING CO., INC.,)
an Oklahoma corporation,)
)
Defendants.)

No. 90-C-441-B ✓

ORDER

Before the Court for decision are post-trial motions of Plaintiffs pursuant to Fed.R.Civ.P. 59(a), 59(e) and 52(b). Therein Plaintiffs seek a new trial concerning the issue of attorneys fees, move to alter and amend the judgment to provide for compounding of prejudgment interest, and move to amend the Court's Findings of Fact No. 21 and 22, and Conclusion of Law No. 6.

Also before the Court are post-trial motions of the Defendants relative to the following: A motion pursuant to Fed.R.Civ.P. 59(e) seeking to alter or amend the judgment and delete prejudgment interest in the amount of 6% per annum; a motion to amend the Court's Findings of Fact to place the word "invention" instead of the word "claim" at line 6 of Finding of Fact No. 21, and line 2 of Finding of Fact No. 22; Defendants move to disallow costs in the amount of \$1841.20 deposition expense allowed by the Clerk; Defendants seek attorneys fees as prevailing party in reference to Plaintiffs' patent infringement claim pursuant to 35 U.S.C. § 285, Defendants seek to recover attorneys fee in reference to being the

prevailing party concerning Plaintiffs' claim for labor regarding lighted sight pins, and Defendants seek costs in defending against the Plaintiffs' motion herein.

This action was tried to the Court sitting without a jury, and Findings of Fact and Conclusions of Law were entered herein on December 4, 1991. The Plaintiffs asserted a claim of patent infringement of their bow sight, Patent No. 4,823,474, pursuant to 35 U.S.C. §§ 271 and 281. Plaintiffs also sought a preliminary and permanent injunction, an accounting, and in their second cause of action sought damages for alleged breach of an oral contract with the Defendants concerning assembling and marketing of the subject bow sight. The Defendants counterclaimed for indemnification due to alleged bow sight design flaws and sought a declaratory judgment for alleged patent invalidity pursuant to 28 U.S.C. §§ 2201 and 2202, and for correction of inventors under 35 U.S.C. § 256.

On December 4, 1991, the Court entered judgment in favor of the Plaintiffs and against the Defendant, Cobra Manufacturing Co. Inc., in the amount of Eight Thousand Thirteen Dollars (\$8,013.00) for breach of contract, plus prejudgment interest thereon at the rate of 6% per annum from September 1, 1987 until December 4, 1991, and postjudgment interest at the rate of 4.98% per annum from that date. Judgment was entered in favor of the Defendants on Plaintiffs' additional claims for breach of contract, infringement of the Reynolds' 4,823,474 patent, injunction, and request for accounting. Judgment was also entered in favor of the Plaintiffs on Defendants' counterclaims for indemnity, Reynolds' 4,823,474

patent invalidity and claim as a co-inventor or for correction of inventors. The Court directed that the parties are to pay their own respective attorneys fees and costs were to be assessed against the Defendant, Cobra Manufacturing Co. Inc., if timely applied for pursuant to Local Rule.

The Court will first address the various post-trial motions of the Plaintiffs:

Herein, as reflected in the Court's Findings of Fact No. 4 and 5 (filed December 4, 1991), the parties entered into a joint agreement to market the bow sight invented by Plaintiff, Loyd I. Reynolds. Plaintiff, Loyd I. Reynolds, was to provide his bow sight design and Defendant, Cobra, was to acquire the raw materials, tool and manufacture the bow sight parts according to Reynolds' design. Plaintiffs were then going to assemble the bow sight parts furnished by Cobra. Cobra had determined that profit could be made of \$6.00 per bow sight from their sale. The profit would be split \$3.00 for Plaintiffs and \$3.00 for Defendants. Due to the Plaintiffs' cash bind, Cobra paid Plaintiffs \$3.00 upon receipt of an assembled bow sight and then Cobra sold the sights to retail distributor outlets. Throughout Plaintiffs have referred to their entitlement to \$3.00 per bow sight as "royalty." (See Stipulated Fact No. 1N, (2), (3), pp. 4 and 5 of the Court's Findings of Fact and Conclusions of Law filed December 4, 1991).

Thus, the Court concluded that under the contractual agreement to market the subject bow sight entered into by the parties, Plaintiffs were not entitled to an attorneys fee pursuant to Okla.

Stat. tit. 12, §936. Therefore, the Court determines that its Conclusion of Law No. 6 on page 13 of the Findings of Fact and Conclusions of Law of December 4, 1991 is correct and should not be amended. Further, the Court notes that an offer of judgment pursuant to Fed.R.Civ.P. 68 was made by the Defendants to the Plaintiffs on May 2, 1991 in the amount of \$10,000.00, and the ultimate recovery of the Plaintiffs herein did not exceed that sum. If Plaintiffs were entitled to an attorneys fee herein, it would be for services rendered relative to the claim recovered upon until May 2, 1991, the date of the offer of judgment. See, Hicks v. Lloyd's General Ins. Agency, Okl., 763 P.2d 85 (1988). The Plaintiffs' Motion for New Trial on the issue of award of attorneys fee is hereby OVERRULED.

The Plaintiffs' motion to compound the award of prejudgment interest is likewise OVERRULED because Okla. Stat. tit. 23, § 6 does not provide for the compounding of prejudgment interest. Further, Plaintiffs' motion to amend the Court's Findings of Fact 21 and 22 is OVERRULED except as requested by Defendants, line 6 of Finding of Fact 21, the word "invention" is hereby substituted for the word "claim," and on line 2 of Finding of Fact 22 filed on December 4, 1991, the word "invention" is to be substituted for the word "claim."

The Court's ruling in reference to the Defendants' post-trial motions are as follows:

The Defendants' Motion to Alter or Amend the Court's Judgment pursuant to Fed.R.Civ.P. 59(e) concerning the deletion of

prejudgment interest is hereby OVERRULED. The Court concludes that the sum of \$8,013.00 awarded for breach of contract is a sum certain as contemplated by Okla. Stat. tit. 23, § 6 and prejudgment interest thereon is appropriate. See, First National Bank and Trust Company of Oklahoma City v. Iowa Beef Processors, 626 F.2d 764 (10th Cir. 1980). and Cook v. Oklahoma Bd. of Public Affairs, Okl., 736 P.2d 140 (1987).

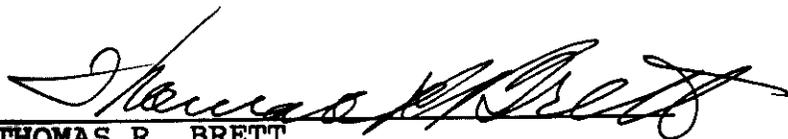
As previously stated, the Court has granted Defendants' Fed.R.Civ.P. 59(e) motion to substitute the word "invention" for the word "claim" in line 6 of Finding of Fact 21, and line 2 of Finding of Fact 22 filed herein on December 4, 1991.

The Defendants' Motion to Disallow Costs in the sum of \$1841.20 previously awarded by the Clerk of the Court to Plaintiffs against the Defendants in the sum of \$1841.20 is hereby OVERRULED because the subject depositions giving rise to the cost claim were offered and received in evidence at trial.

Further, Defendants' motion to recover attorneys fees relative to the issue of assembly of lighted sight pins upon which Defendants prevailed is OVERRULED for essentially the same reason given to deny the Plaintiffs' requested attorneys fee claim regarding the bow sight assembly. Further, Defendants' request for an award of attorneys fee as the prevailing party in reference to the alleged patent infringement issue under 35 U.S.C. § 285 is hereby OVERRULED. The Court does not conclude that Plaintiffs' claim of alleged patent infringement was exceptional as contemplated by said statute. Finally, Defendants' request for

assessment of costs against Plaintiffs concerning Plaintiffs' post-trial motions is hereby OVERRULED.

IT IS SO ORDERED this 6th day of March, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

CHARLES H. DAVIS,

Plaintiff,

vs.

AMERICAN EXPRESS COMPANY, a
New York corporation;

Defendants,

AMERICAN EXPRESS TRAVEL RELATED
SERVICES COMPANY, INC. d/b/a
AMEX TRAVEL; and AMEX ASSURANCE
COMPANY,

Additional Party Defendants and
Third Party Plaintiffs,

vs.

INTERNATIONAL CLAIM SERVICE
CORPORATION,

Third Party Defendant.

Case No. 90-C-651-~~C~~E

FILED

MAR - 6 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

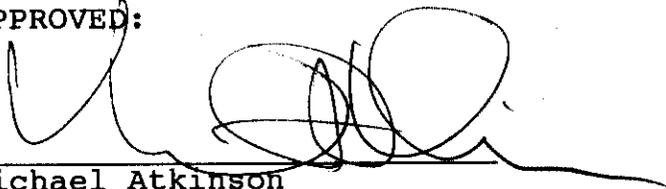
STIPULATION OF DISMISSAL

COME NOW the Plaintiff, Charles H. Davis, and the Additional Party Defendants and Third Party Plaintiffs, American Express Travel Related Services Company, Inc. and Amex Assurance Company and the Third Party Defendant, International Claim Service Corporation, representing all of the parties to this action and pursuant to Rule 41(a)(1) F.R.C.P. hereby dismiss the above styled action including all Complaints, Third Party Complaints, Counter Claims, Cross Complaints and all amendments thereto with prejudice to the refileing of same.

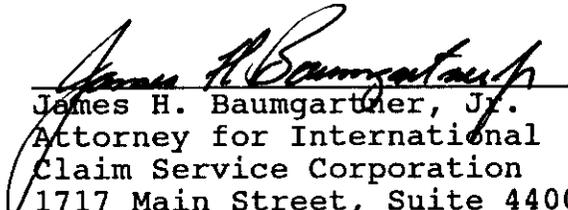
Dated this 6 day of March, 1992.

SEPARATE SIGNATURE PAGES ATTACHED HERETO

APPROVED:



Michael Atkinson
Attorney for Plaintiff
Charles H. Davis
525 South Main, Suite 1500
Tulsa, OK 74103


James H. Baumgartner, Jr.
Attorney for International
Claim Service Corporation
1717 Main Street, Suite 4400
Dallas, TX 75201



MARK W. KUEHLING
Attorney for American Express
Travel Related Services Company, Inc.
and Amex Assurance Company
5900 N.W. Grand Blvd.
Oklahoma City, OK 73118

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

FILED

MAR 06 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PIONEER-STANDARD ELECTRONICS)
)
)
 Plaintiff(s))
)
 vs.)
)
 AMERICAN BINARY TECHNOLOGIES)
)
)
 Defendant(s))

No. 91-C-365-B

ADMINISTRATIVE CLOSING ORDER

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

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

IT IS SO ORDERED this 6th day of March,
19 92.

S/ THOMAS R. BRETT.

UNITED STATES DISTRICT JUDGE

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

AVA FLAGG,)
Plaintiff,)
)
VS.)
)
ROBEL TISSUE MILLS, INC., a)
domestic corporation, NISSAN)
INDUSTRIAL EQUIPMENT)
COMPANY, a foreign corporation,)
and NISSAN MOTOR COMPANY, LTD.,)
Defendants,)
)
and)
)
NATIONAL UNION FIRE INSURANCE)
CO.,)
Intervenor.)

FILED

MAR 6 1962

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 90-C-772-B

ORDER OF DISMISSAL

This matter comes on for hearing on the Joint Stipulation of the Plaintiff, Ava Flagg, and Defendants, Nissan Motor Company, Ltd. and Nissan Industrial Equipment Company, 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 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.

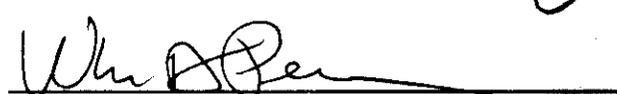
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause be and is hereby dismissed with

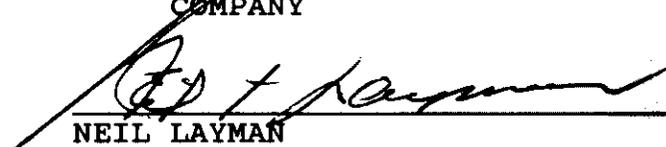
prejudice to the filing of a future action, the parties to bear their own respective costs.

Dated this 6 ^{March} day of ~~February~~, 1992.

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


MICHAEL ROONEY
ATTORNEYS FOR PLAINTIFF


WILLIAM D. PERRINE
ATTORNEYS FOR DEFENDANTS,
NISSAN MOTOR COMPANY, LTD.
AND NISSAN INDUSTRIAL EQUIPMENT
COMPANY


NEIL LAYMAN
ATTORNEY FOR INTERVENOR,
NATIONAL UNION FIRE
INSURANCE CO.

FILED

IN THE UNITED STATES DISTRICT COURT MAR 6 1992
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JAMES ALEXANDER, JR.,

Plaintiff,

V.

TULSA COUNTY EMERGENCY SHELTER

Defendant.

No. 90-C-559-E

ORDER

After careful consideration of the Motion to Dismiss for failure to state a claim, and for good cause shown, it is

ORDERED that the above-styled and numbered case be and hereby is dismissed without prejudice.


CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

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

FILED

MAR 6 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CITGO PETROLEUM CORPORATION,)
)
 Plaintiff,)
)
 V.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

No. 90-C-922-E ✓

ORDER
AND
JUDGMENT

The Court has before it for consideration the Plaintiff's and the Defendant's respective Motions for Summary Judgment. Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and that as a matter of law he is entitled to judgment. Fed. R. Civ. P. 56(c). Summary judgment cannot be awarded when there exists a genuine issue as to a material fact. Adickes v. Kress, 90 S.Ct. 1598 (1970). In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), the Supreme Court Stated that "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 at trial." Id. at 322, 106 S.Ct. at 2552. The moving party, of course, must shoulder "the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any which [it] believes demonstrate

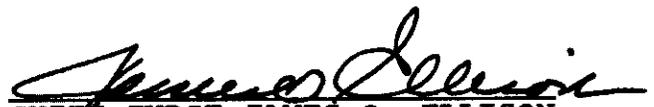
the absence of a genuine issue of fact." Id. at 323, 106 S.Ct. at 2553.

The Court has reviewed the pleadings and filings in this action, and finds, construing the pleadings liberally in favor of the party opposing summary judgment and considering all factual inferences tending to show triable issues, that material issues of fact do not remain to be litigated.

The Court finds that the sale of gasoline by Citgo to the New York Terminal Corporation (NYFT) was a bulk transfer and therefore not taxable under the applicable pre-1990 version of 26 U.S.C. §4081. The Court also finds that the registration requirement of the pre-1990 version of 26 U.S.C. § 4101 was not applicable in the case at bar, because that section pertained only to "person[s] subject to tax under section 4081." In addition, the Court decides that equitable considerations mandate the finding that NYFT was the "ultimate purchaser," thus satisfying all the conditions required by 26 U.S.C. § 6416 before allowing a refund.

IT IS THEREFORE ORDERED that Plaintiff's, Citgo Petroleum Corporation, Motion for Summary Judgment is granted and that Defendant's, United States of America, Motion for Summary Judgment is denied.

SO ORDERED on the 6th day of March 1992.


CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

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

FILED

MAR 06 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CAR RENTAL LICENSEE ASSOCIATION,)
INC., a Nevada corporation,)
)
Plaintiff,)
)
v.)
)
BUDGET RENT A CAR CORPORATION,)
a Delaware corporation,)
)
Defendant.)

No. 90-C-1060-B

ORDER

Before the Court is the motion for summary judgment of counterplaintiff, Budget Rent A Car Corporation ("Budget").¹ Budget brings its counterclaim against the counterdefendant, Car Rental Licensee Association, Inc. ("CRLA")² for declaratory judgment that under the express provisions of the applicable license agreements Budget may require participants in Budget's Reservation System to pay a ten percent (10%) commission to travel agents for travel

¹ Also before the Court is CRLA's motion to strike in part the affidavits of Peter Giamalva and Paul Ruden and Budget's request for judicial notice of certain franchise documents. As the Court does not rely on the affidavits or the documents in deciding Budget's summary judgment motion, the Court will not reach the merits of the motions.

² The counterclaim alleged against CRLA is apparently directed at the following members who have refused to comply with Budget's demand for payment of travel agent commissions: (1) Leebron & Robinson Rent A Car, Inc. d/b/a Budget Rent A Car of Shreveport (the "Shreveport licensee"); (2) Louisiana Rent A Car, Inc. d/b/a Budget Rent A Car of Baton Rouge (the "Baton Rouge licensee"); (3) Currey Enterprises, Inc. d/b/a Budget Rent A Car of Amarillo, etc. (the "Amarillo licensee"); (4) Ryan & Davis, Inc. d/b/a Budget Rent A Car of Austin (the "Austin licensee"); and (5) Miljack, Inc. d/b/a Budget Rent A Car of Tulsa (the "Tulsa licensee").

agent-generated reservations. The parties agree that the issue is properly before the Court for summary judgment pursuant to Fed.R.Civ.P. 56 as no genuine issue of material fact exists.

Budget operates the world-wide "Budget Rent A Car System" and is the sole and exclusive owner of all proprietary and property rights and interests in and to certain trade names, trademarks and service marks using the word "Budget." Budget's business includes the development and promotion of vehicle rental businesses under the Budget name through licensee and corporate owned locations. In order to assist the operation of its rental system, Budget has developed a modern, centralized, computerized reservation system. Under this system, an independent travel agent may call a designated toll-free telephone number or use a computer to communicate with the reservation system's central computer and reserve a vehicle from any of Budget's operators. The reservation system was designed to increase the patronage of the Budget rental system by the public and travel agents. Travel agents provide approximately 65-75% of the reservations that are communicated to licensees through Budget's International Reservation System. (PX-1, ¶28; PX-2, ¶28; PX-3, ¶28; PX-8, ¶28).

Budget's reservation system has evolved over the past thirty years. During the 1960s Budget maintained a telephone and telegraph reservation system with offices in Chicago, Los Angeles and New York. Due to the growth of Budget's automobile rental business, Budget contracted with a company named Telemax to operate a central computerized reservation system which Telemax operated from June

1970 until July 1971 when Telemax declared bankruptcy. International Reservation Corporation ("IRC") took over operations from October 1971 until 1974. Budget then assumed operations of the reservation system which it operated originally from Omaha, Nebraska and later, in 1981, from Carrollton, Texas. See J.J. Brooksbank Co., Inc. v. Budget Rent-A-Car Corp., 337 N.W.2d 372, 374 (Minn. 1983) (reviewing the history of Budget's reservation system). Budget continues to operate this central, computerized reservation system from Carrollton, Texas.

From November 1970 through December 1990, the reservation system maintained or operated by Budget did not involve the payment of commissions to travel agents. Budget offered separate programs such as the Travel Agent Reservation Program ("TARP") and the Travel Agency Commission System ("TACS"), in which the licensee could voluntarily agree to participate. (PX-1, ¶9; PX-2, ¶9; PX-3, ¶9; PX-4, ¶2; PX-5, ¶2; PX-7; PX-8, ¶9). Licensees were also given the option of providing information through the Reservation System that certain locations did not pay travel agent commissions. (PX-1, ¶10; PX-2, ¶10; PX-3, ¶10; PX-4, ¶3; PX-5, ¶3; PX-8, ¶10).

On or about August 27, 1990, Budget notified certain licensees that it was exercising its right not to renew the existing reservation system agreement, the "Budget and Sears Reservation System Participation Agreement." (PX-1B, PX-2C, PX-3B, Px-4B). On or about November 14, 1990, Budget sent its licensees a new reservation system agreement, which Budget stated would become effective January 1, 1991. Pursuant to the new agreement, the

licensee would be required to pay a 10% commission to travel agents for travel agent-generated reservations either through the licensee's participation in TARP or through direct payment to the travel agent with proof of payment to Budget. Also, on or about January 1, 1991, Budget discontinued its practice of making information available through its reservation system to travel agents regarding a particular licensee's policy concerning commission payments.

Car Rental Licensee Association ("CRLA") is an association of some, mostly small, Budget licensees, incorporated under the laws of Nevada with its principal place of business in Tulsa, Oklahoma. CRLA was formed to object to Budget's actions in relation to the Budget International Reservation System (the "Reservation System"). In accordance with this objective, CRLA filed this action on December 31, 1990. The parties agree that CRLA has associational standing for the limited purpose of resolving the issue presented in Budget's counterclaim.

In its counterclaim Budget seeks the Court's declaration of the rights and obligations of the parties under the following provisions in three representative license agreements:

(1) the current license agreement form, incorporated in Budget's license agreement with its Baton Rouge licensee, which states in pertinent part:

LICENSEE agrees to participate in the BUDGET International Reservation System which is now in effect and as it may be modified by BUDGET from time to time or which may hereafter be instituted by BUDGET; to comply with all of the terms and conditions applicable to said

Reservation System; to accept and service all reservations received through said Reservation System; and to pay BUDGET, Travel Agents, Airlines, or other sources of reservations, the fees and other charges due for the reservations generated on behalf of, and accepted by, LICENSEE through said Reservation System.

(2) the license agreement form in use in 1981, incorporated in Budget's license agreements with its Shreveport and Tulsa licensees, which states in pertinent part:

LICENSEE agrees to participate in the BUDGET International Reservation System which is now in effect or which may hereafter be instituted by BUDGET; to comply with all of the terms and conditions applicable to said Reservation System; to accept and service all reservations received through said Reservation System; and to pay BUDGET the fees and other charges due under said Reservation System.

(3) the license agreement form in use in 1970, incorporated in Budget's license agreements with its Amarillo and Austin licensees, which states in pertinent part:

BUDGET and LICENSOR will forward to SUBLICENSEE without charge all applicable reservations received at BUDGET's reservation offices.

As the first two provisions expressly reference Budget's International Reservation System and provision (3) does not, the Court will first address provisions (1) and (2).

Budget argues that the license agreement provisions (1) and (2) allow Budget to require its licensees to pay a 10% commission to travel agents for any travel agent-generated reservation placed through Budget's Reservation System. Budget contends that the unambiguous language of these provisions expressly allows Budget to

make unilateral changes in the Reservation System and/or to institute a new reservation system. Budget reasons that it is irrelevant that the payment of travel agent commissions has not previously been included in the operation of Budget's Reservation System, because Budget can either modify the present system and/or institute a new system which requires such payment under these express license agreement provisions.

In response, CRLA argues that the "Budget International Reservation System" referenced in the provisions (1) and (2) above is ambiguous as it is not defined in the applicable license agreements. CRLA therefore asserts that under contract rules of construction, the Court must look to the intent of the parties at the time of contracting. Mendelson v. Flaxman, 32 Ill. App. 3d 644, 647-48, 336 N.E.2d 316, 319-20 (Ill. App. Ct. 1975); Pocius v. Halvorsen, 30 Ill.2d 73, 81, 195 N.E. 2d 137, 141 (Ill. 1964).³ At the relevant times of contracting, CRLA contends, the Reservation System was comprised only of the facilities, equipment and personnel reasonably necessary for the receipt and transmission of reservations⁴; the payment of commissions to travel agents for

³ The Court applies Illinois law pursuant to the choice of law provision in the subject license agreements.

⁴ In support of its interpretation of "Reservation System" under the license agreements, CRLA cites the language of the Budget and Sears Reservation System Participation Agreement, the agreement Budget did not renew and seeks to replace, in which Budget agreed to

A. Provide facilities, equipment and personnel for the SYSTEM which may be reasonably necessary for the solicitation, reception and transmission of national and international reservations to LICENSEE.

travel agent-generated reservations was handled by Budget through separate "programs" such as TARP. Given this past practice, CRLA argues that Budget is not seeking to alter the Reservation System, but is attempting unilaterally to amend the license agreements without the express written agreement of the parties.⁵

The Court finds that the terms of these provisions are clear and unambiguous. Although the parties dispute the scope of "Budget's International Reservation System," contract terms are not rendered ambiguous "simply because the parties do not agree on the meaning of [the] terms." Gardner v. Padro, 163 Ill.App.3d 449, 452, 517 N.E.2d 1131, 1132 (Ill. App. Ct. 1987). "When the contract terms are clear and unambiguous, the intent of the parties must be discerned only from the language used in the contract itself." Id.; Village of Grandview v. City of Springfield, 122 Ill.App.3d 794, 797, 461 N.E.2d 1031, 1034 (Ill. App. Ct. 1984).

B. Expend all fees received from the LICENSEE as provided for herein to defray all costs and expenses associated with the SYSTEM; including, but not limited to, the costs and expenses incurred to equip, operate, maintain, and to do research for and about, and to promote said SYSTEM.
(PX-1B, PX-2C, PX-3B and PX-8B).

⁵ The license agreements with the Austin and Amarillo licensees state that "[n]o amendment or other modification of this Agreement shall be valid or binding on either party hereto unless reduced to writing, executed by the parties hereto and approved by BUDGET."

The license agreements with the Baton Rouge, Shreveport and Tulsa licensees state that "[n]o amendment or other modification of this Agreement shall be valid or binding on either party hereto unless reduced to writing and executed by the parties hereto."
(PX-1A, §12.02(c); PX-2A, §14.02(c); PX-2B, §14.02(c); PX-3A, §14.02(c); PX-8A, §12.02(c)).

Provision (1) explicitly obligates the licensee to participate in a current, modified or new reservation system instituted by Budget and "to pay . . . Travel Agents . . . the fees and other charges due for reservations generated on behalf of, and accepted by, LICENSEE through said Reservation System." The Court concludes that this language expressly recognizes Budget's right to require the licensee to pay travel agent commissions for reservations placed through Budget's Reservation System.

While provision (2) does not include a specific reference to payments to travel agents for reservations placed through Budget's Reservation System, it does expressly obligate the licensee to participate in Budget's Reservation System as it existed at the time of contracting or in a reservation system "which may hereafter be instituted by BUDGET," and "to pay BUDGET the fees and other charges due under said Reservation System." This language clearly binds the licensee to participation in Budget's Reservation System, permits Budget to institute a new reservation system, and requires the licensee to pay fees and other charges due under either the current or new reservation system. To find, as CRLA urges, that this provision excludes the payment of commissions to travel agents for reservations they place through Budget's Reservation System because the prior reservation system did not include a then separate program of commission payment overlooks the obvious: through its new reservation participation agreement, Budget is exercising its right under this license agreement provision to institute a new reservation system and to require its licensees to

pay fees and other charges due under this system. While the Court acknowledges that the term is not defined in the subject license agreements, the Court cannot read "Budget's International Reservation System" so narrowly to exclude payment of a reasonable commission to a travel agent for a reservation placed through the Reservation System. The Court, therefore, concludes that in requiring the licensee to pay travel agent commissions on reservations generated through the Reservation System, Budget is acting within its right to institute a new reservation system rather than impermissibly modifying the license agreement.⁶

Budget and CRLA exchange arguments in their discussions of provision (3), the provision incorporated in the earlier Austin and Amarillo license agreements. Although CRLA finds the language of provisions (1) and (2) ambiguous, CRLA contends that provision (3) clearly states that Budget has to provide the licensee with reservations at no charge; therefore, the licensee is under no obligation to pay travel agent commissions on travel agent-generated reservations through Budget's Reservation System. Budget, on the other hand, argues that provision (3) does not apply to Budget's modern, computerized Reservation System or refer to charges which do not originate with or are paid to Budget. Although Budget argues that past practice is irrelevant in interpreting provisions (1) and (2), Budget cites past practice to support its

⁶ The Court finds no merit in CRLA's alternative argument that what Budget is attempting to do by requiring the payment of a 10% travel agent commission is "akin to antitrust violations such as price fixing, improper approval of suppliers and unfair competition." (CRLA's Response Brief, p. 15).

interpretation of provision (3). Budget contends that provision (3) cannot mean that the licensee does not have to pay fees or charges connected with Budget's Reservation System, because the Austin and Amarillo licensees agreed to do so under the Budget and Sears Reservation System Participation Agreements they later entered into with Budget.⁷

Budget cites J.J. Brooksbank Co., Inc. v. Budget Rent-A-Car Corp., 337 N.W.2d 372, 374 (Minn. 1983), in support of its argument that the parties did not contemplate the present centralized computer reservation system when they agreed to provision (3). Budget concludes that under the reasoning of Brooksbank, provision (3) only obligates Budget to forward reservations at no charge under Budget's old telephone and telegraph system.

In Brooksbank, the Supreme Court of Minnesota interpreted the obligations of Budget and its licensee, J.J. Brooksbank Company, concerning Budget's current centralized reservation system pursuant to the parties' 1962 license agreement. At the time of contracting, Budget transmitted and received reservations by telephone and telegraph through its offices in New York, Chicago and Los Angeles. The pertinent part of the license agreement lists the following obligations of Budget:

⁷ The Amarillo licensee, Currey Enterprise, Inc. d/b/a Budget Rent A Car of Amarillo, Lubbock, Abilene, Texas and Durango, Cortez, Pagosa Springs and Pueblo, Colorado, entered into the Budget and Sears Reservation Participation Agreement with Budget on or about March 31, 1980. (PX-8, ¶11). The Austin licensee, Ryan and Davis, Inc., entered into the Budget and Sears Reservation Participation Agreement with Budget on or about April 8, 1980. (PX-1, ¶11).

C. To spend a minimum of FIFTY PERCENT (50%) of the gross monthly per car service charged paid by all Licensees for advertising, promotion, and reservations for the benefit of all Licensees, allocated on a reasonable basis nationally and locally.

D. To maintain reservations offices in New York City, Los Angeles and Chicago.

E. To forward to LICENSEE all applicable reservations made at BUDGET'S reservations office at no charge to LICENSEE.

Brooksbank, 337 N.W.2d at 373. The court found that the license agreement did not contemplate any technological changes in Budget's reservation system. Noting the difficulty of anticipating changed circumstances under long term contracts, the court determined that the bargain intended by the parties would best be realized by requiring Budget to provide the licensee with reservations at no cost from New York, Chicago and Los Angeles, while requiring the licensee to pay for all other reservations generated under the new centralized computer system.

The Court finds the language of provision (3) clear and unambiguous, and gleans from such language that the parties intended Budget (and the licensor, Sam Coker, Jr. d/b/a Budget Rent A Car of the Southwest) to provide the Austin and Amarillo licensees (or sublicensees) with all applicable reservations "received at Budget's reservation offices" "without charge." As outlined above, a centralized computer reservation system was operated by Telemax at the time the Austin licensee contracted with Budget on November 1, 1970 and by IRC at the time the Amarillo licensee entered into its license agreement on April 24, 1973. These license agreements, therefore, differ from the one at issue

in Brooksbank in that a modern reservation system comparable to the present Budget Reservation System was in existence at the times of contracting. Interpreting the express language of provision (3), the Court concludes that Budget not only has no right to require the Austin and Amarillo licensees to pay a 10% travel agent commission or any other fee or charge associated with reservations pertaining to their franchises, but Budget is obligated to provide said licensees without charge the applicable reservations received at Budget's current reservation office in Carrollton, Texas.⁸

In accordance with the above, the Court sustains Budget's motion for summary judgment in part and denies it in part. The Court schedules a status conference on March 23, 1992 at 1:15 P.M. to determine what issues remain in this lawsuit.

IT IS SO ORDERED, this 6th day of March, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁸ The Court also notes that under their license agreements, the Austin and Amarillo licensees remain obligated to "accept and service all such reservations and all reservations received from other BUDGET licensees and sublicensees. . . [and] to transmit all reservations which [they are] requested to place by any customer . . . without charge to the customer and without fee to the receiving licensee or sublicensee other than the then current communication charge specified in the Operating Manual." (PX-1A, ¶3.02, PX-8, §3.02)

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

WINSTON CONNOR, II, and
SHELLIE F. CONNOR,

Plaintiffs,

vs.

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendant.

~~FILED~~

~~MAR 04 1992~~

No. 91-C-426-E

~~FILED~~

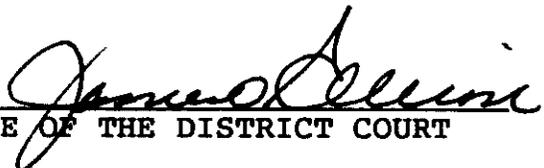
MAR 6 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

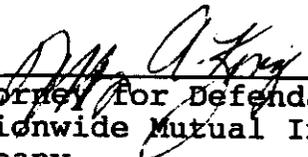
ON THIS 6th day of March, 1992, comes on for hearing Defendant's Application for Order of Dismissal With Prejudice. The Court acknowledges that Plaintiffs have agreed to settle their claims with the Defendant, Nationwide Mutual Insurance Company, for the amount of TWENTY THOUSAND AND NO/100 DOLLARS (\$20,000.00). The Court approves said settlement, and hereby approves said Application and orders that the case be dismissed with prejudice.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that Defendant's Application be sustained and that Plaintiffs' claims against Defendant, Nationwide Mutual Insurance Company, be dismissed with prejudice.


JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:


Attorney for Plaintiffs


Attorney for Defendant
Nationwide Mutual Insurance
Company

JAD/jo
2/25/92

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

FILED
MAR 0 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CONTINENTAL INSURANCE)
COMPANY,)
)
Plaintiff,)
)
vs.)
)
HOLLAND HITCH COMPANY,)
)
Defendant.)

Case No. 91-C-356-B

ORDER OF DISMISSAL WITH PREJUDICE

Now on this 6th day of March, 1992,
the above-captioned cause comes on before the undersigned Judge
of the District Court on the plaintiff's Application to Dismiss
With Prejudice. The Court, being advised that all issues
between the parties have been fully compromised and settled,
hereby grants said Application and orders as follows:

It is ordered, adjudged and decreed that this matter
be dismissed with prejudice.

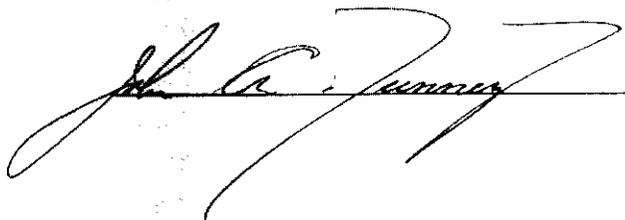
IT IS SO ORDERED this 6th day of March,
1992.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of
The foregoing was deposited in the U.S. Mail this _____ day of
_____, 1992, addressed to: Michael J. Gibbens, Jones,
Givens, et al., 3800 First National Tower, Tulsa, OK 74103 with
proper postage thereon fully prepaid.



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

FILED

MAR 6 1991

Richard M. Lawrence
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BILLY R. VINING, TRUSTEE
ON BEHALF OF THE BANKRUPTCY
ESTATE OF STEVE D. THOMPSON
TRUCKING, INC.,

Plaintiff,

vs.

MANHATTAN FURNITURE COMPANY

Defendant.

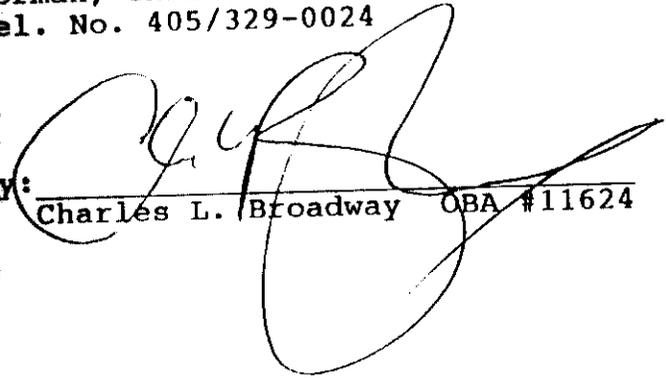
Case No. CIV 91-C-648 (B)

NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, BILLY R. VINING, TRUSTEE ON BEHALF OF THE BANKRUPTCY ESTATE OF STEVE D. THOMPSON TRUCKING, INC., and dismisses this cause of action without prejudice to the bringing of any other action on the facts alleged herein.

BILLY R. VINING, TRUSTEE ON BEHALF
OF THE BANKRUPTCY ESTATE OF STEVE
D. THOMPSON TRUCKING, INC.,
PLAINTIFF

CHARLES L. BROADWAY
629 Twenty-fourth Avenue S.W.
Norman, Oklahoma 73069
Tel. No. 405/329-0024

By: 
Charles L. Broadway OBA #11624

FILED

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

MAR 6 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

DAVID LEE SACK,)
)
 Plaintiff,)
)
 vs.)
)
 ST. FRANCIS HOSPITAL, et al.,)
)
 Defendants.)

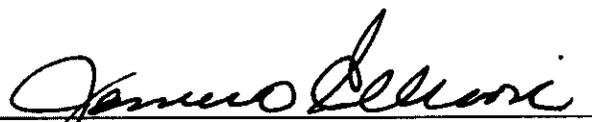
No. 91-C-79-E

ORDER AND JUDGMENT

The Court has for consideration the Report and Recommendation of the Magistrate that this case be dismissed because it does not state a justiciable claim. Specifically, the Magistrate found that the Defendant hospital personnel were not acting under color of state law except as to the blood sample which was permissible under Schmerber v. State of California, 384 U.S. 757 (1966). The Court finds that Schmerber is on point and concurs with the Magistrate.

The Court therefore affirms the Magistrate's Report and Recommendation. All other pending motions are hereby rendered moot. Plaintiff will take nothing from Defendants. This case is dismissed.

So ORDERED this 6th day of March, 1992.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

MAR 6 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

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

MARLOW LAMONT BENSON,)
)
 Plaintiff,)
)
 vs.)
)
 SHERIFF BLOOMFIELD, et al.,)
)
 Defendants.)

No. 91-C-155-E

ORDER AND JUDGMENT

The Court has for consideration the Report and Recommendation of the Magistrate Judge filed November 12, 1991, in which the Magistrate Judge recommended that Defendant Bloomfield's Motion for Summary Judgment be granted for Plaintiff's failure to respond to the motion as directed by Order dated August 9, 1991. 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 Judge should be and hereby is affirmed pursuant to City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1981) and Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989).

IT IS THEREFORE ORDERED that Defendant Sheriff Bloomfield's Motion for Summary Judgment is granted. Plaintiff shall take nothing from Defendant. This matter is dismissed.

ORDERED this 6th day of March, 1992.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

MAR 6 - 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BILLY R. VINING, TRUSTEE
ON BEHALF OF THE BANKRUPTCY
ESTATE OF STEVE D. THOMPSON
TRUCKING, INC.,

Plaintiff,

vs.

DON MOON
d/b/a MOON SHADOW CLASS

Defendant.

Case No. CIV 91-C-651 (B)

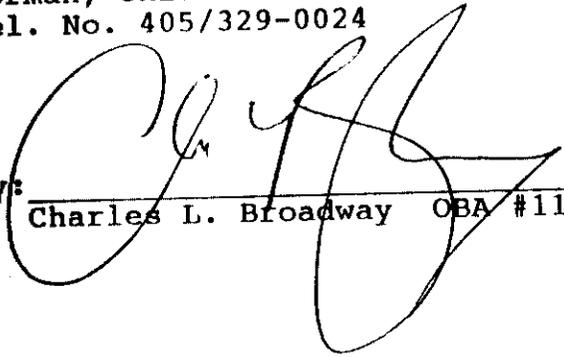
NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, BILLY R. VINING, TRUSTEE ON BEHALF OF THE BANKRUPTCY ESTATE OF STEVE D. THOMPSON TRUCKING, INC., and dismisses this cause of action without prejudice to the bringing of any other action on the facts alleged herein.

BILLY R. VINING, TRUSTEE ON BEHALF
OF THE BANKRUPTCY ESTATE OF STEVE
D. THOMPSON TRUCKING, INC.,
PLAINTIFF

CHARLES L. BROADWAY
629 Twenty-fourth Avenue S.W.
Norman, Oklahoma 73069
Tel. No. 405/329-0024

By:


Charles L. Broadway OBA #11624

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

FILED

MAR 5 1992

GENERAL ELECTRIC CAPITAL
CORPORATION,

Plaintiff,

vs.

MYRON L. KING, ET AL.,

Defendants.

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

Case No. 90-C-379-E

ORDER DISMISSING
SECURITY NATIONAL BANK OF COWETA

Motion for Court Approval of Settlement Agreement and for Dismissal of Security National Bank of Coweta comes on for consideration before me, the undersigned Judge of the United States District Court for the Northern District of Oklahoma, this 5th day of ~~February~~ ^{March}, 1992. Having reviewed the Motion and exhibits attached thereto, and being well and fully advised in the premises, this Court FINDS:

1. That General Electric Capital Corporation has duly exercised its statutory right of redemption, pursuant to Title 42 O.S. §§18 and 19, of the interest of Security National Bank of Coweta;
2. That Security National Bank of Coweta has executed its Disclaimer and caused the same to be filed in this cause;

WHEREFORE, foregoing premises considered, IT IS ACCORDINGLY ORDERED that

1. The Settlement Agreement reached by GECC and Security is hereby approved, and

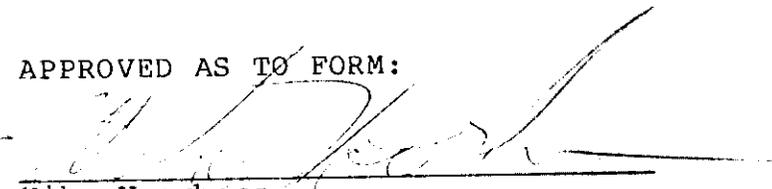
2. Security is, pursuant to its request, dismissed from this cause of action so that the cause may proceed to foreclosure.

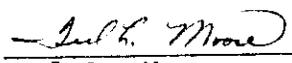
IT IS SO ENTERED this 5th day of March, 1992.

S/ JAMES O. ELLISON

James O. Ellison
United States District Judge

APPROVED AS TO FORM:


Mike Voorhees
Attorney for GECC


Ted L. Moore
Attorney for Security

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

FILED

MAR 5 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JOE BOATMAN,)
)
 Plaintiff,)
)
 vs.) No. 90-C-586-E ✓
)
 FEDERAL TRUCK DRIVING SCHOOL,)
 INC.,)
)
 Defendant.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court upon consideration of the pleadings, briefs, arguments of counsel and evidence presented at the bench trial enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Court has jurisdiction of the parties and the subject matter of these proceedings.
2. The Plaintiff, Joseph Boatman, in September of 1988 in the company of his wife, Patricia Boatman, went to the Tulsa office of Federal Truck Driving school to discuss possible enrollment in its program.
3. Wayne Roney, manager of the Tulsa office of the Defendant, was told by Plaintiff that he had a felony conviction and a DUI conviction. Plaintiff specifically expressed to Roney his concern as to the effect of these convictions on job opportunities in the truck driving industry.
4. Plaintiff advised Roney that he was not certain of the date of the DUI conviction but believed it to be either

1984, 1985 or 1986. Boatman was advised by Roney that the date of conviction for the DUI might be a factor but that it was essential for the Defendant to receive a DMV Report on Boatman prior to Boatman's traveling to San Diego, California where the Defendant's driver school training was conducted.

5. Roney told the Plaintiff that the DMV would show on its face the date of any DUI conviction. Roney further explained that Federal would review the report and Boatman would not be allowed to attend the school in San Diego unless the DMV Report was "clear". Roney explained to the Plaintiff that clear meant that the date of the DUI conviction as shown on the DMV Report would not affect Boatman's chance for employment in the trucking industry.
6. Roney required Plaintiff to furnish the Defendant with the following information prior to leaving for San Diego to participate in the driver training school:
 - a. A completion certificate showing the result of a drug test required by Federal.
 - b. Current Oklahoma operator's license.
 - c. Current Oklahoma commercial driver's license.
 - d. Certificate of Boatman's discharge from confinement from J.C.C.C.
 - e. A certificate of high school equivalency.
 - f. DMV Report from Oklahoma Department of Public Safety.

7. Patricia Boatman on behalf of her husband sent \$5.00 to the Oklahoma Department of Public Safety, together with a request that Boatman's DMV Report be forwarded to the Defendant in an enclosed envelope which contained Federal's Tulsa address.
8. Federal's Tulsa office received the DMV Report on Plaintiff on October 7, 1988. After receipt of the DMV Report Roney informed both Joe Boatman and Patricia Boatman that the DMV Report was "clear" and that the information contained would not affect Boatman's employment chances in the event he completed his training course successfully.
9. Upon receipt of Roney's representation in regard to the DMV Report Boatman proceeded to San Diego, California in November 1988 and reported to Federal's training school.
10. Plaintiff gave Federal in San Diego the proceeds of two loans obtained from CitiBank of New York for his tuition and other expenses incident to the truck driving school.
11. Plaintiff completed Federal's six weeks training in San Diego, graduating in the top 10% of his class.
12. After he graduated from the truck driving school, Boatman spent three months contacting at least 32 trucking companies in an attempt to gain employment as a truck driver. He went to locations in Oklahoma, Arkansas, Kansas and Missouri. In each instance, his application for employment was denied because of the DMV Report. The

report revealed a DUI conviction in 1986 which was within three years of the time of the application for employment.

13. At the time the DMV Report was delivered to Roney it revealed on its face that Boatman had a DUI conviction in 1986. Roney knew that no trucking company would employ a person with a DUI conviction received within three years of the date of their application for employment. Roney however advised the Plaintiff that the DMV Report was "clear". This constituted a material misrepresentation.
14. As a result of the Defendant's misrepresentation through its agent and employee Roney, the Plaintiff suffered the following damages:
 - a. Tuition and other training school expenses in the approximate amount of \$8,000.00.
 - b. Car, food and motel expenses in an unsuccessful attempt to secure employment in the approximate sum of \$1,600.00.
 - c. Emotional and mental stress and embarrassment.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter to these proceedings.
2. Plaintiff's cause of action against the Defendant is grounded upon the provisions of Title 76 O.S.A. Section

2:

"One who willfully deceives another with an intent to induce him to alter his position to his injury or risk is liable for any damage which he suffers thereby."

3. The fraudulent misrepresentations by the agent and employee of the Defendant made to Plaintiff constituted actionable fraud. LeFore v. Reflections of Tulsa, Inc., 708 P.2d 1068 (Okla. 1985) and State ex rel Southwestern Bell Telephone Co. v. Brown, 519 P.2d 491, 495 (Okla. 1974).
4. Plaintiff is entitled to recover from Defendant compensatory damages for indebtedness incurred by Plaintiff for tuition and other school expenses in the amount of \$8,000.00 and travel, lodging and food expenses incurred in his attempts to secure employment in the sum of \$1,600.00.

Plaintiff is entitled to the sum of \$2,500.00 for mental pain and suffering caused by the fraudulent conduct of the Defendant.

Plaintiff is entitled to the sum of \$5,000.00 as and for punitive damages under the provisions of Title 23, O.S.A. Section 9.

5. Any Finding of Fact which would more appropriately be termed a Conclusion of Law is adopted as a Conclusion of Law. Any Conclusion of Law which would more appropriately be termed a Finding of Fact is adopted as

a Finding of Fact.

6. Judgment should be entered in favor of the Plaintiff and against the Defendant in the sums indicated.

So ORDERED this 4th day of March, 1992.



JAMES C. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

CRAIG AVIATION, INC.

Plaintiff

vs.

BIZJET INTERNATIONAL SALES AND
SUPPORT, INC., CESSNA FINANCE
CORPORATION, GENERAL FINANCIAL
SERVICES, INC., and LIFEGUARD
AIR RESCUE, INC.,

Defendants.

Case No. 91-C-804-E

FILED

MAR 5 1992

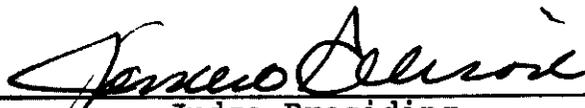
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

Came on for consideration this day the dismissal from the above-entitled and numbered cause of LIFEGUARD AIR RESCUE, INC., Third-Party Defendant, and, there being no objections from the other parties herein,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Third-Party Defendant LIFEGUARD AIR RESCUE, INC. be and hereby is dismissed with prejudice from the above-entitled and numbered cause, and that no costs be adjudged against LIFEGUARD AIR RESCUE, INC.

SIGNED this 2nd day of March, 1992.



Judge Presiding

FILED

MAR 5 1992

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

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JOE BOATMAN,)
)
 Plaintiff,)
)
 vs.)
)
 FEDERAL TRUCK DRIVING SCHOOL,)
 INC.,)
)
 Defendant.)

No. 90-C-586-E /

JUDGMENT

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

IT IS ORDERED AND ADJUDGED that the Plaintiff, Joe Boatman, recover of the Defendant, Federal Truck Driving School, Inc., the sum of \$17,100.00, with interest thereon at the rate of 4.21 per cent as provided by law, and his costs of action.

SO ORDERED on the 2nd day of March 1992.


CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

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

FILED

MAR 5 1992

FEDERAL DEPOSIT INSURANCE
CORPORATION, in its corporate
capacity,

Plaintiff,

vs.

BEACON DEVELOPMENT, INC., an
Oklahoma corporation, et al.,

Defendants.

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

Case No. 90-C-852-E

ADMINISTRATIVE CLOSING ORDER

NOW on this 4th day of March, 1992, upon the Application for Administrative Closure of Plaintiff, Federal Deposit Insurance Corporation and for good cause shown, the captioned case is administratively closed for a period of ninety (90) days from the date of this Order, with allowance to the parties to submit an agreed judgment as a part of the contemplated settlement and without prejudice to the rights of the parties to re-open the proceeding for final adjudication on the merits. If no judgment or application to re-open the proceeding or application for continuance is filed within said 90 day period, the action will be terminated with prejudice to the rights of the parties to re-open same.

UNITED STATES DISTRICT JUDGE

APPROVED:

THE LAW OFFICES OF
HEMRY & HEMRY, P.C.

By
William P. McDaniel, #3968
Attorney for Federal Deposit
Insurance Corporation
P.O. Box 2207
Oklahoma City, OK 73102
(405) 235-3571

Governing Section 2254 Cases.²

Under Rule 2(a) of the Rules Governing Section 2254 Cases, the state officer having custody of the applicant should be named as a respondent. When a habeas corpus petitioner seeks relief from state custody, he must direct his petition against those state officials holding him in restraint. Moore v. United States, 339 F.2d 448 (10th Cir. 1964). However, petitioner's pro se pleadings will be held to a less stringent standard than pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972).

In Spradling v. Maynard, 527 F. Supp. 398, 404 (1981), held that the Attorney General of the State of Oklahoma is not a proper party respondent in a habeas corpus action.³ The court stated:

The Attorney General of Oklahoma is simply legal counsel for the Oklahoma Department of Corrections and its employees. He is not the custodian of any prisoner incarcerated in any Oklahoma correctional institution. In the circumstances, he could not respond to a writ of habeas corpus on behalf of a prisoner even if one was issued to him.

Id.

The Court is aware that the model form for use by petitioners making § 2254

²Rule 2(a), regarding applicants in present custody, reads as follows: "If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent."

³The Magistrate notes that Rule 2(b) of the Rules Governing Section 2254 Cases in the United States District Courts pertaining to applicants subject to future custody requires the joinder of the state Attorney General: "If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents."

habeas corpus applications includes the state attorney general as an additional respondent. The Attorney General of Oklahoma, as legal counsel for the Oklahoma Department of Corrections and its employees, benefits by receiving immediate notice of a habeas corpus petition. However, the Court concludes that respondents' request for dismissal of the Attorney General of Oklahoma as a party respondent should be granted pursuant to Rule 2(a).

PETITIONER'S FIRST CLAIM

Petitioner contends that his Sixth Amendment right to confront an adverse witness was denied when the trial court permitted the prosecution to read to the jury testimony of a witness transcribed from a preliminary hearing.

The Sixth Amendment assures that the accused will have the opportunity to confront witnesses against him. Pointer v. Texas, 380 U.S. 400, 401 (1965). The primary objective of the Confrontation Clause is not only to allow the accused to test the recollection and sift the conscience of the accuser, but also to compel him to face the jury in order that they may assess his demeanor and evaluate the credibility of his testimony. Barber v. Page, 390 U.S. 719, 721 (1968). However, the Supreme Court has subsequently determined that the Confrontation Clause allows admission of transcribed testimony if the witness is unavailable and the testimony is reliable. Ohio v. Roberts, 448 U.S. 56, 66 (1980). A witness is "unavailable" if the prosecutorial authorities made a good faith effort to secure the witness's presence, but were unsuccessful. Barber, 390 U.S. at 724-25. The amount of effort required is a question of reasonableness. Roberts, 448 U.S. at 74.

Oklahoma has created a similar exception. Preliminary hearing testimony may be

utilized when: (1) the testimony was recorded by a certified reporter and properly filed with a court; (2) the defendant was represented by an attorney present at the time of transcription; (3) the attorney did in fact cross-examine the witness; (4) a proper predicate was laid for the introduction of the testimony; (5) the state has made good faith efforts to have the witness testify at trial; and (6) despite these efforts, the witness was not available at trial. In re Bishop, 443 P.2d 768, 772-773 (Okla. Crim. App. 1968).

Petitioner asserts that the State failed to make a reasonable good faith effort to obtain the presence of the witness. Therefore, petitioner concludes, the witness was not "unavailable" and the court committed reversible error by admitting his testimony.

"In federal habeas proceedings we must presume factual determinations by state courts to be correct, unless an enumerated exception applies." Martinez v. Sullivan, 881 F.2d 921, 925-26 (10th Cir. 1989), cert. denied, 493 U.S. 1029 (1990). However, the determination of the ultimate issue of availability has been viewed as a mixed question of fact and law reviewable de novo. Id. at 926.

The Oklahoma Court of Criminal Appeals found that the prosecution exercised a reasonable good faith effort, and that the witness, Brian Anderson, was unavailable for trial. The State submitted an affidavit swearing that, two weeks prior to trial, a deputy sheriff attempted to serve a subpoena on Mr. Anderson. The deputy was informed by Mr. Anderson's father that Mr. Anderson had moved to Las Vegas and that his phone number and address were unknown. The deputy spoke with other people, but no one knew how to locate Mr. Anderson. This court finds that the Oklahoma Court of Criminal Appeals properly concluded that the state made a reasonable good faith effort to have Brian

Anderson testify at trial.

Additionally, the admission of the transcribed testimony was harmless beyond a reasonable doubt. The Constitution guarantees a criminal defendant a fair trial, not a perfect one. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Thus, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Id.

The record reflects that eleven of the State's twelve witnesses testified at trial. (Transcript of Trial, Feb. 26 and 27 and March 2, 1987 ("Tr.") - see index for list of witnesses). Objecting to the admission of the transcribed testimony, petitioner's counsel argued that it was merely cumulative. The record shows that the testimony was cumulative and the evidence of the defendant's guilt was substantial. See Harrington v. California, 395 U.S. 250, 254 (1969) (holding that erroneously admitted evidence was harmless beyond a reasonable doubt where it was merely cumulative, and the proof of defendant's guilt was overwhelming). There is no merit to petitioner's first claim.

PETITIONER'S SECOND CLAIM

Petitioner next asserts that the evidence was insufficient to sustain his conviction. Contrary to respondent's contention, this is a federal constitutional claim and is cognizable in a federal habeas corpus proceeding. Jackson v. Virginia, 443 U.S. 307, 321 (1979); Chatfield v. Ricketts, 673 F.2d 330 (10th Cir.), cert. denied, 459 U.S. 843 (1982). Relief will be provided if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id. at 332. "[A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume - even if it does not

affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326.

Examining the records from a perspective most favorable to the prosecution, the court concludes that a rational trier of fact could infer that the petitioner was guilty of shooting with intent to kill beyond a reasonable doubt. In the presence of numerous witnesses, petitioner boisterously and repeatedly proclaimed that he had just shot someone. (Tr. 177, 213). He told several friends that he shot the individual because he was "mouthing off," "they got in an argument," and because "he told the guy that if he didn't quit messing with him [Petitioner] . . . he was going to pay for it." (Tr. 186, 221, 266). After boasting about his illicit exploits, petitioner and several friends drove to the location of the shooting and petitioner pointed out the victim as he was being carried away from the scene (Tr. 215-16). There is no merit to petitioner's second claim.

PETITIONER'S THIRD CLAIM

Because the trial court failed to instruct the jury regarding a lesser included offense, the petitioner alleges that he was denied due process of the law guaranteed by the Fourteenth Amendment. It is established in the Tenth Circuit, however, that unless a death sentence is imposed, the lesser included offense argument is not a cognizable basis for federal habeas corpus review. Chavez v. Kerby, 848 F.2d 1101, 1103 (10th Cir. 1988). Therefore, because the death sentence was not imposed on petitioner, his third claim is not reviewable.

PETITIONER'S FOURTH CLAIM

Petitioner asserts that admission of prejudicial other crimes evidence injected as

evidentiary harpoons intentionally elicited by the State prevented petitioner from receiving a fair trial. Evidentiary and procedural determinations made by Oklahoma state courts may not be questioned unless the petitioner demonstrates that the contested statements were so prejudicial that he was deprived of the fundamental fairness guaranteed by the Due Process Clause of the Constitution. Nichols v. Sullivan, 867 F.2d 1250, 1253 (10th Cir.), cert. denied, 490 U.S. 1112 (1989) (citing Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980)).

The petitioner argues that improper other-crimes evidence was first introduced during voir dire. The disputed "evidence" was a question posed by the State to a potential juror:

"Is there anything, and I'm not going to say offensive, because even though it's offensive, you've promised you could set it aside, do you think it would make it difficult for you to sit on this jury involving a case where there was drinking, perhaps some drugs being used at a party going on . . ." [question interrupted by petitioner's objection].

(Tr. 50-51). The judge overruled petitioner's objection because the State did not say that the petitioner was in fact at the party. (Tr. 51). Such a question posed during voir dire does not constitute "other-crimes evidence." Moreover, the record is replete with evidence confirming that petitioner was not only at the party, but had in fact been drinking. Thus, the State's question did not deprive petitioner of a constitutionally fair trial.

Next, petitioner claims that the State intentionally elicited from George Fowler prejudicial evidentiary harpoons. An evidentiary harpoon is a term used by some courts "to describe the situation where a government witness, while testifying in a criminal case, deliberately offers inadmissible testimony with the purpose of prejudicing the defendant."

United States v. Hooks, 780 F.2d 1526, 1535, n. 3 (10th Cir.), cert. denied, 475 U.S. 1128 (1986).

During cross examination of George Fowler, defense counsel tried to weaken the witness's credibility by uncovering evidence of animosity between the witness and petitioner. (Tr. 231). During re-direct, the State followed the line of questioning initiated by defense counsel and asked Mr. Fowler if he had a motive to testify falsely. "Yeah," Mr. Fowler responded, because the petitioner "stole 16 hundred dollars worth of guns from my house." (Tr. 233). Defense counsel did not object, but further pursued this line of questioning during re-cross examination. (Tr. 236). As a result, George Fowler stated that petitioner "liked guns because he could trade them for cocaine." (Tr. 236). Petitioner then objected and moved for a mistrial. The court overruled the objection, stating that in light of the questions asked, an unfavorable response was foreseeable, and any prejudice was not sufficient to warrant a mistrial. (Tr. 237). Nevertheless, the trial judge did instruct the jury to disregard the statement. (Tr. 238).

Even if Mr. Fowler's remarks were prejudicial, because the defense counsel invited the disputed comments, petitioner is precluded from predicated reversible error upon them. See, e.g., United States v. Pino, 827 F.2d 1429, 1432-33 (10th Cir. 1987) (holding that where defense counsel initiated a line of inquiry that resulted in erroneous questioning by the prosecution, defense counsel invited the error); United States v. Hooks, 780 F.2d at 1535 (concluding that a criminal defendant cannot base an appeal on an error which his questioning invited); Gourley v. State, 777 P.2d 1345 (Okla. Crim. App. 1989).

Finally, petitioner contends that the State also elicited prejudicial evidentiary

harpoons from Tina Porche. During **direct examination**, Mrs. Porche testified that petitioner told her that the night of the **shooting** "he had done some acid." (Tr. 259). To mitigate any negative influence, the **trial judge** cautioned the jury to disregard the testimony. (Tr. 260).

Evaluating the disputed remarks **individually** and cumulatively in light of the entire record, the court concludes that they were **harmless** beyond a reasonable doubt and did not deprive the petitioner of a fundamentally **fair trial**.

PETITIONER'S FIFTH CLAIM

Petitioner claims that he did not **receive** a fundamentally fair trial because the trial court erred by not giving a **limiting instruction** to the jury regarding other-crimes evidence offered by Tina Porche and George Fowler. This contention is meritless. First, contrary to petitioner's allegation, Tina Porche's **disputed** testimony was not admitted as other-crimes evidence, and upon objection, the **trial judge** did in fact advise the jury to disregard the statement. (Tr. 260). Second, when **George Fowler** testified that the petitioner had stolen guns from him, defense counsel **did not object**. (Tr. 233). The trial judge is not obligated to give a limiting instruction **regarding** the proper use of other crimes evidence unless he is requested to do so. United States v. Martinez, 938 F.2d 1078, 1081 (10th Cir. 1991); Drew v. State, 771 P.2d 224 (Okla. Crim. App. 1989).

PETITIONER'S SIXTH CLAIM

Petitioner asserts that the trial court **deprived** him of his constitutional right to due process when it rejected his motion to **be certified** as a child. Okla. Stat. tit. 10, § 1104.2(A) (1981) instructs that **juveniles sixteen** or seventeen years of age charged for

committing certain violent crimes are subject to adult criminal prosecution. Before criminal proceedings are initiated, the juvenile may petition to be certified as a child. Title 10, § 1104.2(C). A preliminary hearing will be held and, following the presentation of the State's case, the accused may introduce evidence in support of his petition. *Id.* The statute directs the court to evaluate the evidence in light of four criteria. § 1104.2(C)(1)-(4). The first and most important criterion is "[w]hether the alleged offense was committed in an aggressive, violent, premeditated or willful manner." §1104.2(C)(1). Specifically, petitioner alleges that the trial court abused its discretion by improperly concluding that the evidence demonstrated that the alleged act was perpetrated in a violent, premeditated fashion. (Transcript of Preliminary Hearing, Feb. 25 and 26, 1986 ("Tr. P.H."), 88).

As previously stated, state evidentiary questions are not subject to federal scrutiny unless the petitioner was deprived of a fundamentally fair proceeding. The record reveals that the trial court scrupulously adhered to the guidelines of § 1104.2. The petitioner was represented by counsel, a preliminary hearing was held, and the petitioner was allowed to proffer evidence in support of his motion to be certified as a child.

Moreover, the court articulated with more than the statutorily required specificity its reasons for denying the motion. (Tr. P.H. 88). In addition to the violent and willful nature of the offense, the court was influenced by the testimony of June Atwood, the petitioner's juvenile court counselor. *Id.* Based on her testimony, the court found that petitioner's prior history of repeated juvenile conduct was of an increasingly serious nature, that in light of petitioner's age and prior history, the juvenile system did not provide the appropriate rehabilitative services, and that the juvenile system would not provide adequate

protection of the public. Id.

Presuming the trial court's findings of fact correct, this court finds that the petitioner received a fundamentally fair proceeding. There is no merit to petitioner's assertion that he was denied his due process rights by the certification procedure.

PETITIONER'S SEVENTH CLAIM

Finally, petitioner attacks the constitutionality of Oklahoma's reverse certification procedure in Okla. Stat. tit. 10, §§ 1101(a) and 1104.2 on two grounds. First, he contends that the provisions deny a subclass of juveniles accused of certain crimes equal protection of the law guaranteed by the Fourteenth Amendment. The United States Constitution grants the States broad discretion to draft laws that affect some citizens differently than others. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). The constitutional guarantee of equal protection of the law is not infringed unless a classification of citizens demarcated by state law is "wholly irrelevant to the achievement of the State's objective." Id. at 425. Thus, a discriminatory state law will not be revoked unless no reasonable justification can be conceived for its existence. Id. at 426.

An important purpose of the reverse certification provisions is to protect the public. See State ex rel. Coats v. Rakestraw, 610 P.2d 256, 259 (Okla. Crim. App. 1980). The protection of the public from dangerous criminals is certainly an objective of the State and justifies treating some citizens differently than others. Therefore, the court concludes that the statutory provisions pass equal protection scrutiny.

Second, petitioner asserts that §§ 1101(a) and 1104.2 create a presumption that juveniles accused of certain crimes are competent to be tried as adults. The juvenile bears

the burden of proving that it is in both the state's and the juvenile's best interests to be placed in the juvenile division's jurisdiction. 10 O.S. 1981, § 1104.2(C). Petitioner claims that the presumption of competency, and the resulting shift of the burden of proof, violates his right to due process guaranteed by the Fourteenth Amendment.

The court concludes that the procedural guidelines of Oklahoma's reverse certification provisions do not violate the Due Process Clause of the Fourteenth Amendment. The United States Constitution does not expressly or implicitly bestow to persons under eighteen years of age the right to be placed under the auspices of a state's juvenile rehabilitation system. See Stokes v. Fair, 581 F.2d 287, 289 (1st Cir. 1978), cert. denied, 439 U.S. 1078 (1979); Woodard v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977), cert. denied, 434 U.S. 1088 (1978). Thus, a State wields the right to confer juvenile status upon individuals within its jurisdiction at its prerogative, subject to the requirements of the United States Constitution.⁴ Because juvenile status is a privilege granted by a State at its discretion, requiring the accused to prove that it is in both his and the State's best interest to certify the accused as a child is not a violation of the Due Process Clause. See, United States v. Alvarez-Porras, 643 F.2d 54, 66-67 (2nd Cir.), cert. denied, 454 U.S. 839 (1981) (construing a similar federal statute, 18 U.S.C. § 5031, the court held that the Constitution is not offended by requiring a criminal defendant seeking juvenile status to come forward with credible evidence of his minority).

⁴ The original version of Oklahoma's reverse certification statute treated females differently than males in violation of the Equal Protection Clause of the United States Constitution. The 1981 version cited by the petitioner eliminated that distinction.

In conclusion, the petitioner's various claims are meritless and his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed.

Dated this 9th day of Mar., 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 05 1992 *AK*

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

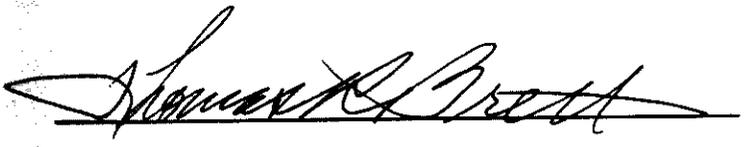
LOUISE F. BARNES,)
)
 Plaintiff,)
)
 v.)
)
 JIM STANLEY, individually, and)
 BUILDERS TRANSPORT, INC., a Georgia)
 corporation,)
)
 Defendants.)

No. 91-C-505-B ✓

ORDER

Before the Court is the Motion to Dismiss for Failure to Prosecute filed by the defendants, Jim Stanley and Builders Transport, Inc.. In support of the motion the defendants state that the plaintiff has repeatedly failed to comply with the Scheduling Order, timely endorse her expert witness(es), produce requested documents, or voluntarily present herself for medical examination prior to the discovery cut-off. For these reasons, the Court grants defendants' motion and dismisses the case without prejudice.

IT IS SO ORDERED, this 5th day of March, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

AK

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

FILED

MAR 5 - 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LINEAR FILMS, INC.,
an Oklahoma corporation,

Plaintiff,

v.

AMBROSE SALES, d/b/a AMBROSE
PACKAGING, a Kansas corporation,
and JEFF AMBROSE, d/b/a AMBROSE
PACKAGING, an Individual,

Defendants.

No. 91-C-662-E

JOINT STIPULATION ^{OF} ~~THE~~ DISMISSAL, WITH PREJUDICE

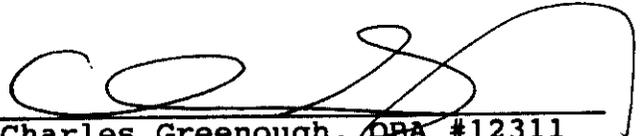
COME NOW all of the parties to this action, Plaintiff, Linear Films, Inc., and Defendants, Jeff Ambrose, individually and d/b/a Ambrose Packaging, and Ambrose Sales, Inc., and pursuant to Rule 41(a)(1)(ii) stipulate that this action, and all claims asserted by any party herein, may be, and hereby is, dismissed, with prejudice.

Respectfully submitted,

By Ronald E. Goins
Ronald E. Goins, OBA #3430
Micah D. Sexton, OBA #13774
Ellen E. Gallagher, OBA #14717
Suite 700, Holarud Building
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(918) 584-1471

Attorneys for Linear Films, Inc.

OF COUNSEL:
HOLLIMAN, LANGHOLZ, RUNNELS & DORWART,
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(918) 584-1471

By 

Charles Greenough, OBA #12311
Suite 500
320 South Boston Avenue
Tulsa, Oklahoma 74103-3725
(918) 582-1211

Attorney for Defendants, Jeff
Ambrose, d/b/a Ambrose Sales, Inc.

OF COUNSEL:

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON
Suite 500
320 South Boston Avenue
Tulsa, Oklahoma 74103-3725
(918) 582-1211

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of March, 1992, I caused to be placed in the United States mails a true and correct copy of the JOINT STIPULATION FOR DISMISSAL, WITH PREJUDICE with proper postage thereon fully prepaid to:

Charles Greenough, Esq.
Doerner, Stuart, Saunders,
Daniel & Anderson
Suite 500
320 South Boston Avenue
Tulsa, Oklahoma 74103

Ronald P. Wood, Esq.
Gates & Clyde Chartered
Suite 200
10990 Quivira
Overland Park, Kansas 66210



Ronald E. Goins

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 5 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

JIMMIE M. GREEN; REGINA S.)

GREEN; COUNTY TREASURER,)

Tulsa County, Oklahoma;)

BOARD OF COUNTY COMMISSIONERS,)

Tulsa County, Oklahoma,)

Defendants.)

CIVIL ACTION NO. 92-C-082-E

ORDER

Upon the Motion of the United States of America acting on behalf of the Secretary of Veterans Affairs by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, to which no objections have been filed, it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 5th day of March, 1992.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM

United States Attorney


WYN DEE BAKER, OBA #465

Assistant United States Attorney

3600 United States Courthouse

Tulsa, OK 74103

(918) 581-7463

WDB/esr

Attorney General Steven Spears Kerr said he objected to the motion for bail because Hayes had not exhausted his state remedies. However, Kerr admitted that he believed Hayes would be freed by the state because of the decisions regarding Penn by the Oklahoma Court of Criminal Appeals.

In his Objection, Hayes avers that Respondent did not file any objection to the Magistrate's Report and Recommendation because the putative Objection was not signed by an attorney of record for Respondent. ¹

Rule 11, Federal Rules of Civil Procedure, provides that: "Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name . . .". Rule 11 further provides: "If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." Hayes filed his Motion To Strike on February 12, 1992, with the certificate of service indicating that a copy thereof was mailed to Respondents' attorney on February 7, 1992. As of the date of this Order, there has been no attempt, within the Court's knowledge, by Respondents' counsel to either belatedly sign the original Objection or substitute a duplicate original.

Based upon the foregoing, the Court concludes Respondents' Objection to the Magistrate's Report and Recommendation is an

¹ The original pleading was not signed by anyone. The following printing appears thereon "Steven Spears Kerr by WPL". WPL is a still unidentified person.

improperly filed instrument and is therefore stricken. The Magistrate's Report and Recommendation, having no valid objection thereto within the prescribed time, is affirmed by the Court which adopts and ratified same.

IT IS SO ORDERED this 4th day of March, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

PENTECO CORPORATION LIMITED
PARTNERSHIP - 1985A,

Plaintiff,

vs.

UNION GAS SYSTEM, INC.,
a Kansas corporation,

Defendant.

No. 85-C-1076-B

FILED

MAR 04 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On December 11, 1991, the United States Magistrate Judge filed his Report and Recommendation in this matter concluding as follows: "No diversity exists between East Central, a limited partner of plaintiff partnership, and defendant. This case should be dismissed." Plaintiff herein timely filed an objection to the Magistrate Judge's Report and Recommendation. After reviewing said Report and Recommendation, as well as the parties' respective arguments and briefs, the Court concludes the Magistrate Judge's Report and Recommendation should be affirmed with the exception of the following: The second sentence of the second paragraph on page 1 should state: "On May 27, 1987, a judgment was entered in favor of plaintiff in the amount of \$185,711.08, plus interest, and on November 25, 1987, an additional judgment was entered in favor of plaintiff for attorneys fees in the amount of \$82,937.50."

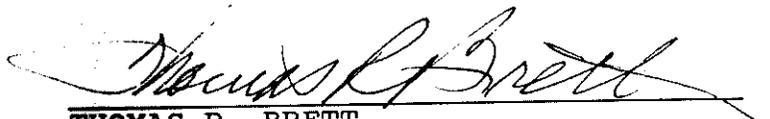
The first line on page 2 should read as follows: "... corporation organized under Kansas law with its principal place of business in Kansas."

Therefore, said judgments previously entered herein on May 27,

1987 and November 25, 1987, respectively, are hereby set aside, and the action is hereby dismissed without prejudice for want of diversity of citizenship and subject matter jurisdiction when the action was originally filed by Plaintiff on December 6, 1985.

IT IS SO ORDERED.

DATED this 4th day of March, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

In the United States District Court
for the Northern District of Oklahoma

FILED

MAR 4 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Voice Systems and Services, Inc.,

Plaintiff,

vs.

Freeman Engineering Associates, Inc.

Defendant.

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Case No. 91-C-264-B

JOINT STIPULATION ^{OF} FOR DISMISSAL WITH PREJUDICE

The parties hereby stipulate ^{of} for dismissal with prejudice of all claims and counterclaims asserted or assertable in this action. Each party to bear its own attorneys' fees and costs.

Michael D. Conklin

Michael D. Conklin
Attorney for Plaintiff
1512 South Denver Avenue
Tulsa, OK 74119
582-5754

Dan Morgan

Dan Morgan
Attorney for Defendant
Suite 2000
15 West 6th Street
Tulsa, OK 74119
582-9201

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

FILED

MAR 4 1992 *H*

RESOLUTION TRUST CORPORATION,)
as Receiver for Sooner Federal)
Savings Association,)

Plaintiff,)

vs.)

PAUL D. BRADFORD and CHERRY)
STREET ASSOCIATES, LTD.,)

Defendants.)

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

No. 91-C-310-E

JUDGMENT

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

IT IS THEREFORE ORDERED that title be quieted as prayed for on the subject property and that the Plaintiff recover of the Defendant its costs of action.

So ORDERED this 4th day of March 2, 1992.

James O. Ellison

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

DONNA MATHIS,
Plaintiff,

vs.

CONTRACT LODGING
CORPORATION, a Minnesota
corporation,

Defendant.

Case No. 90-C-1043-B

FILED

MAR 3 - 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

This matter comes on consideration on the Motion for Summary Judgment filed by the Defendant, Contract Lodging Corporation ("Lodging"). Plaintiff is suing for sexual harassment under Title VII of the Civil Rights Act. 42 U.S.C. § 2000e, *et seq.* Defendant claims that Plaintiff, Donna Mathis, (Mathis) has failed to state a claim upon which relief can be granted.

Lodging owns a restaurant in Tulsa, Oklahoma, where Mathis was employed first as a waitress and later as Manager (service director). Lodging also owns a motel near the restaurant. Both facilities are near railroad terminals in Tulsa.

Mathis claims she was harassed by her female supervisor, Darlene Beatty, when Beatty allegedly suggested that Mathis date the railroad workers who frequented the restaurant.¹ Mathis alleges that Beatty's suggestions constituted sexual harassment, and Mathis's refusal to date the customers resulted in her

¹ In the railroad industry, workers are frequently referred to as "rails".

constructive termination, by forcing her to resign. Beatty and Lodging deny the allegations, and assert that Plaintiff willingly resigned.

Lodging argues that, assuming, *arguendo*, the allegations are true, Plaintiff's claim is still not actionable under Title VII, because Beatty's alleged statements do not constitute either a *quid pro quo* or a hostile work environment claim for sexual harassment.

Plaintiff began working for Lodging as a waitress in 1986. Beatty became her supervisor in April or May of 1988. Mathis claims that Beatty repeatedly encouraged her to "date the rails," which Mathis interpreted as a suggestion to have sex with them. Beatty claims that she never encouraged social or sexual interaction, both strictly against company policy, but only friendly behavior.

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, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, 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).

The Court concludes that the Plaintiff has, in fact, failed to state a claim upon which relief can be granted, because her claims do not rise to an actionable level of sexual harassment. Although sexual harassment may take a variety of forms, courts have consistently recognized two distinct categories of sexual harassment claims: *quid pro quo* and hostile work environment. Baker v. Weyerhaeuser Co., 903 F. 2d 1342 (10th Cir. 1990) (citing Hicks v. Gates Rubber Co., 833 F. 2d 1406, 1413 (10th Cir. 1987)). The court in Hicks explained that *quid pro quo* harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits. 833 F. 2d at 1406. *Quid pro quo* harassment usually involves express or implied demands for sexual favors in return for job benefits. Id. The typical situation involves a male employee attempting to solicit sex from a female worker in return for explicit or implicit job benefits or treatment. Because Plaintiff is claiming sexual harassment by a woman employee regarding male clientele, Beatty's remarks would have to more clearly express that Mathis engage in sexual conduct to be actionable. In this case, Mathis can only allude to what Mathis believed Beatty was suggesting. Further, by Mathis' own admission, no sexual activity was demanded of her. Accordingly, the evidence

does not support a *quid pro quo* harassment claim.

To establish a *prima facie* case for sexual harassment based on a hostile work environment, a plaintiff must establish the following elements:

- (1) that the employee belongs to a protected group;
- (2) that the employee was subject to unwelcome sexual harassment;
- (3) that the harassment complained of was based on sex;
- (4) that the harassment complained of affected a term, condition, or privilege of employment; and
- (5) the employer knew or should have known of the harassment in question and failed to take remedial action.

Graham v. American Airlines, Inc., 731 F. Supp. 1494, 1501-02 (N.D. Okla. 1989); Hicks v. Gates Rubber, *supra*, citing Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

In the present case, Plaintiff fails to satisfy all the requisite elements. It is undisputed Mathis satisfied the first element and, arguable, the second element since she claims the supervisor's alleged suggestion to "date the rails" was unwelcome. In order to sustain the third requirement, the harassment complained of must be based on sex, present herein. This requirement relates not to sexual activity but gender.

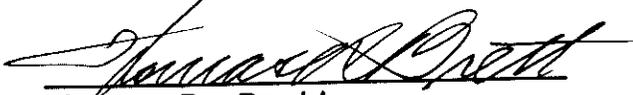
As to the fourth requirement, Plaintiff failed to establish that the alleged harassment affected a term, condition, or privilege of her employment. Mathis alleges but does not establish constructive discharge. See Mathis' Letter of Resignation, dated

August 25, 1988, Lodging's Exhibit D. In her deposition, Mathis concedes that Beatty's alleged statements did not create an offensive environment, nor were any economic benefits withheld from her. Plaintiff states that the only noted change was an increase in the number of hours that she had to work, due to a personnel shortage. Mathis said she knew that working extra hours, when necessary, was part of her job description.

Even assuming the first four elements were satisfied, Mathis' claim would fail on the fifth requirement because she did not inform Lodging of the alleged harassment until her letter of resignation. Plaintiff was fully aware of the appropriate grievance procedures, as outlined in the company policy manual, but admits she neglected to follow same. Since Lodging did not have effective notice of the alleged harassment, it can not be held liable. Hicks v. Gates Rubber, *supra*. Baker v. Weyerhaeuser Co., *supra*.

Because Plaintiff has failed to establish prima facie elements for either *quid pro quo* or hostile work environment sexual harassment, her claim is not actionable under Title VII. The Court concludes that Mathis has failed to state a claim upon which relief can be granted; therefore, the motion of Defendant for summary judgment should be and the same is hereby GRANTED.

IT IS SO ORDERED this 3rd day of March, 1992.


Thomas R. Brett
United States District Judge

Thomas R. Brett
Judge

United States District Court
Northern District of Oklahoma
333 West Fourth, Room 4-508
United States Courthouse
Tulsa, Oklahoma 74103

March 3, 1992

Re: Buzzard v. Oklahoma Tax Commission, No. 90-C-848-B

To All Counsel of Record:

The attached Amended Order filed on March 3, 1992 is identical in every respect to the Order entered on February 24, 1992 except for the highlighted changes in the first paragraph on page 4:

The parties agree that the only issue before the Court is whether the subject smokeshops are located in Indian country. The resolution of this issue determines whether the UKB is required to collect and remit state taxes on tobacco sales. In Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, ___ U.S. ___, 111 S.Ct. 905 (1991), the Supreme Court reaffirmed the doctrine of tribal sovereign immunity when the Court held that the State of Oklahoma could not impose state tax on cigarette sales to tribal members in a tribal owned convenience store located on land held by the federal government in trust for the tribe. However, the Court also reiterated its decisions in Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) and Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980) that Indian retailers in Indian country may be required to collect all applicable state taxes on sales to nontribal members. Therefore, if the subject smokeshops are not located in Indian country, the OTC may assess taxes on tobacco sales to tribal members and non-members alike.

The Judgment remains as filed on the 24th day of February, 1992.

Sincerely yours,



Thomas R. Brett
United States District Judge

AK

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

SONNY BUZZARD, GARY FORREST,
DAN HAYES, DAYTON HOLT, AUSTIN
KETCHER, ROGER LIMORE, NORMAN
LITTLEDAVE, BOBBY MAYFIELD,
DIANNA MAYFIELD, ADALENE SMITH,
ROBERTA SMOKE, CAROL STACY,
PEGGY STEPP, MARY STIGLETS,
TABBIE HESS, J. L. BARNETT,
Smokeshop Managers and Licensees;
THE UNITED KEETOOWAH SMOKESHOP
ASSOCIATION, an unincorporated
Indian Organization, THE UNITED
KEETOOWAH BAND OF CHEROKEE
INDIANS OF OKLAHOMA,

Plaintiffs,

v.

THE OKLAHOMA TAX COMMISSION;
ROBERT ANDERSON, Chairman of the
Tax Commission, ROBERT L. WADLEY,
Vice Chairman of the Tax Commis-
sion; and DON KILPATRICK,
Secretary of the Tax Commission;
JON D. DOUTHITT, District Attorney
for Delaware and Ottawa Counties,
Oklahoma; JIM EARP, Sheriff for
Delaware County, Oklahoma; GERALD
HUNTER, District Attorney for
Adair, Cherokee, Wagoner, and
Sequoyah Counties, Oklahoma;
W. A. "DREW" EDMONDSON, District
Attorney for Muskogee County,
Oklahoma; PATRICK R. ABITOL,
District Attorney for Rogers,
Mayes, and Craig Counties,
Oklahoma; and their successors
in office,

Defendants.

FILED

MAR 03 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 90-C-848-B

AMENDED ORDER

Before the Court for decision are the Motions for Summary Judgment filed by the Defendants Oklahoma Tax Commission ("OTC"), its named officers, and the Defendants Oklahoma District Attorneys

Douthitt, Hunter, Edmondson and Abitol,¹ as well as motion for summary judgment filed by the plaintiff, the United Keetoowah Band of Cherokee Indians ("UKB").

This suit was brought by the United Keetoowah Smokeshop Association ("UKSA"), an unincorporated Indian organization, individual smokeshop managers and licensees, and the UKB. In its Order of May 2, 1991, the Court sustained the defendants' motions to dismiss the individual plaintiffs and the UKSA. The UKB, therefore, is the only remaining plaintiff in this case. In bringing this suit, the UKB seeks injunctive relief prohibiting the enforcement of Oklahoma's tobacco taxing statutes in smokeshops allegedly owned and licensed by the UKB and located within the boundaries of the original Cherokee Indian Reservation.

The Keetoowah Society of Oklahoma Cherokees had existed within the original Cherokee Tribe of Oklahoma since the 1800s as an "organization of full-bloods dedicated to preservation of Indian culture and traditions. It represented the most conservative portion of the Cherokee Indians, and had several specific objectives, including opposition to slavery and subsequent opposition to allotment." (PX-AK, Briefing Paper for Deputy Ass't Secretary).² When the Keetoowahs later sought recognition by

¹ Upon motion of the plaintiffs, the Court dismissed Jim Earp, Sheriff for Delaware County, Oklahoma, on February 11, 1991.

² The exhibits designated "PX" reference plaintiff's exhibits A through AX in support of plaintiff's motion for preliminary injunctive relief, in opposition to defendant's motion to dismiss as converted to motion for summary judgment and plaintiff's cross motion for summary judgment. (Docket #59).

Congress in order to organize as a separate band under the Oklahoma Indian Welfare Act, 25 U.S.C. §503 ("OIWA"), Congress enacted the Act of August 10, 1946 which stated "[t]hat the Keetoowah Indians of the Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma within the meaning of section 3 of the Act of June 26, 1936." (PX-B). In 1950 the UKB organized under the OIWA, adopting a constitution and by-laws, as well as a Corporate Charter. (PX-L and PX-M).

Another descendant of the old Cherokee tribe is the Cherokee Nation. The Cherokee Nation did not avail itself of the right to organize under the OIWA; however, in 1976 the Cherokee Nation adopted a new constitution, its current governing document, which was approved by the Commissioner of Indian Affairs.

Historically, the Bureau of Indian Affairs and the Department of the Interior have recognized the Cherokee Nation as the primary Cherokee tribe. Because the Department of the Interior has determined that the population of the UKB is included in the population base of the Cherokee Nation, the Secretary has designated the Cherokee Nation as the proper recipient of grants and contracts applied for under Public Law 93-638 until the UKB establishes a "tribal roll to identify its service population, separate and apart from the Cherokee Nation." (PX-AM). Furthermore, the Secretary has refused to take any lands within the boundaries of the original Cherokee Indian Reservation into trust for the UKB without the consent of the Cherokee Nation, and the Cherokee Nation has refused to grant its consent. (PX-AP). It is this compendium of

events from which the present controversy arises.

The parties agree that the only issue before the Court is whether the subject smokeshops are located in Indian country. The resolution of this issue determines whether the UKB is required to collect and remit state taxes on tobacco sales. In Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, ___ U.S. ___, 111 S.Ct. 905 (1991), the Supreme Court reaffirmed the doctrine of tribal sovereign immunity when the Court held that the State of Oklahoma could not impose sales tax on cigarette sales to tribal members in a tribal owned convenience store located on land held by the federal government in trust for the tribe. However, the Court also reiterated its decisions in Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) and Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980) that Indian retailers in Indian country may be required to collect all applicable state taxes on sales to nontribal members. Therefore, if the subject smokeshops are not located in Indian country, the OTC may assess taxes on tobacco sales to tribal members and non-members alike.

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, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

To survive a motion for summary judgment, 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).

The UKB states that the following are controverted facts:

1. That the land in question upon which the United Keetoowah Band of Cherokee Indians in Oklahoma have located their smoke shops is restricted against alienation and, therefore, Indian Country.
2. There has been no express legislation disestablishing the boundaries of the old Cherokee Reservation in Oklahoma.

(UKB's Reply Brief, Statement of Controverted Facts) (exhibits omitted). The Court, however, finds that these are matters of law, not issues of fact, and concludes that there are no genuine issues of material fact which would preclude summary judgment.

The term "Indian country" is defined by statute as

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-

of-way running through the same.

18 U.S.C. §1151. While this statute is included in the federal criminal code governing applicable federal criminal law in Indian country, the Supreme Court has held that the statute's definition of Indian country also applies to issues of federal civil and tribal jurisdiction. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1986); DeCocteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

The statutory definition of Indian country has been expanded through judicial decision to include land held in trust by the federal government for the benefit of Indian tribes. The Supreme Court recently revisited this broader definition in Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, ___ U.S. ___, 111 S.Ct. 905 (1991), in which the Court found that land held in trust for the Potawatomis was Indian country:

In United States v. John, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether the land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government."

Id. at 910. See also Cheyenne-Arapaho Tribes v. State of Oklahoma, 618 F.2d 665, 667-68 (10th Cir. 1980).

The UKB does not claim that any of the smokeshop sites are located within dependent Indian communities or on Indian

allotments³ or trust land. The UKB instead argues that it is entitled to exercise tribal sovereignty over the subject lands because (1) they are reservation lands, and the UKB is heir to these unallotted lands within the limits of the original Cherokee Indian Reservation;⁴ and (2) these lands, while held by the UKB in fee, are similar to "trust lands," as they are subject to restrictions imposed by 25 U.S.C. §177 and the Charter of the UKB.

(1) The UKB, in essence, argues that the smokeshops sites which are unallotted lands located within the boundaries of the original Cherokee Indian Reservation transform into Indian country upon the UKB's purchase in fee. The UKB reaches this conclusion reasoning that a) it is one of the bands of Cherokee Indians for whom the original Cherokee Indian Reservation was established; b) the original Cherokee Indian Reservation has never been

³ Although there is some evidence in the record that the smokeshop operated by Roberta Smoke, a former plaintiff in this case, is located on an Indian allotment (Defendant District Attorneys' Brief, Affidavit of Margrett Kelly, Exh.2), the UKB does not claim that any of the subject smokeshops sites are Indian allotments.

⁴ The original Cherokee Indian Reservation was established by several federal treaties including the Treaties of May 6, 1828, 7 Stat. 311, and New Echota of December 29, 1835, 7 Stat. 478, as clarified and/or modified by the Treaty of August 6, 1846, 9 Stat. 871. These reservation lands were later subject to allotment pursuant to the Act of March 1, 1901, 31 Stat. 848, the Act of July 1, 1902, 32 Stat. 716, and the Act of April 26, 1906, 34 Stat. 137. Lands not allotted to the members of the Cherokee tribe or reserved for the use of the tribe as town, church or school sites, were sold on the open market "and the proceeds of such sales deposited in the United States Treasury to the credit of the [Cherokee tribe]." Section 16 of the Act of April 26, 1906, 34 Stat. 137.

The UKB, in effect, claims that the unallotted land within the boundaries of the original Cherokee Indian Reservation which it has purchased in fee is reservation land.

disestablished; c) Congress recognized the UKB by the Act of August 10, 1946, 60 Stat. 976; and d) the UKB's corporate Charter and By-Laws, issued by the Secretary of the Interior pursuant to Section 3 of the OIWA, 25 U.S.C. §503, recognize the UKB's rights to the original Cherokee Indian Reservation.

The UKB, however, offers no authority to support its claim that it is heir to the original Cherokee Indian Reservation. The Act of August 10, 1946 simply recognizes the UKB as a "band of Indians residing in Oklahoma"; it does not set aside a reservation for the UKB or acknowledge the UKB's jurisdiction over the original Cherokee Indian Reservation. Also, while the Act's recognition of the UKB permitted the UKB to incorporate under Section 3 of the OIWA, nothing in Section 3 creates or recognizes the UKB's claim to the original Cherokee Indian Reservation. Neither does the UKB's Corporate Charter, Constitution or By-Laws grant the UKB jurisdiction over the reservation lands.⁵

Contrary to the UKB's claim, the Secretary of the Interior has determined that the lands within the original Cherokee Indian Reservation are not under the jurisdiction of the UKB:

The first issue to be addressed is whether the United Keetoowah Band has a reservation as that term is used in the land acquisition regulations. [25 C.F.R. §151.8] We believe it is clear that they do not. The regulations

⁵ Section 7 of the Corporate Charter states that "[t]he Band ownership of unallotted lands, whether or not occupied by particular individuals, is hereby expressly recognized." This section, however, merely recognizes UKB's corporate right to own unallotted lands, not its right to assume jurisdiction over the unallotted lands within the boundaries of the original Cherokee Indian Reservation.

define the term "Indian reservation", in the State of Oklahoma, "as that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 CFR 151.2(f). The United Keetoowah Band has never had a reservation in Oklahoma, and the Band has never exercised independent governing authority over any of the Cherokee Nation's reservations lands. . . . While the [Act of August 10, 1946] recognized the society as a Band for the purposes of organizing under the Oklahoma Indian Welfare Act, it did not create or set aside a reservation for the Band. Neither did it purport to give the newly acknowledged Band any authority to assert jurisdiction over any lands belonging to the Cherokee Nation.

(Defendants District Attorneys' Brief in Support of Motion for Summary Judgment, Exhibit 4). Furthermore, as this Court noted in The United Keetoowah Band of Cherokee Indians in Oklahoma v. Secretary of the Dept. of Interior, No. 90-C-608-B (May 31, 1991), the Secretary has recognized that the original Cherokee Indian Reservation is the former reservation of the Cherokee Nation, not the UKB, thereby necessitating the UKB's procurement of the Cherokee Nation's consent before the Secretary will acquire any such land in trust for the UKB pursuant to 25 U.S.C. §465. See 25 C.F.R. §151.8.

The Court, therefore, concludes that UKB has failed to show any treaty or Congressional act establishing UKB's "inherited" right or claim to reservation land within the boundaries of the old Cherokee Indian Reservation.⁶

⁶ In so holding, the Court need not reach the issue of whether or not the original Cherokee Indian Reservation has been terminated or disestablished.

(2) The UKB also argues that because the subject lands owned by the UKB are restricted against alienation by direct action by Congress in enacting 25 U.S.C. §177 which prohibits the "purchase, grant, lease, or other conveyance of [tribal] lands, or of any title or claims thereto" without congressional authorization, and by the Secretary of Interior through the limitations in the Corporate Charter issued to the UKB pursuant to the OIWA, 25 U.S.C. §503, such land is similar to "trust status" land and therefore should be designated Indian country.

The UKB contends that under 25 U.S.C. §177 the UKB must obtain consent of the federal government before the UKB can alienate any of the land it has purchased in fee simple. ⁷

The UKB further urges that it is restrained from alienating its land due to the limitation on its power as set forth in the Corporate Charter issued by the Secretary of the Interior. The UKB's power to buy and sell real property is set out in section 3 of the UKB's Corporate Charter:

The United Keetoowah Band of Cherokee Indians
in Oklahoma, subject to any restrictions
contained in the Constitution and laws of the

⁷ Section 177, title 25 of the United States Code, is the codification of the Indian Non-Intercourse Acts of 1790 and 1834. In enacting this statute, the Congress was acting in *parens patriae* to protect the tribes from "the practice of state authorized Indian land cessions that had flourished under the Articles of Confederation and during the prior colonial experience." F. Cohen, *Handbook of Federal Indian Law* 511 (1982); Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960) ("The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress. . .").

United States or in the Constitution and Bylaws of the Band, and subject to the limitations of sections 4 and 5 of this Charter, shall have the following corporate powers as provided by section 3 of the Oklahoma Indian Welfare Act. . .

(r) To purchase, take by gift, bequest, or otherwise own, hold, manage, operate, and dispose of property of every description, real or personal.

However, under section 4 of the Corporate Charter, this power is limited: "No land belong [sic] to the Band or interest in land shall ever be sold or mortgaged." The Corporate Charter also incorporates the statutory requirement of an act of Congress to revoke or surrender the charter.

The Cherokee Nation, appearing as amicus curiae, claims that §177 does not impose restraints on the alienation of the UKB's land because the congressional approval required by §177 has been granted through the enactment of §17 of the IRA, 25 U.S.C. §477, which authorizes Indian tribes organized under the IRA "to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real or personal." The Cherokee Nation argues that because the Secretary of the Interior issued the UKB's Corporate Charter pursuant to §3 of the OIWA, 25 U.S.C. §503, and §17 of the IRA, 25 U.S.C. §477, any restraint imposed by §177 has been removed by Congress.

The defendants also urge that the restraint on alienation in section 4 of the Corporate Charter is self-imposed and does not by itself transform fee simple land to trust land. To so find, they

argue, would eviscerate the federal government's power to acquire trust land. Land acquisitions in trust are governed by federal regulations in 25 C.F.R. §151. Section 151.10 sets forth seven factors to be considered by the Secretary of the Interior in evaluating requests for acquisitions of land in trust status:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
- (f) Jurisdictional problems and potential conflicts of land use which may arise; and
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

The defendants argue that if the UKB can create trust land simply by acquiring land in fee simple, the Department of the Interior would not have the power to deny trust status if its consideration of the above factors so counseled.

The Court finds the defendants' argument persuasive. The UKB has the power to purchase land in fee without approval from the federal government. The regulations concerning trust acquisitions, contrarily, vest power in the Secretary of the Interior to determine which land will become trust land and thus, Indian

country. The copies of the deeds to the subject tracts reflect that the lands were granted to the "United Keetoowah Band of Cherokee Indians in Oklahoma," and not to the "United States of America in trust for the United Keetoowah Band of Cherokee Indians in Oklahoma." (attached to Defendant OTC's Brief in support of Motion for Summary Judgment). The Court can only conclude from the record before it that the smokeshop sites at the time of the UKB's purchase had lost any restricted status they may have once had and were therefore subject to state jurisdiction. Furthermore, the UKB has failed to cite any action by the federal government after the UKB's purchase by which the federal government assumed jurisdiction over the subject sites, removing the lands from the jurisdiction of the state. While the Court acknowledges that the UKB is restricted from alienating its fee land, the Court cannot conclude from this that the subject lands are Indian country; that is, that they have been "validly set apart for the use of the Indians as [trust land or reservation] under the superintendence of the government." Potawatomi, 111 S.Ct. at 910. The UKB's power to purchase land in fee under its Corporate Charter is not synonymous with the federal government's setting aside land for the use of the UKB, nor does the government's approval before the land can be sold, if any is required, by itself rise to the level of government "superintendence." The Court, therefore, concludes that the restraint on alienation of the UKB's fee land does not create Indian country.

In accordance with the above, the Court holds that the subject

smokeshops owned and operated by the UKB are not in Indian country, and are therefore subject to the taxing authority of the State of Oklahoma.⁸ The Court, therefore, sustains the motions for summary judgment filed by the defendants and overrules the motion for summary judgment filed by the UKB.

DATED this 3rd day of March, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁸ In so holding, the Court is not unsympathetic to the plight of the UKB or ignorant of the potential effect of such a ruling on the tribe's self-determination and economic development. The UKB is in the untenable position of being a recognized Indian tribe without land over which to assert tribal sovereignty: the Department of the Interior refuses to acquire UKB's land in trust without the consent of the Cherokee Nation and the Cherokee Nation refuses to grant its consent. Consequently, the dispute is founded in the power struggle between the two tribes of Cherokee Indians. Furthermore, as this Court concluded in The United Keetoowah Band of Cherokee Indians in Oklahoma v. Secretary of the Dept. of Interior, No. 90-C-608-B (May 31, 1991), the UKB cannot bring suit against the Secretary to compel trust acquisition of its land without the Cherokee Nation's consent to waive its sovereign immunity, as the Cherokee Nation is an indispensable party under Fed.R.Civ.P. 19. Under the present state of the law, it appears that the UKB's only remedy is a political one.

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

FILED

MAR 03 1992 *plw*

TY LANE PETERSON and
TAMARA RENE HARLAN,

Plaintiffs,

vs.

CITY OF BROKEN ARROW and
MARCUS PETE FULTZ,

Defendants.

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 91 C 0073B ✓

Joint STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Ty Lane Peterson and Tamara Rene Harlan, by and through their counsel of record, Mark Lyons, hereby stipulate that they dismiss Marcus Pete Fultz of any and all claims or causes of action which have been asserted in the past or which are capable of assertion in the future with prejudice to the right of refileing the same.

Mark D. Lyons

Mark D. Lyons
LYONS & CLARK
616 South Main, Suite 201
Tulsa, Oklahoma 74119
(918) 599-8844

ATTORNEY FOR PLAINTIFFS

Kirk Turner

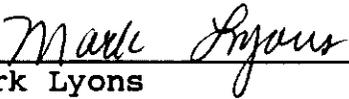
S. M. Fallis, Jr., OBA # 2813
W. Kirk Turner, OBA # 13791
NICHOLS, WOLFE, STAMPER,
NALLY & FALLIS, INC.
400 Old City Hall Building
124 East Fourth Street
Tulsa, Oklahoma 74103-4004
(918) 584-5182

ATTORNEYS FOR DEFENDANT,
MARCUS PETE FULTZ

CERTIFICATE OF MAILING

I hereby certify that on the 3 day of March, 1992, I mailed a true and correct copy of the above and foregoing instrument, with proper postage fully prepaid thereon, to:

S.M. Fallis
W. Kirk Turner
NICHOLS, WOLFE, STAMPER,
NALLY & FALLIS, INC.
124 East 4th Street
Suite 400
Tulsa, OK 74103-4004



Mark Lyons

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

CLARENCE E. JACKSON,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES POSTAL SERVICE,)
)
 Defendant.)

No. 91-C-74-C

FILED
MAR -3 1992

RICHARD D. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

ORDER

This matter came on for **status** conference on February 7, 1992. At that time, the Court expressed to plaintiff's counsel doubt as to the Court's jurisdiction over plaintiff's purported cause of action (involving improper disciplinary measures imposed upon plaintiff by his employer, The United States Postal Service). The Court requested plaintiff's counsel to brief the jurisdictional issue by February 21, 1992 or to dismiss the case. No brief has been filed, but a form Order has been tendered to the Court, which recites that the case is dismissed for lack of subject matter jurisdiction. The Court interprets this as a concession that plaintiff's counsel does not wish to proceed further.

It is the Order of the Court that this action is hereby dismissed with prejudice.

IT IS SO ORDERED this 2 day of March, 1992.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

5

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

JIM T. SPEARS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 91-C-007-B

FILED

MAR 8 - 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter is before the court for decision of Fed. R. Civ. P. 56 motions for partial summary judgment filed by the Defendant (United States of America) and for summary judgment filed by the Plaintiff (Jim T. Spears).

Plaintiff seeks a refund of taxes paid, alleging same were improperly assessed against him. Defendant, in its Motion for Partial Summary Judgment, requests the assessment to be determined correct.

The undisputed facts are as follows:

On September 30, 1985, the Internal Revenue Service notified the Plaintiff of a proposed assessment of penalties under 26 U.S.C. section 6672 of the Code, as a responsible person of Phoenix Energy Corporation ("Phoenix"), in the amount of \$8,264.22 for the taxable quarters ending March 31, 1984 through September 30, 1984.

On November 22, 1985, Plaintiff filed a petition under Chapter 7 of the United States Bankruptcy Code. Therein Spears scheduled the Phoenix Energy IRS tax obligation in the amount of \$10,000.00.

On December 9, 1985, the IRS assessed Plaintiff a 100 percent penalty tax under Section 6672 of the Internal Revenue Code, as amended (26 U.S.C.) (the "Code) as a responsible person of Phoenix Energy Corporation. This assessment was during the automatic stay period of Section 362 of the Code.

On February 19, 1986, the IRS filed a proof of claim in Plaintiff's bankruptcy action for responsible person penalties in the amount of \$8,264.22.

The IRS filed a Notice of Federal Tax Lien in the Tulsa County Clerk's Office dated February 19, 1986, during the automatic stay period provided by Section 362 of the Code.

Plaintiff was granted a discharge in the bankruptcy matter on April 17, 1986. There is no contention by the IRS of lack of notice as to Plaintiff's discharge in the Bankruptcy matter.

In order to qualify for a loan for the purchase of a home, Plaintiff paid the IRS on May 28, 1988, the sum of \$8,500.22, to effectuate the release of the tax lien.

Plaintiff filed a claim for refund of the above amount, filing the instant action when IRS denied same.

Neither the validity of the assessment nor the dischargability of the alleged tax debt nor the violation of the automatic bankruptcy stay was raised or litigated by either the IRS, Spears or Spears trustee in the bankruptcy proceedings.

Summary Judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477, U.S. at 317 (1986), it is stated:

"The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, 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).

Plaintiff contends in his motion for summary judgment that the assessment imposed by the government should be void as a matter of law because the assessment was levied during Plaintiff's pending bankruptcy, thereby violating the automatic stay provisions of the bankruptcy code.

Defendant, in objecting to plaintiff's motion, states that recent case law has determined that certain violations of the bankruptcy stay are merely voidable, not void. In Re Brooks, 79 B.R. 479 (9th Cir. BAP 1987), *aff'd* on other grounds, 871 F. 2d 89 (9th Cir. 1989); Sikes v. Global Marine, Inc., 881 F. 2d 176 (5th Cir. 1989).

Defendant cites In re Schwartz, 119 Bankr. 207 (Bankr. 9th Cir. 1990), Case No. 90-35830, a case similar to the one at bar, in which the Bankruptcy Appellate Panel held that assessment of Section 6672 penalties during bankruptcy, in violation of the automatic stay provisions, was voidable and not void because the debtors did not challenge the tax assessment during the original bankruptcy proceeding. The panel went on to state "such actions (violations) are voidable in the sense that the act is unenforceable and can be avoided or declared when the question is properly presented." *Id.* at 210, 211.

However, Schwartz, *supra*, was recently reversed on the very issue urged by the IRS, i.e. that an assessment levied during the automatic bankruptcy stay is merely voidable and not void. In re Schwartz, 1992 WL 6893 (Jan. 22, 1992). The Schwartz opinion pointed out the majority of cases treating stay violations as merely voidable, involved technical, not-substantive violations. It reasoned that an IRS assessment, which imposes a lien upon all the taxpayers property, is a substantive violation of the bankruptcy automatic stay.

Further, the Schwartz court held the view that Congress intended violations of the automatic stay to be void and that nothing in the Bankruptcy Code or the legislative history "suggests that Congress intended to burden a bankruptcy debtor with an obligation to fight off unlawful claims." *Id.* The Schwartz court concluded the great weight of authority supported its view, citing among others cases, Ellis v. Consolidated Diesel Elec. Corp., 894

F.2d 371 (10th Cir.1990).

Defendant states that at no time during the bankruptcy proceeding did the plaintiff challenge the tax assessment or assert that the IRS had violated the automatic stay, citing In re Oliver, 38 B.R. 245, 247, (Bankr. D. Minn. 1984), and In re Calder, 907 F.2d 953 (10th Cir. 1990) The record reflects no action taken by Plaintiff to challenge the assessment.

In re Oliver follows those decisions which rely primarily on sections 362(d) and 549 of the Bankruptcy Code to support their conclusions. As pointed out in Schwartz, "[T]hese Courts have reasoned that (1) the court's power under section 362(d) to annul an automatic stay and (2) the trustee's duty under section 549 to bring an action to void an unauthorized transfer are inconsistent with violations of the stay being void and thus demonstrate that violations of the automatic stay are merely voidable." This Court, as did the Schwartz court, finds this reasoning not sound.

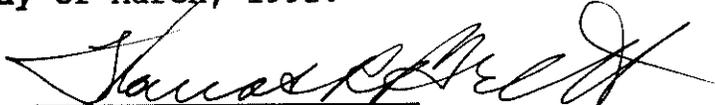
This Court distinguishes In re Calder, 907 F.2d 953 (10th Cir. 1990), which held that a debtor who failed to assert his rights under 11 U.S.C. section 362 in a timely manner was precluded from claiming protection based upon the automatic stay provisions. The Calder court stated that the debtor "must bear some responsibility for his unreasonable delay in asserting rights under section 362(d)." *Id.* at 957.

This Court finds no unreasonable delay on the part of Spears. If fact, Spears has stated under oath he was not even aware the IRS

made the assessment occurring during the automatic stay period.¹ Moreover, this Court believes the better view, and one supported by the more cogent authority, is that an IRS assessment made during the bankruptcy automatic stay period, is void. Thus, no timely assessment has ever been made. Under the circumstances herein, the bankrupt was required to take no action relative to the void assessment.

The court concludes that Plaintiff's Motion for Summary Judgment should be and the same is hereby Granted. The Defendant's Motion for Partial Summary Judgment, on the issue of the validity of its assessment, should be and the same is hereby DENIED.

IT IS SO ORDERED this 30th day of March, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹ It is probable that Spears could be burdened with constructive notice of the IRS assessment because his Bankruptcy attorney knew or could have known of same. The IRS filed a Proof of Claim in Spears' bankruptcy proceeding.

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

ESTATE OF JACOB O. HIGHTOWER,)
et al.,)
)
Plaintiffs,)
)
vs.)
)
DAIRYLAND INS. CO., et al.,)
)
Defendants.)

No. 91-C-196-E /

FILED

MAR 3 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER AND JUDGMENT

This matter is before the Court on the following motions: Defendant Dairyland's Motion for Summary Judgment; Plaintiff's Administratrix's Application to Dismiss Without Prejudice; Defendant Allstate's Motion for Default Judgment and Rule 15(A) Motion to Enter Judgment. The Court has reviewed the record and the applicable law and finds that:

1. The analysis of Judge Cook in Stanley v. Dairyland Insurance Co., 90-C-688-C, is applicable to the instant case: while Oklahoma has not yet addressed the issue, sister jurisdictions have determined that the 24-hour notice provision of the policy at issue is valid and enforceable. Therefore the Motion of Defendant Dairyland Insurance Co. for summary judgment should be granted.
2. Plaintiff's Application to Dismiss Without Prejudice so that the case may be refiled with a request for jury trial is untimely and would burden Defendants unduly. Therefore Plaintiff's Motion should be denied.

3. Defendant Allstate's Motion for Default Judgment and Rule 15(A) Motion to Enter Judgment should be granted: Plaintiff's failure to respond is deemed a waiver of objection.

IT IS THEREFORE ORDERED that the Motion of Dairyland Insurance Co. for summary judgment is granted; Plaintiff's Motion to Dismiss is denied; Defendant Allstate Insurance Co.'s Motion for Default Judgment and Rule 15(A) Motion to Enter Judgment are granted. Judgment is entered in favor of Defendants; Defendants shall recover their costs herein.

So ORDERED this 31st day of March, 1992.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 2 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IVA N. KINCY,
Plaintiff,

vs.

SOUTHWESTERN BELL TELEPHONE
COMPANY, a corporation,

Defendant.

Case No. 91-C-761-E

ORDER

This Court, having reviewed the Stipulation of Dismissal filed by the parties, finds that this case should be dismissed with prejudice to the refiling of same. Thus, it is

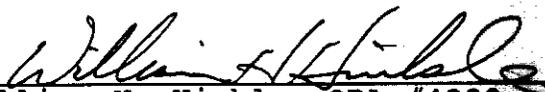
ORDERED that the complaint, and all claims for relief are dismissed with prejudice to the refiling of same.

IT IS FURTHER ORDERED that the parties shall bear their respective costs, expenses and attorney fees.

IT IS SO ORDERED this 2nd day of March,
1992.


UNITED STATES DISTRICT JUDGE

APPROVED:



William H. Hinkle, OBA #4229
320 South Boston, Suite 1100
Tulsa, Oklahoma 74103
(918) 584-6700

Attorney for Plaintiff



Nancy L. Coats
Southwestern Bell Telephone
One Bell Central, 800 North Harvey
Oklahoma City, Oklahoma 73102
(405) 236-6483

Attorney for Defendant

FILED

MAR 2 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA, ex rel.)
INTERNAL REVENUE SERVICE,)
))
Appellant,)
))
v.)
))
NELSON UTILITY PRODUCTS, INC.,)
SENORA NELSON and)
THOMAS I. NELSON,)
))
Debtors.)

Case No. 91-C-729-E

ORDER OF DISMISSAL

Pursuant to the Stipulation of Dismissal filed by the parties, this appeal is hereby dismissed with prejudice.

Dated: 3/2, 1992.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EDWARD G. MAYEUX, JR.; TONI L.
MAYEUX a/k/a TONY LYNNE MAYEUX;
KELLY ALM; PAMELA ALM; COUNTY
TREASURER, Tulsa County,
Oklahoma; and BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

MAR 2 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 91-C-428-C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day
of February, 1992. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Kathleen Bliss Adams, Assistant United States
Attorney; the Defendants, County Treasurer, Tulsa County,
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by J. Dennis Semler, Assistant District
Attorney, Tulsa County, Oklahoma; and the Defendants, Edward G.
Mayeux, Jr., Toni L. Mayeux a/k/a Toni Lynne Mayeux, Kelly Alm,
and Pamela Alm appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendants, Edward G. Mayeux, Jr. and
Toni L. Mayeux a/k/a Toni Lynne Mayeux, acknowledged receipt of
Summons and Complaint on July 16, 1991; that the Defendants,
Kelly Alm and Pamela Alm, were served with Summons and Complaint
on December 5, 1991; that Defendant, County Treasurer, Tulsa

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

County, Oklahoma, acknowledged receipt of Summons and Complaint on June 25, 1991; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on June 26, 1991.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed its Answer on July 1, 1991; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on July 9, 1991; and that the Defendants, Edward G. Mayeux, Jr., Toni L. Mayeux a/k/a Toni Lynne Mayeux, Kelly Alm, and Pamela Alm, 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 Four (4), Block Three (3), STACEY LYNN ADDITION, an Addition in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on February 28, 1983, Edward G. Mayeux, Jr. and Toni L. Mayeux 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 \$52,500.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Edward G. Mayeux, Jr. and Toni L. Mayeux 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 February 28, 1983, covering the above-described property. Said mortgage was recorded on February 28, 1983, in Book 4671, Page 1826, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Edward G. Mayeux, Jr. and Toni L. Mayeux a/k/a Toni Lynne Mayeux, 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, Edward G. Mayeux, Jr. and Toni L. Mayeux a/k/a Toni Lynne Mayeux, are indebted to the Plaintiff in the principal sum of \$49,183.15, plus interest at the rate of 12 percent per annum from November 1, 1989 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$55.00 (\$20.00 docket fees, \$35.00 fees for service of Summons and Complaint).

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.

The Court further finds that the Defendants, Kelly Alm and Pamela Alm, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Edward G. Mayeux, Jr. and Toni L. Mayeux a/k/a Toni Lynne Mayeux, in the principal sum of \$49,183.15, plus interest at the rate of 12 percent per annum from November 1, 1989 until judgment, plus interest thereafter at the current legal rate of 4.21 percent per annum until paid, plus the costs of this action in the amount of \$55.00 (\$20.00 docket fees, \$35.00 fees for service of Summons and Complaint), 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, Kelly Alm, Pamela Alm, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Edward G. Mayeux, Jr. and Toni L. Mayeux a/k/a Toni Lynne Mayeux, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

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

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

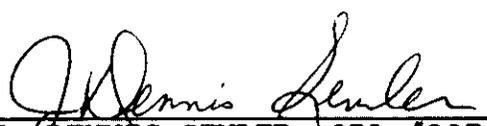
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 91-C-428-C

KBA/css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 02 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

v.

CIVIL ACTION NO. 91-C-794-B

ONE 1987 CHEVROLET CAMARO,
VIN 1G1FP21SXHL132042,

Defendant.

JUDGMENT OF FORFEITURE

This cause having come before this Court upon Plaintiff's Application filed herein, and being otherwise fully apprised in the premises, the Court finds as follows:

That the verified Complaint for Forfeiture In Rem was filed in this action on the 8th day of October, 1991; the Complaint alleges that the defendant property is subject to forfeiture pursuant to Title 21 U.S.C. § 881(a)(4) because it was used, or intended to be used, to facilitate a violation of the drug control laws of the United States, Title 21 United States Code.

That a Warrant of Arrest and Notice In Rem was issued on the 16th day of October, 1991, by the Clerk of this Court as to the defendant property.

That the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant property, on the 1st day of November, 1991.

NOTE: THIS ORDER IS TO BE MAILED
BY CLERK TO ALL COUNSEL AND
PARTIES TO THIS ACTION

That the Plaintiff, United States of America, knew of know persons who might claim an interest in the defendant property, and, therefore, no service was made, or attempted to be made, by the United States Marshals Service upon any individual.

That USMS Form 285 reflecting service on the above-described defendant property is on file herein.

That all persons interested in the defendant property, hereinafter described, if any, were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claims.

That the defendant property upon which personal service was effectuated more than twenty (20) days ago has failed to file a claim or answer, as directed in the Warrant of Arrest and Notice In Rem on file herein.

That the United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce & Legal News on December 5, 12, and 19, 1991; and that Proof of Publication was filed of record on the 16th day of January, 1992.

That no other claims, papers, pleadings, or other defenses have been filed by the defendant property or any persons or entities having an interest therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the following-described defendant property:

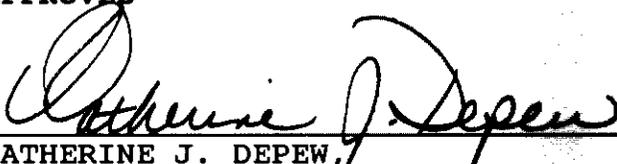
**ONE 1987 CHEVROLET CAMARO,
VIN 1G1FP21SXHL132042,**

and against all persons and/or entities, if any, having an interest in such property, and that said defendant property be, and the same is, hereby forfeited to the United States of America for disposition by the United States Marshal according to law, and that no right, title, or interest shall exist in any other party.

SUBMITTED

**THOMAS R. BRETT,
Judge of the United States District
Court for the Northern District of
Oklahoma**

APPROVED



CATHERINE J. DEPEW,
Assistant United States Attorney

CJD/ch

**FBI FILE NO.: 26B-OC-50242-SUB F-1
FBI SEIZURE NO.: 3580-92-F-004
\FC\DAVIS\01917**

FILED

MAR 2 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

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

LARRY VON CATO, JR.,
Petitioner,
vs.
R. MICHAEL CODY, et al.,
Respondents.

No. 91-C-625-E

ORDER

The Court has for consideration the Report and Recommendations of the Magistrate filed on the 2nd day of January 1992. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, and the Petitioner's response to the Magistrate's R&R, the Court has concluded that the Report and Recommendations of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is denied.

ORDERED this 28th day of February 1992.


CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

FILED

MAR 02 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

JOYCE SWAFFORD and JAMES SWAFFORD,)
)
 Plaintiffs,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

Case No. 90-C-990-B

J U D G M E N T

In keeping with the Court's Order Sustaining the Defendants' Motion for Summary Judgment Pursuant to Fed.R.Civ.P. 56 of February 24, 1992, Judgment is hereby entered in favor of the Defendant, the United States of America, and against the Plaintiffs, Joyce Swafford and James Swafford, and said action is hereby dismissed. Costs are hereby assessed against the Plaintiffs if timely applied for pursuant to Local Rule 6, and the parties are to pay their own respective attorneys fees.

DATED this 2nd day of March, 1992.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 vs.)
)
 POLLIE LAZENBY a/k/a POLLY)
 LAZENBY a/k/a POLLIE A. LAZENBY)
 a/k/a POLLIE ANN LAZENBY;)
 MARSHALL DARNELL WILSON; STATE)
 OF OKLAHOMA ex rel. OKLAHOMA TAX)
 COMMISSION; COUNTY TREASURER,)
 Tulsa County, Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma;)
 JOSETT MARIE WILSON,)
)
 Defendants.)

F I L E D

MAR 2 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 91-C-0056-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28th day
of Feb, 1992. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Phil Pinnell, Assistant United States Attorney;
the Defendants, County Treasurer, Tulsa County, Oklahoma, and
Board of County Commissioners, Tulsa County, Oklahoma, appear by
J. Dennis Semler, Assistant District Attorney, Tulsa County,
Oklahoma; the Defendant, State of Oklahoma ex rel. Oklahoma Tax
Commission, appears by its attorney Lisa Haws; and the
Defendants, Pollie Lazenby a/k/a Polly Lazenby a/k/a Pollie A.
Lazenby a/k/a Pollie Ann Lazenby, Marshall Darnell Wilson, and
Josett Marie Wilson, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, Pollie Lazenby a/k/a Polly
Lazenby a/k/a Pollie A. Lazenby a/k/a Pollie Ann Lazenby, was
served with Summons and Amended Complaint on March 7, 1991; that

the Defendant, Marshall Darnell Wilson, was served with Summons and Amended Complaint on August 28, 1991; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on January 30, 1991; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 30, 1991; that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 30, 1991; and that the Defendant, Josett Marie Wilson, was served with Summons and Amended Complaint on July 18, 1991.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on February 8, 1991; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on February 12, 1991; and that the Defendants, Pollie Lazenby a/k/a Polly Lazenby a/k/a Pollie A. Lazenby a/k/a Pollie Ann Lazenby, Marshall Darnell Wilson, and Josett Marie Wilson, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that O. Z. Lazenby and Pollie Lazenby became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated May 28, 1974, from Donald E. Johnson as Administrator of Veterans Affairs to O. Z. Lazenby and Polly Lazenby, husband and wife, as joint tenants, and not as tenants in common, with full right of survivorship, the whole of the estate to vest in the survivor in the event of the death of either, which Warranty Deed was filed

of record on July 8, 1974, in Book 4127, Page 609, in the records of the County Clerk of Tulsa County, Oklahoma.

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

Lot Twenty-Seven (27), Block Five (5), VALLEY VIEW ACRES ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on May 29, 1974, O. Z. Lazenby and Pollie Lazenby 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 \$9,000.00, payable in monthly installments, with interest thereon at the rate of seven percent (7%) per annum.

The Court further finds that as security for the payment of the above-described note, O. Z. Lazenby and Pollie Lazenby 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 May 29, 1974, covering the above-described property. Said mortgage was recorded on July 8, 1974, in Book 4127, Page 616, in the records of Tulsa County, Oklahoma.

The Court further finds that O. Z. Lazenby died on February 16, 1980. Upon the death of O. Z. Lazenby the subject

property vested in his surviving joint tenant, Pollie Lazenby, by operation of law. On July 8, 1980, Pollie A. Lazenby executed an Affidavit in Termination of Joint Tenancy which terminated joint tenancy and established the death of O. Z. Lazenby. This Affidavit was recorded on July 23, 1980, in Book 4486, Page 604 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Pollie Lazenby a/k/a Polly Lazenby a/k/a Pollie A. Lazenby a/k/a Pollie Ann Lazenby, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Pollie Lazenby a/k/a Polly Lazenby a/k/a Pollie A. Lazenby a/k/a Pollie Ann Lazenby, is indebted to the Plaintiff in the principal sum of \$6,576.02, plus interest at the rate of 7 percent per annum from September 1, 1989 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$37.16 (\$20.00 docket fees, \$17.16 fees for service of Summons and Complaint).

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action in the amount of \$670.49, plus penalties and interest, by virtue of income tax warrant No. ITI 88 016810 00, issued on September 26, 1988 and filed on September 30, 1988 in the records of Tulsa County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

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.

The Court further finds that Defendants, Marshall Darnell Wilson and Josett Marie Wilson, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Pollie Lazenby a/k/a Polly Lazenby a/k/a Pollie A. Lazenby a/k/a Pollie Ann Lazenby, in the principal sum of \$6,576.02, plus interest at the rate of 7 percent per annum from September 1, 1989 until judgment, plus interest thereafter at the current legal rate of 4.21 percent per annum until paid, plus the costs of this action in the amount of \$37.16 (\$20.00 docket fees, \$17.16 fees for service of Summons and Complaint), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment in the amount of \$670.49, plus penalties and interest, by virtue of income tax warrant No. ITI 88 016810 00, issued on September 26, 1988 and filed on September 30, 1988 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Marshall Darnell Wilson, Josett Marie Wilson, and

County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Pollie Lazenby a/k/a Polly Lazenby a/k/a Pollie A. Lazenby a/k/a Pollie Ann Lazenby, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

right, title, interest or claim in or to the subject real
property or any part thereof.

S/ JAMES O. FUSON

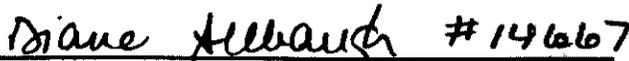
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



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



LISA HAWS, OBA #12695 for
Attorney for Defendant,
State of Oklahoma ex rel.
Oklahoma Tax Commission



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 91-C-0056-E

PP/css

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

FILED

MAR 2 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ALBERT D. TOLIVER and SHERRY)
L. TOLIVER, his wife,)
)
 Plaintiffs,)
)
 vs.)
)
 CURTIS TRANSPORT, INC.,)
 GEORGE ALFRED HARTLE, and)
 COREY WAYNE BATES,)
)
 Defendants.)

No. 90-C-584-E

JUDGMENT

This action came on for trial before the Court and a jury, James O. Ellison, Chief District Judge, presiding, on the 18th day of February, 1992, and the issues having been duly tried and the jury, on the 19th day of February, 1992, having duly rendered its verdict,

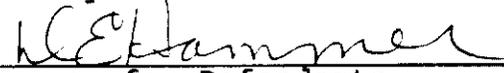
IT IS ORDERED AND ADJUDGED that the Plaintiffs take nothing, that the action be dismissed on the merits and that the Defendants, Curtis Transport, Inc. and George Alfred Hartle, recover of and from the Plaintiffs, Albert D. Toliver and Sherry L. Toliver, their costs of this action.

ENTERED this 2nd day of ^{March} ~~February~~, 1992.

JAMES O. ELLISON

JAMES O. ELLISON,
Chief District Judge

FORM APPROVED:


Attorneys for Plaintiffs

Attorney for Defendants

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

FILED

MAR 2 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JOHN EARL McCASKEY, a minor,)
deceased, by and through his)
parents and next of kin,)
DAWN L. McCASKEY and CHARLES)
R. McCASKEY, husband and wife,)
et al.,)

Plaintiffs

vs.

No. 90-C-490-E ✓

UNITED STATES OF AMERICA,)
d/b/a CLAREMORE INDIAN)
HOSPITAL,)

Defendant.)

JUDGMENT AND ORDER

This action came on for jury trial before the Court, Honorable James O. Ellison, District Judge, presiding, and the Court having entered its Findings of Facts and Conclusions of Law finds the issue in favor of the Defendant.

IT IS THEREFORE ORDERED that the Plaintiffs take nothing from the Defendant, and that the action be dismissed on the merits.

ORDERED this 28th day of February, 1992.


CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WILLIAM BRADFORD INGE; MARY)
 BETH INGE; DORIS ANN SIMON;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

MAR 02 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 88-C-591-B

DEFICIENCY JUDGMENT

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed on the 2nd day of March, 1992, in which the Magistrate Judge recommended that a deficiency judgment be granted in the amount of \$19,304.29 against the Defendants, William Bradford Inge and Mary Beth Inge. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

The Court being fully advised and having examined the court file finds that a copy of Plaintiff's Motion was mailed to Frank M. Rowell, Jr., Attorney for Defendants, William Bradford Inge and Mary Beth Inge, 500 Skelly Building, 23 West 4th Street, Tulsa, Oklahoma 74103, and all other counsel and parties of record.

The Court further finds that the amount of the Judgment rendered on December 19, 1988, in favor of the Plaintiff United States of America, and against the Defendants, William Bradford

Inge and Mary Beth Inge, with interest and costs to date of sale is \$33,304.29.

The Court further finds that the appraised value of the real property at the time of sale was \$14,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered December 19, 1988 and the Order filed on October 17, 1989 amending the judgment, for the sum of \$9,741.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on the 11th day of April, 1991.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendants, William Bradford Inge and Mary Beth Inge, as follows:

Principal Balance as of 12-19-88	\$23,837.49
Interest	7,569.35
Late Charges to Date of Judgment	497.64
Appraisal by Agency	425.00
Abstracting	381.29
Publication Fees of Notice of Sale	146.52
1988 and 1989 Taxes	<u>447.00</u>
TOTAL	\$33,304.29
Less Credit of Appraised Value	- <u>14,000.00</u>
DEFICIENCY	\$19,304.29

plus interest on said deficiency judgment at the legal rate of ^{4.21}~~4.02~~ percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

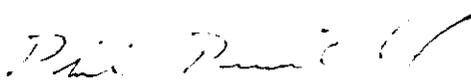
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendants, William Bradford Inge and Mary Beth Inge, a deficiency judgment in the amount of \$19,304.29, plus interest at the legal rate of ^{4.21}~~4.02~~ percent per annum on said deficiency judgment from date of judgment until paid.

S/ THOMAS R. BHETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney


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

PP/css

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

FILED

MAR 2 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

RESOLUTION TRUST CORPORATION,)
as Receiver for Sooner Federal)
Savings Association,)

Plaintiff,)

vs.)

No. 91-C-310-E

PAUL D. BRADFORD and CHERRY)
STREET ASSOCIATES, LTD.,)

Defendants.)

ORDER

This matter is before the Court on the following motions: Plaintiff's Motion to Dismiss Defendants' Counterclaim, Defendants' Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment. In this quiet title action Plaintiff alleges that a caveat filed of record in Tulsa County on the subject realty clouds Plaintiff's title thereto. Defendants' counterclaim asserts that the caveat evinces a valid and binding contract between them and Plaintiff's predecessor which is superior in interest to Plaintiff's claim to the subject property. Defendants counterclaim for breach of contract, punitive damages, determination of the superiority of Defendant Bradford's interest; constructive trust and equitable lien. The Court has considered the arguments and authorities of the parties submitted on the three pending motions and finds that:

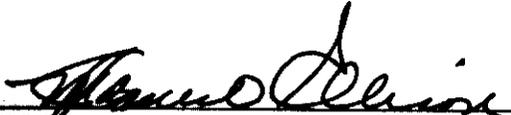
1. Because the Defendant has failed to exhaust the administrative remedies provided by FIRREA at 12 U.S.C.

§1821, this Court lacks subject matter jurisdiction over Defendants' claim. U.S. v. Altman, 762 F.Supp. 130 (S.D. Miss. 1991).

2. Were the Court to find that it had jurisdiction, Defendants' counterclaim must fail under the four requisites of the D'Oench Doctrine, D'Oench, Duhme & Co. v. FDIC, 62 S.Ct. 676 (1942) and its statutory counterpart, 12 U.S.C. §1823(e).
3. Indeed, the Court has been hard-pressed to find a valid and binding contract underlying Defendants' claims in the first instance, but assuming, arguendo that a contract exists, Defendants' claims will not survive under the undisputed facts herein.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Dismiss Defendants' Counterclaim is granted, Defendants' Motion for Summary Judgment is denied and Plaintiff's Motion for Summary Judgment is granted.

ORDERED this 2^d day of March, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

F I L E D

MAR 2 1992 *dl*

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

BARBARA L. PARKER,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF REGENTS OF THE TULSA)
 JUNIOR COLLEGE, et al.,)
)
 Defendants.)

No. 91-C-111-E ✓

O R D E R

This matter is before the court on the Motion for Summary Judgment filed by individual Defendants Zumwalt, Blue, Looney, Taylor, Philips, Van Trease, Martin and Benton ("Individual Defendants"). The Individual Defendants assert that they are entitled to summary judgment on the grounds that qualified immunity protects their actions in this case. Because the defense of qualified immunity shields those entitled to its succor from suit, it is incumbent upon the trial court to address this issue at the outset. Mitchell v. Forsyth, 105 S.Ct. 2806, 2815 (1985)(citing Harlow v. Fitzgerald, 102 S.Ct. 2727, 2737 (1982)).

"The test for qualified immunity is whether Defendants violated "clearly established statutory or constitutional rights of which a reasonable person would have known."" Powell v. Mikulecky, 891 F.2d 1454, 1456 (10th Cir. 1989)(quoting Harlow, supra, 102 S.Ct. at 2738). Plaintiff, in this case, clearly possessed "a property right in continued employment." Cleveland Board of Education v. Lauderhill, 105 S.Ct. 1487, 1491 (1985). It

is undisputed that, as a tenured administrator, she was entitled to a pre-termination hearing and that she could be discharged only for "just cause" pursuant to the TJC Policies and Practices and Procedures (Exhibit 9, Exhibits to Brief in Support of Individual Defendants' Motion for Summary Judgment). It is also undisputed that she submitted her written resignation and it was accepted by the proper authorities.

The following line of cases can be said to chart the evolution of the legal doctrine applicable to Plaintiff's claim herein. In the 1913 case of Grannis v. Ordean, 34 S.Ct. 779, 783, the Supreme Court upheld the Plaintiff landlord's right to notice and the opportunity to be heard in a partition action and declared that "[t]he fundamental requisite of due process of law is the opportunity to be heard." (citations omitted). Grannis was then cited in the Armstrong case for the proposition that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Mango, 85 S.Ct. 1187, 1191 (1965). Armstrong was then cited in Logan v. Zimmerman Brush Co., 102 S.Ct. 1148, 1157-1159 (1982) as authority for the finding that the procedural safeguards of Illinois employment law was a species of property interest mandating a pre-termination hearing. In due course Logan was quoted in Findeisen v. NorthEast Independent School Dist., 749 F.2d 234 (5th Cir. 1984), cert. denied, 105 S.Ct. 2657 (1985), as support for the requirement that

One threatened with the deprivation, under color of state law, of a federally protected property interest must be given "an opportunity .. at a meaningful time and in a

meaningful ... manner for [a] hearing appropriate to the nature of the case ... so as to minimize the likelihood of an erroneous discharge."

Id. at 239 (quoting Logan, supra, 102 S.Ct. at 1158). It is instructive to note that in Findeisen, the Plaintiff, a tenured teacher, had resigned but he claimed that "his resignation was coerced and ... tantamount to a constructive discharge ..." Id. at 236. Because the material facts of Plaintiff's constructive discharge claim were in dispute, the Court found that summary judgment was inappropriate. Shortly thereafter, Findeisen was cited in Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985) for the precept that

[I]f a Plaintiff establishes he had a protected property or liberty interest of which he was deprived without a due process hearing, his claim that he was forced to resign or was constructively discharged from employment may be actionable under §1983.

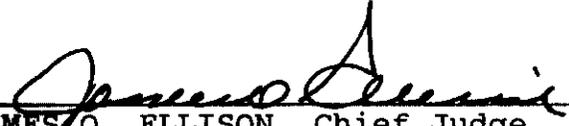
Id. at 579 (footnote omitted; citations omitted).

Thus, the applicable law was clearly established when Plaintiff's claim arose and Plaintiff has met her burden as to one of the two requirements of a Plaintiff in response to a claim of qualified immunity. But Plaintiff must also "come forward with facts or allegations sufficient to show ... that the Defendant's alleged conduct violated the law." Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988). As to Individual Defendants Zumwalt, Blue, Looney, Taylor and Phillips Plaintiff has not met her burden; no facts have been alleged which indicate their conduct violated the law. Plaintiff has alleged

facts sufficient to defeat Defendants' Motion as to Individual Defendants Van Trease, Benton and Martin.

IT IS THEREFORE ORDERED that Individual Defendants' Motion for Summary is granted, in part and denied in part: claims against Defendants Zumwalt, Blue, Looney, Taylor and Philips are dismissed.

So ORDERED this 2^d day of March, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

Arleen M. Meadows, with interest and costs to date of sale is \$78,531.09.

The Court further finds that the appraised value of the real property at the time of sale was \$39,400.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered May 6, 1991, for the sum of \$35,385.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on the 2nd day of January, 1992.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendants, George L. Meadows and Arleen M. Meadows, as follows:

Principal Balance as of 5/6/91	\$57,833.05
Interest	18,788.66
Late Charges to Date of Judgment	252.16
Appraisal by Agency	550.00
Management Broker Fees to Date of Sale	440.00
Abstracting	300.00
Publication Fees of Notice of Sale	142.22
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$78,531.09
Less Credit of Appraised Value	- <u>39,400.00</u>
DEFICIENCY	\$39,131.09

plus interest on said deficiency judgment at the legal rate of 4.21 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendants, George L. Meadows and Arleen M. Meadows, a deficiency judgment in the amount of \$39,131.09, plus interest at the legal rate of 4.21 percent per annum on said deficiency judgment from date of judgment until paid.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PB/css