

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

**FILED**

JAN -7 1993

RICHARD H. LAWRENCE  
CLERK  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

GAIL PITMAN, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BLUE CROSS AND BLUE SHIELD )  
OF OKLAHOMA, individually and )  
as Trade Name of Group Health )  
Insurance of Oklahoma, Inc., )  
 )  
Defendant. )

No. 92-C-451-E

**ENTERED ON DOCKET**  
**DATE JAN 8 1993**

ORDER AND JUDGMENT

Upon the impetus of Defendant's Motion to Amend Court's Order (docket #30), the Court has revisited the issue of whether Defendant is entitled to judgment as a matter of law. Finding that it is, the Court grants Defendant's Motion to Amend.

The Court takes cognizance of the case of Wilson v. Group Hospitalization and Medical Services, Inc. T/A Blue Cross and Blue Shield of the National Capital Area, 791 F.Supp. 309 (D.D.C. 1992). In Wilson, Judge Greene, reciting a history with which the Court has had occasion to become familiar,<sup>1</sup> stated:

In the recent past, Blue Cross, along with a host of other insurance carriers, refused to cover the costs of the bone marrow treatment, claiming that it was excluded as "experimental" or "investigative" treatment under the terms of the plan. Employees denied coverage, however, began to litigate whether the treatment was experimental, and they met with increasing success. See, e.g., Pirozzi v. Blue Cross/Blue Shield of Virginia, 741

<sup>1</sup>See, Elke Reiff v. Blue Cross/Blue Shield, Case No. 90-C-1020-E.

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F.Supp. 586, 591 (E.D. Va. 1990). Blue Cross has acknowledged both in its papers and at the hearing on the preliminary injunction that it was because it could no longer exclude coverage of the treatment as "experimental," that it sought to amend the plan directly to achieve the exclusion. That amendment is the focus of this case.

Wilson at 311. Similarly, in the instant case, the endorsement is of pivotal concern. Plaintiff avers that the cases are analogous and to that extent, the Court concurs. However, the Court has reviewed the Stipulations and Admissions of the parties, found at pp. 3-8 of the Pre-Trial Conference Order and finds that in contradistinction from the case of Wilson, neither the notice nor the endorsement/amendment at issue herein is ambiguous. The Court further finds that the dispositive facts are of record, that none are in dispute and, accordingly, Defendant is entitled to summary judgment.

IT IS THEREFORE ORDERED that:

1. Defendant's Motion to Amend is granted;
2. The Court's Order of October 7, 1992 (docket #29) is vacated insofar as it denies in part Defendant's Motion for Summary Judgment;
3. Defendant's Motion for Summary Judgment (docket #8) is now granted in its entirety;
4. This case is dismissed.

So ORDERED this 7<sup>th</sup> day of January, 1993.

  
\_\_\_\_\_  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

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

FILED

JAN -8 1993

RICHARD W. LAWRENCE  
CLERK

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA  
MURKIN BUILDING OF OKLAHOMA  
TULSA, OKLAHOMA

DEWEY NIMS,

Plaintiff,

v.

LOUIS W. SULLIVAN, M.D.,

Defendant.

91-C-933-E

ENTERED ON DOCKET

DATE JAN 8 1993

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed December 3, 1992 in which the Magistrate Judge recommended that the case be remanded.

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

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

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 6<sup>th</sup> day of January, 1993.

  
JAMES O. ELLISON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

FILED  
JAN 8 1993

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

In re: FITZGERALD, DE ARMAN )  
& ROBERTS, )  
Debtor, )

DAVID P. NEWSOM, JR., as )  
Trustee for the liquidation )  
of FITZGERALD, DE ARMAN & )  
ROBERTS, )

Plaintiff, )

vs. )

CENPAC SECURITIES, an Arizona )  
Corporation; SCOTT STEGALL; )  
JAMES DESMOND; BARBARA )  
BUCCARELLI MORROW; J. BRADLEY )  
MORROW; CARLTON PHILLIPS; )  
GERALD BOVEE; WALTON )  
FREDERICK CARLISLE; VINCENT )  
KEMENDO; )

Defendants. )

**FILED**

JAN 7 1993

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

No. 90-C-714-E

**ADMINISTRATIVE CLOSING ORDER**

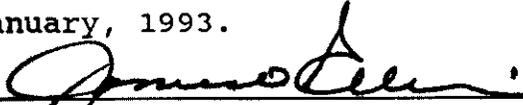
The Court has been advised that this action has been settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

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

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litigation is necessary.

ORDERED this 7<sup>th</sup> day of January, 1993.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

FILED

JAN 08 1993

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAMAR J. ANDERSON,

Defendant.

Civil Action No. 92-C-1009-E

ENTERED ON DOCKET

DATE JAN 8 1993

DEFAULT JUDGMENT

This matter comes on for consideration this 7<sup>th</sup> day of January, 1993, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, LAMAR J. ANDERSON, appearing not.

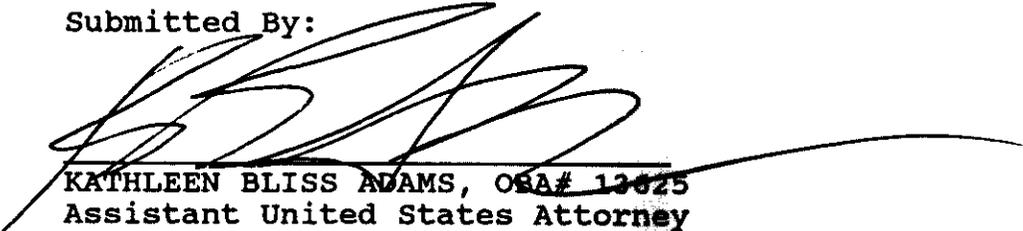
The Court being fully advised and having examined the court file finds that Defendant, LAMAR J. ANDERSON, was served with Summons and Complaint on December 9, 1992. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, LAMAR J. ANDERSON, for the principal amount of \$20,186.57, plus accrued interest of \$4,543.81 as of September 30, 1992, plus interest thereafter at the rate of 4 percent per annum until judgment, a

surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 3.72 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
KATHLEEN BLISS ADAMS, OSA# 13025  
Assistant United States Attorney  
3900 United States Courthouse  
333 West 4th Street  
Tulsa, Oklahoma 74103  
(918)581-7463

DATE 1/7/93

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

**FILED**

JAN 5 1993

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

REVOCABLE INTER VIVOS TRUST )  
OF RUTH WATSON DITTMAN, )  
RUTH WATSON DITTMAN, TRUSTEE )  
and RUTH ANN BLAIR, TRUSTEE )

Plaintiffs, )

vs. )

LARRY GARNER and DAVID JANSEN, )  
Special Agents of the Internal )  
Revenue Service, )

Defendants. )

No. 92-C-655-B

ORDER

The Court has for decision Defendants' Motions to Dismiss Plaintiffs' original Complaint pursuant to Fed.R.Civ.P. 12(b) and 4(j). Also before the Court for decision is Plaintiffs' motion to file their First Amended Complaint. Following a thorough consideration of said motions and the relevant pleadings and legal authority, the Court concludes Defendants' Motions to Dismiss should be SUSTAINED and Plaintiffs' Motion to File Amended Complaint should be DENIED.

The Motion to Dismiss of the Defendant, Larry Garner, is hereby SUSTAINED because personal service has not been obtained on said Defendant pursuant to Fed.R.Civ.P. 4(j).

While Plaintiffs have argued to the contrary, Plaintiffs' original Complaint is essentially a Fed.R.Crim.P. 41(e) action for the return of property. Such a claim should be filed in the pending *in rem* forfeiture action in this court, United States v. One 1984 Mercedes Benz, Case No. 92-C-726-B. Said 1984 Mercedes Benz was

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C/m

seized pursuant to a valid affidavit and search warrant on file in and issued pursuant to Case No. 92-C-726-B. If the claimant has an adequate remedy at law, which the Plaintiffs herein have by way of the pending forfeiture action, a Rule 41(e) motion should be dismissed. Floyd v. United States, 860 F.2d 999, 1003 (10th Cir. 1988); Frazer v. Internal Revenue Service, 947 F.2d 448 (10th Cir. 1991); and 3C Wright, Federal Practice and Procedure: §673 (2d Ed. 1982).

Plaintiffs assert in their response brief that their claim sounds as a "Bivens" action for alleged violation of their constitutional rights. In Plaintiffs' original Complaint there are no allegations of specific facts or acts that would constitute a constitutional violation of the Plaintiffs' rights by the individual Defendants. Dismissal pursuant to Fed.R.Civ.P. 12(b)(6) is therefore appropriate. Baker v. Smith, 771 F.Supp. 1156, 1158 (D.Kan. 1991); Retzlaff v. IRS, 728 F.Supp. 1304, 1305 (E.D. Tex. 1989); *See*, Davis v. Passman, 442 U.S. 228, 239 (1979). Complaints alleging violations of civil or constitutional rights may not be conclusory. Blinder, Robinson & Company, Inc. v. U.S. S.E.C., 748 F.2d 1415, 1419 (10th Cir. 1984), *cert. denied*, 105 S.Ct. 2655 (1984). Further, when allegations of conspiracy are raised, they must be supported by material facts, not mere conclusory statements. Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978), and Henzel v. Gerstein, 608 F.2d 654, 659 (5th Cir. 1979). Thus, the allegations of Plaintiffs' original Complaint are insufficient to allege a Bivens action against the

Defendants so Defendants' Motion to Dismiss is thereby SUSTAINED.

Concerning Plaintiffs' First Amended Complaint, an effort is made to cure the deficiency of specific allegations of conduct by Defendants in violation of Plaintiffs' constitutional rights. The second numbered paragraph of Plaintiffs' First Amended Complaint states as follows:

"Plaintiffs also seek to recover actual and punitive damages from Defendants from wilful violation of their Constitutional rights to Due Process and against uncompensated taking, under the Fifth Amendment to the Constitution; and against unreasonable searches and seizure under the Fourth Amendment to the Constitution. In this regard, Plaintiffs allege upon information and belief that:

(a) Defendants acted with gross indifference to Plaintiff's ownership rights with respect to the Automobile;

(b) Defendants acted with gross indifference to the law, particularly insofar as the law may protect the rights of 'innocent owners' (which Plaintiffs assert that they are);

(c) Defendants were not candid with the magistrate who issued a seizure warrant with respect to the Automobile, in misrepresentation of facts or in failure to inform of material facts bearing on the issue of probable cause; and

(d) Defendants' actions in seizing the Automobile are part of a larger scheme, whose true purpose is not to enforce the laws regarding forfeiture, but rather to 'put pressure' on Albert Jack Blair, Ruth Ann Blair's former husband."

However, in Plaintiffs' Response to Defendants' Motion to Dismiss, Plaintiffs state at page 7 concerning the allegations in paragraph (2) in the First Amended Complaint quoted above:

"Plaintiffs do not know these facts to be true at the present time; however, discovery will establish whether or not any of such concerns have merit."

Plaintiffs have thereby admitted that their Complaint is nothing more than a fishing expedition as no known facts exist at this time to support any such allegation.

The facial validity of the subject affidavit and warrant in Case No. 92-C-726-B, entitle the Defendants to qualified immunity unless there are allegations of fact to the contrary. United States v. Leon, 468 U.S. 897, 913-14, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and Zawacki v. City of Colorado Springs, 759 F.Supp. 655, 661 (D.Colo. 1991).

For the reasons stated herein, the Defendants' Motions to Dismiss are hereby SUSTAINED and Plaintiffs' Motion to file their First Amended Complaint is hereby DENIED. If Plaintiffs intend to contest the forfeiture of the subject 1984 Mercedes vehicle, their claim or claims should be filed in the matter of United States v. One Mercedes Benz, Case No. 92-C-726-B.

DATED this 5th day of January, 1993.



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THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



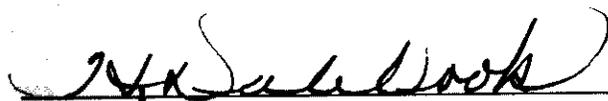
sent him by the Court Clerk's Office. The text of the letter advises receipt of the Complaint, but states that the Clerk's office is sending plaintiff an affidavit of financial status which did not accompany the Complaint. Obviously, the Complaint was only filed by the Court Clerk's office - and properly so - upon receipt of a proper request to proceed in forma pauperis. It is the holding of Paulk and similar cases that "once a plaintiff has filed the complaint and petition to proceed [as a pauper] within the limitations period," the statute is tolled. 830 F.2d at 83 (emphasis added). See also, Smith v. Ouzts, 629 F.Supp. 1001 (S.D. Miss. 1986). These cases do not disturb the general principle that a federal cause of action is commenced upon the filing of the complaint. See Hobson v. Wilson, 737 F.2d 1, 44 (D.C. Cir. 1984). Accordingly, October 19 is the appropriate measuring date.

As best the Court can determine, plaintiff alleges four causes of action: 2 civil rights claims (presumably under 42 U.S.C. §1983, as plaintiff alleges deprivation of a property right and a liberty interest); antitrust violations, and breach of contract. The statute of limitation for both a federal and state antitrust action is 4 years. See 15 U.S.C. §15b; 79 O.S. §25. In Oklahoma, a civil rights claim under §1983 is governed by 12 O.S. §95 (Third) and limited to two years. Abbitt v. Franklin, 731 F.2d 661, 662-63 (10th Cir. 1984). Finally, a claim for breach of a written contract must be brought within 5 years, and upon a contract express or implied not in writing must be brought within 3 years. See 12 O.S. §95 (First) and (Third). Even assuming that plaintiff had a written contract with the Law Journal, his claim is barred.

The Court concludes that dismissal is appropriate under 28 U.S.C. §1915(d). See Street v. Vose, 936 F.2d 38, 39 (1st Cir. 1991).

It is the Order of the Court that the application of the plaintiff to proceed in forma pauperis is hereby denied and his Complaint is dismissed.

IT IS SO ORDERED this 6<sup>th</sup> day of January, 1993.

  
\_\_\_\_\_  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE





## RELEASE AND SETTLEMENT AGREEMENT

This general Release and Settlement Agreement ("Agreement") is entered into this 30 day of November, 1992, by and between Donna Johnson ("Johnson"), and Shashi Husain, M.D. ("Husain").

WHEREAS, Johnson and Husain desire to compromise and settle fully and finally all claims which have been or could have been brought by the aforementioned parties in any way involving or relating to the employment of Johnson by Husain,

THEREFORE, in consideration of the promises, covenants and agreements set forth herein, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, Johnson and Husain agree as follows:

1. The purpose of this agreement is to compromise and settle any and all claims and causes of action, whether tortious, contractual, or otherwise, arising out of the employment of Johnson by Husain. This compromise and settlement of claims includes all matters which were or could have been raised by Johnson in the action pending before the United States District Court for the Northern District of Oklahoma in the case styled *Johnson v. Husain*, Case No. 92-C-226-E. This compromise and settlement also includes any and all claims and causes of action, whether tortious, contractual or otherwise, regarding Johnson's employment with Husain that could have been or could be raised by Johnson before any other state or federal court or any administrative body or tribunal.

2. This Agreement is executed for the sole and express purpose of compromising and settling disputed claims and it is expressly understood and agreed as a condition hereof that this Agreement shall not constitute or become construed as an admission on the part of any party hereto, nor shall

it otherwise be evidence indicating any degree of culpability, liability, or admission of the truth or correctness of any claim or potential claim on the part of any party hereto.

3. In consideration of payment to Johnson by Husain of the sum of \$4,200 (referred to as "settlement amount"), Johnson does hereby promise and agree to the following:

- a. Johnson will dismiss with prejudice her lawsuit against Husain filed in the United States District Court for the Northern District of Oklahoma, Case No. 92-C-226-E.
- b. Johnson does hereby now and forever knowingly and voluntarily release and discharge Husain and all of her present and former employees, officers, agents and attorneys from any and all claims, suits, demands, causes of action or complaints of whatever kind or nature, whether tortious, contractual, or otherwise, that arise out of her employment with Husain. This release and discharge of claims includes, but is not limited to, claims for the recovery of back pay, liquidated damages, attorneys fees, costs, or any other relief arising out of claims that were raised or could have been raised in Case No. 92-C-226-E or any other action which could have been filed with any other state or federal court, agency or administrative body regarding her employment with Husain.
- c. It is specifically agreed by the parties that Johnson would not receive and will not be entitled to any other compensation, benefits or perquisites from Husain other than the payment of the settlement amount.

4. In consideration of Johnson's knowing and voluntary agreement to the general Release and Settlement, including but not limited to the Dismissal with Prejudice of Case No. 92-C-226-E, as set out above, Husain does hereby promise and agree as follows:

a. Husain agrees to pay to Johnson the total settlement amount of \$4,200, payable as follows:

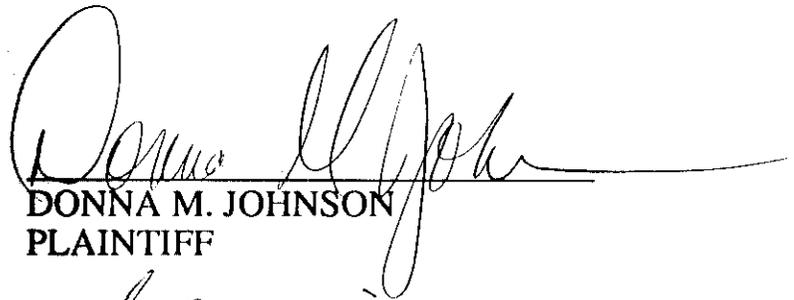
1. One check in the amount of \$2,851.02, from which there is no withholding, made payable to Johnson and her attorney of record, Steven R. Hickman; and
2. A second check in the gross amount of \$1,348.98, less any applicable withholding, made payable only to Johnson. The second check shall be considered a payroll check.

5. This Agreement may be used as evidence in any subsequent legal proceeding between the parties in which it is alleged that a breach of the conditions contained herein has occurred.

6. This Agreement shall be binding upon an inure to the benefit of the respective legal representatives, successors, assigns, employees, and agents of the parties hereto to the extent permitted by law.

7. By signing this Agreement, Johnson agrees that she has fully read and has understood the terms and conditions of this Agreement, that she has fully consulted with her attorney and with all other persons whom she wishes or needs to consult. Johnson further acknowledges that this Agreement has been signed knowingly and voluntarily and without duress and that the terms of this Agreement are bargained for and incorporate the full agreement of the parties.

8. Johnson agrees not to contact Dr. Husain, directly or indirectly, for any reason or her employees and shall not interfere in any way with the operation of her business.



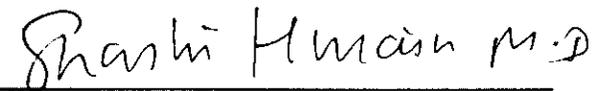
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DONNA M. JOHNSON  
PLAINTIFF



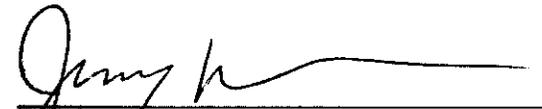
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STEVEN R. HICKMAN  
ATTORNEY FOR PLAINTIFF



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SHASHI HUSAIN, M.D.  
DEFENDANT



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JERRY WILLIAMS  
ATTORNEY FOR DEFENDANT

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

ENTERED ON DOCKET  
DATE JAN 7 1993

EILIENE R. GAINES,  
Plaintiff,

vs.

No. 92-C-409-E

ROBERT TILTON, Individually,  
et al.,

Defendants.

**FILED**

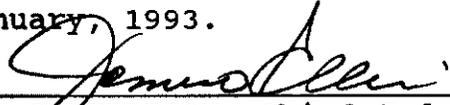
JAN 6 1993

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

ORDER

The Court has for consideration the Motion of the Defendants for sanctions pursuant to Rule 11 Fed.R.Civ.P. The Court has reviewed the record and finds that Plaintiff filed a Notice of Dismissal Without Prejudice pursuant to Fed.R.Civ.P. 41(a)(1). The Court finds that at the time the Notice was filed Plaintiff had pled an actionable case arising under state law and alleging fraudulent misrepresentation and conduct. The Court finds that at the time the complaint was filed herein, complete diversity existed between the parties. The Court finds that Plaintiff's basis for dismissal of the complaint was her intention to join additional defendants, which joinder would destroy diversity. The Court concludes that Rule 11 sanctions are inappropriate in the instant case; therefore Defendants' Motion should be denied. Parties to bear their respective costs and attorneys' fees.

ORDERED this 6<sup>th</sup> day of January, 1993.

  
\_\_\_\_\_  
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

ENTERED ON DOCS  
JAN 7 1993  
DATE

DOROTHY RIES,

Plaintiff,

vs.

No. 92-C-227-E

ROBERT TILTON, Individually,  
et al.,

Defendants.

**FILED**

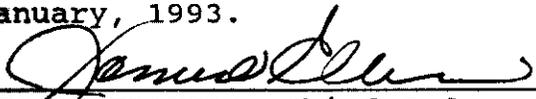
JAN 6 1993

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

ORDER

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ORDERED this 6<sup>th</sup> day of January, 1993.

  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

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

ENTERED ON DOCKET  
DATE JAN 7 1993

BEVERLY CROWLEY,  
Plaintiff,

vs.

No. 92-C-169-E

ROBERT TILTON, Individually,  
et al.,

Defendants.

**FILED**

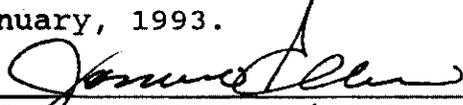
JAN 6 1993

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

ORDER

The Court has for consideration the Motion of the Defendants for sanctions pursuant to Rule 11 Fed.R.Civ.P. The Court has reviewed the record and finds that Plaintiff filed a Notice of Dismissal Without Prejudice pursuant to Fed.R.Civ.P. 41(a)(1). The Court finds that at the time the Notice was filed Plaintiff had pled an actionable case arising under state law and alleging fraudulent misrepresentation and conduct. The Court finds that at the time the complaint was filed herein, complete diversity existed between the parties. The Court finds that Plaintiff's basis for dismissal of the complaint was her intention to join additional defendants, which joinder would destroy diversity. The Court concludes that Rule 11 sanctions are inappropriate in the instant case; therefore Defendants' Motion should be denied. Parties to bear their respective costs and attorneys' fees.

ORDERED this 6<sup>th</sup> day of January, 1993.

  
\_\_\_\_\_  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

16

ENTERED ON BOOK

JAN 6 1993

DATE

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

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

ERVIN W. HAWKINS, JR., )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
WARDEN RON CHAMPION, et al., )  
 )  
Respondents. )

No. 92-C-305-E

ORDER

The Magistrate is directed to submit a Report and Recommendation pursuant to Order of the Court. The Court's Order of the 28th of October, 1992 is stricken.

ORDERED this 4<sup>th</sup> day of January, 1993.

  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-6-93

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

**FILED**

JAN - 4 1993

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

KENNETH ADAMS, an individual, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FEDERAL DEPOSIT INSURANCE )  
 CORPORATION, as Receiver for )  
 First Bank and Trust Co., )  
 Booker, Texas, )  
 )  
 Defendant. )

No. 92-C-419-B

**ORDER**

The Motion to Dismiss or in the Alternative to Transfer Venue filed by the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for First Bank and Trust Co., Booker, Texas, pursuant to 28 U.S.C. § 1406(a), 12 U.S.C. § 94, and 12 U.S.C. § 1441(a)(b)(1) is before the Court for decision. Following a review of the record, including the briefs and arguments of counsel, the Court concludes the FDIC's alternative motion to transfer venue should be sustained for the reasons stated hereafter.

The record reflects the subject promissory note was entered into by the parties on March 31, 1986, at the First State Bank and Trust Co. - Booker, Texas, and same was to be repaid by Plaintiff at the First State Bank and Trust Co. - Booker, Texas. (See Plff.'s Ex. A). Said bank subsequently failed and the FDIC became the receiver of the bank and holder of the subject alleged defaulted promissory note.

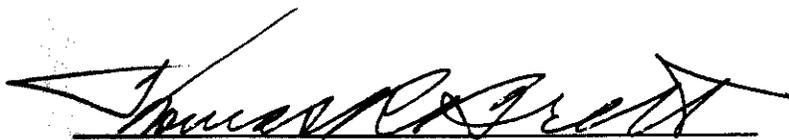
The original action on said promissory note was commenced by the Defendant, FDIC, in this court against Plaintiff, Kenneth

Adams, Case No. 91-C-490-E, and was dismissed without prejudice by stipulation of the parties on May 7, 1992. (See Plff.'s Ex. B). The Court concludes that such original action dismissed without prejudice by stipulation was not a waiver of the venue provisions of 12 U.S.C. § 94, in reference to the instant action commenced by Plaintiff against FDIC, Receiver. In re Longhorn Securities Litigation, 573 F.Supp. 274 (W.D.Okla. 1983); Federal Deposit Ins. Corp. v. Hartford Ins. Co. of Illinois, 877 F.2d 590 (7th Cir. 1989); Buffum v. Chase Nat. Bank of City of New York, 192 F.2d 58 (7th Cir. 1951); and Bechtel v. Liberty Nat. Bank, 534 F.2d 1335 (9th Cir. 1976). FDIC, Receiver, had a choice of forum to commence the action against the Defendant, Kenneth Adams, in the federal judicial district where he resided or in the federal judicial district where the bank's principal place of business was located and the promissory note was entered into. Once the FDIC's initial action against Adams in this court was dismissed without prejudice by agreement of the parties, FDIC, Receiver, still had the right to insist on being sued in accordance with 12 U.S.C. § 94, i.e., in the federal district of the First State Bank and Trust Co.'s principal place of business.

Having first commenced this pending action, Plaintiff, Kenneth Adams, should be permitted to continue to proceed herein as Plaintiff. Thus, pursuant to 28 U.S.C. § 1406(a), the Court hereby orders transfer of this case to the United States District Court for the Northern District of Texas, Amarillo Division. McAlister v. General American Life Insurance Company, 516 F.Supp. 919

(W.D.Okla. 1980).

DATED this 44<sup>th</sup> day of January, 1993.

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

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



26, 1992 and July 9, 1992 are hereby affirmed. The petition for writ of habeas corpus is dismissed.

IT IS SO ORDERED this 5<sup>th</sup> day of January, 1993.

  
\_\_\_\_\_  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

**FILED**

JAN - 4 1993

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA **Richard M. Lawrence, Court Clerk**  
U.S. DISTRICT COURT

CAROLYN DIANE GLASS,  
  
Plaintiff,  
  
v.  
  
JACK N. GRAVES; BILL MILDREN;  
and SHEARSON LEHMAN HUTTON, INC.,  
  
Defendants.

ENTERED ON DOCKET  
DATE JAN 5 1993

Case No. 90-C-104-E

JOINT STIPULATION OF DISMISSAL

Plaintiff Carolyn Diane Glass and Defendants Jack N. Graves, Bill Mildren and Shearson Lehman Brothers Inc. (formerly known as Shearson Lehman Hutton Inc.), hereby jointly stipulate to the dismissal of this action with prejudice.

Respectfully submitted,

THOMAS, GLASS, ATKINSON, HASKINS  
NELLIS & BOUDREAUX

By: *K. Clark Phipps*  
K. Clark Phipps, OBA #  
525 South Main, Suite 1500  
Tulsa, Oklahoma 74103  
(918) 582-8877

ATTORNEYS FOR PLAINTIFF

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

By: *Claire V Egan*  
Claire V. Egan, OBA #554  
4100 Bank of Oklahoma Tower  
One Williams Center  
Tulsa, Oklahoma 74172  
(918) 588-2700

ATTORNEYS FOR DEFENDANTS

ENTERED ON DOCKET

DATE JAN 5 1993

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

**F I L E D**

FEDERAL DEPOSIT INSURANCE )  
CORPORATION, as receiver of Victor )  
Savings and Loan Association, a )  
Federal Savings and Loan )  
Association, Muskogee, Oklahoma, )

Plaintiff, )

vs. )

ALBERT CULLIPHER and WANDA J. )  
CULLIPHER a/k/a WANDA CULLIPHER, )  
husband and wife, and JACK L. )  
COTHERMAN a/k/a JACK COTHERMAN and )  
WANDA A. COTHERMAN a/k/a WANDA )  
COTHERMAN, husband and wife, )

Defendants. )

Case No. 90-C-831-E /

*JAN 04 1993*  
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER DISMISSING CASE

IT IS HEREBY ORDERED, that this action is dismissed without prejudice, upon the Motion for Dismissal filed herein by the Plaintiff, Federal Deposit Insurance Corporation.

IT IS SO ORDERED THIS 21<sup>st</sup> day of Dec., 1993.

*James A. ...*  
UNITED STATES ~~BANKRUPTCY~~ JUDGE

Jeffrey D. Hassell  
Gable & Gotwals  
2000 Fourth National Bank Building  
15 West Sixth Street  
Tulsa, Oklahoma 74119  
(918) 582-9201

ATTORNEY FOR THE FEDERAL  
DEPOSIT INSURANCE CORPORATION

53

DATE JAN 5 1993

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

**UNITED STATES OF AMERICA,**            )  
   )  
   )  
   )  
   )  
**Plaintiff,**                                )  
   )  
   )  
**vs.**   )  
   )  
   )  
**ERNEST L. ROBINSON and**            )  
**DORTHEA B. ROBINSON,**            )  
   )  
   )  
   )  
**Defendants.**                             )  
   )  
   )  
   )

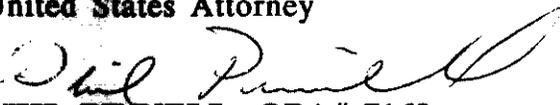
**CIVIL ACTION NO. 92-C-973-C**

JAN -4 1993  
 [Handwritten signature]  
 [Faint stamp text]

**NOTICE OF DISMISSAL**

The United States of America, ex rel Internal Revenue Service, 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 Fed. R. Civ. P. hereby notices its dismissal of its previously filed petition to enforce internal revenue summons. The plaintiff would show the court that the summons has been fully complied with and there is no need for the setting of a show cause hearing.

Accordingly, the plaintiff hereby dismisses its petition to enforce internal revenue summons previously filed herein.

**TONY M. GRAHAM**  
 United States Attorney  
  
**PHIL PINNELL, OBA# 7169**  
 Assistant United States Attorney  
 3600 US Courthouse  
 Tulsa, Oklahoma 74103  
 (918) 581-7463

CERTIFICATE OF SERVICE

I hereby certify that on this <sup>4<sup>th</sup></sup> day of January, <sup>1993</sup>~~1992~~, a true and correct copy of the foregoing was mailed postage prepaid addressed thereon as follows:

Kenneth C. Ellison, Esq.  
4815 South Harvard, Room 534  
Tulsa, OK 74135

Elizabeth Downs, Attorney  
Office of District Counsel  
Internal Revenue Service  
500 W. Main, Suite 320  
Oklahoma City, OK 73102

Steven L. Cardell  
Revenue Agent  
Internal Revenue Service  
5100 E. Skelly Drive, Suite 450  
Tulsa, OK

  
Paul Paul  
Assistant United States Attorney

PP/am

**FILED**  
IN OPEN COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA DEC 29 1992

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

DOLLAR SYSTEMS, INC., )  
a Delaware Corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BLUEWATER LEASING, INC., )  
a Michigan corporation; )  
JAY M. MONTROSE, an )  
individual; and ROSS E. )  
LINDSAY, an individual, )  
 )  
Defendants. )

Case No. 92-C-1118-E

ENTERED ON DOCKET  
DATE JAN 5 1993

**TEMPORARY RESTRAINING ORDER**

Plaintiff Dollar Systems, Inc. ("Dollar") has moved, pursuant to Fed. R. Civ. P. 65, for a Temporary Restraining Order to enjoin Defendants Bluewater Leasing, Inc. ("Bluewater"), Jay M. Montrose ("Montrose"), and Ross E. Lindsay ("Lindsay"), from transferring, assigning, leasing, selling, renting, damaging or otherwise disposing of the vehicles or removing them from their present locations at the following facilities: (i) the on-airport facility located at 334 Lucas Drive, Detroit, Michigan 48242; (ii) the Livonia facility located at the Ramada INN, 30375 Plymouth Road, Livonia, Michigan 48150; (iii) the Southfield facility located at the Days Inn 17017 W. Nine Mile Road, Southfield, Michigan 48075; and (iv) the Waterford facility located at the Airport Pick-Up, 6959

4

Highland Road, Waterford, Michigan 48327 (the "Premises"), pending a hearing on Dollar's Motion for a Preliminary Injunction.

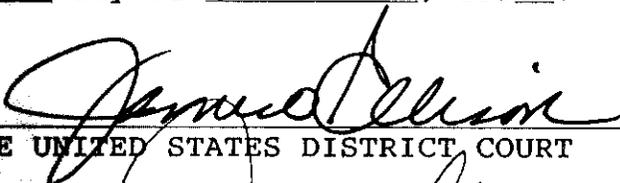
The Court finds that it clearly appears from Dollar's evidence that Dollar will be irreparably injured by Defendants' removal or disposal of the vehicles from the Premises. Dollar has made a prima facie showing that Defendants have breached the Vehicle Lease Agreement by failing to comply with its obligations therein, that Dollar has properly terminated the Vehicle Lease Agreement and has a right to repossess the vehicles from Bluewater. Dollar has made a prima facie showing that Dollar will succeed on the merits of this action, will be irreparably harmed if a Temporary Restraining Order is not issued, that Bluewater will not suffer irreparable injury, and that the public interest favors the imposition of such a Temporary Restraining Order.

Dollar has further made a prima facie showing that Defendants' counsel was notified that this hearing was to occur on this date at such time as was convenient to the Court.

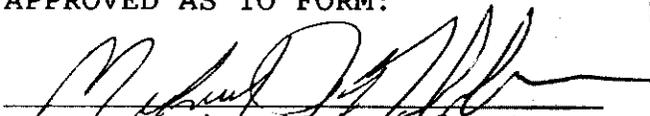
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants Bluewater Leasing, Inc., Jay M. Montrose, and Ross E. Lindsay, their agents, servants, and all other persons acting by and under Defendants' authority or in concert with Defendants are restrained from removing or

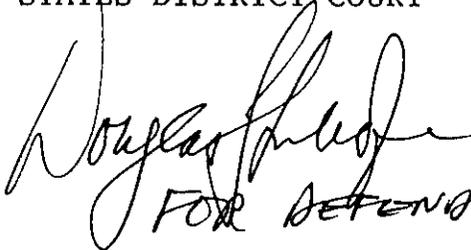
otherwise disposing of the vehicles from the Premises, such restraining order to remain in full force and effect until 21<sup>st</sup> day of Jan., 1992, at 4:30 P.m. o'clock, at which time Defendants will be given an opportunity to show cause why the foregoing restraining order should not be made a preliminary injunction, in the Courtroom of the Honorable James Collins (Beg at 9:00 A.M.)

This Temporary Restraining Order is issued at 4:30 pm o'clock on the 29<sup>th</sup> day of Dec., 1992.

  
THE UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:

  
James L. Kincaid, OBA #5021  
Michael J. Gibbens, OBA# 3339  
W. Kyle Tresch, OBA #13789

  
FOR DEFENDANTS

- Of the Firm -

CROWE & DUNLEVY  
A Professional Corporation  
Suite 500  
321 South Boston  
Tulsa, Oklahoma 74103-3313  
(918) 592-9800

344.92B.WKT

FILED

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

DEC 30 1992

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

VALERIE CORDRAY,  
Plaintiff,

vs.

INDIAN ELECTRIC COOPERATIVE,  
INC., a corporation,  
Defendant.

Case No. 92-C-337-E

JAN 5 1993

ORDER OF DISMISSAL

UPON Application for Order of Dismissal filed this date by Plaintiff in the above-captioned case, this Court finds it to be in the best interest of each of said parties for this Court to order dismissal with prejudice to refiling of this action herein for the reason that all claims by Plaintiff against said Defendant have been concluded by agreement between the parties. Each party is to bear their respective costs and fees.

WHEREFORE, this Court orders dismissal of the above entitled cause with prejudice and with each party to bear their respective costs and fees.

*James D. ...*  
UNITED STATES DISTRICT JUDGE



Marshal's service; the Defendant, Lynn Molleder a/k/a Lynn Mollerker, acknowledged receipt of Summons and Complaint on July 6, 1992; the Defendant, County Treasurer, Delaware County, Oklahoma, acknowledged receipt of Summons and Complaint on July 6, 1992; and that Defendant, Board of County Commissioners, Delaware County, Oklahoma, acknowledged receipt of Summons and Complaint on July 13, 1992.

The Court further finds that the Defendant, Commonwealth Land Title Company, was served by publishing notice of this action in the Delaware County Journal, a newspaper of general circulation in Delaware County, Oklahoma, once a week for six (6) consecutive weeks beginning October 21, 1992, and continuing to November 25, 1992, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Commonwealth Land Title Company, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstractor filed herein with respect to the last known address of the Defendant, Commonwealth Land Title Company. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the

evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to its present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer and Board of County Commissioners, Delaware County, Oklahoma, filed their Answer on July 17, 1992, disclaiming any right, title or interest in the subject property; and that the Defendants, Randy G. Clark a/k/a Randy Gene Clark, Corina R. Clark, Lynn Molleder a/k/a Lynn Mollerker, and Commonwealth Land Title Company, 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 Delaware County, Oklahoma, within the Northern Judicial District of Oklahoma:

A piece, part or parcel of land lying in the Northwest Quarter of Southeast Quarter of Northeast Quarter of Section 31, Township 24 North, Range 24 East, Delaware County, State of Oklahoma, more particularly described as follows, to-wit:

Beginning at the Northeast corner of the above described tract; thence South 210 feet; thence West 210 feet for a point of beginning; thence West 175 feet or to U.S. Highway No. 59; thence on and along the highway in a Northeasterly direction 150 feet; or to a private drive; thence on along the South side of the private drive 185 feet; thence South 50 feet to the point of beginning.

The Court further finds that on October 19, 1983, the Defendants, Randy Gene Clark and Corina R. Clark, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$27,500.00, payable in monthly installments, with interest thereon at the rate of 13 percent (13%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Randy G. Clark a/k/a Randy Gene Clark and Corina R. Clark, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated October 19, 1983, covering the above-described property. Said mortgage was recorded on October 20, 1983, in Book 455, Page 143, in the records of Delaware County, Oklahoma.

The Court further finds that the Defendants, Randy G. Clark a/k/a Randy Gene Clark and Corina R. Clark, 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, Randy G. Clark a/k/a Randy Gene Clark and Corina R. Clark, are indebted to the Plaintiff in the principal sum of \$26,549.63, plus interest at the rate of 13 percent per annum from June 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$335.25 (\$55.00 fees for service of Summons and Complaint, \$272.25 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Delaware County, Oklahoma, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, Randy G. Clark a/k/a Randy Gene Clark, Corina R. Clark, Lynn Molleder a/k/a Lynn Molleker, and Commonwealth Land Title Company, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Randy G. Clark a/k/a Randy Gene Clark and Corina R. Clark, in the principal sum of \$26,549.63, plus interest at the rate of 13 percent per annum from June 1, 1991 until judgment, plus interest thereafter at the current legal rate of 3.75 percent per annum until paid, plus the costs of this action in the amount of

\$335.25 (\$55.00 fees for service of Summons and Complaint, \$272.25 publication fees, \$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, Randy G. Clark a/k/a Randy Gene Clark, Corina R. Clark, Lynn Molleder a/k/a Lynn Mollerker, and Commonwealth Land Title Company, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer and Board of County Commissioners, Delaware County, Oklahoma, disclaims any right, title, or interest in the subject real property.

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

**First:**

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

**Second:**

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

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

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

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM  
United States Attorney

WYN DEE BAKER, OBA #465  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

Judgment of Foreclosure  
Civil Action No. 92-C-558-E

WDB/esr

DATE 1/4/93  
**FILED**

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

DEC 31 1992

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

JERRY HARRIS,  
  
Plaintiff,  
  
vs.  
  
CITY OF CATOOSA, OKLAHOMA,  
a municipal corporation;  
BENNY L. DIRCK, Chief of  
Police; CAPTAIN RAYMOND  
RODGERS; VICE-MAYOR R. D.  
HESTER; and NANCY DIRCK,  
  
Defendants.

No. 91-C-882-B ✓

J U D G M E N T

In keeping with the Court's Order Sustaining the Defendants' Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56 filed this date, Judgment is hereby entered in favor of the Defendants, City of Catoosa, Oklahoma, a municipal corporation, Benny L. Dirck, Chief of Police, Captain Raymond Rodgers, Vice-Mayor R. D. Hester, and Nancy Dirck, and against the Plaintiff, Jerry Harris. Plaintiff's action is hereby dismissed with costs to be assessed against the Plaintiff if timely applied for pursuant to Local Rule 6. The parties are to pay their own respective attorney fees.

DATED this 31<sup>ST</sup> day of December, 1992.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE ~~FILED~~ JAN 4 1993

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

DEC 30 1992

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

FRANCIS E. HEYDT COMPANY )

Plaintiff, )

vs. )

No. 87-C-974-E

UNITED STATES OF AMERICA, )

Defendants. )

**ADMINISTRATIVE CLOSING ORDER**

The Court has been advised by the Court of Appeals for the Tenth Circuit that this Court is without jurisdiction to take further action in this case. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation.

ORDERED this 30<sup>th</sup> day of December, 1992.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

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

FILED  
JAN 4 1993

AVEMCO INSURANCE COMPANY, )  
a Maryland corporation, )

Plaintiff, )

V. )

No. 90-464-E /

ROBIN GAYLE WHITE, )  
individually and as personal )  
representative of the Estate )  
of JEFFERY ALAN WHITE, )  
deceased; DONIECE LACKEY, )  
individually and as Executrix )  
of the Estate of WILLIAM ROY )  
LACKEY, deceased, and as )  
personal representative of )  
the heirs of WILLIAM ROY )  
LACKEY; and HAROLD D. "RED" )  
STEVENSON, )

Defendants. )

FILED

DEC 30 1992

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

ORDER AND JUDGMENT

COMES NOW before the Court Plaintiff's Motion for Summary Judgment which the Court took under advisement pending resolution of a question of state law by the Supreme Court of Oklahoma. For the reasons stated herein, Plaintiff's motion is granted.

Although the relief contemplated by Federal Rule of Civil Procedure 56 is drastic and should be applied with caution so that litigants will have an opportunity for trial on bona fide factual disputes, summary judgment shall be rendered if the pleadings and other documents on file with the Court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230, 234 (10th Cir. 1975); Jones v. Nelson,

484 F.2d 1165, 1168 (10th Cir. 1973); Machinery Center, Inc. v. Anchor National Life Insurance Co., 434 F.2d 1, 6 (10th Cir. 1970).

Plaintiff issued an aircraft policy in Missouri to Decedent White which covered an airplane owned by him. White's aircraft policy provided excess coverage during his operation of aircraft owned by another, but the aircraft policy expressly excluded coverage during his operation of any aircraft lacking a "Standard" Category Airworthiness Certificate.

In 1989, White and Lackey died in a crash which occurred while White was operating an airplane owned by Defendant Stevenson. Stevenson did not have a "Standard" Category Airworthiness Certificate for his airplane, but instead had an experimental aircraft certificate. Lackey's estate filed a negligence action against Stevenson and White's Estate in the District Court of Muskogee County. White's Estate demanded that Avemco defend the state court tort action and indemnify the Estate. Avemco refused, filed this action for declaratory judgment, and sought summary judgment on all issues.

Plaintiff argues that it has no duty to defend or indemnify the estate of the policyholder with respect to litigation arising out of a non-commercial aircraft accident because coverage is excluded where the aircraft is not owned by the policyholder and either 1) is flown without the owner's consent or 2) flown without a "standard" category airworthiness certificate. In first addressing Plaintiff's Motion for Summary Judgment, the Court found that the issue of whether the plane was flown by Decedent White

without the owner's consent was in dispute. However, the Court took the Plaintiff's motion under advisement, pending resolution of the following state question of law by the Oklahoma Supreme Court: Whether an Airworthiness Certificate exclusion in an aircraft liability policy is contrary to Oklahoma public policy, and unenforceable when no causal link has been shown between the crash of the aircraft and the failure to have a "Standard" Category Airworthiness Certificate?

On the 4th day of November, 1992, the Supreme Court of Oklahoma addressed and resolved the above-stated issue of state law. Following the majority of jurisdictions, the Oklahoma Supreme Court rejected the notion that public policy requires a causal connection between the commission of an act that gives rise to an exclusion from insurance coverage and the happening of a casualty where the terms of the policy that imposed such condition were not ambiguous. Because the express terms of the aircraft policy issued to the Decedent White excluded coverage of the loss at issue in the state court, Plaintiffs are under neither an obligation to defend the insured in the Muskogee County action, nor to indemnify the insured.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment with respect to their request for a declaratory judgment is hereby granted.

SO ORDERED, ADJUDGED AND DECREED this 30<sup>TH</sup> day of December, 1992.

*James D. Ellison,*  
U.S. D. J.

ENTERED ON DOCKET

DATE

1/4/93

**FILED**

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

DEC 31 1992

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

JERRY HARRIS,

Plaintiff,

vs.

No. 91-C-882-B

CITY OF CATOOSA, OKLAHOMA,  
a municipal corporation;  
BENNY L. DIRCK, Chief of  
Police; CAPTAIN RAYMOND  
RODGERS; VICE-MAYOR R. D.  
HESTER; and NANCY DIRCK,

Defendants.

**ORDER SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The Motion for Summary Judgment Pursuant to Fed.R.Civ.P. 56 of the Defendants herein is before the Court for decision. Following a thorough review of the record, the parties' arguments, and the applicable legal authority, the Court concludes the Defendants' motion should be SUSTAINED for the reasons discussed hereafter.

This case arises from the various federal and state claims of the Plaintiff, Jerry Harris ("Harris"), regarding the termination of his employment with the City of Catoosa ("Catoosa") Police Department.

The Plaintiff was employed as a police officer by the City of Catoosa. Defendant, Benny Dirck, was the police chief; defendant, Raymond Rodgers ("Rodgers") was a police force captain; defendant, R. D. Hester ("Hester"), was a city councilman and vice-mayor; and defendant, Nancy Dirck, is the wife of police chief, Benny Dirck.

Plaintiff alleges eight claims herein as follows:

In Count I, Plaintiff alleges that in violation of 42 U.S.C.

§ 1983, he was deprived of property and liberty interests in his employment without due process, that he was deprived of protected First Amendment freedom of speech, and that his rights under 42 U.S.C. § 1985, were violated by virtue of a conspiracy among the Defendants.

In Count II, Plaintiff alleges among the following pendent claims a breach of contract based upon the City of Catoosa employee handbook.

In Count III, Plaintiff alleges a claim for wrongful termination in violation of public policy.

In Count IV, Plaintiff alleges claims for wrongful interference with contract relations and invasion of privacy resulting from Benny Dirck allegedly playing a tape recording for Fred Nouri of Oklahoma Auction House.

Count V alleges claims for wrongful interference with contractual relations and invasion of privacy resulting from alleged conversations between Benny Dirck and Plaintiff's landlord, Dan Williams.

Count VI alleges claims for slander and invasion of privacy resulting from alleged conversations between Benny Dirck and Kurt Watson in which Plaintiff was purportedly accused of being a child molester.

Count VII alleges claims for invasion of privacy resulting from an alleged conversation between Benny Dirck and L. C. Sinor.

Lastly, Count VIII alleges claims for slander and invasion of privacy resulting from an alleged conversation between Defendant

Hester and Wanda Campbell.

The uncontroverted material facts are as follows:

1. Defendant, City of Catoosa, Oklahoma, is a municipal corporation existing pursuant to the provisions of Okla. Stat. tit. 11, § 11-101 *et seq.* and is governed under the strong-mayor-council form of city government. (Ex. A, Catoosa City Code attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992).

2. Plaintiff, Jerry Harris, was employed as a police officer by the City of Catoosa.

3. On December 3, 1990, Plaintiff telephoned Nancy Dirck at her home and made unwelcome proposals to her concerning masturbation and other sexual activity. (Ex. B attached to Brief in Support of Motion for Summary Judgment filed October 20, 1992, Plff.'s Depo., p. 174, lines 22-25, and p. 109, line 7; transcript of audio tape recording of entirety of Plaintiff and Nancy Dirck's telephone conversation; Diane Harris Depo. pp. 84-102. Attached hereto as Appendix A are the specific pages of the Plaintiff and Nancy Dirck's obscene telephone conversation, line 17, p. 91 through and including line 21, p. 100).

4. The December 3, 1990, telephone call was recorded on the Dirck telephone. (Ex. C attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Nancy Dirck Depo., p. 31, lines 17-21). The Plaintiff, Jerry Harris, admits the telephone conversation as reflected by the audio tape transcript.

5. Nancy Dirck and Benny Dirck reported the telephone call to the Catoosa Police Department. Captain Raymond Rodgers took the report. (Ex. D attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Benny Dirck Depo., p. 57, lines 7-24; Nancy Dirck Depo., p. 47, lines 6-25; Raymond Rodgers Depo., p. 23, line 22, to p. 24, line 16).

6. On December 4, 1990, Benny Dirck and Raymond Rodgers took the tape recording of the telephone conversation to the Rogers County District Attorney. (Ex. E attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Benny Dirck Depo., p. 87, lines 12-23; Raymond Rodgers Depo., p. 25, lines 1-22).

7. On the afternoon of December 4, 1990, Plaintiff was advised by the district attorney's office of the existence of the tape and the possibility of charges being filed for making an obscene telephone call. (Ex. F attached to Defendants' Brief in Support of Motion for Summary Judgment, Plff.'s Depo., p. 74, lines 11-20).

8. Following the conversation with the district attorney on December 4, 1990, Plaintiff went to the Catoosa police department and signed a written resignation from the Catoosa police department. The letter of resignation states as follows:

"December 4, 1990

To: Benny Dirck  
Chief of Police  
Catoosa Police Department

Dear Chief Dirck:

Please accept this letter as notice of my resignation from the Catoosa Police Department, effective this date.

It has been a pleasure working with the Catoosa Police Department for the past 1 1/2 years.

Sincerely,

/s/ Jerry Harris

Jerry Harris."

(Ex. G attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Ex. 2 to Benny Dirck's Depo.; Plff. Depo., p. 82, lines 8-9; Benny Dirck Depo., p. 80, lines 19-21; Raymond Rodgers Depo., p. 35, line 19, through p. 36, line 22).<sup>1</sup>

9. Plaintiff was charged with "Indecent Telephone Conversation" in the District Court of Rogers County, Oklahoma. He entered a plea of no contest and was sentenced to pay a fine. (Ex. H attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Information, Amended Information and Court Minute in Case No. CRM-91-112). (Plaintiff objects to same but the Court concludes the appropriate officials of the City of Catoosa could rightfully consider such public record of conviction regarding Plaintiff's continued employment).

10. In an unrelated matter, Plaintiff was also charged with

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<sup>1</sup>Plaintiff asserts that he signed the resignation letter under duress, having been advised by Benny Dirck he would not work in law enforcement again if he consulted an attorney.

"Solicitation of a Bribe," requesting that a person engage in sexual activity in exchange for not filing of criminal charges. Plaintiff subsequently stipulated to the factual basis for that charge and entered a plea of no contest. (Ex. I attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Information and Court Minute, Case No. CRF-91-40, Rogers County District Court). (Plaintiff objects to consideration of same but the Court concludes the appropriate officials of the City of Catoosa could consider such public documents, including the conviction and stipulation of facts stated therein regarding Plaintiff's conduct and fitness for continuing employment or return to employment).

11. Plaintiff was given a copy of the City of Catoosa's employee handbook at the time he was hired by the City. The handbook was adopted by the City Council's resolution on December 16, 1982, but was not adopted as an ordinance. (Ex. J attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Plff. Depo., p. 201, lines 7-11; City of Catoosa Employee Handbook, Ex. 1 to Benny Dirck's Depo.; Minutes of City Council Meeting December 16, 1982).

12. Under the Catoosa municipal government strong-mayor-council form of government, pursuant to Okla. Stat. tit. 11, § 11-101 *et seq.*, only the mayor had the authority to hire and terminate city employees. (Ex. K attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Catoosa City Code, attached as Ex. A and Plff. Depo. p. 174, lines 11-14).

13. Plaintiff has presented no competent evidence that the City of Catoosa or its employees made any statements to prospective employers or others concerning the reasons for Plaintiff's termination. (Ex. L attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Plff. Depo., p. 34, line 2, through p. 35, line 7).

14. Plaintiff has no evidence, except his own personal speculation, that anyone with the City of Catoosa or any of the Defendants were motivated to terminate his employment in retaliation for his mayoral candidacy. (Ex. M attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Plff. Depo., p. 195, lines 5-25; Plff. Ex. 1, Plff. Depo., pp. 65-67 and 85-87).

15. Plaintiff has presented no evidence of a conspiracy between the individual Defendants to terminate Plaintiff's employment other than his own speculation in that regard. (Ex. N attached to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Plff. Depo., p. 196, line 1, through p. 198, line 5).

16. Count IV of Plaintiff's Complaint alleges interference with contractual relations and invasion of privacy by Benny Dirck when he allegedly played a tape of an obscene telephone call to Fred Nouri. No admissible evidence has been presented in support of this allegation and Defendants' Exhibit O to Brief in Support of Motion for Summary Judgment filed October 20, 1992, the affidavit of Fred Nouri is to the contrary.

17. Count V of Plaintiff's Complaint alleges interference with contractual relations and invasion of privacy by virtue of an alleged conversation between Benny Dirck and Plaintiff's landlord, Dan Williams. There is no evidence in the record that the Defendant, Benny Dirck, made a request to Dan Williams, Plaintiff's landlord, to terminate or otherwise influence the lease between Plaintiff and Dan Williams. (Ex. P to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Depo. of Dan Williams, p. 27, lines 9-11).

18. Count VI of Plaintiff's Complaint alleges a cause of action for slander and invasion of privacy as a result of an alleged conversation between Benny Dirck and Kurt Watson, in which Benny Dirck allegedly accused Plaintiff of being a child molester. There is no admissible evidence in the record that Benny Dirck conversed with Kurt Watson concerning Plaintiff being a child molester or had molested Plaintiff's stepdaughter. (Ex. Q to Defendant's Brief in Support of Motion for Summary Judgment filed October 20, 1992, Affidavit of Kurt Watson; Plff. Ex. 4, Affidavit of Ruby Maxine Watson dated November 5, 1992, is hearsay).

19. Count VII of Plaintiff's Complaint alleges invasion of privacy as a result of an alleged conversation between Benny Dirck and L. C. Sinor wherein Benny Dirck allegedly stated that the Plaintiff had made obscene telephone calls to Nancy Dirck. There is no admissible evidence in the record that supports such allegation. (Ex. R to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Depo. of Benny Dirck, p.

111, lines 13-18). Plaintiff, Jerry Harris, has never denied herein, but has admitted the obscene telephone conversation as is reflected by the attached appendix, Deft. Ex. B, Depo. of Diane Harris, p. 91, line 17 through and including p. 100, line 21).

20. Count VIII of Plaintiff's Complaint alleges causes of action for slander and invasion of privacy by virtue of a conversation between R. D. Hester and Wanda Campbell wherein Hester allegedly claimed that Plaintiff had made obscene telephone calls to Nancy Dirck. There is no evidence in the record that supports the contents of the Campbell/Hester conversation being defamatory nor do they constitute an invasion of privacy. (Ex. S to Defendants' Brief in Support of Motion for Summary Judgment filed October 20, 1992, Depo. of Plff., p. 235, line 1, through p. 236, line 2; Plff. Ex. 5, Affidavit of Wanda Lee Campbell dated November 5, 1992).

The Standard of Fed.R.Civ.P. 56  
Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

"Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .

"A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

## Legal Analysis and Conclusions

1. The alleged property interest, liberty interest, and First Amendment free speech claims under 42 U.S.C. § 1983.

State law controls whether there is a property interest in employment. Bishop v. Wood, 426 U.S. 341, 344, 48 L.Ed.2d 684, 98 S.Ct. 2074 (1976), and Board of Regents v. Roth, 408 U.S. 564 (1972). Absent a property interest in employment, no § 1983 action exists. See, Bailey v. Kirk, 777 F.2d 567, 572 (10th Cir. 1985).

Oklahoma acknowledges the "employment-at-will doctrine" and any such employee is subject to termination for any cause or for no cause. Burk v. K-Mart Corp., 770 P.2d 24, 26 (Okla. 1989), and Pierce v. Franklin Electric, 737 P.2d 921, 923 n. 4 (Okla. 1987). Thus, employment-at-will has no protected property interest under § 1983.

The Plaintiff was employed as a police officer for the City of Catoosa Police Department. The City of Catoosa has a strong-mayor-council form of government which is provided for under Okla. Stat. tit. 11, § 11-101 *et seq.* Under such a form of government, Oklahoma law provides that a city employee can be terminated "for the good of the service." Okla. Stat. tit. 11, §11-106 states as follows:

"The mayor shall be chief executive officer and head of the administrative branch of the city government. He shall execute the laws and ordinances, and administer the government of the city. He shall be recognized as the head of the city government for all ceremonial purposes and by the Governor for purposes of military law. He shall:

1. Appoint, and when necessary for the good of the service, remove, demote, lay off,

or suspend all heads or directors of administrative departments and all other administrative officers and employees of the city in the manner provided by law. The mayor or the council by ordinance may authorize the head of a department, office or agency to appoint and remove subordinates in such department, office or agency; . . ."

The Catoosa City Code applicable herein also provided that city employees were terminable "for the good of the service." Article 18, Section 1-72, and Article 2, Section 1-2, provide:

Sec. 1-72. Appointments and promotions on merit; removals and demotions; personnel department.

Appointments and promotions in the service of the City of Catoosa shall be made solely on the basis of merit and fitness; and removals, demotions, suspensions and layoffs shall be made solely for the good of the service. . . . (Emphasis added)

Sec. 1-2. Mayor as chief executive officer-powers and duties.

The mayor shall be chief executive officer and head of the administrative branch of the city government. He shall execute the laws and ordinances and administer the government of the city. He shall be recognized as the head of the city government for all ceremonial purposes and by the governor for purposes of military law. He shall:

(1) Appoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all heads, directors of administrative departments and all other administrative officers and employees of the city; . . ." (Emphasis added)

Both Oklahoma Supreme Court authority and Tenth Circuit Court of Appeals authority have specifically stated that an employee who can be terminated "solely for the good of the service" does not

have a sufficient expectation of continued employment to have a constitutionally protected property interest and entitlement to "due process." Hall v. O'Keefe, 617 P.2d 196, 200 (Okla. 1980); Campbell v. Mercer, 926 F.2d 990, 993 (10th Cir. 1991); Lane v. Town of Dover, 761 F.Supp. 768 (W.D.Okla. 1991), *aff'd*, 951 F.2d 291 (10th Cir. 1991); *see also*, Driggins v. City of Oklahoma City, 954 F.2d 1511 (10th Cir. 1992), and Graham v. Oklahoma City, 859 F.2d 142 (10th Cir. 1988).

An obfuscating factor herein, relied upon by Plaintiff, is the City of Catoosa employee handbook which was provided Plaintiff at the time he was hired by the city. The employee handbook contains language that states "employment separation shall be solely for cause." (Defts'. Ex. J, Employee Handbook, Section 1.1). The employee handbook was adopted by resolution by the city council in 1982, but not enacted as an ordinance. (Defts'. Ex. J). Under Oklahoma law, where terms of employee dismissals are explicitly stated in the city code or charter, such is the fundamental law of the city and city officials are not authorized to alter or ignore the basic law of the city. A provision of the city code or charter prevails over a conflicting resolution. Phillips v. Calhoun, 956 F.2d 949 (10th Cir. 1992); Graham, 859 F.2d at 146; Hall v. O'Keefe, 617 P.2d 196 (Okla. 1980), and Goodwin v. Oklahoma City, 199 Okla. 26, 182 P.2d 762 (1947). The city charter, code or ordinance takes precedence over a resolution. Umholtz v. City of Tulsa, 565 P.2d 15 (Okla. 1977). 56 Am.Jur.2d, Municipal Corporations, Etc., § 344 provides:

"The term 'resolution' denotes something less formal than the term 'ordinance'; generally, it is a mere expression of the opinion or mind of the council concerning some matter of administration coming within its official cognizance, and provides for the disposition of a particular item of the administrative business of a municipal corporation. It is ordinarily of a temporary character, while an ordinance prescribes a permanent rule of conduct or of government. A resolution is not a law, and in substance there is no difference between a resolution, order, and motion." [Emphasis supplied].

Thus, language in the employee handbook approved by resolution stating that an employee could be terminated only for cause did not create a property interest in Plaintiff herein or the reasonable expectation of continued employment.

Further, the City of Catoosa's code specifically provides that the mayor may remove employees when "necessary for the good of the service." Such discretionary authority rests only with the mayor regarding the "good of the service" determination.

Plaintiff asserts that his resignation from the police force was coerced by actions of the police chief, the Defendant, Benny Dirck. Plaintiff states that the Defendant, Benny Dirck, threatened to put him in jail if he didn't sign the resignation letter, and in doing so Plaintiff's property interest was terminated. The Oklahoma Statutes and the Catoosa city code vested such employment termination authority only in the mayor. Even if Benny Dirck acted as alleged by Plaintiff, Benny Dirck was without authority under the basic law of the City of Catoosa to terminate the Plaintiff. Plaintiff indicated in his deposition that he was

aware, under the law of the City of Catoosa, the mayor had authority to hire and terminate employees. (Defts.' Ex. K, Plff.'s Depo. p. 174, lines 11-14).

The Oklahoma Statutes and the Catoosa employee handbook provide that Plaintiff had the right to appeal any questioned termination of his employment. (See, Okla. Stat. tit. 11, § 11-125 and the employee handbook, Section 7.2D, Defts.' Ex. T and J, respectively). Plaintiff did not request a hearing before a personnel board so in failing to take advantage of the due process mechanism, Plaintiff waived such due process claim. (Defts.' Ex. V, Plff.'s Depo., p. 203, line 6; see, Pitts v. Board of Education of U.S.D. 305, Salina, Kansas, 869 F.2d 555, 557 (10th Cir. 1989); Weinrauch v. Park City, 751 F.2d 357 (10th Cir. 1984); Riggins v. Board of Regents of University of Nebraska, 790 F.2d 707 (8th Cir. 1986); Correa v. Nampa School District No. 131, 645 F.2d 814 (9th Cir. 1981); and Stewart v. Bailey, 556 F.2d 281 (5th Cir. 1977).

In his Complaint, Plaintiff asserts that he was deprived of his liberty interest by "failing to afford the Plaintiff due process in regard to his right to be free from taint to his reputation, good name, honor and integrity." (See, Complaint, paragraph 11). In order to establish a violation of Plaintiff's liberty interest, he must demonstrate that his dismissal resulted in the publication of information which was both false and stigmatizing. Asbill v. Housing Authority of the Choctaw Nation of Oklahoma, 726 F.2d 1499, 1503 (10th Cir. 1984); Sipes v. United States, 744 F.2d 1418, 1421 (Okla. 1984). Further, any such

defamatory publication must occur in the course of the termination of employment. Melton v. City of Oklahoma City, 928 F.2d 920, 926 (10th Cir. 1991). Also, any such stigmatization must result in the inability to obtain other employment to rise to the level of a constitutional violation. Allen v. Denver Public School Board, 928 F.2d 978, 982 (10th Cir. 1991), and McGhee v. Draper, 639 F.2d 639, 643 (10th Cir. 1981).

The record herein reveals that Plaintiff cannot establish a violation of a liberty interest because (1) the statements were not false and stigmatizing; (2) they were not made in public; see, Bishop v. Wood, 426 U.S. 341, 48 L.Ed.2d 684, 98 S.Ct. 2074, 2079 (1976); and Rich v. Secretary of the Army, 735 F.2d 1220, 1227 (10th Cir. 1984); (3) they were not made during the course of termination of employment; Paul v. Davis, 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976); and see, Wulf v. City of Wichita, 883 F.2d 842, 869 (10th Cir. 1989); Harris v. Blake, 798 F.2d 419, 423 (10th Cir. 1986); and McGhee, 639 F.2d at 643; and (4) did not result in Plaintiff's inability to obtain other employment.

Any statement made concerning Plaintiff's obscene telephone call was not false. (See attached Appendix). The record does not reveal that Defendants made any false statements in connection with the termination of Plaintiff's employment which might have stigmatized him or limited his future ability to get employment. (See Defts. Ex. W, Plff.'s Depo., p. 33, line 12 through p. 35, line 7).

Finally, Plaintiff's alleged First Amendment violation claim

stems from his statement to the Defendant, Benny Dirck, that he was considering running for the office of mayor of the City of Catoosa. (See Complaint, Paragraph 5). In order to establish his First Amendment, free speech claim, the record must demonstrate that Plaintiff's speech was constitutionally protected and that the speech was a substantial or motivating factor in his termination. See, Conaway v. Smith, 853 F.2d 789, 795 (10th Cir. 1988). The first requirement is met because the announcement to run for mayor would be constitutionally protected speech. However, the record is devoid of any evidence that the city's termination of the Plaintiff was in any way motivated by such protected speech. Plaintiff admits that he made the subject obscene telephone call to police chief Defendant, Benny Dirck's wife, Nancy Dirck, (see Uncontroverted Fact No. 3), and Plaintiff admits that he signed the resignation letter (see Uncontroverted Fact No. 8). Plaintiff has further testified that he does not know of any evidence that his termination was motivated by his announced mayoral candidacy. (See Uncontroverted Fact No. 11).

**2. Plaintiff's claim of conspiracy under 42 U.S.C. § 1985.**

Plaintiff's own testimony and the record support that he has no evidence of his alleged conspiracy claim. (Defts'. Ex N, Plff.'s Depo. p. 197, line 7, through p. 198, line 12).

**3. The record does not support Plaintiff's claim of breach of employment contract.**

Plaintiff rests his claim for breach of employment contract

upon the Catoosa employee handbook.

For an employee handbook to give rise to an implied contract of employment, there must be some promissory inducement outside the handbook itself, and there must be some evidence of employee's reliance on the handbook. See, Hinson v. Cameron, 742 P.2d 549, 556 n. 28 (Okla. 1987), and Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976). There is no evidence in the record that Plaintiff relied on the employee handbook and requested any hearing provided therein. (Deft. Ex. X, Plff.'s Depo. p. 201, line 7 through 11, and p. 202, line 2 through p. 203, line 15).

It has been held that an employee manual listing some, although not all, of the grounds for termination could not be construed to be a contract of employment. Hinson v. Cameron, *supra*, see also, Carnes v. Parker, 922 F.2d 1506, 1511 (10th Cir. 1991), Dupree v. United Parcel Service, Inc., 956 F.2d 219, 222 (10th Cir. 1992), and Williams v. Maremont Corp., 875 F.2d 1476 (10th Cir. 1989).

The Catoosa employee handbook lists some, but not all, of the grounds for termination. (Deft. Ex. J).

Further, for the reasons pointed out in paragraph 1 above, the City of Catoosa had no authority to adopt provisions in its employee handbook at odds with or contrary to the Oklahoma state statutes and the Catoosa city code duly adopted and passed.

4. The record does not support Plaintiff's Count III alleging wrongful termination in violation of Oklahoma public policy.

Oklahoma has recognized an action in tort for wrongful discharge of an at-will employee under a public policy exception. Hinson v. Cameron, 742 P.2d 549 (Okla. 1987), and Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). In Burk, the Supreme Court of Oklahoma stated that the public policy exception applies only in a "narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law." *Id.* at 28.

The public policy violation Plaintiff asserts deals with his First Amendment right concerning his announcement he was contemplating running for mayor. First, the record does not support that Plaintiff's termination arose from his mayoral announcement but it clearly reflects it stemmed from his obscene telephone call to Nancy Dirck on December 3, 1990. Further, public policy was not implicated in Plaintiff's termination because Okla. Stat. tit. 11, § 22-101.1, permits the City of Catoosa to restrict political activity by employees:

"Municipal corporations may establish employment requirements requiring municipal employees to refrain from filing as candidates for public office while employed by said municipal entities."

The City of Catoosa Code, adopted in 1982, after the enactment of § 22-101.1, in 1981, placed restrictions upon employee participation in mayoral or council elections. (Deft. Ex. D to Reply Brief filed December 11, 1992).

5. The record does not support Plaintiff's Counts IV and V claims of tortious interference with contractual relationships.

Plaintiff has not produced any competent evidence to establish the elements of tortious interference with the contract relating to his employment at the Oklahoma Auction House. Employer, Fred Nouri, states that Benny Dirck did not play the tape of the obscene telephone call of Plaintiff for Nouri. (Deft. Ex. O). Further, the record supports that Plaintiff worked as a part time security guard for the Oklahoma Auction House in early 1990, but was not so employed in December 1990, when the alleged conversation between Benny Dirck and Nouri took place. (Deft. Ex. O).

Concerning Count V, there is no factual basis in the record for Plaintiff's claim of wrongful interference with his relationship with Plaintiff's landlord, Dan Williams. Williams has testified that Benny Dirck did not make any request or inducement of Williams to break or terminate Plaintiff's residential lease. (Deft. Ex. P, Depo. of Dan Williams, p. 27, lines 9-11). Additionally, Plaintiff has not demonstrated any damage from the alleged wrongful interference because Plaintiff continued to lease the premises from Williams until May 1992. (Deft. Ex. Y, Depo. of Plff. p. 5, lines 3-20). Niemeyer v. U. S. Fidelity and Guaranty Co., 789 P.2d 1318, 1320 (Okla. 1990) (An action for tortious interference of contract arises when one maliciously interferes in a contract between two parties inducing one of them to break the contract to the detriment of the other); Mac Adjustment, Inc. v.

Property Loss Research Bureau, 595 P.2d 427, 428 (Okla. 1979) (setting forth elements of malicious interference with contractual relations); Ellison v. An-Son Corp., 751 P.2d 1102 (Okla. Ct. App. 1987).

6. The record does not support Plaintiff's claims in Counts IV, V, VI and VII for invasion of privacy.

Counts IV, V, VI and VII allege that Benny Dirck and the Defendant Hester invaded the Plaintiff's privacy. Specifically, Plaintiff asserts that statements allegedly made by Benny Dirck to Fred Nouri, Dan Williams, Kurt Watson and L. C. Sinor and statements allegedly made by Hester to Wanda Campbell invaded his privacy by placing him in a false light. As previously discussed herein, Benny Dirck did not play the obscene audio tape for Fred Nouri. (Deft. Ex. O). Benny Dirck made no statements to Kurt Watson concerning Plaintiff's alleged child molestation. (Deft. Ex. Q). Benny Dirck made no statements to L. C. Sinor concerning Plaintiff or any alleged obscene telephone calls. (Deft. Ex. R). Plaintiff's own testimony indicates that the statements purportedly made by Hester to Wanda Campbell were not an invasion of privacy.

To establish a claim of invasion of privacy/false light, there must be a communication involving "highly offensive" matter that the actor had knowledge as to its falsity. Colbert v. World Publishing Company, 747 P.2d 286, 290 (Okla. 1987), citing McCormack v. Oklahoma Publishing Company, 613 P.2d 737 (Okla. 1980), and Restatement (Second) of Torts § 652A (1977).

Any such conversation by Benny Dirck was not false because the obscene telephone conversation took place and has been acknowledged and never denied by Plaintiff. Further, Plaintiff was formerly charged with making an indecent telephone call for which he was convicted, so the matter was of public record and not "private" as Plaintiff asserts. The record indicates there is no factual or legal basis for Plaintiff's claim of invasion of privacy with regard to the alleged statement made to L. C. Sinor and Fred Nouri.

Plaintiff's contentions concerning the statements made by Defendant Hester to Wanda Campbell, the editor of the local newspaper, do not rise to the level of the tort of invasion of privacy/false light. Plaintiff's testimony simply indicates that Hester told Wanda Campbell that "if she would listen to the tapes that she would have a different opinion of [Plaintiff]." (Def. Ex. Z, Depo. of Plff. p. 235, lines 15-17). Both the matter of the indecent telephone call and the solicitation of bribe charges were of public record for which the Plaintiff was convicted. Thus, such conversation would not constitute the highly offensive kind of false statement which would place Plaintiff in a false light because they were true and of public record.

7. **There is no factual basis in the record for Plaintiff's claim of defamation in Count VIII.**

Plaintiff alleges that Benny Dirck made statements to Kurt Watson that Plaintiff was a child molester and had molested his stepdaughter. Additionally, Plaintiff alleges that Defendant Hester told Wanda Campbell, the local newspaper editor, that

Plaintiff had made an obscene telephone call to Benny Dirck's wife.

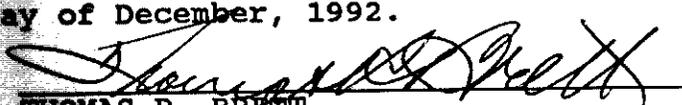
The record does not support Plaintiff's allegation of defamation concerning Plaintiff being a child molester to Kurt Watson. (Deft. Ex. Q).

Any statement by Defendant Hester to Wanda Campbell to the effect that Plaintiff had made obscene telephone calls to Benny Dirck's wife would not be actionable under Oklahoma's defamation law, Okla. Stat. tit. 12, § 1441. Defendant Hester's statement was not false so not actionable. Miskovsky v. Oklahoma Publishing Company, 654 P.2d 587 (Okla. 1982). The criminal conviction of the Plaintiff for making an indecent telephone call was a matter of public record. (Deft. Ex. H).

Finally, any statement of Hester to Campbell that if she listened to the tape "she would have a different opinion" of Plaintiff was not defamatory. (Deft. Ex. Z, Depo. of Plff. p. 235, lines 15-17). Such a statement of an opinion under Oklahoma law does not constitute actionable defamation. Miskovsky, supra at 593, and Tanner v. Western Publishing Company, 682 P.2d 239 (Okla. Ct. App. 1984).

In conclusion and for the reasons and analysis above stated, Defendants' Motion for Summary Judgment is hereby SUSTAINED and a Judgment in keeping with the Court's order will be filed contemporaneously herewith.

DATED this 31<sup>ST</sup> day of December, 1992.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

1 should have been strapped down.

2 MS. DIRCK: huh.

3 MR. HARRIS: Maybe somebody borrowed it  
4 during the day.

5 MS. DIRCK: Oh, you think so? It's still  
6 under there, isn't it?

7 MR. HARRIS: I hope.

8 MS. DIRCK: Maybe the dog needs a drink of  
9 water or something.

10 MS. DIRCK: Yeah, probably so.

11 MR. HARRIS: I will call you back.

12 MS. DIRCK: Okay.

13 MR. HARRIS: Okie dok.

14 MS. DIRCK: Bye.

15 This is October the 3rd, 1990. Benny is at  
16 the city meeting.

17 MS. DIRCK: Hello.

18 MR. HARRIS: Well?

19 MS. DIRCK: Well?

20 MR. HARRIS: Well, are you ready?

21 MS. DIRCK: For what?

22 MR. HARRIS: To do it.

23 MS. DIRCK: To do it. To do it what?

24 MR. HARRIS: Whatever you want.

25 MS. DIRCK: What did you do with the boy?

1 MR. HARRIS: He is in the front room. I'm  
2 in the bedroom.

3 MS. DIRCK: Oh, I see.

4 MR. HARRIS: Well, I just thought I would  
5 tell you. Perfect time, perfect time.

6 MS. DIRCK: Perfect time for what?

7 MR. HARRIS: To do it.

8 MS. DIRCK: To do it? Well --

9 MR. HARRIS: Well?

10 MS. DIRCK: I don't know what you mean.

11 MR. HARRIS: You have to do it over the  
12 phone.

13 MS. DIRCK: Do it over the phone. Okay,  
14 tell me how.

15 MR. HARRIS: Okay. You got to take your  
16 pants off first.

17 MS. DIRCK: You take your pants off, and  
18 then what?

19 MR. HARRIS: You got them off?

20 MS. DIRCK: Well, no I'm --

21 MR. HARRIS: No, no, it doesn't work that  
22 way.

23 MS. DIRCK: Oh, it doesn't?

24 MR. HARRIS: Huh-uh.

25 MS. DIRCK: Well, you have got to tell me

1 things beforehand, so I can get ready.

2 MR. HARRIS: Well, that's what I want you  
3 to do.

4 MS. DIRCK: All right. Tell me again.

5 MR. HARRIS: Okay, take your pants off.

6 MS. DIRCK: Yeah.

7 MR. HARRIS: No, you ain't got them off  
8 yet.

9 MS. DIRCK: Well, that's, that's -- hum. I  
10 just don't understand what thrill you get out of  
11 that.

12 MR. HARRIS: Well, you have to try it and  
13 see.

14 MS. DIRCK: Try it and see. And then  
15 what?

16 MR. HARRIS: And then what what?

17 MS. DIRCK: Now after I get my pants off,  
18 what?

19 MR. HARRIS: Have you got them off?

20 MS. DIRCK: Yeah.

21 MR. HARRIS: You don't either.

22 MS. DIRCK: Well, Jerry, tell me.

23 MR. HARRIS: Well, I can't.

24 MS. DIRCK: Why?

25 MR. HARRIS: Well, you have to get them off

1 first.

2 MS. DIRCK: Well, you are not going to know  
3 if I do.

4 MR. HARRIS: Yeah, I can tell.

5 MS. DIRCK: Tell me how you can tell.

6 MR. HARRIS: I can hear them come off.

7 MS. DIRCK: Okay. They are off.

8 MR. HARRIS: No, they are not. Where are  
9 you at?

10 MS. DIRCK: I'm in the bedroom.

11 MR. HARRIS: Oh. What are you going to do  
12 if he walks in?

13 MS. DIRCK: Hang up the phone, I guess.

14 MR. HARRIS: Well, if he comes to the  
15 (inaudible), holler so I will know what's going on.

16 MS. DIRCK: Okay.

17 MR. HARRIS: You could come down here.

18 MS. DIRCK: Huh-uh.

19 MR. HARRIS: Why?

20 MS. DIRCK: No, I have got to keep this  
21 fire going.

22 MR. HARRIS: Oh, you do? Lay on the bed  
23 with your clothes off.

24 MS. DIRCK: Lay on the bed with my clothes  
25 off?

1 MR. HARRIS: Rub real softly (inaudible).

2 MS. DIRCK: Rub?

3 MR. HARRIS: Yeah, rub. Did it choke you  
4 up?

5 MS. DIRCK: Yeah, I guess so.

6 Rub myself real soft.

7 MR. HARRIS: Are you doing that?

8 MS. DIRCK: Huh-uh. That's embarrassing. I  
9 can't believe you are saying this.

10 MR. HARRIS: I'm not embarrassed.

11 MS. DIRCK: You are not embarrassed?

12 MR. HARRIS: Huh-uh.

13 MS. DIRCK: So, what are you doing?

14 MR. HARRIS: Well, do you really want to  
15 know?

16 MS. DIRCK: Yeah.

17 MR. HARRIS: Well, I have got my pants  
18 down.

19 MS. DIRCK: You do?

20 MR. HARRIS: Uh-huh.

21 MS. DIRCK: And?

22 MR. HARRIS: And, yes, I am.

23 MS. DIRCK: Yes, you am what?

24 MR. HARRIS: I am playing with myself.

25 MS. DIRCK: And what if the boy gets in?

1 MR. HARRIS: He can't.

2 MS. DIRCK: Oh.

3 MR. HARRIS: I have got the door shut.

4 MS. DIRCK: Oh. And he doesn't come in  
5 when the door is shut?

6 MR. HARRIS: Huh-uh. He knows better.

7 MS. DIRCK: Oh.

8 MR. HARRIS: So see, now it's your turn.

9 MS. DIRCK: My turn for what?

10 MR. HARRIS: What are you doing besides  
11 talking to me?

12 MS. DIRCK: Starting to talk real fast  
13 (inaudible).

14 MR. HARRIS: Are you? Is your heart  
15 beating fast?

16 MS. DIRCK: Yeah. Is it supposed to be?

17 MR. HARRIS: No. Why do I think this is a  
18 one-sided deal?

19 MS. DIRCK: Because I have never done this  
20 before, and you are going to have to tell me what --  
21 how you --

22 MR. HARRIS: You won't do it.

23 MS. DIRCK: I don't know how to play.

24 MR. HARRIS: Well, you won't do it. I told  
25 you.

1 MS. DIRCK: Well, but it doesn't lead  
2 anywhere.

3 MR. HARRIS: Yeah, it does, too, believe  
4 me.

5 MS. DIRCK: Oh, it does? Tell me where.

6 MR. HARRIS: It only gets better.

7 MS. DIRCK: Better.

8 MR. HARRIS: Then we eventually get  
9 together soon.

10 MS. DIRCK: Oh.

11 MR. HARRIS: Then that's when the fun  
12 starts.

13 MS. DIRCK: That's when the fun starts.  
14 Jerry, Jerry, I can't believe this.

15 MR. HARRIS: Are you telling me no?

16 MS. DIRCK: I told you the other day. -I  
17 can't believe you are doing this.

18 MR. HARRIS: You don't want to do it?

19 MS. DIRCK: Well, no.

20 MR. HARRIS: You don't?

21 MS. DIRCK: No.

22 MR. HARRIS: Why?

23 MS. DIRCK: Because I have never done  
24 anything like that.

25 MR. HARRIS: Well, you can't start any

1 younger, can you?

2 MS. DIRCK: Well, you know how old I am.  
3 That's no fair.

4 MR. HARRIS: You couldn't have started any  
5 younger anyhow. It's impossible.

6 MS. DIRCK: What do you mean?

7 MR. HARRIS: You don't get any younger.

8 MS. DIRCK: Well, I thought I was getting  
9 younger every day.

10 MR. HARRIS: Are you? I don't know. Well  
11 if you don't want to do it, we won't do it.

12 MS. DIRCK: Well, I don't think so.

13 MR. HARRIS: Coward.

14 MS. DIRCK: I guess I am. It's just --  
15 doesn't sound much fun to me.

16 MR. HARRIS: What?

17 MS. DIRCK: What you are doing.

18 MR. HARRIS: I'm not doing it now.

19 MS. DIRCK: Oh, you quit?

20 MR. HARRIS: Yeah. You done put a stop to  
21 it.

22 MS. DIRCK: Oh.

23 MR. HARRIS: Took all the fun out of it.

24 MS. DIRCK: Oh, I'm sorry. Well --

25 MR. HARRIS: I've got my britches back on

1 now.

2 MS. DIRCK: Well, you was just afraid you  
3 was going to get caught.

4 MR. HARRIS: By who?

5 MS. DIRCK: The boy.

6 MR. HARRIS: No, I wasn't either.

7 MS. DIRCK: Who else is there?

8 MR. HARRIS: You said, no, you wasn't going  
9 to do it.

10 MS. DIRCK: Oh.

11 MR. HARRIS: So, what's the use in doing it  
12 if you are not going to do it? Does that make  
13 sense?

14 MS. DIRCK: Yeah.

15 MR. HARRIS: But I think you should.

16 MS. DIRCK: You think I should; why?

17 MR. HARRIS: Because I guarantee you would  
18 like it.

19 MS. DIRCK: I would like it. I just don't  
20 see -- I don't know. There's just nowhere to go.  
21 That's just --

22 MR. HARRIS: Where do you want to go?

23 MS. DIRCK: Well, when you do things like  
24 that, you are supposed to have feelings, and I don't  
25 have any feelings like that.

1 MR. HARRIS: Well, you would.

2 MS. DIRCK: I would?

3 MR. HARRIS: It's not something that you  
4 just jump right into and enjoy it the first time.  
5 You have to build yourself up to it.

6 MS. DIRCK: Well, you sound like you have  
7 done this a bunch before.

8 MR. HARRIS: No, no.

9 MS. DIRCK: Oh. Then how do you know?

10 MR. HARRIS: Well, I'm smart. That's why  
11 I'm the detective.

12 MS. DIRCK: You are the detective. I  
13 forgot.

14 MR. HARRIS: Just an officer.

15 MS. DIRCK: Yeah.

16 MR. HARRIS: Well, okay, if you don't want  
17 to do it, I won't ever bother you with it anymore,  
18 Nancy.

19 MS. DIRCK: Okay.

20 MR. HARRIS: But I think you are crazy.

21 MS. DIRCK: You think I am, huh?

22 MR. HARRIS: Is Benny settling down?

23 MS. DIRCK: Settling down from what?

24 MR. HARRIS: Has he quit being his grouchy  
25 old self?

1/4/93

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

**FILED**

DEC 31 1992

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

MARION PARKER, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BANCOKLAHOMA MORTGAGE COMPANY, )  
 et al, )  
 )  
 Defendants. )

92-C-664-B/

ORDER

Now before this Court are the following motions: Joint Motion To Dismiss (docket #16), Motion To Dismiss (docket #17), Motion To Be Dropped From Case As Party Defendant (docket #22), Amended Motion To Dismiss Or, In The Alternative, Motion To Sever (docket #34) and Motion For Protective Order (filed on November 18, 1992).

I. Summary of Facts/Procedural History

On July 29, 1992, Plaintiff Marion Parker, a black male, filed suit against Defendants, asserting claims under 42 U.S.C. §1981, 42 U.S.C. §3601 *et. seq* and also alleging an Oklahoma "Public Policy Tort." Parker asserts he is a qualified real estate appraiser of residential property and claims Defendants have discriminated against him. Part of his Complaint alleges:

The plaintiff has continuously applied for work as a residential real estate appraiser from each of the defendants. The defendants have either provided less contract work to him than appraisers of the White/Caucasian [sic] race, or not provided him any contact work whereas White/Caucasian appraisers [sic] have continued to receive work. As a result of the discriminatory practices, Plaintiff has suffered great loss of income and other damages...of not less than \$500,000. *Complaint, page 2 (docket #1)*.

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In response to Plaintiff's Complaint, Defendants filed several dispositive motions. Defendants BankOklahoma Mortgage Corp. ("BOMC"), Woodland Bank ("Woodland") and Brumbaugh & Fulton ("Brumbaugh") filed a Joint Motion To Dismiss on September 10, 1992, arguing that Plaintiff had failed to state a claim under either 42 U.S.C. §3601 *et. seq.*, 42 U.S.C. §1981 or under Oklahoma's Public Policy Tort.

On September 10, 1992, Woodland also filed a second Motion To Dismiss pursuant to Rule 20 of the Federal Rules of Civil Procedure. Four days later, Mortgage Clearing Corporation filed a Motion To Be Dropped From The Case pursuant to Rule 20. On October 9, 1992, United Bank of Texas ("United Bank") filed its Motion To Dismiss, Or, In The Alternative, Motion To Sever.<sup>1</sup> United Bank later filed a Motion For Protective Order.

## II. Legal Analysis

Two issues are raised in this case. The first focuses on whether Plaintiff's Complaint states a claim. Specifically, does Plaintiff's Complaint provide Defendant with fair notice of what the Plaintiff's claim is and the grounds upon which his claims rest? The second issue is whether all of the Defendants are properly named as parties in the lawsuit.

### *A. Failure To State A Claim*

Plaintiff attempts to state a cause of action under 42 U.S.C. §1981, 36 U.S.C. §3601 *et. seq.* and Oklahoma's Public Policy Tort. The question is whether he has sufficiently stated a claim under these respective causes of action.

The general rule is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support

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<sup>1</sup> United Bank first argues it is an improper party. It also asserts that: 1) the court lacks subject matter jurisdiction because Plaintiff did not exhaust his administrative remedies; and 2) Plaintiff lacks standing because 42 U.S.C. §3601 *et. seq.* does not apply in this case.

of his claim which would entitle him to relief. *Conley v. Gipson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

To establish a case under most **failure-to-hire** situations, plaintiff must establish (1) That he belongs to a protected class; (2) That he applied for and was qualified for a job for which the employer was seeking applicants; (3) That despite his qualifications, he was rejected; and (4) That after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). In addition, and of particular importance, is that "purposeful discrimination" is a prerequisite to liability under § 1981. *General Building Contractors Assoc., Inc. v. Pennsylvania*, 458 U.S. 375, 388-389, 102 S.Ct. 3141, 3148-49, 73 L.Ed. 2d 835 (1982). See also, *Imagineering, Inc. v. Kiewit Pacific Company*, 976 F.2d 1303, 1313 (9th Cir. 1992).

In this case, Defendants' primary contention is that Plaintiff, an appraiser who believes he has not been hired because he is black, has failed to state a claim under either §1981 or/and §3606.<sup>2</sup> §3606 states:

**It shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.**

Defendants have not cited any cases dealing with an appraiser (i.e., an independent contractor) suing under §3606, and this Court has found none. However, in *Favors v.*

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<sup>2</sup> Defendants' arguments focused on 42 U.S.C. §3605, but Plaintiff asserts that he is relying on 42 U.S.C. §3606.

*MAQ Management Corp.*<sup>3</sup>, a black woman sued under §§1981 and 3606 after she was denied a job as a leasing consultant.

The Defendants' argument in that case - similar to the one at bar - was that the Fair Housing Act does not address discriminatory hiring. The court in *Favors* rejected the argument, writing:

Defendants' construction unduly narrows the facially broad language of the statute. To "deny participation" in a "facility relating to the business of renting dwellings" implied denying employment. Otherwise, one would be looking for other forms of participation in a business besides employment. Do Defendants mean to say that, for instance, volunteers or stockholders in such a business are given protection but not employees? This makes little sense...This Court declines to torture §3606 into allowing such a scheme that so undermines the purposes of the Fair Housing Act. There is no reason to assume that Congress did not intend to reach hiring in the housing section because of the existence of Title VII. *Id. at 944.*<sup>4</sup>

In this case, this Court agrees with the reasoning of *Favor*: it is possible for Plaintiff to state a claim under both §1981 and §3606 for alleged discriminatory failure by Defendants to hire him as a real estate appraiser. Therefore, Defendants' Motions To Dismiss are denied on these grounds.

The next issue is whether because of vagueness, Plaintiff's Complaint merits dismissal. Rule 8(a)(2), of the *Federal Rules of Civil Procedure* requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint need only "give the defendant fair notice of what the plaintiff's claim

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<sup>3</sup> 753 F.Supp. 941 (N.D. Ga. 1990)

<sup>4</sup> The facts in *Favors* differ from the case at bar. One important distinction is that the employer in *Favors* was apparently hiring white leasing personnel in a "back door" scheme to avoid renting apartments to black persons. That, along with other facts (i.e. intent to discriminate) are not present here. The *Favors* case, however, is persuasive because it states that the Fair Housing Act - particularly §3606 - does include hiring practices in the housing sector.

is and the ground upon which it rests." *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1386 (10th Cir.1980). However, what constitutes a "short and plain statement" depends on the circumstances of the case. *Id.*

In this case, the Complaint alleges the following facts: 1) Plaintiff is black; 2) Plaintiff is a "qualified" real estate appraiser; 3) Plaintiff has continuously applied for work as an appraiser; and 4) Defendants have "either provided him less contract work to him than" White appraisers or not provided him any contract work. *Complaint at page 2.*<sup>5</sup>

Plaintiff's Complaint fails to meet the Rule 8(a) standard for the following reasons. First, a prerequisite to a §1981 action is purposeful discrimination. Plaintiff has not alleged intentional or purposeful discrimination. Second, Plaintiff has provided no time frame for the alleged discriminatory actions. This failure potentially raises statute of limitation questions. Not to mention, the simple failure to apprise Defendants of specific events complained of. Third, Plaintiff has named nine Defendants, but has failed to state the actual wrongful conduct of each Defendant toward him beyond a general statement that they did not hire him as an appraiser. Lastly, there is no mention as to whether Defendants allegedly conspired or if they acted individually.<sup>6</sup>

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<sup>5</sup> In a response to the motions to dismiss, Plaintiff writes: "The facts upon which the Plaintiff brings this action are: 1) Plaintiff was qualified as a residential appraiser both by education and specific training. Plaintiff had attended training programs through the Department of Housing and Urban Development. 2) The Defendants have participated in the selling of VA-FHA insured homes first as participant in HUD programs and then under the guidelines of HUD. 3) As part of the program all Defendants were subject to anti-discrimination policies and practices in the selection process of appraisers. 4) The Defendants created a selection process hereby [sic] appraisers' names were placed upon a list for assignment to do appraisals on residential property as part of the process of selling the property. The Defendants selected White appraisers and decline to provide the Plaintiff with work." Plaintiff's Objection To Defendant, Bank United's Amended Motion To Dismiss, page 5 (docket #38).

<sup>6</sup> The same is true for Plaintiff's claim under "Oklahoma's Public Policy Tort".

The purpose of Rule 8(a)(2) is to put Defendants on fair notice. Here, while the Defendants know that they are being charged with failure to hire Plaintiff because of alleged discriminatory conduct, no single Defendant is apprised of a time within which the alleged conduct took place, or the facts concerning the claim of discrimination against that Defendant. Absent a statement of the facts pertinent to each named Defendant, supplying at least the foregoing information, the Complaint, as stated fails to state a claim in conformity with Rule 8(a)(2), *Fed.R.Civ.P.*

### *B. The Issue of Joinder*

Several Defendants also assert that the case should be dismissed because they are not proper parties. Rules 20 and 21, *Fed.R.Civ.P.* allow a court to sever a party or parties from a case to allow separate lawsuits to proceed. Generally, the question focuses on whether the claim arises out of the same transaction or series of transactions and whether there is a common question of law or fact.

The court is unable to rule on the issue. Defendants, while citing various legal propositions for their arguments, have offered few, if any, facts in regards to their relationship with Plaintiff. Such a scarcity of facts thus makes it difficult to decide which parties should be in this lawsuit and which, if any, should be severed or dismissed. As stated above, it is initially the Plaintiff's function to provide the underlying facts.

### III. Conclusion

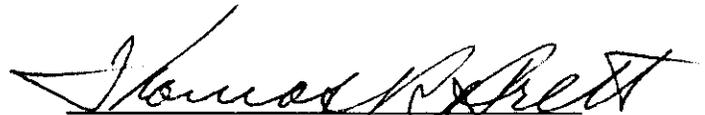
After careful examination of the pleadings, the Court finds that Defendants' Motions to Dismiss (docket Nos. 16,17, and 34) are granted; Plaintiff, however, is given the opportunity to amend. The Motion to Be Dropped from Case (docket #22) is hereby held

in abeyance pending filing by Plaintiff of an Amended Complaint. The Motion For Protective Order is stayed.

Plaintiff must file an Amended Complaint no later than **January 15, 1993**. The Amended Complaint must include facts about the 1) time frame of the alleged conduct, 2) place of the alleged conduct, 3) statements as to what roles the various Defendants played in the alleged discrimination, and 4) a statement of facts setting forth the alleged specific wrongful conduct of each Defendant. Plaintiff also must attach a copy of his complaint to the EEOC, together with a copy of his **right to sue** letter.

Once the Amended Complaint is filed, Defendants are to file any further responsive or dispositive pleadings on or before **January 29, 1993**. A status/scheduling conference is set for February 3, 1993 at 9:30 a.m. before Magistrate Judge Jeffrey Wolfe.

SO ORDERED THIS 31<sup>st</sup> day of Dec, 1992.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DATE

1/4/93

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

DANIEL RESOURCE DEVELOPMENT,  
INC., a Texas corporation,

Plaintiff,

v.

PAX PETROLEUM CORPORATION,  
a California corporation,

Defendant.

CASE NO. 92-C-586 B

**FILED**

JAN - 4 1993

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

ORDER

Now before the Court for its consideration is the defendant, Pax Petroleum Corporation's ("Pax") motion to dismiss for lack of personal jurisdiction and improper venue, pursuant to Fed.R.Civ.P. 12(b)(2) and (3).

Plaintiff Daniel Resource Development, Inc. ("DRD") originally filed this action in the District Court in Tulsa County, State of Oklahoma, alleging two causes of action against Pax. DRD sought payment for costs and other sums it alleged Pax owed on a contract for DRD's drilling of two oil and gas wells in Cheyenne County, Colorado. DRD also sought declaratory relief against Pax, alleging a controversy existed between Pax and DRD concerning the parties' rights and obligations relating to four oil and gas well sites on which Pax and DRD had agreements. One of those well sites was in Grady County, Oklahoma; the other well sites were in Louisiana, Texas and Colorado.

Pax removed this action to this Court, alleging diversity

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between the parties as the grounds for removal pursuant to 28 U.S.C. §1441. DRD did not contest the removal. Pax brought its motion to dismiss, arguing that there are no significant contacts between Pax and the State of Oklahoma and therefore this Court lacks personal jurisdiction over Pax. In support of its motion, Pax avers that (1) it has no office, and owns no real or personal property or other assets in Oklahoma, (2) has never registered to do business in Oklahoma, entered the State to solicit business and derives no revenue or benefit from the conduct of business in Oklahoma, and (3) has no employees or designated agents in Oklahoma for any purpose, including the service of process. Given the lack of personal jurisdiction, according to Pax, venue in this action is also improper as to Pax.

In response, DRD alleges that Pax has three significant contacts with the State of Oklahoma upon which to base personal jurisdiction. DRD first points out that Pax is required, under the terms of the parties' agreement covering the drilling of the Colorado wells, to make payment of its costs to an escrow account held at the Commercial Bank & Trust Company in Tulsa. DRD argues that Oklahoma is the place of performance of Pax's obligation to pay those costs, which Pax did not perform, thus giving rise to this action. DRD next points to Pax's ownership of a beneficial interest in an oil and gas well located in Custer County, Oklahoma. In 1991 Pax brought a lawsuit in Custer County suing to quiet title to that well. Finally, DRD alleges that Pax owns property in Oklahoma in connection with Pax's working interest in the Umbach

#1-21 well in Grady County, one of the four well sites upon which DRD seeks declaratory relief. In reply, Pax denies that these three contacts alone or in combination provide sufficient grounds to subject it to this Court's jurisdiction.

The alleged contacts of Pax with Oklahoma will be examined to determine whether they can support either specific or general jurisdiction over Pax. If the defendant's contacts with the state show the defendant's purposeful availment of the privilege of doing business in the state and the cause of action arises out of or relates to those contacts, the forum may exercise "specific jurisdiction". See Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1418 (10th Cir. 1988). The Court exercises "general jurisdiction" over a defendant "when the suit does not arise from or relate to the defendant's contacts with the forum and jurisdiction is based on the defendant's presence or accumulated contacts with the forum." Id.

A number of courts have found that the mailing of payments to an address in the forum state alone is insufficient to permit the exercise of personal jurisdiction over an out of state defendant. See Stuart v. Spademan, 772 F.2d 1185, 1194 (5th Cir. 1985) (agreement to mail payment checks into the forum state "does not weigh heavily in the calculus of contacts"); C & H Transp. Co., Inc. v. Jensen & Reynolds Const. Co., 719 F.2d 1267, 1270 (5th Cir. 1983), cert. denied, 466 U.S. 945 (1984) (defendant's mailing of a payment check to plaintiff in forum state "can hardly be termed significant in terms of purposeful availments of the benefits of

the forum state."); Scullin Steel Co. v. National Ry. Utilization Corp., 676 F.2d 309, 314 (8th Cir. 1982) (making of payments in forum state is a "secondary or ancillary" factor and cannot alone provide a minimum contact). The Court finds that Pax's mailing of payments to a bank in Tulsa, Oklahoma was solely due to DRD's selection of that payment site, as specified in the Letter Agreement sent to Pax. See Exhibit C, Defendant's Motion to Dismiss. DRD could have specified any state as the site for Pax's payments into an escrow account. In view of the cited decisions, the Court finds that Pax's payments to the Oklahoma bank account are an insufficient basis for specific or general jurisdiction.

Neither Pax's ownership of a leasehold interest in a Custer County, Oklahoma oil and gas well<sup>1</sup> nor its ownership of a working interest in the Umbach #1-21 well<sup>2</sup> in Grady County, Oklahoma are sufficient contacts to support general personal jurisdiction in this Court. Ownership of the wells alone is not a contact with the forum state that is so continuous and systematic as to make it fair to the defendant to litigate any matter in Oklahoma. Mere property ownership in the forum is not a sufficient basis for jurisdiction in actions unrelated to the property. Shaffer v. Heitner, 433 U.S. 186, 209, 97 S.Ct. 2569, 2582, 53 L.Ed.2d 683 (1977).

Furthermore, it is clear that the Court may not exercise

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<sup>1</sup> A Judgment by Default issued by the district court of Custer County, Oklahoma shows that Pax owns a 4.51521% undivided leasehold interest in an oil and gas well located in Custer County as a result of prevailing in a lawsuit it brought to quiet title to the well and recover damages.

<sup>2</sup> Pax admits that it owns interest in this well.

specific jurisdiction over the defendant based on its interest in the Custer County well because the plaintiff has raised no claims as to that well in this case. However, the exercise of specific jurisdiction based on Pax's ownership of an interest in the Umbach #1-21 well is appropriate if there is a dispute between the parties relating to it and if ownership of the well constitutes the purposeful availment of the privilege of doing business in Oklahoma.

In Manley v. Fong, 734 F.2d 1415 (10th Cir. 1984), a nonresident defendant who allegedly breached a purchase contract for a working interest in an oil and gas well in Oklahoma was held to be subject to personal jurisdiction in Oklahoma. The Tenth Circuit in Manley relied, in part, on the Oklahoma long-arm statute then in force which provided that "[a] court may exercise personal jurisdiction over a person . . . having an interest in, using, or possessing real property in this state."<sup>3</sup> Id. at 1419 (quoting Okla. Stat. Ann. tit. 12, §1701.03 (West 1980)). The court in Manley found that the working interest to be purchased by the

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<sup>3</sup> Oklahoma revised its long-arm statute in 1984. That statute now provides that "[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States." Okla. Stat. tit. 12, §2004(F) (1984). The Court does not view Manley as distinguishable from the present case for its use of the prior statute; the Oklahoma Supreme Court had interpreted that prior long-arm statute as being intended to allow the reach of personal jurisdiction of the Oklahoma courts to the outer limits permitted by the due process clause of the United States Constitution. See Glidewell Motors Inc. v. Pate, 577 P.2d 1290, 1291 (Okla. 1978).

nonresident was an interest in real property in Oklahoma.<sup>4</sup>

The court then considered for due process purposes whether the defendant in Manley had certain minimum contacts with Oklahoma. The court found that by virtue of the nonresident's ownership of the interest in the oil and gas lease "which by Oklahoma law is an ownership of an interest in real estate," the nonresident defendant "became a party to the activity in Oklahoma not only relating to the drilling of the well, but also to the activities in the production of oil and gas therefrom and the marketing and sale of the oil and gas produced and all other related activities necessary to make the investment profitable." Id. at 1419-20. The court held that from the defendant's ownership of the working interest in the Oklahoma well, the defendant "availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Id. at 1420 (citing Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958)).

Pax argues, however, that personal jurisdiction cannot be exercised on the basis of ownership of the Umbach #1-21 well because (1) the well has not been commercially productive and will be plugged and abandoned; and (2) DRD has manufactured a dispute between the parties on this well for jurisdictional purposes. In response, DRD contends that (1) DRD is attempting, with Pax's

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<sup>4</sup> In the Manley case, the Tenth Circuit found that the nonresident defendant had contracted to buy the working interest and had waived the performance of the condition precedent to the purchase, thus vesting the defendant with an equitable interest in real property in Oklahoma. 734 F.2d at 1419.

support, to recomplete the Umbach #1-21 well in another formation, and (2) that Pax's president had threatened to sue DRD over negligent or fraudulent statements DRD made to Pax about the Umbach #1-21 well. In applying Manley to the present case, the Court is confronted with these conflicting assertions by the parties about the Umbach well's status<sup>5</sup> and whether a dispute between the parties exists regarding that well.

In support of their positions, both parties have attached affidavits and other documents. On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of proof, rather than the movant. Behagen v. Amateur Basketball Ass'n of U.S.A., 744 F.2d 731, 733 (10th Cir. 1984), cert. denied, 471 U.S. 1010 (1985); Wyatt v. Kaplan, 686 F.2d 276, 280 (5th Cir. 1982). To determine whether personal jurisdiction should be exercised, a court may receive and weigh affidavits of the parties prior to trial on the merits. O'Hare Int'l Bank v. Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971). However, if the issue of jurisdiction raised by a motion to dismiss is to be decided on the basis of affidavits submitted by the parties, the plaintiff is required to make only a prima facie case of jurisdiction, rather than proving jurisdiction by a preponderance of the evidence. See Behagen, 744 F.2d at 733; Wyatt, 686 F.2d at 280. Where the affidavits conflict upon facts bearing upon the issue of jurisdiction, the disputed facts are to

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<sup>5</sup> Presumably, Pax would distinguish Manley on the grounds that the contacts found by the Tenth Circuit regarding the production, marketing and sale of the oil and gas, would not be present here on a commercially unproductive well, as averred by Pax.

be resolved in favor of the plaintiff. See Behagen, 744 F.2d at 733; Nelson by Carson v. Park Indus., Inc., 717 F.2d 1120, 1123 (7th Cir. 1983), cert. denied, 465 U.S. 1024 (1984); Wyatt, 686 F.2d at 280.

Here, the president of Pax has asserted in his affidavit that the Umbach #1-21 well was "never commercially productive" and that "[t]here are no current disputes between the parties relating to . . . that well." See Exhibit B, Affidavit of C. Ronald Paxson, Defendant's Brief in Support of Motion to Dismiss, p.3, ¶ 12. In his second affidavit, Paxson states that "all attempts at production have ceased" and the Umbach #1-21 well "currently awaits plugging and abandonment." See Exhibit A, Second Affidavit of C. Ronald Paxson, Defendant's Reply Brief, p. 2, ¶ 6.

DRD's president, Bruce M. Daniel, states in his affidavit that the Umbach #1-21 well "produced for at least two months and sold approximately \$1,690.87 worth of natural gas attributable to the interest of Pax." See Exhibit D, Affidavit of Bruce M. Daniel, Plaintiff's Response to Defendant's Motion to Dismiss, ¶ 3. Mr. Daniel's affidavit indicates that the Umbach #1-21 well is currently the subject of a proceeding before the Oklahoma Corporation Commission to confirm DRD as the operator of that well. Id. at ¶ 4. According to Daniel, Pax supported naming DRD as operator of the Umbach #1-21 well, and supported DRD's efforts to recomplete that well in another formation. Id. at ¶¶ 4-5. Daniel further states in his affidavit that in a telephone conversation, Paxson informed Daniel of his belief that "DRD had

negligently or fraudulently informed Pax that the Umbach #1-21 well should be completed when the well should not have been completed" and that Pax "would sue DRD over that issue and other issues between the company [sic]." Id. at ¶ 6.

The conflict between the parties' affidavits regarding the Umbach #1-21 well's status and the existence of an actual dispute between the parties on that well must be resolved in favor of the plaintiff, DRD. Under Manley, Pax's ownership of a working interest in the Umbach #1-21 well qualifies as an ownership of an interest in real property in Oklahoma. Pax has derived some revenue (\$1,690.87) from the sale of natural gas produced from the well, and has been involved in business decisions affecting the well, including the appointment of a new operator and recompletion attempts. Pax can thus be said to have availed itself of the privilege of doing business in Oklahoma. In addition, because the complaint in this case alleges a dispute between the parties over an agreement concerning the drilling of the Umbach #1-21 well, a part of the cause of action appears to relate to this contact.

Accordingly, at this time the Court finds that Pax has sufficient minimum contacts with the State of Oklahoma through the Umbach #1-21 well so that the Court can exercise personal jurisdiction over Pax, without offending "traditional notions of justice and fair play."

On the issue of venue Pax argues that venue is improper in this Court because the Court lacks personal jurisdiction. Pax requests only that the case be dismissed on this ground. It

mentions nothing about transfer. The Court, however, has the prerogative to act sua sponte to transfer the case to another federal district court for convenience of the parties and witnesses, in the interest of justice. 28 U.S.C. § 1404; Fine v. McGuire, 433 F.2d 499, 501 (D.C.Cir. 1970); Empire Gas Corp. v. True Value Gas of Florida, 702 F.Supp. 783, 784 (W.D.Mo. 1989); Mobil Corp. v. S.E.C., 550 F.Supp. 67, 69 (S.D.N.Y. 1982).

The original complaint sets forth the following facts:

- 1) DRD is a Texas corporation with its principal place of business in Texas;
- 2) Pax is a California corporation with its principal place of business in California;
- 3) DRD prays for damages in the amount of \$223,185.00 for Pax's alleged breach of an agreement pertaining to the drilling of two oil and gas test wells in Cheyenne County, Colorado;
- 4) DRD requests a determination of its rights and legal status as to an agreement concerning the drilling of oil and gas wells in Grady County, Oklahoma, Desoto Parish, Louisiana, and Cheyenne County, Colorado and as to the operation of wells located in Texas.

Review of these facts indicates that there is a possibility that though venue is proper in this Court, another forum might be more convenient for the parties. DRD and Pax will be allowed twenty (20) days from the date of this Order to submit briefs on the propriety of a transfer of this action. The parties should evaluate whether the location of witnesses and other evidence point to a particular forum in which the trial of this action may be more

convenient and/or efficient.

IT IS SO ORDERED this 4 of January, 1993.

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

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE JAN 1 1993

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

FILED  
DEC 29 1992

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OK

ROBERT RANDALL ZIEGLER,  
Petitioner,  
v.  
RON CHAMPION, WARDEN,  
Respondent.

No. 91-C-226-C

O R D E R

Before the Court are the motion for leave to proceed in forma pauperis and the application for relief from judgment. The court has previously denied petitioner's habeas corpus petition. The fee to begin the case initially was paid; therefore the motion for leave to proceed will be denied as unnecessary. This Court's decision was affirmed by the Tenth Circuit Court of Appeals and certiorari has been denied by the Supreme Court.

Petitioner now contends that the Court's prior decision is "void" because of the Supreme Court's decision in Sawyer v. Whitley, 112 S.Ct. 2514 (1992). That decision, dealing with the "actual innocence" exception to the traditional "cause and prejudice" showing in habeas cases, in no way renders the Court's decision void. As the Court previously stated, petitioner does not met this exception.

It is the Order of the Court that petitioner's motion for leave to proceed in forma pauperis is hereby denied as unnecessary.

It is the further Order of the Court that petitioner's

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application for relief from judgment is hereby denied.

IT IS SO ORDERED this ~~28~~ 29 day of December, 1992.

A handwritten signature in cursive script, appearing to read "H. Dale Cook", written over a horizontal line.

H. DALE COOK  
UNITED STATES DISTRICT JUDGE