ENTERED ON DOCKET
DATE NOV 10 1993

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

FILED
Lawrence, Clerk
DISTRICT COURT
OKLAHOMA

LOUIS THOMAS,	)	
Plaintiff,	)	
vs.	)	No. 93-C-219-B
LARRY FIELDS, et al.,	)	
Defendants.	)	

ORDER

Before the Court is Defendants' motion to dismiss filed on July 26, 1993. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 15(A).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss [docket #9] is **granted** and the above captioned case is **dismissed without prejudice** at this time.

(2) The Court may reopen this case if Plaintiff submitts a response to Defendants' motion to dismiss no later than twenty (20) days from the date of entry of this order.

SO ORDERED THIS 8th day of Nov., 1993.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

12

ENTERED ON DOCKET
DATE NOV 10 1993

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

FILED
NOV 10 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE, Plaintiff,	)	
vs.	)	No. 93-C-348-B
JESS WALKER, et al., Defendants.	)	

ORDER

Before the Court are Defendants' motions to dismiss Plaintiff's second civil rights action and Plaintiff's responses.

On April 19, 1993, Plaintiff brought this action, alleging that Defendants violated his Fifth and Fourteenth Amendment rights, when they unlawfully retained his trucks from September 14, 1988, until the present. Plaintiff alleged that Defendants should have returned his trucks on January 12, 1990, or shortly thereafter, when false charges, previously filed against him, were dismissed. Plaintiff further alleged that he unsuccessfully asked defendants about the trucks; that on February 8, 1993, he inquired whether the trucks had been forfeited; and that on February 11, 1993, the Craig County District Court Clerk responded that no forfeiture proceedings were pending regarding the trucks. Plaintiff also alleged pendent state claims.

Defendants moved to dismiss, arguing Plaintiff's unlawful taking-of-property claim accrued when the trucks were taken in September 1988, and thus was barred by the two-year statute of limitations. Defendants also argued this action was barred by res judicata as it was a duplication of Case No. 91-C-274-E.

Plaintiff responded this action was not based on the unlawful

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taking of property, but related to Defendants' unlawful retention of his trucks for five and one-half years. He argued this action did not accrue until he received the February 11, 1993 "letter from the Craig County Court Clerk stating that there ha[d] not been a forfeiture hearing to date concerning Plaintiff's trucks." [Docket #7 at 2.] In the alternative, Plaintiff argued that there had been a continuing violation and that the statute of limitations should be tolled because he was an inmate. Plaintiff also requested the court to order a Martinez report. [Docket #10.]

Because there is no federal statute of limitations for a civil rights action, the time in which such action must be filed is determined by the applicable state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The applicable statute of limitations under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988). In such cases the cause of action accrues at the time the injury occurred. Id. Thus, a plaintiff must bring an action within two years of the date of that occurrence. The statute of limitations may be excused or tolled where the complaining party was not aware that the facts could not have been discovered at an earlier date through the exercise of reasonable diligence. Id.

Plaintiff's contention that he could not reasonably have discovered all the elements of his action until he received the letter from the District Court Clerk lacks merit. The allegations in his complaint reveal that Plaintiff had knowledge of the alleged unlawful retention at least as of January 1990, when false charges

were dismissed. The February 1993 letter from the District Court Clerk simply stated that no forfeiture had occurred in his criminal case. Thus, the allegations in the complaint establish that the two-year statute of limitations has expired and that Plaintiff knew or could have discovered the facts upon which his current claims are based within the limitations period. See Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) (where a complaint shows on its face that the applicable statute of limitations has expired, a motion to dismiss for failure to state a claim is appropriate).

Plaintiff's inmate status is insufficient justification for tolling the statute of limitations. Oklahoma has no tolling provision for civil lawsuits filed by prisoners. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989). Thus, Plaintiff's due process claim for the retention of his trucks is hereby dismissed.

The Court declines to exercise pendent jurisdiction over Plaintiff's state claims. See 28 U.S.C. § 1367(c)(3); see also United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966).

ACCORDINGLY, IT IS HEREBY ORDERED, that:

(1) Defendants' motions to dismiss [docket # 6 and #8] are **granted** and the above captioned case is hereby **dismissed.**

(2) Plaintiff's motion for a special report [docket #10] is **denied.**

SO ORDERED THIS 8th day of Nov., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE NOV 1993

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

FILED
NOV 9 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

DARRELL CRAWFORD and MARK GERNHARDT,	)	
Plaintiffs,	)	
vs.	)	Case No. 93-C-305-B
GRAPHICS UNIVERSAL, INC., and the GRAPHICS UNIVERSAL, INC. EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,	)	
Defendants.	)	

ORDER OF DISMISSAL OF COUNT II OF PLAINTIFFS' COMPLAINT WITHOUT PREJUDICE

Upon Motion by Plaintiffs, which is unopposed, the Court hereby dismisses Count II of Plaintiffs' Complaint without prejudice.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Timothy A. Carney, Esq.
Richard D. Koljack, Jr., Esq.
GABLE & GOTWALS
2000 Bank IV Center
Tulsa, Oklahoma 74119
(918) 582-9201

ATTORNEYS FOR PLAINTIFFS

ENTERED ON DOCKET

DATE 11-10-93

FILED

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
-vs.-	)	CASE NO. 93-C-484B
	)	
CAROLYN JOYCE BENIGHT;	)	
THE STATE OF OKLAHOMA, ex rel.	)	
OKLAHOMA TAX COMMISSION;	)	
CITY OF BROKEN ARROW, OKLAHOMA;	)	
COUNTY TREASURER,	)	
Tulsa County, Oklahoma; and	)	
BOARD OF COUNTY COMMISSIONERS,	)	
Tulsa County, Oklahoma;	)	
	)	
Defendants.	)	

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9th day of November, 1993. The plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, appears by Assistant General Counsel Kim D. Ashley; the defendant, City of Broken Arrow, Oklahoma, appears by City Attorney Michael R. Vanderburg; the defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Assistant District Attorney J. Dennis Semler; and the defendant Carolyn Joyce Benight, appears not, but makes default.

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

1. (a) The defendant, **Carolyn Joyce Benight**, acknowledged receipt of summons and complaint on June 13, 1993, but has failed to otherwise appear and is now in default;

(b) All other defendants, namely **The State of Oklahoma, ex rel. Oklahoma Tax Commission; City of Broken Arrow, Oklahoma; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have filed timely answers in this action and either have approved the form of this judgment as evidenced by their attorney's subscriptions or have filed a disclaimer of any interest in this action.

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 August 31, 1987, the defendant Carolyn Joyce Benight, a single person, executed and delivered to Mercury Mortgage Co., Inc., promissory note in the amount of $67,833.00, payable in monthly installments, with interest thereon at the rate of 8.625% per annum.

4. As security for payment of the above described note, the defendant Carolyn Joyce Benight executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated August 31, 1987, covering the following described property:

Lot Thirty-nine (39), Block Five (5), SILVERTREE, an addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Such tract is referred to herein as "the Property." This mortgage was recorded with the Tulsa County Clerk September 8, 1987, in book 5050 at page 771. The mortgage tax due thereon was paid.

5. On September 22, 1988, Mercury Mortgage Co., Inc. assigned the 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 September 22, 1988, in book 5129 at page 2398.

6. On October 1, 1988, the defendant, Carolyn Joyce Benight, 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. Superseding agreements were reached on February 1, 1990; March 1, 1991; and January 1, 1992.

7. The defendant, Carolyn Joyce Benight has defaulted under the terms of the note, mortgage and forbearance agreement due to her failure to pay installments when due. Because of such default, the defendant, Carolyn Joyce Benight is indebted to the plaintiff in the amount of $98,435.91, plus interest at the rate of 8.625% per annum from May 20, 1993, until the date of this judgment, plus interest thereafter at the legal rate of 3.38 % until fully paid; plus the

costs of this action in the amount of $170.00 for abstracting and $8.00 for recording the Notice of Lis Pendens.

8. The defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, claims no right, title or interest in or to the Property.

9. 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 Valley Ridge addition.

10. The defendant, County Treasurer, Tulsa County, Oklahoma, claims an interest in the Property by virtue of personal property taxes for: tax year 1988, indexed under number 88-03-2763050, in the amount of $22.00; tax year 1989, indexed under number 89-03-2763330, in the amount of $19.00; and tax year 1991, indexed under number 91-03-2819560, in the amount of $61.00.

11. The defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims 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, Carolyn Joyce Benight,

in the principal sum of $98,435.91, plus interest at the rate of 8.625% per annum from May 20, 1993, until judgment, plus interest thereafter at the legal rate of 3.38 % until paid, plus the costs of this action in the amount of $178.00, 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, State of Oklahoma, ex rel. Oklahoma Tax Commission, has no right, title or interest in the Property.

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 as shown on the duly recorded plat of Valley Ridge Addition.

IT IS FURTHER ORDERED that the defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $102.00, 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, Carolyn Joyce Benight, 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 appraisement 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.

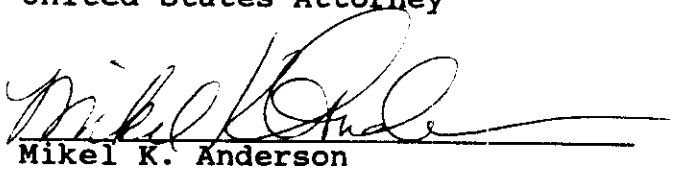
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

Judgment of Foreclosure
USA v. Carolyn Joyce Benight, et al.
Civil Action No. 93-C-484B

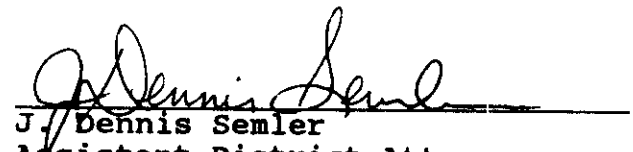
APPROVED:

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

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

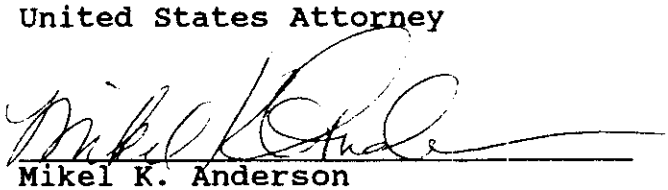


J. Dennis Semler
Assistant District Attorney
Attorney for defendants
Tulsa County Treasurer and
Board of Tulsa County Commissioners

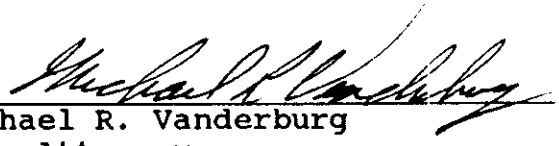
Judgment of Foreclosure
USA v. Carolyn Joyce Benight, et al.
Civil Action No. 93-C-484B

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



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

ENTERED ON DOCKET
NOV 10 1993

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

FILED

NORMAN PANTHER,	)	
Plaintiff,	)	
vs.	)	No. 93-C-248-B
LARRY FIELDS, et al.,	)	
Defendants.	)	

ORDER

Before the Court is Defendants' motion to dismiss filed on July 26. 1993. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 15(A).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss [docket #7] is **granted** and the above captioned case is **dismissed without prejudice** at this time.

(2) The Court may reopen this case if Plaintiff submitts a response to Defendants' motion to dismiss no later than twenty (20) days from the date of entry of this order.

SO ORDERED THIS 8th day of Nov, 1993.

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

ENTERED ON DOCKET

DATE NOV 10 1993

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

PRESTON CARTER HAYES,	)	
Plaintiff,	)	
vs.	)	No. 93-C-829-B
DELAWARE COUNTY SHERIFF DEPARTMENT, et al.,	)	
Defendants.	)	

FILED

NOV 09 1993

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

ORDER

Before the Court is Plaintiff's motion to dismiss the above captioned case with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion do dismiss [docket #4] is **granted** and the above captioned case is **dismissed with prejudice.**

SO ORDERED THIS 8th day of Nov., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

5

ENTERED ON DOCKET
DATE NOV 10 1993

FILED
NOV 10 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 93-C-718-E
SCOTT E. THOMAS, JAMES R. GOTWALS,	)	
Defendants.	)	

AGREED JUDGMENT

This matter comes on for consideration this 10th day of ~~October,~~ November 1993, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, SCOTT E. THOMAS, appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, SCOTT E. THOMAS, was served with Summons and Complaint on October 8, 1993. The Defendant has not filed an Answer but in lieu thereof has agreed that SCOTT E. THOMAS is indebted to the Plaintiff in the amount of $39,248.81 and that judgment may accordingly be entered against SCOTT E. THOMAS in the amount of $39,248.81, plus interest thereafter at the legal rate until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant SCOTT E. THOMAS in the amount of $39,248.81, plus interest thereafter

AND
IMMEDIATELY
UPON RECEIPT.

at the current legal rate of 3.40 percent per annum until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED:

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

PETER BERNHARDT
Assistant United States Attorney

SCOTT E. THOMAS

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

ENTERED ON DOCKET
NOV 10 1993

ATLANTIC RICHFIELD COMPANY, Plaintiff, vs. AMERICAN AIRLINES, INC., et al., Defendants.	Case Nos. 89-C-868 B; 89-C-869 B; 90-C-859 B (Consolidated)
AND CONSOLIDATED ACTIONS	
AMERICAN AIRLINES, INC.; et al., Third-Party Plaintiffs, vs. BIG CABIN TRUCK PLAZA, INC., f/k/a CHEROKEE TRUCK TERMINAL, INC., et al. Third-Party Defendants.	

FILED
1993
David M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER FOR DISMISSAL WITHOUT PREJUDICE

Now on this 9th day of November, 1993, upon presentation of the Notice of Dismissal Without Prejudice of Third-Party Defendant Precision Imports, Inc. by the Group I Defendants/Third-Party Plaintiffs, the Court finds and adjudges, pursuant to and in accordance with Fed. R. Civ. P. 41(a), that all claims of the Group I Defendants/Third-Party Plaintiffs set forth herein against Precision Imports, Inc. should be and are hereby dismissed without prejudice to any future action on such claims, with the parties to bear and be responsible for their own costs and expenses incurred herein.

S/ THOMAS R. BRETT

THOMAS R. BRETT,
United States District Judge

Submitted by:
Mark B. Jennings, OBA NO. 10082
SHIPLEY, INHOFE & STRECKER
3600 First National Tower
Tulsa, Oklahoma 74103
(918) 582-1720

NOTE: THIS [illegible] FILED
BY [illegible] AND
PA[illegible] IMMEDIATELY
UPON RECEIPT.

ENTERED ON DOCKET
DATE NOV 10 1993

GARY A. EATON
1717 E. 15th STREET
TULSA, OKLAHOMA 74104
(918) 743-8781

JESS WOMACK
ATLANTIC RICHFIELD COMPANY
515 SOUTH FLOWER STREET
45th FLOOR
LOS ANGELES, CALIFORNIA 90071

LARRY G. GUTTERRIDGE
LINDA S. PETERSON
SIDLEY & AUSTIN
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
(213) 896-6000

Attorneys for Plaintiff
ATLANTIC RICHFIELD COMPANY

FILED
NOV 9 1993
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff, -vs- AMERICAN AIRLINES, et al., Defendants.	)	Case Nos. 89-C-868-B 89-C-869-B 90-C-859-B NOTICE OF DISMISSAL WITHOUT PREJUDICE OF WADE FARNAN

Pursuant to Federal Rule of Civil Procedure 41(a)(1), all claims which the Plaintiff Atlantic Richfield Company has filed in

this action against Defendant Wade Farnan are hereby dismissed without prejudice.

Dated: ~~October~~ November 9, 1993

GARY A. EATON

ATLANTIC RICHFIELD COMPANY
JESS WOMACK

SIDLEY & AUSTIN
LARRY GUTTERRIDGE
LINDA S. PETERSON

By: _____
Gary A. Eaton
Attorneys for Plaintiff
Atlantic Richfield Company

AXA93D48.SEL

CERTIFICATE OF MAILING

The undersigned certifies that on November 9, 1993, a true and correct copy of the above instrument / pleading was mailed with postage prepaid to the following persons:

Mr. William Anderson, Attorney at Law and Liaison Counsel and Co-Lead Counsel for Owners and Non-Operator Lessees Group, 320 South Boston Building, Suite 500, Tulsa, OK 74103

Mr. John Tucker, Lead Counsel for Non Group Generators and Transporters, 2800 Bank IV Building, Tulsa, OK 74119

Mr. Steven Harris, Attorney at Law and Lead Counsel for Operators Group, Suite 260 Southern Hills Tower, 2431 East 61st Street, Tulsa, OK 74136

Mr. Charles Shipley, Attorney at Law and Settlement Coordinator, 3600 First National Tower, Tulsa, OK 74103

Ms. Claire V. Eagan, Mr. Michael Graves, and Mr. Matthew Livengood, Attorneys at Law and Lead Counsel for the Sand Springs PRP Group, 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, OK 74172

Mr. David W. Zugschwerdt, United States Department of Justice, Environment and Natural Resources Division, P. O. Box 23986, Washington, D.C. 20026-3986.

ENTERED ON DOCKET
NOV 9 1993

FILED
NOV 9 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

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

THE NANCI CORPORATION INTERNATIONAL, an Oklahoma Corporation,	)	
Plaintiff,	)	
v.	)	No. 92-C-587-B
INTERNATIONAL PRODUCT RESOURCES, a Foreign Company, and LIQUINET, INC., a Foreign Corporation,	)	
Defendants.	)	

O R D E R

This matter comes on for consideration of Plaintiff's Application For Attorney's Fees (docket # 14).

Following an evidentiary hearing on April 14, 1993, Findings of Fact, Conclusions of Law and Judgment were entered herein awarding Plaintiff actual damages in the amount of $262,348.54 plus consequential damages in the amount of $350,000.00 for a total of $612,348.54.

Conclusion of Law #5 awarded Plaintiff reasonable attorney's fees pursuant to 12 O.S. §939 upon proper and timely application under local rules. Plaintiff has made such timely application. Defendants have made no response thereto.

Based upon Plaintiff's pleadings, affidavits and the record before the Court, the Court grants Plaintiff attorney's fees in the amount of $2820.00.

IT IS SO ORDERED this 8th day of November, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
NOV 9 1993

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

ALBERT R. TERHUNE, Plaintiff, vs. HOWARD R. MEFFORD, Special Administrator of the Estate of GLEN DALE GIBBS, Deceased, THE CITY OF SAPULPA, OKLAHOMA, a municipal corporation, and TRACY GRIFFIN, individually and in his official capacity as a police officer for the City of Sapulpa, Oklahoma, Defendants.	)	Case No. 93-C-635-B

FILED
NOV 9 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

Now before the Court is the First Motion for Summary Judgment of Defendants City of Sapulpa and Tracy Griffin (Docket #6) pursuant to Fed.R.Civ.P. 56.

This is an action arising from a police pursuit of a criminal suspect. Plaintiff, Albert R. Terhune ("Terhune") alleges that officer Tracy Griffin ("Griffin"), of the Sapulpa Police Department, pursued an automobile driven by the criminal suspect, Glen Dale Gibbs ("Gibbs"), at a high rate of speed, causing Gibbs' vehicle to collide with Plaintiff's vehicle. Plaintiff has filed this action pursuant to 42 U.S.C. §1983, alleging that Defendants Griffin and the City of Sapulpa violated Plaintiff's civil rights.[1]

The following facts are undisputed:

1) On the morning of Sunday, January 5, 1992, at about 9:30

[1] Plaintiff has also named Howard R. Mefford, the administrator of Gibbs' estate, as a Defendant. Mefford has not filed an answer.

a.m., the Sapulpa Police Department received notice that Glen Dale Gibbs, a black male, had escaped from a correctional institution, and was: 1) suspected of rape; 2) believed to be in possession of firearms and a butcher knife; and 3) subject to a warrant for arrest. The Sapulpa Police Department dispatcher broadcast this information and a description of the vehicle Gibbs was driving to Sapulpa police officers. (See Plaintiff's Complaint, Paragraph IV. See also Affidavit of Tracy Griffin, attached as Exhibit A to Defendant's motion, and attachments A-1 and A-2).

2) Sapulpa Police Officer Tracy Griffin heard the dispatcher's transmission concerning Gibbs. Griffin knew and could recognize Gibbs. While on patrol, Griffin observed a parked vehicle matching the dispatcher's description of Gibbs' car. The car was occupied by a person slumped over the steering wheel. (See Plaintiff's Complaint, Paragraph IV. See also Affidavit of Tracy Griffin).

3) After determining from a tag check that the car was registered to a James Gibbs, whom Griffin knew to be Gibbs' brother, Officer Griffin stopped to investigate. He observed the occupant of the car to be a black male, asleep at the wheel. He also saw a butcher knife in the rear floorboard of the car. Because both doors of the car were locked, Griffin tapped on the window of the automobile. (See Plaintiff's Complaint, Paragraph IV. See also affidavit of Tracy Griffin).

4) The occupant of the parked car awakened, looked up and saw Officer Griffin, who recognized the occupant of the car as Glen Dale Gibbs. The occupant had a can of beer propped in his lap.

There were several cans of beer on the floorboard of the front passenger side of the vehicle which appeared to be empty, plus a 12-pack container. Gibbs immediately started the car and drove away at a high rate of speed to evade the police officer. Based on the information transmitted by the dispatcher, his identification of Gibbs, and his observation of the knife in the car, Griffin perceived Gibbs to be a threat to the safety of the public. Griffin returned to his police cruiser and notified the police dispatcher that he was in pursuit of the Gibbs' vehicle. Griffin activated the overhead lights and siren on the police cruiser. (See Plaintiff's Complaint, Paragraph IV. See also affidavit of Tracy Griffin).

5) The pursuit proceeded down the rural road and onto Highway 66, northbound toward Tulsa. After the vehicles had traveled 2.6 miles at a rate of speed which exceeded the speed limit, the Gibbs vehicle veered to the left. The Gibbs vehicle drove across the southbound oncoming lanes of traffic and collided with the Plaintiff's vehicle in the southbound lane/shoulder area of highway 66. This collision occurred approximately thirty minutes after the police dispatcher broadcast the information concerning Gibbs and approximately three minutes after the pursuit began. (See Plaintiff's Complaint, Paragraph IV. See also Affidavit of Tracy Griffin and attachment A-3).

6) Both Gibbs and Griffin were traveling at approximately 85 miles per hour. The posted speed limit was 55 miles per hour. (Exhibit A to Plaintiff's brief in opposition to Defendants' motion for summary judgment).

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

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

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

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

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

> "Summary judgment is appropriate if 'there is

> no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

Legal Analysis and Authorities

Plaintiff asserts the Defendants violated his civil rights in violation of §1983.[2] To establish §1983 liability, the Plaintiff must prove the Defendants' actions were the result of deliberate or reckless intent to deprive the Plaintiff of his constitutional rights. Daniels v. Williams, 474 U.S. 327, 331 (1986) and Medina v. City and County of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992). "[R]eckless intent is established if the actor was aware of a known

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[2] 42 U.S.C. §1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ....

or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences." Medina, 960 F.2d at 1496 (citing Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990).

> An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to the risk, for example 'when the actor does not care whether the other person lives or dies, despite knowing there is a significant risk of death' or grievous bodily injury. Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988(en banc), *cert. denied*, 489 U.S. 1065 (1989); Apodaca v. Roi Arriba County Sherriff's Dep't, 905 F.2d 1445, 1446-47 n. 3 (10th Cir. 1990)(reckless conduct in police pursuit cases must involve true indifference to risks created); Harris, 843 F.2d at 416; *see also* Temkin v. Frederick County Comm'rs, 945 F.2d 716, 720, 723 (4th Cir. 1991)(reckless conduct in police chase cases must "shock the conscience" to be actionable) *cert. denied*, ___ U.S. _____, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992).

Medina, 960 F.2d at 1496.

Plaintiff contends Officer Griffin's pursuit of Defendant Gibbs was reckless and showed an unreasonable disregard for the consequences of his actions. Plaintiff suggests Defendant Griffin knew Gibbs would flee and thus should not have "changed the status quo"[3] and should not have continued the pursuit "after it was apparent the direction the chase was heading." (Plaintiff's Brief in Opposition, p. 4). Plaintiff contends Gibbs was "asleep and

---

[3] Plaintiff is apparently attempting the distinguish the instant case from DeShaney v. Winnebago County Social Services Department, 489 U.S. 189, 201 (1989), it which the Court concluded the state was not liable where it simply failed to intervene in the status quo.

ineffectual until woken by Griffin and forced to flee." Plaintiff further contends Griffin's actions were unreasonable and in disregard to a known risk -- that Gibbs would flee and injure someone.

The material facts are uncontroverted. Defendant Griffin discovered an individual sitting in a car which met the description of the car Defendant Gibbs was known to be driving. Griffin knocked on the window of the car and recognized the occupant as Gibbs, who sped away. Griffin immediately engaged in a brief high speed chase of Gibbs, who he knew had recently escaped from a correctional institution, was violent and possibly intoxicated.

The Court concludes as a matter of law that the undisputed actions of Officer Griffin do not reflect "a wanton or obdurate disregard or complete indifference to risk." Medina, 960 F.2d at 1496. In order to impose §1983 liability in police pursuit cases, the Plaintiff must establish an "unreasonable disregard of the consequences." Archuleta, 897 F.2d at 499. Although all high speed chases involve a risk of harm, not all such pursuits are unreasonable under the circumstances. In the instant case, the Court concludes that a reasonable jury could not find Officer Griffin's actions involved "reckless conduct" or "true indifference to the risks created." Furthermore, the actions of Officer Griffin do not "shock the conscience."

In summary, the Court concludes Plaintiff has failed to provide evidence establishing a violation of his civil rights by Officer Griffin and therefore Officer Griffin is entitled to

summary judgment.

Plaintiff's Complaint also alleges that the City of Sapulpa is liable under §1983 for "failing to institute an adequate pursuit policy and/or by failing to train and supervise its officers properly." It is well established that "[w]hen there is no underlying constitutional violation by a county officer, there cannot be an action for failing to train or supervise the officer." Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445, 1447 (10th Cir. 1990)(quoting City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)).

As set forth above, Plaintiff has failed to establish an underlying constitutional violation by Officer Griffin, and therefore summary judgment in favor of the City of Tulsa is appropriate. Furthermore, Plaintiff has provided no evidence of the City's pursuit policy or the City's alleged failure to train and supervise its officers.

For all the above stated reasons, the First Motion for Summary Judgment of Defendants City of Sapulpa and Tracy Griffin (Docket #6) should be and is hereby GRANTED.

Plaintiff's Complaint also names Howard R. Mefford, Special Administrator of the Estate of Glen Dale Gibbs, as a Defendant. Although this is an action for relief under 42 U.S.C. §1983, Plaintiff has made no allegation that Gibbs was acting "under color of state law" at the time of the accident and therefore Plaintiff's 42 U.S.C. §1983 claim as to Howard R. Mefford should be and is hereby DISMISSED with prejudice.

IT IS SO ORDERED THIS 8th DAY OF NOVEMBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 11-9-93

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

BRENDA F. DUNIPHIN,	)	
Plaintiff,	)	
v.	)	92-C-447-E
LOUIS W. SULLIVAN,	)	
Defendant.	)	

FILED

NOV 9 1993

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

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 19, 1993 in which the Magistrate Judge recommended that the case be **Remanded** for re-examination of the issue of "chronic diarrhea".

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

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

It is, therefore, Ordered that the case is **Remanded** for re-examination of the issues as set forth in the Report and Recommendation.

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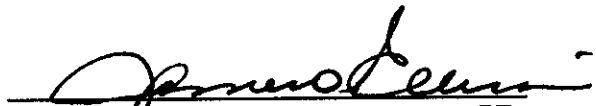
SO ORDERED THIS 8th day of November, 1993.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 11-9-93

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	
JAMES ARTHUR STEPHENS a/k/a JAMES A. STEPHENS; TOMMY G. SMALL; GINA D. SMALL; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION,	)	
Defendants.	)	**CIVIL ACTION NO. 93-C-629-E**

FILED

NOV 9 1993

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day of November, 1993. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, James Arthur Stephens a/k/a James A. Stephens, Tommy G. Small and Gina D. Small, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, James Arthur Stephens a/k/a James A. Stephens, was served with Summons and Amended Complaint on October 1, 1993; that Defendant, Tommy G. Small, acknowledged

receipt of Summons and Complaint on July 27, 1993; that Defendant, Gina D. Small, acknowledged receipt of Summons and Complaint on July 27, 1993; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Amended Complaint on September 23, 1993; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 12, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 12, 1993.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on August 5, 1993, claiming no right, title or interest in the subject property; that the Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on August 5, 1993, claiming no right, title or interest in the subject property; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on October 13, 1993; and that the Defendants, James Arthur Stephens a/k/a James A. Stephens, Tommy G. Small and Gina D. Small, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on September 18, 1991, James Arthur Stephens filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-03252-W, was discharged on January 10, 1992, and the case was closed on February 10, 1992.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage

securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Nineteen (19), Block Nine (9), in RESERVOIR HILL ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on August 15, 1989, the Defendant, James Arthur Stephens a/k/a James A. Stephens, 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 $28,500.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent (7.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, James Arthur Stephens a/k/a James A. Stephens, 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 August 15, 1989, covering the above-described property. Said mortgage was recorded on August 15, 1989, in Book 5201, Page 798, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, James Arthur Stephens a/k/a James A. Stephens, 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, James Arthur Stephens a/k/a James A. Stephens, is indebted to the Plaintiff in

the principal sum of $27,778.83, plus interest at the rate of 7.5 percent per annum from May 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $4.20 for service of Summons and Complaint.

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

The Court further finds that the Defendants, James Arthur Stephens a/k/a James A. Stephens, Tommy G. Small and Gina D. Small, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action by virtue of Income Tax Warrant No. ITI9200197900 against Tommy G. Small and Gina D. Small, filed March 5, 1992 in the amount of $309.64 plus interest and penalties; and Income Tax Warrant No. ITI9300686400 against Tommy G. Small and Gina D. Small, filed April 1, 1993 in the amount of $134.74 plus interest and penalties. Said liens are 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, James Arthur Stephens a/k/a James A. Stephens, in the principal sum of $27,778.83, plus interest at the rate of 7.5 percent per

annum from May 1, 1992 until judgment, plus interest thereafter at the current legal rate of 3.38 percent per annum until paid, plus the costs of this action in the amount of $4.20 for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, James Arthur Stephens a/k/a James A. Stephens, Tommy G. Small, Gina D. Small, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment in the amount of $444.38 plus interest and penalties.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, James Arthur Stephens a/k/a James A. Stephens, 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 appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, in the amount of $444.38 plus interest and penalties.

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

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

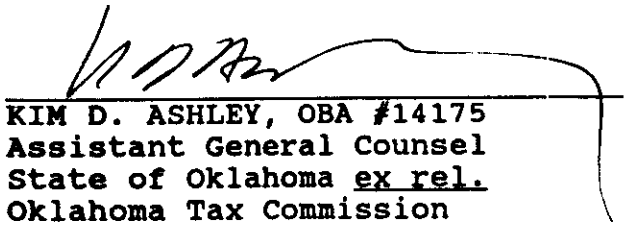
S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

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



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
State of Oklahoma ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 93-C-629-E

WDB/esr

ENTERED ON DOCKET

DATE 11-9-93

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

FILED

NOV 9 1993

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

JOHNNY LEE OWENS, JR.,	)	
Plaintiff(s),	)	
v.	)	93-C-0295-E
TULSA HOUSING AUTHORITY, et al,	)	
Defendant(s).	)	

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 21, 1993 in which the Magistrate Judge recommended that Plaintiff's action be dismissed without prejudice to refiling.

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 Plaintiff's action is dismissed without prejudice to refiling.

SO ORDERED THIS 8th day of November, 1993.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

9

ENTERED ON DOCKET
NOV 9 1993

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

ALBERT R. TERHUNE, Plaintiff, vs. HOWARD R. MEFFORD, Special Administrator of the Estate of GLEN DALE GIBBS, Deceased, THE CITY OF SAPULPA, OKLAHOMA, a municipal corporation, and TRACY GRIFFIN, individually and in his official capacity as a police officer for the City of Sapulpa, Oklahoma, Defendants.	)	Case No. 93-C-635-B

FILED
NOV 9 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Tracy Griffin and the City of Sapulpa, and against the Plaintiff, Albert R. Terhune. Plaintiff shall take nothing of his claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 6, and each party is to pay its respective attorney's fees.

Dated, this 8th day of November, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
NOV 9 1993

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

FILED
NOV 8 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

RICKY CHARLES LASLEY,	)	
Plaintiff,	)	
vs.	)	No. 92-C-1039-B
OTTAWA COUNTY COMMISSIONERS, et al.,	)	
Defendants.	)	

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment filed on September 2, 1993.

On September 20, 1993, the court granted Plaintiff until October 18, 1993, to file a response. As of the date of this Order, Plaintiff has not responded. Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 15(A).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss or for summary judgment [docket #15] is **granted** and the above captioned case is **dismissed without prejudice** at this time.

(2) The Court may reopen this case if Plaintiff submitts a response to Defendants' motion to dismiss or for summary judgment no later than twenty (20) days from the date of

entry of this order.

SO ORDERED THIS 8 day of Nov., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
NOV 9 1993

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

FILED
NOV 8 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

WILLIAM DAVID JINKS, Plaintiff,	)	
vs.	)	No. 93-C-127-B
MICHAEL D. PARSONS, et al., Defendants.	)	

ORDER

Before the Court is Defendants' motion to dismiss filed on May 14, 1993. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 15(A).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss [docket #5] is **granted** and the above captioned case is **dismissed without prejudice** at this time.

(2) The Court may reopen this case if Plaintiff submitts a response to Defendants' motion to dismiss no later than twenty (20) days from the date of entry of this order.

SO ORDERED THIS 8th day of Nov., 1993.

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

ENTERED ON DOCKET
DATE NOV 9 1993

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

FILED
NOV 8 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

EUGENE JACKSON,	)	
Plaintiff,	)	
vs.	)	No. 93-C-165-B
RON CHAMPION, et al.,	)	
Defendants.	)	

ORDER

Before the Court is Defendants' motion to dismiss filed on June 22, 1993. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 15(A).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss [docket #5] is **granted** and the above captioned case is **dismissed without prejudice** at this time.

(2) The Court may reopen this case if Plaintiff submitts a response to Defendants' motion to dismiss no later than twenty (20) days from the date of entry of this order.

SO ORDERED THIS 8th day of Nov., 1993.

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

NOV 8 1993

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

FILED

NOV 8 1993

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

CLINTON E. FAGER, Benefits Administrator and PUBLIC SERVICE COMPANY OF OKLAHOMA, and Named Fiduciary of the Central and South West Systems Employees' Disability Income Plan,	)	
Plaintiff,	)	
vs.	)	Case Number 93-C-709B
BRUCE D. RIDDLE,	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Federal Rules of Civil Procedure Rule 41(a)(1), the Plaintiff hereby dismisses this action without prejudice.

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By: _____

Charles S. Plumb, OBA No. 7194
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Plaintiff

11-8-93

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

Russell Wright,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. 93-C-185-E
	)	
McJunkin Corporation,	)	
	)	
Defendant.	)	

FILED

NOV 8 1993

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

ORDER OF DISMISSAL

This matter comes on pursuant to the joint stipulation of Russell Wright, and McJunkin Corporation in which the parties jointly moves this Court pursuant to Federal Rules of Civil Procedure 41 to dismiss this case with prejudice for the reason that the parties have entered into a settlement of the above styled and numbered cause of action.

IT IS ORDERED, by the Court, that the above styled and numbered civil action is hereby dismissed with prejudice to refiling.

DATED this 5 day of ~~October~~ November, 1993.

S/ JAMES O. ELLISON
United States District Judge

ENTERED ON DOCKET

DATE 11-8-93

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV - 5 1993

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

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, CLC, LOCAL 952	)	
Plaintiff,	)	
v.	)	Civil No. 93-C-0132-E
ROCKWELL INTERNATIONAL CORPORATION	)	
Defendant	)	

ORDER DISMISSING CASE WITH PREJUDICE

Upon Plaintiff's Motion, this Court hereby dismisses the captioned case with prejudice.

IT IS SO ORDERED.

DATED this 2nd day of ~~October,~~ November 1993.

CHIEF JUDGE
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 11-8-93

FILED

NOV 8 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

THOMAS R. SLIGAR,	)	
	)	
Petitioner,	)	
	)	
v.	)	91-C-690-E
	)	
RON CHAMPION, WARDEN, and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,	)	
	)	
Respondents.	)	

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed October 22, 1993, in which the Magistrate Judge recommended that petitioner's Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is therefore Ordered that petitioner's Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is denied, as the petitioner has failed to exhaust his state remedies before coming to this court.

Dated this 8th day of November, 1993.

JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

12

ENTERED ON DOCKET

DATE 11-8-93

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NOV 8 1993

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

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Civil Action No. 93-C-657-E
v.	)	
Rena Howling-Crane,	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 8 day of November, 1993, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Rena Howling-Crane, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Rena Howling-Crane, was served with Summons and Complaint on September 10, 1993. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Rena Howling-Crane, for the principal amount of $29,370.00, plus administrative charges in the amount of $60.00, plus accrued interest of $13,958.15, plus interest thereafter at the rate of

15.5 percent per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 3.38 % percent per annum until paid, plus costs of this action.

S/ JAMES O. ELLISON
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

ENTERED ON DOCKET

DATE NOV 0 8 1993

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 5 1993

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

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
NATHANIEL MORROW, JR. a/k/a NATHAN MORROW, et al., Defendants.	)	CIVIL ACTION NO. 92-C-661-B

O R D E R

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Judgment of Foreclosure entered herein on the 24th day of August, 1993, is vacated, and restoring the note and mortgage sued upon in Plaintiff's Complaint and dismissing this action without prejudice. The Court, having considered the motion and the records and files in this case, and being fully advised in the premises, finds that good cause has been shown for the relief sought and that the motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Judgment of Foreclosure entered herein on the 24th day of August, 1993, be, and the same is hereby vacated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the note and mortgage sued upon in Plaintiff's Complaint and attached thereto as Exhibits A an B, respectively, and more particularly described as follows, to wit:

10

Lot Ten (10) Block Eighteen (18) Northridge, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

be, and such note and mortgage are hereby completely restored as a valid and subsisting note and mortgage and ordered redelivered to Plaintiff, United States of America, as the owner and holder thereof, and with full force and effect, the same as though said judgment and cancellation had never been adjudged and entered.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be, and the same is hereby dismissed without prejudice.

Dated this 4th day of Nov., 1993.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

PP/esr

VA Form 26-5434a (Direct Loan)
Revised March 1970
Section 1811, Title 38, U.S.C.

OKLAHOMA

51-51-4-0006372

MORTGAGE NOTE

Tulsa , Oklahoma.

$9,500.00

August 14 , 1973 .

FOR VALUE RECEIVED, The undersigned promise(s) to pay to the order of the Administrator of Veterans Affairs, an Officer of the United States of America, and his successors in such office, as such, and his or their assigns, the principal sum of Nine thousand five hun dred and no/100--Dollars ($ 9,500.00), with interest from date at the rate of four and one half per centum (4½ %) per annum on the unpaid balance until paid. The said principal and interest shall be payable at the office of the Agent Cashier, Data Processing Center Austin, Texas or at such other place as the holder hereof may designate in writing delivered or mailed to the debtor, in monthly installments of forty eight dollars and 14/100---------- Dollars ($ 48.14), commencing on the first day of September , 19 73 , and continuing on the first day of each month thereafter until this note is fully paid, except that, if not sooner paid, the final payment of principal and interest shall be due and payable on the first day of August , 2003 .

Privilege is reserved to prepay at any time, without premium or fee, the entire indebtedness or any part thereof not less than the amount of one installment, or one hundred dollars ($100.00), whichever is less. Any prepayment made on other than an installment due date will not be credited until the next following installment due date.

If any deficiency in the payment of any installment under this note is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. In the event of any default in the payment of this note and if the same is collected by an attorney at law, the undersigned agree(s) to pay all costs of collection, including an attorney's fee of ten per centum (10%) of the amount then owing on this note.

This note is secured by mortgage of even date executed by the undersigned on certain property described therein and represents money actually used for the acquisition of said property or the improvements thereon.

The undersigned severally waive demand, protest and notice of demand, protest and nonpayment.

Nathaniel Morrow Jr.
Nathaniel Morrow Jr.

Mary Morrow
Mary Morrow

THIS IS TO CERTIFY that this is the note described in and secured by Mortgage of even date herewith and in the same principal amount as herein stated and secured by real estate situated in Tulsa County, State of Oklahoma.

Dated August 14 , 19 73 .

My Commission Expires: 9-28-76

Grace A. Williams
Grace A. Williams Notary Public.

EXHIBIT "A"

476870

2147

VA Form 26-5134 (Direct Loan)
Revised September 1966
Section 1811, Title 38, U.S.C.

295466

51-4-6372

OKLAHOMA

MORTGAGE

BOOK 4083 PAGE 914

Tulsa, Oklahoma.
August 14, 1973

KNOW ALL MEN BY THESE PRESENTS, THAT

Nathaniel Morrow Jr. and Mary Morrow husband and wife

hereinafter called the party of the first part, has mortgaged, and hereby mortgages to the Administrator of Veterans' Affairs, an officer of the United States of America, whose principal office and post-office address is Veterans Administration, Washington, D.C. 20420, and his successors in such office, as such, hereinafter with his successors and assigns called the party of the second part, all the following-described property, situated in the XXX, County of Tulsa, in the State of Oklahoma, with all buildings and improvements now or hereafter thereon and the appurtenances, hereditaments, and all other rights thereunto belonging, or in anywise now or hereafter appertaining, and the reversion or reversions, remainder and remainders, rents, issues and profits thereof, and all fixtures now or hereafter attached to or used in connection with the premises herein described and in addition thereto the following-described household appliances, which are, and shall be deemed to be, fixtures and a part of the realty, and are a portion of the security for the indebtedness herein mentioned:

said premises being more particularly described as follows, to wit:

Lot Ten (10) Block Eighteen (18) Northridge, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof:

EXHIBIT "B"

and warrants title as aforesaid to the same. The indebtedness secured hereby is the unpaid balance of the purchase price of the property above described

TO HAVE AND TO HOLD the premises above described, together with all rights and claims of Homestead and Exemption of the said party of the first part, to the said party of the second part, forever

This Mortgage is given to secure the payment of the principal sum of nine thousand five hundred and no/100---------- Dollars ($ 9,500.00), and other obligations mentioned herein, according to the terms and conditions of a certain note of even date herewith executed by the party of the first part to the party of the second part, which note is in words and figures as follows:

Tulsa , Oklahoma
August 14 , 19 73 .

$ 9,500.00

FOR VALUE RECEIVED, the undersigned promise(s) to pay to the order of , as Administrator of Veterans' Affairs, an officer of the United States of America, and his successors in such office, as such, and his or their assignees, the principal sum of Nine thousand five hundred dollars and no/100----------Dollars ($ 9,500.00), with interest from date, at the rate of four and one half per centum (4½ %) per annum on the unpaid balance until paid. The said principal and interest shall be payable at the office of the Agent Cashier, Veterans Administration DATA PROCESSING CENTER AUSTIN, TEXAS or at such other place as the holder hereof may designate, in writing delivered or mailed to the debtor, in monthly installments of forty eight dollars and 14/100---------- Dollars ($ 48.14), commencing on the first day of September , 19 73 , and continuing on the first day of each month thereafter until this note is fully paid, except that, if not sooner paid, the final payment of principal and interest shall be due and payable on the first day of August , XX 2003

Privilege is reserved to prepay at any time, without premium or fee, the entire indebtedness or any part thereof not less than the amount of one installment, or one hundred dollars ($100.00), whichever is less. Any prepayment made on other than an installment due date will not be credited until the next following installment due date.

If any deficiency in the payment of any installment under this note is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. In the event of any default in the payment of this note and if the same is collected by an attorney at law, the undersigned agrees to pay all costs of collection, including an attorney's fee of Ten per centum (10 %) of the amount then owing on this note.

This note is secured by Mortgage of even date executed by the undersigned on certain property described therein and represents money actually used for the acquisition of said property or the improvements thereon.

The undersigned severally waive demand, protest, and notice of demand, protest, and nonpayment.

s/ Nathaniel Morrow Jr.

s/ Mary Morrow

The said party of the first part covenants and agrees:

1. He is lawfully seized in fee (or such other estate, if any, as is herein stated) of the premises hereby conveyed and has good right to sell and convey the same as aforesaid; that the said premises are clear of all encumbrances except as herein otherwise recited; and that he will forever warrant and defend the aforesaid title to the said premises against all claims and demands. The party of the first part also warrants that he will keep the property hereby conveyed free and clear of all liens and encumbrances which might be prior to the lien of this Mortgage, except as otherwise recited.

2. He will not execute or file of record any instrument which imposes a restriction upon the sale or occupancy of the property described herein on the basis of race, color or creed.

3. He will pay all of said sums, payments and interest mentioned in said note and in this Mortgage, as they become due and payable. Privilege is reserved to prepay at any time, without premium or fee, the entire indebtedness or any part thereof not less than the amount of one installment, or one hundred dollars ($100.00), whichever is less. Any prepayment made on other than an installment due date will not be credited until the next following installment due date. Failure to make the payments provided for in the note and in this Mortgage shall be a breach of the conditions of this Mortgage and render the same subject to foreclosure; and the party of the first part further agrees that in case any ground rents, taxes, charges, or assessments covered by paragraph 13 hereof shall be allowed by the party of the first part to become delinquent, the party of the second part shall have the right to pay the same, together with any interest, penalties, costs and expenses which may have accrued thereon according to law at the time the same are paid, and if the party of the first part shall fail or refuse to reimburse the party of the second part for any such payments, with interest thereon at the rate provided for in the principal indebtedness from the date of such payment, within thirty (30) days after demand of the party of the second part, such failure or refusal shall be a breach of the conditions of this Mortgage and render the same liable to foreclosure.

4. Upon the request of the party of the second part the party of the first part shall execute and deliver a supplemental note or notes for the sum or sums advanced by the party of the second part for the alteration, modernization, improvement, maintenance, or repair of said premises, for taxes or assessments against the same and for any other purpose authorized hereunder. Said note or notes shall be secured hereby on a parity with and as fully as if the advance evidenced thereby were included in the note first described above. Said supplemental note or notes shall bear interest at the rate provided for in the principal indebtedness and shall be payable in approximately equal monthly payments for such period as may be agreed upon by the creditor and debtor. Failing to agree on the maturity, the whole of the sum or sums so advanced shall be due and payable thirty

(30) days after demand by the creditor. In no event shall the maturity extend beyond the ultimate maturity of the note first described above.

5. The party of the first part will keep the said premises in as good order and condition as they are now and will not commit or permit any waste, impairment or deterioration of said premises or any part thereof, except reasonable wear and tear.

6. Upon any default being made in the payment of any monthly installment of principal and interest as provided in the note secured hereby, or in the payment of any of the monthly sums for ground rents, taxes, assessments, and fire and other hazard insurance, or upon any default in payment thirty (30) days after demand of any money advanced by the party of the second part on account of any proper cost, charge, commission, or expense in and about the same, or expense of litigation, all as hereinafter provided for, or upon failure or neglect faithfully and fully to keep and perform any of the other conditions or covenants herein provided; then upon any and every such default, failure or neglect being so made as aforesaid, or if the party of the first part be adjudicated bankrupt or made defendant in a bankruptcy or receivership proceeding, the whole sum of money hereby secured may, at the option of the party of the second part, be declared due and payable at once, and this Mortgage may thereupon be foreclosed for the whole of said money, interest, and costs, together with the statutory damages in case of protest; and the party of the second party shall, upon the filing of petition for the foreclosure of this Mortgage, be forthwith entitled to the immediate possession of the above-described premises, and may at once take possession and receive and collect the rents, issues, and profits thereof. For value received, the party of the first part hereby expressly waives all benefits of all homestead and exemption laws; and appraisement of said premises is hereby expressly waived or not waived at the option of Mortgagee, such option to be exercised at the time judgment is rendered in any foreclosure hereof.

7. In case of a foreclosure of this Mortgage, and as often as any proceedings shall be taken to foreclose the same, the party of the first part will pay to the plaintiff therein an attorney's fee of ten per centum (10 %) of the amount then due, and the same shall be a further charge and lien upon the said premises.

8. As ADDITIONAL SECURITY for the payment of the indebtedness aforesaid the party of the first part does hereby assign to the party of the second part all the rents, issues, and profits now due or which hereafter may become due for the use of the premises hereinabove described. The party of the first part shall be entitled to collect and retain all of said rents, issues, and profits until default hereunder, EXCEPT rents, bonuses, and royalties resulting from oil, gas, or other mineral leases or conveyances thereof now or hereafter in effect. The lessee, assignee, sublessee, or purchaser of production of any such oil, gas or mineral lease is directed to pay any profits, bonuses, rents, revenues or royalties to the owner of the indebtedness secured hereby.

9. The granting of any extension or extensions of time of payment of said note, either to the maker or to any other person, or the taking of other or additional security for payment thereof, or the waiver of or failure to exercise any right to mature the whole debt under any covenant or stipulation herein contained, shall not in anywise affect this Mortgage nor the rights of the said party of the second part hereunder, nor operate as a release from any personal liability upon said note nor under any covenant or stipulation herein contained.

10. In the event the money loaned by the party of the second part and secured hereby shall be used to pay off or discharge any lien or encumbrance upon or against said property, the party of the second part, at its option and without prejudice to any other rights or remedies, shall be subrogated, to all such liens or encumbrances so discharged, satisfied or paid, and to all the rights of the person or persons to whom such payments have been made.

11. Together with, and in addition to, the monthly payments of principal and interest payable under the terms of the note secured hereby, the party of the first part will pay to the party of the second part, as trustee (under the terms of this trust as hereinafter stated) on the installment due day of each month until the said note is fully paid, the following sums:

(a) A sum equal to the ground rents, if any, and the taxes and special assessments next due on the premises covered by this Mortgage, plus the premiums that will next become due and payable on policies of fire and other hazard insurance on the premises covered hereby (all as estimated by the party of the second part, and of which the party of the first part is notified) less all sums already paid therefor divided by the number of months to elapse before one month prior to the date when such ground rents, premiums, taxes and assessments will become delinquent, such sums to be held by party of the second part in trust to pay said ground rents, premiums, taxes and special assessments before the same become delinquent.

(b) The aggregate of the amounts payable pursuant to subparagraph (a) and those payable on the note secured hereby, shall be paid in a single payment each month, to be applied to the following items in the order stated:

(I) ground rents, if any, taxes, assessments, fire and other hazard insurance premiums;

(II) interest on the note secured hereby; and

(III) amortization of the principal of said note.

Any deficiency in the amount of such aggregate monthly payment shall, unless made good by the party of the first part prior to the due date of the next such payment, constitute an event of default under this Mortgage. At the option of the party of the second part, the party of the first part will pay a "late charge" not exceeding four per centum (4%) of any installment when paid more than fifteen (15) days after the due date thereof to cover the extra expense involved in handling delinquent payments, but such "late charge" shall not be payable out of the proceeds of any sale made to satisfy the indebtedness secured hereby, unless such proceeds are sufficient to discharge the entire indebtedness and all proper costs and expenses secured thereby.

12. If the total of the payments made by the party of the first part under (a) of paragraph 11 preceding shall exceed the amount of payments actually made by the party of the second part as trustee for ground rents, taxes and assessments, or insurance premiums, as the case may be, such excess shall be credited on subsequent payments to be made by the party of the first part for such items or, at the option of the party of the second part as trustee, shall be refunded to the party of the first part. If, however, such monthly payments shall not be sufficient to pay such items when the same shall become due and payable, then the party of the first part shall pay to the party of the second part as trustee of any amount necessary to makeup the deficiency. Such payment shall be made within thirty (30) days after written notice from the party of the second part as trustee stating the amount of the deficiency, which notice may be given by mail. If at any time the party of the first part shall tender to the party of the second part, in accordance with the provisions of the note secured hereby, full payment of the entire indebtedness represented thereby, the party of the second part shall, in computing the amount of such indebtedness, credit to the account of the party of the first part any credit balance remaining under the provisions of (a) of paragraph 11 hereof. If there shall be a default under any of the provisions of this Mortgage resulting in a public sale of the premises covered hereby, or if the party of the second part

acquires the property otherwise after default, the party of the second part shall apply, at the time of the commencement of such proceedings, or at the time the property is otherwise acquired, the amount then remaining to credit of the party of the first part under (a) of paragraph 11, preceding, as a credit on the interest accrued and unpaid and the balance to the principal then remaining unpaid on said note.

13. He will pay all ground rents, taxes, assessments, water rates, and other governmental or municipal charges, fines, or impositions, except the mortgage registration tax to be paid upon the recording of this Mortgage, for which provision has not been made hereinbefore, and in default thereof the party of the second part may pay the same; and that he will promptly deliver the official receipts therefor to the party of the second part.

14. He will pay all proper costs, charges, commissions or expense of litigation and in default thereof the party of the second part may pay the same, and any sum or sums so paid shall be added to the debt secured hereby, shall be payable thirty (30) days after demand, shall bear interest at the rate provided for in the principal indebtedness from date of payment and shall be secured by this Mortgage.

15. He will continuously maintain hazard insurance, of such type or types and amounts as the party of the second part may from time to time require, on the improvements now or hereafter on said premises, and except when payment for all such premiums has theretofore been made under (a) of paragraph 11 hereof, he will pay promptly when due any premiums therefor. All insurance shall be carried in companies approved by the party of the second part, and the policies and renewals thereof shall be held by the party of the second part, and have attached thereto loss payable clauses in favor of and in form acceptable to the party of the second part. In event of loss he will give immediate notice by mail to the party of the second part, who may make proof of loss if not made promptly by the party of the first part, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to the party of the second part instead of to the party of the first part and the party of the second part jointly, and the insurance proceeds, or any part thereof, may be applied by the party of the second part at its option either to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged. In event of foreclosure of this Mortgage, or other transfer of title to the said premises in extinguishment of the indebtedness secured hereby, all right, title and interest of the party of the first part in and to any insurance policies then in force shall pass to the purchaser or grantee.

If the foregoing covenants and conditions are fully kept and performed, this conveyance shall be void; otherwise it is to remain in full force and effect.

Notice of the exercise of any option granted herein, or in the note secured hereby, to the holder of said note, is not required to be given.

The covenants herein contained shall bind, and the benefits and advantages shall inure to, the respective heirs, executors, administrators, successors, and assigns of the parties hereto. Whenever used, the singular number shall include the plural, the plural the singular, and the use of any gender shall include all genders and the term "party of the second part" shall include any payee of the indebtedness hereby secured or any transferee thereof whether by operation of law or otherwise.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, sealed, and delivered in the presence of:

Nathaniel Morrow Jr. [SEAL]

[SEAL]

Mary Morrow [SEAL]

[SEAL]

STATE OF OKLAHOMA, COUNTY OF Tulsa } ss:

ACKNOWLEDGMENT

Before me, the undersigned, a Notary Public in and for said County and State, on this 14th day of August, 1973, personally appeared Nathaniel Morrow Jr. and Mary Morrow husband and wife, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

Grace A. Williams, *Notary Public.*

[SEAL]

My commission expires 9-28-76

STATE OF OKLAHOMA

Mortgage

TO

ADMINISTRATOR OF VETERANS' AFFAIRS

STATE OF OKLAHOMA, County of } *ss:*

Filed in the office of the County Clerk for record this *day of* , *A. D. 19* , *at* *o'clock* *m.*, *and recorded in Book of* *of Mortgages, on page*

The within instrument has been compared with the record thereof in this office, and the record there made found correct in every particular, and the same has been properly indexed, in accordance with the laws of Oklahoma.

(Seal) ..... *County Clerk.*

Deputy .....

431066

Office of District Counsel
125 South Main Street
Muskogee OK 74401

Department of Veterans Affairs

October 28, 1993

In Reply Refer to:
351/023

United States Attorney
Northern District of Oklahoma
ATTN: Eileen Rutell
Page Belcher Building Third Floor
333 West 4th Street
Tulsa, OK 74103

NOV 0 1 1993

Re: USA v. Nathaniel Morrow, et al., 51-4-6372
USA v. Carol Miller Maxey, et al., 51-4-6399

Dear Sir:

The above-referenced loans have successfully been reinstated. Please dismiss and return abstracts to this office.

Sincerely,

CLIFTON R. BYRD
District Counsel

By Harold K. Haxton
HAROLD K. HAXTON
Staff Attorney

ENTERED ON DOCKET

DATE 11-5-93

FILED

NOV 4 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

ANTHONY ZANFARDINO, et al.,	)	
Plaintiffs,	)	
V.	)	No. 92-C-1021-E
UNITED STATES OF AMERICA,	)	
Defendant.	)	

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.

ORDERED this 4th day of November, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

18

ENTERED ON DOCKET

DATE 11-4-93

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

ROBERT EUGENE ALLEN,	)	
Plaintiff,	)	
vs.	)	No. 92-C-1020-E
RON CHAMPION, ET AL.,	)	
Defendants.	)	

FILED

NOV 4 1993

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

ORDER

Before the Court is Defendants' motion to dismiss filed on April 7, 1993. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 15(A).

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss [docket #5] is **granted** and that the above captioned case is **dismissed.**

SO ORDERED THIS 3RD day of November, 1993.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

8

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

FILED

NOV -4 93

RICHARD M. LAWRENCE
CLERK
U.S. DISTRICT COURT

MCI TELECOMMUNICATIONS CORPORATION,	)	
Plaintiff,	)	
vs.	)	Case No. 93 C 659 E
RESPONSE MEDIA, INC.,	)	
Defendant.	)	

JUDGMENT

Having considered the Stipulation for Consent to Judgment filed by Plaintiff and Defendants;

IT IS HEREBY ORDERED that MCI Telecommunications Corporation shall recover from Defendant Response Media, Inc. the principal sum of $18,759.40 plus reasonable attorneys' fees of $200.00 and court costs of $143.80 for a total amount of $19,103.20, together with legal interest pursuant to 28 U.S.C. § 1961 accruing at the rate of 3.38 % per annum from the date hereof, for which sum let execution issue.

DONE AND ORDERED THIS 3rd day of Nov, 1993.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT COURT JUDGE

JJP-3453

ENTERED ON DOCKET

DATE 11-4-93

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

HELEN GREY TRIPPET; HELEN GREY TIPPET, Custodian for Leslie S. Murphy and Mark Murphy; ROBERT S. TRIPPET, Guardian of Virginia Trippet; MARY SUSAN TRIPPET; CONSTANCE S. TRIPPET; FLO HEDLEY NORVELL and RUSSEL SIMPSON NORVELL, Executors of the Estate of Alberta Simpson Matterson,	)	
Plaintiffs,	)	
vs.	)	Case No. 92-C-192-E
TRI TEXAS, INC. (a Florida Corporation); CHARLES S. CHRISTOPHER; THE HOME-STAKE OIL AND GAS COMPANY and THE HOME-STAKE ROYALTY CORPORATION; JARRELL B. ORMAND; PAINE WEBBER INCORPORATED;	)	
Defendants.	)	

FILED

NOV 4 1993

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

ORDER DISMISSING THE HOME-STAKE OIL & GAS COMPANY
AND THE HOME-STAKE ROYALTY CORPORATION WITH PREJUDICE

Upon the oral motion of Defendants The Home-Stake Oil & Gas Company and The Home-Stake Royalty Corporation (collectively referred to herein as the "Companies") to dismiss this action with prejudice as against the Defendant Companies and for good cause shown, the Defendant Companies' oral motion is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants The Home-Stake Oil & Gas Company and The Home-Stake Royalty Corporation are dismissed from

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the above-captioned action with prejudice, the parties to bear their own costs and attorneys' fees.

DATED: November 3rd, 1993.

Honorable James O. Ellison
United States District Judge

ENTERED ON DOCKET

DATE 11-4-93

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

WALTER STEPHEN QUAY,	)	
Plaintiff,	)	
vs.	)	No. 92-C-1056-E
SHEFFIELD STEEL CORP.; UNITED STEELWORKERS OF AMERICA, Local No. 2741; and UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC;	)	
Defendants.	)	

FILED

NOV 4 1993

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

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 in favor of Defendants pursuant to the Court's Order (docket #46),

IT IS THEREFORE ORDERED that the action be dismissed on the merits.

ORDERED this 3RD day of ~~October~~ November, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

51

ENTERED ON DOCKET
DATE NOV 04 1993

FILED

NOV 13 1993

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

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN CENTRAL GAS COMPANIES, INC., Plaintiff,	)	
v.	)	Case No. 93-C 714 B
LASALLE ROLLING MILLS, INC., Defendant.	)	

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Plaintiff, American Central Gas Companies, Inc. ("American Central"), pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure hereby dismisses this action without prejudice to the refiling thereof.

Respectfully submitted,

James W. Rusher, OBA #11501
Heath E. Hardcastle, OBA #14247
ALBRIGHT & RUSHER
2600 Bank IV Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5434
(918) 583-5800

ATTORNEYS FOR PLAINTIFF
AMERICAN CENTRAL GAS COMPANIES, INC.

110293k5.DOC(1050.67/krl-lit#5)

CERTIFICATE OF MAILING

I, the undersigned, hereby certify on the 3rd day of November, 1993, a true and correct copy of the above and foregoing instrument was mailed by U.S. Mail with proper postage prepaid thereon to the following counsel of record:

Douglas L. Inhofe
SHIPLEY, INHOFE & STRECKER
3600 First National Tower
15 E. 5th Street
Tulsa, Oklahoma 74103

Paula K. Jacobi
SCHWARTZ, COOPER, KOLB & GAYNOR
Two First National Plaza
20 S. Clark Street, Suite 1100
Chicago, IL 60603

110293k5.DOC(1050.67/krl-lit#5)

ENTERED ON DOCKET
NOV 0 4 1993
DATE

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

FILED
NOV 03 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

COLUMBIA PICTURES INDUSTRIES, INC., TRISTAR PICTURES, INC., METRO-GOLDWYN-MAYER, INC., PARAMOUNT PICTURES, CORP., UNIVERSAL CITY STUDIOS, INC., THE WALT DISNEY COMPANY, WARNER BROS., TWENTIETH CENTURY-FOX FILM CORPORATION,	)	
Plaintiffs,	)	
v.	)	Case No. 93-C-875-B
DONREY CABLEVISION, DONREY MEDIA GROUP, INC.; BIXBY CABLEVISION, MULTIMEDIA CABLEVISION INC.; POST-NEWSWEEK CABLE INC. (system name), POST-NEWSWEEK CABLE INC. (owner); ALERT CABLE TV OF OKLAHOMA INC., CABLEVISION INDUSTRIES INC.; CABLECOM OF VINITA/NOWATA INC., POST-NEWSWEEK CABLE INC.,	)	
Defendants.	)	

PLAINTIFFS' NOTICE OF DISMISSAL OF
CERTAIN DEFENDANTS

Plaintiffs give notice pursuant to Rule 41(a)(1), Fed.R.Civ.P., that the case is hereby dismissed with prejudice as to those Defendants set out in Attachment A hereto ("Settling Defendants"), and each party shall bear its own costs and attorney's fees. Neither answers nor motions for summary judgment have been served upon the

Plaintiffs by any of the Settling Defendants in this action.

CLYDE A. MUCHMORE, OBA #6482
ROBERT E. BACHARACH, OBA #11211

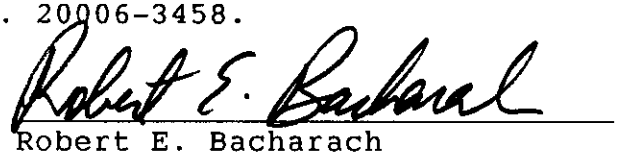
-Of the Firm-

CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document was served by regular mail, postage prepaid, on this 2nd day of November, 1993, to James Horvitz, Esq., Cole, Raywid & Braverman, 1919 Pennsylvania Avenue, N.W., Washington, D.C. 20006-3458.



Robert E. Bacharach

499.93B.REB

ATTACHMENT A

List of Defendants Which Are Dismissed With Prejudice

(Northern District of Oklahoma)

Multimedia Cablevision Inc.
Alert Cable TV of Oklahoma Inc.
Cablevision Industries Inc.
Bixby Cablevision

495.93B.REB

ENTERED ON DOCKET
DATE NOV 0 4 1993

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

FILED
NOV 4 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

REBECCA CAMPBELL, Plaintiff, vs. ASH RANCHHOD, JOHN DOE, partner of Ash Ranchhod, and BEST WESTERN OKMULGEE, a subsidiary of X CORPORATION ,a corporation owned and operated by ASH RANCHHOD and JOHN DOE, Defendants.	)	No. 93-C-983 B

NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW plaintiff and hereby gives notice that she is dismissing this action, without prejudice, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure and hereby files this notice of dismissal with the Clerk of the Court before service by defendant of either an answer, entry of appearance or a motion for summary judgment.

JOHN L. HARLAN & ASSOCIATES, P.C.

by _____

John L. Harlan, OBA 3861
Cheryl S. Gan, OBA 14719
Attorney for Plaintiff

404 E. Dewey St., Suite 106
P. O. Box 1326
Sapulpa, OK 74067
(918) 227-2590

ENTERED ON DOCKET
11-3-93

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

JUANITA BUCHANAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 92-C-985-C
	)	
PENNY SHERRILL, et al.,	)	
	)	
Defendants.	)	

F I L E D
1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court are the motion of the defendant Autex Foods, Inc. ("Autex") for summary judgment and the motion of the plaintiff to strike Autex's motion for summary judgment, and/or for an order for Autex to supplement its motion, and/or extend the time in which plaintiff must respond and/or for an order certifying certain questions for review to the Oklahoma Supreme Court.

This action commenced on October 28, 1992 when plaintiff filed a Complaint in this court alleging six causes of action against various defendants. The Complaint is signed by attorney Jefferson Briggs and lists Jefferson Briggs and Robert Briggs as attorneys for the plaintiff. A Status Conference was held on March 8, 1993 and a Scheduling Order was entered the same day, establishing, among other dates, a trial date of November 15, 1993. On June 2, 1993, plaintiff filed a motion, signed by Robert Briggs, to extend scheduling order. The motion stated in ¶4 that "[t]he extended scheduling order will not interfere with the original scheduling of the pretrial conference and trial date." The Amended Scheduling Order was entered on June 10, 1993, which maintained the November 15,

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1993, trial date. Plaintiff filed an Amended Complaint on June 17, 1993 and again Jefferson and Robert Briggs are listed thereon. The signature of Robert Briggs appears on the Amended Complaint. On July 19, 1993 another application to extend scheduling order was filed, signed by Jefferson Briggs. No request to disturb the trial date was made in the application. The application was granted by order entered on July 30, 1993, establishing a pre-trial conference date of October 18, 1993 and maintaining the trial date of November 15, 1993.

On September 10, 1993, an application to substitute counsel was filed, signed by Robert Briggs. The application states that attorney Rabon Martin has been retained by plaintiff and that Robert Briggs' services are no longer needed. Although Robert Briggs and Jefferson Briggs apparently function out of the same office and have both signed pleadings on the plaintiff's behalf in this case, the application does not specifically request replacement of Jefferson Briggs. On September 15, 1993, an Order was entered which substitutes Rabon Martin for Robert Briggs in plaintiff's representation. On October 4, 1993, Autex filed the pending motion for summary judgment. On October 5, 1993, Rabon Martin filed an entry of appearance, request for scheduling conference and application to extend scheduling order. In that document, attorney Martin states that he has been in the case an insufficient time to familiarize himself with it. Autex objected to any extension. On October 18, 1993, the case came on for its long-scheduled pre-trial conference. Neither Rabon Martin nor Jefferson Briggs appeared on the plaintiff's behalf. Mr. Martin's office did send a self-described "new" attorney who was unfamiliar with the case. She announced that Mr. Martin would be out of town on the trial date of November 15 and for several

days before and after. The Court ruled that the trial date would not be altered.

Suddenly galvanized, Jefferson Briggs filed objections to Autex's proposed Pre-Trial Order on October 21, 1993 and filed the motion presently before the Court on October 22, 1993. The Court will treat the motion as though Jefferson Briggs still operates in a representative capacity on plaintiff's behalf, although he did not demonstrate sufficient concern to appear at the pre-trial. First, plaintiff argues that Autex's motion for summary judgment should be stricken because it does not conform with Local Rule 15 by providing a concise statement of material facts as to which movant contends no genuine issue exists. The Court's review finds plaintiff to be mistaken. Autex's motion does contain such a statement. The statement is interspersed with references to the documentary and other evidence, contained in an appendix, which movant contends supports its position on each point. Plaintiff's argument is not well taken. Next, plaintiff asks for an extension of time to respond to the summary judgment motion, which the Court denies. This litigation has been pending for over a year, and Jefferson Briggs has represented plaintiff, he asserts, throughout its course. The summary judgment motion was filed on October 4, 1993 and this request for additional time was not made until October 22, 1993, with a pending trial date of November 15, 1993. The Court has made reasonable attempts to permit plaintiff to present her case, but can countenance no further delay. The request to certify questions to the Oklahoma Supreme Court is also denied.

Turning to the motion for summary judgment, inasmuch as plaintiff has not responded on the merits within the time limit established by Local Rule 15, the motion is deemed confessed. Nevertheless, the Court has independently reviewed the record and

reviewed same in the light most favorable to the non-moving party. The uncontradicted facts set forth in the motion indicate that Autex is an Oklahoma corporation which operates six restaurants under the name of "Shoney's". Plaintiff was employed by Autex on October 30, 1989 and was an "at-will" employee. On or about August 4, 1991, plaintiff verbally resigned from her employment at Autex. Plaintiff suffered an on-the-job injury on June 24, 1990. She continued to work for months, but went on a "leave of absence" on September 20, 1990. She received all compensation and medical treatment to which she was entitled under the Oklahoma Workers' Compensation Act. Plaintiff returned to work on May 15, 1991. On May 31, 1991, plaintiff fell a second time at work. She continued to perform her normal duties until she resigned on or about August 4, 1991. Plaintiff's work was satisfactory, except for two disciplinary counselings she received on July 27, 1991, one involving a racial slur plaintiff made against a black cook and one involving disparaging remarks about Autex. Plaintiff testified that she decided to quit because she had been "written up." After the July 27, 1991, Autex had decided to transfer plaintiff from Shoney's Store No. 6 to Store No. 5, to separate plaintiff and the black cook and to provide plaintiff with a work environment more acceptable to her.

> BUCHANAN contends that she was "constructively" discharged from AUTEX, and asserts six (6) claims for relief:
>
> (1) a claim for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. "by creating a sexually hostile environment" which resulted in her "constructive discharge";
>
> (2) a claim for "gender-based discrimination" under Title VII based on Defendant's application of certain standards to female employees;

(3) a claim for intentional infliction of emotional distress;

(4) a claim for retaliatory discharge in violation of 85 Okla. Stat. §5 on the ground that AUTEX retaliated against BUCHANAN for having made a workers' compensation claim;

(5) a claim for breach of employment contract pursuant to laws of the State of Oklahoma based on BUCHANAN's claim for vacation pay because she alleges that she was employed for a consecutive 12 month period and was entitled to vacation pay; and,

(6) a claim recognized in Burk v. K-Mart, 770 P.2d 24 (Okla. 1989), based on the public policy prohibiting sexual harassment.

As to the first two claims, the undisputed facts demonstrate that plaintiff was not discharged but rather resigned her position. Constructive discharge can be applied in a Title VII case. See Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986). She has presented insufficient facts to demonstrate that she was subjected to such a severe and pervasively hostile environment that she had no other choice but to quit. See Irving v. Dubuque Packing Co., 689 F.2d, 170, 172 (10th Cir. 1982). Similarly, plaintiff's claim for sex-based gender discrimination fails. The claim for constructive discharge under Oklahoma law is foreclosed by case law. Large v. Acme Engineering and Mfg. Corp., 790 P.2d 1086 (Okla. 1990); Hooks v. Diamond Crystal Specialty Foods, 997 F.2d 793 (10th Cir. 1993). The facts before the Court do not rise to the level of intentional infliction of emotional distress under Eddy v. Brown, 715 P.2d 74 (Okla. 1986) and therefore this claim too fails. No cause of action exists under Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989) in that Oklahoma law, as mentioned, does not yet recognize constructive discharge in this context. While there exists a federal "public policy" as to constructive discharge under Title

VII, for the reasons stated above, plaintiff has presented insufficient underlying factual support for such a claim. Finally, plaintiff cannot demonstrate a breach of contract because it is uncontradicted that Autex's vacation policy requires an employee to work continuously for 12 months before becoming eligible. Plaintiff did not fulfill this requirement and therefore was not eligible for vacation pay.

It is the Order of the Court that the motion of the defendant Autex Foods, Inc. for summary judgment is hereby granted and that the motion of the plaintiff to strike defendant's motion for summary judgment is hereby denied in all respects.

IT IS SO ORDERED this 2nd day of November, 1993.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 11-3-93

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

JUANITA BUCHANAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 92-C-985-C
	)	
PENNY SHERRILL, et al.,	)	
	)	
Defendants.	)	

FILED
NOV 3 - 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This matter came on for consideration of the motions for summary judgment of defendant Autex Foods, Inc. The issues having been duly considered and a decision having been duly rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for defendant Autex Foods, Inc., and against plaintiff, and that plaintiff taking nothing by way of this action.

IT IS SO ORDERED this 2nd day of November, 1993.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET
DATE NOV 0 3 1993

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

SHANNON SMITH, an individual, as Plaintiff, and DAVID LYE TAN, an individual, as Intervenor and Co-Plaintiff vs. WILLIAM ENGLERTH, an individual; HEAVY DUTY TRUX, LTD., a foreign corporation; COMMONWEALTH GENERAL INSURANCE COMPANY, a foreign corporation, Defendants	)	Case No. 93-C-47-B

FILED
NOV 2 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

This matter comes on for consideration of Defendants William Englerth (Englerth), Heavy Duty Trux, Ltd. (Trux), and Commonwealth General Insurance Company's (Commonwealth) Motion For Summary Against Shannon Smith (Smith) (docket #47). Also for consideration is Defendant Commonwealth's Appeal (docket # 35) of the Magistrate's Discovery Order.

History of Case

This action grows out of an automobile/truck accident which occurred on December 1, 1991, near Vinita, Oklahoma. Smith was a passenger in a vehicle driven by Co-Plaintiff David Tan (Tan). Englerth was the driver of the truck which collided with Tan's vehicle, which truck was under lease to Trux. State Farm Mutual Automobile Insurance Company, previously a Third Party Defendant, was Tan's insurer. Commonwealth is the liability insurance carrier for Trux.

29

On November 25, 1992, Smith executed two Releases each for a consideration of $100,000.00. The first Release (hereinafter Tan Release) discharged David L. Tan

> "his heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable or, who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the 1st day of December, (year) 1991 at or near Will Rogers Turnpike near Vinita, Okla."

The second release (hereinafter State Farm Release) executed by Smith on November 25, 1992, was entitled "Release And Trust Agreement" and acknowledged receipt from State Farm Mutual Automobile Insurance Company of the sum of $100,000.00

> "in full settlement and final discharge of all claims under the uninsured/underinsured motorist coverage of the above numbered policy[1] because of bodily injuries known and unknown and which have resulted or may in the future develop, sustained by Shannon Smith by reason of an accident or occurrence arising out of the ownership or operation of an uninsured/underinsured automobile by David L. Tan which occurred on or about the 1st day of December (year) at Will Rogers Turnpike (I-44) near Vinita, Oklahoma."

Movants Englerth, Trux and Commonwealth argue the Release executed by Smith as to Tan also released them from potential liability herein, citing the Oklahoma Uniform Contribution Among Joint Tort-feasors Act, Title 12 O.S. §832 which provides:

> "When a release, covenant not to sue or a similar agreement is given in good faith to one or two or more

---

[1] Policyholder David L. Tan; Claim No. 36-1149-371; Policy No. 2490-970-36A.

persons liable in tort for the same injury or the same wrongful death:

(1) it does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, which ever is greater;"

Defendants argue the Tan Release, and specifically the words "and all other persons, firms or corporations liable or, who might be claimed to be liable", discharged and released them. Defendants rely heavily upon **Brown v. Brown**, 410 P.2d 52 (Okla. 1966) and **Mussett v. Baker Material Handling Corp.**, 844 F.2d 760 (10th Cir. 1988), arguing that the Tan Release phrase quoted above satisfies the statute's "unless its terms so provide" requirement.

The two Releases were executed at the same time and were obviously the product of State Farm's involvement herein, one release being specifically in favor of State Farm. However, the Tan Release involved only Co-Plaintiff David Lye Tan and made no mention of State Farm despite its admitted role as payor of the settlement funds.

Smith argues the State Farm Release is not a separate release but rather the second page of a two page document and that certain phrases on the second page modify and explain the first page's discharge of "all other persons, firms or corporations liable or, who might be claimed to be liable". Smith further argues the dual releases and the phrases therein create at least an ambiguity which should be resolved against the releases' creator, State Farm, and should in any event preclude summary judgment.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **Celotex Corp. v. Catrett**, 477 U.S. 317, 322. 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); **Windon 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 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 Court concludes the Tan Release and the State Farm Release are separate and distinct documents, neither referring to the other. The State Farm Release was based upon the insurer's potential liability under uninsured/underinsured coverage stemming from Smith being a passenger in Tan's vehicle, and therefore a putative (class 2) insured under the policy. **Townsend v. State Farm Mutual Automobile Ins. Co.** 64 O.B.J. 2870 (Okla. Sept. 28, 1993). The Tan Release was predicated upon Smith's direct claim as an injured party against Tan as a tort-feasor.

Contrary to Smith's claim that the releases compliment and explain one another, the Court views the two releases as totally separate legal instruments effecting separate goals. For example, the State Farm Release is also a "Trust Agreement", reserving to the insured certain rights, as follows:

> "For the consideration aforesaid, and to the extent of any payment made thereunder, the undersigned agrees to hold in trust for the benefit of the Company all rights of recovery which he/she shall have against any person or organization legally liable for such bodily injuries, and assigns to the Company the proceeds of any settlement with or judgment against such person or organization."[2]

---

[2] If Smith has further claims against Englerth, his employer Trux and its insurer Commonwealth, does this clause mean State Farm has been assigned any ultimate judgment Smith might recover against these Defendants or any of them? The Court concludes such query became a non-issue by State Farm's agreement with Smith and these Defendants that it be dismissed upon its agreement to waive all rights of subrogation.

A similar clause was not in the Tan Release which emphasizes the individuality of the two separate documents.

The "ambiguity rule" is, the Court concludes, not *apropos* herein because the issue is not between Smith and State Farm but rather between Smith and the Movants. Moreover, in the Court's view, neither release, particularly the discharge language of the Tan Release, is ambiguous.

Smith also argues that a clause which appears in the State Farm Release makes clear that she did not intend to release other alleged tort-feasors such as Englerth, his employer and his employer's insurer. Such clause reads as follows:

> "The undersigned further warrants that he/she has made no settlement with, has given no release to nor prosecuted any claim to judgment against any person or organization legally liable for such bodily injuries, and that no such settlement will be made, no such release will be given, and no such claim will be prosecuted to judgment without the written consent of the Company."

An equally compelling argument is that the absence of such clause in the Tan Release, coupled with the sweeping discharge language "all other persons, firms or corporations liable or, who might be claimed to be liable", confirms that the Tan Release is what it appears to be, an all purpose, general release. Further, simply because these releases may contain countervailing clauses does not mean factual disputes exist which should be reserved for the fact-finders, thereby precluding summary judgment.

Smith also argues the two releases should be read *in toto* because of 15 O.S. § 158 which provides:

"Several contracts relating to the same matters,

> between the same parties, and made as parts of substantially one transaction, are to be taken together."

As stated above, each release is based upon an alleged different right and status of Smith, i.e. Class II insured with contract rights against State Farm, and injured claimant with tort claims against David Tan. These issues are not, in the Court's view, "[S]everal contracts relating to the same matters, between the same parties" although arguably made as parts of one transaction.

Lastly, the language of the **Brown** release mirrors the Tan Release significantly:

> "FOR THE SOLE AND ONLY CONSIDERATION of Eight Hundred and Fifty--Dollars ($850.00) to me/us paid, receipt of which is hereby acknowledged, I/we hereby release and discharge Edith May Taylor, his or their heirs, successors and assigns, and all other persons, firms or corporations who are or might be liable, from all claims of any kind or character which I/we have or may have against him or them, and especially because of all damages, losses or injury to persons or property, or both, whether known or unknown, developed, or undeveloped, resulting or to result from accident on or about March 5, 1961 . . ."

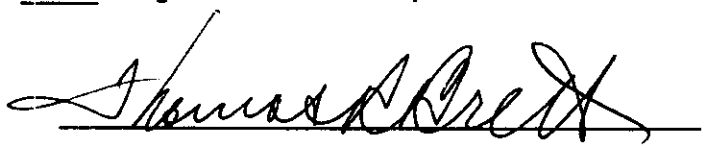
(emphasis by Court). **Mussett**, *supra*, applying Oklahoma law in a general release case, cited **Brown** with approval, duly noting however that **Brown** was decided prior to the Oklahoma Uniform Contribution Among Joint Tort-feasors Act.

Based upon the foregoing, the Court concludes the Tan Release was effective to release "all other persons, firms or corporations liable or, who might be claimed to be liable" which includes the Defendants Englerth, Trux and Commonwealth. Accordingly, the Court concludes Defendants' Motion For Summary Judgment should be and the same is herewith GRANTED. A Judgment in accord with the Court's

Order will be entered simultaneously herewith.

Defendant Commonwealth's Appeal (docket # 35) of the Magistrate's Discovery Order is, in view of the Court's granting of summary judgment herein, denied as moot.

IT IS SO ORDERED, this 2nd day of November, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. CAROL MILLER MAXEY a/k/a CAROL MILLER a/k/a CAROLYN MILLER, et al., Defendants.	)	FILED NOV 2 1993 Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA CIVIL ACTION NO. 93-C-521-B

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 2nd day of Nov, 1993.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

KBA/esr

ENTERED ON DOCKET
DATE NOV 0 3 1993

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

PAUL MAYS, JR.,

Plaintiff,

v.

DAVID WALTERS, the Governor of the State of Oklahoma; THE OKLAHOMA TAX COMMISSION; ROBERT ANDERSON, Chairman of the Tax Commission; ROBERT L. WADLEY, Vice-Chairman of the Tax Commission; DON KILPATRICK, Secretary of the Tax Commission; all in their official capacities,

Defendants.

Case No. 93-C-488-B

FILED
NOV 2 1993
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now before the Court is the Motion to Dismiss of Defendant David Walters (Walters) (docket # 8) and of Defendants Oklahoma Tax Commission, Robert Anderson, Robert L. Wadley, and Don Kilpatrick (collectively, "Tax Commission") (docket # 2).

History of the Case

Plaintiff Paul J. Mays, Jr. brings this action for declaratory and injunctive relief based on the State of Oklahoma's seizure of unstamped tobacco products within the Osage reservation. Mays alleges that the state seized the tobacco under the authority of Enrolled Senate Bill 759 (ESB 759)[1] which allows

> "Any peace officer of this state... to stop any vehicle upon any road or highway of this state in order to inspect the bill of lading or to take such action as may be necessary to determine if unstamped cigarettes (or

[1] Okla.Stat.tit. 68, §§ 346-352 (1993).

10

'tobacco products') are being sold or shipped in violation of this section."

Mays further asserts that he believes that the Defendant is going to attempt to forfeit his interest in the tobacco. Mays asserts that the use of ESB 759 against him violates the 4th and 14th Amendments of the United States Constitution; conflicts with the Commerce Clause of the United States Constitution; is outside the State's jurisdiction because the tobacco was in "Indian country"; constitutes an improper taxation of tribal members; and violated the treaties between the United States of America and the Osage Nation.[2]

Defendants move to dismiss Mays claims because they are barred by the Tax Injunction Act, 28 U.S.C. § 1341. Defendant Walters also asserts that Plaintiff's Complaint does not state a claim upon which relief can be granted.

The Tax Injunction Act provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such states."

In construing this statute, the court, in Brooks v. Nance, 801 F.2d 1237,1239 (10th Cir. 1986) noted:

> "Section 1341 is a broad prohibition against the use of equity powers of federal courts involving state tax matters. *See Comenout v Washington,* 722 F.2d 574,577 (9th Cir. 1983). We noted in *Southland Royalty Co. v. Navajo Tribe of Indians,* 715 F.2d 486 (10th Cir. 1983), that "[s]everal recent Supreme Court cases have reaffirmed the limiting

[2] Plaintiff also asserts a state law claim that ESB 759 violates Okla.Const.Art. 5, §33, and alleges that the Court has pendant, supplemental or ancillary jurisdiction over it.

> power of this statute." *Id.* at 491. This broad limitation on federal court interference with state collection of taxes is not limited to injunctive relief. The tax Injunction Act bars declaratory relief, *California v. Grace Brethren Church,* 457 U.S. 393, 408, 102 S.Ct. 2498, 2507-08, 73 L.Ed. 93 (1982), and suits for damages as well, *Marvin F. Poer & Co. v. Counties of Alameda,* 725 F.2d 1234, 1236 (9th Cir. 1984)."

The Brooks court held that Section 1341 applies to complaints based on an alleged violation of civil rights or the Federal Constitution and specifically rejected the argument that the state court had no jurisdiction over "Indian country." Id. at 1239-1240. Moreover, the Brooks court also held, in a claim that enforcement of the Oklahoma Cigarette Tax Act violated Plaintiffs civil rights when their untaxed cigarettes had been seized for forfeiture, that a plain, speedy, and efficient remedy existed in state courts. Id. at 1240.

Mays argues that §1341 does not bar his suit because a number of his claims do not involve enjoining the tax commission from imposing its revenue generating laws, and that Brooks does not apply because it does not consider ESB 759. The provision Mays complains of, Okla.Stat.tit. 68, § 351(B), allowing peace officers to stop vehicles to determine if "unstamped cigarettes are being sold or shipped in violation of the provisions of this section," clearly constitutes an administrative action to enforce taxes assessed on the sale of cigarettes at a tribally owned or licensed store by Okla.Stat.tit. 68, § 349(A). However, §1341 cannot be avoided by an attack on the administration of the tax as opposed to the validity of the tax itself. Brooks, at 1239, *citing* Czajkowski

v. State of Illinois, 460 F.Supp. 1265, 1272 (E.D. Ill. 1977), *aff'd.*, 588 F.2d 839 (7th Cir. 1978).

In Czajkowski, the court held that an enforcement provision of a cigarette tax allowing officers to arrest any person violating the statute without a warrant and allowing confiscation and forfeiture of the offending goods could not be attacked in federal court because of § 1341. The court stated:

> It is arguable that plaintiffs are only seeking to enjoin the state from using unconstitutional methods and procedures to collect the taxes, rather than the collection of taxes itself, so that § 1341 would be inapplicable. However, in order to grant plaintiffs the relief they request, we would in effect be enjoining the collection of cigarette taxes. For example, plaintiffs demand an injunction preventing the state from expending any funds to enforce the Act against them. The state obviously cannot collect a tax when it has no funds for enforcement. Section 1341 cannot be avoided by attacks on the administration and implementation of the taxing scheme rather than on the validity of the tax itself.

That holding is applicable to the present case. The purpose of the statute of which Mays complains is to enforce the tax on cigarettes sold on tribally owned lands. For this reason, Section 1341 is applicable to Plaintiff's claims, and Plaintiff has a plain, speedy, and efficient remedy in state courts. Brooks, at 1240.

Defendants motions to dismiss (docket #s 2 and 8) are granted. Because it concludes that § 1341 necessitates the dismissal of Plaintiff's claims, the Court denies Walters' motion to dismiss for failure to state a claim as moot.

IT IS SO ORDERED THIS 2nd DAY OF NOVEMBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE NOV 0 3 1993

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

FILED
NOV 2 1993
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MUSEUM STEPS MUSIC; AGE TO AGE MUSIC, INC.; EDWARD GRANT, INC; YELLOW ELEPHANT MUSIC; REALSONGS LEOSUN MUSIC; EMI APRIL MUSIC, INC.; THRILLER MILLER MUSIC; UNCLE RONNIE'S MUSIC COMPANY, INC.; MCA, INC.; JOBETE MUSIC CO., INC.; BILLY STEINBERG MUSIC; DENISE BARRY MUSIC; HIDEOUT RECORDS AND DISTRIBUTORS, INC.; NEBRASKA MUSIC; CASS COUNTRY MUSIC COMPANY; RED CLOUD MUSIC COMPANY; SHAPIRO, BERNSTEIN & CO., INC.; MEADOWGREEN MUSIC COMPANY; BUG AND BEAR MUSIC; GRAND ILLUSION MUSIC; and HICKORY GROVE MUSIC,

Plaintiffs,

vs.

LEEMAY BROADCASTING SERVICES, INC.; LEEMAY BROADCASTING COMPANY, INC.; and JACK D. LEE,

Defendants.

Case No. 92-C-610-B

O R D E R

Now before the Court is Plaintiffs' Motion for Summary Judgment (Docket #13) pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This is an action for willful copyright infringement, brought pursuant to 17 U.S.C. §501, alleging unauthorized public performance of plaintiffs' copyrighted musical compositions by broadcast over radio stations KVIN and KGND-FM, in Vinita, Oklahoma, on July 29-30, 1991, and March 6-7, 1991, respectively. Plaintiffs are members of the American Society of Composers, Authors and Publishers ("ASCAP") to which Plaintiffs have granted

the non-exclusive right to license non-dramatic performances of their copyrighted musical compositions. Defendants were the owners of radio stations KVIN and KGND-FM, in Vinita, Oklahoma, on the dates of the alleged copyright infringements.

The following facts are not in dispute:

1) Plaintiffs are the valid copyright owners of the fourteen (14) respective musical compositions upon which this action is based (Plaintiff's Brief in Support of Motion for Summary Judgment,[1] Ex. 1, ¶¶ 9, 10, 11 and 12; Ex. 3, Admission Nos. 2, 3; Ex. 4, Admission Nos. 2, 3; Ex. 5, Affidavit of Anthony Perretti, ¶ 3, attachments 5A-5N).

2) Defendant Leemay Broadcasting Services, Inc. (LBS) was and still is a corporation organized under the laws of the State of Oklahoma. At all material times, defendant LBS engaged in the business of operating a commercial radio station in Vinita, Oklahoma, known by the call letters KVIN-AM, under license granted by the Federal Communications Commission (Ex. 1, ¶ 4; Ex. 2, Defendants' Answer to Amended Complaint, ¶ 1).

3) Defendant LBS transferred all of its ownership interests in radio station KVIN-AM to a non-party on or about November 11, 1992, (Ex. 11, Affidavit of David S. Hochman, ¶ 13).

4) Defendant Leemay Broadcasting Company, Inc. (LBC) was and still is a corporation organized and existing under the laws of the State of Oklahoma. This defendant was, at all material times, and

[1] Hereinafter, all exhibit citations will reference exhibits attached to Plaintiff's Brief in Support of Plaintiff's Motion for Summary Judgment.

still is, engaged in the business of operating a commercial radio station in Vinita, Oklahoma, known by the call letters KGND-FM, under license granted by the Federal Communications Commission (Ex. 1, ¶ 5; Ex. 2, ¶ 1).

5) Radio station KVIN-AM was, at all material times, operated for commercial purposes. Radio station KGND-FM has been and currently is operated for commercial purposes; further, in connection with the operation of these stations and as part of the programs regularly broadcast therefrom, musical compositions were and are publicly performed. (Ex. 1, ¶¶ 7, 8; Ex. 2, ¶ 1).

6) The uncontroverted affidavits of independent investigators Robert Lea (Ex. 7), June Anglen (Ex. 8) and Kenneth Ayden (Ex. 9), as well as the defendants' admissions, establish that among the songs publicly performed by defendants by broadcast over radio stations KVIN-AM and KGND-FM on March 6-7 and July 29-30, 1991, are the fourteen (14) musical compositions set forth on Schedule "A" of the Complaint (Ex. 3, Admission Nos. 6, 7; Ex. 4, Admission Nos. 6, 7).

7) On the dates of the infringements, defendant Jack D. Lee was the President and Director of corporate defendants LBS and LBC. He also was a shareholder of defendants LBS and LBC (Ex. 3, Admission No. 10; Ex. 4, Admission No. 10).

8) On the dates of the infringements, defendant Jack D. Lee was primarily responsible for the control, management, operations and maintenance of the affairs of defendants LBS and LBC, including the operations of radio stations KVIN-AM and KGND-FM, respectively.

Defendant Lee continues to be primarily responsible for the operations of radio station KGND-FM and currently serves as its General Manager (Ex. 3, Admission No. 11; Ex. 4, Admission No. 11).

9) Defendant LBS's License Agreement with ASCAP for radio station KVIN-AM was terminated on May 5, 1988, for nonpayment of past license fees owed to ASCAP (Ex. 11, ¶ 8).

10) Defendant LBC's License Agreement with ASCAP for radio station KGND-FM expired December 30, 1990, and was not thereafter extended or renewed (Ex. 11, ¶ 10).

11) On the dates of the infringements, the defendants were not licensed by ASCAP and did not obtain permission directly from any of the Plaintiffs to publicly broadcast any of the copyrighted songs involved in this suit (Ex. 11, ¶¶ 4, 8, 11; Ex. 3, Admission Nos. 13, 14; Ex. 4, Admission Nos. 13, 14).

12) Between December 1, 1987, and July 20, 1992, ASCAP repeatedly informed the defendants that permission from the plaintiffs or license from ASCAP was necessary to lawfully broadcast Plaintiffs' songs over Defendants' radio stations. However, Defendants failed to obtain permission or a license (Ex. 11, ¶¶ 6, 7, 8, 9, 10, 11 and 12; Ex. 3, Admission No. 17; Ex. 4, Admission No. 17).

13) Defendants willfully committed the copyright infringements on March 6-7 and July 29-30, 1991 (Ex. 11, ¶14; Ex. 3, Admission No. 18; Ex. 4, Admission No. 18).

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

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate

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

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Analysis and Authorities

The copyright owner of a musical composition has the exclusive right to perform the copyrighted work publicly and/or to authorize others to perform the work publicly. 17 U.S.C. §106(4). Any unauthorized public performance of a copyrighted musical composition is an infringement of the copyright. 17 U.S.C. §501(a). To recover for an infringement of a copyrighted musical composition, the Plaintiffs must establish the following:

1. the originality and authorship of the compositions involved;
2. compliance with the formalities required to secure a copyright under Title 17, United States Code;

3. ownership of the copyrights of the relevant compositions;
4. defendants' public performance of the compositions; and
5. defendants' failure to obtain permission from the plaintiffs or their representatives for such performance.

Fermata International Melodies, Inc. v. Champions Golf Club, Inc., 712 F.Supp. 1257,1259 (S.D.Tex. 1989), aff'd, 915 F.2d 1567 (5th Cir. 1990); Almo Music Corp v. 77 East Adams, Inc., 647 F.Supp. 123, 124 (N.D.Ill. 1986).

The undisputed facts in the instant case establish as a matter of law all of the elements necessary to impose liability for infringement of Plaintiffs' copyrighted musical compositions. Nick-O-Val Music Co. v. P.O.S. Radio, Inc., 656 F.Supp. 826, 828 (M.D.Fla. 1987) and Boz Skaggs v. KND Corp., 491 F.Supp. 908, 913-14 (D.Conn. 1980). The only issues remaining to be resolved are the liability of Defendant Jack D. Lee in his personal capacity and the proper remedy to be afforded the Plaintiffs.

Defendant Lee asserts he should not be held personally liable for the copyright infringements because: (1) he was "thrust into the position of running" the defendant corporations after the other individual involved with the companies "bail[ed] out"; (2) he has spent significant personal finances on these companies to try to keep them afloat and is now on the "edge of bankruptcy"; (3) he has received no salary, compensation or other "financial benefit" in the past several years for management of the stations; and (4) he attempted to get the necessary licenses but was unable "to settle all the bills" owed by "these insolvent corporations."

"A corporate officer may be held vicariously liable (1) if the officer has a financial stake in the activity and (2) if the officer has the ability and right to supervise the activity causing the infringement." Fermata International Melodies, Inc. v. Champions Golf Club, Inc., 712 F.Supp. 1257, 1262 (S.D.Tex. 1989), aff'd, 915 F.2d 1567 (5th Cir. 1990); Meadowgreen Music Company v. Voice in the Wilderness Broadcasting, Inc., 789 F.Supp. 823, 826 (E.D.Tex. 1992); Boz Skaggs v. KND Corp., 491 F.Supp. 908, 913-14 (D.Conn. 1980)(citing Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2nd Cir. 1971)). It is undisputed that Defendant Lee was the President, director and a shareholder[2] of corporate defendants LBS and LBC. It is also undisputed that on the dates of the infringements, defendant Lee was primarily responsible for the control, management, operations and maintenance of the affairs of defendants LBS and LBC, including the operations of radio stations KVIN and KGND-FM, respectively.

As a shareholder and officer of the defendant corporations, Lee had a direct "financial stake" in the actions of the radio stations. The fact that the radio stations were operating at a loss and that Lee was not receiving a salary does not alter the fact Lee had a financial stake in the activities of LBS and LBC.

As manager of the radio stations, Lee had "the ability and right" to supervise the music being played by the stations. It is

---

[2] Lee asserts he is a co-shareholder of the two companies along with Bob May. Lee also states that initially "Bob May was the general manager, corporate officer, director and major shareholder" of the corporations but Lee was left to manage the radio stations after May "bailed out."

undisputed that Lee knew the defendant companies did not have permission to play the copyrighted music and yet he did not stop the broadcast of such music. Therefore, both elements necessary for finding individual liability of Defendant Lee have been satisfied. For these reasons, the Court concludes summary judgment against Defendant Lee in his individual capacity is appropriate.

The only other contested matter is the proper remedy. Plaintiffs seek injunctive relief, statutory damages, and costs, including a reasonable attorney's fee.

Defendants do not object to Plaintiffs' request for injunctive relief. Section 502(a) provides:

> Any Court having jurisdiction of a civil action arising under this title may ... grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

17 U.S.C. §502(a).

It is uncontested that the copyright infringements in this case have occurred over an extended period of time despite Plaintiffs' repeated requests to discontinue playing the copyrighted songs. Under such circumstances, the copyright proprietor is entitled to an injunction prohibiting further infringing performances. Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Assoc., 423 F.Supp. 341 (D.Mass. 1976), aff'd, 554 F.2d 1213 (1st Cir. 1977); Boz Skaggs Music v. KND Corp., 491 F.Supp. 908 (D.Conn. 1980); Nick-O-Val Music Co. v. P.O.S. Radio, Inc., 656 F.Supp. 826 (M.D.Fla. 1987). The Court concludes an injunction is appropriate in the instant case and

Defendants are hereby permanently enjoined from broadcasting all copyrighted music compositions in the ASCAP repertory. Brockman Music V. Miller, 1990 Copyright L. Dec. (CCH) ¶26,602 (W.D.Mich. 1990).

The Copyright law also provides for statutory damages for copyright infringements as follows:

> (c) Statutory Damages --
>
> (1) Except as provided by clause (2) of this subsection, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just.
>
> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000 ....

17 U.S.C. §504. This statute provides the trial court with a wide discretion to set damages within the statutory limits. Morley Music Co. v. Dick Stacey's Plaza Motel, Inc., 725 F.2d 1 (1st Cir. 1983). Factors to be considered include "the expenses saved and profits reaped by the defendants in connection with the infringements, the revenues lost by the plaintiffs as a result of the defendants' conduct, and the infringers state of mind -- whether willful, knowing, or merely innocent." Boz Skaggs Music v. KND Corp, 491 F.Supp. 908,914 (D.Conn. 1980).

Plaintiffs seek statutory damages in the amount of $2,750 per

infringement, for a total of $38,500. Plaintiffs offer no proof of actual damages but rather rely on an affidavit of David Hochman, ASCAP's Director of Radio Licensing, which states (1) the Defendants were not licensed to perform the copyrighted songs; (2) ASCAP repeatedly notified defendants of their infringing activities; and (3) if the radio stations had been properly licensed by ASCAP to date, defendants would owe approximately $20,600 in license fees. (Exhibit 11 to Plaintiffs' motion for summary judgment).

Defendant Lee objects to such an award as excessive. Lee states an award of $38,500 would force LBS and LBC into bankruptcy and would provide the Plaintiffs with a windfall. He also contends that according to his records the license fee would only total approximately $4,196.70.

In the case of willful infringement, an award of statutory damages sufficient to ensure that the Defendants are not better off than radio stations that comply with the copyright law is necessary in order to discourage future infringements. Badco Music, Inc. v. W.M.M., Inc., 1992 Copyright L. Dec. (CCH) ¶ 27,006 (W.D.Okla. 1992). In cases involving intentional copyright infringement, courts often award substantially more that the statutory minimum. E.g., Id. (awarding $1,500 per infringement); T.B. Harms v. Ramarine, CIV-89-367-C (E.D.Okl. 1989)($2,500 per infringement); Rogers v. Eighty Four Lumber Company, 623 F.Supp. 889 (W.D.Pa. 1985)($2,500 per infringement); Coolwell Music v. Richings, CIV-H-83-3898 (S.D.Tex. 1983)($5,000 per infringement).

In this case, the Defendants do not contest the fact that they did not have the necessary license or that they were aware they were infringing the copyrighted songs. Defendants simply contend they could not afford to purchase the needed licenses.

The determination of an appropriate amount of statutory damages "is an issue not determined by the preponderance of evidence but is rather resolved by a discretionary judgment to be resorted to in the absence of sufficient proof of profits, losses, etc." Morley Music Co. v. Dick Stacey's Plaza Motel, Inc., 725 F.2d 1 (1st Cir. 1983)(citing Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1178-79 (9th Cir. 1977)).

> It is true, however, that a trial court is not left completely to its own devices in determining damages. Although there need not be the kind of hearing required if factual damages were the issue, ... there must, we think, be either some hearing or sufficient affidavits to give the trial judge an adequate reference base for his judgment.

Morley Music Co. v. Dick Stacey's Plaza Motel, Inc., 725 F.2d 1, 3 (1st Cir. 1983)(citations omitted).

After considering the evidence presented in this case, along with the arguments of the parties and the relevant legal authority, the Court concludes statutory damages pursuant to §504(c)(1) are appropriate as to each of the Defendants. However, an evidentiary hearing is necessary to give the Court a sufficient foundation for determining an appropriate amount of damages per infringement.

The trial court is also given the discretion to award costs and attorneys fees to the prevailing party in a copyright infringement action. 17 U.S.C. §505. An award of attorneys' fees is

clearly warranted where the Defendant has deliberately violated the copyright law and has failed to come forward with any "colorable grounds" for a defense other than inability to pay. See Milene Music, Inc. v. Gotauco, 551 F.Supp. 1288,1298 (D.R.I. 1992). Under the facts of this case, the Court concludes Plaintiffs are entitled to costs and reasonable attorneys' fees pursuant to 17 U.S.C. §505.

For the reasons stated, Plaintiffs' Motion for Summary Judgment (Docket #13) should be and is hereby GRANTED to the extent set forth herein. A hearing on the issue of statutory damages is hereby set for November 19, 1993, at 9:30 a.m.[3]

IT IS SO ORDERED THIS 2nd DAY OF NOVEMBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[3] In an Order filed October 7, 1993, this Court permitted Karl D. Jones of Hartley & Jones to withdraw as counsel of record for the Defendants, Jack D. Lee, LeeMay Broadcasting Services, Inc. and LeeMay Broadcasting Company, Inc. The October 7, 1993, Order also instructed LBS and LBC to secure other legal representation within 20 days and ordered Defendant Lee to secure other representation or appear *in propria persona* within twenty days. To date, no appearance has been entered on behalf of any of the Defendants.

ENTERED ON DOCKET
DATE NOV 3 1993
FILED
NOV 2 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

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

DEAN HENDRYX,	)	
Plaintiff,	)	
v.	)	Case No. 92-C-119-B
CHARLES HARDT,	)	
Defendant.	)	

O R D E R

This matter comes on for consideration of Plaintiff Dean Hendryx' Motion To Dismiss Without Prejudice (docket # 41).

As previously stated in an earlier Order Plaintiff Hendryx (Hendryx), in his Amended Complaint, alleged he operated a sanitary landfill located in Tulsa County, Oklahoma, and as such has or had contractual dealings with Ogden Martin Corporation (Ogden) whereby ash in large quantities was deposited in and upon Plaintiff's landfill. Plaintiff further alleged that Charles Hardt, the Director of Public Works for the City of Tulsa, at all times acting within the scope of his employment, did by acts and omissions under color of law, interfere with Plaintiff's contractual rights with Ogden, causing the termination thereof, interfere with Plaintiff's contractual rights to participate as a qualified bidder for residual ash from the Ogden burn plant, slander Plaintiff by claiming he was not in compliance with Environment Protection Act (EPA) requirements to such an extent that liability would ensue from such violations to persons or firms using the Plaintiff's

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sanitary landfill, caused Plaintiff's former business with Ogden to be placed with a competitor of Plaintiff's with the intent to drive Plaintiff out of the landfill business, and inject the City of Tulsa into the business relationship existing between Plaintiff and Ogden.

Plaintiff alleged the above described acts on the part of Hardt are in violation of Plaintiff's rights under the Fifth and Fourteenth Amendments of the United States Constitution, and Title 42, U.S.C. §1983.

Defendant Hardt moved to dismiss, alleging the Amended Complaint allegations did not establish any constitutional claim. Hardt further alleged the Complaint failed to demonstrate, as required in §1983 complaints, that Plaintiff was deprived of a right secured by the Constitution or laws of the United States or that the deprivation was achieved under color of law. Hardt also complained Plaintiff couched his pleading in conclusory allegations, not sufficient in actions alleging constitutional violations. Lastly, Hardt raised the issue of qualified immunity, averring that the right an official is alleged to have violated must be pleaded as clearly established in a particularized sense.

Thereafter, briefs were filed in conformance with the Court's Order converting Defendant's Motion to Dismiss to one for Summary Judgment. In its earlier Order the Court allowed Plaintiff to again amend his Complaint to clarify the official capacity issue. Plaintiff did so by filing his Second Amended Complaint on July 9, 1993.

On September 30, 1993, Plaintiff filed a Motion To Dismiss Without Prejudice. A response in opposition thereto was filed by Defendant Hardt, represented by City Attorneys from the City of Tulsa legal staff. Defendant asks the Motion be granted only <u>with prejudice</u> and after imposition of sanctions and/or an award of attorneys fees. Defendant further asks the Court to order that certain discovery requests made by Defendant be deemed admitted because of Plaintiff's failure to answer.

Plaintiff opposes Defendant's response, citing the Magistrate Judge's September 21, 1993 ruling that all discovery be stayed pending this Court's determination of the pending Rule 56 Motion. Plaintiff alludes to his intention to file a state court suit adding additional defendants.

The Court concludes, within its discretion, that Plaintiff's Motion To Dismiss Without Prejudice should be and the same is hereby GRANTED without imposition of sanctions and/or attorneys fees. Parties are to pay their own costs and attorneys fees.

Defendant Charles Hardt's Motion To Dismiss (docket #13) and Motion To Supplement (docket #44) are denied as moot.

IT IS SO ORDERED, this 2nd day of November, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE NOV 03 1993

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

FILED

NOV 2 1993

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

SHANNON SMITH, an individual, as Plaintiff, and DAVID LYE TAN, an individual, as Intervenor and Co-Plaintiff vs. WILLIAM ENGLERTH, an individual; HEAVY DUTY TRUX, LTD., a foreign corporation; COMMONWEALTH GENERAL INSURANCE COMPANY, a foreign corporation, Defendants	)	Case No. 93-C-47-B

J U D G M E N T

Pursuant to this Court's Order of even date herewith, granting Defendants William Englerth, Heavy Duty Trux, Ltd., and Commonwealth General Insurance Company's Motion For Summary against Shannon Smith, Judgment is entered in favor of Defendants William Englerth, Heavy Duty Trux, Ltd., and Commonwealth General Insurance Company and against Plaintiff Shannon Smith. Costs are assessed against Plaintiff if timely applied for pursuant to Local Rule 6 and parties are to bear their own attorneys fees.

DATED this 2nd day of November, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE NOV 2 1993

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NOV 1 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

IDELL M. COOK, an individual, Plaintiff,	)	
v.	)	No. 92-C-554 B
INTERNATIONAL ASSETS ADVISORY CORPORATION and DAVE W. CONNOCHIE, Defendants.	)	92-C-606-B

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 1st day of Nov., 1993, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

Thomas R. Brett
United States District Judge

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Clm 11-2
Clm 11-1-93

ENTERED ON DOCKET

DATE 11-2-93

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

ROBERT DEWAYNE LAMPKIN, Plaintiff, vs. McDONNELL DOUGLAS-TULSA, a division of McDONNELL DOUGLAS CORPORATION; THE FRICK COMPANY; ROBIN WERNER; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW); and LOCAL NO. 1093 of the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), Defendants.	)	Case No. 93-C-200-E

FILED

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

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties to this action, by and through their attorneys of record, and pursuant to Federal Rule of Civil Procedure 41(a)(1), hereby stipulate that all claims against Defendant Robn Werner are hereby dismissed, with prejudice, and that Robn Werner is hereby dismissed, with prejudice, as a Defendant in this action. No party is entitled to his, her or its costs or attorney fees by virtue of this dismissal.

JON B. COMSTOCK & ASSOCIATES

Jon B. Comstock
412 Petroleum Club Building
601 South Boulder
Tulsa, Oklahoma 74119-1304

ATTORNEY FOR PLAINTIFF

Steven R. Hickman
FRASIER & FRASIER
P. O. Box 799
Tulsa, Oklahoma 74101

ATTORNEY FOR UNIONS

NICHOLS, WOLFE, STAMPER,
NALLY & FALLIS, INC.

S. M. Fallis, Jr., OBA No. 2813
Thomas D. Robertson, OBA No. 7665
400 Old City Hall Building
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182

ATTORNEYS FOR DEFENDANTS
McDONNELL DOUGLAS CORPORATION and
ROBN WERNER

DATE NOV 02 1993

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

RONALD C. JOHNSON and DEBORAH A. JOHNSON, husband and wife,

Plaintiffs,

vs.

DORIS W. MILLER, as Executrix of the estate of Thomas Edward Miller, MATRIX, INC., a foreign corporation, and ANTHONY HUGH BRYANT, an individual,

Defendants.

Case No. ~~C-92-553~~ 93-C-67-B

ORDER

THIS MATTER comes before the Court upon the Application of the parties hereto. The Court finds that all of the issues between the parties have been completely settled and compromised, and therefore dismisses the above-entitled cause of action with prejudice as to any future actions.

SO ORDERED this 29 day of October, 1993.

S/ THOMAS R. BRETT
U.S. DISTRICT JUDGE

JAG:pm/10/7/93/[10/7/93]/5114.93

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FILED

OCT 28 1993

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	Civil Action File
v.	)	No. 93-C-687-B
RAY ADAMS, Individually and d/b/a ADAMS ROOFING, Defendant.	)	

ORDER

This Court having read the foregoing Motion for Voluntary Dismissal Without Prejudice and finding that said motion should be granted it is

ORDERED that this case is dismissed without prejudice.

Signed this 28 day of Oct, 1993.

UNITED STATES DISTRICT JUDGE

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c/m

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

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

DARRELL CRAWFORD and MARK GERNHARDT Plaintiffs, vs. GRAPHICS UNIVERSAL, INC., and the GRAPHICS UNIVERSAL, INC., EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST, Defendants.	)	Case No. 93-C-305-B

O R D E R

Now before the Court are the motions to dismiss, for summary judgment, and for sanctions (Docket #4) of Defendants Graphics Universal, Inc. (Graphics) and the Graphics Universal, Inc. Employee Stock Ownership Plan and Trust (the Plan) and the cross motion for summary judgment (Docket #9) of Plaintiffs Darrell Crawford (Crawford) and Mark Gernhardt (Gernhardt).

Undisputed Facts

Plaintiffs Crawford and Gernhardt were employees of Graphics for more than four years when they terminated their employment on March 23, 1989 and April 13, 1989, respectively. At the time of their terminations, Crawford and Gernhardt were each 40% vested in their account balances with the Plan. Following their termination, Plaintiffs made a claim to receive the vested portion of their benefits under the Plan. The claim for lump sum distributions was denied, and Plaintiffs filed suit in the District Court for the Northern District of Oklahoma, styled Darrell Crawford and Mark

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Gernhardt v. Graphics Universal, Inc., Graphics Universal Inc. Employee Stock Ownership Plan and Trust and Leon Calvert, individually and as Trustee of the Graphics Universal, Inc. Stock Ownership Plan and Trust, Case No. 90-C-668-E. The parties settled that lawsuit and executed a release which provides in pertinent part as follows:

> 2. [Plaintiff], for himself, his attorneys, his heirs, executors, administrators, successors and assigns, does hereby fully, finally and forever release and discharge Calvert, Graphics, and the Plan of and from any and all claims, demands, actions, causes of action, suits, damages, losses and expenses of any and every nature whatsoever, asserted or which might have been asserted by or on behalf of [Plaintiff] against Calvert, Graphics, and/or the Plan, including, but not limited to those claims arising out of [Plaintiff's] employment with Graphics and his participation in the Plan.
>
> 3. This Full and Final Release of Claims (hereinafter referred to as "Release") specifically includes, but not by way of limitation, all claims asserted by or on behalf of [Plaintiffs] against Calvert, Graphics and/or the Plan, together with any and all claims which might have been asserted by or on behalf of [Plaintiffs] in any suit, claim, charge or grievance against Calvert, Graphics and/or the Plan for or on account of any matter or things whatsoever up to and including the present time.
>
> 4. [Plaintiffs] do not now, and agree that they will not in the future, seek (re-)employment with or by Graphics. [Plaintiffs] acknowledge and recognize that they are not now and will not ever in the future be eligible for such employment, and they agree that it is fair and just under all of the relevant facts and circumstances.

In, January 1993, Plaintiffs received notice that the Plan had been terminated effective January 1, 1992. Under the provisions of the Plan, upon termination, all amounts credited to an employee's account would become 100% vested. Crawford had, as of December 31, 1991, an unvested account balance of $25,177.18 and Gernhardt had an unvested account balance of $18,373.82. Based on the Plan provisions, Plaintiffs made a claim for the previously unvested 60%

portion of their account balance, which was denied. Graphics took the position that the release executed by Plaintiffs in the previous lawsuit would bar any claim for the remaining portion in Plaintiffs accounts. Plaintiffs assert that the release, by its terms does not apply to claims that did not exist at the time of the execution of the release, that the release is ambiguous and must be construed against Graphics, and that the release, if it is construed to waive these claims, impermissibly alters the provisions of the Plan that provide for termination of participation in the Plan only after five consecutive one year breaks in service. In this suit, Plaintiffs request cash distribution of benefits, and civil penalties pursuant to 29 U.S.C. §1132(c). Defendants move to dismiss and for summary judgment based on the release, and Plaintiffs filed a cross motion for partial summary judgment on their claim for cash distribution of benefits, also based on the release.

Legal Analysis

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

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

> time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Although Federal law governs interpretation of Employee Benefit Plans under the Employee Retirement Income Security Program (ERISA), state law principles are incorporated into the developing body of federal common law. Rodrigues-Abreu v. Chase-Manhattan Bank, N.A. 986 F.2d 580,585 (1st Cir. 1993), *See*, McGee v. Equicor-Equitable HCA Corp. 953 F.2d 1192, 1203 (10th Cir. 1992). The interpretation of a contract, and whether it is ambiguous is a matter of law to be determined by the court. Dodson v. St. Paul Ins. Co. 812 P.2d 372,376 (Okla. 1991). Contracts are to be construed as a whole, with each clause helping to interpret others. Williams Petroleum Company v. Midland Cooperatives, Inc. 539 F.2d 694, 696 (10th Cir. 1976). The Court cannot change the terms of a contract, but may merely interpret it. Id. The words of a contract are to be given their "plain and ordinary meaning." Mercury Investment Company v. F.W. Woolworth Co. 706 P.2d 523, 529 (Okla. 1985). "[W]here a contract is complete in itself and, as viewed in its entirety, is unambiguous, its language is the only

legitimate evidence of what the parties intended." Id. Finally, if a contract is ambiguous, it must be construed against the drafter of the contract. Williams Petroleum Co. v. Midland Cooperatives, Inc. 679 F.2d 815, 821 (10th Cir. 1982).

Here, the parties executed a release and the question is whether the release extends to the claims at issue in this lawsuit. The language that must be examined to answer that question is contained in the following paragraphs:

> 2. [Plaintiff], for himself, his attorneys, his heirs, executors, administrators, successors and assigns, does hereby fully, finally and forever release and discharge Calvert, Graphics, and the Plan of and from any and all claims, demands, actions, causes of action, suits, damages, losses and expenses of any and every nature whatsoever, asserted or which might have been asserted by or on behalf of [Plaintiff] against Calvert, Graphics, and/or the Plan, including, but not limited to those claims arising out of [Plaintiff's] employment with Graphics and his participation in the Plan.
>
> 3. This Full and Final Release of Claims (hereinafter referred to as "Release") specifically includes, but not by way of limitation, all claims asserted by or on behalf of [Plaintiffs] against Calvert, Graphics and/or the Plan, together with any and all claims which might have been asserted by or on behalf of [Plaintiffs] in any suit, claim, charge or grievance against Calvert, Graphics and/or the Plan for or on account of any matter or things whatsoever up to and including the present time.

This language clearly does not evince an intent to preclude claims unless they were "asserted" or "might have been asserted" in the previous lawsuit. Claims arising out of the January 1, 1992 termination of the Plan could not have been asserted until such termination on or after January 1, 1992, which is well after the execution of the release.[1] The argument of the Defendant, that

[1] Crawford executed the Release on December 12, 1990, and Gernhardt executed the Release on December 15, 1990.

Plaintiffs knew of their rights in the case of termination of the Plan, and therefore waived that right, is not supported by the language of the release. At most, the language is ambiguous as to what is meant by "might have been asserted." Such language could be construed as releasing any claim that was foreseeable (which would raise a fact question as to the foreseeability of the termination of the Plan), or as releasing any claim that was supported by facts at the time of the release. The ambiguity must be construed against the Defendants as drafters of the release.

The parties also differ as to what is meant by the use of the word "claim" in paragraphs 2 and 3 of the release. Defendants urge this court to adopt Section 101(4) of the Bankruptcy Act which defines a "claim" as:

> Right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Plaintiffs rely on Webster's New Collegiate Dictionary (1981 Ed.), p. 203, in defining "claim" as "a demand for something due or believed to be due." To adopt the definition used in the Bankruptcy Act would nullify the language "which might have been asserted... for or on account of any matter or thing whatsoever up to and including the present time," and would fail to give the word its plain and ordinary meaning.

Defendants also argue that if the Court does not apply the release to the claims in this lawsuit it is failing to interpret

the release in accordance with the plain purpose of the parties. Defendants assert the "[t]he plain purpose of the Release was to finally settle all claims between the parties, to supersede the Plan and all other collateral documents and to define, once and for all, all of the parties' remaining rights and obligations." (Defendant's Brief, p. 4). While the intent of the parties is the overriding goal in contract interpretation, Mercury Investment Company, at 529, that intention must be ascertained from the document itself. Id. The language of the release does not evince an intent to release claims that did not exist at the time of executing the release.

Defendants also argue that, in paragraph 4 of the release, Plaintiffs gave up any rights to vest in additional amounts under the plan other than those provided in the release. That section provides:

> 4. [Plaintiffs] do not now, and agree that they will not in the future, seek (re-)employment with or by Graphics. [Plaintiffs] acknowledge and recognize that they are not now and will not ever in the future be eligible for such employment, and they agree that it is fair and just under all of the relevant facts and circumstances.

This section cannot be construed, by its ordinary meaning, to give up any rights to vestment. Rather this section gives up the right to reemployment with Graphics. Plaintiffs do not seek to receive 100% of their funds because of reemployment with Graphics[2], but rather seek 100% of their funds because of termination of the plan at a time they still have an interest in the Plan. Defendants do

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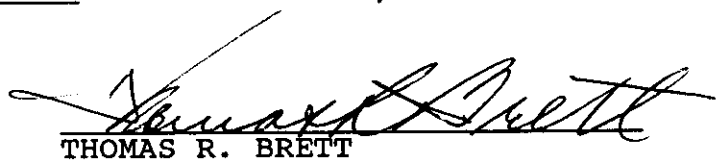
[2] There is no evidence in the record that Plaintiffs have become reemployed with Graphics.

not argue that, under the Plan, Plaintiffs would not be entitled to the same 100% vestment as any other employee that terminated his employment in the past five years, but rather they do not have a right to the 100% vestment because of execution of the release. The plain language of the release does not support such a construction.

Accordingly, Plaintiffs' cross motion for summary judgment is granted, and Defendants' motions to dismiss, for summary judgment, and for sanctions are denied. Because it concludes that the Release does not cover Plaintiff's claims, the Court does not reach any conclusion as to Plaintiffs arguments that its claims could not be waived without specifically and formally amending the Plan.

IT IS SO ORDERED THIS 28th DAY OF OCTOBER, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE NOV 0 1 1993

FILED
NOV 1 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

SUNNY JOSE, Plaintiff,	)	
vs.	)	No. 93-C-150-B
AMERICAN AIRLINES, INC., a Delaware corporation, and JERRY WALTERS, an individual, Defendants.	)	

O R D E R

The Court has for decision Defendants' Motion to Dismiss (Docket #29) Plaintiff's Amended Complaint filed herein by Court order granting same on September 20, 1993. The present motion to dismiss the amended complaint renders moot Defendants' motion to dismiss (Docket #8) the Plaintiff's original complaint. Plaintiff's amended complaint alleges that Plaintiff experienced a false and untimely performance evaluation and was threatened with demotion in his American Airlines, Inc. ("AA") employment. Plaintiff alleges that such resulted from discrimination against him based on national origin (East Indian), and that the responsible supervisor, Defendant Jerry Walters ("Walters"), has not been disciplined. Plaintiff is still employed by Defendant, American Airlines, Inc., in the same position with salary and benefits.

The amended complaint alleges state pendent claims for public policy tort and intentional infliction of emotional distress ("IIED") against both Defendants and for breach of contract in employment discrimination under Title VII against the Defendant,

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AA, only. The motion to dismiss before the Court seeks to dismiss three of four of Plaintiff's claims, excepting only Plaintiff's alleged Title VII claim.

Standard of Review - Motion to Dismiss

When considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court presumes all of Plaintiff's complaint allegations are true, and all reasonable inferences must be indulged in favor of the Plaintiff. Mitchell v. King, 537 F.2d 385 (10th Cir. 1976), and Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991). A complaint should not be dismissed for failure to state a claim unless it appears that plaintiff can prove no set of facts in support of a claim entitling plaintiff to relief. Kennedy v. Meachum, 540 F.2d 1057 (10th Cir. 1976).

LEGAL ANALYSIS AND CONCLUSION

In Plaintiff's complaint he alleges that he has been employed by American Airlines, Inc., since December 1979. He alleges that starting in July 1992, he was subjected to a series of discriminatory acts by his supervisor, Defendant Jerry Walters, which were allegedly motivated by discrimination toward Plaintiff due to his East Indian national origin. Walters caused a series of false performance reviews to be placed in Plaintiff's file and allegedly used them to harass and threaten demotion of Plaintiff. Plaintiff is still employed by the Defendant, AA.

Plaintiff alleges that his union, while sympathetic to his concerns and supportive of his position, was not able to resolve the matter with management. Plaintiff alleges he "believes"

concerns were investigated by the union, by the Defendant, American Airlines, Inc.'s affirmative action committee, and one of its officers who concluded that Plaintiff had been treated unfairly but did nothing to resolve the matter. Plaintiff does allege that a "grudging" apology was made in writing by the Defendant Walters and another American Airlines representative. Plaintiff alleges generally that he continues to be subjected to the discriminatory treatment on the job and suffers from its effects. On August 27, 1992, Plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission and Oklahoma Human Rights Commission in regard to his complaints, and those proceedings are pending investigation.

Since Plaintiff remains in employment and has experienced no money damages, it appears Plaintiff's principal complaint is his alleged mental anxiety and the possibility in the future his employment with American Airlines or elsewhere may be affected.

Plaintiff's public policy tort claim - Oklahoma law recognizes a tort cause of action for wrongful discharge where an employee's termination violates a clear mandate of public policy. *See*, Burk v. K-Mart, 770 P.2d 24 (Okl. 1989), and Tate v. Browning-Ferris, 833 P.2d 1218 (Okl. 1992). In the recent case of Sanchez v. Philip Morris Inc., 992 F.2d 244 (10th Cir. 1993), decided after Defendants' original motion to dismiss was filed, the court concluded that the Burk and Tate public policy tort exception is limited to wrongful terminations motivated by race or retaliation. In Sanchez the Court of Appeals stated:

> ". . . A careful reading of Tate reveals that it was limited to wrongful terminations motivated by race or retaliation, which is closely related to the Burk wrongful discharge exception. The Tate decision simply does not make all Title VII cases actionable under the public policy tort exception enunciated in Burk. We note that the Oklahoma Supreme Court has been very precise in carving out narrow exceptions to the employment-at-will doctrine, and we are unwilling to unnecessarily expand those exceptions. Therefore, the district court properly dismissed Appellee's public policy tort claim as Oklahoma has yet to create an exception to the employment-at-will doctrine in the failure to hire context."

Therefore, since Plaintiff has not been terminated, his claim herein does not constitute an Oklahoma public policy tort claim under Oklahoma law and is hereby dismissed.

The intentional infliction of emotional distress (IIED) claim - Oklahoma law regarding IIED mirrors the law set forth in Restatement (Second) of Torts § 46(1) (1965) (Restatement). To establish a *prima facie* case of IIED, Plaintiff must demonstrate: (1) that the tortfeasor acted intentionally or recklessly; (2) that the tortfeasor's conduct was extreme and outrageous; (3) that the Plaintiff actually experienced emotional distress; and (4) that the emotional distress was severe. Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379 (10th Cir. 1991).

In an IIED claim the court must determine at the outset whether the alleged conduct is sufficiently extreme and outrageous to allow recovery. Haynes v. South Com. Hosp. Mgmt., Inc., 793 P.2d 303 (Okla. App. 1990).

Even when Plaintiff's allegations are taken as true, as well

as all reasonable inferences therefrom, they do not constitute conduct sufficiently extreme and outrageous to permit recovery under a theory of IIED. Merrick v. Northern Natural Gas Co., 911 F.2d 426 (10th Cir. 1990), and Eddy v. Brown, 715 P.2d 74 (Okl. 1986). Thus, Defendants' motion to dismiss Plaintiff's IIED claim is hereby SUSTAINED.

The breach of contract claim - The Court OVERRULES Defendant American Airlines, Inc.'s motion to dismiss Plaintiff's alleged breach of contract claim because there is insufficient factual information set forth in the pleadings, Plaintiff's amended complaint and the Defendants' answer, to rule on said motion.

The parties shall be governed by the scheduling order of Magistrate Judge Jeffrey Wolfe filed July 8, 1993 regarding further pretrial and trial.

DATED this 1ST day of November, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

NOV 1 1993

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

RAY N. CATES,	)	
Plaintiff,	)	
vs.	)	Case No. 92-C-972-C
BANKERS LIFE AND CASUALTY COMPANY, an Illinois corporation,	)	
Defendant.	)	

FILED
OCT 29 1993
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, Ray N. Cates, and the Defendant, Bankers Life and Casualty Company, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal of this action with prejudice.

Greg A. Farrar, OBA #2832
FARRAR & FARRAR
P.O. Box 2982
Tulsa, Oklahoma 74101-2982
(918) 587-7441

ATTORNEY FOR PLAINTIFF

Patricia Ledvina Himes

Elsie Draper, OBA #2482
Patricia Ledvina Himes, OBA #5331
GABLE & GOTWALS, INC.
2000 Bank IV Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5447
(918) 582-9201

ATTORNEYS FOR DEFENDANT

41854

ENTERED ON DOCKET

DATE 11-1-93

AO 450 (Rev. 5/85) Judgment in a Civil Case

OCT 29 1993

United States District Court

NORTHERN DISTRICT OF OKLAHOMA

DEANNA D. YOUNG,

JUDGMENT IN A CIVIL CASE

V.

ALLSTATE LIFE INSURANCE COMPANY,

CASE NUMBER: 92-C-582-S

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

That Judgment is hereby entered in favor of the Defendant, ALLSTATE LIFE INSURANCE COMPANY, and against the plaintiff, DEANNA D. YOUNG, and that plaintiff recover nothing from defendant.

IT IS FURTHER ORDERED that costs are hereby assessed against the plaintiff, DEANNA D. YOUNG, if timely applied for pursuant to Local Rule 6 of this Court.

October 29, 1993

Date

Thomas R. Brett for
Frank H. Seay,
U. S. District Judge

(By) Deputy Clerk