

FILED

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

27 1993

Lawrence, Clerk  
U.S. DISTRICT COURT

C.I.S. TECHNOLOGIES, INC.,  
a Delaware corporation,

Plaintiff,

v.

No. 92-C-1136-E

REFCO SECURITIES, INC., a New York  
corporation, and  
DENMAN AND COMPANY, a California  
corporation,

Defendants.

EOD 1/29/93

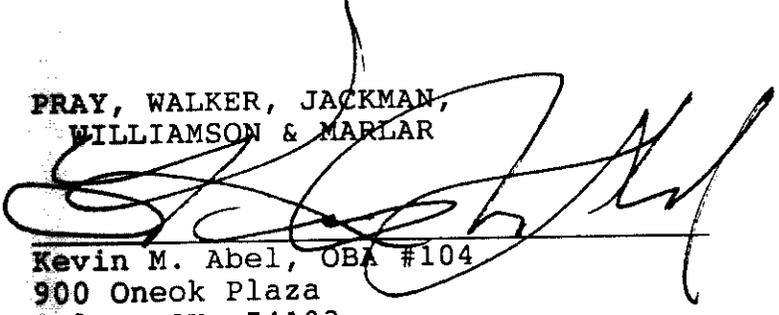
**PLAINTIFF'S NOTICE OF DISMISSAL  
WITHOUT PREJUDICE  
F.R.C.P. 41(a)(1)(i)**

Notice is hereby given that C.I.S. Technologies, Inc., a Delaware corporation, the above-named Plaintiff, hereby dismisses the above entitled and numbered action without prejudice pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, and hereby files this Notice of Dismissal with the Clerk of this Court before service by either adverse party of an answer or of a motion for summary judgment.

Dated this 27th day of January, 1993.

PRAY, WALKER, JACKMAN,  
WILLIAMSON & MARLAR

By:

  
Kevin M. Abel, OBA #104  
900 Oneok Plaza  
Tulsa, OK 74103  
(918) 584-4136

ATTORNEYS FOR PLAINTIFF  
C.I.S. TECHNOLOGIES, INC.

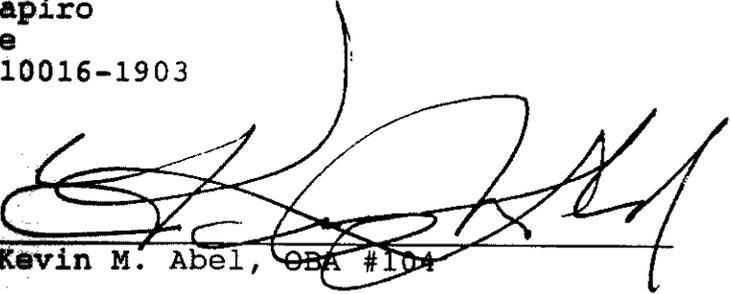
**CERTIFICATE OF MAILING**

I hereby certify that on the 27th day of January, 1993, a true and correct copy of the above and foregoing Dismissal Without Prejudice was mailed via certified mail return receipt requested with correct postage fully prepaid to the following:

Joel L. Wohlgemuth, Esq.  
Norman & Wohlgemuth  
Suite 2900  
401 South Boston  
Tulsa, OK 74103  
(918) 583-7571

and

Marianne Bretton-Granatoor  
Graubard Mollen Horowitz  
Pomeranz & Shapiro  
600 Third Avenue  
New York, N.Y. 10016-1903  
(212) 818-8800.

  
Kevin M. Abel, OBA #104

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

STELLAR COMMUNICATIONS, INC., )  
)  
)  
)  
Plaintiff(s), )  
)  
vs. )  
)  
J. MORGAN DOWDY, et al, )  
)  
Defendant(s). )

**FILED**  
JAN 28 1993  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

No: 92-C-133-B

JUDGMENT DISMISSING ACTION  
BY REASON OF SETTLEMENT

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

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 28<sup>th</sup> day of January,  
19 93.

  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA  
THOMAS R. BRETT

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ENTERED ON DOCKET  
DATE JAN 29 1993

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

**FILED**

JAN 28 1993

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

MICHAEL L. KADUK,  
an individual,  
  
Plaintiff,  
  
v.  
  
AMERADA HESS CORPORATION,  
a corporation,  
  
Defendant.

No. 91-C-849-B

ORDER

The Fed.R.Civ.P. 11 and 28 U.S.C. § 1927 show cause hearing directed by the Court's order of December 2, 1992, was held on December 30, 1992 and January 14, 1993. After considering the entire record, including briefs of legal authorities and the arguments of counsel, the Court concludes as follows:

This lawsuit was originally filed in the Oklahoma state court and was removed to this court. Plaintiff's counsel state the following at page 7 of their Amended Affidavit filed herein on January 12, 1993:

"... Counsel for Kaduk have faith that their claim lies on the cutting edge of the law, will someday be part of the law in the sexual harassment milieu, and they realized the risk of filing a claim which has no clear cut, irrefutable precedent. Their work has been done in honesty and sincerity, without any hint that their claim was unmerited or unwarranted. It is just unprecedented."

Plaintiff's "unprecedented" theory of recovery advanced by his counsel is that he, a white male, is a "... protected person under Title VII because of the disparate impact [on males] of the reasonable woman standard for hostile environment." (Plaintiff's

Show Cause Brief filed December 22, 1992, p. 5). The "reasonable woman standard" was advanced in Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), and Andrews v. Philadelphia, 895 F.2d 1469 (3rd Cir. 1990).<sup>1</sup>

Conceding Plaintiff's original filing of the case may have been in good faith to extend, modify, or reverse existing law,<sup>2</sup> to persist in pursuit of such a claim in the face of the facts developed in the record amounts to unreasonable multiplication and vexatious continuation of the claim. See, e.g., Dreiling v. Peugeot Motors of America, Inc., 768 F.2d 1159 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Chevron, USA, Inc. v. Hand, 763 F.2d 1184 (10th Cir. 1985), and White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990).

As reflected by the uncontroverted evidence in the record (see the Court's Order of December 2, 1992), Plaintiff's conduct over a period of years clearly justified his employer's terminating him, an at-will employee, after concluding Plaintiff lacked people management skills. Plaintiff asserts that he was entitled to additional employer training and education in the area of sexual harassment in the workplace. The record demonstrates the employer offered such training in the equal employment opportunity area but

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<sup>1</sup>It is not clear that the Tenth Circuit Court of Appeals will embrace the reasonable woman or victim standard and may continue with the reasonable person standard. Should this be the case, Plaintiff's theory is even more ethereal.

<sup>2</sup>Going the extra mile with Plaintiff's counsel.

Plaintiff, as a department manager, concluded he was "too busy" to attend, although he was aware of his workplace sexual overture proclivities. No one with Amerada Hess Corporation prevented Plaintiff from attending such additional periodic training offered.

After a consideration of the factors in White, 908 F.2d 675, the Court concludes a monetary sanction is most appropriate to deter Plaintiff's counsel from such future conduct and filings. The amount of such monetary sanction is hereby limited to the total sum of \$5,000.00, following consideration of counsel's sole practitioner status and ability to pay.<sup>3</sup>

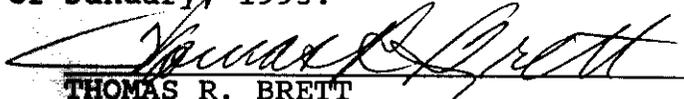
Although the record reveals attorney Thomas L. Bright, as lead counsel herein, to be the employment law specialist, the Court concludes such monetary sanction is to be hereby imposed on both counsel, Thomas L. Bright and Janelle H. Steltzlen, joint and several, because it should have been clear to each following the filing of Defendant's motion for summary judgment that persisting with the action was unreasonable and vexatious in light of what was uncontroverted in the established record. No sanction is imposed on the Plaintiff, Michael L. Kaduk, because as a nonlawyer he merely followed advice of his counsel.

A separate Judgment herein is filed regarding the Court's Order of December 2, 1992, as well as this Order.

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<sup>3</sup>The parties' stipulated that Defendant's fees and expenses to date total \$60,000.00.

DATED this 28<sup>th</sup> day 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 1-29-93

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

IN RE: )  
 )  
 INTERCHANGE WAREHOUSE )  
 INVESTORS I, )  
 )  
 Debtor. )  
 )  
 RESOLUTION TRUST CORPORATION, )  
 )  
 Plaintiff/Appellant, )  
 )  
 v. )  
 )  
 INTERCHANGE WAREHOUSE )  
 INVESTORS I, )  
 )  
 Defendant/Appellee. )

Bky. No. 92-01413-W

Case No. 92-C-566-B

**FILED**

JAN 28 1993

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

ORDER

This order pertains to the appeal of the Resolution Trust Corporation as Receiver for Commonwealth Federal Savings Association ("RTC") of the Order of the U. S. Bankruptcy Court for the Northern District of Oklahoma dated June 26, 1992, pertaining to Debtor's Motion for Cash Collateral Order, or, in the alternative, if the order is not considered a final order, the request of RTC for leave to appeal from an interlocutory order of the bankruptcy court. RTC appeals from the bankruptcy court's order granting debtor's motion to use cash collateral of the RTC for the purpose of paying normal operating expenses, as outlined in the debtor's projection of expenses. Debtor has moved to dismiss the appeal.

The authority for the district court to hear appeals from a bankruptcy case is found at 28 U.S.C. § 158, which provides in pertinent part:

(a) The district court of the **United States** shall have jurisdiction to hear appeals from final judgments, **orders**, and decrees, and, with leave of the court, from interlocutory orders **and decrees**, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title....

(b) An appeal under subsections **(a)** and **(b)** of this section shall be taken in the same manner as appeals in **civil** proceedings generally are taken to the courts of appeals from the **district courts** and in the time provided by rule 8002 of the Bankruptcy Rules.

The first issue presented is **whether** the order is a final order or an interlocutory order. RTC indicates in its response to **the** motion to dismiss that the order may not be a final order and does not argue that it is **final**.

An order is final, generally, if it **ends** the litigation on the merits and leaves nothing for the court to do but execute its judgment. Adelman v. Fourth Nat'l. Bk. & Trust Co. (In re Durability, Inc.), 893 F.2d 264, 265 (10th Cir. 1990) (citing McKinney v. Gannet Co., 694 F.2d 1240, 1246 (10th Cir 1982)). This order clearly does not end the litigation. Additionally, prior case law involving **cash** collateral orders indicates that they are interlocutory orders. See In Re Wiston XXIV Ltd. Partnership, No. 92-CV-4096-DES, 1992 U.S. Dist. LEXIS 18042 (D.Kan. 1992). See also, Ranch Partners Ltd. v. Resolution Trust Corp., No. 92-K-1018, 1992 U.S. Dist. LEXIS 16799 (D.Colo. 1992).

Section 158 is silent as to what **standards** or considerations should be employed by the district court in determining **whether** leave to appeal an interlocutory order should be granted. In general, exceptional **circumstances** must be present to warrant allowing an interlocutory appeal. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1977).

In determining whether to **grant** a motion for leave to appeal an interlocutory bankruptcy order, several district courts **have** looked to the standards set forth in 28 U.S.C.

§ 1292(b). The statute gives the court of appeals the discretion to hear otherwise non-appealable interlocutory orders of a district court if (1) the order involves a controlling question of law which (2) would entail substantial ground for differences of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. First Interstate Bank of Denver N.A. v. Werth 58 B.R. 146, 148 (Bankr. D.Co. 1986).

The court does not need to consider the first two requirements, as appellant has not met its burden in establishing the third requirement. RTC has not established that an immediate appeal will materially advance the termination of the litigation. The cash collateral order allows for the payment of normal operating expenses, and the court granted RTC a post-petition security interest in all assets of the estate. Further, the debtor is subject to subsequent review and RTC may renew its objection.

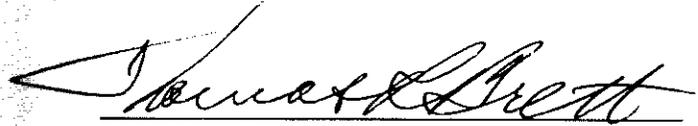
RTC argues that "two Bankruptcy Judges in the Northern District of Oklahoma may have reached conflicting conclusions as to the propriety of spending rents under similar circumstances" (Brief of Appellant RTC/CPSA, pg. 6) and submits the order of Bankruptcy Judge Steven Covey in Bankruptcy Case No. 91-03820-C dated February 3, 1992. However, in the case Judge Covey considered, there was an assignment of rents included in the mortgage, found to be valid and enforceable under the 1986 amendment to Oklahoma's mortgage statute. Okla.Stat.tit 46, § 4. Judge Covey relied upon that assignment of rents in making his decision that the debtor held the rents in trust for the lender and could not use them for any purpose except those authorized in the assignment.

In the case at bar, the mortgage contained an assignment of rents also; however, the mortgage was executed in 1985 and such an assignment was void and unenforceable

prior to the enactment of the 1986 amendment discussed above. Virginia Beach Fed. Sav. & Loan Ass'n. v. Wood, 901 F.2d 849, 851 (10th Cir. 1990). The bankruptcy judge could therefore disregard the assignment and **examine** other factors in making his determination.

RTC has failed to meet the **necessary standard** for this court to allow appeal. For this reason, the motion to dismiss the **appeal is granted**.

Dated this 28<sup>th</sup> day of Jan., 1993.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

JAN 29 1993

FILED

JAN 28 1993

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

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

MICHAEL L. KADUK,  
an individual,  
  
Plaintiff,  
  
v.  
  
AMERADA HESS CORPORATION,  
a corporation,  
  
Defendant.

No. 91-C-849-B

J U D G M E N T

In accordance with the Court's Order of December 2, 1992, sustaining Defendant's motion for summary judgment pursuant to Fed.R.Civ.P. 56, Judgment is hereby entered in favor of the Defendant, Amerada Hess Corporation, and against the Plaintiff, Michael L. Kaduk, and Plaintiff's action is hereby dismissed with costs assessed against the Plaintiff, if timely applied for pursuant to Local Rule 6, and the parties are to pay their own respective attorneys' fees except as hereafter stated.

Further, in keeping with the Court's sanction order filed contemporaneously herewith, Judgment is hereby entered in the amount of Five Thousand Dollars (\$5,000.00), against counsel, Thomas L. Bright and Janelle H. Steltzlen, as and for partial reimbursement of attorneys' fees incurred by the Defendant, with interest thereon at the rate of 3.67% per annum from this date.

DATED this 26th day of January, 1993.

United States District Court )  
Northern District of Oklahoma ) SS  
I hereby certify that the foregoing  
is a true copy of the original on file  
in this Court.

Richard M. Lawrence, Clerk  
By Richard M. Lawrence  
Deputy

Thomas R. Brett  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**FILED** JAN 29 1993

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA JAN 29 1993

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

CRAIG SIMON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FORD MOTOR COMPANY, )  
 )  
 Defendant. )

Case No. 92-C-465-B

ORDER

Before the Court for consideration is the motion for summary judgment pursuant to Fed.R.Civ.P. 56 filed by Defendant, Ford Motor Company ("Ford"). Following a thorough review of the record, the parties arguments and the applicable legal authority, the Court concludes the Defendant's motion should be denied.

Plaintiff, Craig Simon ("Simon"), originally filed this products liability action May 7, 1992, in the District Court of Tulsa County, State of Oklahoma. Defendant subsequently removed the action to this court May 28, 1992, and invoked this Court's diversity jurisdiction under 28 U.S.C. §1332.

Plaintiff's action arises from an accident in which he was crushed between his own parked car and a 1976 Ford Torino Elite ("Elite") which had been manufactured, sold, and distributed by the Defendant. Plaintiff contends that a transmission design defect caused the unoccupied Elite to "self-shift" from park to reverse and collide with Plaintiff. The following facts are undisputed:

1. Robert Fisher ("Fisher") was the owner and driver of the 1976 Ford Torino Elite that was involved in the accident that

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injured Simon on May 8, 1990. (§1 of first Affidavit of Robert F. Fisher, attached to Defendant's Motion for Summary Judgment as Exhibit A).

2. Fisher purchased the Elite during the early part of 1990 and shortly thereafter the transmission stopped working. (§§ 2 and 3 of First Affidavit of Fisher).

3. Fisher obtained another transmission from a salvage yard and with the help of his father and a friend, replaced the transmission in April of 1990. (§§ 4 and 5 of first Affidavit of Fisher).

4. The replacement transmission was adjusted by placing the transmission in low gear. (§ 6 of first Affidavit of Fisher).

5. On more than one occasion after the transmission was replaced and prior to the accident in May of 1990, the car failed to remain in park after Fisher attempted to place the vehicle in park. (§7 of first Affidavit of Fisher).

6. On the day of the accident, Fisher put the Elite in park, left the car running and exited the vehicle. (§ 7 of "Plaintiff's Petition" filed in State Court.)

7. As a result of the accident, Simon suffered substantial injuries, including injuries to his left leg that resulted in amputation. (§ 6 of "Plaintiff's Petition" filed in State Court.)

**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

Although there is no dispute that Fisher's 1976 Ford Elite ran into Simon and caused the injuries alleged in this lawsuit, there is a material factual dispute regarding what caused the car to start into motion.

Defendant contends that improper installation, adjustment and maintenance of the transmission substantially changed its condition and operation. Ford argues that improper installation procedure "prevents the otherwise functioning park system from working accurately." Defendant concludes that the transmission had been seriously altered from the condition it left the manufacturer's possession and control and therefore Defendant cannot be held liable as the manufacturer of the product.

In support, Defendant submits the affidavit of two experts who examined the car after the accident. These experts concluded that the latching spring in the steering column had been broken or was no longer operational, the shift cable bracket was improperly installed using incorrect hardware, the transmission was not adjusted in accordance with the specifications of Ford and the

transmission cable was not properly attached and thus was too loose. (See affidavit of Joseph M. Wills, attached as Exhibit B to Defendant's motion for summary judgment; and affidavit of Lee C. Carr, attached as Exhibit A to Defendant's reply brief).

Defendant's expert also concluded that the problems caused by the improperly installed transmission were such that they would have been obvious to any driver and apparently someone had attempted to fix the problem "by using a hammer to distort the roll pin hole and by using a substance that appeared to be epoxy type glue." (Affidavit of Lee C. Carr, ¶¶ 4.4 and 4.6).

In response, Plaintiff has submitted two affidavits of John M. Stilson ("Stilson"), who conducted an inspection, examination, disassembly and testing of the Elite. He disputes some of the problems found by Defendant's experts but nonetheless states that "[a]bsent the presence of design defects, none of the alleged problems identified by [Defendant's expert] ... would effect the operators ability to place the vehicle transmission control system in 'false park' and suddenly, without warning, self-shift into powered reverse." (¶16 of first Affidavit of John M. Stilson, attached to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment as Exhibit A).

Stilson also stated that he "found no evidence that this particular transmission was altered in any significant way beyond normal and expected usage." Stilson did discover loose column insert plate screws, untorqued T-Bolt nuts, a broken shift lever return spring, a loose transmission cable bracket, and a loose

shift lever roll pin. However, he claims that "[a]ll of these conditions are associated with design and manufacturing defects that influence the park-to-reverse hazard." (§§ 5 and 7 of second Affidavit of John M. Stilson, attached to Plaintiff's response to Defendant's Reply as Exhibit B). He also affirmatively states a "1976 Ford Elite manufactured at the factory perfectly to the specifications of Ford Motor Company has the "false park" defect present and has the potential to self shift into powered reverse." Stilson asserts that this defect worsens as the car is used and the likelihood of shifting into false park increases. (§ 11 of second Affidavit of John M. Stilson). He concludes that the mechanical condition of the gear selection system was caused by defects in the design and manufacturing of the Elite at the time it left the control of Ford Motor Company.

Viewing the evidence and inferences therefrom in a light most favorable to the Plaintiff, Conaway v. Smith, 853 F.2d 789,792 (10th Cir. 1988) the Court concludes there is a genuine issue of material fact in this case. Plaintiff has provided evidence through the affidavit of Stilson that the transmission was defective and that the defect was the cause of the accident. Ford has provided numerous other possible and very plausible explanations for the accident, but has failed to establish beyond a reasonable doubt that the accident occurred because of improper alterations made to the transmission after it left the control of Ford.

Although the Plaintiff's task of proving an inherent defect in the transmission is now burdened significantly by the subsequent

modification and alteration, Plaintiff has provided enough support for his claims to create a material question of fact and thus survive the motion for summary judgment for now.

For the reasons set out above, Defendant's motion for summary judgment should be and the same is hereby DENIED. The Order Setting Discovery Conference entered by Magistrate Wolfe January 22, 1993, shall continue to control discovery in this matter.

IT IS SO ORDERED THIS 29<sup>th</sup> DAY OF JANUARY, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE ~~JAN 29 1993~~

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

CANDIE PAPER )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MONTEREY HOUSE U.S.A., INC., )  
 a Texas corporation, BHC )  
 ACQUISITION CORPORATION, d/b/a )  
 MONTEREY HOUSE/MONTEREY'S TEX )  
 MEX CAFE, an Oklahoma corporation, )  
 MONTEREY'S TEX MEX CAFE OF )  
 BARTLESVILLE, OKLAHOMA, and )  
 RUSSELL CASH, )  
 )  
 Defendants. )

Case No. 91-C-947-B

**FILED**

JAN 29 1993

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

ORDER

Before the Court for consideration is the Defendants' Motion in Limine, Defendants' Combined Motion Requesting Confession of Judgment filed January 19, 1993, Defendants' Motion for Entry of Judgment filed January 25, 1993, and Plaintiff's Application for Additional Time to Respond to Defendants' Motion for Summary Judgment.

The original scheduling order filed in this matter June 12, 1992, established October 15, 1992, as the deadline for dispositive motions and motions in limine and October 30, 1992, as the deadline for responses to dispositive motions and motions in limine. On September 9, 1992, the parties filed a joint application to extend the scheduling order. This application requested "that the court extend the Scheduling Order dates for sixty (60) days" and was signed by counsel for both parties.

The parties also submitted a suggested "Extended Scheduling

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Order" for the Court's signature. This Order was signed by the Court on September 14, 1992. The Extended Scheduling Order reset the deadline for filing dispositive motions and motions in limine to December 15, 1992, and the deadline for responses to motions in limine to December 30, 1992. A date for responses to dispositive motions was apparently inadvertently omitted.<sup>1</sup> However, it is clear from the joint application signed by both counsel and the statements made by Plaintiff's counsel that the parties were requesting a sixty day extension of all remaining deadlines which would have moved the dispositive motion response deadline to December 30, 1992.

Defendants filed a motion for summary judgment and a motion in limine on December 15, 1992. Defendants' motion in limine asked the Court to prohibit the Plaintiff from introducing evidence at trial concerning the *nolo contendere* plea of Russell Cash entered on April 24, 1990, to a charge of Outraging Public Decency. Plaintiff did not respond to this motion prior to the December 30, 1992, deadline and has not requested an extension of time.

Pursuant to Local Rule 15(A), Plaintiff's failure to respond to the motion in limine constitutes a waiver of objection and a confession of the matters raised in the motion. Having reviewed the motion, the arguments and authority cited therein, and the record in this case, the Court finds good and sufficient cause to grant

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<sup>1</sup> According to Plaintiff's counsel "[t]he extended scheduling order was prepared by counsel for defendant who had informed [Plaintiff's counsel] the intent was to reschedule all the dates including dispositive motions and response dates."

the Defendant's motion in limine.

Defendants' Motion for Summary Judgment filed December 15, 1992, seeks judgment on all of Plaintiff's claims pursuant to Fed.R.Civ.P. 56.<sup>2</sup> Plaintiff failed to respond to the motion for summary judgment within 15 days as required by Local Rule 15(A). On January 20, 1993,<sup>3</sup> counsel for Defendants contacted Plaintiff's counsel to ascertain whether a response was forthcoming and volunteered to accept a response if received by January 22, 1993. Plaintiff states that his busy litigation schedule (three trials scheduled in March) prevented him from responding to the "spurious" dispositive motion. On January 22, 1993, Plaintiff filed an Application for Additional Time to Respond to Defendants' Motion for Summary Judgment, to which the Defendants have objected. Plaintiff requests until January 29, 1993, to file a response.

Clearly, all parties intended for December 30, 1992, to be the deadline for filing responses to dispositive motions. Despite the omitted date in the extended scheduling order, no reasonable argument can be made for the belief that the deadline was any date other than December 30. Furthermore, a heavy workload is never a sufficient explanation for failing to seek an extension of time prior to the passing of a deadline.

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<sup>2</sup> Plaintiff's counsel states that "at the time that defendants' Motion for Summary Judgment was filed counsel for Plaintiff was under the mistaken impression that the court had scheduled a day certain by which responses to dispositive motions were to be filed."

<sup>3</sup> Counsel for Defendants states that the conversation was held January 19, 1993.

Nevertheless, Plaintiff's application for an extension of time will be granted due to the remote possibility that the Defendants' inadvertent failure to include a response date on the extended scheduling order caused Plaintiff's counsel to be "unaware" that the response date had passed.

For the reasons stated above, Defendants' Motion in Limine and Motion Requesting Confession of Judgment (on the motion in limine) filed January 19, 1993, are hereby GRANTED; Defendants' Motion for Entry of Judgment (on the motion for summary judgment) filed January 25, 1993, is hereby DENIED; and Plaintiff's Application for an Additional Time to Respond to Defendants' Motion for Summary Judgment is hereby GRANTED.

IT IS SO ORDERED THIS 29 DAY OF JANUARY, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE JAN 28 1993

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

THE UNITED KEETOOWAH BAND OF  
CHEROKEE INDIANS IN OKLAHOMA, )

Plaintiff, )

ADALENE SMITH, DANIEL PROCTOR  
and LUCILLE PROCTOR, )

Intervenors, )

vs. )

WILMA MANKILLER, JOHN A. KETCHER,  
DON CRITTENDEN, JOE BYRD, MIGE  
GLORY, JAMES GARLAND EAGLE,  
HAROLD "JIGGS" PHILLIPS, SAM ED  
BUSH, MARY COOKSEY, PAULA HOLDER,  
TROY WAYNE POTEETE, BARBARA  
MITCHELL, MELVINA SHOTPOUCH,  
WILLIAM SMOKE, HAROLD DEMOSS,  
MAUDIE BAZILLE, GREG PITCHER,  
JIM DANIELSON, WILLIAM P. RAGSDALE,  
TOMMY THOMPSON, BUD SQUIRREL,  
CHAD SMITH, JULIAN FITE, DEAN  
GRITTS, WILLIAM STILL, LARRY  
HOLMES, DELBERT WALKINGSTICK,  
GREG CHUCKLUCK, MIKE MccOY AND  
JOHN DOES I-X. )

MANUEL LUJAN, JR., SECRETARY OF  
THE U.S. DEPT. OF THE INTERIOR,  
ED BROWN, ASSISTANT SECRETARY FOR  
INDIAN AFFAIRS, MERRITT YOUNGDEER,  
DIRECTOR, MUSKOGEE AREA OF THE  
BUREAU OF INDIAN AFFAIRS, DENNIS  
SPRINGWATER, MUSKOGEE AREA OF THE  
BUREAU OF INDIAN AFFAIRS, FRANKLIN  
DREDFULWATER, BUREAU OF INDIAN  
AFFAIRS, )

Defendants. )

**FILED**

JAN 27 1993

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

No. 92-C-585-B ✓

ORDER

The Motions to Dismiss of the federal and nonfederal (Cherokee  
Nation officials) Defendants, and each of them, as well as said

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Defendants' Motions to Dismiss the intervenor complaint, are before the court for decision. Following a review of the respective complaints, the applicable legal authorities, and the arguments presented, the court concludes the Motions to Dismiss should be sustained.

On page 2 of the response brief of Plaintiff, The United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB"), filed December 23, 1992, Plaintiff states the parties are in agreement regarding the essential facts of the controversy. Plaintiff then states the basic issue is the right of the Cherokee Nation (a nonparty) to enforce the subject ordinance or enactment over the UKB. The court has previously determined in prior cases that the Cherokee Nation's sovereignty is preeminent to that of the UKB in Cherokee Nation Indian Country. United Keetoowah Band of Cherokee Indians in Oklahoma v. Secretary of Interior, No. 90-C-608-B (Northern District of Oklahoma, May 31, 1991), and Buzzard v. Oklahoma Tax Commission, No. 90-C-848-B (Northern District of Oklahoma, February 24, 1992).

**The Facts Out of Which the Dispute Arose:**

On August 11, 1990, the Cherokee Nation Tribal Council passed an enactment known as the Cherokee Nation Tax Code (Legislative Act No. 8-90). Act No. 8-90 had as its purpose raising revenues to provide governmental services to and economic development for the benefit of the members of the Cherokee Nation. The enactment applies to all Indian Country, which is defined as "Cherokee

Country," and the Cherokee Nation asserts includes restricted individual allotments. The Act establishes a Tax Commission to implement and enforce its provisions. The Tax Commission is empowered to conduct hearings and promulgate such rules and regulations as it deems necessary.

Act No. 8-90 imposes a tax on the sale of all cigarettes and other tobacco products within the defined Indian Country. It provides that all retailers who sell tobacco products in Indian Country must cause tax stamps to be affixed to their tobacco inventories, thus indicating compliance with the law. It provides that any unstamped tobacco products will be subject to seizure, forfeiture and sale. The Act also provides that all retailers who intend to sell tobacco products in Indian Country must first apply for and receive a Cherokee Nation tobacco retailer license.

Early in 1992, it became known to the Cherokee Tax Commission office that cigarettes were being sold at smoke shops located in the communities of Jay and Bull Hollow in Cherokee Indian Country. The Cherokee Nation Tax Commission verified that neither location was licensed by the Commission. On January 17, 1992, an unstamped carton of cigarettes was purchased at Lil Tims Smoke Shop by a Cherokee Nation official. On February 21, 1992, unstamped cigarettes were likewise purchased at Turtleshell Smoke Shop. The Tax Commission investigation reflected that both shops were observed in the active business of retail tobacco sales. A tribal realty officer verified that both of these smoke shop locations were on individual restricted Cherokee allotments.

On February 28, 1992, the Cherokee Nation Tax Commission entertained applications to seize and forfeit the unstamped cigarettes and tobacco at both of the above-mentioned smoke shops. The Tax Commission issued an order to seize the tobacco products located at each of such smoke shops and Cherokee Nation marshals served the orders along with notices of forfeiture on February 28, 1992. All interested parties were notified that they should answer within ten days or be forever barred from asserting an interest in the seized goods. On March 31, 1992, the Cherokee Nation Tax Commission ordered the seized tobacco goods and contraband forfeited for failure to respond within the ten-day period. On September 2, 1992, the Cherokee Nation Tax Commission ordered the seized tobacco destroyed.

The UKB has commenced this action on behalf of two of its members, Adalene Smith and Soldier Shell, asserting that each operated smoke shops on restricted allotments "subject to the jurisdiction of the UKB by operation of the Constitution of the UKB." Such shops were licensed and taxed by the UKB. The UKB contends the nonfederal defendants (the Cherokee Nation officials) entered upon the restricted allotments and seized the inventories of cigarettes and tobacco products over the objection of the UKB and in disregard of its sovereign powers. The UKB further asserts that the Secretary (federal defendant) has done nothing to prevent the actions of the nonfederal defendants and by the federal defendants' inaction they have been a party to the setting aside of the sovereign powers of the UKB. The UKB prays that this court

enter a declaratory judgment setting forth the rights, privileges and immunities of the UKB with respect to the exercise of its governmental powers over its members and "the exercise of its governmental powers over the restricted allotments of its members." The UKB also seeks a declaration from the court concerning the responsibilities of the Secretary of Interior and enter such injunctive and mandatory relief requiring the Defendants to observe and comply with UKB authority and to further require the Secretary to take active measures to protect the sovereignty of the UKB. The UKB also seeks money damages.

The Intervenors, Adalene Smith, Daniel Proctor and Lucille Proctor, allege that they are members of the UKB, not the Cherokee Tribe. Adalene Smith and Daniel Proctor operated one of the subject raided smoke shops on restricted allotment land owned by Lucille Proctor. It is asserted that Lucille Proctor's Cherokee restricted allotment land and the business operated thereon are under the exclusive jurisdiction of the federal government by operation of the Curtis Act, Act of June 28, 1898, 30 Stat. 495, Act of March 3, 1901, 31 Stat. 1447, Cherokee Agreement, Act of July 1, 1902, 32 Stat. 716, Act of April 28, 1904, 33 Stat. 573, Act of April 26, 1906, 34 Stat. 137 and subsequent amendments thereto. Intervenors assert federal jurisdiction over Cherokee restricted allotment lands has never been ceded or retroceded by an act of Congress. Intervenors seek a permanent injunction against the Defendants from unauthorized trespass and compensatory damages as well as fees and costs.

The Defendants moved to **dismiss** the action of the UKB and the Intervenor and to recover **costs** and attorney fees asserting that the court lacks subject matter jurisdiction, the case is barred by the principles of *res judicata* and collateral estoppel, Plaintiff has failed to exhaust tribal remedies, and has failed to state a cause of action upon which relief can be granted. Since the court concludes the Cherokee Nation is an indispensable party, that *res judicata* and collateral estoppel apply to the UKB and that the Intervenor has failed to state a cause of action, it is unnecessary to address the exhaustion of tribal remedies contention.

**Legal Conclusions and Authorities:**

The Defendants urge that the case should be dismissed for want of subject matter jurisdiction because the Cherokee Nation is an indispensable party under Fed.R.Civ.P. 19(b).

Fed.R.Civ.P. 19(a) provides that a person or entity who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may \* \* \* as a practicable matter impair or impede his ability to protect that interest" shall be joined in the action, if feasible. It is asserted by the Defendants that the land on which the subject smoke shops are situated is restricted Cherokee allotments and, therefore, "Indian Country" within the Cherokee Nation. See, 18 U.S.C. § 1151(c). This court has previously decided that the

Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation. United Keetoowah Band of Cherokee Indians in Oklahoma v. Secretary of the Interior, No. 90-C-608-B (Northern District of Oklahoma, May 31, 1991) (presently on appeal to the Court of Appeals for the Tenth Circuit). The claim of the UKB herein directly attacks the sovereignty of the Cherokee Nation over the subject land and smoke shops.<sup>1</sup> Thus, the court cannot grant complete relief without adjudicating the rights of the Cherokee Nation.

Fed.R.Civ.P. 19(b) requires that the determination the Cherokee Nation is an indispensable party must include a finding that the action cannot "in equity and good conscience" proceed in its absence. See, 3A Moore's Federal Practice ¶ 19.07-2[0], pp. 128-129 (1987). In the case of Provident Tradesmens Bank and Trust Co. v. Patterson, 390 U.S. 102, 109-111, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), the court identified four interests that must be examined in each case to determine whether, in equity and good conscience, a court should proceed in the absence of an otherwise necessary party: (1) the plaintiff's interest in having a forum; (2) the defendant's interest in avoiding multiple litigation, or

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<sup>1</sup>The Cherokee Nation has treaty protected rights of self-government including the right to pass their own laws and to be governed by them. E.E.O.C. v. Cherokee Nation, 871 F.2d 937-938 (10th Cir. 1989). The Cherokee Nation has established a district court with civil and criminal jurisdiction over Indian Country and has been encouraged to do so. Ross v. Neff, 905 F.2d 1349, 1352-53 (10th Cir. 1990); U.S. v. Sands, 968 F.2d 1058, 1062 (10th Cir. 1992).

inconsistent relief, or sole responsibility for a liability he shares with another; (3) the interest of the party alleged to be indispensable; and (4) the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. 390 U.S. at 109-111. The court stated whether or not a party is indispensable must be analyzed on a case by case basis to determine if the party is truly indispensable, or whether the litigation can proceed without the party. *Id.* at 118-119. Since the relief requested by the Plaintiff herein directly affects the sovereignty and fundamental jurisdiction of the Cherokee Nation, the court concludes the Cherokee Nation's interests are substantial and the case cannot be completely and efficiently resolved without the presence of the Cherokee Nation. However, it is well established that absent express consent of the Cherokee Nation or by Congress, the Cherokee Nation cannot be joined due to its sovereign immunity from suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 111 S.Ct. 905 (1991).<sup>2</sup>

Courts have routinely dismissed actions under Fed.R.Civ.P. 19(b) because an Indian tribe is indispensable where a plaintiff has sought to litigate matters affecting an absent tribe's interests. McClendon v. United States, 885 F.2d 627 (9th Cir. 1989), citing Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9th

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<sup>2</sup>It is urged by the nonfederal Defendants that having not waived sovereign immunity nor Congress having done so, the Cherokee Nation is not subject to being sued herein.

Cir. 1975), *cert. denied sub nom. Susenkewa v. Kleppe*, 425 U.S. 903 (1976); Enterprise Management Consultants, Inc. v. United States, 883 F.2d 890 (10th Cir. 1989); Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991); Kickapoo Tribe of Oklahoma v. Lujan, 728 F.Supp. 791, 796-797 (D.D.C. 1990).

A forthright analysis of Plaintiff's complaint compels the conclusion that the action is against the Cherokee Nation itself because the individual nonfederal Defendants were acting within their official capacities. Tewa Tesuque v. Morton, 498 F.2d 240, 243 (10th Cir. 1974). The UKB, on page 2 of its response brief, acknowledges the critical issue of the jurisdictional rights of the Cherokee Nation. Thus, the court concludes that the Cherokee Nation is an indispensable party herein, so the action is hereby dismissed for want of an indispensable party. Further, the court concludes the principles of *res judicata* and collateral estoppel are applicable to the UKB. Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955). The restricted Cherokee Indian allotments on which the smoke shops are located are part of the original Cherokee allotments. The court has previously determined the Cherokee Nation jurisdiction over said lands is superior to that of the UKB in Buzzard v. Oklahoma Tax Commission, No. 90-C-848-B (Northern District of Oklahoma, February 24, 1992), and United Keetoowah Band of Cherokee Indians in Oklahoma v. Secretary of the Interior, No. 90-C-609-B (Northern District of Oklahoma, May

31, 1991). *See also*, 18 U.S.C. § 1151(c). Essentially for the reasons expressed herein, the Intervenor's have failed to state a cause of action against the federal and nonfederal Defendants. Intervenor's motion for summary judgment is hereby OVERRULED.

Defendants' motions to dismiss are SUSTAINED and costs are assessed against the Plaintiff, UKB, if timely applied for pursuant to Local Rule 6. The parties are to pay their own respective attorneys' fees.

DATED this 27<sup>th</sup> day of January, 1993.

  
\_\_\_\_\_  
THOMAS R. BRET  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JAN 26 1993

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

TULSA AIRPORT AUTHORITY AND  
TULSA AIRPORTS IMPROVEMENT  
TRUST,

Plaintiffs,

vs.

AIR MIDWEST, INC., a  
Kansas corporation,

Defendant.

Civil Action No. 92 C 310 E

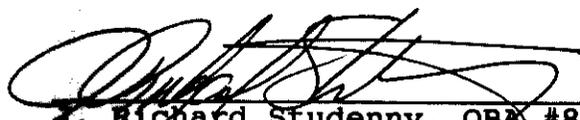
ENTERED ON DOCKET

DATE JAN 27 1993

JOINT STIPULATION OF DISMISSAL

Plaintiffs City of Tulsa, acting by and through the Tulsa Airport Authority and Tulsa Airports Improvement Trust and Defendant Air Midwest, Inc., hereby dismiss with prejudice their cause of action and all pending claims in the above-styled and numbered cause.

Dated this 26th day of January, 1993.



J. Richard Studenny, OBA #8719  
J. Richard Studenny & Associates  
1924 S. Utica, Suite 1200  
Tulsa, OK 74104  
(918) 747-3611

Attorneys for Plaintiffs



Eugene P. de Verges, OBA #2323  
Riseling & Associates, P.C.  
2510 E. 21st Street  
Tulsa, OK 74114  
(918) 747-0111

Attorneys for Defendants

**FILED**

**JAN 20 1993**

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

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

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

ONE 1986 PETERBILT 359 DS )  
TRACTOR TRUCK, )  
VIN 1XP9D29X4GN198598, )  
and )  
ONE THOUSAND SEVEN HUNDRED )  
AND THIRTEEN DOLLARS )  
(\$1,713.00) IN UNITED )  
STATES CURRENCY, )

Defendants. )

CIVIL ACTION NO. 92-C-636-E

ENTERED ON DOCKET

DATE JAN 27 1993

**JUDGMENT OF FORFEITURE**

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

That the verified Complaint for Forfeiture In Rem was filed in this action on the 21st day of July 1992; the Complaint alleges that the defendant properties are subject to forfeiture pursuant to Title 21 U.S.C. §§ 881(a)(4) and (a)(6).

That a Warrant of Arrest and Notice In Rem was issued on the 30th day of July 1992, by the Clerk of this Court as to the defendant properties.

That the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the

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Warrant of Arrest and Notice In Rem on the defendant vehicle on August 10, 1992, and on the defendant currency on August 7, 1992.

That USMS Form 285s reflecting service on the above-described defendant properties are on file herein.

That USMS Form 285s reflecting service on Jerry Stricklen and on First City Bank are on file herein.

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

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

That a Claim and Answer were filed by First City Bank, Tulsa, Oklahoma, on August 17, 1992 as to the defendant vehicle; and that the plaintiff and Claimant, First City Bank, have entered into a Stipulation for Forfeiture, providing for the forfeiture of the defendant vehicle and for the payment of the Claim of First City Bank from the proceeds of the sale of the defendant vehicle.

That the United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce & Legal News on September 24 and October 1 and 8, 1992; and that Proof of Publication was filed of record on the 28th day of October 1992.

That no other claims have been filed in this action as to the defendant vehicle except as to First City Bank, Tulsa, Oklahoma, and that no claims have been filed as to the defendant currency.

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

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

ONE 1986 PETERBILT 359 DS  
TRACTOR TRUCK,  
VIN 1XP9D29K4GN198598,

and

ONE THOUSAND SEVEN HUNDRED  
AND THIRTEEN DOLLARS  
(\$1,713.00) IN UNITED  
STATES CURRENCY,

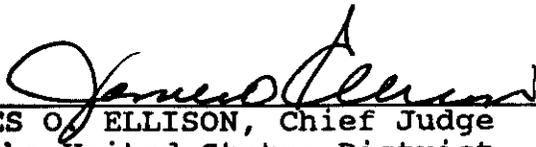
and against all persons and/or entities, if any, having an interest in such properties, and that the defendant properties be, and the same are, hereby forfeited to the United States of

America for disposition by the United States Marshal according to law, and that no right, title, or interest shall exist in any other party.

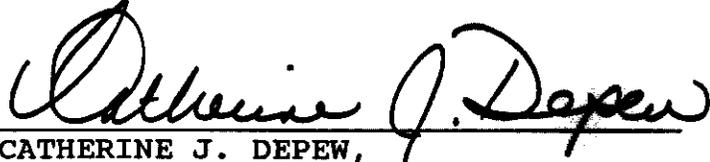
IT IS FURTHER ORDERED by the Court that the proceeds of the sale of the above-described vehicle, shall be distributed in the following priority:

- a) First, for the payment to the United States of all expenses of forfeiture of the defendant vehicle, including, but not limited to, expenses of seizure, custody, storage, advertising, and sale.
- b) Second, for the payment of the Claim of First City Bank, Tulsa, Oklahoma, in the amount of \$17,861.42, plus interest thereon at the rate of \$6.62 per day from August 10, 1992, until said vehicle is sold, to the extent that such proceeds are available.
- c) Third, for payment to the United States of America of the amount of the proceeds remaining after the above disbursements.

Entered this 26<sup>th</sup> day of January, 1993.

  
\_\_\_\_\_  
JAMES O. ELLISON, Chief Judge  
of the United States District  
Court for the Northern District of  
Oklahoma

APPROVED



CATHERINE J. DEPEW,  
Assistant United States Attorney

CJD/ch

DEA SEIZURE NO. Vehicle/116750  
Currency/116297  
DEA FILE NO. MG-92-0011

N: \UDD\CHOOK\FC\STRICK1\02549

**FILED**

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

JAN 26 1993

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CIVIL ACTION NO. 92-C-880-E

ONE PARCEL OF REAL PROPERTY  
IN SECTION 18-T19N-R21E,  
CHEROKEE COUNTY, OKLAHOMA,  
CONTAINING 2.366 ACRES,  
MORE OR LESS, WITH ALL  
BUILDINGS, APPURTENANCES,  
AND IMPROVEMENTS THEREON,

Defendant.

ENTERED ON DOCKET  
DATE JAN 27 1993

JUDGMENT OF FORFEITURE

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

That the verified Complaint for Forfeiture In Rem was filed in this action on the 30th day of September 1992; the Complaint alleges that the defendant real property, with buildings, appurtenances, and improvements is subject to forfeiture pursuant to Title 21 U.S.C. § 881(a)(6) and (a)(7).

That a Warrant of Arrest and Notice In Rem was issued on the 8th day of October 1992, by the Honorable James O. Ellison, Chief Judge of the United States District Court for the Northern District of Oklahoma, as to the defendant real property, its buildings, appurtenances, and improvements.

That the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant real property, its buildings, appurtenances, and improvements on the 28th day of October 1992.

That the following individuals and entities were determined to be potential claimants in this action with standing to file a claim herein:

**BILLY CHARLES JACKSON, JR.**

**COUNTY TREASURER OF CHEROKEE  
COUNTY, OKLAHOMA**

That the United States Marshals personally served the following persons and entities having a potential interest in this action, to-wit:

**BILLY CHARLES JACKSON, JR.**

Served November 2, 1992

**COUNTY TREASURER OF CHEROKEE  
COUNTY, OKLAHOMA**

Served October 29, 1992

That USMS Forms 285 reflecting the services set forth above are on file herein.

That all persons interested in the defendant real property, if any, were required to file their claims herein within ten (10) days after service upon them of the Warrant of

Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claims.

That the defendant real property, its buildings, appurtenances, and improvements upon which personal service was effectuated more than thirty (30) days ago have failed to file its claim or answer, as directed in the Warrant of Arrest and Notice In Rem on file herein.

That the United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Pictorial Press, P. O. Box 88, Tahlequah, Oklahoma, a newspaper of general circulation in the county where the defendant real property is located, on November 6, 13, and 20, 1992, and in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending, on December 3, 10, and 17, 1992; and that Proof of Publication in the Pictorial Press was filed of record herein on the 4th day of December 1992, and Proof of Publication in Tulsa Daily Commerce and Legal News was filed of record herein on the 22nd day of January, 1993.

That no claim in respect to the defendant real property has been filed with the Clerk of the Court, and no person has plead or otherwise defended in this suit as to said defendant real property, and the time for presenting claims and answers, or

other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant real property, its buildings, appurtenances, and improvements, and all persons and/or entities interested therein.

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

A Tract of land in the North Half (N/2) of the Southeast Quarter (SE/4), Section 18, Township 19 North, Range 21 East of the Indian Base and Meridian, Cherokee County, State of Oklahoma, more particularly described as follows:

COMMENCING at the East 1/4 corner of Section 18; thence N 89° 56' 58" W on the East-West Quarter Section line for 1676.28 feet; thence S 0° 03' 33" W parallel with the East line of the SE/4 for 382.29 feet to the POINT OF BEGINNING, thence S 52° 54' 52" E for 282.66 feet; thence S 3° 43' 32" W for 136.79 feet; thence S 38° 01' 33" W for 150.33 feet; thence N 59° 38' 28" W for 297.75 feet; thence N 0° 34' 32" W for 215.11 feet; thence N 66° 07' 52" E for 147.73 feet to the POINT OF BEGINNING; containing 2.366 acres, more or less, together with the right of ingress and egress which grantor acquired or will acquire by and through grantor's chain of title.

AND a 30 foot roadway easement the centerline described as follows: COMMENCING at the POINT OF BEGINNING of the 2.366 acre tract described above; thence S 52° 54' 52" E for 282.66 feet; thence S 3° 43' 32" W for 40.67 feet to the POINT OF BEGINNING of this easement; thence S 78° 28' 38" E for 652.98 feet to the approximate West side of a North-South Road being the POINT OF ENDING of this easement. Easement continues approximately 2 miles North of Farm Road to junction with County Road,

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

IT IS FURTHER ORDERED by the Court that the proceeds of the sale of the above-described real property, its buildings, appurtenances, and improvements, shall be distributed in the following priority:

- a) First, for the payment to the United States of all expenses of forfeiture of the defendant real property, including, but not limited to expenses of seizure, custody, advertising, and sale.
- b) Second, for payment of all real estate taxes owed on the property to date of sale, to the extent that the United States of America is responsible for said taxes.

c) Third, for payment to the United States of America of all amounts remaining after the above disbursements.

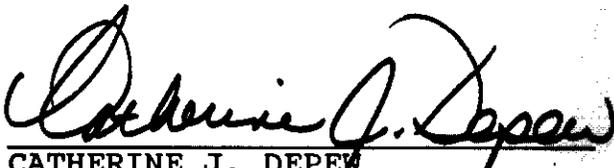
ENTERED this 26<sup>th</sup> day of Jan., 1993.

  
\_\_\_\_\_  
JAMES O. ELLISON, Chief Judge of the  
United States District Court for the  
Northern District of Oklahoma

APPROVED:

UNITED STATES OF AMERICA

TONY M. GRAHAM  
United States Attorney

  
\_\_\_\_\_  
CATHERINE J. DEPEW  
Assistant United States Attorney

DEA SEIZURE NO. 129050

N: \UDD\CHOOK\FC\JACKSON2\02743

ENTERED ON DOC.

DATE 1-27-93

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

**FILED**  
JAN 27 1993

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

CARMEN HAAS,

Plaintiff,

vs.

LIFE FLEET OKLAHOMA, INC.,  
and TOMMY HUDDLESTON,

Defendants.

No. 91-C-822-B ✓

J U D G M E N T

In accordance with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby entered in favor of the Plaintiff, Carmen Haas, and against the Defendant, Tommy Huddleston, in the total amount of Six Thousand Dollars (\$5,000.00 for actual damages plus \$1,000.00 for punitive damages), plus interest at the rate of 3.67% per annum from this date. Costs are also awarded against the Defendant Huddleston if timely applied for pursuant to Local Rule 6, and the parties are to pay their own respective attorneys' fees.

DATED this 27<sup>th</sup> day of January, 1993.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

JAN 27 1993

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 25 1993

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JAN F. SMITH fka JAN F. WHORTON )  
 fka JAN F. BELLER; CHARLES )  
 DAVID SMITH; COUNTY TREASURER, )  
 Rogers County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Rogers County, Oklahoma, )  
 )  
 Defendants. )

CIVIL ACTION NO. 92-C-798-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 25 day  
of Jan., 1993. The Plaintiff appears by Tony M.  
Graham, United States Attorney for the Northern District of  
Oklahoma, through Phil Pinnell, Assistant United States Attorney;  
the Defendants, County Treasurer, Rogers County, Oklahoma, and  
Board of County Commissioners, Rogers County, Oklahoma, appear by  
Bill M. Shaw, Assistant District Attorney, Rogers County,  
Oklahoma; and the Defendants, Jan F. Smith fka Jan F. Whorton fka  
Jan F. Beller and Charles David Smith, appear not, but make  
default.

The Court being fully advised and having examined the  
court file finds that the Defendants, Jan F. Smith fka Jan F.  
Whorton fka Jan F. Beller and Charles David Smith, acknowledged  
receipt of Summons and Complaint on September 14, 1992; that the  
Defendant, County Treasurer, Rogers County, Oklahoma,  
acknowledged receipt of Summons and Complaint on or about  
September 18, 1992; and that Defendant, Board of County

Commissioners, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on September 9, 1992.

It appears that the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, filed their Answer on September 17, 1992; that the Defendants, Jan F. Smith fka Jan F. Whorton fka Jan F. Beller and Charles David Smith, 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 Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot 15 in Block 3 of Amended Plat of Green Acres Addition, a subdivision to the Town of Inola, Oklahoma.

The Court further finds that on April 18, 1979, Jan F. Beller executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of \$28,000.00, payable in monthly installments, with interest thereon at the rate of nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, Jan F. Beller executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated April 18, 1979, covering the above-described property. Said mortgage was

recorded on April 19, 1979, in Book 556, Page 158, in the records of Rogers County, Oklahoma, and was re-recorded on October 1, 1984, in Book 688, Page 404, in the records of Rogers County, Oklahoma.

The Court further finds that the Defendant, Jan F. Smith fka Jan F. Whorton fka Jan F. Beller, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Jan F. Smith fka Jan F. Whorton fka Jan F. Beller, is indebted to the Plaintiff in the principal sum of \$20,633.41, plus accrued interest in the amount of \$1,858.17 as of November 19, 1991, plus interest accruing thereafter at the rate of 9 percent per annum or \$5.0877 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 for recording Notice of Lis Pendens.

The Court further finds that the Defendant, Charles David Smith, is in default and therefore has no right, title or interest in the subject real property.

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment against the Defendant, Jan F. Smith fka Jan F. Whorton fka Jan F. Beller, in the principal sum of \$20,633.41, plus accrued interest in the amount of \$1,858.17

as of November 19, 1991, plus interest accruing thereafter at the rate of 9 percent per annum or \$5.0877 per day until judgment, plus interest thereafter at the current legal rate of 3.67 percent per annum until paid, plus the costs of this action in the amount of \$8.00 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, Charles David Smith and County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, Jan F. Smith fka Jan F. Whorton fka Jan F. Beller, 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



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



BILL M. SHAW, OBA #10127  
Assistant District Attorney  
219 South Missouri, Room 1-111  
Claremore, Oklahoma 74017  
(918) 341-3164  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Rogers County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 92-C-798-B

PP/css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MICHEAL L. GOFF a/k/a MICHAEL )  
 L. GOFF; VANESSA GAIL GOFF; )  
 COUNTY TREASURER, Tulsa )  
 County, Oklahoma; and BOARD OF )  
 COUNTY COMMISSIONERS, Tulsa )  
 County, Oklahoma, )  
 )  
 Defendants. )

**FILED**

JAN 25 1993

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

CIVIL ACTION NO. 92-C-201-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 25 day of Jan., 1993. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, appear not, having previously disclaimed any right, title or interest in the subject property; and the Defendants, Micheal L. Goff a/k/a Michael L. Goff and Vanessa Gail Goff, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 10, 1992; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 10, 1992.

The Court further finds that the Defendants, Micheal L. Goff a/k/a Michael L. Goff and Vanessa Gail Goff, were served by

publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 26, 1992, and continuing to November 30, 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 Defendants, Micheal L. Goff a/k/a Michael L. Goff and Vanessa Gail Goff, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Micheal L. Goff a/k/a Michael L. Goff and Vanessa Gail Goff. 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 parties served by publication with respect to their present or

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

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on March 26, 1992, disclaiming any right, title or interest in the subject property; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on March 26, 1992, disclaiming any right, title or interest in the subject property; and that the Defendants, Micheal L. Goff a/k/a Michael L. Goff and Vanessa Gail Goff, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Thirty-three (33), Block Forty-one (41), VALLEY VIEW ACRES SECOND ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof, less and except the easterly 26 feet thereof.

The Court further finds that on May 20, 1977, the Defendant, Micheal L. Goff, 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, his mortgage note in the amount of \$11,500.00, payable in monthly

installments, with interest thereon at the rate of 8.5 percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Micheal L. Goff, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated May 20, 1977, covering the above-described property. Said mortgage was recorded on May 25, 1977, in Book 4265, Page 2215, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Micheal L. Goff a/k/a Michael L. Goff, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Micheal L. Goff a/k/a Michael L. Goff, is indebted to the Plaintiff in the principal sum of \$9,374.16, plus interest at the rate of 8.5 percent per annum from February 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$348.45 (\$99.25 fees for service of Summons and Complaint, \$249.20 publication fees).

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

The Court further finds that the Defendants, Micheal L. Goff a/k/a Michael L. Goff and Vanessa Gail Goff, are in default

and have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment against the Defendant, Micheal L. Goff a/k/a Michael L. Goff, in the principal sum of \$9,374.16, plus interest at the rate of 8.5 percent per annum from February 1, 1991 until judgment, plus interest thereafter at the current legal rate of 3.67 percent per annum until paid, plus the costs of this action in the amount of \$348.45 (\$99.25 fees for service of Summons and Complaint, \$249.20 publication fees), 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, Micheal L. Goff a/k/a Michael L. Goff, Vanessa Gail Goff, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, Micheal L. Goff a/k/a Michael L. Goff, 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.

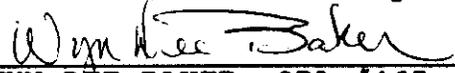
S/ THOMAS R. BRETT

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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-201-B

WDB/esr

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

**FILED**

JAN 25 1993

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

REUBEN THOMAS, )  
)  
Plaintiff, )  
)  
v. )  
)  
STEVE HARGETT, et al, )  
)  
Defendants. )

92-C-499-B

ORDER

Ruben Thomas, a *pro se* litigant, has filed a Petition For Writ Of Habeas Corpus pursuant to 28 U.S.C. §2254. Thomas was convicted of four felonies from 1970 to 1982. Thomas is now serving a 25-year prison sentence after he pled *nolo contendere* in 1986 to robbery after former conviction of felonies ("AFCF"). He asserts that the earlier convictions used to enhance his sentence are invalid.

Respondents reject Thomas' claim. They argue that Thomas, in essence, pled guilty to both the 1986 robbery charge and his former felony convictions. That plea, Respondents maintain, precludes him from obtaining federal habeas relief. This Court agrees. Respondents' Motion To Dismiss is granted.<sup>1</sup>

I. Summary of Facts/Procedural History

In 1970, Thomas was sentenced to two years for unauthorized use of a motor vehicle. In 1976, a jury sentenced him to five years for second-degree burglary. In 1982,

<sup>1</sup> The State's Response To Petition For Writ Of Habeas Corpus will be treated as a Motion To Dismiss.

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clm

Thomas received five years after pleading guilty to second-degree burglary and carrying a fire arm. Thomas has served his time in each of these sentences.

The crux of his habeas petition took place in 1986 when the State charged Thomas with Robbery After Conviction of Two or More Felonies. On the second page of the information, the convictions from 1970 (CRF-70-1292), 1976 (CRF-75-2553) and 1982 (CRF-81-2175 and CRF-81-2176) were listed.

On May 13, 1986, Thomas -- who was represented by an attorney -- pled guilty to the 1986 robbery AFCF charges (CRF-86-393 and CRF-86-420). Of particular importance to this habeas review is the following exchange between Thomas and the judge:

**THE COURT:** You do understand that your plea of No Contest is tantamount to a plea of guilty as far as the Court's prerogative in jurisdiction over you for the purposes of sentencing. Do you understand that?

**THOMAS:** Yeah.

**THE COURT:** And this is also the second part of the information, it alleges that you have previously been convicted of four prior felony offenses; is that correct? And you are pleading guilty to those also; is that correct?

**MS. CONWAY (Attorney):** No Contest.

**THE COURT:** No Contest to those also; is that correct?

**THOMAS:** Yeah.

**THE COURT:** You do understand though they have filed these four prior felonies that they have alleged that you have committed, and you desire not to contest that; is that correct?

**THOMAS:** No, I don't want to.

\*\*\*\*\*

**THE COURT:** Now I will ask you again has anyone forced or coerced either

directly or indirectly to enter this plea of No Contest.

THOMAS: No.<sup>2</sup>

Shortly after that exchange, the judge sentenced Thomas to 25 years. Thomas later attempted to withdraw his plea because he did not "understand what the nature of the plea was" and he said he believed "No Contest means that you was not saying you was guilty." The state court denied his request.

Thomas then filed a direct appeal of the robbery AFCF conviction, but later withdrew it. *See, Order Dismissing Appeal, Exhibit B to Response To Petition For Writ Of Habeas Corpus (docket #8)*. Thomas then filed a series of applications for post-conviction relief. The first application was successful as the Tulsa County District Court vacated Thomas' 1970 conviction.<sup>3</sup> The other applications, however, were denied by the District Court and subsequently affirmed by the Oklahoma Court of Criminal Appeals.

Once denied relief by the State Appeals Court, Thomas filed this habeas petition on June 8, 1992. He claims that his current sentence was improperly enhanced by his convictions in 1970, 1976 and 1982.<sup>4</sup> Respondents, however, argue that his guilty plea to the 1986 robbery AFCF, in effect, prevents him from challenging those previous convictions.

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<sup>2</sup> A transcript of the hearing is in Exhibit A of the Response To Petition For Writ Of Habeas Corpus (docket #8).

<sup>3</sup> Thomas was a minor when he was charged with the 1970 crime of unauthorized use of a motor vehicle. The Tulsa County District Court vacated Thomas' sentence because he was not granted a certification hearing prior to being tried. Order Granting Vacation Of Sentence, March 23, 1988, Exhibit H of Petitioner's Exhibits (docket #4).

<sup>4</sup> Thomas alleges that he received ineffective assistance of appellate counsel in his 1976 conviction (CRF-75-2553). He also contends that his 1982 convictions are invalid because he was not fully advised of his constitutional rights. He also argues that his the vacation of his 1970 conviction should afford him relief on his current sentence.

## II. Legal Analysis

The primary question in this case is whether Thomas, in effect, admitted the validity of those previous convictions when he pled *nolo contendere* to the 1986 Robbery AFCF charges. That admission, Respondents argue, prevents Thomas from attacking his previous convictions in a federal habeas petition.

Had his current 25-year sentence been the result of a trial conviction, the result would likely be different. However, a guilty plea "represents a break in the chain of events" of the criminal process. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973). A conviction based on a guilty plea differs from a verdict because the defendant admits in open court that he committed the acts charged in the information. *Bailey v. Cowley*, 914 F.2d 1438, 1441 (10th Cir.1990). As a result, a series of Supreme Court cases have concluded that a defendant who voluntarily and knowingly pleads guilty generally cannot attack constitutional violations that took place prior to the plea. *Tollett*, 93 S.Ct. at 1608.<sup>5</sup> The Supreme Court writes:

The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable, that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 242, 46 L.Ed.2d 195 (1975).<sup>6</sup>

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<sup>5</sup> In *Tollett*, the Court held that "when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense for which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the guilty plea." *Id.* at 1608. There are exceptions to this rule, but they do not exist here. See, generally, *Osborn v. Shillinger*, 803 F.Supp. 371, 375 (D.Wyo. 1992)(General discussion of exceptions).

<sup>6</sup> This excerpt was also quoted in *Haring v. Prosise*, 462 U.S. 306, 103 S.Ct. 2369, 2377, 76 L.Ed.2d 595 (1983). In that case, the Court held that plaintiff's guilty plea on a criminal charge did not bar him from seeking damages under 42 U.S.C. §1983 for an alleged Fourth Amendment violation.

The instant case differs from the usual circumstances where a defendant is attempting to attack a certain aspect of his conviction (i.e. voluntariness of a confession, illegal search and seizure). Here, Thomas does not dispute the validity of his 1986 robbery conviction; he, instead, attacks his previous convictions to the extent they enhanced his current sentence. Two cases, discussed below, offer guidance on the issue.

In *Long v. McCotter*<sup>7</sup>, Johnny Long had been convicted of two felonies. After serving the time for the two felonies, he was then convicted of a third felony. At the sentencing hearing, the State of Texas presented an enhancement charge to the court based upon two previous felony convictions. Long pleaded "true" to the enhancement allegations and was sentenced to life. He then sought federal habeas review, claiming that his guilty plea in one of the previous convictions was involuntary.

The issue raised by Long to the Fifth Circuit was whether he should be allowed to attack his 1970 conviction despite his plea of "true" to the enhancement charge in his 1979 sentencing hearing. After a lengthy analysis, the Fifth Circuit held that he could not attack the 1970 conviction.

Part of the Court's reasoning stemmed from what they described as the *Zales* waiver doctrine.<sup>8</sup> That doctrine states that a "habeas petitioner who pleaded guilty to enhancement charges in a habitual-offender hearing waived any complaints he may have had concerning the former offenses which were set out in the enhancement charge."<sup>9</sup> The

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<sup>7</sup> 792 F.2d 1338 (5th Cir.1986).

<sup>8</sup> 433 F.2d 20 (5th Cir.1970).

<sup>9</sup> *Id.* at 24.

court in *Long* also wrote:

Our decisions since *Zales* have applied the *Zales* waiver doctrine only in the context of "true" pleas. When a petitioner has not pleaded true to an enhancement charge, or the issue has not been raised by the parties, our decisions have allowed subsequent challenges to the validity of a prior conviction to be asserted when the petitioner was challenging the later enhanced sentence...A plea of "true," on the other hand, relieves the State of its burden of proof and, as such, provides the basis for the *Zales* waiver doctrine. *Long*, 792 F.2d at 1341.

A case before the Western District of Oklahoma also dealt with similar facts.<sup>10</sup> Petitioner Howard Mason pled guilty to forgery and narcotic charges. He served the sentence for those convictions. He subsequently was charged with burglary and forgery AFCF. Mason pled guilty and received a 15-year sentence. While serving that sentence, he filed a federal habeas petition, attacking the validity of the forgery and narcotic convictions.

The court in *Mason*, similar to the one in *Long*, discussed the *Zales* waiver doctrine. It concluded that "a court is not required to consider a petitioner's challenge to his former conviction if he has voluntarily and knowingly pled guilty to the enhancement charge. *Id.* at 677, quoting *Price v. Beto*, 436 F.2d 1070 (5th Cir. 1971).

The facts here are similar to those in *Long* and *Mason*. Thomas was convicted of four felonies prior to 1986.<sup>11</sup> When he was charged with robbery in 1986, the information listed those four convictions. Thomas then pled no contest to the robbery

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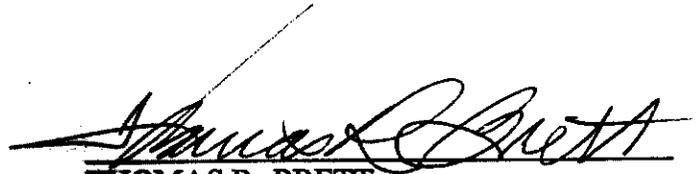
<sup>10</sup> *Mason v. Anderson*, 357 F.Supp. 672 (W.D. Okla. 1973).

<sup>11</sup> The undersigned also does not find that the vacation of the 1970 conviction alters the outcome of this case. 21 Okla. Stat. §51B states that "every person who, having twice been convicted, commits a third...felony offense within 10 years of the date following the completion of the execution of the sentence shall be punished...for a term of not less than 20 years." Since Thomas had a conviction in 1976 and in 1982, he had, at the very least, two convictions prior to his 1986 no contest plea on the robbery charge.

AFCF.<sup>12</sup> He now attempts to attack those previous convictions. In addition, nothing in the record indicates that Thomas' plea was involuntary.

Based on the reasoning in the foregoing cases, this Court finds that Thomas' habeas petition should be dismissed. Thomas pled no contest to the robbery AFCF, the four former convictions being listed on the second page of the charging information. He apparently did so to avoid the consequences of a longer sentence being imposed after a trial.<sup>13</sup> He should not now be able to challenge the same convictions of which he has already admitted guilt in open court.<sup>14</sup> Therefore, the habeas petition is DISMISSED.

SO ORDERED this 25<sup>th</sup> day of January, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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<sup>12</sup>The facts are not identical. For example, Long pled "true" to the enhancement charge. In this case, Thomas pled no contest to the robbery charge, which included the previous convictions. However, such a difference is not critical to this case. The court in Long interpreted the "true" plea to be a guilty plea. Long, 792 F.2d at 1344. Likewise, the United States Supreme Court considers the nolo contendere plea as an admission of guilt in a case where a prison sentence may be imposed as punishment. United States v. Brzoticky, 588 F.2d 773, 776 (10th Cir. 1978) (citing Hudson v. United States, 272 U.S. 451, 455, 457, 47 S.Ct. 127, 71 L.Ed. 347 (1926)).

<sup>13</sup>See Bailey, 914 F.2d at 1441 ("When a defendant pleads guilty, he makes a decision based on a calculated risk that the consequences that will flow from entering the guilty plea will be more favorable than those that would flow from going to trial.")

<sup>14</sup>This Court finds that Thomas is "in custody" as it relates to the holdings of Collins v. Hesse, 957 F.2d 746 (10th Cir. 1992), Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989), and Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1989).

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

**FILED**

JAN 27 1993

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
Northern District of Oklahoma

IN RE:

REPUBLIC TRUST & SAVINGS  
COMPANY, an Oklahoma trust  
company, also d/b/a Western  
Trust and Savings Company,

Debtor.

R. DOBIE LANGENKAMP,  
Successor Trustee,

Plaintiff-  
Appellee.

vs.

JAMES P. GAYNOR,

Defendant-  
Appellant.

Case No. 84-01461-W  
(Chapter 11)

ENTERED ON DOCKET  
DATE JAN 26 1993

Adv. No. 86-0346-C

Dist. Ct. No. 92-C-616-E

**ORDER**

Comes now before the Court for its consideration the above styled parties' Stipulation of Dismissal pursuant to Rule 41(a)(1)(11) Fed. R. Civ. Proc. After review, the Court finds said Stipulation of Dismissal is hereby granted.

ORDERED this 25<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

IN RE:

REPUBLIC TRUST & SAVINGS  
COMPANY, an Oklahoma trust  
company, also d/b/a Western  
Trust and Savings Company,

Debtor.

R. DOBIE LANGENKAMP,  
Successor Trustee,

Plaintiff-  
Appellee.

vs.

SHIRLEY L. McMILLAN,

Defendant-  
Appellant.

Case No. 84-01461-W  
(Chapter 11)

Adv. No. 86-0730-C

Dist. Ct. No. 92-C-620-E

FILED

JAN 23 1993

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

ENTERED ON DOCKET  
JAN 26 1993

DATE \_\_\_\_\_

**ORDER**

Comes now before the Court for its consideration the above styled parties' Stipulation of Dismissal pursuant to Rule 41(a)(1)(11) Fed. R. Civ. Proc. After review, the Court finds said Stipulation of Dismissal is hereby granted.

ORDERED this 25<sup>th</sup> day of January, 1993.

  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DATE JAN 26 1993

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

EVERETT DODSON, JR., a/k/a  
EVERETT DODSON; DANIEL ROBERT  
DODSON a/k/a DANIEL ROBERT  
DICKSON and DANIEL ROBERT  
ROBERT DICKSON DODSON; JACK  
DODSON; COUNTY TREASURER,  
Osage County, Oklahoma; and  
BOARD OF COUNTY COMMISSIONERS,  
Osage County, Oklahoma,

Defendants. ) CIVIL ACTION NO. 91-C-519-E

**FILED**

JAN 26 1993

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

ORDER

Upon the Motion of the United States of America, acting on behalf of the Farmers Home Administration, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 26<sup>th</sup> day of Jan., 1993.

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

APPROVED AS TO FORM AND CONTENT:  
TONY M. GRAHAM  
United States Attorney

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

PB/esr

12

**FILED**

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

JAN 22 1993

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

BETTE L. STOBAUGH,  
Plaintiff,

vs.

MEMOREX TELEX CORPORATION,  
Defendant.

Case No. 91-C-887-E

ENTERED ON DOCKET

DATE JAN 25 1993

ORDER OF DISMISSAL WITH PREJUDICE

COMES NOW before me the undersigned United States District Judge the joint stipulation of the Plaintiff and Defendant that the above captioned matter be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREE by the Court that the above captioned matter be and the same is hereby dismissed with prejudice.

Dated this 22<sup>nd</sup> day of January, 1993.

  
JAMES P. ELLISON  
Chief United States District Judge

DATE JAN 25 1993

**FILED**  
JAN 22 1993

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

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

REGINALD HORNER,  
Plaintiff,

v.

MANAGEMENT & TRAINING  
CORPORATION and the TULSA  
JOB CORPS CENTER,

Defendants.

Case No. 91-C-835-B

**JUDGMENT**

NOW on the 15<sup>th</sup> day of January, 1993, came on for consideration Defendants' Motion to Vacate Attorneys' Lien, and the Motion of the Howard and Widdows law firm for Attorneys' Fees, and the Court, being fully advised in all premises, found that Defendants' Motion to Vacate Attorneys' Lien is well taken and that the Motion of the Howard and Widdows law firm for Attorneys' Fees must be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the attorneys' lien filed herein on September 8, 1992, by the Howard and Widdows law firm should be and is hereby vacated and of no further force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that motion of the Howard and Widdows law firm for attorneys' fees should be and is hereby denied, with the firm receiving no fees other than the \$280.71 in costs previously ordered by Magistrate Wolfe to be paid by Plaintiff Reginald Horner.

ORDERED this 22 day of January, 1993.

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

JAN 22 1993

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

DELIA DEEM and H. A. DEEM,  
Individually and as Husband  
and Wife,

Plaintiffs,

vs.

No. 92-C-827-B

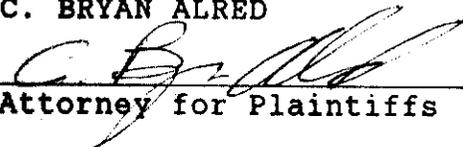
GOLDEN CORRAL CORPORATION,  
a Foreign Corporation,

Defendant.

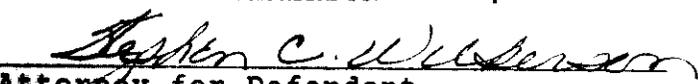
STIPULATION OF DISMISSAL

COME NOW the Plaintiffs, Delia Deem and H. A. Deem, and the Defendant, Golden Corral Corporation, by and through their respective attorneys, and in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby stipulate to the dismissal without prejudice of all claims and causes of action involved herein.

C. BRYAN ALRED

  
Attorney for Plaintiffs

STEPHEN C. WILKERSON

  
Attorney for Defendant



DATE JAN 25 1993

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

**FILED**

JAN 22 1993

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

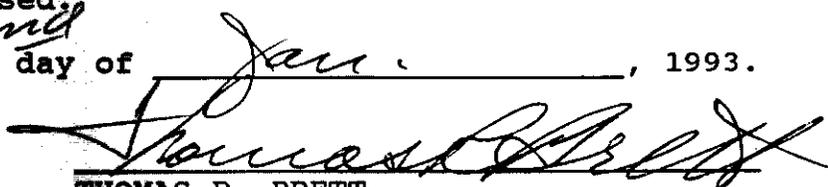
JONATHAN R. THOMAS,  
Plaintiff,  
vs.  
S. MIDDLETON, et al.,  
Defendants.

No. 92-C-762-B

**ORDER**

Defendants filed a motion to dismiss/motion for summary judgment. Plaintiff has failed to respond to the motion. Pursuant to Local Rule 15(A), Plaintiff's failure constitutes a waiver of objection and a confession of the matters raised by the motion. Accordingly, Defendants' motion is granted, and Plaintiff's complaint is hereby dismissed.

SO ORDERED THIS 22<sup>nd</sup> day of Jan., 1993.



THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

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

**FILED**

RICHARD HUFF,  
Plaintiff,  
vs.  
STANLEY GLANZ, et al.,  
Defendants.

No. 92-C-729-B

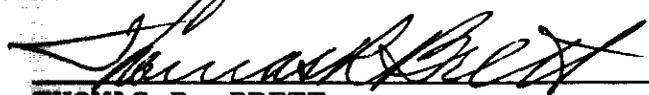
JAN 22 1993

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

**ORDER**

Defendants filed a motion to dismiss/motion for summary judgment (docket #5). Plaintiff has failed to respond to the motion. Pursuant to Local Rule 15(A), Plaintiff's failure constitutes a waiver of objection and confession of the matters raised by the motion. Accordingly, Defendants' motion is granted, and Plaintiff's complaint is hereby dismissed.

SO ORDERED THIS 22<sup>nd</sup> day of Jan, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET  
DATE JAN 25 1993

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

HARLEY ANN PATRICK,  
individually and as Personal  
Representative of the Estate  
of LYNN DAVID PATRICK,  
Deceased,

Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD  
COMPANY, a Delaware  
corporation, d/b/a UNION  
PACIFIC RAILROAD COMPANY  
and MISSOURI-KANSAS-TEXAS  
RAILROAD COMPANY, a Delaware  
corporation,

Defendant.

No. 92-C-998-E

**FILED**

JAN 28 1993

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

ORDER

COMES NOW BEFORE THE COURT FOR CONSIDERATION Defendant  
Missouri-Kansas-Texas Railroad Company's Motion to Dismiss and  
Plaintiff's Response thereto.

This action arises out of a collision, which occurred on the  
13th day of February 1992, of a vehicle driven by the Decedent and  
a Union Pacific train. The collision took place at an intersection  
which was, and still is, owned and operated by Missouri Pacific  
Railroad Company. Missouri-Kansas-Texas Railroad Company  
apparently never had an ownership interest therein. Defendant's  
motion is based on the assertion that Missouri-Kansas-Texas  
Railroad Company is therefore not the real party in interest and is  
not subject to the personal jurisdiction of this Court. Plaintiff  
does not oppose Defendant's motion to dismiss with respect to

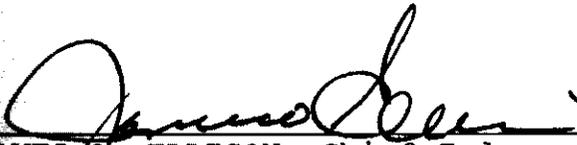
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Missouri-Kansas-Texas Railroad Company, but retains its right to pursue its action as against Missouri Pacific Railroad Company, a Delaware corporation, d/b/a Union Pacific Railroad Company as the real party in interest.

The Court therefore finds that Missouri Pacific Railroad Company, a Delaware corporation, d/b/a Union Pacific Railroad Company, and not Missouri-Kansas-Texas Railroad Company, is the real party in interest in this litigation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Missouri-Kansas-Texas Railroad Company's Motion to Dismiss is hereby granted.

ORDERED this 22<sup>d</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 21 1993

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

LEONARD NASH,

Plaintiff,

v.

DR. MARGARET STRIPLING, et al.,

Defendants.

92-C-6-E

ENTERED ON DOCKET

DATE JAN 25 1993

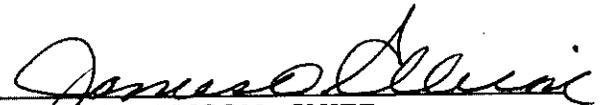
**ORDER**

The court has for consideration the Report and Recommendation of the Magistrate Judge filed December 18, 1992, in which the Magistrate Judge recommended that Defendant Gray's Motion to Dismiss and Motion for Judgment on the Pleadings be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is therefore Ordered that Defendant Gray's Motion to Dismiss and Motion for Judgment on the Pleadings is granted. Plaintiff's Reurged Motion for Specialized Medical Care and defendant Gray's Response in Opposition to Plaintiff's Motion for Specialized Medical Care are moot.

Dated this 20<sup>th</sup> day of January, 1993.

  
JAMES O. ELLISON, CHIEF  
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET  
DATE JAN 25 1993

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

**FILED**

JAN 21 1993

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

JACK L. PAYNE,

Plaintiff,

v.

LOUIS W. SULLIVAN, M.D.,  
SECRETARY OF HEALTH AND  
HUMAN SERVICES,

Defendant.

91-C-308-E

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed December 7, 1992, in which the Magistrate Judge recommended that this case be remanded for computation of benefits from July 12, 1976 through August 31, 1988 and for an additional factual determination of whether plaintiff's condition continues to meet the Listings, and, if not, when his disability ended. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is therefore Ordered that this case is remanded to the Secretary for computation of benefits from July 12, 1976 through August 31, 1988, and for an additional factual determination of whether plaintiff's condition continues to meet the Listings, and, if not, when his disability ended.

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Dated this 20 day of January, 1993.

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

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

**FILED**

JAN 21 1993

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

LARRY LEON CHANEY,  
Petitioner,

vs.

No. 91-C-157-E

ANDERA BYNUM, et al.  
Respondents.

ENTERED ON DOCKET  
DATE JAN 25 1993

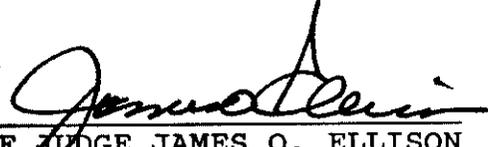
ORDER

The Court has for consideration the Report and Recommendations of the Magistrate filed on December 16, 1991. After careful consideration of the record and the issues, including the objections, briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendations of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that Respondent's Motion to Dismiss for Failure to Exhaust State Remedies is hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Chaney's Petition for Writ of Habeas Corpus is hereby dismissed without prejudice to the right of the Petitioner to refile such petition for good cause shown after exhaustion of Petitioner's state court remedies.

ORDERED this 19<sup>th</sup> day of January, 1993.

  
CHIEF JUDGE JAMES O. ELLISON  
UNITED STATES DISTRICT COURT

14

ENTERED ON DOCKET  
DATE JAN 25 1993

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

**FILED**

JAN 19 1993

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

JACQUELINE GORDON, et al., )  
)  
Plaintiffs, )  
)  
v. )  
)  
CITY OF TULSA, OKLAHOMA, et al., )  
)  
Defendants. )

Case No. 91-C-124-E

**FILED**

JAN 22 1993

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

**ORDER**

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed December 16, 1992 in which the Magistrate Judge recommended that Plaintiffs' claim for relief under the Genocide Act be dismissed, the Act only enforceable by the Government in the context of criminal penalties.

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 Plaintiffs' claim for relief under the Genocide Act is dismissed, the Act only enforceable by the Government in the context of criminal penalties.

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SO ORDERED THIS 22<sup>d</sup> day of January, 1993.

  
JAMES O. ELLISON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET  
DATE JAN 22 1993  
**FILED**

JAN 21 1993

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

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

A. PAUL SHAPANSKY, individually, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
TITLE TECHNOLOGIES, INC., a )  
corporation, )  
 )  
Defendant. )

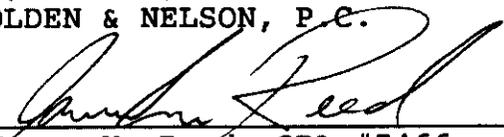
Case No. 93-C-0010B ✓

NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, A. Paul Shapansky, and pursuant to Fed. R. Civ. P. Rule 41(a)(1), hereby dismisses without prejudice the above-referenced action as filed on the 6th day of January, 1993.

Respectfully submitted,

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

By:   
James M. Reed, OBA #7466  
4100 Bank of Oklahoma Tower  
One Williams Center  
Tulsa, Oklahoma 74172  
(918) 588-2700

ATTORNEYS FOR A. PAUL SHAPANSKY

CERTIFICATE OF MAILING

I hereby certify that on the 21 day of January, 1993, I mailed a true and correct copy of the above and foregoing document, with proper postage fully prepaid thereon, to the following:

Paul H. Peterson  
6966 South Utica  
Tulsa, Oklahoma 74136

Jesse Clayton-Aguiree  
Title Technologies, Inc.  
610 ONEOK Plaza  
100 West Fifth Street  
Tulsa, OK 74105

A handwritten signature in cursive script, appearing to read "Paul H. Peterson", is written over a horizontal line.

ENTERED  
DATE JAN 22 1993

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

**FILED**

JAN 21 1993

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

CURT MASSENGALE, O.D.; DERRICK  
SKAGGS, O.D.; LARRY GREENHAW, O.D.;  
LENSCRAFTERS, INC.; and PEARLE  
VISION, INC.; PHILIP MILLER,  
O.D., INTERVENOR,

Plaintiffs,

vs.

No. 92-C-584-B

OKLAHOMA BOARD OF EXAMINERS IN  
OPTOMETRY; V. DUANE MOORE, O.D.;  
GEORGE E. FOSTER, O.D.; and  
LLOYD PECK, O.D.; individually and  
in their capacities as members of  
the OKLAHOMA BOARD OF EXAMINERS  
IN OPTOMETRY,

Defendants.

ORDER

The Motion to Dismiss of the Defendants is before the Court for decision. The Plaintiffs, Curt Massengale, Derrick Skaggs, Larry Greenhaw and Philip Miller are licensed optometrists in the state of Oklahoma whose practices are located within space subleased from LensCrafters, Inc. or Pearle, Inc. Such subleased space is usually adjacent to or near LensCrafters or Pearle retail eyeglass dispensing stores usually located in shopping centers or malls. The Defendants, Duane Moore, George E. Foster and Lloyd Peck are licensed optometrists whose practices are located in the cities of Ada, Bristow and Woodward, Oklahoma, respectively. The Oklahoma Board of Examiners in Optometry is an agency created pursuant to Okla. Stat. tit. 59, § 582, and charged with regulating the practice of optometry in Oklahoma. Each of Doctors Moore, Foster and Peck have been duly appointed by the Governor of

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Oklahoma to serve as members of the Oklahoma Board of Examiners in Optometry for a term of three years.

Plaintiffs seek to invoke the jurisdiction of this court to obtain declaratory relief which, if granted, will permanently enjoin the Oklahoma Board of Examiners in Optometry from enforcing statutes and rules purportedly designed to protect and regulate the practice of optometry in the state of Oklahoma. Counts I and II of Plaintiff's complaint allege violations of §§ 1 and 2 of the Sherman Act (15 U.S.C. § 1, 2). Count III alleges constitutional violations of due process. Count IV alleges constitutional violations of equal protection. Count VI alleges constitutional violations of free speech. Count V alleges Okla.Stat. tit. 59, §§ 596 and 944, are void for vagueness and are unconstitutional and lastly, Count VII alleges that said Oklahoma Statutes in Count V, if clear in their meaning, have been both misinterpreted and misapplied by the Defendant optometry Board.

#### **THE FACTS GIVING RISE TO THE DISPUTE**

The parties basically agree to the underlying facts concerning the dispute. Plaintiffs, Drs. Massengale and Greenhaw, have office space sublease agreements with LensCrafters, Inc. in Oklahoma City, Oklahoma shopping malls, and Drs. Skaggs and Miller have office space sublease agreements with LensCrafters and Pearle, respectively, in Tulsa, Oklahoma. The Plaintiffs' optometry practice offices under sublease are not in the retail space of either LensCrafters or Pearle but are adjacent to or nearby.

In 1990 and 1991, the Defendant Board commenced a dialogue

with the Plaintiffs (1992, in the case of Dr. Philip Miller) regarding the subject subleases and initially advised Plaintiffs that they may well be in violation of Okla. Stat. tit. 59, §§ 593, 596, and 944.<sup>1</sup> Such a decision was a matter of interpretation of the subject statutes, and the Board, having some doubt concerning such interpretation, sought an opinion of the Attorney General of Oklahoma and the Attorney General responded with such an opinion. The Attorney General concluded "a licensed optometrist may not lease or sublease space from a retail optical supplier or seller."

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<sup>1</sup>Okla.Stat. tit. 59, § 593

"It is the public policy of the State of Oklahoma that optometrists rendering visual care to its citizens shall practice in an ethical, professional manner; that their practices be free from any appearance of commercialism; that the visual welfare of the patient be the prime consideration at all times; and that optometrists shall not be associated with any nonprofessional person or persons in any manner which might degrade or reduce the quality of visual care received by the citizens of this state.

Okla.Stat. tit. 59, § 596

"It shall be unlawful for any optometrist to render optometric care in any retail, mercantile establishment which sells merchandise to the general public; and it shall be unlawful for any person to display, dispense, sell, provide or otherwise purvey to the public, prescription eyeglasses, prescription lenses, frames or mountings for prescription lenses, within or on the premises of in any manner, any retail or mercantile establishment in which the majority of the establishment's income is not derived from the sale of such prescription optical goods and materials.

Okla.Stat. tit. 59, § 944

"\* \* \* No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examinations or visual care to occupy space in such retail store...."

Exhibit A, Plaintiff's Complaint of July 7, 1992.

After the formal opinion was rendered by the Attorney General, the Defendant Board, in a memorandum mailed to all licensed optometrists of the State of Oklahoma, advised of the Attorney General's opinion and stated all licensed optometrists would be expected to comply and not violate Okla. Stat. tit. 59, §§ 593, 596, and 944. In May 1992, the Defendant Board voted to conduct disciplinary hearings in July 1992, against the optometrist Plaintiffs (subsequently including Dr. Miller in the decision) for failing to comply with the statutes, Okla.Stat. tit. 59, §§ 593, 596, and 944, regarding their aforesaid subleases with LensCrafters and Pearle. Previous to the scheduled July 1992, disciplinary hearings, the Plaintiffs filed the instant action. To date no formal action has been taken against any of the Plaintiffs, nor has any formal decision of the Board been rendered. The Board has voluntarily stayed any formal action against the Plaintiffs regarding the subleasing issue and purported violations of Okla.Stat. tit. 59, §§ 593, 596, and 944, pending the outcome of the instant action.

Plaintiffs assert that they are not required to exhaust their state administrative remedies because such does not provide an adequate remedy. Plaintiffs state the Defendant Board is a biased administrative body in the following three respects: (1) the historic opposition of the Board to commercial retail dispensaries and optometrists associated with them, (2) the substantial and direct economic interest the Board members have in bringing an

enforcement action and imposing sanctions against the optometrists, and (3) certain Board members' obvious prejudgment of the issues as to the optometrists' cases. The Defendants urge that adequate disqualification procedures are provided by Oklahoma law to remedy the purported Board bias which have not been exhausted by Plaintiffs. Plaintiffs assert that the available remedy for disqualification or recusal of Board members is ineffective because any replacement member would be subject to the same bias.

#### Conclusions and Legal Analysis

Plaintiffs cite Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689 (1983), as authority that they are not required to exhaust administrative remedies if such would be futile. The instant case is distinguishable from Gibson, however, because the Oklahoma Administrative Procedures Act provides, alternatively, that upon appropriate motion there can be an impartial, neutral hearing officer appointed to replace the Board. OAC 505:1-7-7, OAC 505:1-7-14. *See also*, Okla.Stat. tit. 75, §§ 301-326 (notably § 316). Plaintiff optometrists have not sought recusal or disqualification of the Defendant Board members under this procedure. In Gibson, 411 U.S. 564, no disqualification or recusal procedure of purportedly biased Board members existed.

Plaintiffs' assertion that any Oklahoma licensed optometrist would be unfit to serve as an impartial hearing officer is overly broad. Defendants point out that many Oklahoma practicing optometrists do not dispense eyewear. If Plaintiffs' assertion is correct, no licensed Oklahoma optometrist could sit on an official

optometrist professional Board in judgment of their peers.

In Plaintiffs' supplemental brief filed November 24, 1992, they urge the recent case of Russel Guisti, O.D. et al., v. Nevada State Board of Optometry, et al., CV-N-92-290-ECR, as supporting authority for this action. In Guisti, as in Gibson, 411 U.S. 564, there was no adequate procedure for disqualification of alleged biased optometrist Board members.<sup>2</sup> Plaintiffs' due process claim arising from the alleged bias of the Defendant Board members is without merit because Plaintiffs have not availed themselves of the process that is due. Plaintiffs must first exhaust the administrative remedies available. Whitney National Bank in Jefferson Parish v. Bank of New Orleans, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965); Harr v. Federal Home Loan Bank Bd., 557 F.2d 747 (10th Cir. 1977) *cert. denied*, 434 U.S. 1013. *See also*, Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Commission, 764 P.2d 172 (Okla. 1988); and City of Chickasha v. Arkansas Louisiana Gas Co., 625 P.2d 638 (Okla. 1981).

In Public Service Com'n of Utah v. Wycoff Company, 344 U.S. 237, 247 (1952), the court acknowledged that federalism required granting state administrative agencies the initial right to reduce the general policies of state regulatory statutes into concrete

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<sup>2</sup>In Guisti, the optometrist board members were from the same cities of Las Vegas and Reno as the optometrists under investigation. Herein, the members of the board reside and practice in small Oklahoma cities in excess of 75 miles distant from the Plaintiffs' optometry practices in Oklahoma City and Tulsa.

orders and the primary right to take evidence and make findings of fact. Anticipatory declarations of state regulatory statutes should usually not be undertaken by the federal court in the first instance. Alabama State Fed. of Labor v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945). This principle is applicable equally to the claims of both the optometrist and corporate Plaintiffs. Thus, the court concludes the matter is not ripe for adjudication in this federal forum.

Additionally, the Pullman doctrine of abstention is also applicable. Railroad Commission v. Pullman Company, 312 U.S. 496, 500-01 (1941). Pullman provides that a federal district court may in its discretion abstain from deciding constitutional questions which hinge on difficult state law issues. Abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it, Vinyard v. King, 655 F.2d 1016, 1018, (10th Cir. 1981) citing Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), but is applicable where "the issues presented . . . are fundamental and important questions of state law and policy that state courts should be allowed to answer in the first instance." Lehman v. City of Louisville, 967 F.2d 1474 (10th Cir. 1992).<sup>3</sup>

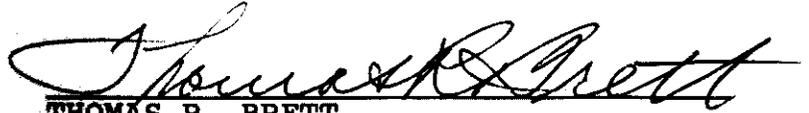
Having concluded the matter is not ripe for federal adjudication, and that the court should abstain, Defendants' Motion to Dismiss is hereby SUSTAINED. It is, therefore, unnecessary for

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<sup>3</sup> The Oklahoma state court should first be given the opportunity to review and pass upon the Oklahoma Attorney General's interpretive opinion.

the court to address the other federal statutory and constitutional claims of Plaintiffs.

DATED this 21<sup>ST</sup> day of January, 1993.



**THOMAS R. BRETT**  
**UNITED STATES DISTRICT JUDGE**

ENTERED ON DOCKET  
DATE **JAN 22 1993**

~~FILED~~  
JAN 13 1993  
FILED

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

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

ARTHUR LEON HAMLIN

VS.

C.A. NO. 87-C-523-C

JAN 13 1993

FIBREBOARD CORPORATION,  
ET AL

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

AGREEMENT AND CONSENT ORDER

This is a Court-approved Agreement and Consent Order by and between Plaintiffs, ARTHUR LEON HAMLIN, (hereinafter "Plaintiff"), and the above captioned Defendant, FIBREBOARD CORPORATION (hereinafter "Defendant").

1. The Plaintiff believes that he has been exposed to asbestos or asbestos-containing products manufactured and/or distributed by the above-captioned Defendant. Further, Plaintiff claims that he has an asbestos-related condition causally related to such exposure. Further, Plaintiff does not wish at this time to pursue a claim or Complaint against the above captioned Defendant.

2. This action shall be dismissed, without prejudice, as to this Defendant, FIBREBOARD CORPORATION. By filing this Petition, Plaintiff sought to recover compensation for an alleged asbestos-related disease allegedly caused in part by the Plaintiff's exposure to asbestos-related containing products manufactured or distributed by one or more of the Defendants named in that petition.

3. Plaintiff agrees not to file a subsequent lawsuit seeking to recover compensation for an alleged asbestos-related disease for a period of at least two years following the entry of this Order. This two year prohibition against filing subsequent suit, however, will not be applicable should the Plaintiff contract an asbestos related malignancy, or be diagnosed by a physician as having an impairing asbestos-related disease.

4. Any recovery obtained by **the Plaintiff** by way of settlement or verdict, concerning the allegations contained in **the Complaint**, or otherwise received from or on behalf of any asbestos-containing product **seller**, manufacturer, or distributor, shall be used to reduce any ultimate liability to the **Plaintiff** by this Defendant.

**FIBREBOARD CORPORATION** will not plead any defense of collateral estoppel, res judicata or any other defense based **upon a verdict** that may be reached in the above-referenced action against other defendants; provided, however, any settlements with or judgments against any defendants as **settling tort-feasors** under the laws of contribution, indemnity, comparative fault, or other **similar laws** of the jurisdiction.

5. Defendant agrees to toll **the Statute** of Limitations from the date that this Order is entered until a subsequent claim, **if any** is brought by the Plaintiff. However, it is expressly understood that this Order in **no way** acts to revive a claim that was barred by the Statute of Limitations in accordance **with applicable** State and Federal laws as of the date the Plaintiff effected proper service of **the Complaint** in this action upon this Defendant.

6. If Plaintiff should die **due to an alleged** asbestos-related disease, any claim for wrongful death must be filed **within the** time period set forth by the Statute of Limitations applicable to the claim on **the date** the death occurs.

7. If the Plaintiff is diagnosed **as having contracted** an alleged asbestos-related malignancy, any claim resulting therefrom **must be** filed within the time period set forth by the Statute of Limitations applicable to **the claim** on the date of such diagnosis.

8. The parties agree and **understand** that consenting to this agreement by or on behalf of this Defendant is not a waiver **of any defenses** that have been or could be asserted on behalf of this Defendant. Further, **consenting** to this Order is not to be construed as an admission of liability on the part of this **Defendant**, by whom liability is expressly denied.

IT IS ORDERED THIS 13 day of Jan, 199~~7~~<sup>3</sup>.

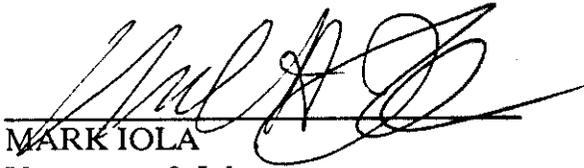
(Signed) H. Dale Cook

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Presiding Judge

APPROVED AS TO FORM AND SUBSTANCE

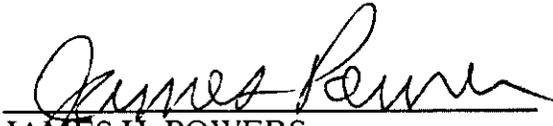
By:

  
MARK IOLA

Ungerman & Iola  
Riverbridge Office Park, Suite 300  
1323 East 71st Street  
Tulsa, OK 74170-1917  
(918) 495-0550  
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ATTORNEYS FOR PLAINTIFFS

By:

  
JAMES H. POWERS

SBOT # 16217400  
Roberts, Markel, Folger & Powers  
Weslayan Tower  
24 Greenway, Suite 1010  
Houston, Texas 77046  
(713) 840-1666  
fax (713) 840-1271

ATTORNEYS FOR DEFENDANT,  
FIBREBOARD CORPORATION



4. Any recovery obtained by the Plaintiff by way of settlement or verdict, concerning the allegations contained in the Complaint, or otherwise received from or on behalf of any asbestos-containing product seller, manufacturer, or distributor, shall be used to reduce any ultimate liability to the Plaintiff by this Defendant.

FIBREBOARD CORPORATION will not plead any defense of collateral estoppel, res judicata or any other defense based upon a verdict that may be reached in the above-referenced action against other defendants; provided, however, any settlements with or judgments against any defendants as settling tort-feasors under the laws of contribution, indemnity, comparative fault, or other similar laws of the jurisdiction.

5. Defendant agrees to toll the Statute of Limitations from the date that this Order is entered until a subsequent claim, if any is brought by the Plaintiff. However, it is expressly understood that this Order in no way acts to revive a claim that was barred by the Statute of Limitations in accordance with applicable State and Federal laws as of the date the Plaintiff effected proper service of the Complaint in this action upon this Defendant.

6. If Plaintiff should die due to an alleged asbestos-related disease, any claim for wrongful death must be filed within the time period set forth by the Statute of Limitations applicable to the claim on the date the death occurs.

7. If the Plaintiff is diagnosed as having contracted an alleged asbestos-related malignancy, any claim resulting therefrom must be filed within the time period set forth by the Statute of Limitations applicable to the claim on the date of such diagnosis.

8. The parties agree and understand that consenting to this agreement by or on behalf of this Defendant is not a waiver of any defenses that have been or could be asserted on behalf of this Defendant. Further, consenting to this Order is not to be construed as an admission of liability on the part of this Defendant, by whom liability is expressly denied.

IT IS ORDERED THIS 13 day of Jan, 1993.

(Signed) H. Dale Cook

Presiding Judge

APPROVED AS TO FORM AND SUBSTANCE

By:



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Ungerman & Iola  
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fax (713) 840-1271

ATTORNEYS FOR DEFENDANT,  
FIBREBOARD CORPORATION

DATE 1-22-93

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

**FILED**

JAN 20 1993  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

WTG - EAST, INC., )  
a Delaware corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
GENERAL SIGNAL CORPORATION, )  
a New York corporation, )  
 )  
Defendant. )

91-C-545-B

ORDER OF DISMISSAL WITH PREJUDICE  
OF COMPLAINT OF PLAINTIFF AND  
COUNTER-DEFENDANT WTG-EAST, INC.

Pursuant to the Notice of Dismissal and Application for Order of Dismissal With Prejudice, and for good cause shown, it is hereby ordered that the Complaint, and each and every claim for relief therein, of the Plaintiff and Counter-Defendant, WTG - East, Inc., is dismissed with prejudice, each party to bear its own attorney fees, costs and expenses incurred herein.

Dated this 20 day of January, 1993.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

1-22-93

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

**FILED**

JAN 20 1993

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

WTG - EAST, INC., )  
a Delaware corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
GENERAL SIGNAL CORPORATION, )  
a New York corporation, )  
 )  
Defendant. )

91-C-545-B

ORDER OF DISMISSAL WITH PREJUDICE  
OF COUNTERCLAIMS OF DEFENDANT AND  
COUNTERCLAIMANT GENERAL SIGNAL CORPORATION

Pursuant to the Notice of Dismissal and Application for Order of Dismissal With Prejudice, and for good cause shown, it is hereby ordered that the Counterclaim, and each and every claim for relief therein, of the Defendant and Counterclaimant, is dismissed with prejudice, each party to bear its own attorney fees, costs and expenses incurred herein.

Dated this 20 day of January, 1993.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 1-22-93

**FILED**

JAN 20 1993

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

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

RAYMOND SCOTT, JR.,	)
	)
Petitioner,	)
	)
v.	)
	)
JAMES MOON, Warden, and THE	)
ATTORNEY GENERAL OF THE	)
STATE OF OKLAHOMA,	)
	)
Respondents.	)

Case No. 92-C-475-B

**ORDER**

This order pertains to Petitioner's Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1)<sup>1</sup>, Respondents' Motion to Dismiss for Failure to Exhaust State Remedies (Docket #10), and Petitioner's Triverse [sic] to the Reply (Docket #15). Petitioner was convicted in Tulsa County District Court, Case No. CRF-83-439, of first degree manslaughter and sentenced to **eighty** (80) years imprisonment. The conviction was appealed to the Oklahoma Court of Criminal Appeals, and the court affirmed the conviction, but modified the sentence to **forty** (40) years.

Petitioner did not file an application for relief under the Oklahoma Post-Conviction Procedure Act, 22 O.S. § 1080 et seq.

Petitioner now seeks federal habeas relief on the alleged ground that the Court of Criminal Appeals erred in modifying, **rather than** reversing, his sentence, because minority members were excluded from the jury **and** prosecutorial misconduct occurred at his trial.

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

The court has reviewed the record **in its entirety** and finds that: (1) Petitioner must exhaust his state remedies before **bringing** this claim to federal court; (2) Petitioner's claims that blacks were excluded from **the jury** that convicted him, a black, and that prosecutorial comments deprived him of a fair trial have no merit and do not show a fundamental miscarriage of justice occurred; and (3) matters of sentencing are traditionally not reviewable in a federal habeas corpus action.

PETITIONER MUST EXHAUST HIS STATE REMEDIES

Respondents claim that this action **should** be dismissed because petitioner has failed to exhaust his state remedies. A petitioner must completely exhaust all state remedies before coming to the federal court. Rose v. Lundy, 455 U.S. 509 (1982); Anderson v. Harless, 459 U.S. 4 (1982). A federal habeas petitioner must give the state courts a fair opportunity to decide the substance of **the federal** claims. Id. The Tenth Circuit has noted that a "rigorously enforced" exhaustion **policy** is necessary to serve the end of protecting and promoting the State's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982).

Petitioner appealed the decision of the trial court and the court affirmed the conviction, but modified the sentence (Ex. D to Respondents' Brief in Support of Motion to Dismiss for Failure to Exhaust State Remedies ("Brief")). Petitioner filed a Petition for Rehearing on March 28, 1988, raising as his sole basis for rehearing the claim that he was denied his right to equal protection of **the law** because the prosecutor used peremptory challenges to systematically exclude **each and every** black person questioned during voir dire, the supposedly race-neutral reasons given for excusing these jurors were pretextual

and did not rebut the prima facie showing of racially discriminatory purpose and intent in the removal of black jurors, and because the trial court failed in its duty to ensure that the reasons for excusal advanced by the prosecutor were legitimate and not simply contrived and pretextual. (Exhibit "E" to Brief). The petition was denied on April 14, 1988 (Ex. "F" to Brief) and petitioner appealed to the United States Supreme Court. Certiorari was denied on June 12, 1989 (Ex. "G" to Brief).

Petitioner argues in his petition that modification of his sentence by the Oklahoma Court of Criminal Appeals was not according to law. He claims that, because a sentence of 45 years is classified as a life sentence and any sentence above 45 years requires the same amount of time to be served before consideration for parole (15 years), then modification of his sentence from 80 to 40 years was a sham and he must still serve substantially the same amount of time before parole. He seeks reversal of his sentence rather than its modification. This is a different claim from the one made to the Court of Criminal Appeals. No state court has had the opportunity to pass judgment on this claim.

Petitioner has failed to exhaust his state remedies and has an available remedy under the Oklahoma Post-Conviction Procedure Act, 22 O.S. § 1080 et seq.

PETITIONER'S BATSON CLAIM AND PROSECUTORIAL  
MISCONDUCT CLAIM HAVE NO MERIT

The court has reviewed the trial transcript and finds no merit to Petitioner's claims that blacks were systematically excluded from the jury that convicted him and that prosecutorial comments deprived him of a fair trial. The prosecutor presented a neutral

explanation for his challenges of the **black potential jurors**,<sup>2</sup> thereby meeting his burden under Batson v. Kentucky, 476 U.S. 79, 97 (1986), to show that the veniremen were not removed on the basis of their race.

Under Oklahoma law, counsel for both the State and the defendant are allowed "wide latitude" in closing arguments, "encompassing a wide range of discussion and argumentation." Nobles v. State, 668 P.2d 1139, 1142 (Okla. Crim. App. 1983). Both sides have the right to discuss the evidence and draw reasonable inferences from their point of view. Capps v. State, 674 P.2d 554, 557 (Okla. Crim. App. 1984). "[E]ven if there is error during a trial, this alone is not sufficient to require reversal. The error must injure the defendant and the burden is on him to establish that he was prejudiced in his substantial rights by the error." Smith v. State, 656 P.2d 277, 283-284 (Okla. Crim. App. 1982). After detailed review and analysis of the entire record, the court concludes that the prosecutor's statements did not have the combined effect of depriving Petitioner of a fair trial and were not so grossly improper as to warrant reversal of the verdict given the evidence presented of his guilt.<sup>3</sup>

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<sup>2</sup>The prosecutor stated to the court:

[T]he reason Mr. Cato was dismissed was because he is a criminal defendant and he is presently under apparently a two year deferred sentence, at least from what he says, for a drug possession. Ms. Gardner was excused because she is a minister with a, I believe she said a Baptist church and that not having ministers on juries is a practice that numerous lawyers engage in. Very few feel comfortable about having a minister or a missionary on a jury. And as to Ms. Asberry, Your Honor, she just didn't appear extremely intelligent to me. In fact, you mentioned to me back in chambers that was your same feeling on her. And that was the reason I dismissed her. I think that the State and the Defense is best benefited by intelligent jurors, and Ms. Asberry didn't seem like this was the kind of case for her. (Trial Transcript, pg. 154).

<sup>3</sup> During voir dire petitioner argues that the prosecutor deprived him of a fair trial when he "repeatedly attempted to define reasonable doubt." The prosecutor first stated during voir dire:

I anticipate that you will be instructed that the State's burden of proof in a case -- in a criminal case is that the State must prove their case beyond a reasonable doubt. Now, I also anticipate you will hear no other phraseology of that. You will hear no other explanation of that. That phrase will not be defined for you. You will have nothing else to go on other than when you are considering the burden of proof. The State must prove this case beyond a reasonable doubt. I can't define it for you. The Judge can't define it. Counsel cannot. No one can. I can tell you this, I can tell you what it is not. It is not the civil burden of proof that you all -- some of you all have had experience with. That civil burden of proof is called a preponderance of the evidence. Anytime someone gets more than 50 percent of the evidence basically, you win. I can also tell you that that phrase does not mean beyond all doubt. It does not mean beyond all mathematical certainty. It means exactly what it says. It means beyond a reasonable doubt. Those words are taken in their common every day usage. (Tr. 24-25).

Defense counsel did not object, and thereafter discussed the subject of reasonable doubt himself:

MR. BRUNTON [defense counsel]: Would you conjure up in your mind the response to his question they hey [sic], I go back in this jury room I don't think they have proven that to me. They have not met their burden of proving this man guilty beyond a reasonable doubt. In other words, if you have got to guess about it then probably you ought to bring back a verdict of not guilty. Do you agree with that?

MR. LYONS [prosecutor]: Your Honor, excuse me. I'm going to object. I think that it [sic] an indirect reference as to a definition of what beyond a reasonable doubt means. I would ask that question be stricken.

THE COURT: I expect all jurors that are seated to be reasonable and use their own reason. I am not going to define a reasonable doubt. I don't think the lawyers should. (Tr. 79).

The prosecutor raised the subject again, defense counsel objected, and the court gave guidance to the jurors:

MR. LYONS: All right. This is a difficult concept that I have got to deal with and analyze, you know, what I discussed with all the other jurors beyond a reasonable doubt is just that. Whatever it takes to get that one little bit, that one little iota or scintilla or whatever those little things are, pass beyond a reasonable doubt. One little bit is all it takes for a conviction. I don't have to have --

MR. BRUNTON: If the Court please, I object to the form of the question. I believe it is just one little bit, you know, we are trying to stay away from defining the term reasonable doubt. I believe that is going a little bit too far. I ask the jury be admonished to disregard that.

THE COURT: I think the jury will follow the definition that I gave before. (Tr. 85-86).

The prosecutor raised the subject one final time, there was an objection, and the court closed the discussion as follows:

MR. LYONS: Now, I can't tell you what beyond a reasonable doubt means. I can't tell you the quantum of evidence necessary for that. I can describe it a number of ways, though. I can say the State is not required to prove it beyond all doubt. We are not required to prove it beyond a mathematical certainty. Those things the State does not have to do. All that is required is that it satisfy you as an individual that the State has proved their case beyond a reasonable doubt. All right.

Now, do you have any questions about that?

JUROR ASBERRY: No.

MR. LYONS: I can also tell you that reasonable doubt is the same in this murder case as in any criminal case, be it a traffic case, a misdemeanor assault and battery case, speeding, whatever.

JUROR ASBERRY: Okay.

MR. LYONS: And the quality --

MR. BRUNTON: Excuse me. If the Court please, I'm going to object to the form of that question. It may or may not be the same in one case or another. I think it is whether or not the police in this case and whether -- I just don't believe that is a proper assessment or analogy. It may be saying in one case it's lesser, in another case more or what have you. But I still think it is getting beyond the proper scope of voir dire with respect to this reasonable

doubt. I ask the jury be admonished to disregard that statement.

THE COURT: It is beyond a reasonable doubt. **That is all** I can tell them. (Tr. 99-100).

It is clear that the prosecutor was merely **bending over backward** to emphasize that the State had to prove its case beyond a reasonable doubt to make sure the juror understood the **State's burden**. No erroneous impression was given to the jurors.

Petitioner also claims there was prosecutorial **misconduct** when the prosecutor "implied the jury could not find the victim was responsible for his own death" by saying: "[Y]ou may **get back there**, you might think well, you know, not everybody went into this with clean hands, might be a little guilty to go around **between one or more parties** here. You understand you can't determine that, though. That may go into your ultimate decision as to **what kind of punishment** as to an act upon someone, but you can't let that interfere with your determination of guilt or innocence." (Tr. 33). Defense counsel objected and the court did not rule on the objection, but said "The court will consider only the evidence that **comes from the witness stand** and only the exhibits, if any, or stipulations by the parties and apply the law that the court gives them and **follow the law** and only the evidence, and that will be your duty." (Tr. 34). The statement cannot be seen as one that would **persuade the jury** to ignore the applicable law which, in this case, concerned self-defense," as petitioner argued. (Brief of Appellant to Oklahoma Court of Criminal Appeals ("Brief"), page 18).

There is also no merit to petitioner's claim that the **"responsibility of the individual juror was disparaged"** by the prosecutor's comments that a juror should "accede to the will of the **majority of the jury**." (Brief, pg. 19). Rather, the comments, as follows, expressed the importance of each individual juror's integrity:

MR. LYONS (prosecutor): All we are asking **you to do is follow** your civic duty. That is come in here, listen to the evidence, listen to it attentively, form an **opinion. One simple** little opinion. Raymond Scott, Junior, is he guilty or is he innocent? Does anybody have any **problems with that?**

Mr. Haskell?

JUROR HASKELL: No problem.

MR. LYONS: Sir, can you assess punishment?

JUROR HASKELL: If the evidence warrants **that and if that is** what everyone else -- their opinion of it.

MR. LYONS: And if that is what everyone else's **opinion is?**

JUROR HASKELL: Uh-huh.

MR. LYONS: Obviously you have got to get **everyone's opinion** to get a unanimous verdict. But are you saying that, I mean, technically what I hear is if everyone **else goes along** with your vote you have got a conviction. You are not telling me that if everyone else wants to **convict and you** are kind of wavering or if everyone wants to let Mr. Scott go and you are wavering a little bit you **won't follow** along with what they do?

JUROR HASKELL: No, I didn't mean it that way.

MR. LYONS: Okay, good. It is extremely **important that every person** on this jury voice their own opinion because it is for a verdict of innocent or a verdict of **guilty. It's got** to be unanimous. (Tr. 35-36).

Petitioner claims the prosecutor suggested **during voir dire** that the terms "not guilty" and "innocent" were interchangeable, thereby "diminishing the prosecution's burden to prove **guilty beyond a reasonable doubt**." The prosecutor stated:

MR. LYONS (prosecutor): You are going to **see one side present** their version and the other side present theirs. And it goes back and forth. And Mr. Brunton **just a moment ago** said that he likes to think of things like the jury verdict forms that say guilty or not guilty and **you will hear lawyers** sometimes split words and -- or split hairs and use one word for this and one word for that.

MR. LYONS: What is the difference between **being innocent** and not guilty?

JUROR SHARPE: Well, it is all the facts that **are brought out**. You have to take the facts.

MR. LYONS: All right. (Tr. 68-69).

There was no objection to this question. The "law" was not "misstated," as petitioner claims, and the prosecution's burden was not misrepresented.

Petitioner also argues that the prosecutor "distorted the law of self-defense," (Brief, pg. 19), by the following comments:

(1) "But the only question is, ladies and gentlemen, and this is what is called an affirmative defense, is did Raymond Scott, Junior do it with a legitimate belief he was acting in self-defense. And I submit to you the only way you can show that is did Barry Morris have a gun and if so, where is it." (Tr. 161). Objection was made and the jury was told to confine their considerations to the evidence. (Tr. 162).

(2) "What legal or otherwise justification is there for [the killing]? Did you all hear any evidence about that? Did you hear anyone say that, number one, that Barry Morris had a gun, Barry Morris had a knife, that he had a club or anything. You didn't hear one single witness state that. Technically speaking that is what is required." (Tr. 286).

(3) So if we concede that you have at least got to have a gun before you can make someone reasonably believe that they are in fear of death or great bodily injury, there is not one single witness in this trial that has put (the victim) in possession of a gun . . . and you are bound by the testimony you heard here in these proceedings.

. . . .

That isn't what self-defense speaks of. Self-defense speaks of being in fear of your life or of great bodily injury. It doesn't speak of suspicions or fears or probabilities or maybes -- (Tr. 289-90).

When defense counsel objected to these last two comments, the objections were overruled and the jury was told to follow the court's instructions on self-defense. (Tr. 290). The prosecutor had the right to discuss the evidence and inferences that could arise from it concerning petitioner's belief in the need to defend himself when the shooting occurred. The comments did not lead to an unfair trial.

Petitioner claims that the prosecutor's comment that "myself and the defense attorneys and the Judge will try to bring you every single bit of evidence that is legally admissible and legally relevant" (Tr. 117) suggested that the defense had a burden to bring forth evidence and threatened petitioner's right to remain silent. There is no merit to this claim.

There is also no merit to petitioner's arguments that an unfair trial resulted because the prosecutor "misconstrued" the evidence by stating that petitioner was "hiding" after the shooting (Tr. 292), that all the witnesses testified that the victim was leaving the bar when he was shot (Tr. 291), that first degree murder charges were not filed because of the circumstances (Tr. 296-297), and that petitioner was "waiting" for the victim prior to the shooting. (Tr. 313). The prosecutor was discussing the evidence from his point of view.

During closing argument the prosecutor commented on evidence given by various witnesses (Tr. 288-292). He discussed the fact that many of the statements made by the petitioner to the police were unconfirmed or contradicted by other witnesses: "Did you hear any of them testify about that? No, you didn't. And I submit the reason you didn't hear that is because it didn't happen. We have got a fabricated story here. You have got from Raymond Scott, Junior making up a story that is convenient and lying and doing the best he can to make it sound good for him so he would not get in trouble." (Tr. 292-293).

After the defense's objection, the court refused to grant a mistrial, but stated to the jury that they should assess the facts. There is no merit to petitioner's claim that these comments should have resulted in a mistrial. The Oklahoma Court of Appeals found that this comment did not affect the verdict of guilty, but may have affected the punishment given, so the sentence was modified.

There is also no merit to petitioner's contention that prejudice occurred when the prosecutor said: "Are we going to talk out of both sides of our mouth?" (Tr. 311), "right now you are only to consider guilt or innocence. You get back there and wonder why you are not doing punishment. Don't wonder about that" (Tr. 297), and "I want you to be proud of your verdict. . . . Justice does not say that you let a man go when he kills an unarmed man . . . . That isn't what the American system of justice is all about." (Tr. 314-315). These comments did not challenge the integrity of defense counsel, "suggest" the existence of a prior conviction, or badger the jury. Defense counsel made a similar plea for the jurors to perform their "duty": "bring back the verdict into this courtroom that you think is appropriate. Be proud of that verdict. Do your duty and I feel confident that it will have to be not guilty." (Tr. 310).

Finally, there is no merit to petitioner's argument that he received an excessive sentence because the prosecutor noted that petitioner had two prior convictions for assault and was "a dangerous man" with "violent natures, violent propensity" who "should not be out on the streets" but "should spend a considerable period of time in the state penitentiary." (Tr. 322).

MATTERS OF SENTENCING NOT REVIEWABLE IN HABEAS ACTION

The court notes that matters involving sentencing traditionally involve only an issue of state law and are not reviewable in a federal habeas corpus action. Hill v. Page, 454 F.2d 679, 680 (10th Cir. 1971); Handley v. Page, 279 F.Supp. 878, 879 (W.D. Okla.), aff'd, 398 F.2d 351 (10th Cir. 1968), cert. den., 394 U.S. 935 (1969).

In Livingston v. State, 795 P.2d 1055 (Okla. Crim. App. 1990), cert. den., 111 S.Ct. 688 (1991), the court set forth the procedures to be used when a defendant's sentence is modified on appeal. Id. at 1057-1059. The Oklahoma Court of Criminal Appeals' review of a sentence is governed by 22 O.S. § 926<sup>4</sup> and § 1066<sup>5</sup>. Both provisions can be given effect by the court. Significantly, the Livingston court concluded:

In reviewing the sentence imposed,<sup>6</sup> this Court will exercise its authority to modify a sentence **only when**, after a review of the entire record, the sentence is so excessive as to **shock** the conscience of the Court and it is apparent that injustice has been **done**. . . . Section 1066 does not require, nor has this Court so interpreted that section, as a mandate to modify to the

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<sup>4</sup>Title 22 of the Oklahoma Statutes, § 926, reads:

In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as herein after provided.

<sup>5</sup>Title 22 of the Oklahoma Statutes, § 1066, read as follows when the Oklahoma Court of Criminal Appeals ruled on petitioner's appeal:

The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the court, within the time, and in the manner, to be prescribed by rule of the court.

If the case is reversed for a new trial, the clerk of the court from which such cause was appealed is required to make return showing that said case was specifically called to the attention of the trial court at the time of the setting of the docket following receipt of mandate, and showing the court's action in placing said cause on the docket for trial, said return to be made immediately after the trial and entry of judgment, or earlier disposal. Should the case not be retried and should it be dismissed by the court, return shall be made, giving the reasons stated by the court in his minutes justifying such dismissal.

minimum statutory sentence when modification is necessary . . . .

[U]nder this Court's appellate review of the appropriateness of a sentence a defendant may receive a benefit. Any modification of a sentence by this Court is a reduction in the term set by the jury, not an increase. It is not a violation of either a statutory right or a constitutional right for this Court to lessen the punishment fixed by the jury . . . .

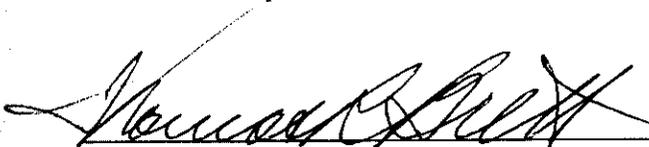
The reduction in sentence necessary to cure trial error is determined by the particular circumstances of each case, and the belief that the interests of justice would be best served by modification to a particular term of years. It is not the type of error which determines whether it is necessary to modify the sentence or to what level it will be modified. It is the effect of that error, determined by our appellate review of all the facts and circumstances of the case, on the fundamental fairness of the trial and the appropriateness of the punishment.

Id. at 1058-1059. (citations omitted).

The Oklahoma Court of Criminal Appeals examined the particular circumstances of petitioner's case and determined that the interests of justice would be best served by modification to forty years. The decision by the appellate court was based on the court's interpretation of Oklahoma law and the findings are entitled to a presumption of correctness by this court.

Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is denied. Petitioner's only recourse is to bring his claim under the Oklahoma Post-Conviction Procedure Act, 22 O.S. § 1080 et seq.

Dated this 20 day of Jan., 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 1-22-93

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

**FILED**

JAN 20 1993  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ARBY'S, INC.,

Plaintiff,

v.

AMW, INC., MID-AMERICA BEEF  
CORP. and UNITED STATES BEEF  
CORP.,

Defendants.

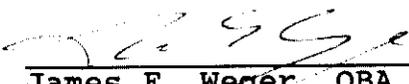
No. 92 C-813 B

**STIPULATION OF VOLUNTARY  
DISMISSAL PURSUANT TO FED. R. CIV. P. 41(a) AND 41(c)**

Pursuant to Rule 41(a) and (c) of the Federal Rules of Civil Procedure, the parties hereby stipulate that all claims, counterclaims and cross-claims asserted in this action shall be dismissed with prejudice and without right of appeal, except that the cross-claim of United States Beef Corp. as to Defendants AMW, Inc. and Mid-America Beef Corp.

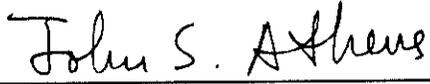
shall be dismissed without prejudice. All parties shall bear their own costs.

STIPULATED AND AGREED THIS 14~~th~~ DAY OF JANUARY 1993:

  
James E. Weger, OBA #9437

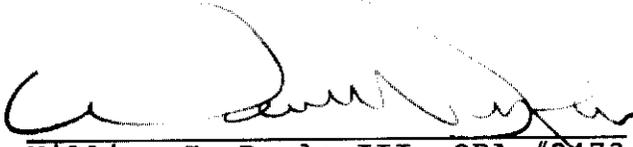
JONES, GIVENS, GOTCHER &  
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3800 First National Tower  
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Attorneys for Defendants  
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Beef Corporation

  
William J. Doyle III, OBA #2473

WILLIAM J. DOYLE III &  
ASSOCIATES  
550 Oneok Plaza  
Tulsa, Oklahoma 74103-4213  
(918) 583-7766

Attorney for Defendant United  
States Beef Corporation

IT IS SO ORDERED:

S/ THOMAS R. BRETT

United States District Judge

January 20, 1993

ENTERED ON DOCKET  
DATE JAN 21 1993

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

**FILED**  
JAN 19 1993  
Richard M. Lawrence, Clerk  
U.S. District Court  
Northern District of Oklahoma

THRIFTY RENT-A-CAR SYSTEM,  
INC., an Oklahoma corporation, )  
  
Plaintiff, )  
  
vs. )  
  
ELCO AUTO SYSTEMS, INC., )  
et al., )  
  
Defendants. )

No. 92-C-609-E

ORDER

The dispositive motion hearing set for the 22nd day of January, 1993 is stricken. The Court finds that Defendant Laskey's motion at docket #6 is moot because the United States Bankruptcy Court for the District of New Jersey has extended the automatic stay in case no. 92-35184 to him. As to Defendant Strauss' motion at docket #8, the Court adopts the approach of the Eighth Circuit in Arkansas Rice Growers v. Alchemy Indus. Inc., 797 F.2d 565 (8th Cir. 1986) and finds that Defendant Strauss' involvement did not amount to minimum contacts sufficient to vest this Court with in personam jurisdiction. Accordingly, Defendant Strauss should be dismissed pursuant to Rule 12(b)(2) Fed.R.Civ.P.

So ORDERED this 15<sup>th</sup> day of January, 1993.

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

21

ENTERED ON DOCKET

DATE 1-21-93

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

**FILED**

JAN 20 1993

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

JERRY R. RUSHING, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 RON CHAMPION, ET AL., )  
 )  
 Respondents. )

Case No. 88-C-1288-E

**ORDER**

On the 14th day of December, 1992, the above-styled Petition for Writ of Habeas Corpus came before this Court for an evidentiary hearing. The Court notes that the Petitioner, an inmate in the Oklahoma Department of Corrections, was personally present and appeared through Robert Nigh, Jr., Assistant Federal Public Defender. The Respondents were represented by and appeared through Wellon B. Poe, Assistant Attorney General of the State of Oklahoma.

**STATEMENT OF THE CASE**

The Petitioner in this case was tried for the murder of his wife, Debra Rushing, in Garfield County, Case No. CRF-80-13. A jury convicted the Petitioner of First Degree Murder and recommended a sentence of life imprisonment. The trial court sentenced the Petitioner in accordance with the jury's recommendation.

The Petitioner appealed that sentence to the Oklahoma Court of Criminal Appeals. That court affirmed the conviction and sentence in Rushing v. State, 676 P.2d 842 (Okl. Cr. 1984). The Petitioner

subsequently filed two Petitions for Writ of Habeas Corpus in federal district court. Following the dismissal of those Petitions for Writ of Habeas Corpus for the failure to exhaust his State remedies, the Petitioner filed this Petition.

The above-styled Petition was originally denied by this Court in Rushing v. Champion, Unpub. Op. Case No. 88-C-1288-E (N.D. Okla. 1990). On appeal, the Tenth Circuit Court of Appeals remanded the case for further consideration of the doctrine of abuse of the writ under the standards of McCleskey v. Zant, \_\_\_\_\_ U.S. \_\_\_\_\_, 111 S.Ct. 1454 (1991) and for further consideration on the issue of exculpatory evidence. In particular, the court directed this court to determine what, if any, exculpatory evidence was withheld from the Petitioner or his counsel at the time of his trial and, if any was withheld, whether disclosure of that evidence would have affected the outcome of the Petitioner's trial. Rushing v. Champion, Unpub. Op. Case No. 90-5230 (10th Cir. June 6, 1991).

Immediately prior to the evidentiary hearing, the Respondents waived any claim to the "abuse of the writ" doctrine which had been previously raised.

At the evidentiary hearing, the Petitioner presented one witness, Jerry Chuck Rushing, who was one of the Petitioner's sons. Jerry Chuck Rushing testified that he had previously signed an affidavit asserting information which would tend to exculpate the Petitioner. The witness testified that the affidavit was not true and recanted that document. Jerry Chuck Rushing further testified that he had never informed any judge or state official that the

Petitioner was not present at the crime, thereby exculpating the Petitioner. Jerry Chuck Rushing stated while on the witness stand that soon after the murder of Debra Rushing, he spoke with the Enid, Oklahoma Police Department implicating the Petitioner in the murder. A transcription of that statement was entered into evidence by the Petitioner. Jerry Chuck Rushing finally stated that any statements made exculpating the Petitioner were false and were made for the sole purpose of helping his father, the Petitioner.

Following the testimony of the witness, the Petitioner rested his case. The Respondent then moved for a directed verdict on the issue of whether any exculpatory evidence was withheld at the time of the Petitioner's trial.

#### FINDINGS OF FACT

The Court, having received oral testimony and having fully reviewed the record, finds as follows:

1. The Petitioner is currently incarcerated in the Oklahoma Department of Corrections, serving a sentence of life imprisonment for a conviction for First Degree Murder, State of Oklahoma v. Rushing, Case No. CRF-80-13 (Garfield County, 1980), sentence affirmed, Rushing v. State of Oklahoma, 676 P.2d 842 (Okla. Cr. 1984).

2. Jerry Chuck Rushing, in 1985, signed an affidavit indicating that he saw two women shoot his mother, Debra Rushing, and that his father, the Petitioner, was not present when the shooting occurred. The affidavit also alleged that prior to the

criminal trial, Jerry Chuck Rushing attempted to tell a state judge that his father was not present at the murder scene but was informed by the judge that he could not testify.

3. Jerry Chuck Rushing signed that affidavit in an attempt to help secure his father's release from incarceration. Jerry Chuck Rushing now recants that affidavit.

4. Jerry Chuck Rushing made a statement to the Enid, Oklahoma Police Department one month after the murder of Debra Rushing, which implicated the Petitioner in the crime. That is the only statement made to any officials for the State of Oklahoma. No exculpatory statements, other than the false affidavit, were ever made by Jerry Chuck Rushing.

#### CONCLUSIONS OF LAW

The Court, having fully reviewed the record, concludes as follows:

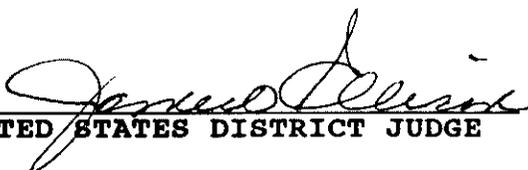
1. The Respondents have waived any claim to any "abuse of the writ" procedural law which may have occurred with the filing of the Petition for Writ of Habeas Corpus. Thus, the Petition must be decided on the merits.

2. Any statement made by Jerry Chuck Rushing alleging that the Petitioner was not present at the time of Debra Rushing's murder was false and no State official was ever provided an exculpatory statement by Jerry Chuck Rushing concerning the Petitioner. Thus, no exculpatory evidence was withheld from the Petitioner or his defense counsel under Brady v. Maryland, 373 U.S. 83 (1963).

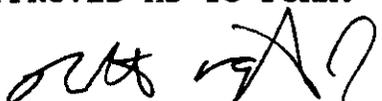
3. The Petitioner failed to show that any statements made by Jerry Chuck Rushing or Terry Rushing were exculpatory in nature. Thus, the Respondent's motion for directed verdict on the issue of exculpatory evidence is sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that no exculpatory evidence was withheld and the Petition for Writ of Habeas Corpus filed herein be denied.

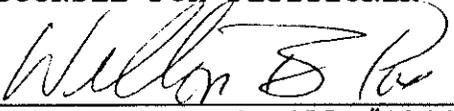
DATED this 20<sup>th</sup> day of Jan, 19 93.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

  
ROBERT NIGH, JR.  
ASSISTANT FEDERAL PUBLIC DEFENDER  
222 S. Houston, Suite C  
Tulsa, OK 74127

COUNSEL FOR PETITIONER

  
WELLON B. POE, OBA #12440  
ASSISTANT ATTORNEY GENERAL

4545 N. Lincoln, Suite 260  
Oklahoma City, OK 73105-3498  
(405) 521-4274

COUNSEL FOR RESPONDENTS

wbp/rushing3.ord  
fc-88-501

ENTERED ON DOCKET

DATE 1-21-93 1

FILED

JAN 20 1993

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

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

AMERICAN AIRLINES, INC.,	)	Case No. 88-C-1158-E
a Delaware corporation,	)	
	)	
Plaintiff,	)	STIPULATION AND ORDER
	)	<u>OF DISMISSAL</u>
vs.	)	
	)	
NATIONAL AIRLINE CONSULTANTS,	)	
SCHREIER ENTERPRISES, GAYLE	)	
SCHREIER, IRWIN SCHREIER,	)	
JOHN DOE, JANE DOE	)	
and DOE ENTERPRISES,	)	
	)	
Defendants.	)	
	)	

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, plaintiff American Airlines, Inc. ("American") by its counsel, and defendants National Airline Consultants, Schreier Enterprises, Gayle Schreier and Irwin Schreier (the "Defendants"), that the above-captioned action shall be dismissed with prejudice and with each party to bear its own costs and attorneys' fees. This Court shall retain jurisdiction to enforce the Settlement Agreement dated as of October 20, 1992 between American and the Defendants and the Agreed Permanent Injunction entered in this action as well as to enter, pursuant to the terms of said Settlement Agreement, the Consent Judgments executed by

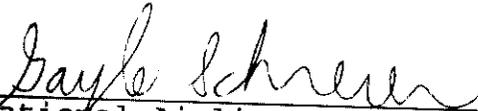
Gayle Schreier and Irwin Schreier, copies of which are attached hereto as Exhibit 1.

Dated: Tulsa, Oklahoma  
~~October~~, 1992  
NOV 30,

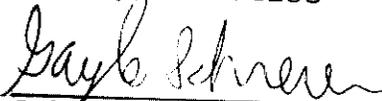


John T. Schmidt, OBA #11,028

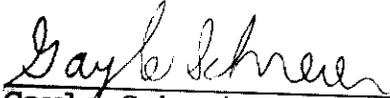
CONNER & WINTERS  
2400 First National Tower  
Tulsa, OK 74103  
Attorneys for Plaintiff



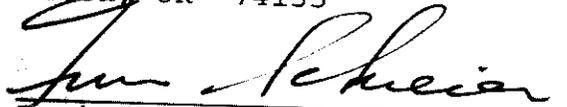
National Airline Consultants  
3511 S. Toledo Avenue  
Tulsa, OK 74135



Schreier Enterprises  
3511 S. Toledo Avenue  
Tulsa, OK 74135



Gayle Schreier  
3511 S. Toledo Avenue  
Tulsa, OK 74135



Irwin Schreier  
3511 S. Toledo Avenue  
Tulsa, OK 74135

SO ORDERED:

S/ JAMES O. ELLISON

U.S.D.J.

ENTERED ON DOCKET

DATE 1-21-93

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

**F I L E D**

JAN 20 1993

DORIS KLEY,

Plaintiff(s),

vs.

MRS. ALLISON'S COOKIE CO., INC.,

Defendant(s).

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

No: 92-C-289-B

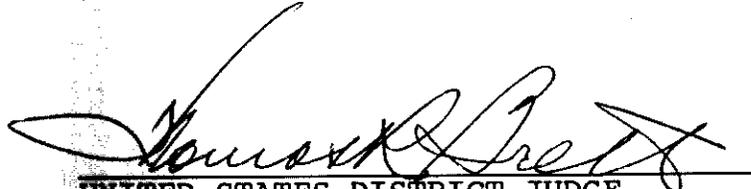
**JUDGMENT DISMISSING ACTION**  
**BY REASON OF SETTLEMENT**

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

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 20 day of January,  
19 93.



UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. BRETT

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

**FILED**

JAN 20 1993

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

TERRY A. JENKINS,  
Plaintiff,  
v.  
GREEN BAY PACKAGING, INC., et al.,  
Defendants.

No. 91-C-639-B  
(Consolidated)

RICHARD. E. LOHMANN,  
Plaintiff,  
v.  
GREEN BAY PACKAGING, INC., et al.,  
Defendants.

**FILED**

JAN 20 1993

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

LARRY B. KUNS,  
Plaintiff,  
v.  
GREEN BAY PACKAGING, INC., et al.,  
Defendants.

**ORDER**

Now before the Court for consideration is a motion filed by plaintiff Richard Lohmann, pursuant to Fed.R.Civ.P. 54(d), requesting the Court to review costs assessed against the plaintiffs in this action by the Clerk of the United States District Court for the Northern District of Oklahoma ("Clerk").

On August 20, 1992, the Court granted summary judgment for the defendants and, in entering that judgment, ordered that costs were

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to be assessed against the plaintiffs. On December 1, 1992, after a hearing, the Clerk found that costs in the amount of \$3,246.00 should be paid by the plaintiffs. Of that \$3,246.00 taxed, \$46.00 represented fees for a transcript and \$3,200.00 represented costs of photocopies "necessarily" incurred by the defendants. Lohmann's motion complains that the copying charges incurred by the defendants and allowed by the Clerk were excessive, were not necessary for trial and were not substantiated by sufficient documentation. In response, the Green Bay defendants point out that the Clerk reduced defendants' requested amount of \$5,423.10 for copying costs to the taxed amount of \$3,200.00.

Review of the Clerk's taxation of costs is de novo and addressed to the sound discretion of the Court. Signal Delivery Service, Inc. v. Highway Truck Drivers & Helpers Local No. 107, 68 F.R.D. 318, 321 (E.D. Pa. 1975). While the Court has "broad discretion" in determining whether expenses claimed by a prevailing party may be taxed as costs, that discretion is not unfettered; "the court must determine that the expenses are allowable cost items and that the costs are reasonable, both in amount and necessity to the litigation." Weihaupt v. American Medical Ass'n, 874 F.2d 419, 430 (7th Cir. 1989).

The Court recognizes that the Clerk considerably reduced the defendants' requested copying charges. However, from the record before the Court, the grounds on which that reduction was made cannot be determined. While the defendants may have presented the Clerk with a description of the documents copied, the number of

copies made, the total number of pages copied and the cost per copied page, that information is not now available to the Court in the record. The Court therefore requests the Green Bay defendants, to the best of their ability to do so,<sup>1</sup> to submit that information to the Court by affidavit within twenty (20) days of the date of this Order.

The Court declines to reconsider its previous decision to award costs to the defendants.

IT IS SO ORDERED this 20<sup>th</sup> day of January, 1993.

  
THOMAS R. BRETT  
U.S. District Court Judge

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<sup>1</sup> In Northbrook Excess & Surplus v. Proctor & Gamble, 924 F.2d 633 (7th Cir. 1991), the copying charges claimed by the prevailing party as costs were challenged as lacking sufficient documentation. The Seventh Circuit recognized that the prevailing party "was not required to submit a bill of costs containing a description so detailed as to make it impossible economically to recover photocopying costs" but rather that party "was required to provide the best breakdown obtainable from retained records." Id. at 643.