

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

HELTON OIL COMPANY, a  
partnership (consisting of  
John R. Helton and Robert  
M. Helton),

Plaintiff,

vs.

UNITED STATES OF AMERICA,  
DEPARTMENT OF INTERIOR,  
BUREAU OF INDIAN AFFAIRS,  
ex rel.; JULIA M. LANGAN,  
Superintendent, Pawnee Agency;  
UNITED STATES OF AMERICA,  
DEPARTMENT OF INTERIOR, BUREAU  
OF LAND MANAGEMENT, ex rel.,  
PAUL TANNER and ex rel.,  
JIM MASON; and THE HEIRS  
OF JOHN HAYMOND, Deceased,  
a restricted Indian, who are  
believed to be EUGENE HAYMOND,  
WESLEY P. HAYMOND AND BUENA  
K. HAYMOND, MARSHA HAYMOND  
FOREMAN, a single person,  
LUTHER HAYMOND, Jr., a single  
person, and DENISE HAYMOND,  
a single person,

Defendants.

ENTERED ON DOCKET  
JUL 30 1993  
DATE

Case No. 92-C-1134-B

FILED  
JUL 30 1993

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

ADMINISTRATIVE CLOSING ORDER

This matter comes on for consideration this 30 day of July, 1993, pursuant to Joint Motion to Suspend Scheduling Order filed by the parties. The Court finds the parties have requested the Court to suspend the Scheduling Order of April 6, 1993, to facilitate the settlement of all issues without the burden of ongoing, and perhaps unnecessary, discovery. The Court finds that the parties are attempting in good faith to settle and resolve all issues, but the fulfillment of a settlement is dependent upon actions and decisions of third parties over whom

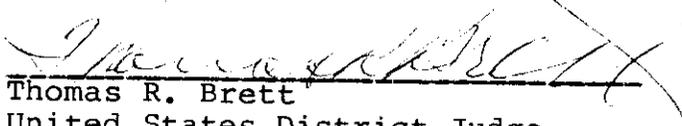
20

neither party has any control. The Court further finds that such settlement, if it occurs, will be consummated within six (6) months from this date.

IT IS THEREFORE ORDERED that the Clerk of the Court administratively terminate this proceeding in his records, without prejudice to the rights of either party to reopen the proceedings for any reason, or for any purpose required to obtain a final determination of this litigation.

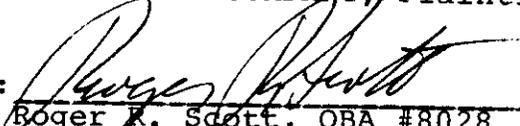
IT IS FURTHER ORDERED that if this proceeding is reopened, all pleadings, motions, briefs and other acts of the Court shall be reinstated without further action or cost; provided, however, a new Scheduling Order shall be issued forthwith.

IT IS FURTHER ORDERED that unless either party reopens this proceeding by January 31, 1994, this action shall be deemed dismissed with prejudice.

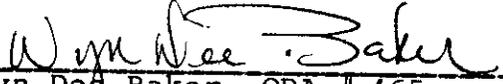
  
Thomas R. Brett  
United States District Judge

APPROVED AS TO FORM AND CONTENT:

HELTON OIL COMPANY, Plaintiff

By:   
Roger K. Scott, OBA #8028  
525 South Main, #1111  
Tulsa, OK 74103  
(918) 583-8201  
Attorney for Plaintiff

UNITED STATES OF AMERICA, et al.,  
Defendants

By:   
Wyn Dee Baker, OBA # 465  
Assistant U.S. Attorney  
3900 U.S. Courthouse  
Tulsa, OK 74103  
Attorney for Defendants

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

DATE JUL 30 1993

ATLANTIC RICHFIELD COMPANY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 AMERICAN AIRLINES, INC., ET AL. )  
 )  
 Defendants. )

Consolidated Case Nos.

89-C-868-B ✓  
89-C-869-B  
90-C-859-B

FILED  
JUL 30 1993

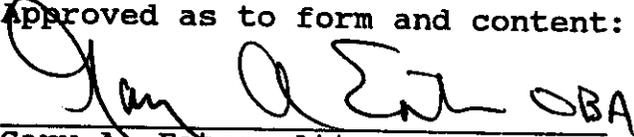
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

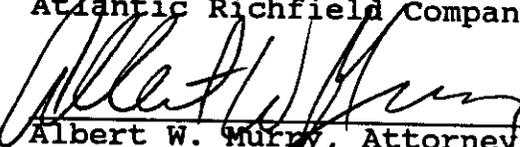
ORDER FOR DISMISSAL WITHOUT PREJUDICE

Now on this 30 day of July, 1993, upon presentation of the Stipulation for Dismissal Without Prejudice executed by Plaintiff Atlantic Richfield Company and Defendant Eason & Smith Enterprises, Inc., the Court finds and adjudges that all claims of Atlantic Richfield Company set forth herein against Eason & Smith Enterprises, Inc. should be and are hereby dismissed without prejudice to any future action upon such claims and that each of these parties shall bear and be responsible for its own costs and expenses incurred herein.

  
Judge

Approved as to form and content:

  
Gary A. Eaton, Attorney for Atlantic Richfield Company OBA 2598

  
Albert W. Murry, Attorney for Eason & Smith Enterprises, Inc.  
AXA93B62.SEL (7/15/93 2:36pm) BAR 6541

907

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

ENTERED ON DOCKET  
DATE JUL 30 1993

JOHN W. MILLER and OMA JANE MILLER, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 REACH ALL, INC., )  
 )  
 Defendant. )

Case No. 92-C-116-B

**FILED**

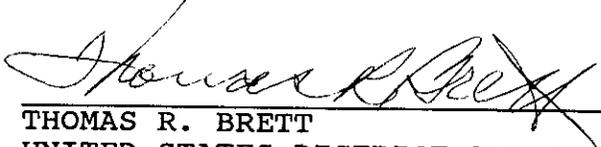
JUL 30 1993

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

J U D G M E N T

In accordance with the jury verdict entered July 30, 1993, in favor of Defendant, Reach All, Inc. and against the Plaintiffs, John W. Miller and Oma Jane Miller, on all issues, Judgment is herewith entered in favor of Defendant, Reach All, Inc. and against the Plaintiffs, John W. Miller and Oma Jane Miller, on all issues. Costs are assessed against the Plaintiffs if timely applied for under Local Rule 6, and each party is to pay its respective attorney's fees.

DATED this 30<sup>th</sup> day of July, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

47

ENTERED ON DOCKET

DATE 7-29-93

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DORIS A. TAYLOR,

Plaintiff,

vs.

DONNA E. SHALALA,  
SECRETARY OF HEALTH AND  
HUMAN SERVICES,

Defendant.

FILED

JUL 28 1993

CASE NO. 89-C-1002-E

**JUDGMENT**

After consideration of defendant's Motion to Remand, the Court finds that the Motion is well taken. Therefore, plaintiff's cause is **HEREBY REMANDED** to the defendant for payment of disability benefits under the Social Security Act and judgment is hereby entered in favor of plaintiff pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Sullivan v. Schaefer, (S.Ct. June 24, 1993) 1993 WL 218284.

Dated this 28 day of July, 1993.

S/ JAMES O. ELLISON

JAMES O. ELLISON  
CHIEF UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

F. L. DUNN, III  
United States Attorney

PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

ENTERED ON DOCKET  
DATE JUL 29 1993

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

LARRY B. WATSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 AMERICAN AIRLINES, INC. )  
 )  
 Defendant. )

Case No. 92-C-211+B

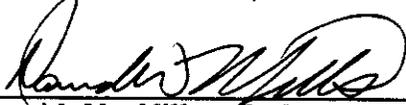
JUL 29 1993

FILED  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA  
TULSA

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto stipulate for dismissal with prejudice, each party to bear its own costs and attorneys' fees.

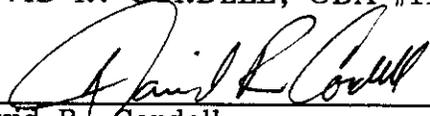
DAVID W. MILLS, OBA #11678

By: 

David W. Mills, P.C.  
610 South Main  
Suite 212  
Tulsa, Oklahoma 74119  
(918) 585-8688

Attorney for Plaintiff,  
LARRY B. WATSON

DAVID R. CORDELL, OBA #11272

By: 

David R. Cordell  
2400 First National Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4391  
(918) 586-5711

Attorneys for Defendant,  
AMERICAN AIRLINES, INC.

OF COUNSEL:

CONNER & WINTERS  
2400 First National Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4391  
(918) 586-5711

ENTERED ON DOCKET

DATE 7-29-93

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

FILED

JUL 29 1993

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

Plaintiff, )

-vs-

No. 92-C-998-E

MISSOURI PACIFIC RAILROAD COMPANY, )  
a Delaware corporation, d/b/a )  
UNION PACIFIC RAILROAD COMPANY, )

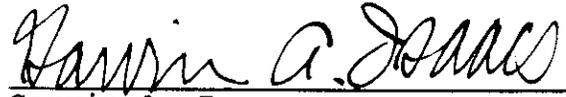
Defendant. )

RECEIVED  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

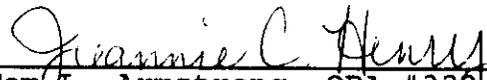
STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Harley Ann Patrick, and the Defendant, Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company, by and through their attorneys of record and pursuant to Fed. R. Civ. Pro. 41, file this Stipulation of Dismissal dismissing with prejudice all claims raised by the Plaintiff, Harley Ann Patrick, against Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company in the case styled Harley Ann Patrick, individually and as Personal Representative of the Estate of Lynn David Patrick v. Missouri Pacific Railroad Company, a Delaware corporation, d/b/a Union Pacific Railroad Company, Case No. 92-C-998-E, filed in the United States District Court for the Northern District of Oklahoma, for the reasons that

the parties have compromised and settled all matters in controversy.



Garvin A. Isaacs  
Garvin A. Isaacs, Inc.  
120 N. Robinson, Suite 1400  
Oklahoma City, OK 73102  
ATTORNEYS FOR PLAINTIFF



Tom L. Armstrong, OBA #329  
Jeannie C. Henry, OBA #12931  
TOM L. ARMSTRONG & ASSOCIATES  
601 South Boulder, Suite 706  
Tulsa, Oklahoma 74119

ATTORNEYS FOR DEFENDANT

ENTERED ON DOCKET  
DATE 7-29-93

JBS/mlp

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

FILED

JUL 29 1993

RANDALL DEAN JOHNSON, and  
KERRI LE-ANN JOHNSON,  
Plaintiffs,

vs.

BURLINGTON NORTHERN RAILWAY  
COMPANY, a Delaware corporation,  
et al., Defendants.

Case No. 90-C-0004-E

STIPULATION FOR DISMISSAL WITH PREJUDICE AS TO DEFENDANT  
CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY ONLY

Plaintiffs Randall Dean Johnson and Kerri Le-Ann Johnson and Defendant Chicago and Northwestern Transportation Company, by and through their respective attorneys, stipulate that the Plaintiffs' action against Defendant Chicago and Northwestern Transportation Company has been compromised and settled and that the action is to be dismissed with prejudice as to its refiling reserving to plaintiffs the right to pursue all of their causes of action against all other responsible parties.

  
Dale Warner  
2512 E. 21st St., Suite 200  
Tulsa, OK 74114  
(918) 749-4100  
ATTORNEY FOR PLAINTIFFS

  
Tom L. Armstrong, OBA #329  
David S. Landers, OBA #12367  
Jeannie C. Henry, OBA #12331  
TOM L. ARMSTRONG & ASSOCIATES  
601 South Boulder, Suite 706  
Tulsa, OK 74119  
(918) 587-3939  
ATTORNEYS FOR DEFENDANT CHICAGO AND

NORTHWESTERN TRANSPORTATION COMPANY

Certificate

I hereby certify that on this 29 day of July, 1993,  
a copy of the above and foregoing was mailed to:

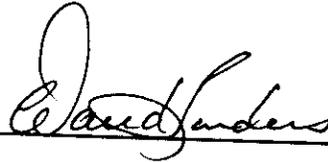
A. Camp Bonds, Jr., Attorney  
P.O. Box 1906  
Muskogee, OK 74402-1906

Jack B. Sellers, Attorney  
P.O. Box 730  
Sapulpa, OK 74067-0730

Paul T. Boudreaux, Attorney  
Marthanda Beckworth  
Thomas, Glass, Atkinson,  
Haskins, Nellis & Boudreaux  
1500 ParkCentre  
525 S. Main  
Tulsa, OK 74103

Dale Warner, Attorney  
2512 E. 21st St.  
Suite 200  
Tulsa, OK 74114

Richard Carpenter, Attorney  
Sanders & Carpenter  
Suite 202, 624 S. Denver Ave.  
Tulsa, OK 74119

  
\_\_\_\_\_

FILED

JUL 29 1993

1

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

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

SAC AND FOX NATION, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE HONORABLE ORVAN J. HANSON, JR. )  
 Associate District Judge, Ottawa )  
 County, Oklahoma, and THE DISTRICT )  
 COURT FOR THE THIRTEENTH JUDICIAL )  
 DISTRICT, Ottawa County, Oklahoma, )  
 RONALD FIXICO, MERLE BOYD, )  
 BRUCE WILLINGHAM, JACK THORPE, )  
 TOM GRAY, and JAMES BRANUM, )  
 )  
 Defendants. )

No. 92-C-645-B

ENTERED ON DOCKET  
DATE JUL 29 1993

ORDER

The Court has for decision the motion of the Defendants, Tom Gray and Bruce Willingham, to alter judgment and impose sanctions (docket # 37), and plaintiff's motion to alter or amend judgment (docket # 45). Said motions refer to the Court's Order and Judgment filed March 2, 1993.

Upon reconsideration and reflection, the Court concludes its Order and Judgment filed March 2, 1993, is in error. A reading of Appendix B to the Defendant Tom Gray's brief in support of motion to dismiss and in response to plaintiff's motion for preliminary injunction (Public Law No. SF-84-05, Section 302, as amended, of the Sac and Fox Tribe of Indians of Oklahoma, also known as Sac and Fox Nation), demonstrates that the Sac and Fox Tribe did not waive tribal sovereign immunity. The Tribe waived sovereign immunity only in reference to the Sac and Fox Industrial Development Commission as stated. A waiver of tribal sovereign immunity

48

"cannot be implied but must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978) (citations omitted).<sup>1</sup>

In order to subject the sovereign (the Plaintiff herein, Sac and Fox Nation), to suit in the state courts of Oklahoma, there must be a specific waiver of sovereign immunity and none exists herein. Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, \_\_\_ U.S. \_\_\_, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978); Enterprise Management Consultants, Inc. v. United States ex rel. Hodel, 883 F.2d 890, 892 (10th Cir. 1989); White v. Pueblo of San Juan, 728 F.2d 1307, 1311 (10th Cir. 1984); Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992); Black Hills Institute v. Dept. of Justice, 967 F.2d 1237, fn. 5 (8th Cir. 1992); and In Re Green v. Mt. Adams Furniture, 980 F.2d 590 (9th Cir. 1992).

The individual claimants in the pending action in the District Court of Ottawa County, State of Oklahoma, Dorothy Johnston, et al v. Ronald Fixico, et al., Case No. C-91-131, desiring to proceed against the Plaintiff herein, Sac and Fox Nation, must first proceed in the Sac and Fox Tribal Court as such state court is

---

<sup>1</sup>While the record is clear that the Sac and Fox Industries Commission is the alter ego of the Plaintiff, Sac and Fox Nation, the Plaintiff did not waive sovereign immunity to permit suits against it in the Oklahoma state court. Thus, in granting sovereign immunity to the Plaintiff, Sac and Fox Nation, the Congress of the United States insulated it from Oklahoma state court jurisdiction relative to the individual Defendants' claims against the Plaintiff herein.

without jurisdiction due to the Plaintiff's grant of sovereignty by the United States Government. Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992). Thus, Plaintiff is entitled to the entry of the preliminary injunction requested under Fed.R.Civ.P. 65. Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir. 1992), and Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980). For the same reasons, Plaintiff is also entitled to the entry of a permanent injunction as requested in their complaint. Defendants' motion to alter judgment and impose sanctions should be and is hereby denied.

IT IS THEREFORE ORDERED, the Honorable Orvan J. Hanson, Jr., Associate District Judge, Ottawa County, Oklahoma, and the individual Defendants herein, are hereby restrained and enjoined from conducting proceedings, enforcing orders, or proceeding against the Sac and Fox Nation and its officers and agents in their official capacities in said state court action.

A Judgment in keeping with the Court's Order herein shall be filed contemporaneously herewith.

DATED this 29<sup>th</sup> day of July, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
JUL 29 1993

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

SAC AND FOX NATION, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE HONORABLE ORVAN J. HANSON, JR. )  
 Associate District Judge, Ottawa )  
 County, Oklahoma, and THE DISTRICT )  
 COURT FOR THE THIRTEENTH JUDICIAL )  
 DISTRICT, Ottawa County, Oklahoma, )  
 RONALD FIXICO, MERLE BOYD, )  
 BRUCE WILLINGHAM, JACK THORPE, )  
 TOM GRAY, and JAMES BRANUM, )  
 )  
 Defendants. )

No. 92-C-645-B

ENTERED ON DOCKET  
DATE JUL 29 1993

J U D G M E N T

In accordance with the Court's Order granting the Plaintiff's motion to alter or amend judgment, Judgment is hereby entered in favor of the Plaintiff, Sac and Fox Nation, and against the Honorable Orvan J. Hanson and the individual Defendants herein. Such Defendants are hereby permanently enjoined from conducting proceedings, enforcing orders, or proceeding against the Sac and Fox Nation and its officers and agents in their official capacities in the case of Dorothy Johnston, et al., v. Ronald Fixico, et al., No. C-91-131.

Costs are hereby assessed against the Defendant if timely applied for pursuant to Local Rule 6, and the parties are directed to pay their own respective attorneys fees.

DATED this 29<sup>th</sup> day of July, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

49

ENTERED ON DOCKET  
DATE JUL 29 1993

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

**FILED**

**JUL 29 1993**

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

FRED M. SIEGMEIER, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MEMOREX-TELEX CORPORATION, )  
 )  
 Defendant. )

92-C-442-B

ORDER

This matter comes for consideration of the Motion for Summary Judgment filed (#30) by Defendant, Memorex Telex Corporation (Memorex) on February 18, 1993, with supporting Brief and Exhibits.

Defendant asserts that pursuant to Fed.R.Civ.P. 56, they are entitled to Summary Judgment on all three of Plaintiff's claims. In the First Claim for Relief, Plaintiff Fred M. Siegmeier (Siegmeier) asserts that Defendant discriminated against him based on his age in violation of the Age Discrimination in Employment Act (ADEA): (1) when his position was eliminated on October 26, 1990, and (2) when he was not considered for another opening within the corporation.

In the first alleged incidence of age discrimination, Siegmeier alleges he was fired and that Defendant replaced him in his position as Controller, with a younger person, Rebecca Holt, age 36. In the second alleged incidence of age discrimination, failure to hire, Seigmeier asserts age discrimination when Memorex failed to hire him as Controller for the Southern/South Region division of the corporation and instead hired a younger person, Cathy Jimenez, age 28.

61

In the Second Claim for Relief, Plaintiff alleges the existence of an implied employment agreement which was violated when he was terminated without cause.

Finally, in the Third Claim for Relief, Plaintiff seeks to recover damages based on Memorex's alleged violation of Oklahoma public policy as articulated in Okla. Stat. tit. 25 §§ 1101, et seq., a so-called Burk<sup>1</sup> tort.

The undisputed material facts reveal that Plaintiff Fred. M. Siegmeier, was 56 years of age in October, 1990. Plaintiff, had been employed by Defendant, Memorex Telex Corp since February 26, 1973.<sup>2</sup> Throughout his employment, Plaintiff's work appears to have been exemplary while he progressed upward in the company.

During Plaintiff's seventeen years with Memorex, he held the positions of Controller, Manager of Financial Systems, Manager of Internal Audit and Manager of Accounting. On four different occasions, Plaintiff was selected to head the merger of the accounting functions of acquired companies into the financial operations at corporate headquarters. On December 1, 1988, Plaintiff was hired as the Controller for the "Original Equipment Manufacturing" ("OEM") group. Plaintiff was the Controller for OEM at the time of his discharge.

---

<sup>1</sup> Burk v. K-Mart, 770 P.2d 24 (Okla.1989).

<sup>2</sup> Don Wilson states in his deposition, that Plaintiff had previously been scheduled for a reduction-in-force. However, Wilson had Plaintiff transferred to OEM to take the newly created position of OEM Controller. Therefore, there was no break in Plaintiff's service to the company. (Deposition of Donald Wilson, p. 37).

Defendant Memorex is a worldwide supplier of plug-compatible computer equipment and accessories. Memorex's OEM group manufactures high performance tape drives for the minicomputer market which are sold directly to other companies for resale. Due to a slump in OEM orders which began in 1989, OEM was forced to reduce its work force on a number of occasions. During this period, OEM's work-force decreased in excess of 90% as follows:<sup>3</sup>

<u>DATE:</u>	<u>EMPLOYEES:</u>
January, 1989	506
January, 1990	267
January, 1991	77
January, 1992	42

During the period from June 1988 until January 1991, the President of the OEM group of Memorex was Don Wilson. As president of OEM, Wilson had a direct responsibility for making decisions concerning reductions-in-force. On October 4, 1989, Wilson sent a memo to all OEM personnel advising them of a decline in OEM business and seeking volunteers to accept a voluntary reduction in force. Then on August 16, 1990, Wilson in another memo, advised all OEM employees that based on current business estimates that the OEM Division headcount would be reduced by 20-25%.

On or about October 16, 1990, Plaintiff was notified by Don Wilson that his position would be eliminated on October 26, 1990. Wilson also informed Plaintiff that a regional controller's position was vacant for the Southern/South Central Region.

---

<sup>3</sup> At the pre-trial conference on July 16, 1993, Defendant stated that subsequent to submission of the Motion of Summary Judgment, the remainder of the OEM division had been eliminated, including the position of Rebecca Holt.

Plaintiff then completed a Job Interest Form for the position. Plaintiff received notification from Human Resources that they had received his form, but Plaintiff never received any further notice about the position.

Cathy Jimenez, age 28, was the former Controller for the Northeast Region of Sales and Service. Her position was eliminated as a result of the mergers of the Northeast and Mid-Atlantic Regions. Cathy Jimenez was then awarded the position of Controller for the newly merged Southern/South Regions (the position Plaintiff applied for).

The hiring of Ms. Jimenez required her to relocate from New York to Tulsa, where Plaintiff was already located. The decision to hire Ms. Jimenez was made by Garrett Roper, Vice President of Finance. John Steckbeck, the Regional Vice President of the Southern/South Region, had previously worked with Ms. Jimenez and was supportive of the decision to transfer her into the position.

Plaintiff's argues that his position was eliminated and that he was replaced because of his age. Plaintiff also avers he was not "considered" for the position of Controller for the Southern/South Region. Additionally, Plaintiff alleges and Memorex denies that an implied contract of employment existed whereby plaintiff was entitled to continue to work for defendant so long as the Plaintiff performed satisfactorily.

Plaintiff does not dispute the fact that his title and salary as Regional Controller may have been eliminated. At the time of Plaintiff's discharge and immediately thereafter, Rebecca Holt, age

36, held the position of Financial Analyst for the OEM. As a result of Plaintiff's discharge, Ms. Holt assumed several of Plaintiff's former duties. In her deposition, Ms. Holt testified that prior to Plaintiff's termination, Plaintiff was responsible for the accounts payable, credit collection, general ledger, cost accounting, and human resources in OEM. Ms. Holt testified that after Plaintiff's discharge, she ultimately became responsible for general ledger, cost accounting, accounts payable and credit accounting in addition to her other duties. Plaintiff asserts that he was treated less favorably than younger employees. Defendant contends that Plaintiff's position was eliminated as part of a massive lay-off, as a cost-cutting measure.

It is also disputed whether Plaintiff was "considered" for the Southern/South Region Controller. Plaintiff asserts that Garrett Roper "considered" Plaintiff for the Southern/South Region Controller without talking to Plaintiff personally, without talking to Don Wilson who was Plaintiff's supervisor, without looking at Plaintiff's personnel file and without knowledge that Plaintiff had been Controller for the entire company for six years. Plaintiff contends that this degree of "consideration" was not truly consideration at all. Defendant asserts that Plaintiff was given fair consideration for the Controller position and for legitimate business reasons the position was awarded to Cathy Jimenez.

Plaintiff's second claim alleges the existence of an implied employment contract between Plaintiff and Defendant. Defendant denies the existence of such an agreement.

Plaintiff's third and final claim for relief asserts a Burk tort, based on alleged violations of Oklahoma public policy as articulated in Okla. Stat. tit. 25 §§ 1101 et seq<sup>4</sup>. Defendant contends that such a claim is dependent on Plaintiff being discriminated against based on his age and since no such discrimination took place, summary judgment should also be granted on this claim.

**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, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Ins. Corp., 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.

---

<sup>4</sup> The State of Oklahoma's employment discrimination statutes.

574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conway 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"

In an ADEA case, the Plaintiff must establish that age was a "determining factor" in the employer's challenged decision. Lucas v. Dover Corp., Norris Div., 857 F.2d 1397 (10th Cir. 1988); Branson v. Price River Coal Co., 627 F.Supp. 1324, 1328 (D.C. Utah 1986), aff'd, 853 F.2d 768 (10th Cir. 1988); and Cockrell v. Boise Cascade Corp., 781 F.2d 173, 177 (10th Cir. 1986).

The Plaintiff may also rely on the three-part allocation of the burden of presenting evidence, as established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the McDonnell Douglas test, in order to set forth a prima facie case, Plaintiff must, by a preponderance of the evidence, establish the following:

1. That he is within the protected age group (40 or older);
2. That his performance was sufficient to meet his employer's legitimate expectations;
3. That he was discharged despite the adequacy of his performance; and
4. That his position was filled by a person younger than the Plaintiff.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Krause v. Dresser Industries, Inc., 910 F.2d 674, 677 (10th Cir. 1990). In a reduction-in-force case, as is present herein, the Tenth Circuit Court of Appeals has altered the fourth element of the test as follows:

In reduction-in-force cases . . . courts have modified the fourth prima facie element by requiring the plaintiff to 'produc[e] evidence, circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.' . . . This element may be established through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the reduction-in-force.

Lucas v. Dover Corp., Norris Div., supra, 857 F.2d at 1397 (quoting Branson v. Price River Coal Co., supra, 853 F.2d at 771.

If Plaintiff satisfies the modified McDonnell Douglas test, then the burden of production shifts to the employer. The employer is to then articulate a plausible, nondiscriminatory reason for

Plaintiff's dismissal or layoff. If a sufficient explanation for the discharge or layoff is given, the Plaintiff must then "rebut" the employer's showing by demonstrating the proffered justification is a pretext. E.E.O.C. v. Sperry Corp., 852 F.2d 503, 507 (10th Cir. 1988). It is the Plaintiff's burden throughout to establish that age was the determining factor in the sense that "but for" his employer's discrimination against him because of his age, he would not have been discharged. Lucas, 857 at 1401; Cockrell, 781 F.2d at 177.

#### **Reduction-In-Force**

The Court concludes from a review of the record herein, that as to Plaintiff's alleged discrimination involving his treatment in Defendant's reduction-in-force, Plaintiff cannot establish a prima facie case of age discrimination. Plaintiff has failed to establish either that he was **replaced** by a younger worker or, in Plaintiff's own terms, he "was treated less favorably than younger employees." (Plaintiff's Response to Defendant's Brief In Support of Summary Judgment, p. 10).

Plaintiff must establish all four elements of the McDonnell Douglas test in order to establish a prima facie case of age discrimination. Although, the proof required to establish a prima facie case may vary within the context in which the alleged discrimination allegedly occurred, Plaintiff must prove more than simply that he was within the protected age group and adversely affected by a decision of management relating to his employment. Rowe v. Flight Safety International, 43 Lab. Rel. Rep. (BNA) 1131

(N.D. Okla. 1987).

This Court finds that Plaintiff has not established the fourth element of his prima facie case. Plaintiff failed to establish that his position was filled by a younger person. Although Plaintiff could have established the fourth element by use of circumstantial evidence, Plaintiff has failed to do so. Lucas, 857 F.2d at 1401. There must be sufficient evidence to "allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of age." Barnes v. Gencorp, Inc., 896 F.2d 1457, 1466 (6th Cir. 1990). From the record provided, it appears that Plaintiff's position was eliminated as part of a massive company wide reduction-in-force and Plaintiff was not treated less favorably than younger employees during this reduction. Contrary to Plaintiff's contentions, Plaintiff was not replaced by the younger Ms. Holt. In Barnes, the court expounded on the distinction between an employee being replaced and eliminated, in part the court stated:

[A] person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties.

896 F.2d at 1465; See also Sahadi v. Reynolds Chemical, 636 F.2d 1116, 1117 (6th Cir. 1980); (stating that plaintiff was not replaced when his former duties were assumed by another employee in addition to his existing functions).

Plaintiff concedes that after his discharge, Ms. Holt was

performing some of Plaintiff's prior duties as well as her duties as Financial Analyst. Plaintiff in his deposition stated "Becki Holt still retained her job responsibilities as before, but, in addition, she took up also my job responsibilities as manager of the finance department. In other words, she then wore two hats or three." (Deposition of Plaintiff, p. 145). This Court cannot reasonably conclude that the Defendant intended to discriminate against the Plaintiff in reaching their reduction-in-force decision.

Further, Plaintiff's assertion that Plaintiff was "more qualified" than Rebecca Holt for the Financial Analyst position, should not control the issue of whether Defendant discriminated against Plaintiff in the reduction-in-force because of his age. The Supreme Court has stated that courts should not require companies to adopt what it perceives to be the "best" hiring procedures. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78 (1978). The decision of who should be eliminated from a businesses' payroll, absent discrimination, is best left to the business to decide. Decisions to enact a reduction-in-force and whose jobs must be eliminated, "always involve a number of subjective factors, and disappointed candidates cannot expect a federal judge to intervene simply in hope that he or she will evaluate the factors differently. The ADEA only requires the intervention of the federal judiciary when age is a determining factor . . ." Parker v. Federal Nat. Mortg. Ass'n., 741 F.2d 975, 981 (7th Cir. 1984).

### Disparate Impact

Plaintiff also asserts that Defendant's reduction-in-force has had a disparate impact on older workers. A prima facie case of disparate impact consists of a showing "that a specific identifiable employment practice or policy caused a significant disparate impact on a protected group." Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1242 (10th Cir. 1991); See also Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 656 (1989). The Court has been provided data that reflects the impact on the number of employees company wide and in the OEM division. These statistics also disclose the impact on those in the protected age group. Plaintiff may rely on statistics to show the disparate impact as long as the statistics are reliable and involve the appropriate comparable. Id. at 1243.

The statistics reveal that at the peak of OEM's business operations, OEM employed over 500 employees. However, starting in January, 1989, the number of employees at OEM steadily declined. As of January, 1992, the statistics reveal that the number of employees had declined to 42 employees. Additionally, prior to the October 1990 RIF, there were 143 total employees, of those 30.8% were less than 40 years of age and 69.2% were over 40. During the period October 26, 1990 through April 30, 1991, of the total number employees involved in the two reduction-in-force actions, 21 employees or 32.3% of the those employees were under age 40, and 44 employees or 67.7% were over 40, thus leaving a remaining work force comprised of 23 employees under 40 (29.5%) and 55 employees

(70.5%) over 40 years of age. After the RIF actions, there was actually a slight increase in the percentage of workers over age forty (69.2% to 70.5%). From the evidence provided to this Court, this Court concludes that there was no disparate impact, company wide or within the OEM division on older workers.

#### **Failure to Hire Plaintiff as Regional Controller**

In order to establish a prima facie case of age discrimination in a failure-to-rehire situation, the Plaintiff must meet a modified McDonnell Douglas test. See McDonnell Douglas, 411 U.S. at 802. Plaintiff must establish:

- (1) that he is a member of the protected age group;
- (2) that he is qualified for the rehire or recall position;
- (3) that he applied for the available position or can establish that the employer was otherwise obligated to consider him; and
- (4) the existence of evidence supporting the inference that he was denied a position because of his age.

Whitten v. Farmland Industries, Inc., 759 F.Supp. 1522 (D. Kan. 1991) (citing Wanger v. G.A. Gray Co., 872 F.2d 142, 145 (6th Cir. 1989)).

Plaintiff has produced evidence sufficient to establish the existence of the first three elements of a prima facie case of failure to hire. Plaintiff, age 56 at the time this action arose, is clearly within the protected age group. Secondly, Plaintiff has provided evidence suggesting that Plaintiff was qualified for the controller position. Finally, Plaintiff applied for the position of controller by completing a Job Interest Form.

As to the fourth element, this Court believes that there are several factors, which viewed together, may give rise to an inference that Plaintiff was denied the controller position because of his age. First of all, it is undisputed that the controller position was filled Cathy Jimenez, a younger employee. Ms. Jimenez was 28 years old and Plaintiff was 56 years old at the time this action arose. Additionally, there is a factual dispute whether Plaintiff was truly considered for the position of controller. Finally, evidence of the degree of differences between the qualifications and experience of Plaintiff and Ms. Jimenez may also help support an inference of age discrimination.

The decision to hire Cathy Jimenez was made by Garrett Roper. In his deposition, Mr. Roper confirms that (1) he never spoke with any of the candidates, except Ms. Jimenez, about the position, (2) he never made an inquiry about the applicants' qualifications or abilities to their superiors, (3) he did not look at their personnel files, and (4) Mr. Roper was not aware that Plaintiff had been Controller for the entire company for six years prior to Roper's time with the company. (Deposition of Garrett Roper, p. 29, 50-53). Additionally, after filling out a Job Interest Form, Plaintiff never received any notification that he was even considered for the position. In contrast, Ms. Jimenez, who ultimately received the position, never filled out an application or Job Interest Form for the controller position. (Deposition of Garrett Roper, p. 46).

Although both Plaintiff and Ms. Jimenez appear to be well

qualified individuals, the Court recognizes that there is a difference in the level of experience between the individuals. As discussed supra, a persons' qualifications should not be the sole controlling factor on whether Defendant discriminated against Plaintiff on the basis of age. However, this Court believes that a persons qualifications can be considered, in light of other evidence, when examining whether Plaintiff has established an inference of age discrimination. In the case at bar, Ms. Jimenez had a little over five years with the company and only three of those years as an exempt employee. Additionally, Ms. Jimenez had only nine months experience as a Regional Controller. In contrast, Plaintiff had eighteen years experience with the company and seventeen years as an exempt employee. Additionally, Plaintiff had experience as Controller of Sales and Service for over six years, worked as Controller of Telex for six plus years and had an additional two plus years as Controller for OEM. (Affidavit of Fred Siegmeier, p. 2-3).

Therefore, this Court concludes from a review of the record herein that there are material factual disputes concerning whether or not Plaintiff was denied the controller position because of his age.

#### **IMPLIED EMPLOYMENT CONTRACT**

Plaintiff also alleges that "Defendant created an implied contract of employment with Plaintiff whereby Plaintiff was entitled to work for Defendant so long as the Plaintiff performed satisfactorily." (Plaintiff's Corrected Amended Complaint, p. 4).

Plaintiff asserts that his implied employment contract was breached when Plaintiff's position was eliminated in October, 1990.

The Supreme Court of Oklahoma has established several factors which the court considers critical to an inquiry as to whether an implied employment contract exists. These critical factors include: "(a) evidence of some 'separate consideration' beyond the employee's services to support the implied term, (b) longevity of employment, (c) employer handbooks and policy manuals, (d) detrimental reliance on oral assurances, pre-employment interviews, company policy and past practices and (e) promotions and commendations."<sup>5</sup> Hinson v. Cameron, 742 P.2d 549, 554-555 (Okla. 1987).

A determination of whether an implied employment contract exists is usually a factual question. Williams v. Maremont Corp., 875 F.2d 1476, 1481 (10th Cir. 1989). However, if the "alleged promises are nothing more than vague assurances," the issue of whether an implied employment contract exists can be decided as a matter of law. Dupree v. United parcel Service, Inc., 956 F.2d 219, 222 (10th Cir. 1992). Furthermore, to create an implied contract, the Defendant's promises of employment must be of a

---

<sup>5</sup> "Examples of the implied-in-law contract theories that courts have crafted from the general categories are: (a) job training where the costs are borne by the employee, (b) detrimental reliance followed by turning down offers of other employment, (c) selling a business by people who then become employees of the buyer, (d) moving after being lured by an indication of lengthy employment, (e) implied or express promises about job security made during recruiting, and (f) statements made about good working conditions, salary increases, promotions or special compensation programs." Id. at 555, n. 20, (citations omitted).

definite nature. Krause v. Dresser Indus. Inc., 910 F.2d 674, 678 (10th Cir. 1990) (citing Williams, 875 F.2d at 1481).

In support of Plaintiff's contention that an implied employment contract exists, Plaintiff states that Defendant "did not follow their seniority policy" as applied to Plaintiff. (Plaintiff's Response to Defendant's Brief in Support of Motion for Summary Judgment, p. 16). Plaintiff further asserts that he "turned down other offers of employment during his tenure with Defendant." (Plaintiff's Response, p. 16). Additionally, Plaintiff states that he had "17 plus years of employment" with Defendant and had also received "numerous promotions and commendations during his tenure." (Plaintiff's Response, p. 16).

Although the Hinson factors should be considered, this Court finds that no one factor should be conclusive of the existence of a contract, what is important is "whether the evidence supports a sufficient disagreement to require submission to a jury." Anderson, 477 U.S. at 251-252. Additionally, this court is "not required to evaluate every conceivable inference which can be drawn from evidentiary matter, but only reasonable ones." Lucas, 857 F.2d at 1401.

Plaintiff asserts that Defendant's failure to follow their seniority policy constituted evidence of an implied contract in accordance with Hinson. However, in referring to company policy, Hinson states that there must be "detrimental reliance on oral assurances, pre-employment interviews, company policy and past practices." 742 P.2d at 555. (emphasis added). Plaintiff has

failed to provide any evidence that Plaintiff relied on this seniority policy to his detriment. Additionally, Plaintiff in his deposition conceded that there exists no evidence to support a finding that an employment contract even existed.<sup>6</sup>

Furthermore, beyond Plaintiff's mere statements in his Response Brief, Plaintiff has not provided this Court with any evidence that Plaintiff, in reliance on an implied employment contract, "turned down other offers of employment" during his tenure with Defendant. Plaintiff's claims fall short of the type of claims that courts have found to satisfy the Hinson factors. See supra note 2, at 12. Plaintiff did not personally pay for job training, did not move his residence on a pretense of lengthy employment nor has this Court been provided any evidence that Plaintiff relied on this alleged employment contract to his

---

<sup>6</sup> Plaintiff's deposition at p. 201-202, provides in part:

Q. I'm not following your answer. My question was really directed towards this contract and the source of this contract. Was it in writing?

A. No

Q. Who had advised you that you had an employment contract?

A. Really nobody.

Q. Did anyone advise you that as long as you continued to perform satisfactorily, that you would continue to have a job?

A. Not directly. That was implied - - implied situation.

\* \* \* \*

Q. Can you identify any individuals that specifically advised you that as long as you performed satisfactorily that you would have a job with Memorex Telex?

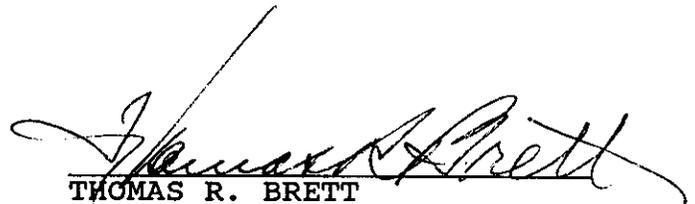
A. Not that I recall.

detriment. Thus, this Court finds that Plaintiff<sup>7</sup> has failed to support the claim that an implied employment contract existed.

Finally, as to Plaintiff's third claim for relief, the alleged Burk tort based upon violation of 25 O.S. §§ 1101, et seq, the Court having concluded that factual disputes exist as to Plaintiff's "failure to hire" claim, the Court determines that summary judgment is also precluded based upon the same premise.<sup>7</sup>

For the reasons set out above, Defendant Memorex-Telex's Motion for Summary Judgment is **GRANTED in part and DENIED in part**. As to the ADEA claim relating to Defendant's reduction-in-force action and the claim of an implied employment contract, Defendant's Motion for Summary Judgment should be and is hereby **GRANTED**. As to Plaintiff's ADEA claim for failure to hire and Plaintiff's Burk tort claim for alleged violations of Oklahoma Public Policy, the motion for summary judgment is hereby **DENIED**.

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

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

---

<sup>7</sup> Plaintiff's alleged age discriminatory discharge and alleged age discriminatory failure to hire occurred essentially as one continuing event. The Court views Plaintiff as a terminable-at-will employee for the purposes of the Burk tort allegations.

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
JUL 29 1993

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

THE UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 MILDRED J. HILL; )  
 TULSA DEVELOPMENT AUTHORITY; )  
 COUNTY TREASURER, )  
 Tulsa County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma; )  
 )  
 Defendants. )

CASE NO. 93-C-318B

ENTERED ON DOCKET  
JUL 29 1993  
DATE \_\_\_\_\_

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28<sup>th</sup> day of July, 1993. The plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendant, Tulsa Development Authority, appears by its attorneys Brown and Fransein, through Doris L. Fransein; the defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney; and the defendant, Mildred J. Hill, appears not, but makes default.

The Court, being fully advised and having examined the file, finds as follows:

1. (a) The defendant, Mildred J. Hill, was served with process on June 2, 1993, but has failed to otherwise appear and is now in default.

(b) All other defendants, namely **Tulsa Development Authority; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have filed timely answers in this action and have approved the form of this judgment as evidenced by their attorney's subscriptions.

2. This court has jurisdiction according to 28 U.S.C. Section 1345 because the United States is the plaintiff; and venue is proper because this lawsuit is based upon a note which was secured by a mortgage covering land located within the Northern Judicial District of Oklahoma.

3. On April 13, 1984, the defendant, Mildred J. Hill, executed and delivered to Firstier Mortgage Co., a promissory note in the amount of \$30,650.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half (12.50%) percent per annum.

4. As security for the payment of the above described note, the defendant, Mildred J. Hill, a single person, executed and delivered to Firstier Mortgage Co., a real estate mortgage dated April 13, 1984, covering the following described property:

Lot Five (5), Block Six (6), LAKE-VIEW HEIGHTS  
AMENDED ADDITION to the City of Tulsa, Tulsa  
County, State of Oklahoma, according to the  
recorded Plat thereof.

Such tract is referred to below as "the Property." This mortgage was recorded with the Tulsa County Clerk April 17, 1984, in book 4783 at page 715. The mortgage tax due thereon was paid.

5. On June 6, 1988, Firstier Mortgage Co. assigned such promissory note and the mortgage securing it to Leader Federal Savings & Loan Association by an instrument recorded with the Tulsa County Clerk on September 20, 1988, in book 5129 at page 183.

6. On May 5, 1989, Leader Federal Bank for Savings assigned such promissory note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns by an instrument recorded with the Tulsa County Clerk May 15, 1989, in book 5183 at page 980.

7. The defendant, Mildred J. Hill, has defaulted under the terms of the note and mortgage due to her failure to pay installments when due. Because of such default, the defendant, Mildred J. Hill, is indebted to the plaintiff in the amount of \$44,292.53, plus interest at the rate of twelve and one-half (12.5%) percent per annum from April 5, 1993, until the date of this judgment, plus interest thereafter at the legal rate until fully paid; plus the costs of this action in the amount of \$225.00 for abstracting and \$8.00 for recording the Notice of Lis Pendens.

8. The defendant, Tulsa Development Authority, claims an interest in the Property by virtue of a mortgage from Mildred J. Hill, a single person, to The Area Counsels for Community Action of Tulsa, Oklahoma, dated April 12, 1988, in the amount of \$3,460.00, plus penalties, interest and a reasonable attorney's fee of \$519.00.

9. The defendant, County Treasurer, Tulsa County, Oklahoma, claims an interest in the Property by virtue of personal property taxes for tax year 1992, in the amount of \$1.00.

10. The defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in or to the Property.

11. Pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED** that the plaintiff have and recover judgment IN REM against the defendant, Mildred J. Hill, in the principal sum of \$44,292.53, plus interest at the rate of twelve and one-half (12.5%) percent per annum from April 5, 1993, until judgment, plus interest thereafter at the legal rate of 3.58% until paid, plus the costs of this action in the amount of \$233.00, plus any additional sums advanced or to be advanced or expended during this foreclosure

action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the Property.

**IT IS FURTHER ORDERED** that the defendant, Tulsa Development Authority, have and recover judgment in the amount of \$3,460.00, plus a reasonable attorney's fee of \$519.00, plus penalties and interest.

**IT IS FURTHER ORDERED** that the defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$1.00, plus penalties and interest.

**IT IS FURTHER ORDERED** that the defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in or to the Property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of the defendant, Mildred J. Hill, 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 the Property, according to the plaintiff's election with or without appraisal and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

**Second:**

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

**Third:**

In payment of the judgment rendered herein in favor of the defendant, Tulsa Development Authority.

**Fourth:**

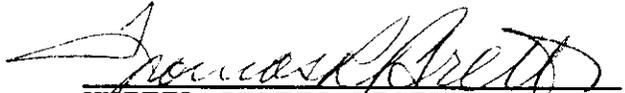
In payment of the judgment rendered herein in favor of the defendant, County Treasurer, Tulsa County, Oklahoma.

**Fifth:**

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** that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED** that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them, be forever barred and foreclosed of any right, title, interest or claim in or to the Property or any part thereof.

  
UNITED STATES DISTRICT JUDGE

Judgment of Foreclosure  
USA v. Mildred J. Hill, et al.  
Civil Action No. 93-C-318B

APPROVED:

F. L. DUNN, III  
United States Attorney



Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

---

Doris L. Fransein, OBA #3000  
Attorney for the defendant  
Tulsa Development Authority



J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

Judgment of Foreclosure  
USA v. Mildred J. Hill, et al.  
Civil Action No. 93-C-318B

APPROVED:

F. L. DUNN, III  
United States Attorney



Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



Doris L. Fransein, OBA #3000  
Attorney for the defendant  
Tulsa Development Authority

---

J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 29 1993

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 RICHARD L. DRAKE and )  
 MELODY DRAKE, individually )  
 and/or as the ALTER EGOS of )  
 SKYVIEW-HAZELDEL, INC., a )  
 former Idaho corporation, )  
 )  
 Defendants. )

Civil Action No. 93-C-401-B

ENTERED ON DOCKET  
DATE JUL 29 1993

DEFAULT JUDGMENT

This matter comes on for consideration this 28 day of July, 1993, the Plaintiff appearing by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendants, Richard L. Drake and Melody Drake, individually and/or as the alter egos of Skyview-Hazeldel, Inc., a former Idaho corporation, appearing not.

The Court being fully advised and having examined the court file finds as follows:

1. United States of America filed its Complaint against Defendants on March 19, 1991.
2. On March 25, 1991, Defendants, Richard L. Drake and Melody Drake, acknowledged receipt of Summons and Complaint.

5

3. On April 23, 1992, the Defendants filed a Motion to Dismiss.

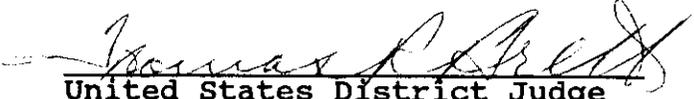
4. On August 31, 1992, United States of America filed an Amended Complaint setting out the reasons the Court should pierce the corporate veil and lowering the Defendants' amount of indebtedness.

5. After consideration of the information provided in the United States of America's Amended Complaint and Defendants' Motion to Dismiss, the Court entered an Order denying Defendants' Motion to Dismiss on October 16, 1992.

The time within which the Defendants could have answered or otherwise moved has expired and has not been extended. The Defendants have not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendants, Richard L. Drake and Melody Drake, individually and/or as the alter egos of Skyview-Hazeldel, Inc., a former Idaho corporation, for the principal amount of \$3,000.00, plus accrued interest of \$886.80,

plus interest thereafter at the rate of 6 percent per annum until judgment, plus interest thereafter at the current legal rate of 3.58 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
KATHLEEN BLISS ADAMS, OBA# 13625  
Assistant United States Attorney  
3900 United States Courthouse  
333 West 4th Street  
Tulsa, Oklahoma 74103  
(918) 581-7463

DATE JUL 29 1993

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

DONALD ROBERTSON and DIANE )  
ROBERTSON on behalf of )  
Elizabeth Ann Robertson, an )  
infant of six (6) months of )  
age and Mark Alexander )  
Robertson and Donald Robertson )  
III, all minors of the ages of )  
3 yrs., and 5 yrs., )

Plaintiffs, )

vs. )

The Department of Health and )  
Human Services, Jeri Poplin, )  
social worker, Meredith )  
Houston, case worker, Dorothy )  
Troupe (Supervisor), and Bill )  
Hindman (Supervisor), et al. )  
and Saint Francis Hospital, )  
Dr. Stoiko, Chief Pediatrician )  
for Intensive Care Unit and )  
Dr. William Betts, )  
Pediatrician, et al., all )  
parties named and others )  
individually and in their )  
official capacities. )

Defendants. )

Case No. 93-C-504B

FILED

JUL 29 1993

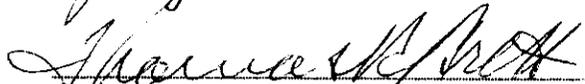
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

ORDER OF DISMISSAL

THIS MATTER comes on before this Court pursuant to the  
Plaintiffs' Motion to Dismiss. The Court finds that,  
pursuant to the Plaintiffs' Motion, the attorneys for all  
Defendants have given their permission for the Plaintiffs to  
Dismiss their action without prejudice.

IT IS THEREFORE ORDERED that this action be dismissed  
without prejudice.

Dated this 28 day of July, 1993.

  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JUL 29 1993

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

HAROLD BROWN and LORI ANN  
BROWN, individually and on  
behalf of their minor child,  
MISTY ANN BROWN,

Plaintiffs, )

No: 92-C-571-B ✓

v. )

D.Ct: C-91-618 @

AMERICAN HOME PRODUCTS, INC., a  
Delaware corporation;  
HUTCHISON'S DISCOUNT FOODS,  
INC.; and BOYLE-MIDWAY  
HOUSEHOLD PRODUCTS, INC.,

Defendants.)

ENTERED ON DOCKET  
DATE JUL 29 1993

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 29 day of July, 1993, it appearing to  
the Court that this matter has been compromised and settled, this  
case is dismissed with prejudice to the refiling of a future  
action.

  
United States District Judge

336\241\stip.kav\PTB

43

DATE 7-29-93

44-75

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

**FILED**

JUL 29 1993

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

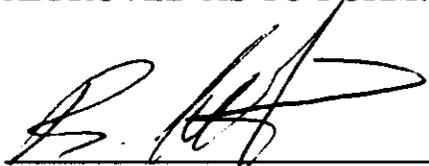
KATHRYN HORTON,	)
	)
Plaintiff,	)
	)
vs.	)
	)
	)
WAL-MART STORES, INC.,	)
	)
Defendant.	)

Case No. 92-C-1062E

**JOINT STIPULATION OF DISMISSAL**

COMES NOW the Plaintiff, Kathryn Horton, and the Defendant, Wal-Mart Stores, Inc., and hereby present their Stipulation of Dismissal of the above-caption cause with prejudice.

APPROVED AS TO FORM:



B. Kent Watson  
Attorney for Plaintiff



Steven E. Holden  
Mark T. Steele  
Attorneys for Defendant

ENTERED ON DOCKET

DATE 7-29-93

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

THRIFTY RENT-A-CAR SYSTEM, INC., )  
an Oklahoma corporation, )

Plaintiff, )

vs. )

CAPITAL FLEET MANAGEMENT, INC., )  
a foreign corporation; and )  
SAAD N. ISMAIL, an individual, )

Defendants. )

Case No. 92-C-486-E

**FILED**  
JUL 29 1993

JUDGMENT BY DEFAULT

This matter came before the Court on the 28 day of July, 1993, upon motion of the Plaintiff, Thrifty Rent-A-Car System, Inc., for default judgment against Defendants, Capital Fleet Management, Inc. ("Capital") and Saad N. Ismail ("Ismail"). The Court having personal jurisdiction over the parties hereto and having reviewed the Complaint, Summonses, Returns of Service, and court file, finds that the Defendants, Capital and Ismail have been validly served with the Complaint and Summons, that the date by which Defendants were required to appear and defend this action has passed and that Defendants have failed to respond or otherwise plead to Plaintiff's Complaint. Defendants are in default and have thus admitted the allegations of the Complaint. The Court being fully advised, finds that the allegations of Plaintiff's Complaint are deemed true as set forth, that the damages have been established by the Plaintiff in the amount of \$134,534.92, and that Plaintiff is entitled to judgment in that amount, plus attorneys' fee and costs.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff, Thrifty Rent-A-Car System, Inc., is granted judgment against Defendants, Capital Fleet Management, Inc., and Saad N. Ismail, in the amount of \$134,534.92, together with costs of this action in the amount of \$255.33, and for attorneys' fees in the amount of \$3,600.00, for the total amount of \$138,390.25, for all of which let execution issue. Interest shall accrue on this judgment at the rate of 7.42% per year.

IT IS SO ORDERED.

DATED this 28 day of July, 1993.

S/ JAMES O. ELLISON

\_\_\_\_\_  
JAMES O. ELLISON

ENTERED ON DOCKET

DATE 7-28-93

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

**FILED**

JUL 23 1993

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

HEATHER THOMPSON, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 STATE FARM AND CASUALTY )  
 COMPANY, )  
 )  
 Defendant. )

No. 92-C-132-E

**JUDGMENT**

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

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

ORDERED this 28<sup>th</sup> day of July, 1993.

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

DATE JUL 28 1993

**FILED**

JUL 27 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

IN RE:	)	
	)	
VERN ODEAN LAING, M.D.	)	
	)	
Debtor.	)	
	)	District Court Appeal
VERN ODEAN LAING, M.D.,	)	No. 92-C-1089-B
	)	
Appellant,	)	
	)	
v.	)	Bankruptcy No. 92-00612-C
	)	Chapter 7
KAY BARLOW,	)	Adv. No. 92-0140-C
	)	
Appellee.	)	

ORDER

This order pertains to the appeal of Appellant Vern Odean Laing of the Judgment Order entered by the United States Bankruptcy Court for the Northern District of Oklahoma dated June 17, 1992, as modified by the Bankruptcy Court's Order of November 5, 1992.

Appellant claims that the Bankruptcy Court erred with regard to three issues: (1) it erred in finding that the obligation established by the Decree of Divorce between Appellant and Kay Barlow ("Barlow") in the amount of \$101,160.12, which represented the mortgage obligations due and owing against the home awarded Barlow, was nondischargeable pursuant to 11 U.S.C. § 523(a); (2) it erred in finding that the obligation imposed upon Appellant in the Decree of Divorce to satisfy the outstanding obligation on the Mercedes automobile awarded to Barlow, \$2,925.00, was nondischargeable pursuant to 11 U.S.C. § 523(a)(5), since the lien against the vehicle was released when the obligation was satisfied by Barlow; and (3) it erred in failing to direct apportionment of the payment by Appellant to Barlow of \$22,553.00 against the obligation deemed

*clm*

nondischargeable in the bankruptcy case. Barlow contends that the Bankruptcy Court properly concluded that these debts were nondischargeable, making apportionment of the payments by Appellant unnecessary.

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

In the Bankruptcy Court's Order of June 17, 1992, the court found the following debts owed to Barlow nondischargeable under 11 U.S.C. § 523(a)(5)<sup>1</sup>: (1) eighteen thousand dollars (\$18,000.00) payable in the amount of one thousand dollars (\$1,000.00) per month as support alimony, which Appellant does not contest was nondischargeable; (2) five hundred fifty-three dollars (\$553.00) per month, payable to the Bank of

---

<sup>1</sup> Section 523(a)(5) of Title 11 of the United States Code provides in part as follows:

(a) A discharge under section 727, . . . does not discharge an individual debtor from any debt --

(5) to a . . . , former spouse, . . . for alimony to, maintenance for, or support of such spouse . . . , in connection with a . . . , divorce decree . . . but not to the extent that --

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support;

Oklahoma, Sand Springs, until the obligation attributable to a Mercedes awarded to Barlow was satisfied; and (3) one hundred and one thousand one hundred and sixty and 12/100 dollars (\$101,160.12), payable at a rate of two thousand dollars (\$2,000.00) per month, until the third and fourth mortgages against Barlow's home were released.

After the entry of this judgment, Appellant filed a Motion to Alter or Amend Judgment Order on June 25, 1992, claiming that the Bank of Oklahoma had conveyed the note and the Mercedes, which Appellant turned over to the Bank of Oklahoma, to Barlow. Since the Bank of Oklahoma no longer held the note, Appellant asked that the Bankruptcy Court's Order be amended to reflect that the payments be made to Barlow. On October 23, 1992, Barlow filed an Application to Settle Judgment Order, requesting a proposed order stating that Appellant was entitled to a credit of \$9,075.00 in connection with the return of the Mercedes to the bank and a reduction of the balance due to Barlow in connection with the Mercedes to \$9,822.92 to reflect this credit and ordering payment to be made directly to Barlow instead of the bank.

Finally, on October 29, 1992, Appellant filed an Objection to Application to Settle Judgment Order and Amended Motion to Alter or Amend Judgment stating that Barlow had obtained full release of the debt secured by the automobile awarded to her, thus rendering moot the issue of whether payments to the bank could be considered in the nature of alimony or support to her. The Bankruptcy Court amended its Judgment on November 5, 1992, to find that the obligation associated with the Mercedes was deemed nondischargeable in the amount of \$2,925.00 in the bankruptcy case.

In In re Goin, 808 F.2d 1391, 1392 (10th Cir. 1987), the court stated that neither

state law nor the parties' characterization determined whether a debt was nondischargeable under § 523(a)(5). "A bankruptcy court must look beyond the language of the decree to the intent of the parties and to the substance of the obligation." Id. (citation omitted).

The court cited four factors "pertinent" to the inquiry:

(1) if the agreement fails to provide explicitly for spousal support, the court may presume that the property settlement is intended for support if it appears under the circumstances that the spouse needs support; (2) when there are minor children and an imbalance of income, the payments are likely to be in the nature of support; (3) support or maintenance is indicated when the payments are made directly to the recipient and are paid in installments over a substantial period of time; and (4) an obligation that terminates on remarriage or death is indicative of an agreement for support.

Id. at 1392-93 (citation omitted).

The Tenth Circuit in In re Sampson, No. 92-1238 (10th Cir. June 21, 1993), reconciled the Goin case with an earlier case, In re Yeates, 807 F.2d 874 (10th Cir. 1986), which articulated a different standard to be applied in determining whether a debt to a former spouse was alimony, maintenance or support. The Sampson court found that a debtor's lack of duty under state law to support his or her former spouse does not control whether an obligation to the former spouse is dischargeable in bankruptcy. Sampson, slip op. at 9. "Similarly, § 523(a)(5) requires federal courts to look beyond the label which the parties attach to an obligation." Id. The Sampson court emphasized that "[i]nquiry by federal courts into the actual nature of the obligation promotes nationwide uniformity of treatment between similarly situated debtors . . . and furthers § 523(a)(5)'s underlying policy favoring enforcement of familial support obligations over a debtor's 'fresh start.'" Id. at 10 (citations omitted).

Because the label attached to an obligation does not control, a court must examine

both the parties' intent and the substance of an obligation to determine if it is nondischargeable under § 523(a)(5). "The party seeking to hold the debt nondischargeable has the burden of proving by a preponderance of the evidence that the parties intended the obligation as support and that the obligation was, in substance, support." *Id.* at 10-11. The inquiry into the parties' intent does not turn on one party's post hoc explanation as to his or her state of mind at the time of the agreement, even if uncontradicted, but on the shared intent of the parties at the time the obligation arose. *Id.* at 11.

The written agreement between the parties is persuasive of intent. *Id.* Post hoc testimony, standing alone, is insufficient to overcome the "substantial obstacle" posed by the Agreement's clear expression of the parties' shared intent. *Id.* at 13. In addition, the surrounding circumstances at the time of the parties' divorce may indicate that the obligation was intended as maintenance. *Id.* at 16. A spouse's need for support is a very important factor in determining the intent of the parties. *Id.* at 17. When the spouse's "obvious need for support is consistent with the unambiguous expression of the parties' intent in an agreement, the presumption is even more compelling." *Id.*

In determining whether an obligation was in substance support, the critical question is the function served by the obligation at the time the parties divorced. *Id.* at 18. This may be determined by considering the relative financial circumstances of the parties at the time of the divorce. *Id.* at 18-19.

The Sampson court noted that a spouse's "dire financial circumstances" at the time of a divorce will suggest that a debt is in the nature of support. *Id.* at 19. If a separate child support award is insufficient to provide a spouse and children with the standard of

living to which they are accustomed, this will also confirm that a further obligation is support. Id. Finally, if the provisions in a divorce decree have the actual effect of enabling a spouse to maintain a home and have a monthly income, an obligation is in the nature of support. Id. "Thus, if an obligation effectively functions as the former spouse's source of income at the time of the divorce, it is, in substance, a support obligation." Id. The Sampson court added:

In addition to being extremely relevant in the determination of the substance of the obligation, a spouse's need for support at the time of the divorce is sufficient to presume that the parties' [sic] intended the obligation as support. Consequently, this factor becomes a critical inquiry and may, in some cases, be dispositive on whether an obligation to a former spouse is nondischargeable under § 523(a)(5). Id. at n.7 (citation omitted).

In making its independent determination that the three debts at issue were nondischargeable under 11 U.S.C. § 523(a)(5), the Bankruptcy Court cited the following factors from In re Goin, discussed earlier, as important to its decision: (1) how did the state court label the award, (2) does it appear in a part of the decree separate and apart from the division of property, (3) was there disparity of income so that the recipient spouse needed alimony to support herself, (4) did the award help provide for the necessities of life such as food, housing, clothing, transportation, and medical care, (5) was the award payable to the spouse or to a third party, (6) was it in a definite amount payable over a long period of time, and (7) are the payments terminable upon death or remarriage of the recipient spouse and are they modifiable. (Memorandum Opinion, p. 6).

The Bankruptcy Court noted that the awards were labeled alimony by the divorce court, after a contested hearing. (Memorandum Opinion, p. 7). The awards were in the alimony portion of the decree, and there was a separate portion of the decree which dealt

specifically with division of property. (Memorandum Opinion, p. 7). There was a disparity in income between Appellant, who earned as much as \$105,000.00 per year, as a practicing medical physician specialist, during the immediately preceding five years according to his federal income tax returns, and Barlow who earned approximately \$8,400.00 per year. (Memorandum Opinion, pp. 4 and 7). The award provided for the necessities of life, namely housing and transportation. (Memorandum Opinion, p. 7). The award was terminable upon death or remarriage of Barlow. (Memorandum Opinion, p. 7). The award was modifiable. (Memorandum Opinion, p. 7). The award was for a specific amount to be paid over a long period of time in definite monthly payments. (Memorandum Opinion, p. 7). The Bankruptcy Court concluded on the basis of these facts that the obligations of Appellant to Barlow were in the nature of support alimony.

The Bankruptcy Court's decision was not clearly erroneous. The Divorce Decree was clear. The obligations at issue were set out in a separate paragraph in the Divorce Decree between the parties, dated December 3, 1991, at page two. The parties' property settlement was separately discussed later on pages four and five. The paragraph on page two of the Decree specifically states that Barlow was awarded "support alimony in direct payments" of \$18,000.00, "as additional support alimony" Appellant was ordered to pay the indebtedness on two Mercedes automobiles, and "as additional support alimony" Barlow was awarded a judgment in the amount of \$101,160.12.

Thus, the Decree representing the agreement between the parties provides compelling evidence that they intended the obligation to be maintenance. It not only labeled payments as alimony, but its structured drafting dealt with separate issues in totally

distinct segments of the Decree. Appellant has a substantial obstacle to overcome in challenging these express terms when he claims that the payments, though labeled support alimony, were actually part of a division of property "dressed up" to look like alimony to make them "bankruptcy proof."

Notwithstanding the Decree's clear expression of the parties' intent, Appellant points to several factors which, he argues, are characteristic of a property settlement: (1) the payments are a contractual debt owed to a bank, (2) debts of this nature are generally dischargeable, (3) the state court cannot convert a dischargeable debt into a nondischargeable debt by calling it support alimony, (4) the purpose of the payments of the mortgages were to restore Barlow to a home clear of any mortgages placed against it by Appellant, (5) the payments are related to property and not to support, (6) the payments allow Barlow to maintain a luxury home, not a necessity of life, and (7) Appellant could satisfy the obligation by obtaining a release of the mortgages. The Bankruptcy Court found that, while the awards had many earmarks of a property division, the factors indicating alimony outweighed the property division factors. This conclusion was not clearly erroneous.

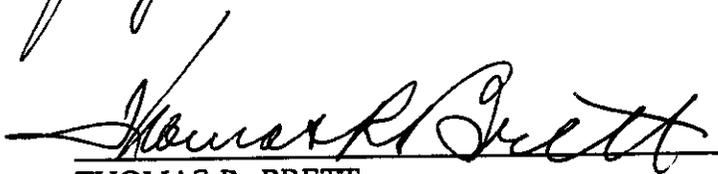
As earlier stated in our discussion of the parties' intent, Barlow had an obvious need for support at the time of the divorce, with her low income and limited employment opportunities. Appellant was clearly in a position to provide support. Given these facts, it is clear that Appellant's obligation to Barlow served as a source of her support at the time of the parties' divorce and was in substance a support obligation.

In light of the clear expression of the parties' intent exhibited by the language and

structure of the agreement and Barlow's obvious need for support, the decision of the Bankruptcy Court regarding nondischargeability is affirmed.

In post-trial motions, the parties raised the issue of allocation of Appellant's payment of \$22,553.00 to Barlow in alimony since the divorce. Appellant claims the case must be remanded to the Bankruptcy Court for a determination of the allocation of this between the \$18,000.00 alimony debt and the \$101,160.12 judgment. Since both debts have been found nondischargeable, remand is unnecessary. The total amount due to Barlow is to be reduced by any amounts already paid by Appellant.

Dated this 27 day of July, 1993.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DATE JUL 26 1993

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

**FILED**

JUL 23 1993

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

BIZJET INTERNATIONAL SALES )  
& SUPPORT, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PRATT & WHITNEY CANADA, INC., )  
and )  
P&WC AIRCRAFT SERVICES, INC., )  
and )  
AVIALL, INC., )  
 )  
Defendants. )

Case No. 91-C-904-B

ORDER  
(Appeal of Magistrate Judge's Order)

Plaintiff Bizjet has appealed (#141) the Magistrate Judge's Order entered April 15, 1993. In such order the Magistrate Judge refused Bizjet's attempt to re-open discovery to explore a recent transaction involving the parties and a company representative of Next Century Aviation (NCA). Bizjet alleges NCA solicited bids from it, P&WC, Aviall and Airwork for the overhaul of two JT15D engines and that P&WC employees told NCA that Bizjet was not an authorized (from P&WC) overhauler. BizJet further alleges that NCA was told it would not receive good service from Bizjet because Bizjet "does not get good service from Pratt & Whitney". Further, BizJet alleges that P&WC agreed to discount the cost of its impeller from a list price of \$66,113 to \$15,000, which was P&WC's cost and that NCA was told it could experience major problems because Bizjet was not an

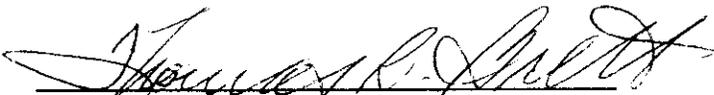
JB

"approved facility". BizJet alleges that NCA was also told it may not get "support from Pratt & Whitney in the future" and that there would be no warranty, requiring NCA to deal with Bizjet exclusively in the future.

In response Defendants urge that the Magistrate Judge was correct in not allowing further discovery because to do so would enable any party to destroy the case schedule by claiming a need to reopen discovery for "recent business transactions". Further, Defendants argue that, even assuming the statements were made, it is true Bizjet is not an authorized overhauler and, further, that P&WC is offering the same impeller discount to all parties, including Bizjet.

The Court concludes, in the interest of judicial expediency and the exercise of sound case management, that BizJet's appeal from the Magistrate Judge's Order of April 15, 1993, should be and the same is herewith DENIED.

IT IS SO ORDERED this 23<sup>rd</sup> day of July, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



one such firm that P&WC has designated as an authorized overhaul facility for JT15D engines. Defendant Pratt & Whitney Canada Aircraft Services, Inc. (Aircraft Services) is a designated overhaul facility of P&WC and a distributor of engine parts manufactured by P&WC, having six locations in the United States.<sup>1</sup> Aircraft Services is a sister corporation of P&WC, each being wholly owned subsidiaries of non-party United Technology, Inc., a Delaware corporation headquartered in Hartford, Connecticut. Non-party Airwork Corporation, located in New Jersey, is also a designated overhaul facility of P&WC, for a total of eight in North America.

Plaintiff, Bizjet International Sales & Support, Inc. (Bizjet), performs maintenance and overhaul services on aircraft engines, including the JT15D, but is not authorized by P&WC to perform engine overhauls on the JT15D. In November, 1990, Bizjet requested that P&WC recognize and deal with it as an overhaul facility with respect to JT15D engines on equal footing with authorized overhaulers. Bizjet alleges this request was prompted by its desire to be provided with a complete set of the applicable Instructions for Continued Airworthiness, including current overhaul manuals, which it maintains is information essential to performance of overhauls in accordance with applicable P&WC standards and specifications. Additionally, Bizjet alleges it

---

<sup>1</sup> Ken Peterson, P&WC's Manager of Customer Facilities, testified in his deposition that, at one point in time, there were "70 or 80 -- let's say 70 overhaul shops worldwide and the information that we had was that those numbers were going to increase significantly as we went through the 1990s." Defendants' Appendix, Tab C, p. 24.

wanted to be provided test cell correlation services, comparable to those provided by P&WC to authorized overhaulers, which enable precise evaluation of the conformity of engine performance in relation to P&WC's specifications. Bizjet also alleges it wanted to purchase parts for the JT15D at the same discount price structure offered to authorized overhaulers. Bizjet is approved by the Federal Aviation Administration (FAA) as a JT15D overhaul facility. P&WC refused Bizjet's November, 1990 request, which prompted Bizjet's 16 count complaint. BizJet by its Complaint does not seek to become an authorized JT15D authorized overhaul facility, but seeks money damages due to its alleged losses stemming from various theories of recovery.

#### Counts in Plaintiff's Complaint

Counts I-V and VIII of the Complaint<sup>2</sup> allege antitrust claims, charging a "conspiracy" by P&WC and Aviall to restrain trade, an anti-competitive "boycott," perpetration of "tie-in" sales, "market division", denial of an "essential facility" (treated by separate section herein), and "monopolization." The next three claims (Counts IX-XI) allege price discrimination and other Robinson-Patman Act violations. Counts XII and XIII assert violations of state antitrust law, Count XII alleging a conspiracy to violate state antitrust law.

The remaining counts, XIV, XV and XVI, are state common law

---

<sup>2</sup> Counts VI and VII are not the subject of partial summary judgment motions having apparently been abandoned as they are not stated in the Pretrial Order as issues.

claims for tortious interference with Bizjet's business and prospective economic advantage, breach of contract, and conversion, which Bizjet argues are not precluded by the Federal Aviation Act, ("the Act"), 49 U.S.C. §1421 (1988) which expressly provides that its provisions are "in addition" to remedies existing at common law or by statute.<sup>3</sup>

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. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Winton Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

"[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate

---

<sup>3</sup> Earlier, Defendants P&WC and Aircraft Services sought to dismiss these counts on grounds that there is no private right of action under the pertinent provisions of the Act or its regulations. In response, Plaintiff agreed no private right of action exists under the Act, arguing these claims were not brought under the Act or its regulation. Plaintiff argued any reference to the act is merely to indicate the duties and obligations owed by Defendants. Plaintiff further argues that these counts aver common law state claims for tortious interference with Bizjet's business and prospective economic advantage, breach of contract, and conversion, which are not precluded because the Act itself expressly provides that its provisions are "in addition" to remedies existing at common law or by statute. The Court, while denying Defendant's Motion To Dismiss, stated that Plaintiff carries a heavy burden indeed relative to the allegations of conversion and third party beneficiary status.

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, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

"... The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

#### The Antitrust Conspiracy Claims

Defendants argue the central allegation of Plaintiff's Complaint on the "conspiracy" counts, Counts I, II, III, IV, V, VIII & XII, is their attempt to exclude Plaintiff BizJet from the JT15D engine overhaul business. Defendants state that an "identical" conspiracy claim against P&WC was dismissed as baseless

by the 5th Circuit on summary judgment in Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186 (5th Cir. 1978). Moreover, Defendants urge that for these antitrust conspiracy claims to withstand summary judgment the record must reflect significant probative evidence creating an inference of an unlawful agreement that tends to exclude the possibility that P&WC's decision not to authorize BizJet was unilateral. Defendants maintain that since the filing of the Complaint, BizJet has discovered 44,000 documents from defendants but still has no proof of any conspiracy regarding Defendants' alleged exclusion of BizJet from the JT15D overhaul business.

Defendants argue that Plaintiff's antitrust conspiracy claims cannot withstand summary judgment if the evidence is "as consistent with unilateral conduct as with an unlawful conspiracy", citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).<sup>4</sup> Moreover, Defendants aver, the Monsanto/Matsushita doctrine has been consistently applied by the Tenth Circuit Court of Appeals, citing Gibson v. Greater Park City Co., 818 F.2d 722 (10th Cir. 1987). This doctrine, the argument goes, places a burden directly upon Plaintiff to present "significant probative evidence" of an unlawful agreement that "tends to exclude the possibility" that P&WC's decision not to authorize Plaintiff was unilateral.

---

<sup>4</sup> Plaintiff contends in its brief that Eastman Kodak Co. v. Image Technical Services, Inc., 112 S.Ct. 2072 (1992), altered the essential ruling in the Monsanto/Matsushita doctrine but at oral argument recanted that view.



The issue in Gibson was whether summary judgment is appropriate in a case where many of the allegations relate to the motive and intent of the defendants. In Gibson the Court discussed the two-part Matsushita inquiry for evaluating the propriety of summary judgment in an antitrust conspiracy case: "(1) is the plaintiff's evidence of conspiracy ambiguous, i.e., is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests." Gibson, at 724. See also, Key Financial Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635 (10th Cir. 1987).

In response, Plaintiff argues that factual disputes exist which precludes summary judgment on the conspiracy issue. Much of Plaintiff's argument is based upon statements which, it avers, could suggest or infer an agreement or contractual preclusion by P&WC with at least two of its authorized JT15D engine overhaulers, Aviall and Airwork (a non-party herein), such as the deposition testimony of Carmen Lloyd, P&WC's VP who, according to Bizjet's Chairman, Roger Hardesty, stated that "he didn't know that he could do anything" (about Bizjet's request to be authorized) and "that Aviall and Airwork would probably take his hide if he made another overhaul facility". (Hardesty deposition, at 146; Vol.I, Tab A). BizJet also argues that Hardesty testified that Lloyd referred to the "relationship and agreements" between P&WC and Aviall and Airwork, indicating those agreements "would prohibit" the

authorization of another JT15D overhaul facility. See Plaintiff's Response To Defendants' Motion To Strike Plaintiff's Affidavit, at 2. Plaintiff's characterization of Hardesty's deposition testimony takes disingenuous liberty. The specific testimony was as follows:

Q. Okay. Mr. Hardesty, do you recall anyone on behalf of Pratt and Whitney at that meeting, making any reference to Pratt and Whitney's agreements with Aviall and Airwork?

A. Well, there was some conversation about their relationship and agreements between the two companies, I don't remember specifically what was said about them.

Q. What did you --

A. It seems like Carmen [Lloyd] made a statement, he didn't know if that would be permitted by the agreement or not, that he wanted to look at the agreements -- something to that effect, I don't remember specifically. Hardesty deposition at 152; Vol I, Tab A.

The Court concludes that "didn't know if that would be permitted" is quite different than "would prohibit".

Plaintiff points to P&WC's Parts Support Director William L. Lindsay's, statement that BizJet is already in the JT15D overhaul business as a "rogue" shop as being acknowledged by P&WC employees as a negative or derogatory statement. The statement, which occurred in a memorandum from Lindsay to C.L. Lloyd (Vol. II, Tab T), was first characterized by P&WC's Director of Customer Support Roy Blinco "as carrying a negative connotation" when used relative to persons rather than organizations. Blinco testified in his deposition that a rogue person "[G]ets up to mischief" but when asked again if he considered the use of the term "rogue" to carry with it negative connotations he replied: "I don't have an opinion either way". (Vol. II, Tab B, at 162, 163). P&WC's Vice President Gordon McArthur Hogg testified in his deposition that he preferred

to think of "rogue" shops as independents and that he considered BizJet an independent or a rogue shop. Hogg based his preference of the term "independent" as being "less derogatory". (Vol.I, Tab P, at 120, 121).

The word "rogue" has many meanings such as playfully mischievous, not complying with desired standards, dishonest, etc.. Such a statement by an employee or employees of a competitor, while perhaps derogatory, is not evidence of a conspiracy.

Plaintiff argues that P&WC's Manager of Customer Facilities Support, Ken Peterson, advised Bizjet's LaBombard the relationship between P&WC and Aviall would prevent any agreement between Bizjet and P&WC with respect to designation of Bizjet as a JT15D overhauler. Affidavit of Bruce E. LaBombard, dated May 24, 1993; Vol. I, Tab G. LaBombard states that Peterson told him if LaBombard was telling Bizjet's president Butch Walker that Bizjet would ever be authorized by P&WC as a JT15D overhauler he "was blowing smoke up his ass". Affidavit of Bruce E. LaBombard, dated May 24, 1993; Vol. I, Tab G. LaBombard's belated descriptive metaphor and rather crude remembrance is not evidence of a conspiracy as it is equally consistent with the conclusion that Peterson believed LaBombard's conclusions were premature.

These statements come from LaBombard's late filed affidavit which Defendants seek to strike. Defendants argue Bizjet seeks to "fill the gaping holes in BizJet's case identified by Defendants in their Motion for Summary Judgment on the conspiracy claims." The Court agrees that LaBombard's affidavit has an expedient tone. It

is established law that a party cannot create a genuine issue of fact by submitting an affidavit containing conclusory allegations which contradicts prior deposition admissions or sworn testimony. Diliberti v. United States, 817 F.2d 1259 (7th Cir. 1987). The underpinning for the rule is that "the utility of summary judgment as a procedure for screening out sham fact issues would be greatly undermined if a party could create an issue of fact merely by submitting an affidavit contradicting his own prior testimony." Franks v. Nimmo, 796 F.2d 1230 (10th Cir. 1986); Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572 (2nd Cir. 1969); Radobenko v. Automated Equip. Corp., 520 F.2d 540 (9th Cir. 1975); Kennett-Murray Corp. v. Bone, 622 F.2d 887 (5th Cir. 1980).

An examination of the record before the Court reveals LaBombard's newly recollected "agreement" or "would prevent" testimony does not square with prior LaBombard deposition testimony and Answers to Interrogatories. See Plaintiff's Supplemental Response to Defendant P&WC Aircraft Services, Inc.'s Revised First Set of Interrogatories as 23 (June 2, 1992. See, also, Deposition of LaBombard, vol. III, at 113 (Sept. 28, 1992. The Court is of the view that LaBombard, who was deposed on three occasions, had ample opportunity to respond to pertinent questions regarding any agreements between Defendants which in any way affected BizJet. For example, see Deposition of LaBombard, vol. I, at 155-158, 169. LaBombard spoke only of written commercial agreements between Defendants regarding discounts and support, which were in existence prior to LaBombard's employment with BizJet. Id. at 155-158.

Nor does the most recent affidavit of Dennis P. Wilkinson, dated June 28, 1993, bolster LaBombard's late offering. Wilkinson's singular mention of LaBombard was that "[he] spoke with Bizjet personnel, including Larry Rhodes, Steve Choate and Bruce LaBombard, on numerous occasions in connection with BizJet's efforts to secure JT15D maintenance and overhaul level parts." In the Court's view Wilkinson's reference to LaBombard in no way supports an inference of a conspiracy involving Defendants to prevent BizJet from becoming a P&WC authorized overhaul facility for JT15D engines.

When critically analyzed, Plaintiff's circumstantial evidence, while creating some sparks and obfuscating smoke, is insufficient to create the inferential flame necessary to permit a jury to pass upon the issue of conspiracy. Plaintiff's web of allegations and suspicions of conspiracy remain just that, lacking the required significant probative evidence establishing an inference of unlawful agreement.

The Court concludes the Affidavit of Bruce LaBombard should be and the same is hereby stricken. Defendants' Motion To Strike (#169) is GRANTED.

The Court has carefully considered other alleged conspiracy inferences offered by BizJet. In the main, the Court finds such inferences nonexistent or overstated, or if properly attributed, to be as consistent with Defendants' own legitimate business self-interests as with the alleged conspiracy.

The Court concludes that Plaintiff's evidence of "conspiracy"

is, viewed in the light most favorable to Plaintiff, ambiguous in that it is as consistent with Defendants' independent, allowable self-interest pursuits, statements and actions as with a conspiratorial effort to preclude Bizjet from the JT15D engine overhaul business. Further, the Court concludes there is a lack of evidence which would tend to exclude the possibility that Defendants were pursuing their own independent interests. Based upon this, the Court concludes Defendants' Motion for Partial Summary Judgment (#102), based upon the conspiracy claim, should be and the same is hereby GRANTED.

**ESSENTIAL FACILITIES CLAIM**

In Count V, labelled "Sherman Act § 2 -- Essential Facilities," BizJet claims P&WC has excluded it from the JT15D overhaul business by denying access to "certain facilities essential to the performance of overhauls of JT15D engines." Complaint ¶ 82. The claimed "essential facilities" are "engine parts," "test cell correlation services" and "overhaul manuals," which BizJet "has no reasonable means of obtaining or duplicating." Complaint ¶ 84.

In order to sustain an "essential facilities" doctrine claim to withstand a motion for partial summary judgment, the Plaintiff must demonstrate the presence of each of the following four elements by record probative evidence to create the necessary inference:

- (1) Control of the essential facility by a monopolist;
- (2) Plaintiff's inability practically or reasonably to duplicate the facility;

(3) The denial of the use of the essential facility to Plaintiff; and

(4) The feasibility of providing the facility.

City of Chanute, Kansas v. Williams Natural Gas Co., 955 F.2d 641, 647 (10th Cir.), *cert. denied*, 113 S.Ct. 96 (1992), *citing* MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). *See also*, McKenzie v. Mercy Hosp. of Independence, Kansas, 854 F.2d 365, 371 (10th Cir. 1988).

The undisputed material facts concerning the above four "essential facilities" elements establish the following:

1. Elements (3) and (4) above, denial of the use of the essential facilities to Plaintiff and the feasibility of providing the facility, appear not to be in dispute. This is because it is undisputed the Defendants have refused to provide JT15D overhaul manuals, test cell correlation services, or all necessary engine parts. Further, from the record it appears undisputed the Defendants could provide such essential facilities to BizJet, if they chose to do so.

2. Regarding essential element number (1), control of the essential facility by a monopolist, paragraphs 84 and 85 of Plaintiff's complaint, page 29, alleges not that P&WC alone has a monopoly in the JT15D overhaul market in the traditional Sherman Act § 2 sense, but it is alleged that P&WC enjoys a "shared monopoly" with BizJet overhaul competitors, Aviall and Aircraft Services, as well as nonparty, Airwork. McKenzie, 854 F.2d at 367,

states that the court must first conduct a preliminary investigation of the Plaintiff's allegations to ensure that the activity complained of is a practice forbidden by the provisions of the Sherman Act. Once this threshold inquiry is satisfied, then the court moves to the second stage of its analysis to consider the merits of the claim. The term "shared monopoly" is antithetical to the concept of a single firm having "monopoly power" in the traditional Sherman Act § 2 sense. (See the Court's conspiracy claim analysis, pp. 11-12 herein).

(3) Defendants' motion for summary judgment is centered principally in an analysis of the record regarding the second element, i.e., Plaintiff's inability practically or reasonably to duplicate the facility. It is Defendants' assertion that the undisputed material facts support that BizJet has duplicated the essential facilities and has been in the business of overhauling JT15D engines since early 1991. Relevant undisputed material facts on this element reflect the following:

(A) BizJet is in the business of overhauling JT15D engines. Response to P&WC's Request for Admission No. 2 (Deft. Appdx., Tab A).

(B) BizJet received JT15D overhaul certification from the Federal Aviation Administration (FAA) in 1991. Walker Deposition (Vol. I) at 44 (Deft. Appdx. at Tab C).

(C) BizJet completed overhauling its first JT15D engine in July 1991. Deposition of Bruce LaBombard, BizJet "Pratt & Whitney Program Manager" (Feb. 4, 1993) (Vol. IV) at 165 (Deft. Appdx., Tab

B). Since July 1991, BizJet has overhauled in excess of 20 JT15D engines for its customers. Deposition of William Walker, BizJet President (Feb. 2, 1993) (Vol. II) at 70 (Deft. Appdx., Tab C).

(D) BizJet's President Walker testified that at the time BizJet requested authorization from P&WC to serve as a licensed overhaul facility, it already had a JT15D overhaul manual and test cell facility as well as qualified personnel to perform the overhaul on the JT15D. Walker testified that ". . . overhaul manuals, and other technical type things . . . might be nice to have [from P&WC]. But they would not prevent us from being successful in the industry. There are other ways to skin that cat." Walker Depo. (Vol. II) at 20 (Deft. Appdx., Tab C).

(E) Thomas Rosell, BizJet JT15D Manager of Customer Service, advises customers that BizJet has a "full capability to do 15D overhauls." Rosell considers BizJet's price quotes concerning JT15D overhauls to be "very competitive." Rosell is not aware of any time when BizJet turned down the opportunity to bid on any sort of JT15D work. To Rosell's knowledge no customer has ever taken their JT15D work to another facility because BizJet was not a factory authorized overhaul facility. Neither was Rosell aware of any situation where a customer had taken their JT15D overhaul work elsewhere because of the lack of a test cell correlated directly to the manufacturer's test cell, the lack of manuals and updates and service bulletins directly from the manufacturer or for any concerns about quality or safety of the work that would be done by BizJet. Deposition of Thomas Rosell (July 15, 1992) at 63, 109,

222 and 223 (Deft. Appdx., Tab D).

(F) BizJet has the necessary overhaul manuals it needs to overhaul P&WC's JT15D engines. LaBombard Dep. (Vol. III) at 202-207 (Deft. Appdx., Tab B); *see also*, Defendants' Appendix, Tab E; Deposition of Ralph Hawkins, Chief Engineer, Hawkins Aerospace, Inc. (Jan. 28, 1993) at 66-67 (Deft. Appdx., Tab F); Deft.'s Appendix Tab E; *see also*, Defendants' Appendix at Tab G; and Walker Deposition, (Vol. I) at 202-204 (Deft. Appdx., Tab C).

(G) BizJet has a fully operational JT15D "test cell" that BizJet uses to test the performance of the JT15D engines it has overhauled. *See* BizJet International Summary of Engine Correlation Testing, August 24, 1992 (Appdx. at Tab H). *See also*, LaBombard Depo. (Vol. II) at 297-300, 391 (Appdx. at Tab B); Walker Dep. (Vol. I) at 42-44 (Appdx. at Tab C); Deposition of Daniel Francescon, BizJet Manager of Production (October 21, 1992) at 129-32 (Deft. Appdx. at Tab I); Deposition of Jim Summerlin, BizJet Test Cell Technician (October 22, 1992) at 33, 45 (Deft. Appdx. at Tab J). BizJet also concedes that it has lost no business because of deficiencies in its test cell. *See* Response to Interrogatory No. 12 (Appdx. at Tab O).

(H) BizJet is able to purchase all JT15D spare parts necessary for an overhaul from a variety of sources:

1. BizJet has never had a single delay in overhauling a JT15D engine as a result of not getting a particular part according to its Facilities and Purchasing Manager. As Stephen

Choate testified:

Q. In BizJet's overhauling of 15D engines, to your knowledge has that overhaul ever been held up because of BizJet's inability to get 15D parts?

A. No.

Deposition of Stephen Choate, BizJet Purchasing & Facilities Manager (September 22, 1992) at 188 (Deft. Appdx. at Tab K).

2. Bruce LaBombard, BizJet Pratt & Whitney Program Manager, testified that there were no JT15D accessories or sub-assemblies "that would be essential for an overhaul that you could not buy either as an exchange part or a new part." LaBombard Dep. (Vol. I) at 200 (Deft. Appdx. at Tab B).

3. BizJet is able to (and does) purchase new JT15D overhaul parts from P&WC Aircraft Services, Aviall and Airwork. Deposition of Larry Rhodes, BizJet JT15D Overhaul Coordinator, at 78-79 (September 25, 1992) (Deft. Appdx. at Tab L). BizJet also purchases new JT15D spare parts directly from parts manufacturers, often at greater discounts than it could obtain from P&WC. *Id.* at 78-93.

4. BizJet has numerous alternative sources for both new and used JT15D spare parts, including parts brokers OK Turbines, Pacific Air Resources, Apex, Entirely Turbine Services and International Turbine Services, and through a computer system called ILS, the "International Parts Listing Service." *Id.* at 79-83; Choate Dep. at 77-79 (Deft. Appdx. at Tab K).

(I) BizJet's expert states that BizJet was able to capture

"13% of the [JT15D] overhaul market" in 1991, and "is a viable competitor in the JT15D market." Report of Steven L. Wilsey (Jan. 29, 1993) at 4 (Deft. Appdx. at Tab M).

(J) BizJet has stated that it is "fully capable in all respects" of performing JT15D overhauls and has completed in excess of 20. (Plff. Memorandum Brief in Support of Motion *in limine* Regarding BizJet's Technical Capabilities at p. 8, April 26, 1993).

(K) Plaintiff's economist, Jadow, has stated that by July 1991, BizJet had all essential facilities to enter the market of the JT15D overhaul business. (Jadow Depo. at 60-61, 79).

**LEGAL ANALYSIS AND CONCLUSION**  
**(ESSENTIAL FACILITIES)**

Generally a manufacturer has a right to deal or refuse to deal with whomever it chooses. United States v. Colgate & Co., 250 U.S. 300, 307 (1919); Olympia Equip. Leasing v. Western Union Tel., 797 F.2d 370, 375 (7th Cir. 1986); and Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1192 (5th Cir. 1978).<sup>5</sup> The "essential facilities" doctrine is an exception to the general

---

<sup>5</sup>P&WC considers requests by an overhaul facility for manuals, test cells and parts to be tantamount to a request for factory authorization of the requesting facility, to provide the required technical support services. See, e.g., Deposition of Gordon Hogg, P&WC Vice-President of Customer Support (Sept. 16, 1992), at 87-89 (Deft. Appdx. at Tab P). P&WC has had what it considers prior negative experience with a nonauthorized overhaul facility that bought an overhaul manual and then proceeded to demand technical support by P&WC and the time-consuming follow-up services implied. Thus, P&WC has made the decision to provide such only to authorized facilities. Deposition of Ken Peterson, P&WC Manager of Customer Support Facilities (Aug. 6, 1992) at 71-74 (and related correspondence) (Deft. Appdx. at Tab Q).

rule with respect to facilities in the control of a monopolist that are essential to a firm's ability to compete in the market. Olympia, 797 F.2d at 376.

Plaintiff must establish that it is unable reasonably to duplicate the essential facilities because it is economically infeasible. City of Chanute, Kansas v. Williams Natural Gas Co., 955 F.2d 641, 648 (10th Cir.), *cert. denied*, 113 S.Ct. 96 (1992); Twin Lab., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2nd Cir. 1990). See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Terminal RR Ass'n. of St. Louis, 224 U.S. 383 (1912); Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1987); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985). To withstand the Defendants' motion for summary judgment, the evidence in the record must establish more than BizJet's additional costs and/or inconvenience. City of Chanute, 955 F.2d at 648-649; Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991).

Plaintiff's "essential facilities" claim is lacking if the evidence demonstrates the facilities are obtainable from alternate sources, permitting Plaintiff market entry and the ability to be competitive. McKenzie, 854 F.2d at 365, and Twin Lab., 900 F.2d at 567.

The uncontroverted material facts establish that BizJet is an FAA certified and equipped overhaul facility of the JT15D engines, and not severely handicapped in obtaining "essential facilities"

for market entry. Twin Laboratories, 900 F.2d at 566, 568, and City of Chanute, 955 F.2d at 648-649. The uncontroverted evidence demonstrates that BizJet has alternative sources for the three "essential facilities," i.e. overhaul manuals, a test cell and spare parts. The record establishes BizJet is an active viable competitor in the JT15D engine overhaul market, although experiencing inconvenience in doing so and experiencing higher but economically feasible costs. For the reasons expressed, the Plaintiff's "essential facilities" claim is not supported by the evidence in the record so Defendants' motion for partial summary judgment is hereby SUSTAINED.

**ROBINSON-PATMAN FEDERAL AND  
STATE LAW DISCRIMINATORY  
PRICING CLAIMS**

BizJet alleges unlawful price discrimination by P&WC in violation of federal law (Count IX), and state law (Count XIII), illegal inducement of discriminatory prices by Defendant Aviall (Count X), and discrimination in P&WC's offering of services to Aviall in connection with parts sales (Count XI). The complaint alleges that Aircraft Services sold JT15D spare parts to BizJet at a 20% discount while P&WC sold JT15D parts to authorized distributors, Aviall and Airwork, at a 40% discount. In reference to the Robinson-Patman claims, BizJet must prove that the "same seller" charged different prices to BizJet than Air Services, Aviall or Airwork for the parts. Barnosky Oils, Inc. v. Union Oil Co. of Cal., 665 F.2d 74, 83 (6th Cir. 1981); American News Co. v. FTC, 300 F.2d 104, 109 (2nd Cir.), *cert. denied*, 371 U.S. 824 (1962);

and Ben B. Schwartz & Sons, Inc. v. Sunkist Growers, Inc., 203 F.Supp. 92, 99 (E.D.Mich. 1962).<sup>6</sup> Both Aircraft Services and P&WC are subsidiaries of United Technologies and it is the contention of said Defendants that they are separate legal entities engaged in separate and distinct businesses so BizJet has not purchased from the same seller as has Aviall, Airwork and Aircraft Services.

BizJet acknowledges that it does not buy parts from P&WC directly. BizJet alleges that it is an "indirect purchaser" from P&WC through Aircraft Services (Complaint, ¶ 104), and thus satisfies the "same seller" requirement. Legal authority permits an indirect purchaser to pursue price discrimination claims when the distributor (Aircraft Services) is effectively the "alter ego" of the manufacturer and the manufacturer controls the distributor's pricing.<sup>7</sup> Purolator Products, Inc. v. F.T.C., 352 F.2d 874, 883

---

<sup>6</sup>Oklahoma's price discrimination statute, Okla.Stat. tit. 79, §2, involves the same analysis as it applies to conduct by a "person" as does § 2(a) of the Robinson-Patman Act. The Oklahoma Supreme Court has stated "interpretation of federal antitrust legislation provides valuable assistance in interpreting the provisions of the Oklahoma statutes." Teleco, Inc. v. Ford Indus., Inc., 587 P.2d 1360, 1362 (Okla. 1978).

<sup>7</sup>The case of F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968), cited by Plaintiff in support of its indirect purchaser argument involved § 2(d), prohibition on unequal promotion allowances, not § 2(a), price discrimination claims, as involved herein. Fred Meyer specifically stated it was "unnecessary" for the parties to "resort to the indirect customer doctrine." 390 U.S. at 354. Authority since Fred Meyer recognizes that in § 2(a) claim cases, the plaintiff must show sufficient control of the manufacturer over the distributor-dealer resale pricing to support a finding of "indirect purchaser." Julius Nasso Concrete Corp. v. DIC Concrete Corp., 467 F.Supp. 1016 (S.D. N.Y. 1979); Checker Motors Corp. v. Chrysler Corp., 283 F.Supp. 876 (S.D. N.Y. 1968), *aff'd on other grounds*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); and FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019 (2d Cir. 1976), *cert.*

(7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968). Where the prices are entirely set by the distributor absent control by the manufacturer, there is no price discrimination by the "same seller," even when the manufacturer and distributor are affiliated companies. Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4, 8 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969), and Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp., 785 F.2d 1240, 1243 (5th Cir.), *cert. denied*, 479 U.S. 848 (1986). Plaintiff's complaint states that P&WC refuses to provide BizJet with JT15D related parts purchases. Complaint, ¶ 12. Thus, the basic question is whether there is sufficient probative evidence in the record to create the necessary inference of control by P&WC over Aircraft Services in establishing pricing.

Plaintiff's § 2(f) claim against the Defendant, Aviall, for "inducing" discriminatory pricing is likewise governed by the "same seller" rule, because a buyer can be liable under § 2(f) only where the seller would be liable under § 2(a). Great Atlantic & Pacific Tea Co. v. F.T.C., 440 U.S. 69, 77 (1979); Automatic Canteen Co. of America v. F.T.C., 346 U.S. 61, 70-71 (1953); *see also*, Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1190 (5th Cir. 1978).

The following material facts relative to BizJet's price discrimination claim appear to be uncontroverted:

1. P&WC and Aircraft Services are separate legal entities,

---

*denied*, 429 U.S. 1097 (1977).

each of which is a subsidiary of United Technologies Corporation. Appendix at Tab A.

2. P&WC is a Canadian corporation based in Montreal which, *inter alia*, manufactures new engines and engine parts. Complaint, ¶ 9.

3. Aircraft Services is a U.S. corporation, headquartered in West Virginia, which operates six service centers in the U.S. It purchases parts from P&WC and re-sells them to customers. Deposition of Jay Mullen, P&WC Aircraft Services Manager of Satellite Operations (December 3, 1992) at 5, 75 (Appendix at Tab B); Deposition of William Lindsay, P&WC Director of Parts Support (September 15, 1992) at 14-15 (Appendix at Tab C).

4. P&WC sells JT15D spare parts and provides services in North America only to three distributors: Aviall, Airwork and Aircraft Services. Deposition of Carmen Lloyd (April 13, 1992) at 242 (Appendix at Tab D). William Lindsay, P&WC Director of Parts Support, testified similarly that "[i]t has been a long-standing policy within the [P&WC parts support] department to restrict the sale of parts only to those people with whom we have business agreements." Lindsay Dep. at 77 (Appendix at Tab C).

5. BizJet does not purchase JT15D parts directly from P&WC. Lloyd Dep. at 246-247 (Appendix at Tab D).

6. As to services, Plaintiff's Complaint states that "P&WC refuses to provide BizJet with [JT15D-related] services and facilities" in connection with parts purchases. Complaint, ¶ 112.

7. Only Aviall, Airwork and Aircraft Services receive a

discount of list price less 40% from P&WC. As P&WC Parts Support Director William Lindsay testified, P&WC grants the 40% discount only to the three distributors of JT15D parts. Lindsay Dep. at 14-15 (Appendix at Tab C).

8. BizJet purchases parts at discount prices from Aircraft Services, Aviall and Airwork. Aviall of Dallas, Texas has provided BizJet with a 29% discount while the other two offer parts discounts to BizJet ranging from 10 to 20%. (Walker Depo., Vol. II at 23, Deft. Appndx. Tab G; LaBombard, Vol. I at 142, 147-49, Deft. Appndx. at Tab H).

#### ANALYSIS AND CONCLUSION

#### (ROBINSON-PATMAN FEDERAL AND STATE LAW DISCRIMINATORY PRICING CLAIMS)

The record reflects that only Aviall, Airwork and Aircraft Services receive a discount of list price less 40% from P&WC. Lindsay Dep. at 14-15 (Deft. Appendix at Tab C). P&WC asserts that it exercises no control over JT15D parts pricing by Aircraft Services, Aviall or Airwork. Deposition of Gordon Hogg (September 16, 1992) at 149-150 (Deft. Appendix at Tab E); Lloyd Deposition at 246 (Deft. Appendix at Tab D); and Mullen Deposition at 75 (Deft. Appendix at Tab B).

In opposition to Defendants' claims of no control over distributors, BizJet cites to many references in the record in pages 21 through 28 of its brief. These references sometimes refer to the Bruce E. LaBombard belated affidavit (Plff.'s Appendix Vol I, Tab G), which the Court has stricken. The Court has

meticulously analyzed the other evidentiary dispute references of Plaintiff regarding the Robinson-Patman pricing issue, and finds none that are probative in creating the necessary inference of control of P&WC over Aircraft Services or Aviall pricing policy.

However, the recently filed affidavit of Dennis P. Wilkinson (Defts. Reply to Plaintiff's Submission of the "Wilkinson Affidavit"), a former assistant parts administrator for P&WC Aircraft Services, Wichita, Kansas, does create an issue of control by P&WC over Aircraft Services' resale pricing of P&WC parts.<sup>8</sup> Certain statements in Wilkinson's affidavit are contradictory in that he states Aircraft Services sometimes sold parts to nonauthorized distributors despite policies and directives of P&WC. However, the Wilkinson affidavit does not implicate P&WC in control of Aviall's resale parts pricing. Therefore, the Defendants' motion for partial summary judgment in reference to Plaintiff's Robinson-Patman claims concerning discriminatory pricing, both federal and state, is hereby OVERRULED. Defendants' motion for partial summary judgment concerning said claims against the Defendant Aviall is hereby SUSTAINED.

**COUNTS XIV, XV AND XVI REGARDING ALLEGED  
"TORTIOUS INTERFERENCE," "BREACH OF CONTRACT,"  
AND "CONVERSION OF PROPERTY RIGHTS."**

The Defendants previously moved to dismiss these claims because they are grounded in state common law theories of recovery

---

<sup>8</sup>Defendants state Wilkinson's affidavit presents credibility problems in stating he "resigned" from Aircraft Services when in fact he was terminated due to positive unlawful drug test results.

arising out of breach of Federal Aviation Acts standards. The parties concede that no private right of action is available to the Plaintiff to enforce the Federal Aviation Act standards. In Re Mexico City Air Crash of October 31, 1979, 708 F.2d 400, 405-08 (9th Cir. 1983); McCord v. Dixie Aviation Corp., 450 F.2d 1129, 1130 (10th Cir. 1971); Rauch v. United Instruments, Inc., 548 F.2d 452 (3rd Cir. 1976); Obenshain v. Halliday, 504 F.Supp. 946 (E.D.Va. 1980); Rosdail v. Western Aviation, Inc., 297 F.Supp. 681 (D.Colo. 1969); Yelinek v. Worley, 284 F.Supp. 679 (E.D.Va. 1968); Moungy v. Brandt, 250 F.Supp. 445 (W.D.Wisc. 1966); Moody v. McDaniel, 190 F.Supp. 24 (N.D.Miss. 1960); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973). The Court previously overruled the Defendants' motion to dismiss but stated Plaintiff "carries a heavy burden indeed relative to the allegations of conversion and third party beneficiary status."

The Defendants urge now that discovery has been completed that there are two independent grounds to grant summary judgment as to Counts XIV through XVI. First, BizJet's reliance solely on FAA regulation is legally deficient because only the FAA can enforce its regulations. Second, the FAA regulation on its face does not apply to the JT15D engine and thus imposes no duty on P&WC with respect to JT15D overhaul manuals.

The following appear to be undisputed material facts relative to Plaintiff's claims in Counts XIV through XVI:

1. The complaint mentions no basis for the rights and duties asserted in Counts XV and XVI, breach of contract and conversion,

other than FAA regulations. (Complaint, 125-126, 130-134, 136-139, citing 14 C.F.R. § 21.50).

2. Concerning Count XIV (alleged tortious interference), Plaintiff relies on the violations of FAA regulations and the withholding of other information and facilities from BizJet. When BizJet was asked to respond by interrogatory answer, and to fully describe its tortious interference claim in Count XIV, Plaintiff referred to its status as an "owner" and FAA certified overhauler of JT15D engines and P&WC's withholding of information and facilities from BizJet and P&WC's interference with BizJet's overhaul customers. (Sept. 14, 1992 Interrogatory Responses at 7, Defts. Appendix at Tab B) (See the Court's Order herein, (conspiracy, pp. 5-12), (essential facilities, pp. 12-20) and (price discrimination, pp. 20-25)).

3. When asked on two different occasions to state the basis for the "contract" alleged in Count XV (breach of contract) of which Plaintiff claims to be a third party beneficiary, Plaintiff referred at length to the FAA regulatory structure and then restated its original allegations that P&WC's sale of JT15D engines "under type certificates issued by the FAA" subjected P&WC to a "contractual obligation to furnish technical support and instructions" to BizJet. Sept. 14, 1992 Interrogatory Responses at 7 (Defts. Appendix at Tab B) and Jan. 25, 1993 Interrogatory Responses at 7 (Defts. Appendix at Tab C). The explanations cite no other source of "contractual" rights.

4. When asked to state the basis for the "property right"

alleged in Count XVI (conversion), Plaintiff referred to the "regulatory framework" and then restated its original allegations that "as the owner of JT15D engines and as an FAA-certified overhauler, BizJet has a property right to receive technical support." Sept. 14, 1992 Interrogatory Responses at 8 (Defts. Appendix at Tab B) and Jan. 25, 1993 Interrogatory Responses at 8 (Defts. Appendix at Tab C). Plaintiff cites no other source for such "right."

5. 14 C.F.R. § 21.50(b) provides, in pertinent part, that the manufacturer of an engine who holds an FAA certificate "for which application was made after January 28, 1981, shall furnish at least one set of Instructions for Continued Airworthiness . . . to the owner." (Defts. Appendix at Tab D). See Complaint ¶ 33.

6. The FAA regulations further define "Instructions for Continued Airworthiness" as including the overhaul manual and revisions. 14 C.F.R. § A33.3(b) (Defts. Appendix at Tab D). See Complaint ¶ 22.

7. The date of application on P&WC's Type Certificate for the JT15D engine is June 2, 1969. (Defts. Appendix at Tab E).

8. BizJet has never sought enforcement action by the DOT regarding alleged violations of 14 C.F.R. § 21.50 of the FAA regulations. Deposition of BizJet President William Walker (Feb. 19, 1992) (Vol. I) at 136-39 (Defts. Appendix at Tab F).

9. The FAA acknowledges the right of a manufacturer of an engine certified prior to the 14 C.F.R. § 21.50(b) application date of January 28, 1981, to furnish overhaul manuals only to authorized

manufacturer overhaul distributors and facilities. FAA letter at 2 (Deft. Appendix at Tab G).

10. BizJet has obtained JT15D overhaul manuals and up-to-date revisions to those overhaul manuals from the FAA and other third party sources. (See Court's Findings of Fact, page 14-15, No. 3(D) and (F)).

#### LEGAL ANALYSIS AND CONCLUSION

##### (COUNTS XIV, XV AND XVI REGARDING ALLEGED "TORTIOUS INTERFERENCE," "BREACH OF CONTRACT," AND "CONVERSION OF PROPERTY RIGHTS.")

Plaintiff urges its three state law claims are not precluded because the Act itself in 49 U.S.C. § 1506 expressly provides that its provisions are in addition to remedies existing at common law or by statute. Regarding Plaintiff's Counts XV (breach of contract) and XVI (conversion) claims, it is clear they arise not from principles at common law but solely from the standard of conduct established by the Federal Aviation Act and its promulgated regulations. BizJet is free to lodge a complaint with the FAA regarding the Defendants' alleged breaches of the Act and regulations.

Regarding Plaintiff's Count XIV claim for tortious interference with business and prospective economic advantage, Oklahoma law provides that to succeed on such a claim the Plaintiff must establish: (1) Plaintiff has a business or contractual right, or some type of reasonable expectation of profit that was interfered with; (2) that the interference was malicious or wrongful, and that such interference was neither justified,

privileged nor excusable; and (3) the damage was proximately sustained as a result of the interference. Mac Adjustment, Inc. v. Property Loss Research Bureau, 595 P.2d 427, 428 (Okla. 1979); Ellison v. An-Son Corp., 751 P.2d 1102, 1106 (Okla.Ct.App. 1987); and Overbeck v. Quaker Life Ins. Co., 757 P.2d 846, 847-48 (Okla.Ct.App. 1984). As previously stated herein, the evidence is insufficient to establish conspiracy or essential facilities claims. For the same reasons the Court concludes Plaintiff's tortious interference claim evidence is insufficient. The Court further concludes Defendant P&WC's Motion for Summary Judgment as to this claim (Count XIV) should be SUSTAINED.

For the reasons expressed herein, Defendants' motion for partial summary judgment is hereby SUSTAINED in reference to Plaintiff's Count XIV claim (tortious interference), Count XV (breach of contract) and Count XVI (conversion) claims.

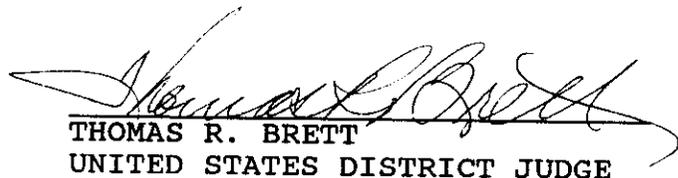
#### SUMMARY

In summary, the Court concludes the Affidavit of Bruce LaBombard, dated May 24, 1993, should be and the same is hereby stricken. Defendants' Motion To Strike (#169) is GRANTED. Further, the Court [1] sustains Defendants' Motion for Summary Judgment (#102) on the issue of antitrust conspiracy claims (Counts I-V, VIII and XII); [2] sustains Defendants' Motion for Summary Judgment (#104) on the essential facilities claims (Count V); [3] sustains Defendants' Motion for Summary Judgment (#108) on the Robinson-Patman federal and state law alleged violations as to Aviall (Count X) but denies such motion as to P&WC and Aircraft Services (Counts

IX, XI, and XIII), and [4] sustains Defendants' Motion for Summary Judgment (#106), sustaining the motion on the tortious interference with existing business and prospective economic advantage claims (Count XIV), the breach of third-party beneficiary claims (Count XV) and conversion claims (Count XVI).

Jury trial in this matter is set for October 18, 1993, at 9:30 a.m.. Parties are directed to complete all desired discovery on the remaining issues herein by August 23, 1993, and to complete any witness exchanges, exhibit exchanges and other pretrial activity, including a revised pretrial order, relative to the remaining issues, on or before September 23, 1993. Trial briefs, suggested voir dire and suggested instructions shall be filed by October 11, 1993.

IT IS SO ORDERED this 23<sup>rd</sup> day of July, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DATE 7-26-93

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

FILE :

JUL 26 1993

EARLE LINCOLN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 AMERICAN AIRLINES, et al, )  
 )  
 Defendants. )

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

92-C-1189-E

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed June 30, 1993 in which the Magistrate Judge recommended that this case be dismissed without prejudice to its refiling. Specifically, the case should be dismissed for failure of Plaintiff to prosecute the action.

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 this case is dismissed without prejudice to its refiling.

SO ORDERED THIS 23<sup>rd</sup> day of July, 1993.

  
JAMES O. ELLISON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

DATE 7-26-93

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

**FILED**

**JUL 23 1993**

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

BRIDGET WILSON,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SOUTHWESTERN BELL CORPORATION	)
CUSTOMCARE MEDICAL PLAN,	)
and THE PRUDENTIAL INSURANCE	)
COMPANY OF AMERICA,	)
	)
Defendants.	)

No. 93-C-496-E

**JUDGMENT**

This action came on for non-jury trial before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly tried and a decision having been rendered in favor of Defendants according to the Findings of Fact and Conclusions of Law filed herewith.

IT IS THEREFORE ORDERED that Judgment be entered in favor of Defendants and against Plaintiff and that each party bear its own costs associated with this action.

ORDERED this 23<sup>rd</sup> day of July, 1993.

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

ENTERED ON D. O. CASE

DATE 7-26-93

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

JUL 23 1993

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

THE UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 MYRA FRITZ SHADE ROBINSON; )  
 OSTEOPATHIC HOSPITAL FOUNDERS )  
 ASSOCIATION, a corporation )  
 d/b/a OKLAHOMA OSTEOPATHIC )  
 HOSPITAL )  
 COUNTY TREASURER, )  
 Tulsa County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma; )  
 )  
 Defendants. )

Case No. 92-C-504E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22 day of July, 1993. The plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendant, Osteopathic Hospital Founders Association, a corporation d/b/a Oklahoma Osteopathic Hospital, appears by Daniel M. Webb; the defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney; and the defendant, Myra Fritz Shade Robinson, appears not, but makes default

The Court, being fully advised and having examined the file, finds as follows:

1. (a) The defendant, **Myra Fritz Shade Robinson**, was personally served a copy of the summons and complaint on June 15, 1993, by a Deputy U.S. Marshal, but has failed to otherwise appear and is now in default;

(b) All other defendants, namely **Osteopathic Hospital Founders Association, a corporation d/b/a Oklahoma Osteopathic Hospital; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have filed timely answers in this action and have approved the form of this judgment as evidenced by their respective attorney's subscriptions.

2. This court has jurisdiction according to 28 U.S.C. Section 1345 because the United States is the plaintiff; and venue is proper because this lawsuit is based upon a note which was secured by a mortgage covering land located within the Northern Judicial District of Oklahoma.

3. The defendant, **Myra Fritz Shade Robinson**, is one and the same person as, and was formerly or is sometimes known as **Myra F. Shade, Myra Shade, Myra S. Robinson, and/or Myra Fritz Robinson**. Such defendant is currently a single person.

4. On August 15, 1978, **Richard D. Shade** and the defendant, **Myra Shade**, then husband and wife, executed and delivered to Mortgage Clearing Corporation a promissory note in the amount of \$13,100.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

5. As security for the payment of the above described note Richard D. Shade, and the defendant, Myra Shade, then husband and wife, executed and delivered to Mortgage Clearing Corporation a real estate mortgage dated August 15, 1978, covering the following described property:

Lot Nine (9), Block Eight (8), LAKE-VIEW HEIGHTS AMENDED Addition to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

Such tract is referred to below as "the Property." This mortgage was recorded with the Tulsa County Clerk August 17, 1978, in book 4347 at page 627. The mortgage tax due thereon was paid.

6. a) On August 17, 1978, Mortgage Clearing Corporation assigned such promissory note and the mortgage securing it to Federal National Mortgage Association by assignment recorded with the Tulsa County Clerk August 23, 1978, in book 4348 at page 963.

b) On July 12, 1989, Federal National Mortgage Association assigned such promissory note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This mortgage assignment was recorded with the Tulsa County Clerk on July 25, 1989, in book 5196 at page 2048.

7. The defendant, Myra Fritz Shade Robinson, was subsequently divorced from Richard D. Shade and was awarded the Property as her sole and separate property subject to the mortgage indebtedness. Such defendant was then married to

Steven Mark Robinson and divorced from him in Osage County District Court Case Number JFD 91-11. In such divorce the defendant, Myra Fritz Shade Robinson, was awarded the Property as her sole and separate property and she has not since remarried.

8. On July 1, 1989, the defendant, Myra Fritz Shade Robinson, entered into an agreement with the plaintiff lowering the amount of the monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose.

9. The defendant, Myra Fritz Shade Robinson, has defaulted under the terms of the note, mortgage and forbearance agreements due to her failure to pay installments when due. Because of such default, the defendant, Myra Fritz Shade Robinson, is indebted to the plaintiff in the amount of \$18,058.49, plus interest at the rate of nine and one-half (9.5%) percent per annum from July 9, 1993, until the date of this judgment, plus interest thereafter at the legal rate until fully paid; plus the costs of this action in the amount of \$300.00 for abstracting and \$8.00 for recording the Notice of Lis Pendens.

10. The defendant, Osteopathic Hospital Founders Association, a corporation d/b/a Oklahoma Osteopathic Hospital, claims an interest in the Property by virtue of a Judgment in Tulsa County District Court Case Number CS 87-

03775 dated September 29, 1987, and recorded with the Tulsa County Clerk October 6, 1987, in book 5056 at page 963.

11. The defendant, County Treasurer, Tulsa County, Oklahoma, and the defendant, Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in or to the Property.

12. Pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED** that the plaintiff have and recover judgment against the defendant, Myra Fritz Shade Robinson, in the principal sum of \$18,058.49 plus interest at the rate of nine and one-half (9.5%) percent per annum from July 9, 1993, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action in the amount of \$308.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the Property.

**IT IS FURTHER ORDERED** that the defendant, Osteopathic Hospital Founders Association, a corporation d/b/a Oklahoma Osteopathic Hospital, have and recover judgment in the amount of \$2,837.43, plus penalties, interest and costs.

IT IS FURTHER ORDERED that the defendants, County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title, or interest in the real property.

IT IS FURTHER ORDERED that upon the failure of the defendant, Myra Fritz Shade Robinson, 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 the Property, according to the plaintiff's election with or without appraisal and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

**Second:**

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

**Third:**

In payment of the judgment rendered herein in favor of the defendant, Osteopathic Hospital Founders Association, a corporation d/b/a Oklahoma Osteopathic Hospital.

**Fourth:**

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** that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED** that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them, be forever barred and foreclosed of any right, title, interest or claim in or to the Property or any part thereof.

**S/ JAMES O. ELLISON**

UNITED STATES DISTRICT JUDGE

Judgment of Foreclosure  
USA v. Myra Fritz Shade Robinson, et al.  
Civil Action No. 92-C-504E

APPROVED:

F. L. DUNN, III  
United States Attorney



Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

---

Daniel M. Webb  
Attorney for defendant  
Oklahoma Hospital Founders Association d/b/a  
Oklahoma Osteopathic Hospital

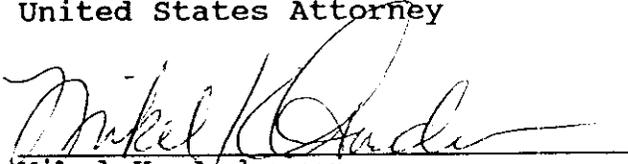


J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

Judgment of Foreclosure  
USA v. Myra Fritz Shade Robinson, et al.  
Civil Action No. 92-C-504E

APPROVED:

F. L. DUNN, III  
United States Attorney



Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



Daniel M. Webb  
Attorney for defendant  
Oklahoma Hospital Founders Association d/b/a  
Oklahoma Osteopathic Hospital

---

J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

ENTERED ON DOCKET

DATE 7-26-93

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JAMES LLOYD GAMBILL; JOAN L. )  
GAMBILL; COUNTY TREASURER, )  
Ottawa County, Oklahoma; and )  
BOARD OF COUNTY COMMISSIONERS, )  
Ottawa County, Oklahoma, )  
 )  
Defendants. )

**FILED**

JUL 23 1993

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

CIVIL ACTION NO. 93-C-478-E

O R D E R

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by F.L. Dunn, III, 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 22 day of July, 1993.

**JAMES O. ELISON**

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

F.L. DUNN, III  
United States Attorney

PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

PB/esr

ENTERED ON DOCKET  
DATE 7-26-93

**FILED**

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

JUL 23 1993

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

RHONDA LYNN HEATH, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BRUCE DUNCAN, BARBARA McCOY, )  
 )  
 MIKE ROMINE, GARY YOUNG, )  
 )  
 JIM WALL, RON SOLE, and the )  
 )  
 CITY OF SAPULPA, )  
 )  
 Defendants. )

Case No. 92-C-291 E

STIPULATION OF DISMISSAL WITH PREJUDICE

All parties to this action hereby stipulate that Counts 1, 2, 3 and 4 of Plaintiff's Complaint should be dismissed with prejudice.

Rhonda Lynn Heath  
RHONDA LYNN HEATH  
Plaintiff

ELLER AND DETRICH  
A Professional Corporation

Steven L. Sessinghaus  
STEVEN L. SESSINGHAUS  
1710 South Boston  
Tulsa, Oklahoma 74010-0200  
(918) 587-5286  
Attorney for Plaintiff

By: John H. Lieber  
JOHN H. LIEBER  
2727 East 21st Street  
Suite 200, Midway Building  
Tulsa, Oklahoma 74114-3533  
(918) 747-8900  
Attorney for Defendants

DATE July 23 1993 FILED

JUL 22 1993

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

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

DAVID C. BURRELL, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 OKLAHOMA ARMY NATIONAL )  
 GUARD CO. B, 1ST BN. 179th )  
 INF., Sapulpa, Oklahoma, )  
 )  
 Defendants )

Case No. 92-C-658-B ✓

ORDER

This matter comes on for consideration of Plaintiff's Appeal (#8) of the Magistrate Judge's Report and Recommendation entered herein on June 11, 1993, which appeal was filed June 16, 1993.

This case was originally filed herein by the *pro se* Plaintiff seeking judicial review of an alleged wrongful discharge from the Oklahoma National Guard in 1986 because "one enlistment person throught (sic) (think) I was a homosexual, because I walk different from the rest of them." Plaintiff alleges he "has exhausted all military remedies in getting a Hon. Discharge, a final decision having been rendered by the Defendant."

Defendant, The Military Department of the State of Oklahoma, moved to dismiss this action pursuant to Rule 4(d)(6), Rule 10(a), and Rule 12(b)(1), (2), (4), (5) and (6) of the Fed.R.Civ.P., because service of the Complaint was not proper, because the form of the Complaint is insufficient, because of lack of subject matter and personal jurisdiction, because of insufficiency of process and

91

service of process, because the Complaint herein fails to state a claim upon which relief can be granted and because the Complaint on its face shows that the action is barred by the applicable statute of limitations.

The Magistrate Judge recommended the matter be dismissed because more than six months have passed since the filing of the Complaint<sup>1</sup>, and Rule 4(j), Fed.R.Civ.P. provides that service be made within 120 days of filing unless good cause can be shown why service was not made within that time. Plaintiff has made no showing of good cause.

The Court concludes, based upon the pleadings and the record herein, that the Report and Recommendation of the Magistrate Judge should be and the same is herewith adopted and affirmed. The Court further concludes this action should be and the same is herewith DISMISSED.

IT IS SO ORDERED, this 22<sup>nd</sup> day of July, 1993.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

---

<sup>1</sup> Almost a year has passed since Plaintiff first attempted to file.

ENTERED ON DOCKET

DATE 7-23-93

**FILED**

JUL 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

JAMES HELMS,

Plaintiff,

vs.

No 93 C 406 E

MARYLAND CASUALTY COMPANY, a Corp., )  
formerly known as AMERICAN GENERAL )  
FIRE & CASUALTY COMPANY, a Corp., )

**ORDER**

UPON Motion of the Defendant and stipulation of the Plaintiff, it is hereby ordered that this case be, and is hereby, transferred to the United States District Court for the Western District of Arkansas.

**JAMES O. ELLISON**

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

  
\_\_\_\_\_  
GARY EATON  
ATTORNEY FOR PLAINTIFF

\_\_\_\_\_  
RICHARD W. WASSALL  
ATTORNEY FOR DEFENDANT

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

BIZJET INTERNATIONAL SALES )  
& SUPPORT, INC., )  
an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
ZEPHYR AVIATION SERVICES, INC., )  
a California corporation, and )  
INDO-AIR FLEET, INC., )  
a California corporation, )  
 )  
Defendants. )

Case No. 92-C-926-C ✓

**F I L E D**

JUL 23 1993 ✕

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

ORDER

THIS MATTER comes before the Court, upon request of Plaintiff, Bizjet International Sales & Support, Inc., ("Bizjet") for entry of this Order pursuant to Bizjet's Motion for Order Enforcing Settlement Agreement filed July 22, 1993, (the "Motion") and the Court's Order of July 16, 1993 regarding that Motion.

1. On June 22, 1993, Plaintiff, Bizjet, moved for an Order Enforcing a Settlement Agreement, requested an expedited hearing thereon, and filed a brief in support thereof.

2. The Court held a hearing on the Motion on July 13, 1993, heard the statements of counsel, reviewed the Court's file, examined the Plaintiff's Motion and examined a copy the Settlement Agreement, a copy of which is attached to this Order.

3. The Motion for Order Enforcing Settlement Agreement was filed June 22, 1993. No party filed any objection thereto and therefore, pursuant to Local Rule 15A, all parties waived any

61

objections to the Motion and the matters raised and plead therein are confessed.

4. Defendant, Indo-Air Fleet, Inc., ("Indo") and Defendant Zephyr Aviation Services, Inc. ("Zephyr") appeared at the hearing on July 13, 1993. Indo stated to the Court that it also sought enforcement of the Settlement Agreement.

5. As a result of the Motion and the hearing thereon, on July 13, 1993, the Court found, in its Order entered July 16, 1993, inter alia, that (i) a settlement and accord has been reached in this matter as memorialized by the written Settlement Agreement, an executed copy of which the Court has reviewed, and (ii) the Settlement Agreement should be enforced according to its terms. The Court ordered Indo to pay the \$546,000.00 called for by the Settlement Agreement, to Bizjet, by July 22, 1993.

6. The Court also ordered that if the above referenced amount was not paid by July 22, 1993, the Court would enter Judgment for Bizjet and against Indo for \$546,000.00, and order such other relief as is appropriate under the terms of the Settlement Agreement.

7. The Court finds that, pursuant to information supplied to it by counsel for Bizjet, Indo has not made the payment as required by the Court's July 16, 1993, Order and that, consequently, therefore, the Court should order as set forth herein.

8. As alleged by Bizjet in its Motion for Order Enforcing Settlement Agreement and as confessed by the parties by their failure to file objections thereto, on May 11, 1993, as a result of

telephone conferences between the principals of Bizjet and Indo, and attorneys for same, an agreement to settle this matter, pending the approval of additional defendant Zephyr Aviation Services, Inc. was reached.

9. Thereafter, within a few days, initial written terms of the agreement were exchanged, and Zephyr gave its approval to the settlement.

10. Shortly thereafter, on or about May 19, 1993, agreement was reached as to the final form of the documents.

11. On July 12, 1993, Indo returned fully executed settlement documents to Bizjet's counsel.

12. The settlement, at the date of the this Order, has still not closed. A reasonable time for its closing has passed.

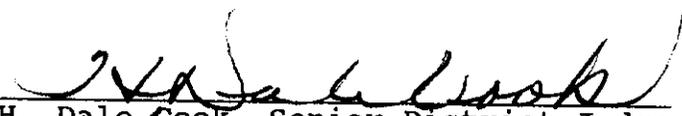
13. The Court therefore finds it appropriate to enter Judgment for Bizjet and against Indo in the amount of \$546,000.00. The judgment will be entered simultaneously herewith. The judgment will accrue interest at the appropriate lawful rate, and of course, if applicable, may give rise to applications for fees and costs by any party deeming themselves entitled thereto.

14. The Settlement Agreement recites that upon receipt by Bizjet from Indo of \$546,000.00, Bizjet shall do certain work on the two aircraft the subject of this action, and thereafter turn over the planes to Indo. The Court finds that it should enforce the Settlement Agreement as closely as possible according to its terms. Therefore, the court orders that once the judgment for

Bizjet and against Indo is satisfied, and only then, do Bizjet's subsequent obligations under the Settlement Agreement arise.

15. The Court finds that the lien of Bizjet on the two aircraft, pursuant to 42 Okla. Stat. §91, as found to exist validly by the Court's Order of April 26, 1993, is preserved and survives the entry of this Order and the judgment. The preliminary injunction granted to Indo by the Order of April 26, 1993, prevented, temporarily, Bizjet from selling the aircraft in foreclosure of its lien, pending the resolution of the merits of this action. The merits are resolved by the Settlement Agreement, this Order enforcing same, and the judgment entered herewith, and the preliminary injunction is therefore dissolved.

Dated this 23<sup>rd</sup> day of July, 1993.

  
H. Dale Cook, Senior District Judge  
United States District Court  
Northern District of Oklahoma

order.3

## SETTLEMENT AGREEMENT

### THE PARTIES

The parties to this Settlement Agreement are BIZJET INTERNATIONAL SALES & SUPPORT, INC., an Oklahoma corporation, ZEPHYR AVIATION SERVICES, INC., a California corporation, and INDO-AIR FLEET, INC., a California corporation. Hereinafter, the parties will be referred to as BizJet, Zephyr and Indo, respectively.

### RECITALS

1. The parties to this Settlement Agreement are parties litigant in a lawsuit currently pending in the United States District Court for the Northern District of Oklahoma, styled and numbered as follows: BizJet International Sales & Support, Inc., Plaintiff v. Zephyr Aviation Services, Inc., and Indo-Air Fleet, Inc., Defendants, Case No. 92-C-926-C (hereinafter referred to as the "Lawsuit").

2. The Lawsuit arises out of disputes by, among and between the parties thereto concerning repair and maintenance work done on two Falcon 20 jet aircraft, Serial No. 108, N101ZE and Serial No. 126, N102ZE, known to the parties as N101 and N102, respectively (collectively, the "Aircraft"). The Lawsuit also concerns disputes regarding the right to possession of and lien rights regarding the Aircraft as well as various and sundry other alleged torts and claims concerning the Aircraft, and the use and possession thereof.

3. The parties hereto desire to settle their differences concerning the disputes among them without any admission of liability by any party all as is set out hereinafter.

**AGREEMENTS FOR PAYMENT,  
PERFORMANCE, RELEASES AND DISMISSALS**

In consideration of the covenants and promises contained herein and the consideration recited herein, the sufficiency of which is hereby acknowledged, BizJet, Zephyr and Indo hereby agree as follows:

1. Indo will arrange for the payment of \$546,000.00 to BizJet. The timing of the payment, as well as the method and verification of the receipt of the payment, shall be satisfactory to BizJet and its attorneys.

2. Indo shall arrange for the delivery, to the BizJet facility in Tulsa, Oklahoma, at Indo's sole cost and expense, landing gear for N102.

3. After the receipt of the funds by BizJet and the arrival of the landing gear at the BizJet facilities, BizJet shall, within approximately three days, complete and fully certify the MCI inspection on N101 as in complete compliance with all applicable rules and regulations and place the landing gear on N102, certifying its proper installation according to manufacturer's specifications.

4. After the completion of the payment and performance recited in the foregoing paragraphs, the releases recited in paragraph 5 shall become effective, and those releases shall become

effective only upon the satisfactory payment and completion of the performance recited heretofore. -

5. BizJet and Indo release and forever discharge each other and their respective successors, assigns, affiliates, subsidiary corporations and parent corporations, as the case may be, and their officers, directors, shareholders, employees, legal representatives, agents, servants and partners, from any and all manner of rights, claims, responsibilities, obligations, causes of action, potential claims and demands, suits, debts, dues, sums of money, accounts, controversies, damages, orders or the like, of whatsoever nature, arising from or related to the facts and circumstances giving rise to the Lawsuit, including any claims or counterclaims presented in such Lawsuit by any of the parties or which any of them could have or should have presented.

BizJet and Zephyr release and forever discharge each other and their respective successors, assigns, affiliates, subsidiary corporations and parent corporations, as the case may be, and their officers, directors, shareholders, employees, legal representatives, agents, servants and partners, from any and all manner of rights, claims, responsibilities, obligations, cause of action, potential claims and demands, suits, debts, dues, sums of money, accounts, controversies, damages, orders or the like, of whatsoever nature, arising from or related to the facts and circumstances giving rise to the Lawsuit, including any claims or counterclaims presented in such Lawsuit by any of the parties or which any of them could have or should have presented.

Zephyr and Indo each reserve and except from this agreement all claims each may have against the other.

6. BizJet, Zephyr and Indo further agree to execute and file all necessary stipulations for dismissal and dismissals with prejudice of the Lawsuit, each party to bear its own costs and fees therein. Nothing herein shall in any manner be construed as a release or waiver of any claims Zephyr and Indo may have against the other, notwithstanding the propriety of asserting any such claims in the Lawsuit.

#### MISCELLANEOUS

7. This Settlement Agreement is made by the parties hereto solely for the purpose of compromising and settling the matters involved in the Lawsuit, without the expense and inconvenience of trial, and it is expressly understood and agreed, as a condition hereof, that neither this Settlement Agreement nor the dismissals to be entered in the Lawsuit shall constitute or be construed to be an admission against any of the parties hereto or as evidencing or indicating in any degree an admission of the truth or correctness of any of the allegations contained in the Lawsuit.

8. The parties agree that they shall not disclose the terms of this Settlement Agreement, nor discuss the claims or defenses asserted in the Lawsuit, with or to any third party, except: (i) by compulsion of a subpoena; (ii) by order of a court or regulatory agency; (iii) by prior written approval of the nondisclosing parties or (iv) to permit the disclosing party to comply with applicable laws, rules, regulations, ordinances or any accounting

or financial reporting requirements of any governing agency or body necessary to the conduct of its business affairs.

9. The parties hereby further agree that they will not, directly or indirectly, aid, advise or counsel, any third parties to commence any legal action or other proceedings, in law or in equity, against the other parties hereto, their respective successors, assigns, affiliates and subsidiary or parent corporations, as the case may be, and their officers, directors and employees, based upon or in any way arising from any or all known and unknown rights, claims, damages, liabilities and/or injuries resulting or to result from the matters alleged and/or causes of action raised or asserted in, or which could have been raised or asserted in, the Lawsuit. Nothing herein shall be construed in any way to limit or restrict the activities of counsel for any of the parties in any way.

10. The terms and conditions hereof shall inure to the benefit of and are made binding upon the parties hereto and their respective successors and assigns.

11. This Settlement Agreement shall be governed by the laws of the State of Oklahoma.

12. All of the agreements, understandings, terms and conditions relating to this Settlement Agreement are set forth herein and this Settlement Agreement supersedes any and all prior agreements, whether written or oral, among the parties regarding the subject matter hereof.

13. The undersigned hereby certify that they have read the terms of this Settlement Agreement, that they have had an opportunity to discuss it with their attorneys and that they understand its terms and effects. The undersigned acknowledge that they are executing this Settlement Agreement of their own volition and that there have been no representations made to them concerning the terms and effects of this agreement other than those contained herein.

IN WITNESS WHEREOF and intending to be legally bound hereby, the undersigned execute the foregoing Settlement Agreement on the date set forth by the signature of the respective party.

BIZJET INTERNATIONAL SALES  
& SUPPORT, INC.

By [Signature]  
Its President  
Date 5-21-93

ZEPHYR AVIATION SERVICES, INC.

By [Signature]  
Its President  
Date 7-12-93

INDO AIR-FLEET, INC.

By [Signature]  
Its President  
Date 7-8-93

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

FILED

BIZJET INTERNATIONAL SALES  
& SUPPORT, INC.,  
an Oklahoma corporation,  
  
Plaintiff,  
  
v.  
  
ZEPHYR AVIATION SERVICES, INC.,  
a California corporation, and  
INDO-AIR FLEET, INC.,  
a California corporation,  
  
Defendants.

JUL 23 1993

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

Case No. 92-C-926-C

JUDGMENT

In accordance with the Court's Order entered on the 23 day  
of July, 1993, regarding the enforcement of the  
Settlement Agreement and an accord as between the parties herein,  
the Court hereby enters judgment in favor of Bizjet International  
Sales & Support, Inc. and against Indo-Air Fleet, Inc., a  
California corporation, in the amount of \$546,000.00. The Judgment  
rendered hereby shall bear interest at the appropriate legal lawful  
rate and shall be exclusive of any costs and fees to be taxed, if  
lawful and appropriate.

The Court finds and expressly determines that there is no just  
cause for delay and expressly directs the entry of this Judgment.

Dated July 23, 1993.

  
H. Dale Cook, Senior District Judge  
United States District Court  
Northern District of Oklahoma

judgment

62

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

ENTERED ON DOCKET

DATE       

MIDFIRST BANK, SSB, an Oklahoma )  
savings and loan association, as )  
agent for The Government )  
National Mortgage Association, )  
Plaintiff, )

vs. )

C. W. HAYNES & COMPANY, INC., )  
a South Carolina corporation; )  
and FIRST CITIZENS BANK & TRUST )  
COMPANY OF SOUTH CAROLINA, )  
a South Carolina corporation, )  
Defendants. )

Case No. C-93-457-B

**F I L E D**

**JUL 22 1993**

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

ORDER

This matter comes before the Court on the Joint Motion of Plaintiff and Defendants for entry of an Order transferring this case to the United States District Court for the District of South Carolina, Columbia Division. The Court has reviewed the Joint Motion and authorities cited therein, and finds that the case should be transferred as requested therein.

ACCORDINGLY, IT IS HEREBY ORDERED that this case be transferred to the United States District Court for the District of South Carolina, Columbia Division, and the Clerk of this Court is hereby ordered to transfer all pleadings and other records pertaining to this action to the Clerk of the United States District Court for the District of South Carolina, Columbia Division.

DATED this 22 day of July, 1993.

**S/ THOMAS R. BRETT**

UNITED STATES DISTRICT JUDGE

DATE 7-22-93

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUL 22 1993

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

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PATRIC M. TAYLOR; COUNTY )  
TREASURER, Ottawa County, )  
Oklahoma; and BOARD OF COUNTY )  
COMMISSIONERS, Ottawa County, )  
Oklahoma, )  
 )  
Defendants. )

CIVIL ACTION NO. 92-C-602-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22 day  
of July, 1993. The Plaintiff appears by F.L. Dunn,  
III, United States Attorney for the Northern District of  
Oklahoma, through Phil Pinnell, Assistant United States Attorney;  
the Defendants, County Treasurer, Ottawa County, Oklahoma, and  
Board of County Commissioners, Ottawa County, Oklahoma, appear by  
Wesley E. Combs, Assistant District Attorney, Ottawa County,  
Oklahoma; and the Defendant, Patric M. Taylor, appears not, but  
makes default.

The Court further finds that the Defendant, Patric M.  
Taylor, was served by publishing notice of this action in the  
Miami News-Record, a newspaper of general circulation in Ottawa  
County, Oklahoma, once a week for six (6) consecutive weeks  
beginning March 28, 1993, and continuing to May 2, 1993, as more  
fully appears from the verified proof of publication duly filed  
herein; and that this action is one in which service by  
publication is authorized by 12 O.S. Section 2004(c)(3)(c).  
Counsel for the Plaintiff does not know and with due diligence

cannot ascertain the whereabouts of the Defendant, Patric M. Taylor, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Patric M. Taylor. 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, F.L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, filed their Answer on July 21, 1992; and that the Defendant, Patric M.

Taylor, has failed to answer and his 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 Ottawa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lots Seven (7) and Eight (8), Block One Hundred Thirty-six (136), in the City of Miami, Ottawa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on July 14, 1987, the Defendant, Patric M. Taylor, 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 \$10,000.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Patric M. Taylor, 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 July 14, 1987, covering the above-described property. Said mortgage was recorded on July 14, 1987, in Book 460, Page 530, in the records of Ottawa County, Oklahoma.

The Court further finds that the Defendant, Patric M. Taylor, 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, Patric M. Taylor, is indebted to the Plaintiff in the principal sum of \$9,303.64, plus interest at the rate of 10 percent per annum from April 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$214.20 (\$3.00 fees for service of Summons and Complaint, \$203.20 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Ottawa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$17.90 for the year 1991-1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Patric M. Taylor, is in default and has no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment against the Defendant, Patric M. Taylor, in the principal sum of \$9,303.64, plus interest at the rate of 10 percent per annum from April 1, 1991 until judgment, plus interest thereafter at the current legal rate of \_\_\_\_\_ percent per annum until paid, plus the costs of this action in the amount of \$214.20 (\$3.00 fees for service of

Summons and Complaint, \$203.20 publication fees, \$8.00 fee for recording Notice of Lis Pendens) plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, have and recover judgment in the amount of \$17.90 for personal property taxes for the year 1991-1992, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Patric M. Taylor, has no right, title, or interest in the subject real property.

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

**First:**

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

**Second:**

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

**Third:**

In payment of Defendants, County Treasurer  
and Board of County Commissioners, Ottawa  
County, Oklahoma, in the amount of \$17.90,  
personal property taxes which are currently  
due and owing.

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

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

~~BY~~ **JAMES O. ELLISON**

---

UNITED STATES DISTRICT JUDGE

APPROVED:

F.L. DUNN, III  
United States Attorney



---

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



---

WESLEY E. COMBS, OBA #13026  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Ottawa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 92-C-602-E

PP/esr

**FILED**

JUL 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**

**HORNER'S INC., a domestic corporation,**

**Plaintiff,**

**v.**

**HUSSMANN CORP., a foreign corporation; AAA  
REFRIGERATION & AIR CONDITIONING,  
INC., a Missouri corporation; and AAA  
REFRIGERATION & AIR CONDITIONING,  
INC., of Chanute, a Kansas corporation,**

**Defendant.**

**NO. 92-C-1112-E**

**STIPULATION AND ORDER  
OF DISMISSAL OF  
HUSSMANN CORPORATION**

Plaintiff Horner's, by and through counsel of record Richard W. Pierson and John W. Woodard, defendant Hussmann, by and through counsel of record William Leach, defendant AAA by and through counsel of record Gregory Nellis, hereby stipulate as follows:

1. That the defendant Hussmann be dismissed from this cause of action with prejudice and with each party bearing its own costs;

2. This stipulation for dismissal is entered into for the reason that the Plaintiff has now become aware that the defendant AAA Refrigeration is admitting to the installation of the reach-in freezers at the Jay, Oklahoma store owned by Horner's. Since that removes the issue as to whether or

1 not Hussmann potentially installed the subject reach-in freezers, Hussmann no longer is a viable  
2 defendant in this lawsuit, and therefore is being released by the Plaintiff pursuant to this stipulation.  
3  
4

5 DATED this 15th day of July, 1993  
6

7 PEERY, HISCOCK, PIERSON & RYDER  
8 Attorneys for Plaintiff

9  
10 By:   
11 Richard W. Pierson

12 FELDMAN, HALL, FRANZEN, WOODARD  
13 & FARRIS  
14

15  
16 By:   
17 John W. Woodard

18 RHODES, HIERONYMUS, JONES,  
19 TUCKER & GABLE

20 By:   
21 William Leach  
22 Attorney for Hussmann

23 THOMAS, GLASS, ATKINSON, HASKINS,  
24 NELLIS & BOUDREAUX

25 By:   
26 Gregory Nellis  
27 Attorney for AAA Refrigeration  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**ORDER OF DISMISSAL**

The parties having stipulated to an order of dismissal, and the court having considered the stipulation, now therefore, it is hereby

**ORDERED, ADJUDGED AND DECREED** that the defendant Hussmann is dismissed from this proceeding with prejudice, and with each party to bear its costs, pursuant to CR 41(a).

DATED THIS 27 day of July, 1993.

S/ JAMES O. ELLISON

\_\_\_\_\_  
Judge

PEERY, HISCOCK, PIERSON & RYDER

  
Richard W. Pierson  
Attorney for Plaintiff

FELDMAN, HALL, FRANDEN, WOODARD  
& FARRIS

  
John R. Woodard, III  
Attorney for Plaintiff

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

RHODES, HIERONYMUS, JONES  
TUCKER & GABLE



---

William Leach  
Attorney for Hussmann Corporation



---

Gregory Nellis  
Attorney for AAA Refrigeration

ENTERED ON DOCKET

DATE 7-22-93

**FILED**

JUL 22 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

JUDY A. WARD,

Plaintiff,

v.

DEPARTMENT OF HEALTH & HUMAN  
SERVICES,

Defendant.

92-C-0527-E

ORDER

The Secretary denied Social Security benefits to Plaintiff Judy Ward. Ward now appeals that decision, raising three issues: 1) Substantial evidence does not support the Secretary's finding that she can do sustained work on a regular basis; 2) The Secretary ignored the "treating physician rule"; and 3) Her multiple sclerosis condition meets a listed impairment. For the reasons discussed below, the case is remanded.

I. Standard Of Review

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. § 405(g).<sup>1</sup> The undersigned's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). The court "may not reweigh the evidence or try the issues de novo or substitute its judgment for that of the Secretary." *Pierre v. Sullivan*, 884 F.2d 799, 802 (5th

---

<sup>1</sup> Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

Cir. 1989).<sup>2</sup>

The claimant bears the burden of proving disability under the Social Security Act. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). If he shows that his disability precludes returning to his prior employment, the burden of going forward shifts to the Secretary, who must then show that the claimant retains the capacity to perform another job and that this job exists in the national economy. *Id.*

When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation;<sup>3</sup> (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). If the Secretary finds the claimant disabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). In this case, the ALJ found that Ward could return to her past relevant work as a restaurant manager.

## II. Summary of Evidence/Procedural History

Judy Ward was born in 1944. She stands 5-foot-4 and weighs 155 pounds. She completed 12th grade. For 19 years, Ward worked in a restaurant owned by her husband. After having been diagnosed with multiple sclerosis, Ward quit working. She then filed an

---

<sup>2</sup> Substantial evidence is "more than a scintilla; it is relevant evidence as a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" will be found only where there is a conspicuous absence of credible choices or no contrary medical evidence. *Trimiar v. Sullivan*, No. 90-5249, slip op. at 6 (10th Cir. April 23, 1989).

<sup>3</sup> Appendix 1 is a listing of impairments for each separate body system. 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991).

application for disability benefits, claiming an onset date of September of 1988. In the application, Ward stated that her "multiple sclerosis, fatigue, pain, double vision and dizziness" prevented her from working.

Ward's request for benefits resulted in a May 17, 1991 hearing before the ALJ. The ALJ heard testimony from Ward, the Secretary's medical expert and a vocational expert. In addition, several doctors who had examined Ward submitted reports to the ALJ.

#### A. The Evidence

At the hearing, Ward testified that she has had "several" attacks since October of 1988. She testified that the attacks last anywhere from four weeks to four months. During such attacks, Ward said that she "can't do anything" including work. Ward also testified that these attacks make her sleepy and bring about double vision, dizziness and fatigue. Her last attack took place in November of 1990. *Record, pp. 52-67.*

Dr. Harold Goldman, an M.D. and the Secretary's medical expert, also testified. *Id. at 19-29.* Goldman, who did not personally examine Ward, said he looked at reports from the various doctors who had examined Ward. Those medical reports, Goldman testified, showed that she was diagnosed with multiple sclerosis in 1988 and possibly could have had the condition as early as 1984.<sup>4</sup> Goldman also testified that Ward, while visually impaired, could lead a normal life. He also stated that she did not meet listing 11.09. Goldman further testified:

**Multiple sclerosis is a rather strange disease, however, and patients have**

---

<sup>4</sup> Goldman described Ward as having the "good" multiple sclerosis. In explaining that statement, he testified that there are usually three patterns of occurrence of multiple sclerosis. The first is a single attack which disappears. The second is where patients go "downhill" for about two to four years without remissions. The third group, which is where Goldman placed Ward, is where the patient "has attacks, and remissions, and may plateau off and may last many years and may stop and leave no residual or may leave some residual." *Record at 69.*

attacks when they do nothing at all. If they rest in between the attack and are careful -- as this claimant says, and she still has attacks whether she rests or not -- so the answer is, is not for a patient to be very careful, because unfortunately, they still have attacks. *Id. at 70.*

Dr. William Young, a vocational expert, testified that attacks such as the ones Ward described would prevent her from working on a regular basis.<sup>5</sup> Young also indicated that Ward might have problems working when she was not having an attack. *Id. at 79-82.*

The other medical evidence shows that Ward was diagnosed with Multiple Sclerosis in 1988. Since then, various doctors have discussed her complaints of fatigue, dizziness, problems with diplopia and double vision.<sup>6</sup> Of particular importance is a May 16, 1991 letter from Dr. Barbara Hastings, a treating physician:

The...patient has been under my neurological care since March of 1989 for multiple sclerosis...The patient's above deficits compromise her ability to function in terms of sustained activity with either her hands or her legs and especially with sustained activities requiring her to be up on the feet and/or walking for any period of time. She has above and beyond the common multiple sclerosis problem of excessive fatigability, which literally incapacitates this patient. For all of the above reasons, I believe the patient is disabled and unable to work or be trained in any occupation in which she could sustain her performance... *Id. at 235-236.*

After the hearing, the ALJ denied benefits to Ward. He found that Ward did not meet any listing in Appendix 1, Subpart P. The ALJ also found that Ward's subjective allegations of pain were neither credible or medically substantiated. He wrote: The claimant has had occasional exacerbations of multiple sclerosis, but there is no indication that the claimant was disabled for more than a short period of one or two months, and

---

<sup>5</sup> The ALJ asked Young the following question: "If a person did have a problem with a -- multiple sclerosis and they'd have periods where they would be -- maybe a couple of times a year where they would have these attacks where they'd have excessive fatigue and visual problems, would they be able to function on these jobs on a consistent regular basis?" Answered Young: "No they would not." *Id. at 80.*

<sup>6</sup> The ALJ's summary of the medical evidence is adopted in this *Order, Record* at 35-39.

there is no indication that the claimant has been disabled for one year at a time in the record." *Id.* at 38.

The ALJ also noted that, as a general rule, Dr. Hastings' May 16 letter should be given "great weight." *Id.* Yet, he concluded that the letter was not substantiated by Hastings' other examinations of Ward. Wrote the ALJ:

The claimant's testimony of complete disability, to the point of being confined to a home at a less than sedentary level, is simply considered to be an exaggeration. There is nothing in the medical record that would indicate the claimant is homebound. The claimant has reported that she is feeling better to her doctor at various times, and certainly at her last examination she appeared to be functioning well. *Id.*

After finding Ward's complaints of pain to not be credible, the ALJ then found that Ward could return to her past relevant work as a restaurant manager. Consequently, the ALJ found that Ward was not disabled and could not receive benefits under §§ 216(i) and 223 of the Social Security Act. *Id.* at 39-40.

### III. Legal Analysis

The first issue is whether substantial evidence supports the ALJ's decision that Ward can engage in substantial gainful activity, and, as a result, return to her past relevant work. The Social Security Act defines disability as the

**inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. §423(d)(1)(A).**

In the instant case, one of the ALJ's reasons for denying benefits was that he had "no indication that the claimant was disabled for more than a short period of one or two months, and there is no indication that the claimant has been disabled for one year at a

time in the record." *Record at 38*. That statement was one reason for the ALJ's decision.

The ALJ's analysis is similar to one made in *Singletary v. Bowen*, 798 F.2d 818 (5th Cir. 1986). In that case, doctors diagnosed a 29-year-old claimant with long-term mental problems. Those problems caused sporadic employment as the claimant held a variety of short-term jobs. After analyzing such facts, the ALJ in *Singletary* wrote that the claimant's mental condition "does not appear to have been severe enough to have prevented substantial gainful employment for more than short periods of time - far less than twelve continuous months." *Id. at 821*.

On appeal, the Fifth Circuit concluded that the ALJ misunderstood the duration requirement: "The statute quite clearly requires that it is the impairment only which must last for a continuous period...That statute does not require that a claimant be unable to engage in work during the entire 12 month period." *Id. at 821*. Also, see *Freemyer v. Sullivan*, 723 F.Supp. 1417, 1419 (D. Kan. 1989).

In the case at-bar, substantial evidence clearly shows that Ward has had multiple sclerosis since 1988, and, as a result, her impairment has lasted for more than 12 months. Therefore, the pertinent question is whether the severity of her impairment prevented substantial gainful activity. A condition that does not allow a person to work on a regular basis precludes substantial gainful activity. *Dix v. Sullivan*, 900 F.2d 135, 138 (8th Cir. 1990), quoting *Broadbent v. Harris*, 698 F.2d 407, 413 (10th Cir. 1983). Furthermore,

**A finding that a claimant is able to engage in substantial gainful activity requires more than a simple determination that the claimant can find employment and that he can physically perform certain jobs; it also requires a determination that the claimant can hold whatever job he finds for a significant period of time. *Parsons v. Heckler*, 739 F.2d 1334, 1340 (8th Cir. 1984).**

The facts in *Dix* are similar to the case here. Joan Dix, the claimant, was diagnosed as having Crohn's disease in 1970.<sup>7</sup> From 1970 to 1976, Dix did not work. However, between 1976 and 1985, Dix was able to work regularly because the disease was "inactive." She applied for benefits in 1985 because the disease resurfaced, causing monthly "flare-ups" that rendered her incapable of performing most activities. Based on these facts, the ALJ found that Dix was not disabled due to the "inconsistencies of record." *Dix*, 900 F.2d at 136.

On appeal, the Eighth Circuit rejected the ALJ's conclusion. It stated that "sporadic or transitory activity" does not disprove disability. Furthermore, the court stated that, while the record "establishes that Dix receives occasional reprieves from her pain and symptoms, she is not capable of holding a job for a significant period of time." *Id.* at 138.

The facts in *Singletary* and *Dix* can arguably be distinguished from the case at-bar. In *Singletary*, the claimant had a long-term mental impairment, and the claimant in *Dix* had more frequent flare-ups than does Ward in this case. However, the reasoning is still the same: Ward's periodic attacks could prevent her from engaging in substantial gainful activity.

The medical evidence clearly shows that Ward suffers from multiple sclerosis. It shows that she has suffered several attacks since 1988. According to her testimony (which is not refuted by any other evidence), the attacks induce vision problems, dizziness and fatigue, which preclude her from working. The ALJ acknowledges as much, but -- since

---

<sup>7</sup> Crohn's disease is a chronic, inflammatory disease of the gastrointestinal tract which produces symptoms such as severe abdominal pain, cramping, nausea, fatigue, diarrhea, and insomnia. The disease is often accompanied by periods of inactivity.

the attacks were infrequent -- he still concluded that Ward could engage in substantial gainful activity.

Another puzzling aspect of the ALJ's decision concerns the testimony of the vocational expert. Dr. Young stated that a person such as Ward who suffered multiple sclerosis attacks a "couple of times a year" could not engage in substantial gainful activity. The ALJ ignored such testimony.

The ALJ also did not give substantial weight to the May 16, 1991 letter from Dr. Hastings, one of Ward's treating physicians. The letter stated that Ward was "disabled and unable to work or be trained in any occupation in which she could sustain her performance." In discounting that letter, the ALJ concluded -- with little explanation -- that the letter was "inconsistent" with Hastings' other findings. Such an explanation, without more, does not meet the requirements of the treating physician rule. *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984).<sup>8</sup>

#### IV. Conclusion

The question is whether Ward can engage in substantial gainful activity. Substantial evidence does support the finding that Ward, when she is not having an multiple sclerosis attack, can engage in substantial gainful activity. However, such a finding misses the point: What job, if any, can she hold for a significant period of time?<sup>9</sup>

---

<sup>8</sup> In *Jozefowicz v. Heckler*, 811 F.2d 1352 (10th Cir. 1987), the court wrote: "Unless good cause is shown to the contrary, the Secretary must give substantial weight to the testimony of the claimant's treating physician. And if the treating physician's opinion is to be disregarded, specific, legitimate reasons for this action must be set forth. *Jozefowicz v. Heckler*, 811 F.2d 1352 (10th Cir. 1987).

<sup>9</sup> In *Parsons supra*, the court stated that "the ability of the claimant to perform jobs in the national economy must take into account the actual ability of the claimant to find and hold a job in the real world." Exactly why the ALJ ruled the way he did is unclear. It appears that he based part of his decision on the fact that Ward's husband owns a restaurant; however, the more pertinent question is whether Ward could engage in substantially gainful activity as a manager in any restaurant -- not one owned by her husband. If she can not, the analysis must

Additional fact-finding is necessary to answer such a question. First, it is unclear from the record as to how many "attacks" Ward has suffered from 1988 to date. The second question is how long the attacks keep her from working. The medical evidence is sketchy on this point. In addressing this issue, additional evidence and/or testimony must be taken from Dr. Hastings, the vocational expert, and, if needed, the Secretary's medical expert. Once the additional fact-finding is concluded, the ALJ must re-examine his decision in light of the foregoing authority. The case is REMANDED.

SO ORDERED THIS 21<sup>st</sup> day of July, 1993.

  
JAMES O. ELLISON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

---

*proceed to the fifth step.*

DATE 7-22-93

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

CESSNA FINANCE CORPORATION, )  
 )  
Plaintiff. )

vs. )

A. F. BUSH and TERESA L. BUSH, )  
d/b/a SKIP BUSH & ASSOCIATES, )  
 )  
Defendants. )

Case No. 93-C-306-E

**FILED**

JUL 22 1993

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

**AGREED JOURNAL ENTRY OF JUDGMENT**

This matter comes on for hearing on the stipulation of the plaintiff, Cessna Finance Corporation, and defendants, A. F. Bush and Teresa L. Bush. This Court, having reviewed the pleadings on file and having been advised that the defendants stipulate to the entry of judgment, the Court makes the following findings:

1. On July 5, 1991, defendants executed a Promissory Note (the "1991 Note") in favor of CFC in the principal amount of Eighteen Thousand Seven Hundred Seventeen and 77/100's Dollars (\$18,717.77).

2. The 1991 Note provides for the payment of interest from July 5, 1991 on the unpaid balance at the annual percentage rate of 12% computed on a daily basis until the principal is paid in full.

3. The 1991 Note matured on July 5, 1992, and is now delinquent. As of April 28, 1993, the outstanding balance was Eleven Thousand One Hundred Twenty-Three and 82/100's Dollars (\$11,123.82), with interest continuing to accrue at Three and 10/100's Dollars (\$3.10) per day until paid.

4. On March 19, 1992, defendant, A. F. Bush, on behalf of himself and Teresa L. Bush, executed a Promissory Note (the "1992 Note") in favor of CFC in

the principal amount of Two Hundred Thirty-Eight Thousand One Hundred Ten and 03/100's Dollars (\$238,110.03).

5. The 1992 Note provides for the payment of interest on the unpaid balance at the rate of 8.25% per annum until paid in full. The Note further provides that on the 15th day of each month following the date of this Note, the Interest Rate shall be adjusted to reflect the increase or decrease in the prime lending rate in effect on the first Tuesday of that month at the Continental Illinois National Bank and Trust Company, Chicago, Illinois (the "Prime Rate"), and, on that date, the Interest Rate shall be adjusted to an amount equal to the Prime Rate plus 1.75% (hereinafter the "Note Rate").

6. The 1992 Note matured on September 19, 1992, and is now delinquent. As of April 28, 1993, the outstanding balance was Two Hundred Fifty-Nine Thousand Nine Hundred Seven and 13/100's Dollars (\$259,907.13), with interest continuing to accrue at the Note Rate until paid.

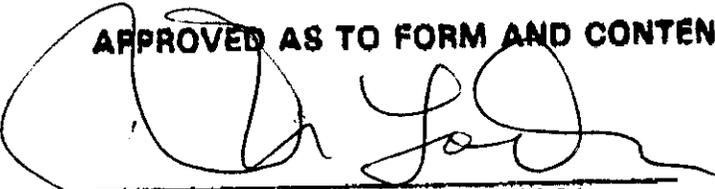
**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the plaintiff, Cessna Finance Corporation have and recover judgment against A. F. Bush and Teresa L. Bush on Count I of the Complaint in the sum of \$11,123.82 with interest continuing to accrue on that amount at \$3.10 per day from April 29, 1993 until paid.

**IT IS FURTHER ORDERED** that plaintiff have and recover judgment against A. F. Bush and Teresa L. Bush on Count II of the Complaint in the sum of \$259,907.13 with interest continuing to accrue on that amount at the Note Rate from April 29, 1993 until paid.

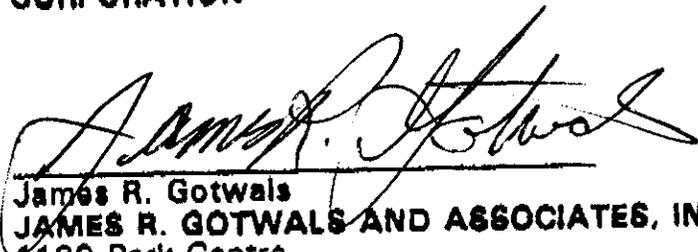
IT IS FURTHER ORDERED that plaintiff be awarded costs and a reasonable attorney's fee in the amount of \$1,000.00.

  
JAMES O. ELLISON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

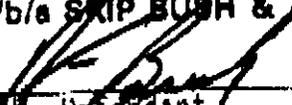
APPROVED AS TO FORM AND CONTENT:

  
Thomas M. Ladner, OBA #5161  
NORMAN & WOHLGEMUTH  
2900 Mid-Continent Tower  
Tulsa, Oklahoma 74103  
(918) 583-7571

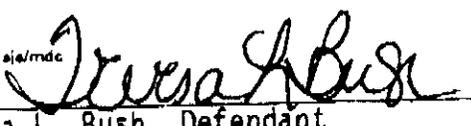
ATTORNEYS FOR CESSNA FINANCE  
CORPORATION

  
James R. Gotwals  
JAMES R. GOTWALS AND ASSOCIATES, INC.  
1130 Park Centre  
526 South Main Street  
Tulsa, Oklahoma 74103-4512  
(918) 599-7088

ATTORNEYS FOR A. F. BUSH and TERESA L.  
BUSH, d/b/a SKIP BUSH & ASSOCIATES

  
A. F. Bush, Defendant

cess.bush.eja/mdc

  
Teresa L. Bush, Defendant

DATE 7-22-93

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

**FILED**

JUL 22 1993

Thrifty Rent-A-Car System, Inc., \*\*

Plaintiff, \*\*

vs. \*\*

Thomas A. Toye, et al, \*\*

Defendants. \*\*

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

No. 91-C-739-E

**Final Judgment**

The Court entered an "Order and Judgment" in this matter on October 27, 1992 in which the Court granted summary judgment in favor of Defendants on the issue of contract interpretation. The parties were directed in that Order and Judgment to advise the Court concerning the resolution of the remaining accounting and post-closing adjustments issues. In a "Joint Stipulation" filed by the parties on May 18, 1993, the parties advised the Court of the resolution of the accounting and post-closing adjustments. Based upon the foregoing,

IT IS HEREBY ORDERED AND ADJUDGED that

Thomas A. Toye, Hefflefinger, Inc. and Salient Group, Inc. recover from Thrifty Rent-A-Car System, Inc. the amount of \$244,715.82, with interest thereon at the rate of 3.54% as provided by law, and the costs of this action.

Dated this 21 day of July, 1993.

S/ JAMES O. ELLISON

James O. Ellison, Chief Judge

ENTERED ON DOCKET

DATE 7-22-93

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

**FILED**

MICHAEL CURRAN & ASSOCIATES, )  
 INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 GREAT LAKES GAS TRANSMISSION )  
 LIMITED PARTNERSHIP, et al., )  
 )  
 Defendants. )

JUL 22 1993

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

92-C-738-E

ORDER

This case was opened, pursuant to Rule 45 of the Federal Rules of Civil Procedure, to enforce a subpoena issued by this court on August 13, 1992, ordering Willbros Butler Engineers, Inc., located in Tulsa, Oklahoma, to produce for inspection certain documents to plaintiff to assist in discovery related to Case No. 92-924, filed in the United States District Court for the Southern District of Texas, Houston Division. A hearing was held on September 17, 1992 and the Motion to Compel Willbros Butler Engineers, Inc. to Comply with Plaintiff's Subpoena Duces Tecum (Docket #1)<sup>1</sup> was granted.

As the cause is proceeding in the Southern District of Texas, this case is closed.

Dated this 21<sup>st</sup> day of July, 1993.

  
 JAMES O. ELLISON, CHIEF  
 UNITED STATES DISTRICT JUDGE

---

<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.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUL 21 1993

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

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
CHARLES R. YORK aka CHARLES )  
RICHARD YORK; JUANITA YORK; )  
COUNTY TREASURER, Washington )  
County, Oklahoma; and BOARD OF )  
COUNTY COMMISSIONERS, Washington )  
County, Oklahoma, )  
)  
Defendants. )

CIVIL ACTION NO. 93-C-463-B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 21 day  
of July, 1993. The Plaintiff appears by F. L. Dunn,  
III, United States Attorney for the Northern District of  
Oklahoma, through Phil Pinnell, Assistant United States Attorney;  
the Defendants, Charles R. York aka Charles Richard York; Juanita  
York; County Treasurer, Washington County, Oklahoma; and Board of  
County Commissioners, Washington County, Oklahoma, appear not,  
but make default.

The Court being fully advised and having examined the  
court file finds that the Defendant, Charles R. York aka Charles  
Richard York, acknowledged receipt of Summons and Complaint on  
May 20, 1993; that the Defendant, Juanita York, was served with  
Summons and Complaint on June 22, 1993; that the Defendant,  
County Treasurer, Washington County, Oklahoma, acknowledged  
receipt of Summons and Complaint on May 24, 1993; and that  
Defendant, Board of County Commissioners, Washington County,  
Oklahoma, acknowledged receipt of Summons and Complaint on  
May 18, 1993.

It appears that the Defendants, Charles R. York aka Charles Richard York; Juanita York; County Treasurer, Washington County, Oklahoma; and Board of County Commissioners, Washington County, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on July 23, 1990, Charles Richard York and Juanita York filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-02070-C. On November 19, 1990, a Discharge of Debtor was entered in this case discharging the debtors from all dischargeable debts. Subsequently, Case No. 90-02070-C, United States Bankruptcy Court, Northern District of Oklahoma, was closed on January 15, 1991.

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

A part of the SE $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 21, Township 28 North, Range 13 East, Washington County, Oklahoma, described as follows: Beginning at a point that is 165 feet North of Southwest corner of the SE $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 21, Township 28 North, Range 13 East; thence North along West line of said SE $\frac{1}{4}$  of the NE $\frac{1}{4}$  for a distance of 67.5 feet; thence East 130 feet; thence South 67.5 feet; thence West 130 feet to the point of beginning, "subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record".

The Court further finds that on March 21, 1988, Charles R. York and Juanita York executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$24,940.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Charles R. York and Juanita York executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated March 21, 1988, covering the above-described property. Said mortgage was recorded on March 21, 1988, in Book 847, Page 1796, in the records of Washington County, Oklahoma.

The Court further finds that the Defendants, Charles R. York aka Charles Richard York and Juanita York, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Charles R. York aka Charles Richard York and Juanita York, are indebted to the Plaintiff in the principal sum of \$26,192.86, plus accrued interest in the amount of \$6,701.72 as of January 8, 1993, plus interest accruing thereafter at the rate of 10 percent per annum or \$7.1761 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$23.00 (\$15.00 fees for service of Summons and Complaint, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Washington County, Oklahoma, 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, the United States of America, acting through the Farmers Home Administration, have and recover judgment in rem against the Defendants, **Charles R. York aka Charles Richard York and Juanita York**, in the principal sum of \$26,192.86, plus accrued interest in the amount of \$6,701.72 as of January 8, 1993, plus interest accruing thereafter at the rate of 10 percent per annum or \$7.1761 per day until judgment, plus interest thereafter at the current legal rate of 3.54 percent per annum until paid, plus the costs of this action in the amount of \$23.00 (\$15.00 fees for service of Summons and Complaint, \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, County Treasurer and Board of County Commissioners, Washington County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, **Charles R. York aka Charles Richard York and Juanita York**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma,

commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

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

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

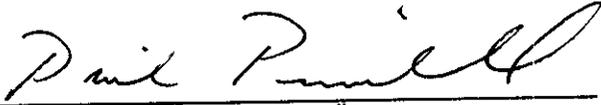
**S/ THOMAS R. BRETT**

---

UNITED STATES DISTRICT JUDGE

APPROVED:

F. L. DUNN, III  
United States Attorney

---

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

Judgment of Foreclosure  
Civil Action No. 93-C-463-B

PP/css

ENTERED ON DOCKET

JUL 22 1993

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

FILED

PHYLLIS M. RASKIN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 DEPARTMENT OF THE TREASURY, )  
 INTERNAL REVENUE SERVICE, )  
 )  
 Defendants. )

JUL 22 1993  
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

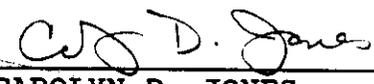
Case No. 93-C-1030-B

STIPULATION OF DISMISSAL

It is hereby stipulated and agreed that the complaint in the above-entitled action filed against the United States of America, Department of the Treasury, Internal Revenue Service be dismissed without prejudice, the parties to bear their respective costs, including any possible attorneys' fees or other expenses of this litigation.

F. L. DUNN, III  
United States Attorney

  
THOMAS G. POTTS OBA NO. 7254  
Houston and Klein, Inc.  
Suite 700  
320 South Boston Avenue  
Tulsa, Oklahoma 74103-3712  
Telephone: (918) 583-2131  
Attorneys for the plaintiff

  
CAROLYN D. JONES  
Trial Attorney, Tax Division  
U.S. Department of Justice  
P.O. Box 7238  
Ben Franklin Station  
Washington, D.C. 20044  
Telephone: (202) 514-6637  
Attorneys for the defendant

FILED  
DATE JUL 22 1993

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

FILED  
JUL 21 1993  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

LESLIE R. SELLERS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 WILLIS B. FRIEND, )  
 )  
 Defendant. )

92-C-1105-B ✓

ORDER

Appellant received a \$110,000 state court judgment against Appellee plus an additional \$10,000 in punitive damages. Appellee then filed bankruptcy. The Bankruptcy Court subsequently discharged the punitive damage portion of the judgment pursuant to 11 U.S.C. §523(a)(9). Appellant now challenges that decision.

I. Summary of Facts

On August 14, 1987, a car driven by Appellee Willis Boyd Friend collided with another car, injuring Appellant Leslie Sellers. At the time of the collision, Friend was arrested by Broken Arrow Police for driving under the influence. Chemical breath tests showed that Friend had an alcohol concentration of .17 percent. He was subsequently convicted of driving while intoxicated while impaired by alcohol.

Sellers then sued Friend, Oklahoma Farm Bureau Mutual Insurance Company and Kansas City Fire and Marine Insurance Company in state court for the injuries she received as a result of Friend's drunk driving. On January 17, 1992, a jury awarded Sellers \$110,000 in actual damages and an additional \$10,000 in punitive damages. The

g

insurance companies paid the actual damages, leaving Friend liable for the \$10,000 in punitive damages.<sup>1</sup>

On March 23, 1992, Friend filed Chapter 7 bankruptcy. Nearly a month later, Sellers requested that the Bankruptcy Court find the \$10,000 punitive damage "debt" nondischargeable. *See, Complaint To Determine Dischargeability of Debt*. The Bankruptcy Court, however, ruled against Sellers and decided the debt was discharged pursuant to 11 U.S.C. §523(a)(9). Sellers then appealed to this Court.

## II. Legal Analysis

In an earlier decision, this Court concluded that, as a general rule, punitive damages can be held to be nondischargeable. *See, Bryan v. Manley, Case No. 92-C-0029-B (docket #34)*. *Also, see In Re Dahlstrom*, 129 B.R. 240 (Bankr. D. Utah 1991)(most courts addressing the issue have held punitive damages may be held to be nondischargeable).

Therefore, since punitive damages may be held to be nondischargeable, the issue here is whether, under the circumstances of this case, the Bankruptcy Court erred in discharging the \$10,000 in punitive damages pursuant to 11 U.S.C. §523(a)(9). The pertinent part of 523(a)(9) reads:

**(a) a discharge under section 727...of this title does not discharge an individual debtor from any debt...(9) for death or personal injury by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug or another substance.**

In analyzing §523(a)(9), the Court finds a Ninth Circuit case persuasive. *In Re Adams*, 761 F.2d 1422 (9th Cir. 1985), involved facts similar to the case at bar. A drunk

---

<sup>1</sup> *The Stipulation of Facts* states that "the full amount of the debt relating to the verdict for actual damages, and interest thereon, has been satisfied by the various insurance companies providing coverage. No amount of the \$10,000 debt owed by the Defendant-Debtor Willis Boyd Friend for punitive damages, nor any post-judgment interest thereon, has been paid."

driver collided with another car, injuring plaintiff. A jury awarded plaintiff \$258,000 in general damages and an additional \$75,000 in punitive damages as a result of the accident. The drunk driver filed Chapter 7 bankruptcy. *Id. at 1423-1424*. The district court found that both the general and punitive damages awarded were nondischargeable. On appeal, the Ninth Circuit agreed. After analyzing §523(a)(6) and §523(a)(9), the court wrote:

There is no evidence in the legislative history underlying either section 523(a)(6) or section 523(a)(9) that suggests that Congress intended to limit the scope of nondischargeability to punitive damages...Accordingly, we conclude that both compensatory and punitive damages are subject to findings of nondischargeability pursuant to sections 523(a)(6) and 523(a)(9). *Id. at 1428.*<sup>2</sup>

A decision by the Third Circuit bolsters the reasoning in *Adams*. In *Lugo v. Paulsen*, 886 F.2d 602 (3rd Cir. 1989), the court noted that New Jersey state law levies a surcharge on convicted drunk drivers.<sup>3</sup> Robert Logo was convicted of driving under the influence, and, as a result, the state billed him \$3,000 payable over three years. Logo filed Chapter 7 bankruptcy while he still owed the \$3,000.

The Third Circuit found that the \$3,000 surcharge was nondischargeable under §523(a)(9). The court, in thoroughly examining the statute's legislative history, found that the legislature's paramount concern was to deter drunk driving. *Id. at 610*. The court also stated, citing *In re Hudson*, 859 F.2d 1418, 1423 (9th Cir. 1988), that Congress had three objectives in passing §523(a)(9): (1) to deter drunk driving; (2) to ensure that those who

---

<sup>2</sup> The issue in *In Re Adams* was different than the one in the instant case. There, the appellant argued that the actual damages stemming from the state court judgment should be discharged. In the case at bar, the Bankruptcy Court held that the punitive damages should be discharged. The issue of whether the actual damages should be discharged was not raised by the parties.

<sup>3</sup> The surcharges under what is called the "Merit Rating Plan" fund the New Jersey Automobile Full Insurance Underwriting Association. The Plan provides that if a driver fails to pay the surcharge, his or her driver's license will be revoked.

caused injury by drunk driving did not escape civil liability through the bankruptcy laws; and (3) to protect victims of drunk driving. *Lugo*, 886 F.2d at 610. The court also wrote:

We conclude nothing in the congressional record suggests that Congress intended to limit application of § 523(a)(9) solely to civil tort judgments. We also conclude that Congress intended § 523(a)(9) to act as a deterrent to drunk driving. We recognize that Merit Rating Plan surcharges are civil and remedial, rather than punitive, in nature. Nevertheless, they do arise as a consequence of driving while intoxicated and therefore may serve to deter drunk driving. (*emphasis added*) *Id.*

Applying the foregoing analysis to the case at bar, the punitive damages assessed against Friend should not have been discharged. Several reasons lead to this conclusion. First, the Court finds the reasoning in *Adams* persuasive: "both compensatory and punitive damages are subject to findings of nondischargeability" pursuant to §523(a)(9).<sup>4</sup> Second, as discussed in *Lugo*, the purpose behind the statute was to deter drunk driving. In the instant case, the jury assessed punitive damages against Adams. Punitive damages typically serve to deter future conduct. *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716 (Okla. 1983).

A third reason for holding the punitive damages nondischargeable focuses on another objective of §523(a)(9): "to ensure that those who caused injury by drunk driving [do not] escape civil liability through the bankruptcy laws." In the instant case, the facts show that various insurance companies paid the \$110,000 in actual damages. Friend paid "no amount of the \$10,000" punitive damage award prior to bankruptcy. *See, Stipulated Facts, filed November 9, 1992.* Allowing him to now discharge the punitive damages -- and, in effect, escape monetary liability for his actions -- does not deter drunk driving. It simply

---

<sup>4</sup> In a footnote, the Tenth Circuit wrote: "Subsequent to oral argument, the case of *In Re Adams*... was brought to our attention. We have carefully reviewed the opinion, but do not agree with its interpretation of §523(a)(6) or its retroactive application of §523(a)(9)." *In Re Compos*, 768 F.2d 1155, 1159, fn. 2 (10th Cir. 1985). That case, however, did not address whether a debt for punitive damages should be discharged under §523(a)(9).

allows Friend to circumvent the consequences of his conduct by using §523(a)(9). As a matter of public policy, the Court does not find that Congress intended such a result.

Furthermore, by holding punitive damages to be nondischargeable, the Court does not find, under the circumstances here, the decision unduly interferes with the Bankruptcy Code's policy of a fresh start. No constitutional or fundamental right to a bankruptcy discharge exists; a "fresh start" is only available to the "honest but unfortunate debtor." *Grogan v. Garner*, 111 S.Ct. 654, 659 (1991)(quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934)).

In reaching this decision, the Court does not lay down a hard and firm rule that, in all cases, §523(a)(9) mandates that punitive damages be nondischargeable. However, the Court does find, based on the facts presented here, that the Bankruptcy Court's decision to discharge the \$10,000 punitive damage award was improper. Therefore, the Bankruptcy Court's decision is **REVERSED** and the Bankruptcy Court is directed to enter an order consistent herewith.

SO ORDERED THIS 21<sup>st</sup> day of July, 1993.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 7-22-93

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 JIMMIE CARR; )  
 NORVELLA CARR; )  
 COUNTY TREASURER, )  
 Tulsa County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma; )  
 )  
 Defendants. )

CASE NO. 93-C-325E

**FILED**

JUL 22 1993

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21 day of July, 1993. The plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendants, Tulsa County Treasurer and Board of Tulsa County Commissioners appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the defendant, Jimmie Carr, appears not, but makes default; and the defendant, Norvella Carr, appears not, but makes default.

The Court, being fully advised and having examined the file, finds as follows:

1. (a) The defendant, Jimmie Carr, acknowledged receipt of summons and complaint on May 7, 1993, but has failed to otherwise appear and is now in default;

(b) the defendant, **Norvella Carr**, acknowledged receipt of summons and complaint on May 7, 1993, but has failed to otherwise appear and is now in default;

(c) All other defendants, namely County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma have filed timely answers in this action and have approved the form of this judgment as evidenced by their attorney's subscription.

2. This court has jurisdiction according to 28 U.S.C. Section 1345 because the United States is the plaintiff; and venue is proper because this lawsuit is based upon a note which was secured by a mortgage covering land located within the Northern Judicial District of Oklahoma.

3. On November 21, 1984, the defendants Jimmie Carr and Norvella Carr, husband and wife, executed and delivered to Mercury Mortgage Co., Inc., a corporation, a mortgage note in the amount of \$28,600.00, payable in monthly installments, with interest thereon at the rate of Thirteen (13.0%) percent per annum.

4. As security for the payment of the above described mortgage note, the defendants Jimmie Carr and Norvella Carr, husband and wife, executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated November 21, 1984, covering the following described property:

Lot Eight (8), Block Eighteen (18), VALLEY VIEW ACRES ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Such tract is referred to below as "the Property." This mortgage was recorded with the Tulsa County Clerk November 30, 1984, in book 4831 at page 1295. The mortgage tax due thereon was paid.

5. On August 31, 1988, Mercury Mortgage Co., Inc. assigned the mortgage note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington, D.C., its successors and assigns by an instrument recorded with the Tulsa County Clerk on August 31, 1988, in book 5125 at page 319.

6. On October 1, 1988, the defendants, Jimmie Carr and Norvella Carr, husband and wife, entered into an agreement with the plaintiff lowering the amount of the monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose.

7. The defendants, Jimmie Carr and Norvella Carr, have defaulted under the terms of the note, mortgage and forbearance agreement due to their failure to pay installments when due. Because of such default, the defendants, Jimmie Carr and Norvella Carr, are indebted to the plaintiff in the amount of \$48,350.08, plus interest at the rate of thirteen (13%) percent per annum from April 9, 1993, until the date of this judgment, plus interest thereafter at the legal rate until fully paid; plus the costs of this action in the amount of \$593.00 for abstracting and \$8.00 for recording the Notice of Lis Pendens.

8. The defendant, Tulsa County Treasurer, claims an interest in the Property by virtue of personal property taxes for: tax year 1991, in the amount of \$18.00; for tax year 1990, in the amount of \$1.00; and tax year 1989, in the amount of \$2.00.

9. The defendant, Board of Tulsa County Commissioners, claims no right, title or interest in or to the Property.

10. Pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED** that the plaintiff have and recover judgment against the defendants, Jimmie Carr and Norvella Carr, in the principal sum of \$48,350.08, plus interest at the rate of thirteen (13%) percent per annum from April 9, 1993, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action in the amount of \$601.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED** that the defendant, Tulsa County Treasurer, have and recover judgment in the amount of \$21.00, plus penalties and interest.

IT IS FURTHER ORDERED that the defendant, Board of Tulsa County Commissioners claims no right, title or interest in or to the Property.

IT IS FURTHER ORDERED that upon the failure of the defendants, Jimmie Carr and Norvella Carr, 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 the Property, according to the plaintiff's election with or without appraisalment and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

**Second:**

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

**Third:**

In payment of the judgment rendered herein in favor of the defendant, County Treasurer, Tulsa County, Oklahoma.

**Fourth:**

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** that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED** that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them, be forever barred and foreclosed of any right, title, interest or claim in or to the Property or any part thereof.

**BY JAMES O. ELLISON**

UNITED STATES DISTRICT JUDGE

Judgment of Foreclosure  
USA v. Jimmie Carr, et al.  
Civil Action No. 93-C-325E

APPROVED:

F. L. DUNN, III  
United States Attorney



Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

ENTERED ON DOCKET

DATE 7-22-93

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )

-vs.- )

CASE NO. 92-C-530E )

MARK EUGENE AGEE; )  
 MARCELLA KAY AGEE; )  
 VSA, INC., D/B/A VSA OF TEXAS, )  
 a Colorado corporation; )  
 MURPHY PROPERTIES, INC., )  
 an Oklahoma corporation; )  
 AUTORAMA LEASING, INC. )  
 an Oklahoma corporation; )  
 KEYCORP MORTGAGE, INC., )  
 formerly GOLDOME REALTY )  
 CREDIT CORP., a Maryland )  
 Corporation; )  
 THE STATE OF OKLAHOMA, ex rel. )  
 OKLAHOMA TAX COMMISSION; )  
 CITY OF BROKEN ARROW, OKLAHOMA, )  
 a municipal corporation; )  
 COUNTY TREASURER, )  
 Tulsa County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma; )

Defendants.

**FILED**

JUL 22 1993

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21 day of July, 1993. The plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendant, Mark Eugene Agee, appears not, but makes default; the defendant, Marcella Kay Agee, appears not, but makes default; the defendant, VSA, Inc. d/b/a VSA of Texas, appears not but makes default; the defendant, Murphy Properties, Inc., appears not, having previously filed its

disclaimer of any interest herein; the defendant, Autorama Leasing, Inc., appears not, but makes default; the defendant, Keycorp Mortgage, Inc. formerly Goldome Realty Credit Corp., appears not, but makes default; the defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission appears by Kim D. Ashley, Assistant General Counsel; the defendant, City of Broken Arrow, Oklahoma, appears by Michael R. Vanderburg, City Attorney; and the defendants, Tulsa County Treasurer and Board of Tulsa County Commissioners appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma.

The Court, being fully advised and having examined the file, finds as follows:

1. (a) The defendant, **Mark Eugene Agee**, was personally served with process in this case by the U.S. Marshals Service on May 10, 1993; but has failed to otherwise appear and is now in default;

(b) the defendant, **Marcella Kay Agee**, was personally served with process in this case by the U.S. Marshals Service on May 10, 1993, but has failed to otherwise appear and is now in default;

(c) the defendant, **VSA, Inc. d/b/a VSA of Texas**, acknowledged receipt of Summons and Complaint July 9, 1992, but has failed to otherwise appear and is now in default; and

(d) the defendant **Murphy Properties, Inc.**, entered an appearance herein on April 22, 1993, and disclaimed any interest in or to the Property.

(e) the defendant, **Autorama Leasing, Inc.**, acknowledged receipt of Summons and Complaint July 14, 1992, but has otherwise failed to appear and is now in default.

(f) the defendant, **Keycorp Mortgage, Inc. formerly Goldome Realty Credit Corp.**, acknowledged receipt of Summons and Complaint on July 8, 1992, but has failed to otherwise appear and is now in default;

(g) All other defendants filed timely answers and have approved the form of this judgment as evidenced by their subscription.

2. This Court has jurisdiction according to 28 U.S.C. Section 1345 because the United States is the plaintiff; and venue is proper because this lawsuit is based upon a note which was secured by a mortgage covering land located with the Northern Judicial District of Oklahoma.

3. On July 25, 1986, Richard E. Helberg and Cindy Helberg, husband and wife, executed and delivered to Harry Mortgage Co. a note in the amount of \$61,350.00, payable in monthly installments, with interest thereon at the rate of ten (10%) percent per annum.

4. As security for the payment of such note Richard E. Helberg, and Cindy Helberg, husband and wife, executed and delivered to Harry Mortgage Co. a mortgage covering the following described property:

Lot Twenty (20), Block Two (2), WOODSTOCK, an addition to the City of Broken Arrow, Tulsa County,

State of Oklahoma, according to the recorded plat thereof.

Such tract is referred to below as "the Property." This mortgage was dated July 25, 1986, and was recorded with the Tulsa County Clerk August 4, 1986, in book 4960 at page 994.

5. a) On August 26, 1986, Harry Mortgage Co. assigned such promissory note and the mortgage securing it to Goldome Realty Credit Corp. by an assignment recorded with the Tulsa County Clerk September 8, 1986, in book 4968 at page 488.

b) On March 31, 1988, Goldome Realty Credit Corp. assigned such promissory note and the mortgage securing it to Leader Federal Savings and Loan Association by an assignment recorded with the Tulsa County Clerk January 29, 1991, in book 5301 at page 181, and re-recorded in an attempt to repair a defective acknowledgment on March 25, 1991, in book 5311 at page 314. This instrument remains defective in spite of such re-recording because it is executed by an assistant vice president and not by a "president or vice president;" therefore Keycorp Mortgage, Inc., formerly known as Goldome Realty Credit Corp., was made a defendant to this lawsuit to extinguish any apparent right, title or interest it may have in the Property due to such defective mortgage assignment.

c) On April 7, 1989, Leader Federal Savings and Loan Association assigned such promissory note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns by an assignment recorded with the Tulsa County Clerk April 11,

1989, in book 5176 at page 2655, however the execution of this instrument was not attested by a corporate secretary according to law. A corrective assignment was recorded January 29, 1991, in book 5301 at page 182, and on March 26, 1991, in book 5311 at page 315.

6. On August 25, 1988, Richard E. Helberg and Cindy Helberg, husband and wife, granted a general warranty deed to the defendants, Mark Eugene Agee and Marcella Kay Agee. This deed was recorded with the Tulsa County Clerk August 29, 1988, in book 5124 at page 875, and the defendants, Mark Eugene Agee and Marcella Kay Agee assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

7. On April 1, 1989, the defendants, Mark Eugene Agee and Marcella Kay Agee, husband and wife, entered into an agreement with the plaintiff lowering the amount of the monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on April 1, 1990, and on July 1, 1991.

8. The defendants, Mark Eugene Agee and Marcella Kay Agee, have defaulted under the terms of the note, mortgage and forbearance agreements due to their failure to pay installments when due and due to their abandonment of the Property. Because of such default the defendants, Mark Eugene Agee and Marcella Kay Agee, are indebted to the plaintiff in the amount of \$84,659.81, plus interest at the rate of ten

percent per annum from July 1, 1992, until the date of this judgment, plus interest thereafter at the legal rate until fully paid; plus the costs of this action in the amount of \$410.00 for abstracting and \$8.00 for recording the Notice of Lis Pendens.

9. The defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission has a lien on the Property which was perfected on November 16, 1988, by virtue of tax warrant number STS8800235901 dated November 14, 1988, in the amount of \$18,981.08, plus penalties and interest.

10. The defendant, Tulsa County Treasurer, has a lien on the Property which was perfected July 2, 1990, for \$17.00 and June 26, 1992, for \$56.00, by virtue of unpaid personal property taxes, plus penalties and interest.

11. The defendant, City of Broken Arrow, Oklahoma, has no right, title or interest in the Property except insofar as it is the holder of certain easements as shown on the duly recorded plat of WOODSTOCK addition.

12. The defendant, Board of Tulsa County Commissioners claims no right, title or interest in or to the Property.

13. Pursuant to 12 U.S.C. 1710(l) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED** that the plaintiff have and recover judgment against the defendants, Mark Eugene Agee and Marcella Kay Agee, in the principal sum of \$84,659.81, plus interest at the rate of ten percent per annum from July 1, 1992, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action in the amount of \$418.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED** that the defendant, State of Oklahoma, ex rel., Oklahoma Tax Commission, have and recover judgment in the amount of \$18,981.08, plus penalties and interest.

**IT IS FURTHER ORDERED** that the defendant, Tulsa County Treasurer, have and recover judgment in the amount of \$73.00, plus penalties and interest.

**IT IS FURTHER ORDERED** that the defendant, City of Broken Arrow, Oklahoma, has no right, title or interest in the Property except insofar as it is the holder of certain easements across the Property as shown on the duly recorded plat of WOODSTOCK addition.

**IT IS FURTHER ORDERED** that the defendants, VSA, Inc., d/b/a VSA of Texas; Murphy Properties, Inc.; Autorama Leasing, Inc.; Keycorp Mortgage, Inc., formerly Goldome Realty Credit

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

**IT IS FURTHER ORDERED** that upon the failure of the defendants, Mark Eugene Agee and Marcella Kay Agee, to satisfy the money judgment of the plaintiff herein within ten days, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the Property, according to plaintiff's election with or without appraisal and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

**Second:**

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

**Third:**

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

**Fourth:**

In payment of the judgment rendered herein in favor of the defendant, Tulsa County Treasurer.

**Fifth:**

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** that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED** that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them shall be forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

**57 JAMES O. ELLISON**

UNITED STATES DISTRICT JUDGE

APPROVED:

F. L. DUNN, III  
United States Attorney



Mikel K. Anderson  
Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



---

Kim D. Ashley  
Assistant General Counsel  
Attorney for defendant  
State of Oklahoma, ex rel.  
Oklahoma Tax Commission

---

Michael R. Vanderburg  
City Attorney  
Attorney for defendant  
City of Broken Arrow, Oklahoma

---

J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

Judgment of Foreclosure  
USA vs. Agee, et al.  
Civil Action No. 92-C-530E

---

Kim D. Ashley  
Assistant General Counsel  
Attorney for defendant  
State of Oklahoma, ex rel.  
Oklahoma Tax Commission

  
Michael R. Vanderburg  
City Attorney  
Attorney for defendant  
City of Broken Arrow, Oklahoma

---

J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

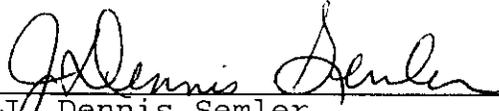
Judgment of Foreclosure  
USA vs. Agee, et al.  
Civil Action No. 92-C-530E

---

Kim D. Ashley  
Assistant General Counsel  
Attorney for defendant  
State of Oklahoma, ex rel.  
Oklahoma Tax Commission

---

Michael R. Vanderburg  
City Attorney  
Attorney for defendant  
City of Broken Arrow, Oklahoma



---

J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

Judgment of Foreclosure  
USA vs. Agee, et al.  
Civil Action No. 92-C-530E

ENTERED ON DOCKET

DATE 7-22-93

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

**FILED**

JUL 22 1993

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

PHILLIPS PIPE LINE COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DIAMOND SHAMROCK REFINING )  
AND MARKETING COMPANY, )  
 )  
Defendant. )

No. 92-C-315-E

ORDER AND JUDGMENT

On April 9, 1993 the Court heard oral arguments on the parties' cross-motions for summary judgment. Following argument, the Court directed the parties to supplement the record on the threshold issue of primary jurisdiction; that is, should this matter be referred to FERC for an initial determination of the application of the "filed rate" doctrine to this case. The Court took the dispositive issue under advisement pending resolution of the primary jurisdiction issue raised sui sponte by the Court.

The Court has reviewed the briefs of the parties regarding the latter issue and finds that reference of this case to FERC is neither warranted nor advisable under the undisputed material facts of record; therefore the dispositive issue is ripe for the Court's consideration. The issue before the Court is simply whether the "filed rate" doctrine and Interstate Commerce Act take precedence over the lease rate provided in Article VI of the parties' 1946 Agreement, as amended in 1971. The material facts appertaining to the issue will not impede the Court's consideration of the legal issue because they are undisputed.

The parties each own an undivided interest in - and, therefore, a fixed percentage of - the "throughput capacity" of Colorado Products Pipeline. The relationship between them was established by a 1946 Agreement, as subsequently amended. That Agreement, as amended, provides in part at Article VI:

Section 1. In the event either party hereto, during any period of operation, does not require the use of its full share of the capacity of any portion of the line in which the other party then owns an interest, then during such period the other party may utilize for the transportation of its products all or any part of such idle capacity.

Section 2. If, during the term of Agreement, commencing April 1, 1972, either party has additional space (throughput capacity) in said system out of McKee that it does not plan to utilize during any month, such party shall notify the other party thereof on or before the 24th day of the month preceding and the other party may elect to lease all or any part of such additional space by giving notice thereof on or before the 26th day of the month preceding. At the end of each such month that a party elects to lease such additional space the lessor party shall invoice the lessee party at the rate of \$.15 per barrel for all space so leased ...

From time to time this provision has been invoked. However, in 1989, Phillips challenged the lawfulness of the provision. Phillips contends that while the leasing arrangement, itself, is legal, when the lessee (either Phillips or Diamond Shamrock) leases the idle capacity of the lessor pursuant to Article VI of the Agreement, it leases as a shipper not as a simple lessee; therefore the lessee must pay the filed tariff rate of the lessor, pursuant to the Interstate Commerce Act, not the rate provided by Article

VI, Section 2.<sup>1</sup>

The parties agree the amount of Diamond Shamrock's product transported via Phillips' idle capacity was 1,812,999 barrels. Phillips has sued for the balance it claims is due: the tariff rate minus the lease rate which Diamond Shamrock has already tendered. Diamond Shamrock's counterclaim seeks a Declaratory Judgment that the rate provided by Article VI, Section 2 of the Agreement is lawful and applicable and should be enforced.

The Court has reviewed the facts in light of the applicable law and finds that Phillips' motion should be granted (docket #19); Diamond Shamrock's motion should be denied (docket #16). While the Court is cognizant of the caution that should be exercised in apply railroad/motor carrier case law to pipeline cases; the Court finds that case law more analogous than NGA case law to the instant case because of the legislative intent underlying ICC law as opposed to NGA law. Specifically, the Court finds that Diamond Shamrock utilized Phillips' idle capacity in a shipper-carrier relationship; the shipper protection purposes of the ICC case are thus involved and Phillips' established tariff rate should, therefore, be applied.

IT IS THEREFORE ORDERED that Phillips' motion for summary judgment is granted; Diamond Shamrock's motion for summary judgment is denied. Judgment shall be entered for Plaintiff; Defendant shall bear Plaintiff's costs and reasonable attorneys' fees. This matter is dismissed.

---

<sup>1</sup>Each party has filed a separate tariff with FERC.

ORDERED this 21<sup>st</sup> day of July, 1993.

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

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

WAYNE EUGENE DOYLE, Personal )  
 Representative of the Estate )  
 of LARRY WAYNE DOYLE, )  
 Deceased, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BURLINGTON NORTHERN RAILROAD )  
 COMPANY; and PULLMAN )  
 STANDARD, INC., )  
 )  
 Defendants. )

**F I L E D**  
 JUL 22 1993  
 Richard H. ... Clerk  
 U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-940 C

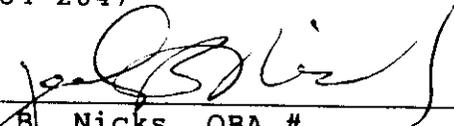
**JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Wayne Eugene Doyle, Personal Representative of the Estate of Larry Wayne Doyle, Deceased, and the Defendants, Burlington Northern Railroad Company and Pullman Standard, Inc., jointly stipulate and agree that this action should be and is hereby dismissed with prejudice, each side to bear his or its own costs, attorneys' fees and expenses.

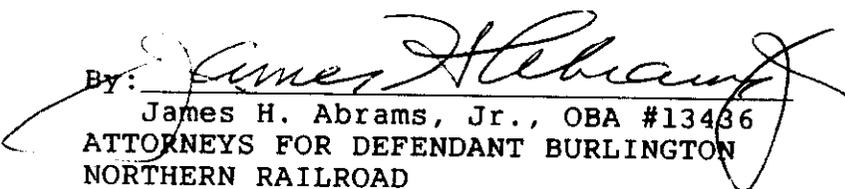
JOHN L. HARLAN & ASSOCIATES, P.C.  
 Attorneys at Law  
 404 East Dewey Street  
 Sapulpa, Oklahoma 74067  
 (918) 227-2590

-and-

JOHN B. NICKS, ESQ.  
Attorney at Law  
1448 South Carson  
Tulsa, Oklahoma 74119  
(918) 584-2047

By:   
John B. Nicks, OBA #  
ATTORNEY FOR PLAINTIFF WAYNE EUGENE  
DOYLE PERSONAL REPRESENTATIVE OF THE  
ESTATE OF LARRY WAYNE DOYLE, DECEASED

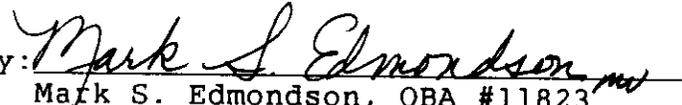
BONDS, MATTHEWS, BONDS & HAYES  
Attorneys at Law  
404 Court Street  
Muskogee, Oklahoma 74402-1906  
(918) 683-2911

By:   
James H. Abrams, Jr., OBA #13436  
ATTORNEYS FOR DEFENDANT BURLINGTON  
NORTHERN RAILROAD

David K. Monroe, Esq.  
GALLAND, KHARASCH, MORSE  
& GARFINKLE, P.C.  
Attorneys at Law  
Canal Square - Second Floor  
1054 Thirty-First Street, N.W.  
Washington, D.C. 20007-4492  
(202) 342-5200

-and-

CROWE & DUNLEVY  
Attorneys at Law  
500 Kennedy Building  
321 South Boston  
Tulsa, Oklahoma 74103-3313  
(918) 592-9800

By:   
Mark S. Edmondson, OBA #11823  
ATTORNEYS FOR DEFENDANT PULLMAN  
STANDARD, INC.

ENTERED ON DOCKET

DATE 7-21-93

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

EDWARD G. BOLTON,	)
	)
Petitioner,	)
	)
v.	)
	)
RON CHAMPION,	)
	)
Respondent.	)

**FILED**  
92-C-455-E  
**JUL 21 1993**  
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This order pertains to Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1)<sup>1</sup>, Respondent's Memorandum Brief in Support of Motion to Dismiss Petition for Writ of Habeas Corpus for Failure to Exhaust State Remedies (Docket #5), and the Response to Respondent's Motion to Dismiss (Docket #7).

Petitioner was convicted in Tulsa County District Court, Case No. CRF-89-5164, of obtaining merchandise by trick, and Case No. CRF-89-5425, of maiming, both after former conviction of a felony. Petitioner pled guilty and was sentenced to seven (7) years on CRF-89-5164 and twenty (20) years on CRF-89-5425. A direct appeal was not filed, although an application under the Post-Conviction Procedure Act, 22 O.S. §§ 1080, was filed in Tulsa County District Court. The district court denied post-conviction relief on April 23, 1992, and no appeal was taken by the petitioner from the district court's denial.

Petitioner now seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254 on the following alleged grounds: (1) there is no available state post-conviction relief available to him; (2) invalid prior guilty pleas enhanced his sentences; and, (3) he received

<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.

ineffective assistance of counsel.

Respondent's motion to dismiss alleges petitioner has failed to exhaust his state remedies in regard to all of the grounds for relief raised by him.

Title 28 U.S.C. § 2254 provides in part:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The Advisory Committee Note to Rule 5 of the Rules Governing § 2254 Cases in the United States District Courts states:

An alleged failure to exhaust state remedies as to any ground in the petition may be raised by a motion by the attorney general, thus avoiding the necessity of a formal answer as to that ground.

In Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that a federal habeas corpus petition which contained exhausted and unexhausted claims was required to be dismissed by the federal habeas corpus court. The Court stated:

In this case we consider whether the exhaustion rule in 28 U.S.C. §§ 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510 (emphasis added).

### The Petitioner Has Failed To Exhaust His State Remedies

The court finds that the claims raised in petitioner's writ of habeas corpus have not been exhausted in the state courts.

A federal habeas petitioner must have fairly presented to the state courts the substance of his federal claim. In Anderson v. Harless, 459 U.S. 4, 6 (1982), the Supreme Court stated:

... 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim. It is not enough that all the facts necessary to support the federal claim were before the state courts . . . or that a somewhat similar state-law claim was made. In addition, the habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim. (citations omitted).

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).

The court determines that petitioner has an available state remedy for these claims under the Post-Conviction Relief Act of Oklahoma, 22 O.S. §§ 1080-1088. Petitioner has failed to exhaust all available state remedies. He must first appeal the Tulsa County District Court's denial of post-conviction relief before he is allowed to file a federal habeas corpus petition pursuant to 28 U.S.C. § 2254.

### There Is No Merit To Petitioner's Claim That He Was Unable To Appeal

Petitioner alleges that his access to the law library was limited by a prison regulation, so he was unable to appeal the denial of post-conviction relief by the Tulsa

County District Court. This allegation is without merit.

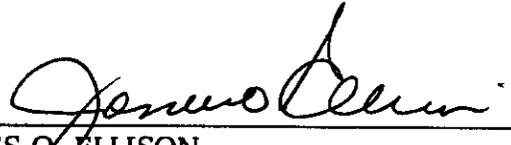
The petitioner simply had to file a notice stating his desire to appeal his denial of post-conviction relief. Upon filing, the petitioner would have been granted an extension of time in which he could have perfected his appeal.

The petitioner admits that he was given access to the correctional center law library. Although his access was limited to six hours a week, this is adequate time to file the appropriate notice of intent to appeal the denial. In Bounds v. Smith, 430 U.S. 817, 828 (1977), the Supreme Court defined the duty of the states to protect the rights of prisoners to access to the courts by holding that "the fundamental constitution right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." See also Nordgren v. Milliken, 762 F.2d 851, 854 (10th Cir.), cert. denied, 474 U.S. 1032 (1985).

The petitioner does not allege that the law library was inadequate, only that his access was limited. In Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978), the Tenth Circuit Court of Appeals ruled that restricted use of the law library to two hours per week does not alone deny an inmate adequate access to the courts, especially if he has legal materials in his cell and his pleadings indicate he is capable of drafting a legible, articulate, and authoritative document. Id. Petitioner admits he was given access to the library for six (6) hours a week and his pleadings are certainly legible, articulate, and authoritative.

Respondent's Motion to Dismiss for Failure to Exhaust State Remedies (Docket #5) is granted.

Dated this 21<sup>st</sup> day of July, 1993.



JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE



action and have approved the form of this judgment as evidenced by their attorney's subscription.

2. This court has jurisdiction according to 28 U.S.C. Section 1345 because the United States is the plaintiff; and venue is proper because this lawsuit is based upon a note which was secured by a mortgage covering land located within the Northern Judicial District of Oklahoma.

3. On June 28, 1979, Katrina Lynn Conley executed and delivered to Charles F. Curry Company, a promissory note in the amount of \$41,200.00, payable in monthly installments, with interest thereon at the rate of ten (10%) percent per annum.

4. As security for the payment of the above described note, Katrina Lynn Conley executed and delivered to Charles F. Curry company, a real estate mortgage dated June 28, 1979, covering the following described property:

Lot Eighteen (18), Block Seven (7), BRADEN HEIGHTS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

This mortgage was recorded with the Tulsa County Clerk July 3, 1979, in Book 4410 at Page 2575. The mortgage tax due thereon was paid.

5. a) On July 6, 1979, Charles F. Curry Company assigned such promissory note and the mortgage securing it to Federal National Mortgage Association by an instrument recorded with the Tulsa County Clerk July 18, 1979, in Book 4414 at Page 28.

b) On October 13, 1989, Federal National Mortgage Association erroneously assigned such promissory note and the mortgage securing it to The Department of Housing and Urban Development by an instrument recorded with the Tulsa County Clerk October 23, 1989, in Book 5215 at Page 654.

c) On January 12, 1990, Federal National Mortgage Association corrected the earlier assignment by filing an assignment to The Secretary of Housing and Urban Development dated January 12, 1990, and recorded with the Tulsa County Clerk January 23, 1990, in Book 5232 at Page 894.

6. On October 3, 1979, Katrina Lynn Conley, a single person, granted a general warranty deed to the defendant Steven G. Ferrell, a single person. This deed was recorded with the Tulsa County Clerk October 9, 1979, in Book 4432 at Page 798, and the defendant Steven G. Ferrell, a single person, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

7. On November 1, 1989, the defendant, Steven G. Ferrell, entered into an agreement with the plaintiff lowering the amount of the monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose. Superseding agreements were reached on December 1, 1990, and on March 1, 1992.

8. The defendant, Steven G. Ferrell, has defaulted under the terms of the note, mortgage and forbearance agreements due to his failure to pay installments when due and

due to his abandonment of the Property. Because of such default, the defendant, Steven G. Ferrell, is indebted to the plaintiff in the amount of \$55,586.34, plus interest at the rate of ten (10%) percent per annum from April 6, 1993, until the date of this judgment, plus interest thereafter at the legal rate until fully paid; plus the costs of this action in the amount of \$435.00 for abstracting and title examination, and \$8.00 for recording the Notice of Lis Pendens.

9. The defendant, County Treasurer, Tulsa County, Oklahoma, claims an interest in the Property by virtue of personal property taxes as follows: 1984 in the amount of \$5.00 which became a lien on the Property as of June 30, 1985; 1985 in the amount of \$5.00 which became a lien on the Property as of June 30, 1986; 1986 in the amount of \$5.00 which became a lien on the property as of June 30, 1987; 1989 in the amount of \$9.00 which became a lien on the Property as of July 2, 1990; 1990 in the amount of \$9.00 which became a lien on the Property as of June 20, 1991; and 1991 in the amount of \$35.00 which became a lien on the Property as of June 26, 1992.

10. The defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in or to the Property.

11. Pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the

mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED** that the plaintiff have and recover judgment against the defendant, Steven G. Ferrell, in the principal sum of \$55,586.34, plus interest at the rate of ten (10%) percent per annum from April 6, 1993, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action in the amount of \$443.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject Property.

**IT IS FURTHER ORDERED** that the defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$68.00, plus penalties and interest.

**IT IS FURTHER ORDERED** that the defendant, Board of Tulsa County Commissioners claims no right, title or interest in or to the Property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of the defendant, Steven G. Ferrell, 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 the Property, according to the plaintiff's election with or without appraisal and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

**Second:**

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

**Third:**

In payment of the judgment rendered herein in favor of the defendant, County Treasurer, Tulsa County, Oklahoma

**Fourth:**

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** that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED** that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them, be forever barred and foreclosed of any right, title, interest or claim in or to the Property or any part thereof.

**S/ THOMAS R. BRETT**

**UNITED STATES DISTRICT JUDGE**

Judgment of Foreclosure  
USA v. Steven G. Ferrell, et al.  
Civil Action No. 93-C-327B

APPROVED:

F. L. DUNN, III  
United States Attorney



Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

DATE JUL 21 1993

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

GUY RICHEY,  
Plaintiff,  
vs.  
MEMOREX TELEX CORPORATION,  
Defendant.

Case No.93-C-98B

**FILED**

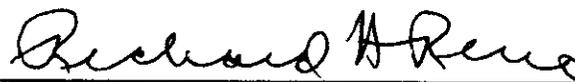
**JUL 20 1993**

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

STIPULATION OF  
DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff and Defendant pursuant to Federal Rule of Civil Procedure Rule 41(a) and hereby stipulate that the above cause is dismissed with prejudice, each party to bear its own costs and attorneys fees.

Respectfully submitted,



Richard H. Reno OBA#10454  
BUFOGLE & ASSOCIATES  
3105 E. Skelly Dr., Suite 600  
Tulsa, Oklahoma 74105  
Attorneys for Plaintiff



Thomas M. Ladner OBA#5161  
NORMAN & WOHLGEMUTH  
2900 Mid-Continent Tower  
Tulsa, Oklahoma 74103  
Attorneys for Defendant

JUL 21 1993

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 ELSIE M. ZACHRY; )  
 REGENCY PARK HOMES ASSOCIATION, )  
 INC.; )  
 COUNTY TREASURER, )  
 Tulsa County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma; )  
 )  
 Defendants. )

CASE NO. 93-C-319B

**FILED**

JUL 20 1993

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20<sup>th</sup> day of July, 1993. The plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendants, Tulsa County Treasurer and Board of Tulsa County Commissioners appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the defendant, Elsie M. Zachry, appears not, but makes default; and the defendant, Regency Park Homes Association, Inc., appears not, having previously disclaimed any interest in the Property.

The Court, being fully advised and having examined the file, finds as follows:

1. (a) The defendant, Elsie M. Zachry, acknowledged receipt of summons and complaint on April 17, 1993, but has failed to otherwise appear and is now in default;

(b) the defendant, **Regency Park Homes Association, Inc.**, acknowledged receipt of summons and complaint on May 7, 1993, and on May 12, 1993, filed its disclaimer of any interest in the Property;

(c) All other defendants, namely County Treasurer, Tulsa County, Oklahoma and Board of County commissioners, Tulsa County, Oklahoma have filed timely answers in this action and have approved the form of this judgment as evidenced by their subscription.

2. This court has jurisdiction according to 28 U.S.C. Section 1345 because the United States is the plaintiff; and venue is proper because this lawsuit is based upon a note which was secured by a mortgage covering land located within the Northern Judicial District of Oklahoma.

3. On April 17, 1986, Clifford A. Weddle and Vera C. Weddle, husband and wife, executed and delivered to Allstate Enterprises Mortgage Corporation, a mortgage note in the amount of \$60,850.00, payable in monthly installments, with interest thereon at the rate of nine (9%) percent per annum.

4. As security for the payment of the above described mortgage note, Clifford A. Weddle and Vera C. Weddle, husband and wife, executed and delivered to Allstate Enterprises Mortgage Corporation, a mortgage dated April 17, 1986, covering the following described property:

Lot Thirty-one (31), Block Eight (8), **REGENCY PARK EAST ADDITION** to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

Such tract is referred to below as "the Property". This mortgage was recorded with the Tulsa County Clerk April 18, 1986, in book 4936 at page 1571. The mortgage tax due was paid and the Tulsa County Treasurer's receipt therefore is endorsed upon the face of said mortgage.

5. On May 23, 1988, Allstate Enterprises Mortgage Corp. n/k/a Sears Mortgage Corporation assigned the mortgage note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington, D.C., its successors and assigns by an instrument recorded with the Tulsa County Clerk June 8, 1988, in book 5105 at page 1815.

6. On October 24, 1986, Clifford A. Weddle and Vera C. Weddle, granted a general warranty deed to the defendant, Elsie M. Zachry, a single person. This deed was recorded with the Tulsa County Clerk November 4, 1986, in book 4980 at page 1087, and the defendant, Elsie M. Zachry, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

7. On October 1, 1989, the defendant, Elsie M. Zachry, a single person, entered into an agreement with the plaintiff lowering the amount of the monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose.

8. The defendant, Elsie M. Zachry, has defaulted under the terms of the note, mortgage and forbearance agreements due to her failure to pay installments when due. Because of such

default, the defendant, Elsie M. Zachry, is indebted to the plaintiff in the amount of \$91,430.56, plus interest at the rate of nine (9%) percent per annum from April 7, 1993, until the date of this judgment, plus interest thereafter at the legal rate until fully paid; plus the costs of this action in the amount of \$325.00 for abstracting and \$8.00 for recording the Notice of Lis Pendens.

9. The defendant, County Treasurer, Tulsa County, Oklahoma, claims an interest in the Property by virtue of personal property taxes for tax year 1991, in the amount of \$47.00.

10. The defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in or to the Property.

11. Pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED** that the plaintiff have and recover judgment against the defendant, Elsie M. Zachry, in the principal sum of \$91,430.56, plus interest at the rate of nine (9%) percent per annum from April 7, 1993, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action in the amount of \$333.00, plus any additional sums advanced or to be advanced or

expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED** that the defendant, Regency Park Homes Association, Inc., having previously disclaimed any interest in and to the Property, has no right, title or interest in the Property.

**IT IS FURTHER ORDERED** that the defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$47.00, plus penalties and interest.

**IT IS FURTHER ORDERED** that the defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in or to the Property.

**IT IS FURTHER ORDERED** that upon the failure of the defendant, Elsie M. Zachry, 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 the Property, according to the plaintiff's election with or without appraisal and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

**Second:**

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

**Third:**

In payment of the judgment rendered herein in favor of the defendant, County Treasurer, Tulsa County, Oklahoma.

**Fourth:**

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** that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED** that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them, be forever barred and foreclosed of any right, title, interest or claim in or to the Property or any part thereof.

**S/ THOMAS R. BRETT**

**UNITED STATES DISTRICT JUDGE**

Judgment of Foreclosure  
USA v. Elsie M. Zachry, et al.  
Civil Action No. 93-C-319B

APPROVED:

F. L. DUNN, III  
United States Attorney



Mikel K. Anderson  
Special Assistant United States Attorney  
U.S. Dept. of Housing & Urban Development  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



J. Dennis Semler  
Assistant District Attorney  
Attorney for defendants  
Tulsa County Treasurer and  
Board of Tulsa County Commissioners

MAC/HPM  
06/22/93

FILED  
DATE JUL 2 1993

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

FILED  
JUL 20 1993

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

NOEL C. WATERS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ROBERTS EXPRESS, INC.; )  
 PROTECTIVE INSURANCE COMPANY; )  
 ROADWAY SERVICES, INC.; )  
 TED GREENE d/b/a T.G.A.; and )  
 DAVID GIBSON, )  
 )  
 Defendants. )

No. 93-C-0206B

**ORDER GRANTING DEFAULT JUDGMENT**  
**ON THE ISSUE OF LIABILITY AND**  
**SETTING HEARING DATE FOR DETERMINATION OF DAMAGES**

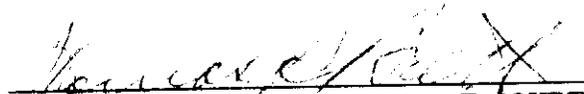
On July 20, 1993, this action came on for hearing before the Court on the motion of Plaintiff Noel Waters for default judgment against Defendants Ted Greene and David Gibson. The issues have been heard and judgment is rendered in the above-styled and numbered cause as follows:

The Court, having reviewed the Complaint, Summons, Return of Service and Court File, finds that Defendants have been validly served with Complaint and Summons, and that no appearance has been made by said Defendants, nor has any motion or pleading been filed on their behalf.

Defendants are in default and have thus admitted the substantial allegations of the Complaint. The Court, being fully advised in the premises, and on consideration thereof, finds that

the allegations of Plaintiff's Complaint are deemed true as therein set forth, and that Plaintiff is entitled to judgment on the issue of liability against Defendant Ted Green and Defendant David Gibson.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment on the issue of liability be entered against Defendants Ted Greene and David Gibson in this case. Hearing date for determination of damages is July 30, 1993, at 10:00 A.M.

  
\_\_\_\_\_  
JUDGE OF THE U.S. DISTRICT COURT

waters\default.ord

ENTERED ON DOCKET

DATE 7-21-93

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DARLENE WASHINGTON; COUNTY )  
 TREASURER, Creek County, )  
 Oklahoma; and BOARD OF COUNTY )  
 COMMISSIONERS, Creek County, )  
 Oklahoma, )  
 )  
 Defendants. )

**FILED**

JUL 20 1993

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

CIVIL ACTION NO. 93-C-0113-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21 day  
of July, 1993. The Plaintiff appears by F. L. Dunn,  
III, United States Attorney for the Northern District of  
Oklahoma, through Wyn Dee Baker, Assistant United States  
Attorney; the Defendants, County Treasurer, Creek County,  
Oklahoma, and Board of County Commissioners, Creek County,  
Oklahoma, appear by Wesley R. Thompson, Assistant District  
Attorney, Creek County, Oklahoma; and the Defendant, Darlene  
Washington, appears not, but makes default.

The Court being fully advised and having examined the  
court file finds that the Defendant, Darlene Washington, was  
served with Summons and Complaint on April 5, 1993; that the  
Defendant, County Treasurer, Creek County, Oklahoma, acknowledged  
receipt of Summons and Complaint on February 10, 1993.

It appears that the Defendants, County Treasurer, Creek  
County, Oklahoma, and Board of County Commissioners, Creek  
County, Oklahoma, filed their Answer on February 24, 1993; that

the Defendant, Darlene Washington, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that on April 20, 1993, Darlene Washington filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-01267-W. On May 27, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtor by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

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

Lot 3, Block 4, QUAIL VIEW WEST ADDITION to the City of Bristow, in Creek County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on November 2, 1981, the Defendant, Darlene Washington, executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of \$36,000.00, payable in monthly installments, with interest thereon at the rate of 13.25 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Darlene

Washington, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated November 2, 1981, covering the above-described property. Said mortgage was recorded on November 3, 1981, in Book 108, Page 2238, in the records of Creek County, Oklahoma.

The Court further finds that on February 2, 1982, the Defendant, Darlene Washington, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on November 28, 1983, the Defendant, Darlene Washington, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on December 13, 1984, the Defendant, Darlene Washington, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on December 12, 1985, the Defendant, Darlene Washington, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which

the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on December 2, 1986, the Defendant, Darlene Washington, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

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

The Court further finds that on November 9, 1988, the Defendant, Darlene Washington, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on November 27, 1989, the Defendant, Darlene Washington, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on January 15, 1991, the Defendant, Darlene Washington, executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendant, Darlene Washington, made default under the terms of the aforesaid note, mortgage, and interest credit agreements by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Darlene Washington, is indebted to the Plaintiff in the principal sum of \$30,798.47, plus accrued interest in the amount of \$3,783.91 as of September 11, 1992, plus interest accruing thereafter at the rate of 13.25 percent per annum or \$11.1802 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$30,586.44, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$229.79, plus penalties and interest, for the year 1992. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$29.36 which became a lien on the property as of 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendant, Darlene Washington, in the principal sum of \$30,798.47, plus accrued interest in the amount of \$3,783.91 as of September 11, 1992, plus interest accruing thereafter at the rate of 13.25 percent per annum or \$11.1802 per day until judgment, plus interest thereafter at the current legal rate of 3.54 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of \$30,586.44, plus interest on that sum at the current legal rate of 3.54 percent per annum from judgment until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, have and recover judgment in the amount of \$229.79, plus penalties and interest, for ad valorem taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, have and recover judgment in the amount of \$29.36 for personal property taxes for the year 1992, plus the costs of this action.

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

**First:**

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

**Second:**

In payment of Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, in the amount of \$229.79, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

**Third:**

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

**Fourth:**

In payment of Defendants, County Treasurer and Board of County Commissioners, Creek County, Oklahoma, in the amount of \$29.36, personal property taxes which are currently due and owing.

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

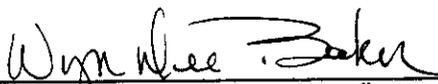
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

**JAMES O. ELLISON**

UNITED STATES DISTRICT JUDGE

APPROVED:

F. L. DUNN, III  
United States Attorney

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

  
\_\_\_\_\_  
**WESLEY R. THOMPSON, OBA #8993**  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Creek County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 93-C-0113-E

WDB/css