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

FILED

MAR 20 1992

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

JANET ELAINE JONES, individually, and JANET ELAINE JONES, natural mother and next friend of EMILY KATE JONES, a minor, and STEPHANIE ANN JONES, a minor,	)	
Plaintiffs,	)	Case No. 91-C-700-E
v.	)	
WAL-MART STORES, INC., A Delaware corporation,	)	
Defendant.	)	

ORDER OF DISMISSAL WITHOUT PREJUDICE

CAME ON for consideration this 19th day of March, 1992, the minor Plaintiffs, EMILY KATE JONES and STEPHANIE ANN JONES', Motion to Dismiss and for good cause shown, this action is hereby dismissed without prejudice.

IT IS SO ORDERED.

/s/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

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

FILED

MAR 20 1992

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

EMPLOYEE BENEFIT PLANS OF OKLAHOMA, INC., Plaintiff,	)	
vs.	)	No. 91-C-151-E
UNITED OLYMPIC LIFE INSURANCE COMPANY, Defendant.	)	

ORDER AND JUDGMENT

The Court has for consideration the Defendant's Motion to Dismiss for Lack of Standing and Plaintiff's Motion for Summary Judgment. The Court finds that the issues should be considered under Rule 56 Fed.R.Civ.P. Sheldon v. Munford, Inc., 660 F.Supp. 130 (N.D. Ind. 1987). The undisputed facts support a cause of action by Plaintiff against Defendant. See Exhibits "A" - "E", Objections to Motion to Dismiss for Lack of Standing (Docket #35). Therefore, Defendant's Motion should be denied. The Court further finds that under the undisputed material facts Plaintiff is entitled to reimbursement for claims paid from its common fund in the total sum of $181,492.63.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is denied. Plaintiff's Motion for Summary Judgment is granted. Plaintiff shall recover from Defendant the sum of $181,492.63 with interest thereon as provided by law, and the costs of this action.

ORDERED this 20th 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 20 1992

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

LOCAL AMERICA BANK OF TULSA,	)	
Plaintiff,	)	
vs.	)	No. 91-C-148-E
DON E. GASAWAY, et al.,	)	
Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

Donald E. Gasaway having filed a 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 thirty (30) days of a final adjudication of the bankruptcy proceedings the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

ORDERED this 19TH 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 20 1992

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

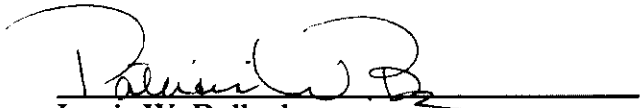
HOMEWARD BOUND, INC. et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 85-C-437-E
THE HISSOM MEMORIAL CENTER, et. al.,	)	
Defendants.	)	

JUDGMENT

In accordance with the Order entered on this 19th day of March, 1992, awarding Plaintiffs' counsel, Bullock & Bullock and PILCOP, interim base attorney fees and expenses, the Court hereby enters judgment in favor of Plaintiffs' counsel, Bullock & Bullock, in the amount of $115,287.50 for base fees and $8,787.66 for expenses and in favor of PILCOP in the amount of $15,005.00 for base fees and $1,225.11 for expenses. Plaintiffs' right to an enhancement of these fees shall be held in abeyance until the matter of Plaintiffs' rights to enhancement is resolved.

ORDERED this 19th day of March, 1992.

JAMES O. ELLISON
United States District Court



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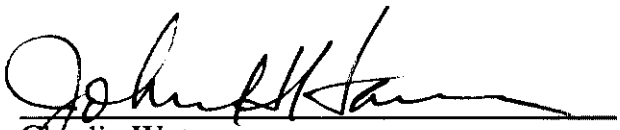
ATTORNEYS FOR PLAINTIFFS



Charlie Waters
John Harris
DEPARTMENT OF HUMAN SERVICES
P. O. Box 53025
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(405) 521-3638

ATTORNEY FOR DEFENDANTS

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

MAR 20 1992
RICHARD M. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

L. S. STARRETT COMPANY, a Massachusetts corporation, Plaintiff,	)	
vs.	)	Case No. 90-C-614E
REX TAYLOR d/b/a TAYLOR PRECISION MANUFACTURING COMPANY, Defendant.	)	

JUDGMENT

Upon the agreement and stipulation of the parties hereto, as reflected by the undersigned signatures of their respective counsel,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff, L. S. Starrett Company, have and recover of the Defendant, Rex Taylor d/b/a Taylor Precision Manufacturing Company, judgment in the sum of $117,000.00, plus postjudgment interest thereon at the rate of 9.58% per annum, from and after the date of this Judgment, plus costs and attorneys fees, to be determined by the Court.

DATED this 20th day of March, 1992.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

By: _____
John J. Carwile (OBA #10757)
Doerner, Stuart, Saunders, Daniel & Anderson
320 South Boston, Suite 500
Tulsa, OK 74103
Attorneys for the Plaintiff, L.S. Starrett Company

By: _____
Larry Oliver (OBA #6769)
Larry Oliver & Associates
2211 East Skelly Drive
Tulsa, OK 74105
Attorneys for the Defendant, Rex Taylor d/b/s Taylor Precision Manufacturing Company

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

FILED

MAR 20 1992

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

IN RE:	)	
REPUBLIC FINANCIAL CORPORATION,	)	
Debtor.	)	
R. DOBIE LANGENKAMP, Successor Trustee,	)	
Plaintiff,	)	
vs.	)	No. 91-C-268-E
B. N. ROLFE and GENE ROLFE,	)	
Defendants.	)	

ORDER

Comes now before the Court for consideration Defendant's Motion for withdrawal of reference. After a review of the pleadings offered by both parties, the Court finds Defendant's Motion for withdrawal of reference should be denied.

The Court bases its denial on Defendant's proofs of claim filed with the Bankruptcy Court as shown on Exhibits "2", "3", and "4". The Court also finds said motion is not timely and results in a waiver of any jury right under In re Latimer, 918 F.2d 136 (10th Cir. 1990). See Exhibit "5".

IT IS THEREFORE ORDERED that Defendant's Motion for withdrawal of reference is denied.

ORDERED this 20th 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 20 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation, Plaintiff,	)	
vs.	)	No. 91-C-845-B
BILL'S RENT-A-CAR, INC., a Kentucky corporation, and WILLIAM W. MINGEY, an individual. Defendants.	)	

ORDER

Before the Court for decision is the Motion to Dismiss, or in the alternative, to Transfer filed by the Defendants, BILL'S RENT-A-CAR, INC., a Kentucky corporation (Rent-A-Car), and WILLIAM W. MINGEY (Mingey). Thrifty Rent-A-Car Systems, Inc. ("Thrifty"), in its Complaint, alleged the following:

Thrifty is an Oklahoma corporation with its principal place of business located in Tulsa, Oklahoma. Defendant Rent-A-Car, is a corporation incorporated under the laws of a state other than the state of Oklahoma having its principal place of business in the state of Kentucky. Defendant Mingey is an individual and resident of the State of Kentucky.

On May 6, 1980, Mingey executed an Exclusive License Agreement for Vehicle Rental and Leasing ("License Agreement") with Thrifty, which granted Mingey the right to operate a Thrifty Car Rental franchise within a specified territory within the state of Kentucky, County of Fayette. The License Agreement provides that

it will be construed in accordance with the laws of the State of Oklahoma.

On September 9, 1985, Thrifty, Rent-A-Car and Mingey entered into an agreement, entitled "Lease Agreement", for the purpose of leasing to Rent-A-Car vehicles to be used in the operation of the franchise in Fayette, Kentucky. Incorporated into the terms of the Lease Agreement were the terms of the Vehicle Lease Orders ("Lease Orders") executed by Rent-A-Car and Mingey from time to time thereafter, which permitted vehicles to be delivered to the lessee. The Lease Orders relevant to this action were executed by Rent-A-Car and personally guaranteed by Mingey.

On May 15, 1991, Thrifty terminated the Kentucky franchise location, alleging that Mingey and Rent-A-Car were in default of their obligations under each of the agreements and the guarantees described above.

Mingey and Rent-A-Car contend that they do not have sufficient minimum contacts with the state of Oklahoma to allow this Court to exercise personal jurisdiction over them. Under the Oklahoma personal jurisdiction statute, 12 O.S. §2004(F), jurisdiction extends to the outer limits permitted by the due process clause of the United States Constitution. Moran Pipe and Supply Co., Inc v. Schwartz, 680 F.Supp. 1499, 1501 (E.D.Okla. 1988). Where personal jurisdiction is challenged, a plaintiff has the burden of establishing that the nonresident defendants have the necessary minimum contacts with the forum. Ten Mile Industrial Park v. Western Plains Service Corp., 810 F.2d 1518, 1524 (10th Cir. 1987);

International Shoe Company v. Washington, 326 U.S. 310 (1945); Hanson v. Denckla, 357 U.S. 235 (1958).

The seminal case on this issue is Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). There the Supreme Court found a "substantial connection" between the non-resident franchisee and the state in which the franchisor established its principal office. The Court noted that the franchisor and the franchisee entered into a long-term relationship over the course of 20 years which "envisioned continuing and wide-reaching contacts" with the state in which the franchisor's headquarters was located. Id. at 480.

The court concludes that Rent-A-Car has had sufficient minimum contacts with the state of Oklahoma so as to subject it to in personam jurisdiction in this state. During the course of their relationship, Rent-A-Car, through its corporate officer, Mingey, has carried on a continuous course of direct communications by mail or telephone with Thrifty's headquarters in Tulsa, Oklahoma, concerning the operation of the franchise. All lease and license payments have been sent to Thrifty's Tulsa office over the term of the License and Vehicle Lease Agreements. In addition, Mingey, the "owner" of Rent-A-Car, visited Tulsa, Oklahoma, to conduct business on behalf of Rent-A-Car. Furthermore, like the franchise agreement in Burger King, the agreement here also contains a choice-of-law provision. The Supreme Court in Burger King reasoned that a choice-of-law provision in light of a long-term contractual relationship between the franchisor and franchisee "reinforce[s] [a] deliberate affiliation with the forum state and the reasonable

foreseeability of possible litigation there." Id. at 482.

The Court also concludes that it has personal jurisdiction over the individual Defendant, Mingey, because he was a guarantor as well a corporate officer of Rent-A-Car and his acts as both establish minimum contacts with Oklahoma. Standard Life and Accident Insurance Co. v. Western Finance, Inc., 436 F. Supp. 843 (W.D.Okla. 1977).

The individual defendant could reasonably have anticipated being sued in an Oklahoma court to answer for alleged defaults under the subject documents without offending traditional notions of fair play and substantial justice. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); Standard Life & Acc. Ins. Co. v. Western Finance, Inc., 436 F. Supp. 843 (W.D.Okla. 1977); Kennedy v. Freeman, 919 F.2d 126 (10th Cir. 1990); Thrifty Rent-A-Car Systems, Inc. v. Theodore J. Sudal, et al., Case No. 88-C-1418-C, United States District Court for the Northern District of Oklahoma; Thrifty Rent-A-Car Systems, Inc. v. Clayton C. Johnson, Case No. 88-C-1551-E, United States District Court for the Northern District of Oklahoma; Thrifty Rent-A-Car Systems, Inc. v. Dynasty Auto Rental and Leasing, Inc., et al., Case No. 90-C-146-B, United States District Court for the Northern District of Oklahoma and Thrifty Rent-A-Car Systems, Inc. v. Hazelhead, Inc., et al., Case No. 91-C-262-B, United States District Court for the Northern District of Oklahoma.

In light of the above, the Court finds that Rent-A-Car and

Mingey have established sufficient minimum contacts with Oklahoma to allow this Court to exercise personal jurisdiction over them. The Court, therefore, DENIES defendants' motion to dismiss.

The Court further concludes that the defendants have failed to meet their burden to show that a transfer is warranted under 28 U.S.C. §1404(a) due to the inconvenience of the parties or witnesses or in the interests of justice. Relevant records concerning this dispute are located in Tulsa, as well as Kentucky, and many of Thrifty's anticipated witnesses are in Tulsa.

As the plaintiff's choice of forum should be afforded deference, and the License and Lease Agreement provide that Oklahoma law governs their interpretation, the Court denies the defendants' Motion to Transfer. Thrifty Rent-A-Car System, Inc. v. Bettinger, et al., Case No. 90-C-469-B (N.D.Okla. May 24, 1991); Thrifty Rent-A-Car System, Inc. v. Altolew, et al., Case No. 91-C-274-B (N.D.Okla. June 20, 1991).

IT IS SO ORDERED, this 20th 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 19 1992

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

DON STEWART ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. 90-C-219-E
COMMISSIONER OF INTERNAL REVENUE,	)	
Defendant.	)	

ORDER

Before the Court is Plaintiff's Motion to Reconsider the Court's Order of April 8, 1991 wherein the Court granted Defendant's Motion to Dismiss for lack of subject-matter jurisdiction. The Court is not persuaded by Plaintiff's argument that Section 7611 of the Internal Revenue Code does not relate to federal taxation.

The Motion to Reconsider is, accordingly, denied.

So ORDERED this 18th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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FILED
MAR 19 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

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

BEVERLY LARGE, Plaintiff,	)	
vs.	)	No. 91-C-425-E
AMERICAN AIRLINES, INC., a Delaware corporation, Defendant.	)	

ORDER OF DISMISSAL AND JUDGMENT

Before the Court is Defendant's Motion to Dismiss. The Court has considered the arguments of the parties in light of the relevant law and now finds that Defendant's motion should be granted. Count I of Plaintiff's Complaint fails to state a claim under the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq., because it does not contain allegations sufficient to demonstrate a prima facie case as required by Merrick v. Northern Natural Gas Co., 911 F.2d 426, 429 (10th Cir. 1990). See also Dugan v. Martin Marietta Aerospace, 760 F.2d 397, 399 (2nd Cir. 1985). Count II is similarly wanting. Plaintiff has not shown the requisite elements of damage. And, in like manner Count III does not meet the Eddy requirement of outrageous conduct. Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986); see also Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379 (10th Cir. 1991). Finally, Count IV is also deficient. Plaintiff has not shown she was discharged for either refusing to act in contravention of public policy or acting in accord with a compelling public policy. See

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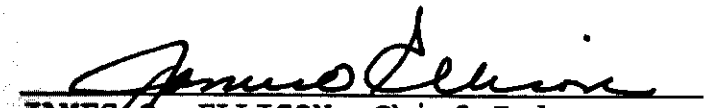
Burk v. K-Mart Corporation, 770 P.2d 24 (Okla. 1989).

In sum, Plaintiff has failed to state actionable claims herein; therefore Defendant's Motion to Dismiss is granted. This matter is dismissed.

So ORDERED this 19th day of March, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

FILED
MAR 19 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

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

LARRY C. BLACK,	)	
Petitioner,	)	
vs.	)	No. 90-C-970-E
STEVE HARGETT, Warden,	)	
Respondent.	)	

ORDER AND JUDGMENT

The Court has for consideration the Report and Recommendation filed September 30, 1991 wherein, at the behest of the Court, the Magistrate considered Petitioner's objections to the Report and Recommendation filed July 16, 1991. The Petitioner has objected to this second Report and Recommendation, as well. The Court has reviewed these objections in light of the applicable law and finds that the Magistrate's Recommendation should be affirmed and the Petitioner's Application for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 should be denied.

ORDERED this 19th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

FILED

MAR 19 1992

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

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

TRENT L. HAWKINS,	)	
Petitioner,	)	
vs.	)	No. 91-C-97-E
RON CHAMPION, et al.,	)	
Respondents.	)	

ORDER

Now before this Court for consideration is Petitioner's Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. After review of Petitioner's writ of habeas, Respondent's reply and United States Magistrate Wagner's report and recommendation, the Court finds Petitioner's Writ of Habeas Corpus should be denied.

The Court finds no evidence that Petitioner was denied his constitutional rights regarding the charge and prosecution for Robbery with a Dangerous Weapon and First Degree Burglary and relies on Timberlake v. United States, 767 F.2d 1479, 1481 (10th Cir. 1985), cert. den. 474 U.S. 1101 (1986). The Court also finds no merit in Petitioner's claim that Petitioner's punishment is excessive because of his age (youth) at the time of the conviction. Moreover, this Court notes Petitioner was certified and tried as an adult. Consequently, the Court finds no abuse of discretion by the trial court in the imposition of sentence.

IT IS THEREFORE ORDERED that Petitioner's Writ of Habeas Corpus be denied.

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ORDERED this 19th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

FILED
MAR 1 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

THE KANSAS BANKERS SURETY COMPANY, a Kansas corporation, Plaintiff,	)	
vs.	)	Case No. 91-C-150-B
DWIGHT W. MAULDING; SECURITY NATIONAL BANCSHARES OF SAPULPA, INC., an Oklahoma corporation; and SECURITY NATIONAL BANK OF SAPULPA, an Oklahoma corporation, Defendants.	)	

FILED
MAR 19 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

This matter comes on for consideration of Defendants', National Bancshares of Sapulpa (Bancshares), Dwight W. Maulding (Maulding), and Plaintiff's, Kansas Bankers Surety Company (KBS) Motions for Summary Judgment.

This action arose on a demand by Defendant Maulding, a former director and officer of National Bank of Sapulpa ("the Bank"), that KBS defend and settle a claim made upon Maulding by Bancshares, an alleged holder of 80% of the bank's stock.[1] KBS seeks a declaration that its Directors and Officers Legal Defense and Limited Indemnity Policy ("D & O Liability Policy"), issued to the Bank, does not provide liability or omissions coverage for any claims made by Bancshares based on the actions or omissions of former bank president Maulding. KBS relies on a policy provision

[1] In another case in this District, Odell Fox et ux v. Dwight W. Maulding et al, 91-C-341-E, it is alleged by Plaintiffs that Bancshares owns all of the stock of Bank and that Maulding is a shareholder of Bancshares.

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excluding claims by the bank itself, characterizing Bancshares' claim as a derivative claim and therefore a claim by the bank.

Bancshares seeks relief in its counterclaim for a declaration that the policy provides coverage for its claim, arguing that the exclusion[2] relied on by KBS does not specifically exclude claims by stockholders (which Bancshares is), and that the policy as a whole, particularly another provision, the "failed bank rider", demonstrates that such stockholder claims are in fact covered under the policy.

KBS issued a D & O liability policy in favor of the Bank for a policy period from May 18, 1990 to May 19, 1991. By letter dated January 8, 1991, defendant Bancshares notified defendant Maulding's counsel that it asserted a claim in the amount of $3,493,033.83 against Maulding "for his acts and omissions as an officer and director of Security National Bank, Sapulpa, Oklahoma, which thus far damaged the Bank in that amount, plus all costs and damages incurred by the Bank in connection with the pending lawsuit against the Bank by Odell Fox." By letter dated January 8, 1991, Maulding, through counsel, notified KBS of the claim and requested KBS provide Maulding with a defense under the terms of the policy.

Section IV(a)(4) of the policy issued by Plaintiff contains the following "insured versus insured" exclusion:

> (a) The Underwriter shall not be liable to make any payment or provide any defense in connection with any claim made against the Directors or Officers:
>
> * * * *
>
> (4) by any other Director or Officer or by the Bank.

---

[2] Section IV(a)(4) of the Policy.

Plaintiff argues this exclusion bars a claim by Bancshares because it is asserting the Bank's claim derivatively. Defendant Bancshares asserts that its claim is not a claim by the bank and avers that it could bring this claim directly in its own right.

On this issue, the Court finds Stuart v. Robertson, 248 P. 617 (Okla. 1926) and Dobry v. Yukon Electric Co., 290 P.2d 135 (Okla. 1955), which held that individual stockholders, damaged solely by injury to the corporation and whose injury is common to other similarly situated stockholders, may not bring an independent action, would apparently be dispositive. However, the Court concludes that it cannot reach, at this time, the issue of whether Bancshares claim is derivative[3] and, arguably, excluded by the "insured versus insured" provision because of its view, *infra*, that the "failed bank rider" makes clear there is no justiciable issue presently before the Court.

Bancshares argues that the "failed bank rider" provision, entitled "Exclusion of Claims by Stockholders or Investors of Failed Banks Rider," renders the "insured versus insured" exclusion ambiguous because it expressly allows shareholder suits so long as they are initiated before a bank fails. Specifically, the "failed bank rider" provision states:

It is agreed that:

---

[3]However, the Court notes that the January 8, 1991 demand letter by Bancshares to Maulding's counsel in which Bancshares informed Maulding it was asserting a claim against Maulding for his acts and omissions "which . . . damaged the bank" and for "damages incurred by the Bank", indicates derivativeness.

> A. The Underwriter shall not be liable to make any payment or provide any defense in connection with any claim made against Directors or Officers by any Stockholder or Investor unless the Underwriter receives notice that a suit has been filed and a Director or Officer has been properly served prior to the taking over of the bank by any receiver or by any other liquidator or by state or federal officials.

The Court concludes this provision clearly contemplates shareholder claims, only requiring that the Underwriter receive notice a suit has been filed and that the director or officer sued has been served prior to the bank failing. However, nothing in the record before the Court indicates any notice of suit by a stockholder against an officer or director of Bank and perfection of service upon the individual involved prior to (and if) bank failure, to trigger any obligation on the part of the Plaintiff to defend or make payment. The Court concludes that it cannot presently resolve the rights and liabilities of the parties under this provision because it has not been established in the record these events have taken place.[4]

The Court concludes there is no present obligation on the part of Defendant KBS to either defend or make payment. However, it does not conclude there will never be coverage under the policy in issue. In the Court's view, there is no present justiciable issue as required by 28 U.S.C. § 2201 and Article 3 of the United States

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[4]This is not to say, however, that Plaintiff may not be required *in futuro* to defend or pay under the policy. If suit by Bancshares against Maulding is filed, the question may then become whether this particular shareholder claim is excluded from coverage by the "insured versus insured" provision, i.e. is it a derivative suit and if so, does Section IV(a)(4) preclude such suit?.

Constitution to establish subject matter jurisdiction. See **Zaborac v. American Casualty Co. of Reading, PA**, 663 F. Supp. 330 (C.D. Ill. 1987). In **Zaborac**, the Plaintiffs argued that since American Casualty had already indicated to them that it was denying coverage, akin to the facts *sub judice*, the matter was ripe for present resolution. The Court, rejecting this argument as misdirected, said:

> "The Court is not concerned with American Casualty's opinion that it is not obligated to indemnify the Plaintiffs for their future liability in the *Gibson* lawsuit, because American Casualty's obligations to the Plaintiffs (if any) will not become enforceable until after the Gison litigation has been resolved. Thus, it remains a matter of speculation whether American Casualty's opinion of its coverage will change upon resolution of the *Gibson* lawsuit. Until that time, this Court cannot and will not attempt to resolve what is nothing more than dispute of opinions; until such time as a legally enforceable obligation exists, there is no case or controversy before the Court for it to decide. *Ibid.* at 333.

In the Court's view, until and if Bancshares sues and serves Maulding, and gives timely notice to Plaintiff, all before the bank fails, if it does, there is no present obligation on the part of Plaintiff to either defend or pay any claim under the policy; *ergo*, no case or controversy before the Court for it to decide. *Zaborac, supra.* See, also **Littleton, Colo. v. Commercial Union Assur. Co.**, 133 F.R.D. (D.Colo.1990).

Further, when parties do not raise the issue of lack of jurisdiction, it is the duty of the court to determine the matter

sua sponte. **Basso v. Utah Power and Light Co.**, 495 F.2d 906, 909 (10th Cir. 1974).

Accordingly, Defendants', Bancshares and Maulding, and Plaintiff's, KBS, Motions for Summary Judgment are DENIED. Further, the Court *sua sponte* DISMISSES, without prejudice, Plaintiff's complaint and Defendant's Bancshares counterclaim.

IT IS SO ORDERED THIS 19th 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 19 1992

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

MARY DREYFUS and MILTON DREYFUS, both individually and as husband and wife,	)	
Plaintiffs,	)	
v.	)	**No. 90 C-784 B**
THE SHERATON CORPORATION, a foreign corporation, a/k/a ITT SHERATON CORPORATION, d/b/a CAIRO SHERATON HOTEL AND CASINO, SHERATON INTERNATIONAL, INC., a foreign corporation, and THE SHERATON OVERSEAS COMPANY, LTD., a foreign corporation	)	
Defendant.	)	

JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, Mary Dreyfus, by Milton Dreyfus, as survivor of Mary Dreyfus, and Milton Dreyfus, individually, and the Defendants, The Sheraton Corporation, a foreign Corporation, a/k/a ITT Sheraton Corporation, d/b/a Cairo Sheraton Hotel and Casino, Sheraton International, Inc., a foreign corporation, and The Sheraton Overseas Company, Ltd., and stipulate pursuant to Federal Rules of Civil

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Procedure, Rule 41, that this action be dismissed with prejudice.

Dated this _____day of March, 1992.

PLAINTIFFS,

BY: _____

Dale Warner, OBA #9359
2512 East 21st Street
Suite 200
Tulsa, Oklahoma 74114
(918)749-4100

DEFENDANTS,

BY: _____

RICHARD M. ELDRIDGE, OBA #2665
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
2800 Fourth National Bank Bldg.
Tulsa, Oklahoma 74119
(918) 582-1173

RME | bv
dreyfuss\stip-dis.m12

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

FILED
MAR 19 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KEITH L. BELKNAP, Plaintiff,	)	
vs.	)	No. 87-C-795-B
AMWAY CORPORATION, Defendant.	)	

ORDER

Before the Court for decision is the appeal of Plaintiff, Keith L. Belknap, from the Magistrate Judge's Order of March 5, 1992, denying Plaintiff's application for attorneys fee. While Plaintiff was the prevailing party concerning the jury verdict and $150,000.00 judgment rendered thereon on June 28, 1991, the Court concurs in the Magistrate Judge's conclusion that Plaintiff's prevailing on his breach of franchise contract action for lost profits does not entitle Plaintiff to an award of attorneys fees under Okla.Stat. tit. 12, §936 in this diversity action. Therefore, the Magistrate Judge's Report and Recommendation is affirmed and Plaintiff's appeal and objection is OVERRULED.

DATED this 19th day of March, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
MAR 1 7 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KEITH L. BELKNAP, Plaintiff,	)	
vs.	)	No. 87-C-795-B
AMWAY CORPORATION, Defendant.	)	

ORDER

Before the Court for decision is the Defendant Amway Corporation's Motion for Judgment Notwithstanding the Verdict pursuant to Fed.R.Civ.P. 50 following a jury trial and adverse $150,000.00 verdict and judgment entered June 28, 1991. Following a thorough review of Defendant's motion and the supporting and opposing briefs of legal authorities, the Court concludes that factual issues under proper instructions on the law were submitted to the jury.[1] Thus, the Court hereby OVERRULES Defendant's Motion for Judgment Notwithstanding the Verdict.

DATED this 19th day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1]The Court previously by its Order of May 23, 1989 sustained a Motion for Summary Judgment pursuant to Fed.R.Civ.P. 526 and concluded therein that no disputed factual issues remained. The Tenth Circuit Court of Appeals reversed and returned the matter for trial on the merits.

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WP

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 19 1992

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DONALD R. SUMTER,	)	
	)	
Defendant.	)	*CIVIL ACTION NO. 92-C-105-B*

NOTICE OF DISMISSAL

Petitioner, United States of America, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, hereby files its Notice of Dismissal without prejudice in regard to this matter.

DATED this 19th day of March, 1992.

UNITED STATES OF AMERICA

TONY M. GRAHAM
United States Attorney

Phil Pinnell

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

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KAB/tb 02/27/92

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

NATIONAL INSURANCE UNDERWRITERS, Plaintiff,	)	
v.	)	Case No. 91-C-642-C
MID-STATES AIRCRAFT ENGINES, INC., and JAMES K. HARROWER, Defendants.	)	

FILED
MAR 18 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STIPULATION ~~FOR~~ OF DISMISSAL WITH PREJUDICE

National Insurance Underwriters and Mid-States Aircraft Engines, Inc. stipulate that they have entered into a compromise settlement of all claims between them which are the subject of this case. The parties would further show the Court that the sole remaining claim by National Insurance Underwriters against James K. Harrower, was disposed of by way of entry of default judgment signed by this Court and filed on December 11, 1991. As such, there are no remaining claims involved in this lawsuit which have not been disposed of by default judgment or settlement and the case is ripe for dismissal with prejudice.

WHEREFORE, the parties hereby stipulate that the case be dismissed with prejudice.

OF COUNSEL:

Stewart & Elder
1329 Classen Drive
Post Office Box 2056
Oklahoma City, Oklahoma 73101
(405) 272-9351

Respectfully submitted,

Bruce V. Winston, OBA #9778

ATTORNEYS FOR THE PLAINTIFF

Law Firm of Edward A. McConwell
6701 W. 64th Street, Suite 210
Overland Park, Kansas 66202
(913) 262-0605

Edward A. McConwell

Edward A. McConwell

ATTORNEY FOR MID-STATES AIRCRAFT ENGINES, INC.

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

FILED

MAR 18 1992

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

NATIONAL ASSOCIATION OF FIREARMS COLLECTORS, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 91-C-476-E
TULSA COUNTY PUBLIC FACILITIES AUTHORITY,	)	
Defendant.	)	

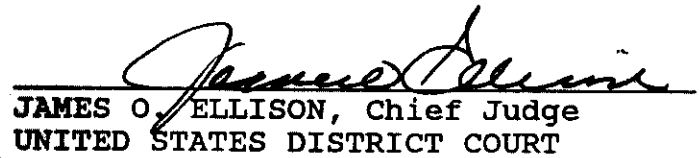
ORDER

The Court has for consideration Defendant's Motion to Dismiss for failure to state a claim upon which relief may be granted. Rule 12(b)(6) Fed.R.Civ.P. The Court has reviewed the record in light of the applicable law and finds that Defendant's Motion should be granted, in part. The Court first notes that Plaintiffs have not shown that Defendant acted under color of state law. Resolution of that issue must await another day. The Court finds that there was no contract between the parties and, consequently, no property interest of Plaintiffs which would give rise to a §1983 claim on that ground. Board of Regents v. Roth, 92 S.Ct. 2701 (1972). However, Plaintiffs' claim of Defendant's alleged retaliatory actions may implicate Plaintiffs' §1983 liberty interests and it cannot be said at this juncture that Plaintiff has failed to state a claim. Therefore, dismissal as to that issue would be inappropriate, given the present record herein.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is granted as to Plaintiffs' alleged property interest; denied as to

Plaintiff's alleged liberty interest.

So ORDERED this 13th 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

BONNIE PERRY, and ROBERT PERRY, husband and wife, Plaintiffs, vs. KOCH ENGINEERING CO., INC., a Kansas corporation; KOCH INDUSTRIES, INC., a Kansas corporation; ERIC SCHLUMPF, an individual; and JOHN VAN GELDER, an individual, Defendants.	)))))))))))))))	90-C-351-B

FILED
MAR 18 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 18 day of ~~February~~ Mar, 1992, this matter coming on before me the undersigned United States District Judge and having received the Joint Motion for Dismissal, finds as follows:

That each of the parties to this matter have entered into a settlement agreement which has been fully satisfied and is binding upon each of the parties to this action. Pursuant to the terms of the settlement agreement, this action is now herein **DISMISSED WITH PREJUDICE** and the Plaintiffs shall be forever barred from pursuing this matter further against the Defendants. Each party shall bear its or their own attorneys' fees and costs incurred in this action.

Thomas R. Brett
United States District Judge

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APPROVED AS TO FORM AND CONTENT:

RICHARDSON & MEIER

BY _____
Attorney for Plaintiffs,
Bonnie Hardy Perry and
Robert Perry

_____
Larry D. Leonard, Attorney for
Defendants, Koch Engineering Co.,
Inc. and John Van Gelder

_____
Kelley D. Sears, Attorney for
Defendants, Koch Engineering Co.,
Inc. and John Van Gelder

BOND & BALMAN

BY _____
Attorney for Defendant,
Eric Schlumpf

CERTIFICATE OF MAILING

This is to certify that on this 16th day of ~~February~~ March, 1992, a true and correct copy of the above and foregoing instrument was mailed, postage pre-paid and properly addressed, to:

Gary L. Richardson
Richardson & Meier
5727 South Lewis, Suite 520
Tulsa, OK 74105

Patterson Bond
Bond & Balman
406 South Boulder
Suite 800
Tulsa, OK 74103

Larry D. Leonard

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

FILED
MAR 1 8 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BARBARA M. HARRIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
LOUIS W. SULLIVAN. M.D., Secretary of Health and Human Services,	)	
	)	
	)	**CASE NO. 90-C-639-B**
Defendant.		

ORDER

The Court hereby adopts the settlement agreement between the parties to this case, and finds that counsel for plaintiff is hereby granted EAJA fees and expenses totalling $4,775.00 for all services performed with respect to plaintiff's September 1986 applications for Social Security disability benefits under Titles II and XVI of the Act. If attorney fees are also awarded under 42 U.S.C. §406(b) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

Order entered at the direction of the Court this 18 day of March, 1992.

S/ THOMAS R. BRETT

THOMAS R. BRETT
United States District Judge

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

FILED
MAR 18 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BRENDA GAYLE MULLIN and JIM MULLIN, husband and wife,	)	
Plaintiffs,	)	
V.	)	91-C-277-B
MAURINE PADGETT,	)	
Defendant.	)	

JUDGMENT

Pursuant to the verdict of the jury returned this date, Judgment is hereby entered in favor of the Plaintiff, Brenda Gayle Mullin, in the amount of One Hundred Four Thousand Dollars ($104,000.00), plus prejudgment interest from April 2, 1991 until March 18, 1992, at the rate of 9.58% per annum, and post judgment interest at the rate of 4.58% per annum; and judgment is entered in favor of the Plaintiff, Jim Mullin, and against the Defendant, Maurine Padgett, in the sum of Eight Thousand Dollars ($8,000.00), with prejudgment interest from April 2, 1991 until March 18, 1992, at the rate of 9.58% per annum, and postjudgment interest at the rate of 4.58% per annum; Plaintiffs are awarded their costs herein as the prevailing parties if timely applied for pursuant to Local Rule 6, and the parties are to pay their own respective attorneys fees.

DATED this 18th day of March, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. BOBBY J. MORGAN a/k/a BOBBY JOE MORGAN; NANCY E. MARKEL f/k/a NANCY E. MORGAN; ALICE I. MORGAN a/k/a ALICE IMOGENE MORGAN a/k/a IMOGENE MORGAN; COUNTY TREASURER, Craig County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Craig County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 91-C-318-B

FILED
MAR 1 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day of March, 1992. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Craig County, Oklahoma, and Board of County Commissioners, Craig County, Oklahoma, appear by Clint Ward, Assistant District Attorney, Craig County, Oklahoma; the Defendant, Nancy E. Markel f/k/a Nancy E. Morgan, appears by her attorney R. E. Richards; and the Defendants, Bobby J. Morgan a/k/a Bobby Joe Morgan and Alice I. Morgan a/k/a Alice Imogene Morgan a/k/a Imogene Morgan, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Bobby J. Morgan a/k/a Bobby Joe Morgan, was served with Summons and Complaint on July 24, 1991; that the Defendant, Nancy E. Markel f/k/a Nancy E. Morgan,

PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

acknowledged receipt of Summons and Complaint on May 30, 1991; that the Defendant, Alice I. Morgan a/k/a Alice Imogene Morgan a/k/a Imogene Morgan, was served with Summons and Complaint on December 13, 1991; that Defendant, County Treasurer, Craig County, Oklahoma, acknowledged receipt of Summons and Complaint on May 15, 1991; and that Defendant, Board of County Commissioners, Craig County, Oklahoma, acknowledged receipt of Summons and Complaint on May 20, 1991.

It appears that the Defendants, County Treasurer, Craig County, Oklahoma, and Board of County Commissioners, Craig County, Oklahoma, filed their Answer and Counterclaim on May 29, 1991; that the Defendants, Bobby J. Morgan a/k/a Bobby Joe Morgan and Alice I. Morgan a/k/a Alice Imogene Morgan a/k/a Imogene Morgan, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on July 22, 1980, Bobby Joe Morgan d/b/a Morgan's Auto Repair filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 80-00868. On April 28, 1981, a Discharge of Debtor was entered releasing debtor from all dischargeable debts. On January 27, 1982, Case No. 80-00868, United States Bankruptcy Court, Northern District of Oklahoma, was closed.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real

property located in Craig County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot 2 in Block 11, in the Town of Big Cabin, Oklahoma, according to the U.S. Government Survey and approved plat thereof.

The Court further finds that on September 29, 1978, Bobby J. Morgan and Nancy E. Morgan executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $17,000.00, payable in monthly installments, with interest thereon at the rate of 8.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Bobby J. Morgan and Nancy E. Morgan executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated September 29, 1978. Said mortgage was recorded on October 2, 1978, in Book 306, Page 11, in the records of Craig County, Oklahoma.

The Court further finds that the Defendants, Bobby J. Morgan a/k/a Bobby Joe Morgan and Nancy E. Markel f/k/a Nancy E. Morgan, 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, Bobby J. Morgan a/k/a Bobby Joe Morgan and Nancy E. Markel f/k/a Nancy E. Morgan, are indebted to the Plaintiff in the principal sum of $16,825.22, plus accrued interest in the amount of $7,482.74 as of September 6, 1990, plus interest accruing thereafter at the rate of 8.5 percent per annum

or $3.9182 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $85.00 ($20.00 docket fees, $57.00 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Craig County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $74.44, plus penalties and interest, for the year of 1990. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Craig County, Oklahoma, have liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $55.21 for the year 1990, $48.82 for the year 1989, $78.89 for the year 1988, $38.90 for the year 1984, and $31.88 for the year 1983. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Alice I. Morgan a/k/a Alice Imogene Morgan a/k/a Imogene Morgan, is in default and has no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against Defendants, Bobby J. Morgan a/k/a Bobby Joe Morgan and Nancy E. Markel f/k/a

Nancy E. Morgan, in the principal sum of $16,825.22, plus accrued interest in the amount of $7,482.74 as of September 6, 1990, plus interest accruing thereafter at the rate of 8.5 percent per annum or $3.9182 per day until judgment, plus interest thereafter at the current legal rate of 4.58 percent per annum until paid, plus the costs of this action in the amount of $85.00 ($20.00 docket fees, $57.00 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Craig County, Oklahoma, have and recover judgment in the amount of $74.44, plus penalties and interest, for ad valorem taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Craig County, Oklahoma, have and recover judgment in the amount of $55.21 for the year 1990, $48.82 for the year 1989, $78.89 for the year 1988, $38.90 for the year 1984, and $31.88 for the year 1983 for personal property taxes, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Alice I. Morgan a/k/a Alice Imogene Morgan a/k/a Imogene Morgan, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Bobby J. Morgan a/k/a Bobby Joe Morgan and Nancy E. Markel f/k/a Nancy E. Morgan, to satisfy the in rem 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 appraisement the real property involved herein and apply the proceeds of the sale as follows:

> **First:**
> In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;
>
> **Second:**
> In payment of Defendants, County Treasurer and Board of County Commissioners, Craig County, Oklahoma, in the amount of $74.44, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;
>
> **Third:**
> In payment of the judgment rendered herein in favor of the Plaintiff;
>
> **Fourth:**
> In payment of Defendants, County Treasurer and Board of County Commissioners, Craig County, Oklahoma, in the total amount of $253.70, personal property taxes which are currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

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

CLINT WARD, OBA # 12027
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Craig County, Oklahoma

R. E. RICHARDS
Attorney for Defendant,
Nancy E. Markel f/k/a Nancy E. Morgan

Judgment of Foreclosure
Civil Action No. 91-C-318-B

PB/css

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

FILED
MAR 18 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

GENE J. KAEFER,

Plaintiff,

vs.

THE MOORCO INTERNATIONAL INC. RETIREMENT INCOME PLAN, an employee benefit plan,

Defendant.

No. 91-C-494-E

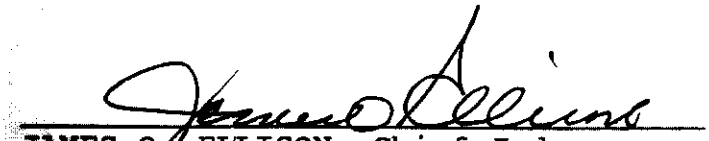
ORDER AND JUDGMENT

This matter is before the Court on cross motions for summary judgment. The Court has reviewed the materials submitted by the parties, on record herein, and has also considered the arguments urged by the parties at the Pre-Trial Hearing, March 13, 1992. This is an ERISA case. Plaintiff claims additional credited service which would, in turn, entitle him to enhanced pension benefits. It is undisputed that Plaintiff worked for the Frank Wheatley Industries ("Wheatley") from 1967 to 1973. It is also undisputed that at the time Geosource, Inc. ("Geosource") acquired Wheatley, Plaintiff was an employee of Geosource, not Wheatley. Thus under the express terms of the plan at issue he was not entitled to credit for previous service to Wheatley. Therefore Plaintiff's claim must fail. The Court also finds that Mr. Levis' situation is clearly distinguishable from the Plaintiff's because Levis' employment by another Geosource acquisition was not interrupted.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary

Judgment is granted; Plaintiff's Motion for Summary Judgment is denied. This case is dismissed on the merits.

ORDERED this 17TH 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 1 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CHARLES P. COTTON, Plaintiff, v. METROPOLITAN LIFE INSURANCE COMPANY, Defendant.	)))))))))	No. 91-C-629-B

ORDER GRANTING APPLICATION FOR A DISMISSAL WITH PREJUDICE

Upon written application of the Plaintiff Charles P. Cotton and the Defendant Metropolitan Life Insurance Company for an order of dismissal with prejudice of the Complaint, and all causes of action against this Defendant, the Court, having examined said application, and having been fully advised in the premises, finds that said application should be granted. It is therefore,

ORDERED, ADJUDGED and DECREED by the Court that the Complaint, and all causes of action of the Plaintiff against Metropolitan Life Insurance Company be and the same is hereby dismissed with prejudice to any further action.

DATED this 17th day of March, 1992.

Judge, United States District Court

B/ECD/03-92340A

FILED

MAR 18 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

MID-AMERICA PROCESS SERVICES, INC., et al,	)	
Plaintiff,	)	
v.	)	91-C-612-B
RICK E. SALYER,	)	
Defendant.	)	

ORDER

Now before this Court is Appellant Rick E. Salyer's appeal of a United States Bankruptcy Court decision. Salyer received $962,600.35 in cash and other assets from Appellee corporations before they filed for bankruptcy. The corporations filed a Complaint in the Bankruptcy Court, seeking to avoid the transfer of assets to Salyer pursuant to 11 U.S.C. §§ 544, 547, 548 and 550. In addition, the corporation sought a preliminary injunction to stop Salyer from transferring or disposing of the assets. The Bankruptcy Court issued the preliminary injunction against Salyer, freezing the $962,600.35. Salyer appeals that decision.

I. Facts

Appellee Lynn Whitefield has, for the purposes of this appeal, been an officer, director and at least a 50 percent shareholder in Mid-America Process Services, Inc. ("MAPS"), MAPS International ("International") and Mid-America Machinery Association, Inc. ("MAMA"). Also, until July 13, 1990, Appellant Salyer owned 50 percent of the

common stock of MAPS. Response Brief Of Corporate Appellees, page 5 (docket #9).

Whitefield, MAMA, MAPS and International voluntarily filed for Chapter 11 bankruptcy in March and April of 1991. However, several transactions allegedly took place between Salyer and the Appellees less than a year before those bankruptcy filings. They are summarized below:

On July 13, 1990, Salyer and Whitefield entered into an agreement where Whitefield promised to pay $3,750,000 for Salyer's stock in MAPS. Salyer received several items in security for the promise.[1] According to Appellees, the following amounts were then paid to Salyer from Whitefield in accord with that agreement:

1. Salyer received six payments from MAPS totaling $325,000.

2. On August 13, 1990, Salyer received $147,565.35 from International.

3. Also, in August of 1990, Whitefield transferred his stock in Computer Automation Technologies, Inc. The transfer reduced Whitefield's debt to Salyer by $90,000.

4. On November 2, 1990, Whitefield assigned a $400,035 promissory note from Diamond S Partners, Ltd. to Salyer. (See Exhibit B of Payments Made To Rick Salyer For MAPS Stock Sale).

In addition, Salyer had other transactions with either Whitefield or the Appellee corporations. On January 29, 1990, International paid Salyer $100,000 for a redemption of his stock in the corporation. On June 25, 1990, MAMA paid Salyer $50,000 to take care of a past debt.

---

[1] *The security included: 1) A pledge of 250 shares of MAPS common stock; 2) Pledge of 50 percent of the outstanding capital stock in MAMA; 3) Pledge of 50 percent of the outstanding capital stock in Midamerica Acquisition and Trading Company, another corporation controlled by Whitefield; 4) Pledge of 50 percent of the interest in real estate located in Branson, Missouri; 5) Pledge of 50 percent of the issued and outstanding capital stock in Horizon Property, Inc; 6) Pledge of 40 percent of the issued and outstanding capital stock of Callaway Boatworks, Inc., and 7) Pledge of shares of Whitefield in the issued and outstanding stock of Computer Automation Technologies. See, Response Brief Of Corporate Appellees at pages 5-6.*

Whitefield was the first Appellee to file for bankruptcy on March 1, 1991. Some five weeks later, on April 12, 1991, MAPS followed suit. On April 17, 1991, MAMA and International also filed for bankruptcy. Subsequently, on July 30, 1991, Appellees filed a Complaint For Recovery Of Property, claiming the transactions from Appellees to Salyer should be avoided pursuant to 11 U.S.C. §§ 544, 547, 548 and 550. In addition, Appellees asked the Bankruptcy Court for an injunction so Salyer could not transfer or dispose of the assets accumulated in the above transactions.

Three days after Appellees' filed their Complaint, the Bankruptcy Court held a hearing on the injunction. No witnesses testified at the hearing, and the Court heard no evidence. The Bankruptcy Court allowed attorneys for both parties to tell him the substance of their arguments.[2] Despite the protest of Salyer's counsel, the judge decided an evidentiary hearing was not needed because he believed the facts concerning the need for an injunction were not disputed. Below is an excerpt from the judge's ruling:

> Now, the facts in this case, which I believe are significant, is that within a year of the execution of the contract and the transfers, the debtors are in Chapter 11, and have stated under oath in their schedules that they are insolvent. That is within a year after this happened. Now, that immediately raises a red flag. The second red flag here is these transfers were made to a former fifty percent stockholder, officer and director [Salyer]. Here you have a substantial transfer of assets of the debtor to a former officer, stockholder and director. That raises another red flag. These are uncontested. The third red flag here is that payments on debtor, Whitefield's debt were made by Debtor, MAPS. Now, Mr. Bratton [Salyer's attorney] says that can all be explained. Perhaps so. But on the face of it, we have assets of a debtor corporation paying the debt of another debtor. That raises another red flag. So there are three controversial or suspicious actions here, within a year of insolvency...Those three things there are the facts which I feel authorize this Court to act under Section 105. *Transcript of Show Cause Hearing, August*

[2] *The 66-page transcript shows the attorneys argued their case before the judge, and that the judge questioned them on their positions.*

2, 1991, page 58.

On August 8, 1991, the Bankruptcy Court issued the Preliminary Injunction, enjoined Salyer from selling, transferring or disposing of the Diamond S Promissory Note, the cash payments totalling $325,000 from MAPS, the $147,565.35 payment from International, the $100,000 redemption payment from International, the $50,000 payment to Salyer by MAMA and the Computer Automation Technologies, Inc. stock given to Salyer by Whitefield. Salyer appealed that decision to this Court on August 14, 1991.

II. Standard Of Review

A district court's denial of a preliminary injunction will be affirmed unless the court abused its discretion, committed an obvious error of law, or made a serious mistake in considering the proof. *Hohe v. Casey, 868 F.2d 69, 72 (3d Cir. 1989).*

Abuse of discretion is defined in the Tenth Circuit as an arbitrary, capricious, whimsical or manifestly unreasonable judgment. *United States v. Wright,* 826 F.2d 938, 943 (10th Cir. 1987).

III. Legal Analysis

The issue is whether the Bankruptcy Court should have conducted an evidentiary hearing prior to granting a preliminary injunction. An evidentiary hearing is not an indispensable requirement when a court allows or refuses a preliminary injunction. *Town of Burlington v. Department of Education,* 655 F.2d 428, 433 (1st Cir. 1981).[3] The majority of cases suggest, however, that such a hearing should be held whenever it is

[3] *Also, see Bradley v. Pittsburgh Board of Education, 910 F.2d 1172, 1175 (3rd Cir. 1990).*

practical to do so. *Aoude v. Mobile Oil Corp.,* 862 F.2d 890, 894 (1st Cir. 1988).[4]

Whether an evidentiary hearing is practical is within the discretion of the trial court. An injunction can properly be issued if a matter can be "heard on the papers." *Id.* In addition, such a hearing is not essential where parties exercised ample opportunity to make written submissions and failed to submit affidavits or make offers of proof. *Town of Burlington,* 655 F.2d at 433. Furthermore, if the "evidence already in the district court's possession enables it to reach a reasonable conclusion, "an evidentiary hearing is not needed". *Syntex Ophthalmics, Inc. v. Tsuetaki,* 701 F.2d 677, 682 (7th Cir. 1983).

Appellate courts also have allowed an injunction to be issued when the movant is proceeding on a legal theory which cannot be sustained, because there then could be no showing of a likelihood of success on the merits. *Bradley v. Pittsburgh Board of Education,* 910 F.2d 1172, 1176 (3rd Cir. 1990). Also, federal appellate courts have concluded that a decision on a preliminary injunction may be based on affidavits and other documentary evidence "if the facts are undisputed and the relevant factual issues are resolved." *Id.*

The First and Second circuits have formulated tests. In the First Circuit, the court asks the following question: Given the nature and circumstances of the case, did the parties have a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions? Under this test, if the question is close and time permits, then doubt should be resolved in favor of taking evidence. *Id.*

The Second Circuit used a sliding scale approach. *SEC v. Frank,* 388 F.2d 486 (2d

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[4] *See, also, Visual Sciences v. Integrated Communications, Inc., 660 F.2d 56, 58 (2d Cir. 1981), and Syntex Ophthalmics Inc. v. Tsuetaki, 701 F.2d 677, 682 (7th Cir. 1983). Both cases state that where issues of fact are conflicting, an injunction should not be issued unless an evidentiary hearing is conducted.*

Cir. 1968). Recognizing the tension between the need in a preliminary injunction for speedy action and the desire for certainty and complete fairness, the court recognizes that a hearing may not be needed in cases where the issues are clear and not in serious dispute. *See Medeco Security Locks, Inc. v. Swiderek,* 680 F.2d 37, 38 (7th Cir. 1982).

However, the Second Circuit also has concluded that "in no uncertain terms that where there are disputed issues of fact...a temporary injunction should not issue on the basis of affidavits save in instances of extreme urgency." *Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Co.,* 443 F.2d 867 (2d Cir. 1971).[5] The Sixth Circuit also has encouraged the use of evidentiary hearings, writing:

> If the allegations of a complaint are denied by a defendant...he is entitled to a hearing, which includes the right to offer evidence in support of his factual claims...A hearing embodies the right to be heard on the controverted facts, as well as upon the law. *Securities & Exchange Commission v. G. Weeks Securities,* 678 F.2d 649, 651 (6th Cir. 1982.)

When a preliminary injunction is granted or refused, Rule 52(a) requires courts to issue findings of fact and conclusions of law. *See Fed.R.Civ.P. 52(a).* The reason is to permit the appellate court to review the decision. *Weitzman v. Stein,* 897 F.2d 653, 658 (2d. Cir. 1990). If a court issuing an injunction does not fully comply with this rule, an appellate court can still proceed if it can "discern enough solid facts from the record to make a decision." *Id.*

However, if the findings are inadequate to explain the basis for the ruling as to permit meaningful review, an appellate court must vacate the injunction and remand for further findings. *Professional Plan Examiners of New Jersey v. Lefante,* 750 F.2d 282, 288

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[5] *In this case, the record shows no exigent or emergency circumstances. See Security and Exchange Commission, 300 F.2d at 490.*

(3rd Cir. 1984).

The elements necessary to obtain a preliminary injunction are: 1) A substantial likelihood of success; 2) Immediate irreparable injury; 3) Balance of harms favors granting the injunction, and 4) the injunction is not against the public interest. *Koerpel v. Heckler*, 797 F.2d 858, 866 (10th Cir. 1986). The movant must establish a prima facie case on these elements before a preliminary injunction can be granted. *Id.*

At the August 2, 1991 Show Cause Hearing, Salyer argued that the Debtor corporations had not met the above elements. Specifically, Salyer argued that no showing as to any immediate or irreparable injury to the Appellees was made. Among the other "facts" questioned by Salyer were whether the debtor corporations were insolvent, disagreement as to the value of the exchanged stock, whether Salyer was an insider at the time of the various transfers and the circumstances surrounding the sale of the stock. *See Show Cause Hearing Transcript, pp. 38-52.*[6]

Salyer repeatedly requested an evidentiary hearing, which was denied. No evidence was presented into the record at the hearing. In addition, the record on appeal is sparse. First, the record does not include the sworn bankruptcy schedules filed by the debtor

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[6] *On page 60 of the Show Cause Hearing Transcript, the following exchange illustrates Salyer's questions about the Bankruptcy Court's factual findings:*
Mr. Bratton: One of the three elements you mentioned was that the debtors have stated in their schedule that they are insolvent --
The Court: Yeah, they have not.
Mr. Bratton: They have not. The main debtor here, MAPS, in its schedules filed in this Court within a few months shows substantial solvency.
The Court: Okay.
Mr. Bratton: And that would--
The Court: Change that and show Chapter 11. I know than an inventory and appraisal was being made, and probably has been made. And I have -- I draw an inference that the appraised value is not going to be anywhere near the value that was stated in the schedule. I'm not bound by either one, of course. It may be worth the $7,000,000 that you have said.
Mr. Bratton: In any event, Your honor, we do object to the Court entering a ruling without taking evidence.

corporations.[7] Secondly, no affidavits or any other adequate "paper record" exists, except the Debtor corporations' Complaint and various other documents filed in the case.[8]

The Bankruptcy Court then issued the following findings of fact: The bankruptcies of the Whitefields and MAPS were less than one year after Whitefield agreed, on July 13, 1991, to purchase Salyer's stock in MAPS; Salyer was an officer, director and 50 percent stockholder of MAPS until approximately July 13, 1991, and some of the payments in respect to Whitefield's obligations were made by other debtor corporations. *Preliminary Injunction, page 2.* The Bankruptcy Court then concluded the above facts presented "three controversial or suspicious actions here within a year of insolvency", which authorized it to act under Section 105.

Also, as Salyer points out, the debtors' filed their Complaint on July 30, 1991. Three days later, the Show Cause hearing was held. Given the fact the Bankruptcy Court had only three days to evaluate the case -- coupled with the other circumstances -- there is no indication that evidence already in the court's possession enabled it to reach its conclusion.

In his appellate brief, Salyer contends that Appellees did not make a prima facie

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[7] *The parties bear the burden of submitting evidence into the record on appeal. See McEwen v. City of Norman, 926 F.2d 1539, 1550 (10th Cir. 1991). In this case, neither party submitted the sworn bankruptcy schedules concerning Whitefield and the Debtor corporations into the record.*

[8] *The Designation Of Record, which was filed August 16, 1991, states the following is included in the record on appeal: 1) Complaint For Recovery of Property filed on July 30, 1991; 2) Temporary Restraining Order entered on July 30, 1991; 3) Objection To Request For Preliminary Injunction filed on August 1, 1991; 4) Preliminary Injunction entered on August 8, 1991, and 5) Transcript Of Hearing for August 2, 1991. The Counter-Designation Of Record submitted the following additional items to be included in the record of appeal: 1) Summons to Salyer filed on August 2, 1991; 2) Certificate of Service filed on the same day; 3) Notice of Appeal filed on August 13, 1991; 4) Notice of Default and Motion for Modification of Stay and for Order of Abandonment filed on April 22, 1991; 4) Amended Notice of Default filed on May 1, 1991; 6) Objection of Debtors To Amended Notice of Default filed on May 15, 1991; 6) Objection on Behalf of Mid-Americas Process Services, Inc. filed on May 17, 1991; 7) Motion by Rick Salyer to Strike Objection of Debtors filed on May 20, 1991, and 8) Response to Creditor Rick Salyer's Motion To Strike Objection filed on May 24, 1991.*

showing of the irreparable harm element. After examining the record on appeal, this Court agrees. No evidence indicates or even suggests that Salyer planned to dissipate his assets or flee. The lack of evidence also makes it difficult to determine whether any of the other three elements needed for a preliminary injunction were met. There must be some basis for meaningful review of the Bankruptcy Court's action.

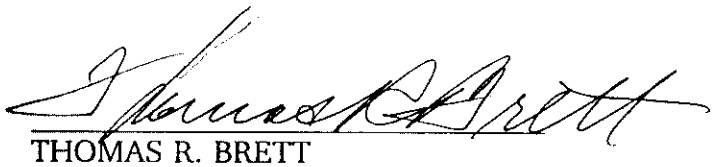
The cases examined on this issue have a common thread: balancing the need for speedy action against the need for complete fairness. In this case, as a matter of fair play, an evidentiary hearing should have been conducted, especially since no extreme urgency existed.

Rule 52(a) was designed, in part, to allow appellate courts a chance at meaningful review of a trial court's decision. The undersigned does not believe the record in this case permits meaningful review.

Conclusion

Therefore, this Court holds that an evidentiary hearing should have been held regarding disputed issues prior to the granting of a preliminary injunction against Salyer. The preliminary injunction is vacated, and the case is remanded to the Bankruptcy Court for an evidentiary hearing. The status quo shall, however, be maintained until the Bankruptcy Court has had an opportunity to conduct an adequate evidentiary hearing and enter its ruling. The Bankruptcy Court also may choose, pursuant to Bankruptcy Rule 7065, to order the trial of the action on the merits to be advanced and consolidated with the hearing of the preliminary injunction application.

SO ORDERED THIS 18 day of Mar, 1992.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

MAR 1 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, Plaintiff,	)	
-vs-	)	CIVIL NUMBER 91-C-641 C
WALTER J. EVANS, 239-04-5966 Defendant,	)	

JUDGMENT BY DEFAULT

Upon application of the Plaintiff, the Court, having examined the records and files in this cause, and being fully advised in the premises, finds that service of process in manner and form provided by law was had upon the defendant, more than twenty days prior to this date.

And it further appearing to the court that the defendant has failed to appear, plead or answer, but has wholly made default, whereupon said defendant is adjudged in default.

And it further appearing to the court that the said plaintiff has filed an Affidavit pursuant to the Soldiers' and Sailors' Civil Relief act of 1940, as amended, and the court finds that the possibility of impairing any right thereunder of the defendant, is remote and that an order should be issued herein directing entry of judgment.

NOTE: THIS ORDER IS TO BE MAILED
[illegible] AND
[illegible]

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, United States of America, have and recover from the defendant, the sum of $857.04 ($857.04 principal, $0 interest and costs as of April 5, 1991), with interest thereafter at the rate of 0% per annum until judgment and thereafter at the rate of 4.5% until paid, and the costs of this action accrued and accruing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that this judgment be entered.

OK

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CLIFTON R. BYRD
District Counsel

CLIFTON R. BYRD
Attorney
Department of Veterans Affairs
Office of District Counsel
125 South Main Street
Muskogee, OK 74401
(918) 687-2191

03/12/92
DAR/jb

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

FILED
MAR 18 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

HARTFORD INSURANCE GROUP OF THE MIDWEST,	)	
Plaintiff,	)	
vs.	)	
BRAINERD HELICOPTER SERVICE, INC.,	)	
Defendant.	)	NO. 91-C-878 B

ORDER

For good cause shown, and upon application of the plaintiff, the above captioned case is hereby dismissed without prejudice.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

FILED

MAR 17 1992

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

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

CAROL ANN LINDLEY, et al.,	)	
Plaintiffs-Appellees,	)	
vs.	)	No. 90-C-936-E
LARRY JOE LINDLEY, et al.,	)	
Defendants-Appellants.	)	

ORDER

This matter came before the undersigned on March 13, 1992 for oral argument on Plaintiffs' Motion for review of taxing of costs and Plaintiffs' Motion for attorneys fees as a Rule 11 sanction for an allegedly frivolous appeal. The Court has also considered the briefs, as appended, on file herein in light of the relevant legal authority. While the Court agrees with Plaintiffs that they are entitled to the costs of the transcript pursuant to Bankruptcy Rule 8014, the Court declines to accept Plaintiffs' view of the appeal as frivolous, pursuant to Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987).

IT IS THEREFORE ORDERED that Plaintiffs' request that the $2,200.00 for trial transcript be taxed as costs is granted; Plaintiffs' Motion for attorneys fees pursuant to Rule 11, Fed.R.Civ.P. is denied.

So ORDERED this 17th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 17 1992

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

BARBARA A. JANI, CHERYL A. ROACH AND RUSSELL E. ROACH,	)	
Plaintiffs,	)	CASE NO. 91-C-767-C
v.	)	
FLEET REAL ESTATE FUNDING CORP.	)	
Defendant.	)	

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW ON THIS 5th day of March, 1992, this matter comes on for hearing before me, the undersigned Judge for the United States District Court for the Northern District of Oklahoma, upon Plaintiffs' Application for Dismissal Without Prejudice.

WHEREUPON the Court having reviewed the Motion and Brief of the Plaintiff and the Objection and Brief of the Defendant and having heard arguments of counsel, finds that Plaintiffs' Motion to Dismiss Without Prejudice should be sustained upon the condition that any subsequent refiling of this or any similar action shall occur only in the United States District Court for the Northern District of Oklahoma and in no other court.

(Signed) H. Dale Cook

H. DALE COOK
United States District Judge

R. Stephen Haynes, OBA No. 4009
HAYNES & MONTGOMERY
6307 Waterford Boulevard, Suite 150
Oklahoma City, OK 73118
(405) 840-0501
Attorneys for Defendant

approved as to form

John B. Nicks
1448 South Carson
Tulsa, OK 74119
Attorney for Plaintiffs

PLEADINGS\FLEET\DISMISSAL.WOP

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

DONALD LEE DIES Plaintiff, V. GROUP BENEFIT PLAN FOR EMPLOYEES OF AMCA INTERNATIONAL CORP. and JASON, INC. HEALTH AND WELFARE PLAN Defendants.	)	CASE NO. 91-C-195-B

FILED
MAR 17 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before the Court on cross Motions For Summary Judgment. Further, the Court has for consideration Plaintiff's, Donald Lee Dies, (Dies) Demand For Jury Trial.

This is an ERISA[1] action wherein Plaintiff, a former employee of Braden Manufacturing, also known as Braden-Morgan Pump (Braden), formerly a unit of AMCA International Corporation, was insured under a major medical plan (the AMCA Capital Plan). The Plan is an "employee welfare benefit plan" as that term is defined in 29 U.S.C. § 1002(1). There is no dispute the matter is controlled in its entirety by ERISA.

Plaintiff filed a claim for treatment he underwent for a condition he alleges was temporal mandibular joint syndrome (TMJ). Plaintiff claims benefits of $13,900 were denied him because the

[1] The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq*.

medical carrier refused to recognize his treatment was medical rather than dental. Part of the treatment was the placement of 13 fixed orthotic devices (crowns) on Plaintiff's upper teeth and 14 crowns on his lower teeth.

Defendants admit that charges for treatment or diagnostic services rendered or prescribed by a physician for non-surgical TMJ were covered expenses under the plan and that, previously, benefits were provided Plaintiff for a temporary splint.

In Plaintiff's Motion For Summary Judgment, he contends under Proposition One: (1) He has exhausted his administrative remedies under the plan, and (2) He is entitled to a *de novo* review by the Court, and (3) Interpretation of the plan is an appropriate matter for summary judgment. Under Proposition Two, Plaintiff contends (1) Treatment of TMJ syndrome by capping teeth is a covered expense under the plan; (2) capping the teeth does not constitute treatment of the teeth.

Defendants responded, urging that Plaintiff's Motion was premature since much discovery had not then been accomplished and Defendants were unable to refute the factual allegations.

Defendants, Group Benefit Plan for Employees of AMCA International Corporation, and Jason, Inc., Health and Welfare Plan, filed their cross-motion for Summary Judgment setting forth four issues: 1. The denial of Plaintiff's claims must be upheld unless arbitrary and capricious; 2. Defendants' interpretation of the plan was reasonable and rationally related to the plan's purposes; 3. The decision would be upheld even under a *de novo*

standard of review; 4. Plaintiff's claims are properly disposed of by summary judgment.

Defendants did not argue, in their cross-motion for summary judgment or in their response to Plaintiff's motion for summary judgment, that Plaintiff has failed to exhaust his administrative remedies (an earlier affirmative defense). Plaintiff included this issue in his Motion for Summary Judgment. The Court concludes Plaintiff should be and is granted partial summary judgment on this issue.

Next, the Court considers the *de novo* review issue. In **Firestone Tire and Robber Co. v. Bruch**, 489 U.S. 101 (1989), the Supreme Court determined ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B), which had resulted in an adoption of the arbitrary and capricious standard of review by some courts.[2] The **Firestone** Court rejected the "wholesale importation of the arbitrary and capricious standard into ERISA" as "unwarranted". Id. at _____. The Court concludes Plaintiff is entitled to a *de novo* review of the denial of his claim.

The parties agree the interpretation of the plan is a matter

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[2] Defendants' citation of **Woolsey v. Marion Laboratories, Inc.**, 934 F.2d 1452 (10th Cir. 1991), is inappropriate. **Woolsey** involved an employee's pension benefits, distributable by the Plan Administrator, "*in his sole discretion*", (emphasis in original). The decisions of plan administrators will be upheld unless they are arbitrary and capricious, not supported by substantial evidence or erroneous on a question of law. **Pratt v. Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust**, 920 F.2d 651 (10th Cir.1990). However, this "deferential standard of review" is only appropriate where the exercise of discretionary power is under review, absent in the present case. **Firestone**, *supra*.

for summary judgment. However, Defendants argue Plaintiff has failed to establish that Plaintiff was indeed suffering from a TMJ disorder. Prior to considering this seeming factual dispute as to a genuine and critical issue, the Court must first determine whether coverage under the Plan exists assuming a valid TMJ diagnosis.

The Plan definitions include reference to TMJ, as follows:

> **TMJ and Related Care** -- Care by any method connected with the detection or correction of jaw joint problems, including Temporomandibular Joint Syndrome and craniomandibular disorders, or other conditions of the joints linking the jawbone and skull, including the complex of muscles, nervous, and other tissue related to that joint.

Among the Covered Expenses itemized by the Plan are:

> 8. Charges for treatment or diagnostic services rendered or prescribed by a Physician for either non-surgical TMJ and Related Care or Skeletal Adjustments.

In his Motion For Summary Judgment, Plaintiff argues that Dr. Nadia Wheeler, who performed the placement of the orthotic devices in Plaintiff's mouth, fits within the definition of physician. It is apparently undisputed that Dr. Wheeler is an English "Doctor of Dental Medicine", abbreviated oddly as D.M.D. In any event, Defendants have not countered Plaintiff's designation of Dr. Wheeler as a physician who, under the Plan, may render or prescribe services for non-surgical TMJ.

The Court concludes that, Plaintiff has coverage under the Plan for non-surgical TMJ if in fact Plaintiff had such malady. The Court further concludes treatment of TMJ, by orthotic devices, is

not precluded by the Plan as "Treatment of the teeth or supporting tissues of the teeth . . "[3]

The Court now considers the remaining issue, i.e. is there any factual dispute as to Plaintiff's alleged condition of TMJ.

Plaintiff's doctor, Dr. Nadia Wheeler, made a diagnosis of "craniovertebral stomatognathic postural stress arthropathy and stomatognathic rhabdomyositis", (Defendants' Ex. D), which the parties treat as synonymous with a TMJ disorder. Defendants' expert, D. Michael Spradlin, D.D.S., a dental surgeon of over twenty years experience, reviewed the diagnostic and treatment materials used by Dr. Wheeler, and concluded "it is unlikely that Mr. Dies suffered from a TMJ disorder. It is impossible to make a diagnosis of a TMJ disorder from the information which has been provided by Dr. Wheeler; the information provided does not support a diagnosis of a TMJ disorder. Further, assuming a TMJ disorder existed, the information does not support treatment involving a complete mouth reconstruction if the reconstruction was intended to treat a TMJ disorder." (Defendants' Ex. N).

The Court concludes a genuine issue of material fact exists as to the issue of Plaintiff's TMJ diagnosis, and on the further issue of the propriety of orthotic devices for TMJ, thereby precluding summary judgment. Accordingly, Plaintiff's and Defendants' Cross-Motions For Summary Judgment should be DENIED on the issue of the Plaintiff's alleged TMJ condition. Partial Summary Judgment is GRANTED Plaintiff on the issue of having exhausted his

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[3] Item 6, Limitations and Exclusions.

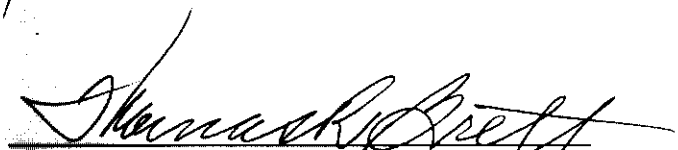
administrative remedies under ERISA. Partial Summary Judgment is GRANTED Plaintiff on the issue of Plan coverage of non-surgical treatment of TMJ, including, if appropriate, the placement of orthotic devices.

JURY DEMAND

Plaintiff has demanded a jury. Defendants contend Plaintiff is not entitled to a jury under an ERISA claim. More recent case law indicates a jury trial would be appropriate in an action on the insurance contract, i. e. an action at law rather than in equity.

Essential facts herein are in dispute; therefore, the Court concludes Plaintiff's jury trial demand is, accordingly, GRANTED.

IT IS SO ORDERED this 17th 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 17 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

MID-AMERICAS PROCESS SERVICES, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 91-C-697-E
RICK SALYER,	)	
Defendant.	)	

ORDER

The Court has before it for consideration Defendant's Motion for Withdrawal of Reference and Demand for Jury Trial. After a review of the pleadings, the Court finds Defendant failed to comply with Rule B-6(3). Accordingly, the Court finds Defendant's Motion for Withdrawal of Reference and Demand for Jury Trial should be denied.

IT IS THEREFORE ORDERED that Defendant's Motion for Withdrawal of Reference and Demand for Jury Trial is denied.

ORDERED this 17th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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FILED

MAR 17 1992

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

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

DR. JOHN ABEL, et al., Plaintiffs,	)	
vs.	)	No. 91-C-902-E
CHARLES SCHWAB & CO., INC., et al., Defendants.	)	

ORDER OF REMAND

This matter is before the Court on Plaintiffs' Motion for an Order to remand this case to state court and their related motion for an award of attorney fees and costs pursuant to 28 U.S.C. §1447(c). The Court heard oral arguments by the parties on March 13, 1992. The Court has reviewed the briefs of the parties in light of the relevant legal authority and now finds that this case lacks the requisite complete diversity because at the time the lawsuit was filed, Defendant McFarlin was a citizen of Oklahoma. Accordingly, this Court does not have subject matter jurisdiction in this case and remand is appropriate. However, given the equities of the case as evidenced by the record, the Court declines to award Plaintiffs their costs and attorney fees incurred herein.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Remand is granted; Plaintiffs' Motion for Attorney fees and Related Costs is denied.

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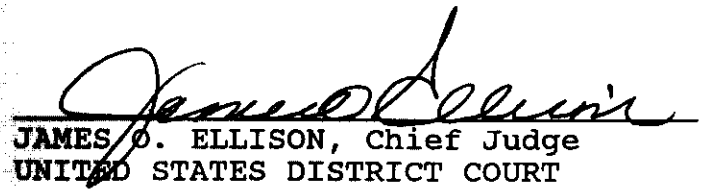
ORDERED this 17TH day of March, 1992.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

FILED

MAR 17 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

GARY DAVIS, Plaintiff, vs. MEMAC INDUSTRIES, INC., a foreign corporation, Defendant.	)	Case No. 91-C-958-E

JOINT STIPULATION ~~FOR~~ of DISMISSAL WITHOUT PREJUDICE

COME NOW the Parties above named, by and through their attorneys, and hereby dismiss without prejudice Plaintiff Gary Davis' cause of action against the Defendant Memac Industries, Inc.

DATED this 17 day of March, 1992.

Respectfully submitted,

By Daniel B. Gossett
DANIEL B. GOSSETT, OBA 013687
Attorney for Plaintiff

STIPE, GOSSETT, STIPE, HARPER,
ESTES, McCUNE & PARKS
P.O. Box 701110
Tulsa, Oklahoma 74170
(918) 749-0749

By Richard C. Honn
RICHARD C. HONN, OBA 4343
Attorney for Defendant

JONES, GIVENS, GOTCHER & BOGAN P.C.
3800 First National Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4309
(918) 581-8200

CERTIFICATE OF MAILING

I hereby certify that on this 17 day of March, 1992, I mailed a true and correct copy of the above and foregoing instrument with sufficient postage prepaid thereon to:

Dan A. Rogers
Richard C. Honn
Attorneys at Law
3800 First National Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4309

Mark R. Riegel
Attorney at Law
PO Box 667
Lancaster, Ohio 43130-0667

Daniel Grassell

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

FILED

MAR 17 1992

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

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,	)	
Plaintiff,	)	
v.	)	No. 92-C-202 B
JAMES A. MAHONEY,	)	
Defendant.	)	

NOTICE OF DISMISSAL WITHOUT PREJUDICE

The Plaintiff, Provident Life & Accident Insurance Company, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismisses this action without prejudice. No answer or other pleading or motion has been filed by the Defendant.

FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS

By Jody R. Nathan

Joseph R. Farris, #2835
Jody R. Nathan, #11685
525 South Main, Suite 1400
Tulsa, OK 74103
(918) 583-7129

3

CERTIFICATE OF MAILING

This is to certify that a full, true and correct copy of the above and foregoing was mailed this 17 day of March, 1992, with sufficient postage prepaid thereon to:

James A. Mahoney
2539 East 22nd Place
Tulsa, OK 74114

Joseph H. Paulk
Suite 20
2021 South Lewis
Tulsa, OK 74104

Judy R. Hatch

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

FILED
MAR 18 1992
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WENDY SEGROVES, a minor, born August 10, 1975, by and through her natural mother, GAYLE JEAN SEGROVES, as next friend,	)	
Plaintiff,	)	
vs.	)	**No. 91-C-182-C**
DAVID HARTSON, M.D.,	)	
Defendant.	)	

ORDER OF DISMISSAL

Now on this 13th day of March, 1992, the above matter comes on for hearing before the undersigned Judge of the United States District for the Northern District of Oklahoma upon the Joint Stipulation to Dismiss Without Prejudice filed by the parties herein--copy of Joint Stipulation attached; and the Court being fully advised in the premises, and upon consideration thereof, finds that the above-entitled cause of action should be dismissed without prejudice, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED that the above-entitled cause of action be and it is hereby dismissed without prejudice, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT JUDGE

csg F:\WP\88319\DISMISS.ORD

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

WENDY SEGROVES, a minor, born August 10, 1975, by and through her natural mother, GAYLE JEAN SEGROVES, as next friend,	)	
Plaintiff,	)	
vs.	)	**No. 91-C-182-C**
DAVID HARTSON, M.D.,	)	
Defendant.	)	

JOINT STIPULATION TO DISMISS WITHOUT PREJUDICE

COME NOW the parties herein and make joint stipulation to the Court to dismiss the above-entitled cause of action without prejudice, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures.

WHEREFORE, the parties respectfully requests that the above-caption case be dismissed without prejudice.

By _____
Matt A. Melone, Attorney for Plaintiffs

By _____
Joseph F. Glass, Attorney for
Defendant, David Hartson, M.D.

lkm F:\WP\88319\STIPULAT

CLOSED

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

3-19-92

CONOCO INC., a Delaware corporation, Plaintiff,	)	
v.	)	No. 92-C-014-B
ANTHONY ARKEKETA, an individual; PHYLLIS DAILEY, an individual; CHRISTI SIMPSON, an individual; WATSON MANAGEMENT GROUP, INC., an Oklahoma corporation; CEJA CORPORATION, an Oklahoma corporation; CORONADO PETROLEUM CORPORATION, an Oklahoma corporation; RONCO ENERGY RESOURCES, INC., an Oklahoma corporation; and BECKER OIL CORPORATION, an Oklahoma corporation, Defendants.	)	

FILED
MAR 16 1992
Richard M. Lawrence, Clerk
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes on for consideration upon the Motion to Dismiss under Fed.R.Civ.P. 12(b)(1), filed by Tribal Defendants based upon an alleged lack of subject matter jurisdiction because Plaintiff failed to exhaust its tribal remedies.

In June, 1991, the Ponca Indian Tribe adopted an Oil and Gas Severance Tax, imposing an eight percent severance tax upon the gross market value of all oil or natural gas which is "produced, severed, saved and removed from any land within the Tribe's jurisdiction". Tax Ordinance, §§501, 502. Tribal jurisdiction is defined to include allotments held in trust for Ponca tribal members. Tax Ordinance, §100(h). The incidence of the tax is on the operator or working interest owner of a well on land within

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Ponca territory. Tax Ordinance, §506. The first purchaser of oil and gas taken from such land is required to withhold the tax from the purchase price and pay the tax to the Tax Commission. Tax Ordinance, §507.

As the first purchaser of oil and gas from allotted Ponca lands, Conoco was notified in August 1991 by the Ponca tribe that it was required to remit severance taxes to the Ponca Tax Commission. Plaintiff requested an appeal before the Tax Commission. However, because Plaintiff refused to pay the taxes under protest, a prerequisite to appeal, the Commission dismissed Plaintiff's appeal, without prejudice to Plaintiff's right to pay the taxes under protest within ten days, and then have its appeal heard on the merits as if timely filed.

Rather than pay the taxes under protest, Plaintiff commenced the present action. Defendants contend Plaintiffs have not exhausted tribal remedies, a prerequisite to obtaining federal question jurisdiction. Plaintiffs argue that exhaustion in this case is not required, but, nevertheless all available tribal remedies have been exhausted.

Whether a tribal court has civil jurisdiction over a non-Indian presents a federal question under 28 U.S.C. §1331 sufficient for subject matter jurisdiction in federal court. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 85 L.Ed. 2d 818 (1985). However, as a matter of comity, a federal court should not exercise jurisdiction until the parties have exhausted tribal remedies. Id.; Tillet v. Lujan, 931 F.2d 636, 640 (10th Cir. 1991).

If, in the process of exhausting tribal remedies, the tribal court determines it has jurisdiction, a Plaintiff may challenge that ruling in the District Court. National Farmers, 85 L.Ed. 2d at 853. Unless the federal court determines that the tribal court lacked jurisdiction, however, relitigation of issues raised and resolved by the tribal court is precluded. Iowa Mutual Insur. Co. v. LaPlante, 480 U.S. 9, 19, 94 L.Ed. 2d 10 (1987).

Plaintiff argues that this case falls within the narrow exception to the exhaustion requirement which the Court outlined in a footnote to the National Farmers case:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

National Farmers, 105 S.Ct. at 2454, n. 21.

Specifically, Plaintiff avers that the assertion of jurisdiction by the Poncas over allotted land is patently violative of jurisdictional prohibitions because the Poncas have asserted sovereignty over land subject to the exclusive jurisdiction of the United States. In effect, Plaintiff asks the Court to determine jurisdiction by examining sovereignty, a request that flies in the face of National Farmers, where the Court opined "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, . . . [and] that examination should be conducted in the first instance in the Tribal Court itself." National Farmers, 105 S.Ct. at 2453-54.

Plaintiff also argues that it has exhausted tribal remedies and any additional attempts would be futile. Specifically, Plaintiff asserts that once its appeal was rejected by the Ponca Tax Commission, its remedies were exhausted because challenges to the Commission are allowed only for recovery of taxes paid under protest. Plaintiff challenges this jurisdictional requirement that taxes be paid under protest on due process grounds.

First, Plaintiff contends the tax ordinance fails to provide a meaningful opportunity to contest tax assessment and fails to provide sufficient means for refund. The Court finds, however, that the mechanisms in place at the time of the filing of this petition to challenge assessment of taxes were sufficient to satisfy due process.[1] Under the ordinance, the Plaintiff could have paid the taxes under protest and requested appeal before the Tax Commission. Plaintiff could then have brought an action against the Tax Commission in the Tribal Business Committee or the Court of Indian Offenses to recover the amount of taxes, penalties, and interest paid under protest. If, as is apparent here, the Plaintiff did not wish to file an appeal with the Business Committee, who adopted the ordinance, it could have stipulated to the civil jurisdiction of the Court of Indian Offenses. Exhaustion is not excused by a Plaintiff's failure to avail himself of tribal forums. White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir.

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[1]The Court notes that since the filing of this petition, the Ponca Tribe has established a Tribal Tax Court as the exclusive forum of last resort for adjudication of appeals brought under the Ponca Tax Ordinance. Resolution No. 25-012292, dated January 22, 1992.

1984).

Moreover, the Court is not persuaded by Plaintiff's argument that it would be futile within the meaning of National Farmers for the Business Committee to consider, in the first instance, the propriety of the tax. If it is presumed in every instance that tribal judges or those acting as judges do not act independently of tribal government, the mandate of National Farmers could be avoided altogether on grounds of futility.

The Court also finds the ordinance provides sufficiently for refund. If the tribal court finds the tax was erroneously imposed, refund is mandated. Tax Ordinance §124. Such a provision adequately protects a Plaintiff's due process rights. Atcheson, Topeka, and Santa Fe Railway Co. v. O'Connor, 223 U.S. 280, 56 L.Ed. 436 (1912). Moreover, payments made under protest are placed in an interest bearing account and are not released until the final order is issued on appeal. Tax Ordinance §119(c). Thus, contrary to Defendant's argument, the Ordinance does "provide clear and certain remedy."

Second, Plaintiff claims due process is violated because the Poncas have not waived sovereign immunity and, therefore, Plaintiff would be unable to get its money back. Plaintiff's argument that the ordinance fails to explicitly require the Ponca Tribe to repay taxes paid under protest in the event of an adverse judgment against the Tribe, and that, therefore, the Poncas have failed to entirely waive sovereign immunity is without merit. The Ordinance expressly provides for suit against the Tax Commission and for

refund in the event an appeal is successful. Tax Ordinance §124. Moreover, should the Tax Commission fail to make refund in violation of a tribal court order, sovereign immunity would not extend to the tribal officials acting beyond the scope of their authority. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59, 56 L.Ed. 2d 106 (1978).

Thus, sovereign immunity is not a valid excuse for Plaintiff's failure to pay under protest. Plaintiff should have either paid under protest and proceeded through the review process or, as Defendant suggests, should have appealed the Tax Commission's Order. Indeed, tribal appellate courts should have the opportunity to review decisions of lower forums, and complete appellate review is a part of the exhaustion process. LaPlante, 480 U.S. 9, 16-17, 94 L.Ed. 2d 10 (1987).

The Court finds that exhaustion of tribal remedies is required in this instance; the exceptions to exhaustion mentioned in National Farmers do not apply. Furthermore, this case, which challenges the authority of the Poncas to enact and enforce its oil and gas severance tax, presents an issue at the very heart of tribal jurisdiction. The Court further finds that Plaintiff failed to exhaust tribal remedies. The Court, therefore, concludes Tribal Defendants' Motion to Dismiss, upon the ground of lack of subject matter jurisdiction, should be and the same is hereby GRANTED.[2]

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[2]Premature lodging of this matter in this Court should not prejudice Plaintiff from timely proceeding in the Tribal Court.

IT IS SO ORDERED, this 13th day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

5/85

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

PATTY ANN FREEMAN Plaintiff(s), vs. SHIRLEY SMITH Defendant(s).	)	No. 90-C-19-E

FILED
MAR 16 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER

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

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

In the action herein, notice pursuant to Rule 36(a) was mailed to counsel of record or to the parties, at their last address of record with the Court, on February 12, 19 92. No action has been taken in the case within thirty (30) days of the date of the notice.

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

Dated this 16TH day of March, 19 92.

UNITED STATES DISTRICT JUDGE

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

THOMAS LEE WARREN and TERRY LYNN WARREN, Husband and Wife,	)	
Plaintiffs,	)	
vs.	)	CASE NO: 89-C-972-B
VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN WERK, INC., and GMBH, a/k/a VOLKSWAGEN WERK AKTIENGESELLSHIFT, (A.G.),	)	
DEFENDANTS.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Upon Application for Dismissal with Prejudice by the Plaintiff herein, and for good cause being shown;

THE COURT FINDS that the above styled and numbered cause should be dismissed with prejudice to the refiling of any future action.

IT IS SO ORDERED, this 16th day of March, 1992.

THOMAS R. BRETT
United States District Judge

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

KATHY L. RYALS, Plaintiff,	)	
vs.	)	No. 91-C-693-E
CITY OF TULSA, OKLAHOMA, et al., Defendants.	)	

FILED
MAR 16 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER

The Court has before it for consideration Defendant Johnson's Motion to Dismiss, or in the alternative motion for a more definite statement. After reviewing all the pleadings, the Court finds Defendant Johnson's Motion to Dismiss should be denied; however, the Court finds Defendant Johnson's motion for a more definite statement should be granted to alleviate existing ambiguity with respect to Plaintiff's claims and remedy sought.

IT IS THEREFORE ORDERED that Defendant Johnson's Motion to Dismiss be denied; but Defendant Johnson's motion for a more definite statement is hereby granted and the Court allows Plaintiff to amend her complaint within twenty (20) days of this Order.

So ORDERED this 16th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

26

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

FILED
MAR 16 1992
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JOANN SELF, Plaintiff,	)	
vs.	)	No. 91-C-751-E
S. CARL MARK d/b/a PINNOCHIO'S CHILD CARE CENTER, Defendant.	)	

ORDER

The Court has before it for consideration Defendant's Motion to Dismiss. After a review of the pleadings, the Court finds Defendant's Motion to Dismiss should be granted pursuant to Rule 12(b)(6); however, the Court will allow Plaintiff twenty (20) days from this Order to amend her Complaint to name the correct party Defendant.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss be granted; this Court grants Plaintiff an additional twenty (20) days after this Order to amend her Complaint.

So ORDERED this 16TH day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

MAR 16 1992

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

MARY JANETTE CARR, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 91-C-846-E
AETNA LIFE INSURANCE CO.,	)	
Defendant.	)	

ORDER

The Court has before it for consideration Plaintiff, Mary Janette Carr's Motion to Dismiss without prejudice and disclaimer of interest. After review of said motion and Defendant's objection, the Court finds that Defendant's Motion to Dismiss without prejudice and disclaimer of interest should be denied.

Since funds have been interplead, the Court will grant Plaintiff a Motion to Dismiss with prejudice and disclaimer of interest if same is filed with the Court.

IT IS THEREFORE ORDERED that Plaintiff, Mary Janette Carr's Motion to Dismiss without prejudice and disclaimer of interest is denied.

So ORDERED this 16th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

CONOCO INC., a Delaware corporation, Plaintiff,	)	
v.	)	No. 92-C-014-B
ANTHONY ARKEKETA, an individual; PHYLLIS DAILEY, an individual; CHRISTI SIMPSON, an individual; WATSON MANAGEMENT GROUP, INC., an Oklahoma corporation; CEJA CORPORATION, an Oklahoma corporation; CORONADO PETROLEUM CORPORATION, an Oklahoma corporation; RONCO ENERGY RESOURCES, INC., an Oklahoma corporation; and BECKER OIL CORPORATION, an Oklahoma corporation, Defendants.	)	

FILED
MAR 16 1992
Richard M. Lawrence, Clerk
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes on for consideration upon the Motion to Dismiss under Fed.R.Civ.P. 12(b)(1), filed by Tribal Defendants based upon an alleged lack of subject matter jurisdiction because Plaintiff failed to exhaust its tribal remedies.

In June, 1991, the Ponca Indian Tribe adopted an Oil and Gas Severance Tax, imposing an eight percent severance tax upon the gross market value of all oil or natural gas which is "produced, severed, saved and removed from any land within the Tribe's jurisdiction". Tax Ordinance, §§501, 502. Tribal jurisdiction is defined to include allotments held in trust for Ponca tribal members. Tax Ordinance, §100(h). The incidence of the tax is on the operator or working interest owner of a well on land within

Ponca territory. Tax Ordinance, §506. The first purchaser of oil and gas taken from such land is required to withhold the tax from the purchase price and pay the tax to the Tax Commission. Tax Ordinance, §507.

As the first purchaser of oil and gas from allotted Ponca lands, Conoco was notified in August 1991 by the Ponca tribe that it was required to remit severance taxes to the Ponca Tax Commission. Plaintiff requested an appeal before the Tax Commission. However, because Plaintiff refused to pay the taxes under protest, a prerequisite to appeal, the Commission dismissed Plaintiff's appeal, without prejudice to Plaintiff's right to pay the taxes under protest within ten days, and then have its appeal heard on the merits as if timely filed.

Rather than pay the taxes under protest, Plaintiff commenced the present action. Defendants contend Plaintiffs have not exhausted tribal remedies, a prerequisite to obtaining federal question jurisdiction. Plaintiffs argue that exhaustion in this case is not required, but, nevertheless all available tribal remedies have been exhausted.

Whether a tribal court has civil jurisdiction over a non-Indian presents a federal question under 28 U.S.C. §1331 sufficient for subject matter jurisdiction in federal court. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 85 L.Ed. 2d 818 (1985). However, as a matter of comity, a federal court should not exercise jurisdiction until the parties have exhausted tribal remedies. Id.; Tillet v. Lujan, 931 F.2d 636, 640 (10th Cir. 1991).

If, in the process of exhausting tribal remedies, the tribal court determines it has jurisdiction, a Plaintiff may challenge that ruling in the District Court. National Farmers, 85 L.Ed. 2d at 853. Unless the federal court determines that the tribal court lacked jurisdiction, however, relitigation of issues raised and resolved by the tribal court is precluded. Iowa Mutual Insur. Co. v. LaPlante, 480 U.S. 9, 19, 94 L.Ed. 2d 10 (1987).

Plaintiff argues that this case falls within the narrow exception to the exhaustion requirement which the Court outlined in a footnote to the National Farmers case:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

National Farmers, 105 S.Ct. at 2454, n. 21.

Specifically, Plaintiff avers that the assertion of jurisdiction by the Poncas over allotted land is patently violative of jurisdictional prohibitions because the Poncas have asserted sovereignty over land subject to the exclusive jurisdiction of the United States. In effect, Plaintiff asks the Court to determine jurisdiction by examining sovereignty, a request that flies in the face of National Farmers, where the Court opined "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, . . . [and] that examination should be conducted in the first instance in the Tribal Court itself." National Farmers, 105 S.Ct. at 2453-54.

Plaintiff also argues that it has exhausted tribal remedies and any additional attempts would be futile. Specifically, Plaintiff asserts that once its appeal was rejected by the Ponca Tax Commission, its remedies were exhausted because challenges to the Commission are allowed only for recovery of taxes paid under protest. Plaintiff challenges this jurisdictional requirement that taxes be paid under protest on due process grounds.

First, Plaintiff contends the tax ordinance fails to provide a meaningful opportunity to contest tax assessment and fails to provide sufficient means for refund. The Court finds, however, that the mechanisms in place at the time of the filing of this petition to challenge assessment of taxes were sufficient to satisfy due process.[1] Under the ordinance, the Plaintiff could have paid the taxes under protest and requested appeal before the Tax Commission. Plaintiff could then have brought an action against the Tax Commission in the Tribal Business Committee or the Court of Indian Offenses to recover the amount of taxes, penalties, and interest paid under protest. If, as is apparent here, the Plaintiff did not wish to file an appeal with the Business Committee, who adopted the ordinance, it could have stipulated to the civil jurisdiction of the Court of Indian Offenses. Exhaustion is not excused by a Plaintiff's failure to avail himself of tribal forums. White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir.

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[1]The Court notes that since the filing of this petition, the Ponca Tribe has established a Tribal Tax Court as the exclusive forum of last resort for adjudication of appeals brought under the Ponca Tax Ordinance. Resolution No. 25-012292, dated January 22, 1992.

1984).

Moreover, the Court is not persuaded by Plaintiff's argument that it would be futile within the meaning of National Farmers for the Business Committee to consider, in the first instance, the propriety of the tax. If it is presumed in every instance that tribal judges or those acting as judges do not act independently of tribal government, the mandate of National Farmers could be avoided altogether on grounds of futility.

The Court also finds the ordinance provides sufficiently for refund. If the tribal court finds the tax was erroneously imposed, refund is mandated. Tax Ordinance §124. Such a provision adequately protects a Plaintiff's due process rights. Atcheson, Topeka, and Santa Fe Railway Co. v. O'Connor, 223 U.S. 280, 56 L.Ed. 436 (1912). Moreover, payments made under protest are placed in an interest bearing account and are not released until the final order is issued on appeal. Tax Ordinance §119(c). Thus, contrary to Defendant's argument, the Ordinance does "provide clear and certain remedy."

Second, Plaintiff claims due process is violated because the Poncas have not waived sovereign immunity and, therefore, Plaintiff would be unable to get its money back. Plaintiff's argument that the ordinance fails to explicitly require the Ponca Tribe to repay taxes paid under protest in the event of an adverse judgment against the Tribe, and that, therefore, the Poncas have failed to entirely waive sovereign immunity is without merit. The Ordinance expressly provides for suit against the Tax Commission and for

refund in the event an appeal is successful. Tax Ordinance §124. Moreover, should the Tax Commission fail to make refund in violation of a tribal court order, sovereign immunity would not extend to the tribal officials acting beyond the scope of their authority. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59, 56 L.Ed. 2d 106 (1978).

Thus, sovereign immunity is not a valid excuse for Plaintiff's failure to pay under protest. Plaintiff should have either paid under protest and proceeded through the review process or, as Defendant suggests, should have appealed the Tax Commission's Order. Indeed, tribal appellate courts should have the opportunity to review decisions of lower forums, and complete appellate review is a part of the exhaustion process. LaPlante, 480 U.S. 9, 16-17, 94 L.Ed. 2d 10 (1987).

The Court finds that exhaustion of tribal remedies is required in this instance; the exceptions to exhaustion mentioned in National Farmers do not apply. Furthermore, this case, which challenges the authority of the Poncas to enact and enforce its oil and gas severance tax, presents an issue at the very heart of tribal jurisdiction. The Court further finds that Plaintiff failed to exhaust tribal remedies. The Court, therefore, concludes Tribal Defendants' Motion to Dismiss, upon the ground of lack of subject matter jurisdiction, should be and the same is hereby GRANTED.[2]

---

[2]Premature lodging of this matter in this Court should not prejudice Plaintiff from timely proceeding in the Tribal Court.

IT IS SO ORDERED, this 13th day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

SUSAN G. McGILL and JAMES R. McGILL, Plaintiff,	)	
v.	)	No. 91-C-678-B
GHS HEALTH MAINTENANCE ORGANIZATION, INC., d/b/a BLUELINCS HMO, and GHS HOLDING COMPANY, INC., d/b/a BLUE CROSS AND BLUE SHIELD OF OKLAHOMA, Defendants.	)	

ORDER OF DISMISSAL

Pursuant to the Stipulation for Dismissal on file herein, it is ordered that the above-captioned cause is dismissed without prejudice each party to bear its own attorneys' fees and costs.

Signed this 13 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 13 1992

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

HUMCO, INC., a Kansas corporation, Plaintiff, vs. BORN, INC., a Delaware corporation, Defendant.	)	No. 90-C-973-E

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the Stipulation of Dismissal With Prejudice filed by all parties in this action,

IT IS THEREFORE ORDERED that the above captioned action be dismissed with prejudice. Each party to bear their own costs and attorney fees.

SO ORDERED this 13th day of March, 1992.

S/ JAMES O. ELLISON
United States District Judge

c:\bornhum\dismissal

FILED

MAR 13 1992

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

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

UNITED STATES OF AMERICA, Plaintiff,	}	
vs.	}	No. 89-CR-77-C 90-C-746-C
STEVEN WILLIAM VANLUE, Defendant.	}	

ORDER

Before the Court is defendant's motion pursuant to 28 U.S.C. §2255. On November 30, 1989, defendant entered pleas of guilty to Count 3 (21 U.S.C. §841(a)(1)) and Count 7 (18 U.S.C. §924(c)) of the Indictment. On January 18, 1990, defendant was sentenced to 60 months on each count, the sentences to run consecutively. No appeal was taken.

Defendant now asks the Court to vacate his sentence, alleging four grounds in his initial motion. First, defendant contends that his plea of guilty was made while he was mentally incompetent, suffering the side effects of cocaine and alcohol abuse and addiction. A defendant's incompetency at the time of pleading constitutes sufficient grounds for relief under §2255. See Schutz v. United States, 432 F.2d 25, 29 (10th Cir. 1970), cert. denied, 401 U.S. 1002 (1971). An evidentiary hearing is only required when the allegations amount to more than conclusory

statements. See United States v. Gutierrez, 839 F.2d 648, 652 (10th Cir. 1988); Nolan v. United States, 466 F.2d 522, 524 (10th Cir. 1972). Here, defendant's allegations are the epitome of conclusory statements. Further, they are contradicted by the plea record. Defendant signed, under oath, a petition to enter plea of guilty which affirmatively states that there is no question of competence. He made a similar statement under oath during the change of plea proceeding. The Court rejects this ground.

Second, defendant alleges that defense counsel gave him "wrong information" prior to sentencing. No specificity as to the information is provided. Again, the plea record contains statements under oath by defendant that he was satisfied with counsel and that he understood all facets of the proceedings as explained to him in detail by the Court. The assertion of counsel ineffectiveness is rejected. See Hill v. Lockhart, 474 U.S. 52 (1985).

Third, defendant alleges that defense counsel "coerced" him to make statements to the questions posed by the Court. The nature of this alleged coercion is not described and the allegation is flatly contradicted by the plea record. This ground fails as well.

Fourth, defendant alleges that he pled guilty without a full understanding of the nature of the plea. Once more, the Court is unpersuaded by this bare allegation when weighed against the

full explanation given by the Court at the time and defendant's statement that he understood the explanation. Relief is denied.

In his "motion to expand the record" filed on June 14, 1991, defendant raises a new ground involving application of the sentencing guidelines. A defendant cannot use §2255 to challenge the legality of matters that should have been raised on direct appeal, unless good cause is shown. United States v. Khan, 835 F.2d 749 (10th Cir. 1987), cert. denied, 487 U.S. 1222 (1988). Good cause has not been demonstrated and relief is denied.

Finally, petitioner has presented to the Court a "traverse" to respondent's answer to his motion. This document has not yet been filed, but will be by order of the Court. In it, petitioner alleges that there was no factual basis for his plea as to Count 7 because his actions do not fall within the statutory language. The Court disagrees, and is again persuaded that the plea record speaks for itself in refuting this claim, which defendant also characterizes as one alleging ineffective assistance of counsel. As a last argument in the "traverse", defendant contends that the plea agreement was breached because defendant received a higher sentence than he anticipated. The plea agreement clearly and unambiguously states, in an underlined sentence, that there were no agreements as to what sentence would be received. Defendant's argument is meritless. See also United States v. Knorr, 942 F.2d 1217 (7th Cir. 1991).

It is the Order of the Court that "petitioner's traverse to respondent's answer" be filed of record.

It is the further Order of the Court that the motion of defendant pursuant to 28 U.S.C. §2255 is hereby denied.

IT IS SO ORDERED this 13 day of March, 1992.

H. DALE COOK
United States District Judge

FILED

MAR 13 1992

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

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

OKLAHOMA OFFSET, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	No. 91-C-554-E
HARRIS GRAPHICS CORPORATION, a Delaware corporation,	)	
Defendant.	)	

ORDER

NOW, on this 13th day of March, 1992, upon joint application of the parties and for good cause shown, it is hereby ordered that the captioned action be administratively closed for thirty days from the date of this order, at which time the parties are ordered to advise the Court of the status of this matter.

S/ JAMES O. ELLISON

JUDGE OF THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GJL-1478

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

WILLIAM H. DAVIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	91-C-774-B
	)	
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. d/b/a MERRILL LYNCH CONSUMER MARKETS,	)	
	)	
Defendant.	)	

FILED
MAR 1 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This order pertains to the Motion to Compel Arbitration and For A Stay of Merrill Lynch, Pierce, Fenner & Smith, Inc. (Docket #2)[1], Plaintiff's Response and Objection to Defendant's Motion to Compel Arbitration and for a Stay (Docket #7), Plaintiff's Motion to Amend Complaint and Strike Breach of Contract Claim (Docket #8), and Merrill Lynch's Reply to Davis' Response to Merrill Lynch's Motion to Compel Arbitration (Docket #14). A hearing was held on November 17, 1991, and oral arguments were heard.

Plaintiff's claim that Defendant's floor traders failed to properly execute a futures contract transaction is presently pending in arbitration before the New York Stock Exchange, Inc. ("NYSE"). Plaintiff alleges that Defendant has been dilatory in the arbitration proceeding and this justifies this federal court action for intentional and negligent infliction of emotional distress and breach of contract. Defendant contends that

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

this action should be stayed and the court should compel arbitration of all the claims asserted. Plaintiff has conceded that his breach of contract claim is subject to arbitration, but alleges that his tort claims are not.

The Supreme Court found in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983), that ". . . as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense of arbitrability." The Court also concluded in Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985), that "the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." The Court noted that "[i]f Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim," such an intent would be deducible from a federal statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes. Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 227 (1987).

In Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334, 338 (7th Cir. 1984), the court concluded that "arbitration clauses are regarded with favor" and therefore claims of fraud under a contract, breach of fiduciary duty, negligence, and gross negligence were not immune from arbitration under a "broadly worded" arbitration clause which encompassed "any controversy arising out of or relating to the contract or its breach." The court found that "[t]hese common law causes of action obviously are controversies that arise out of and

relate to nothing other than the [plaintiffs'] contract . . . . The fraud alleged is fraud under the contract . . . the fraud claim in this case therefore is arbitrable, as are the other common law claims." Id. (citations omitted). The court noted that these types of actions could have been specifically excepted in the contract's arbitration clause, but were not. Id. "'In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . .'" Id. (citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960)).

The Tenth Circuit in Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 699 (10th Cir. 1989), affirmed the trial court's order compelling arbitration of state law fraud, breach of contract, breach of fiduciary duty, and negligent management claims along with his federal claims. The Customer Agreement signed by Adams contained an arbitration clause which read in part: "It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration . . . ." The court concluded that the agreement to arbitrate was not unconscionable or a contract of adhesion. A later decision by the court relied on Securities Exchange Commission Rule 15c2-2, which has been rescinded, to preclude arbitration of a securities fraud action. Coffey v. Dean Witter Reynolds, Inc., 891 F.2d 261, 264 (10th Cir. 1989). The rule prohibited arbitration clauses in brokerage agreements.

Plaintiff relies on the decision in Puller v. Guthrie, 565 F.2d 259 (2nd Cir. 1977). In that case, folksinger Arlo Guthrie entered into a contract with a concert promoter which provided that Guthrie would perform as the principal performer at a concert. The contract

contained an arbitration clause which provided that "the parties will submit every claim, dispute, controversy, or difference involving the musical services arising out of or connected with the contract to an arbitration board." Id. at 260. During the concert Guthrie told the audience that the promoter had "ripped" everyone off and that no one was getting paid. The promoter sued Guthrie in federal court, alleging that Guthrie breached the contract in failing to complete his performance and asserting a tort claim of slander for the statement made by Guthrie to the audience.

Guthrie sought arbitration of both claims, but the district court ordered the parties to proceed to trial on the tort claim and to arbitration on the contract claim. Guthrie appealed. The Second Circuit affirmed the district court, holding that "it is highly unlikely the parties could have foreseen, no less intended, to provide a forum for wholly unexpected tortious behavior." Id. at 261. The court stated: "'absent a clear, explicit statement . . . in the contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another, it must be assumed that the [parties] did not intend to withdraw such disputes from judicial authority.'" Id. (brackets added by Court) (citing Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Union, 359 F.2d 598, 603 (2nd Cir. 1966). The court explained that the slander claim fell "far beyond" the scope of the performance contract's arbitration clause. Id. It further noted that the tort action and the breach of contract action were separate and distinct because they did not raise the same questions.

The Tenth Circuit in Pierson noted that the tort claim in Fuller v. Guthrie fell "far beyond" the intended scope of the arbitration clause in the performance contract, and that

common law claims relating directly to a contract complaint about the way a broker handled an investment account did not fall "far beyond" an arbitration agreement in the investment contract or involve "wholly unexpected tortious behavior." Pierson, 742 F.2d at 339.

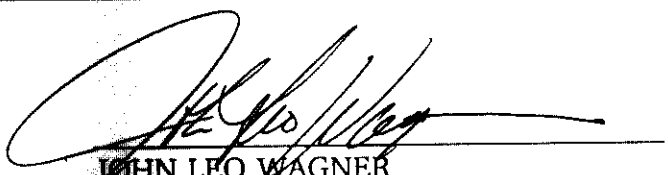
In this case, the arbitration clause in the brokerage contract provides in pertinent part:

> Any controversy arising out of or relating to your account, to transactions with Merrill Lynch pursuant to this agreement or breach thereof, shall be settled by arbitration . . . .

The court recognizes that arbitration clauses are to be broadly construed and any doubts concerning their scope must be resolved in favor of arbitration. The Tenth Circuit has found that tort claims are arbitrable. The court cannot say that the tort claims fall "far beyond" plaintiff's contract claim. Plaintiff complains about the way Defendant handled his account and the resulting tort claim concerning the performance of Defendant in arbitrating the contract claim does not arise from "wholly unexpected tortious behavior," as the tort claim in Fuller v. Guthrie did.

The Motion to Compel Arbitration and For a Stay of Merrill Lynch, Pierce, Fenner & Smith, Inc. (Docket #2) is granted. These proceedings are stayed pending the arbitration process. Plaintiff's Motion to Amend Complaint and Strike Breach of Contract Claim (Docket #8) is denied in light of the ruling on the Motion to Compel Arbitration and For a Stay of Merrill Lynch, Pierce, Fenner & Smith, Inc. (Docket #2).

Dated this 12th day of March, 1992.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

MAR 13 1992

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

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

ORDER DISMISSING CESSNA FINANCE CORPORATION

This Order is made upon the recommendation of John Leo Wagner, U.S. Magistrate Judge for the Northern District of Oklahoma, and upon the stipulation of all parties by and through their counsel.

The third-party defendant, Cessna Finance Corporation, has disclaimed any right, title or interest in and to the aircraft engines, the subject of the Complaint and Third-Party Complaint, and no other claims have been asserted against Cessna Finance Corporation.

IT IS HEREBY ORDERED that Cessna Finance Corporation be dismissed as a party defendant to this action.

S/ JAMES O. ELLISON

James O. Ellison
Judge of the District Court

B-CESSNA.OD

FILED

MAR 13 1992

RICHARD M. LAWRENCE
CLERK
U.S. DISTRICT COURT
N.D. OF OK.

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

UNITED STATES OF AMERICA,	}	
Plaintiff,	}	
vs.	}	No. 74-CR-128-C
	}	No. 92-C-99-C
GEARY WAYNE WOFFORD,	}	
Defendant.	}	

ORDER

Before the Court is the motion of the defendant pursuant to 28 U.S.C. §2255. Defendant was convicted by a jury of one count alleging violation of 18 U.S.C. §659. On February 11, 1975, he was sentenced by Judge Barrow to a term of six years. He appealed to the Tenth Circuit Court of Appeals solely on the ground of insufficiency of evidence. The conviction was affirmed by mandate filed on December 19, 1975.

Defendant now moves to vacate the sentence on the ground that the federal sentence should have been made to run concurrent to a state sentence which defendant was serving at the time. At the time of sentencing, a federal court had no power to render such a sentence. See United States v. Segal, 549 F.2d 1293, 1301 (9th Cir.), cert. denied, 431 U.S. 919 (1977). Moreover, defendant did not raise the issue on appeal. A defendant cannot use §2255 to

challenge the legality of matters that should have been raised on direct appeal, unless good cause is shown. United States v. Khan, 835 F.2d 749 (10th Cir. 1987), cert. denied, 487 U.S. 1222 (1988).

Finally, defendant contends that his counsel was ineffective for failing to file a motion pursuant to former Rule 35 F.R. Crim. P. The record reflects that by Order filed August 25, 1976, Judge Barrow treated a letter from the defendant as a Rule 35 motion and denied it. Accordingly, defendant's claim of ineffective counsel is likewise without merit.

It is the Order of the Court that the motion of defendant pursuant to 28 U.S.C. §2255 and the motion of defendant for appointment of counsel are hereby denied.

It is the further Order of the Court that the motion of defendant to proceed in forma pauperis is hereby granted.

IT IS SO ORDERED this 13th day of March, 1992.

H. DALE COOK
United States District Judge

FILED

MAR 12 1992

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

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

CANDY JEWEL COIT, Plaintiff, vs. OSAGE RAILROAD, et al., Defendants.	)	No. 91-C-12-E
and		
GLENDA HILL, et al., Plaintiffs, vs. OSAGE RAILROAD, et al., Defendants.	)	No. 91-C-22-E (Consolidated)

ORDER

The claim of Roy Anderson was considered in open Court, this 11th day of March, 1992. The Court finds that the claim should be dismissed without prejudice.

So ORDERED this 11th 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

KEVIN PARK, an individual, Plaintiff, vs. ARABESQUE CORPORATION, an Oklahoma corporation; and MONTE MORRIS FRIESNER, a bankrupt, by and through Ada Wynston, Trustee, and BETTE MITCHELL, an individual, Defendants.	)	91-C-198-B

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

ORDER

Now before the Court for its consideration is the motion to dismiss for failure to state a claim, filed by defendants Arabesque Corporation (Arabesque) and Bette Mitchell (Mitchell) pursuant to F.R.Cv.P. 12(b)(6).

I. Factual Background.

Plaintiff claims he was induced into mortgaging his residence in Toronto to fund an advance fee of $310,000.00 in Canadian dollars ($250,000.00 U.S. dollars) for a loan in the amount of $10.9 million dollars for the purchase of a hotel in Kitchner, Ontario. Plaintiff was first approached in January, 1988, by an acquaintance who told him the hotel, which had an appraised value of $17.1 million, could be bought initially for $8.9 million dollars and then immediately resold for $10.9 million dollars. Plaintiff was asked to use the equity in his residence to secure an advance of the funds in order to finance a Performance Guarantee

Fee on the loan to purchase the hotel. In return, plaintiff was promised a $100,000.00 (Canadian dollars) fee when the hotel was resold and plaintiff's mortgage was discharged.

The actual transactions surrounding the purchase of the hotel involve a number of actors. One party, Giamos, entered into an agreement (the "First Agreement") dated November 20, 1989, to purchase the hotel, for $8.9 million (Canadian dollars). Giamos then entered into an agreement (the "Second Agreement") to be completed in February, 1990, to sell the hotel to a company, Arabica-Ontario Properties, Inc. ("Arabica") for $10.9 million (Canadian dollars). Giamos and Arabica had arranged financing in the amount of $10.9 million with the Al Ahli Bank of Kuwait (the "Bank") through First Federal Bancorp (Canada) Inc., ("Bancorp") as agent to finance the Second Agreement. Giamos allegedly paid Bancorp a refundable deposit in the amount of $200,000.00 (U.S. dollars) to secure the Bank's commitment to finance the Second Agreement. Arabica was also to pay the Bank $250,000.00 (U.S. dollars) as a "Performance Guarantee Fee" prior to the advance of the $10.9 million by the Bank. A third party, Gontier, was to lend Arabica the Performance Guarantee Fee and receive a promissory note from Arabica.

Plaintiff alleges that he attended a meeting in February, 1989 at Gontier's lawyers' offices in order to execute the mortgage on his residence in favor of Gontier, so that Gontier could transfer the funds for the Performance Guarantee Fee to Arabica. None of the three defendants were at this meeting. Plaintiff alleges that

Arabica then directed the funds received from Gontier and secured, in part by plaintiff's mortgage, to the Bank of America to be put into a bank account held by Arabesque at the First National Bank of Fairland, Oklahoma. When the closing for the Second Agreement had not taken place as scheduled, plaintiff attended a second meeting at Gontier's lawyers' offices. Defendant Friesner attended that meeting and advised plaintiff that the deal was proceeding, but that obtaining the loan from the Bank would take longer than had been originally expected. According to plaintiff, Friesner represented himself to be an attorney, and assured plaintiff that he would not lose his residence in this deal.

Plaintiff alleges that demand has been made upon Friesner to return the $250,000.00 transferred to Arabesque, and that while Friesner has promised the return of the money, payment has not been made to date. Plaintiff alleges that Gontier has begun foreclosure proceedings against plaintiff's residence.

In his RICO Case Statement, plaintiff describes defendants Friesner and Mitchell as husband and wife. Mitchell is alleged to be the president and sole stockholder of Arabesque, and Friesner is alleged to be its chief executive officer, secretary, agent and holder of its power of attorney. Arabesque is alleged to have been incorporated in January, 1990.

II. Procedural Background.

Plaintiff's Complaint alleges jurisdiction based upon diversity of citizenship of the parties, pursuant to 28 U.S.C.

§1332. Plaintiff alleges violations of the Racketeer Influenced and Corrupt Organizations ("RICO") statutes, 18 U.S.C. §1962 (a)-(d), which have caused injury to his property, and seeks a civil damages remedy for those RICO violations pursuant to 18 U.S.C. §1964(c). Plaintiff also alleges claims under Oklahoma law for fraud and conversion. Defendants Mitchell's and Arabesque's motion to dismiss is directed to all of plaintiff's claims under RICO, and to the two claims under Oklahoma law. These defendants argue that plaintiff's complaint is deficient in failing to allege the necessary elements of these causes of action and thus should be dismissed.

The standard for deciding motions brought under F.R.Cv.P. 12(b)(6)[1] requires that "[a]ll well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." Cayman Exploration Corp. v. United Gas Pipe Line, 873 F.2d 1357, 1359 (10th Cir. 1989) (quoting Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984)). In granting a motion to dismiss brought pursuant to Rule 12(b)(6), the court must determine that the

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[1] In his Response Brief and RICO Case Statement, plaintiff refers the Court to his affidavit which he attached to a motion for default judgment filed against defendant Friesner. Plaintiff also attached exhibits to his Response Brief. The affidavit and exhibits constitute "matters outside the pleadings" and unless excluded from consideration by the Court, would require the conversion of defendants' motion to dismiss to a motion for summary judgment under F.R.Cv.P. 56. See F.R.Cv.P. 12(b). The Court has elected to proceed with the consideration of defendants' motion as one to dismiss under Rule 12(b)(6), finding that plaintiff's complaint and RICO Case Statement are legally insufficient to state causes of action against the moving defendants. The Court has thus excluded plaintiff's affidavit and exhibits from its consideration here.

plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Cayman, 873 F.2d at 1359.

III. RICO Causes of Action.

Pursuant to 18 U.S.C. §1964(c), a civil litigant may recover damages for injuries caused "in his business or property by reason of a violation of §1962." To have standing to sue under §1964(c), a plaintiff must show: (1) a violation of §1962; (2) injury to his business or property; and (3) that the violation caused the injury. O'Malley v. O'Neill, 887 F.2d 1557, 1561 (11th Cir. 1989). Mitchell and Arabesque argue that plaintiff has failed to meet these requirements for standing under §1964(c). After its review of the plaintiff's complaint and RICO Case Statement, the Court finds that the plaintiff lacks standing under §1964(c) on various grounds, as discussed below.

A. Failure to plead a violation of §1962.

The most apparent and immediately fatal flaw in plaintiff's allegations of a RICO-related injury is his failure to sufficiently allege the requisite "pattern of racketeering activity" as defined at 18 U.S.C. § 1961(5). To constitute such a "pattern", there must be "at least two acts of racketeering activity . . . ." A "racketeering activity" is defined at 18 U.S.C. §1961(1) as "any act or threat" involving a number of listed crimes and offenses, or "any act which is indictable" under specifically identified sections of Title 18 of the U.S. Code. Of these offenses enumerated in §1961(1), plaintiff alleges that the wire transfer of the funds received from Gontier and sent to the bank account of

Arabesque in Oklahoma constitutes wire fraud under 18 U.S.C. §1343 and qualifies as a "racketeering activity."

The obvious problem facing plaintiff is that he has plead only one predicate act of wire fraud in the series of transactions of which he complains. He has not alleged a second predicate act of "racketeering activity" as defined in §1961(1) to even come close to meeting[2] the "pattern of racketeering activity" requirement of §1961(5). Plaintiff has set forth specific misrepresentations made to him, but these misrepresentations were made to him in person at meetings in Gontier's lawyers' offices. These misrepresentations cannot qualify as predicate acts, unless plaintiff can show some transmission of them by mail or wire.

A "pattern of racketeering activity" is a requirement that the plaintiff must meet in demonstrating a violation of §1962(a), (b), or (c). In failing to plead this requirement of a "pattern," plaintiff has not established a violation of any of these three subsections, and thus cannot claim civil damages under §1964(c). Having failed to plead a violation of § 1962(a), (b) or (c), plaintiff has no standing to assert a claim for damages based on his allegations of a conspiracy violation under subsection (d). Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1151 (10th Cir. 1989).

Although plaintiff has failed to state a cause of action

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[2] At a minimum, there must be two acts of racketeering. However, merely proving two predicate acts of racketeering in itself does not establish a "pattern" under §1961(5). H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 236 (1989).

against the movants by failing to plead a violation of §1962, the Court will briefly discuss other deficiencies of plaintiff's RICO cause of action.

B. Failure to plead "investment injury" under §1962(a).

In Grider, the Tenth Circuit held that a plaintiff seeking civil damages for a violation of subsection (a) must plead facts tending to show that he was injured by the use or investment of racketeering income. "Injury from the racketeering acts themselves is not sufficient because section 1962(a) does not prohibit those acts." Grider, 868 F.2d at 1149.

Plaintiff has alleged an injury of the deprivation of his funds, allegedly wired to and retained in defendants' bank account. However, that injury arises out of the alleged predicate act of wire fraud by the defendants. Plaintiff has alleged in his RICO Statement that Friesner invested the money obtained from the alleged wire fraud in defendant Arabesque to buy, show, breed and sell horses in interstate commerce. Plaintiff has not demonstrated any facts showing injury to his business or property from Friesner's alleged equine-related investments. Accordingly, plaintiff has not plead a violation of §1962(a).

C. Failure to plead an "acquisition" injury under §1962(b).

Although the Tenth Circuit has not yet addressed this issue, other circuits have held that a plaintiff must allege an "acquisition" injury in making a claim under §1962(b), analogous to the "investment or use" injury required under §1962(a). Danielsen

v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220, 1231 (D.C. Cir. 1991). Claims asserted under §1962(b) may be dismissed "where the complaint fails to identify and describe any proximate causal relationship between an acquisition of an interest in an enterprise, through a pattern of racketeering activity . . . and the damages claimed by [the plaintiff]". Old Time Enterprises v. Intern. Coffee Corp., 862 F.2d 1213, 1219 (5th Cir. 1989).

Plaintiff has not alleged an injury proximately caused by Mitchell's and/or Arabesque's acquisition or maintenance of an enterprise through the alleged racketeering activity. As with his claim under §1962(a), plaintiff has plead only injury from the alleged predicate act of wire fraud, in the alleged deprivation of his funds, rather than from defendants' acquisition or maintenance of an enterprise.

D. Failure to Plead Wire Fraud with Particularity.

In alleging a RICO predicate act of mail or wire fraud, the plaintiff must allege each element of the RICO violation and the predicate act of racketeering with particularity, as required in F.R.Cv.P. 9(b). Cayman Exploration Corp. v. United Gas Pipe Line, 873 F.2d 1357, 1362 (10th Cir. 1989). A plaintiff alleging fraud must know what his claim is when he files it; he cannot rely on a conclusory statement that a defendant is responsible for someone else's fraudulent acts and still withstand a motion to dismiss. Farlow v. Peat, Marwick, Mitchell & Co., No. 89-6310, slip op. at 16 (10th Cir. Feb. 13, 1992).

Here, plaintiff has made no allegations that Arabesque or

Mitchell made any misrepresentation to him on which he relied in executing his mortgage to Gontier. Plaintiff alleges only that Mitchell may have conspired or "allowed" Friesner to use the wire services to obtain funding for Arabesque. Plaintiff does not know whether Mitchell was "personally aware" of Friesner's activities, but asserts that Mitchell should have "confronted" Friesner about the source of Arabesque's funds. Plaintiff concludes that discovery will identify other parties involved in the alleged wire fraud scheme.

Plaintiff's allegations of Mitchell's and Arabesque's participation in the purported wire fraud scheme are insufficient to meet the standard for particularity under Rule 9(b).

E. Failure to plead a violation of §1962(c).

Even if plaintiff had alleged the commission of two predicate acts of racketeering by the defendants, plaintiff has not alleged facts showing the requirement of a threat of continued criminal activity to meet the "pattern" element of §1962(c). "To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity." H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 240 (1989) (emphasis original). To establish continuity, a plaintiff must demonstrate either a "closed period of repeated conduct" or "past conduct that by its nature projects into the future with a threat of repetition." Id. at 241. The second form of continuity is referred as "open-ended continuity" and requires a "clear threat of future criminal conduct

related to past criminal conduct." Id.

Plaintiff has attempted to allege an open-ended continuity in this action, but his allegations focus only upon defendant Friesner's actions and not those of Mitchell or Arabesque. Plaintiff alleges that Friesner represents himself as being able to arrange financing through various banks that require performance guarantee fees, which Friesner then retains without obtaining the financing. Plaintiff suggests the possibility of future criminal conduct in alleging that Friesner is continuing to represent himself to be capable of arranging bank financing. Plaintiff also attempts to link the alleged fraud scheme with another lawsuit filed against Friesner in the U.S. District Court for the Western District of Oklahoma. Even if plaintiff were able to allege enough detail of that lawsuit to convince the Court of the relatedness of the two actions against Friesner, plaintiff has not shown that Mitchell or Arabesque have participated in or are involved in a continuing threat of Friesner's alleged criminal activity.

F. Failure to plead a conspiracy under §1962(d).

A plaintiff's claim of a conspiracy under §1962(d) must allege that each defendant knowingly entered into an agreement to commit two or more predicate crimes. Feinstein v. Resolution Trust Corp., 942 F.2d 34, 41 (1st Cir. 1991). "Mere conclusory allegations with no supporting factual averment are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action." Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th

Cir. 1983).

Plaintiff has not provided any specific details concerning the alleged conspiracy, and admits that he is not certain who the other victims and perpetrators are in the alleged wire fraud scheme. Plaintiff has not alleged that Mitchell and/or Arabesque knowingly agreed to conspire with Friesner. Rather, plaintiff attempts to show Mitchell's and Arabesque's complicity by suggesting that if these two defendants had not conspired with Friesner, they would have returned the funds transferred to Arabesque's account. This "suggestion" falls far short of showing an agreement or concerted action on Mitchell's or Arabesque's part in the conspiracy.

The Court finds that plaintiff's RICO claims against Arabesque and Mitchell are legally insufficient in a number of respects. While the Court has discretion to permit plaintiff to amend his complaint, it is difficult to conceive how plaintiff can cure these many insufficiencies in an amended complaint. The Court therefore finds that defendants Mitchell's and Arabesque's motion to dismiss as to plaintiff's RICO claims against them should be granted.

IV. State Law Claims.

Plaintiff appears to be asserting claims against Mitchell and Arabesque under Oklahoma law for fraud and conversion. Plaintiff has asserted diversity jurisdiction in this action, so that these state law claims may not be dismissed as being merely pendent to the dismissed RICO claims.

A. Fraud.

Under Oklahoma law, a plaintiff claiming fraud must establish

that the defendant made a material misrepresentation, known to be false at the time it was made, that the misrepresentation was made with the specific intent to induce another's reliance, and that the other relied upon the misrepresentation and was thereby damaged. Replogle v. Indian Territory Illuminating Oil Co., 143 P.2d 1002, 1006 (Okla. 1944). However, "[a] person cannot be liable for a fraudulent misrepresentation unless he made it himself or authorized another to make it for him or in some way participated therein." Occidental Life Ins. Co. v. Minton, 73 P.2d 440, 441 (Okla. 1937).

Plaintiff's allegations of misrepresentations concern only those made to him by Friesner and by others participating in the failed hotel purchase scheme. Plaintiff has not set forth any misrepresentations made to him by Mitchell and/or Arabesque on which he relied and thereby suffered his alleged damages.

Even if plaintiff had demonstrated some attribution of Friesner's alleged misrepresentation to Mitchell and Arabesque, he would still face a problem of relating his damages to a reliance upon Friesner's misrepresentations. Plaintiff executed the mortgage over a year before he talked with Friesner, and apparently gave the mortgage in reliance on statements made by persons other than Friesner. Plaintiff admits he does not know whether the other participants in the hotel purchase scheme were acting in concert with Friesner, and thus he cannot connect the misrepresentations on which he did rely to Friesner.

Plaintiff's complaint fails to state fraud with particularity

as required by F.R.Cv.P. 9(b), especially as to Mitchell and Arabesque. The Court finds that plaintiff's claim of fraud against Mitchell and Arabesque is legally insufficient and should be dismissed against those two defendants.

B. Conversion.

Under Oklahoma law, conversion is a tort "committed by one who wrongfully exercises temporary or permanent dominion over property owned by another." White v. Webber-Workman Co., 591 P.2d 348, 350 (Okl. App. 1979) (citing Davidson v. First State Bank & Trust Co., 559 P.2d 1228 (Okl. 1976); Griffith v. McBride, 188 Okl. 227, 108 P.2d 109 (1940)). The essential elements that one seeking damages for conversion must plead and prove are (1) ownership or right to possession of the property in question, (2) wrongful interference of the property right by defendant, and (3) the amount of damages. White, 591 P.2d at .

In their motion to dismiss, Mitchell and Arabesque argue that plaintiff has no right, title or interest in the funds transferred by the Bank of America to Arabesque's bank account. These defendants argue that plaintiff mortgaged his residence to Gontier, and the subsequent transfers of the funds from Gontier to Arabica to Bank of America to Arabesque's bank account cut off plaintiff's interest in those funds. Plaintiff responds that the funds received in Arabesque's account represent the proceeds from the mortgage given on his residence and that he still has title and rights in those funds.

The facts demonstrate that plaintiff has failed to plead the

first essential element of a conversion claim. He executed what appears to be a valid mortgage to Gontier and authorized Gontier to use the proceeds to finance the Performance Guarantee Fee. Plaintiff was not a party to the agreement between Gontier and Arabica, in which Gontier agreed to loan Arabica the Performance Guarantee Fee. Because plaintiff is unconnected with, and a stranger to Gontier's agreement with Aribica he is unable to make the required showing of ownership or right to possession of the funds in question. See Sharp v. Keaton, 245 P. 852 (Okl. 1926); Nance v. Memefee, 242 P. 224 (Okl. 1925).

V. Conclusion.

Having found that plaintiff's complaint is legally deficient in stating causes of action against defendants Bette Mitchell and Arabesque Corporation for damages based on RICO violations and fraud and conversion under Oklahoma law, the Court finds that these defendants' motion to dismiss should be GRANTED.

IT IS SO ORDERED this 12th day of March, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

MAR 12 1992

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

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

CANDY JEWEL COIT,	)	
Plaintiff,	)	
vs.	)	No. 91-C-12-E
OSAGE RAILROAD, et al.,	)	
Defendants.	)	
and		
GLENDA HILL, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 91-C-22-E
OSAGE RAILROAD, et al.,	)	(Consolidated)
Defendants.	)	

ORDER

The claim of Roy Anderson was considered in open Court, this 11th day of March, 1992. The Court finds that the claim should be dismissed without prejudice.

So ORDERED this 11th day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

FILED

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

MAR 11 1992

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

FRANK OTERO,	)	
Plaintiff,	)	
vs.	)	No. 91-C-427-E
STATE ELECTION BOARD OF OKLAHOMA, et al.,	)	
Defendants.	)	

ORDER AND JUDGMENT

The Court has reviewed the arguments of the parties which were submitted in response to and/or subsequent to the Court's Order of February 10, 1992. The Court has also surveyed, once again, the legal authority applicable to the instant case. The Court finds that the new Oklahoma absentee ballot statute adequately protects Plaintiff's free exercise rights pursuant to Berman v. Board of Elections, City of New York, 420 F.2d 684 (2d. Cir. 1969), cert. denied, 397 U.S. 1065, 90 S.Ct. 1502, 25 L.Ed.2d 687 (1970). The Court concludes that the matter should be dismissed on the merits.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Enjoin is denied; and this cause of action is hereby dismissed.

So ORDERED this 11th day of March, 1992.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, Plaintiff, vs. 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.	)	No. 90-C-89-E

FILED

MAR 11 1992

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

ORDER AND JUDGMENT

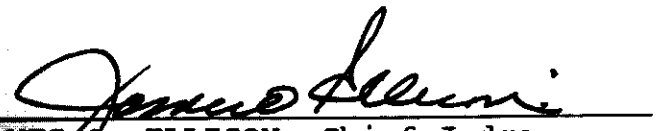
NOW the Third Party Defendant's (Federal Deposit Insurance Corporation, as receiver for First National Bank and Trust Company of Oklahoma City, Oklahoma) Motion for Summary Judgment comes on for consideration before the Honorable James O. Ellison, Chief Judge of the United States District Court for the Northern District of Oklahoma. After examining said Third Party Defendant's Motion for Summary Judgment and Defendant and Third Party Plaintiff's Reply to Third Party Defendant's Motion for Summary Judgment, the Court finds that for good cause shown, Third Party Defendant's Motion for Summary Judgment should be granted.

The Court bases its ruling on the 12 U.S.C. §1823(e)

guidelines. The original Promissory Note executed by Defendant and Third Party Plaintiff and Third Party 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, Third Party Defendant is only required, under 12 U.S.C. §1823(e), to honor said Promissory Note.

IT IS THEREFORE ORDERED that Third Party Defendant's Motion for Summary Judgment be granted.

So ORDERED this 11th 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

JOHN LEWIS ALEXANDER,	)	
Petitioner,	)	
vs.	)	No. 91-C-566-E
RON CHAMPION, et al.,	)	
Respondents.	)	

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

ORDER OF DISMISSAL

This matter is before the Court on the Report and Recommendation of the Magistrate that the Petition herein be dismissed as an abuse of the writ. The Court has reviewed the record and finds that the Magistrate's recommendation should be affirmed.

IT IS THEREFORE ORDERED that this matter is dismissed.

ORDERED this 11TH day of March, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

MAR 11 1992

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

JOHNNY RAY BASHAM,	)	
	)	
Petitioner,	)	
	)	
v.	)	91-C-604-E
	)	
STEPHEN KAISER, Warden,	)	
	)	
Respondent.	)	

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed February 5, 1992, in which the Magistrate Judge recommended that petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is therefore Ordered that petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

Dated this 11th day of March, 1992.

JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

FILED

MAR 11 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

PATRICIA JO HARDESTY and ALBERT M. HARDESTY, Plaintiffs,	)	
vs.	)	Case No. 91-C-396-C
UTILITY CONTRACTORS, INC., a Kansas corporation, d/b/a UTILITY CONTRACTORS OF OKLAHOMA, INC., Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Upon motion of the parties, it appearing that the above cause has been fully compromised and settled, it is hereby

ORDERED, DECREED AND ADJUDGED that the above suit be dismissed with prejudice, each party to bear its own costs.

Dated this 11th day of March, 1992.

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

LW029221

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

FILED

MAR 1 1 1992

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

UNITED STEEL WORKERS OF AMERICAN, AFL-CIO, CLC and its Local Union No. 4430,	)	
Plaintiff,	)	
vs.	)	Case No.: 91-C-152-B
NORRIS SUCKER ROD DIVISION, a Dover Resources Company,	)	
Defendant.	)	

ORDER OF DISMISSAL

This matter coming on before the undersigned Magistrate Judge on the stipulations of the parties herein, the Court finds that said stipulation is sufficient and does hereby dismiss the above entitled cause.

Dated this 11th day of March, 1992.

United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. VICKI L. COMPTON a/k/a VICKI COMPTON a/k/a VICKI LOU COMPTON; FIDELITY FINANCIAL SERVICES, INC., COUNTY TREASURER, Mayes County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, Defendants.	)	FILED MAR 11 1992 Richard M. Lawrence, Clerk U.S. DISTRICT COURT CIVIL ACTION NO. 91-C-390-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9th day of March, 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, Mayes County, Oklahoma, and Board of County Commissioners, Mayes County, Oklahoma, appear by William H. Castor, Assistant District Attorney, Mayes County, Oklahoma; and the Defendants, Vicki L. Compton a/k/a Vicki Compton a/k/a Vicki Lou Compton and Fidelity Financial Services, Inc., appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Vicki L. Compton a/k/a Vicki Compton a/k/a Vicki Lou Compton, acknowledged receipt of Summons and Complaint on June 17, 1991; that the Defendant, Fidelity Financial Services, Inc., was served with Summons and Complaint on December 4, 1991; and that Defendant, Board of

County Commissioners, Mayes County, Oklahoma, acknowledged receipt of Summons and Complaint on June 12, 1991.

The Court further finds that on October 20, 1989, Vicki Lou Compton filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 89-03180-C, was discharged on January 30, 1990, and the case was closed on March 6, 1990.

The Court further finds that on July 24, 1991, Vicki Lou Compton filed her voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-02588-C, and the Order Dismissing Case and Notice Thereof was filed on October 16, 1991.

It appears that the Defendants, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, filed their Answer and Cross-Petition on February 26, 1992; and that the Defendants, Vicki L. Compton a/k/a Vicki Compton a/k/a Vicki Lou Compton and Fidelity Financial Services, Inc., 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 Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

> The S1/2 of the SE1/4 of the SE1/4 of the SW1/4 of Section 36, Township 20 North, Range 20 East of the Indian Base and Meridian.

The Court further finds that on May 27, 1983, the Defendant, Vicki L. Compton, executed and delivered to the United States of America, acting through the Farmers Home Administration, her mortgage note in the amount of $35,450.00, payable in monthly installments, with interest thereon at the rate of 10.75 percent (10.75%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Vicki L. Compton, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated May 27, 1983, covering the above-described property. Said mortgage was recorded on May 27, 1983, in Book 611, Page 694, in the records of Mayes County, Oklahoma.

The Court further finds that on September 14, 1983, the Defendant, Vicki L. Compton, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on September 10, 1984, the Defendant, Vicki L. Compton, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on August 21, 1985, the Defendant, Vicki L. Compton, executed and delivered to the United

States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on August 12, 1986, the Defendant, Vicki L. Compton, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on September 1, 1987, the Defendant, Vicki L. Compton, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on August 4, 1988, the Defendant, Vicki L. Compton, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendant, Vicki L. Compton a/k/a Vicki Compton a/k/a Vicki Lou Compton, made default under the terms of the aforesaid note, mortgage, and interest credit agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that

by reason thereof the Defendant, Vicki L. Compton a/k/a Vicki Compton a/k/a Vicki Lou Compton, is indebted to the Plaintiff in the principal sum of $32,944.78, plus accrued interest in the amount of $3,376.28 as of July 11, 1990, plus interest accruing thereafter at the rate of 10.75 percent per annum or $9.7029 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of $15,344.43, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of $31.24 ($20.00 docket fees, $3.24 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Mayes County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $292.26, plus penalties and interest, for the year of 1990. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Mayes County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $54.54 for the year of 1988; $49.71 for the year of 1989; and $43.11 for the year of 1990. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, Vicki L. Compton a/k/a Vicki Compton a/k/a Vicki Lou Compton and Fidelity

Financial Services, Inc., 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 in rem only against the Defendant, Vicki L. Compton a/k/a Vicki Compton a/k/a Vicki Lou Compton, in the principal sum of $32,944.78, plus accrued interest in the amount of $3,376.28 as of July 11, 1990, plus interest accruing thereafter at the rate of 10.75 percent per annum or $9.7029 per day until judgment, plus interest thereafter at the current legal rate of 4.58 percent per annum until paid, and the further sum due and owing under the interest credit agreements of $15,344.43, plus interest on that sum at the legal rate from judgment until paid, plus the costs of this action in the amount of $31.24 ($20.00 docket fees, $3.24 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, have and recover judgment in the amount of $292.26, plus penalties and interest, for ad valorem taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, have and recover judgment for personal

property taxes in the amount of $54.54 for the year 1988; $49.71 for the year of 1989; and $43.11 for the year of 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Vicki L. Compton a/k/a Vicki Compton a/k/a Vicki Lou Compton and Fidelity Financial Services, Inc., have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

In payment of Defendant, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, in the amount of $292.26, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

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

Fourth:

In payment of Defendant, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, for personal property taxes in the amount of $54.54 for the year of 1988; $49.71 for the year of 1989; and $43.11 for the year of 1990, which are currently due and owing.

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

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

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

WILLIAM H. CASTOR, OBA #1560
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Mayes County, Oklahoma

Judgment of Foreclosure
Civil Action No. 91-C-390-E

PP/esr

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

GENERAL ELECTRIC CAPITAL CORPORATION, Plaintiff,	)	
v.	)	Case No. 90-C-379-E
MYRON L. KING and LAWANDA G. KING, husband and wife; TED WALLACE and EVA WALLACE, husband and wife; SECURITY NATIONAL BANK OF COWETA, COWETA, OKLAHOMA; FRANCES McMAHAN, COUNTY TREASURER OF WAGONER COUNTY, OKLAHOMA; and BOARD OF COUNTY COMMISSIONERS OF WAGONER COUNTY, OKLAHOMA, Defendants.	)	

FILED

MAR 11 1992

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

JUDGMENT

NOW, on this 11th day of March, 1992, this matter comes on for consideration, Plaintiff appearing by and through its attorney of record, Mike Voorhees of Phillips McFall McCaffrey McVay & Murrah, P.C.; Defendants, Myron L. King and Lawanda G. King, husband and wife, appearing not, being in default; Defendants, Frances McMahan, County Treasurer of Wagoner County, Oklahoma, and The Board of County Commissioners of Wagoner County, Oklahoma, appearing not, being in default; Defendants, Ted Wallace and Eva Wallace, husband and wife, appearing not, being in default, and Defendant, Security National Bank of Coweta, Coweta, Oklahoma, appearing not, having executed a Partial Assignment of Mortgage of Real Estate to Plaintiff and having been dismissed. The Court, having examined the pleadings, process and file in this case, and being fully advised in the premises, finds:

1. It has jurisdiction of the parties and the subject matter.

2. The Defendants, Myron L. King and Lawanda G. King, husband and wife, were personally served with Summons and Complaint by private process server. The Summons and Complaint are legal and regular in all respects, the time for filing an Answer or pleading has expired and none has been filed. Therefore, the Defendants, Myron L. King and Lawanda G. King, husband and wife, are in default, and the allegations and averments of Plaintiff's Complaint should be taken as true, and these Defendants should be cut off from claiming any right, title or interest in and to the real and personal property described below.

3. The Defendants, Ted Wallace and Eva Wallace, husband and wife, were served with Summons and Complaint by private process server, as provided by law, and that said summons and service is legal and regular in all respects. The time for filing an Answer or pleading has expired and none has been filed. Therefore, the Defendants, Ted Wallace and Eva Wallace, husband and wife, are in default, and the allegations and averments of Plaintiff's Complaint should be taken as true, and these Defendants should be cut off from claiming any right, title or interest in and to the real and personal property described below.

4. The Defendants, Frances McMahan, County Treasurer of Wagoner County, Oklahoma and The Board of County Commissioners of Wagoner County, Oklahoma, were duly served with Summons and Complaint by certified mail as provided by law, and the summons and

service is legal and regular in all respects. The time for filing an Answer or pleading has expired and none has been filed. Therefore, the Defendants, Frances McMahan, County Treasurer of Wagoner County, Oklahoma and The Board of County Commissioners of Wagoner County, Oklahoma, are in default, and the allegations and averments of Plaintiff's Complaint should be taken as true, and these Defendants should be cut off from claiming any right, title or interest in and to the real and personal property described below.

5. On or about May 9, 1985, in Tulsa County, the Defendants, Myron L. King and Lawanda G. King, husband and wife, made, executed, and delivered to Today's Homes, Inc., ("Today's") a certain written Variable Interest Rate Installment Contract and Security Agreement ("Installment Contract"). Pursuant to the terms of the Security Agreement said Defendants granted a security interest in a mobile home described as follows:

1985 Schult, 52' x 28', Serial Number 1446AB.

6. As a part of the same transaction, and to secure the payment of the indebtedness described above, Myron L. King and Lawanda G. King, husband and wife, made, executed and delivered to Today's, a Real Estate Mortgage in writing, and mortgaged and conveyed to Today's, the following described real estate:

> Lot Eight (8), Block Four (4), Meadow Crest Addition, an Addition to Wagoner County, State of Oklahoma, according to the recorded plat thereof,

with the buildings, improvements and the appurtenances, hereditaments, and all other rights thereunto appertaining or

belonging, and all fixtures then or thereafter attached or used in connection with the premises. This mortgage was duly executed and acknowledged according to law, the mortgage tax duly paid, and on the 17th day of May, 1985, was filed of record in the office of the County Clerk of Wagoner County, Oklahoma, and recorded in Book 672 of Mortgages, at Page 649. This Mortgage, and the record thereof, is incorporated by reference, as provided by law.

7. Thereafter, for good and valuable consideration, Today's assigned the Installment Contract and Mortgage to General Electric Credit Corporation, who subsequently changed its name to General Electric Capital Corporation ("GECC"). GECC is the holder of the Installment Contract and Mortgage has complied with all the terms, conditions precedent and provisions of the Installment Contract and Mortgage, and is duly empowered to bring this suit.

8. The Installment Contract provides that if default be made in the payments of any of the monthly installments, or on failure or neglect to keep or perform any of the other conditions contained therein, that the entire principal and accrued interest, together with all other sums secured by the Installment Contract, shall at once become due and payable, at the option of the holder and the holder shall be entitled to recover the unpaid principal and all expenditures caused thereby, with interest, and to have the premises sold and the proceeds applied to the payment of the indebtedness secured, together with all legal and any other necessary expenses and all costs, and for possession of the personal property and foreclosure of the Mortgage.

9. That the Defendants, Ted Wallace and Eva Wallace, husband and wife, may claim some right, title, or interest in and to the subject real and personal property, but any and all right, title, or interest which the Defendants, Ted Wallace and Eva Wallace, husband and wife, have or claim to have in or to the real and personal property, is subsequent, junior and inferior to the lien of the Plaintiff.

10. That the Defendants, Frances McMahan, County Treasurer of Wagoner County and The Board of County Commissioners of Wagoner County, may claim some right, title, or interest in and to the subject real and personal property, but any and all right, title, or interest which the Defendants, Frances McMahan, County Treasurer of Wagoner County and The Board of County Commissioners of Wagoner County, have or claim to have in or to the real and personal property, is subsequent, junior and inferior to the lien of the Plaintiff.

11. The Defendants, Myron L. King and Lawanda G. King, husband and wife, are in default on the Installment Contract and that there is now due, owing and unpaid to Plaintiff the sum of $61,177.11, together with interest at the Contract rate of 13.99%, per annum, from December 31, 1989 until the date of judgment; post-judgment interest at the lawful rate until paid; attorney's fees in an amount to be determined; costs; late charges, if any; advances by the Plaintiff to protect its security; and all other expenses, fees, charges, advances, assessments, and costs of this action.

12. Defendant, Security National Bank of Coweta, Coweta, Oklahoma, has assigned by Partial Assignment of Mortgage of Real Estate its mortgage lien on the subject real property to Plaintiff in consideration of the payment of the sum of $15,534.44.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, by the Court that Plaintiff, General Electric Capital Corporation, have judgment against Defendants, Myron L. King and Lawanda G. King, husband and wife, in the sum of $61,177.11; together with interest at the Contract rate of 13.99%, per annum, from December 31, 1989 until the date of judgment; post judgment interest at the lawful rate until paid; judgment for attorney fees in an amount to be determined upon application; and judgment for costs, expenses, fees, charges, advances, and assessments.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff have judgment in the sum of $15,534.44 and judgment foreclosing its first mortgage on the following described real property:

> Lot Eight (8), Block Four (4), Meadow Crest Addition, an Addition to Wagoner County, State of Oklahoma, according to the recorded plat thereof,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court that any and all right, title, or interest which the Defendants, Myron L. King and Lawanda G. King, husband and wife, have or claim to have in or to the real and personal property described above is subsequent, junior and inferior to the lien of the herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court that any and all right, title, or interest which the Defendants, Ted Wallace and Eva Wallace, husband and wife, have or claim to have in

or to the real and personal property described above, is subsequent, junior and inferior to the lien of the Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court that any and all right, title, or interest which the Defendants, Frances McMahan, County Treasurer of Wagoner County, Oklahoma and The Board of County Commissioners of Wagoner County, Oklahoma, have or claim to have in or to the real and personal property described above, is subsequent, junior and inferior to the lien of the herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Mortgages be, and the same are hereby, foreclosed and the premises are hereby ordered to be sold to satisfy the judgment herein; that Special Execution and Order of Sale in Foreclosure shall issue, commanding the Sheriff of Wagoner County, Oklahoma, to levy upon the above-described real estate, and after having the same appraised as provided by law, proceed to advertise and sell the same, as provided by law, subject to any unpaid real estate ad valorem tax leins, or special assessments, and apply the proceeds arising from the sale as follows:

FIRST: To the payment of costs of sale and court costs herein;

SECOND: To the payment of the judgments and liens of the Plaintiff in the amounts set forth herein; and

THIRD: The remainder, if any, to be held until further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that upon confirmation of the sale and delivery of Sheriff's Deed, under

and by virtue of this judgment and decree, that said property shall be free and clear of the claims of all Defendants and that all persons claiming under said Defendants since the filing of the Complaint herein, shall have no right, title, interest, claim, lien or demand in or to said property.

JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT

APPROVED FOR ENTRY

Mike Voorhees, OBA No. 9247
Joseph K. Heselton, Jr., OBA No. 4151
PHILLIPS McFALL McCAFFREY
McVAY & MURRAH, P.C.
1001 N.W. 63rd, Suite 200
Oklahoma City, Oklahoma 73116
(405) 848-1684

Attorneys for Plaintiff,
General Electric Capital Corporation

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

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

KENNETH R. MARSHALL,	)	
	)	
Petitioner,	)	
	)	
v.	)	91-C-214-E
	)	
EARL ALLEN, et al,	)	
	)	
Respondents.	)	

ORDER

The court has for consideration the Revised Report and Recommendation of the Magistrate Judge filed February 5, 1992, in which the Magistrate Judge recommended that respondents' Motion to dismiss be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is therefore Ordered that respondents' Motion to Dismiss is denied. It is further ordered that respondents file a response as directed in the Order dated April 9, 1991, within twenty (20) days of the date of this order.

Dated this 11th day of March, 1992.

JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 1 1 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., Plaintiff,	)	
vs.	)	Case No. 91-C-553-B
P.F.T. ENTERPRISES, INC., et al, Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

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

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

IT IS SO ORDERED this 11th day of March, 19 92.

Thomas R. Brett

UNITED STATES DISTRICT JUDGE
THOMAS R. BRETT