

ENTERED ON DOCKET
DATE JAN 20 1994

FILED

JAN 18 1994

CLERK OF COURT
DISTRICT OF OKLAHOMA

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

ERNEST CARTER,
Plaintiff,

vs.

RON CHAMPION,
Defendants.

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)
)

No. 92-C-954-C

ORDER

Before the Court is Defendants' motion to dismiss or for summary judgment filed on November 1, 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 7.1(C).

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss or for summary judgment [docket #6] is granted and the above captioned case is dismissed without prejudice.

SO ORDERED THIS 18th day of January, 1994.

[Handwritten Signature]
H. DALE COOK
UNITED STATES DISTRICT JUDGE

ENTERED IN CLERK'S OFFICE
DATE JAN 20 1994

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

FILED

JAN 19 1994

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

DIANNA LYN ANDERSON, a minor,)
by and through JACQUE ANDERSON,)
and BILL E. ANDERSON, her parents,)
guardians and next friends,)

Plaintiff,)

vs.)

Case No. 92-C-920-C

SEK, INC. and MARK BEALE,)

Defendants.)

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Dianna Lyn Anderson ("Dianna Anderson") and Jacque Anderson and Bill E. Anderson (the "Andersons"), and Defendants SEK, Inc. ("SEK") and Mark Beale ("Beale"), file herein this Joint Stipulation of Dismissal with Prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure. Dianna Anderson, the Andersons, SEK and Beale hereby jointly stipulate that all claims and/or counterclaims asserted herein by Dianna Anderson, the Andersons, SEK and Beale are dismissed with prejudice to the refiling of same.

DATED this 19th day of January, 1994.

Respectfully submitted,

Melissa K Sawyer

Larry L. Oliver

Melissa K. Sawyer

LARRY L. OLIVER & ASSOC.

2211 E. Skelly Drive

Tulsa, Oklahoma 74105

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and Bill E. Anderson

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Attorney for Defendant Mark Beale

ENTERED ON DOCKET
DATE JAN 20 1994

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

GLEN LEE,
Plaintiff,
vs.
SHERIFF DOUG NICHOLS, et al.,
Defendants.

No. 92-C-930-C
consolidated with
No. 92-C-1114-C

FILED
JAN 18 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

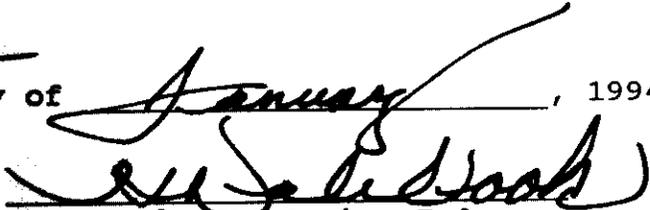
ORDER

Before the Court are plaintiff's motions to dismiss the above captioned case without prejudice filed on November 10, 1993 [docket #17 in 92-C-1114-C], and on January 6, 1994 [docket #53 in 92-C-930-C].

IT IS HEREBY ORDERED that:

- (1) Plaintiff's motions to dismiss without prejudice are **granted** [docket #17 in 92-C-1114-C; and docket #53 in 92-C-930-C];
- (2) The Clerk shall **dismiss** plaintiff as a party in the consolidated action no. 92-C-930-C, and **terminate** action no. 92-C-1114-E.

SO ORDERED THIS 18th day of January, 1994.


H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

54 / 18

ENTERED IN DOCKET
JAN 20 1994

FILED
JAN 18 1994

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

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

ROY STEVEN POTTER,)
)
 Petitioner,)
)
 vs.)
)
 JACK COWLEY,)
)
 Respondent.)

No. 92-C-836-B
(base file)
consolidated with
No. 92-C-837-B

ORDER

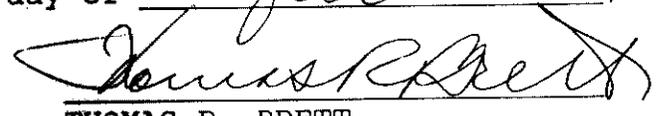
Before the Court are petitioner's motions to amend and to dismiss.

Petitioner requests that the court dismiss his habeas corpus action without prejudice so that he may exhaust his state remedies as to two of the issues recently presented to the court.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motion to dismiss without prejudice [docket #16] is granted;
- (2) Petitioner's motion to amend [docket #15] is deemed moot; and
- (3) The Clerk shall dismiss without prejudice this habeas corpus action.

SO ORDERED THIS 18th day of Jan, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

3

ENTERED ON DOCKET

DATE 1-19-94

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

FILED

JAN 19 1994

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

CALVIN LEROY JOHNSON)

Plaintiff,)

vs.)

OKLAHOMA, STATE OF, et al)

Defendants.)

No. 93-C-769-E

ORDER

Before the court is petitioner's motion to dismiss without prejudice.

ACCORDINGLY, IT IS ORDERED that petitioner's motion to dismiss [docket #9] is granted, and that this case is hereby dismissed without prejudice.

SO ORDERED THIS 18th day of January, 1994.

James O. Ellison
JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-19-94

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

FILED

JAN 19 1994

Richard M. Lawrence, Clerk
Northern District of Oklahoma

WILLIE B. JOHNSON,
Plaintiff,

vs.

No. 93-C-542-E ✓

TULSA POLICE DEPARTMENT,
et al.,

Defendants.

JUDGMENT

In accord with the order granting defendants' motion for summary judgment, the court hereby enters judgment in favor of all defendants and against the plaintiff. Plaintiff shall take nothing on his claim.

SO ORDERED THIS 18th day of January, 1994.

James O. Ellison
JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-18-94

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

KEVIN BALES,

Plaintiff,

v.

DONNA E. SHALALA,

Defendant.

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FRC
U.S.

Perk
1/19/94

Case No. 92-C-927-E ✓

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed December 8, 1993 in which the Magistrate Judge recommended that the case be **REMANDED** to the Secretary for further consideration of the claim.

On remand, the ALJ should have a licensed psychiatrist examine Mr. Bales. The consulting psychiatrist also should complete a Psychiatric Review Technique Form and must testify at a supplemental hearing.¹ The ALJ then should evaluate the new evidence in combination with the evidence already in the record at step 4 of the sequential evaluation to again determine whether Bales can return to his past relevant work. If he cannot return to such work, the ALJ should proceed to step 5 to determine whether Mr. Bales has the residual functional capacity to perform other work in the national economy.

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

¹The vocational expert also should testify at the supplemental hearing.

hereby is adopted and affirmed.

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

SO ORDERED THIS 13th day of January, 1994.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-18-94

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

FILED
JAN 19 1994
Richard M. Law
U. S. District Court Clerk
NORTHERN DISTRICT OF OKLAHOMA

IN RE:)	
)	
OKLAHOMA PLAZA INVESTORS,)	Bk. No. 89-01236-C
LTD.,)	Chapter 11
)	
Debtor,)	
)	
OKLAHOMA PLAZA INVESTORS,)	Adv. No. 90-0151-C
LTD.,)	
)	
Plaintiff,)	
Appellee/Cross-Appellant,)	
)	
vs.)	Case No. 92-C-474-E
)	
WAL-MART STORES, INC.,)	
)	
Defendant,)	
Appellant/Cross-Appellee.)	

ORDER

Now before the Court is an appeal of a decision by the United States Bankruptcy Court for the Northern District of Oklahoma. The Bankruptcy Court held that Appellant Wal-Mart Stores owed Appellee Oklahoma Plaza Investors, Ltd. ("OPI") \$132,000 for breaching a commercial property lease.

The primary issue in this appeal is whether the Bankruptcy Court, erred, as a matter of law, in concluding that the lease was unambiguous. Four other issues also are raised (1) whether OPI rejected the Wal-Mart lease pursuant to 11 U.S.C. §365; (2) whether Wal-Mart's defenses of waiver and estoppel were valid; (3) whether the Bankruptcy Court erred in awarding \$132,000 in damages; (4) whether Wal-Mart tortiously breached the contract

and (5) whether Wal-Mart breached an implied covenant of the lease.

I. Summary of Facts

On May 6, 1977, Wal-Mart signed a 20-year lease at Rolling Hills Shopping Center in Catoosa, Oklahoma. Wal-Mart moved into the shopping center and began doing business as a discount store.¹ Under the terms of the lease, Wal-Mart paid \$59,400 a year for rent and was to pay more depending on the amount of the store's gross sales. The lease also included a Use of Premises clause, which stated:

It is understood and agreed that the demised premises being leased will be used by the Lessee [Wal-Mart] in the operation of a discount store, but Lessor [OPI] agrees the store may be used for any lawful purpose other than the operation of a supermarket...

The lease also included a Default Clause, which read:

If the demised premises shall be **deserted** for a period of over 30 days, or if Lessee shall be adjudicated a **bankrupt**, or if a trustee or receiver of Lessee's property be appointed, or if Lessee shall make an assignment for the benefit of creditors, or if default shall at any time be made by Lessee in the payment of rent reserved herein, or any installment thereof for more than 10 days after written notice of such default by the Lessor, or if there shall be default in the performance of any other covenant, agreement, condition, rule or regulation herein contained or hereafter established on the part of the Lessee for 30 days after written notice of such default by the Lessor...In such case, the Lessor may, at its option, **relet** the demised premises...

The dispute leading to this appeal began in December of 1988 when Wal-Mart closed its discount store -- about a month after OPI filed for bankruptcy.² Wal-Mart, however, continued to pay rent and used the premises occasionally for storage and as a

¹ In 1984, while Wal-Mart still operated a discount store at Rolling Hills, OPI bought the lease from King.

² The debtor initially filed bankruptcy in the United States Bankruptcy Court in the Central District of California. On May 4, 1989, the case was transferred to the Northern District of Oklahoma.

meeting facility.³

On May 29, 1990, OPI filed a **three-count Complaint** against Wal-Mart in Bankruptcy Court, alleging (1) breach of **express** provisions of the lease; (2) breach of an implied covenant of continuous operations; and (3) tortious breach of contract. The Bankruptcy Court later dismissed the **second** count. Wal-Mart, as defenses to the Complaint, asserted that the lease was **rejected** pursuant to 11 U.S.C. §365. Wal-Mart also raised the defenses of estoppel, waiver **and** laches.

In two separate orders, the Bankruptcy Court decided the issues raised in OPI's Complaint. On February 21, 1991, the Bankruptcy Court granted summary judgment in favor of OPI. The court first found that, **contrary** to Wal-Mart's assertions, that OPI did not reject the leasee with Wal-Mart under **the** provisions of 11 U.S.C. §365. Second, the Bankruptcy Court found that Wal-Mart **deserted** the shopping center and therefore breached the lease.

In the second Order, filed on May 21, 1992, the Bankruptcy Court found that Wal-Mart, by breaching the lease, owed OPI **\$131,096**.⁴ The Bankruptcy Court also found that Wal-Mart's defenses of waiver, estoppel **and** laches were without merit.

Following the two orders, Wal-Mart filed a Notice of Appeal on June 1, 1992. On June 8, 1992, OPI filed its Cross-Appeal. **Both** appeals challenged the February 21, 1992 and May 21, 1992 orders.⁵

³ *Wal-Mart removed its inventory and fixtures, locked the doors and covered the windows with brown paper. See page 4 of February 21, 1991 Bankruptcy Order.*

⁴ *This includes damages caused by bursting water pipes.*

⁵ *The parties also appealed an October 5, 1990 Order. However, that deals with Case No. 90-C-642-B and will not be discussed here.*

II. Legal Analysis

The appeal focuses on the Bankruptcy Court's interpretation of the lease between Wal-Mart and OPI, which is governed by Oklahoma contract law. *Mercury Investment Co. v. F.W. Woolworth Co.*, 706 P.2d 523, 529 (Okla. 1985). Under Oklahoma law, if the language of a contract is unambiguous, its language is the only legitimate evidence of what the parties intended." *Ollie v. Rainbolt*, 669 P.2d 275, 279 (Okla. 1983). The parties' intent cannot be determined from the surrounding circumstances, but must be gathered from the words used. *Id.* If the language of a lease or contract is ambiguous, extrinsic evidence may be used to determine the practical construction of the agreement as evidenced by the acts and conduct of the parties.

In this case, the Bankruptcy Court first concluded that the language of the lease, taken as a whole, was "clear, plain, simple and unambiguous." The Bankruptcy Court then found, relying on the language of the lease, that Wal-Mart breached the lease by closing down its retail operation. Stated the Bankruptcy Court:

This Court finds that the lease is unambiguous and that its language is the only legitimate evidence of what the parties intended...The Default Clause of the Lease is clear, plain, simple and unambiguous and says that if lessee deserts the premises the Lease is in default. The undisputed facts shows that Wal-Mart has ceased operating a discount store on the premises, removed its inventory and fixtures, locked the door and covered the windows with brown paper. This is a desertion of the premises and a breach of the lease.

The pivotal issue here is the meaning of the word "deserted". The lease stated that a default would occur "If the demised premises shall be deserted for a period of over 30 days.." The question, therefore, is: Is "deserted" unambiguous within the context of the

lease?⁶

A contract term is unambiguous if there is only one reasonable interpretation within the contract language. Stated another way, an ambiguous term is one about which reasonable minds could differ. *Seiden Associates v. ANC Holidays*, 959 F.2d 425, 428 (2d Cir. 1992) Also, see, generally, *Mercury Investment Co. v. F.W. Woolworth Co.*, 706 P.2d 523, 529 (Okla. 1985).

The first question in this case is whether "deserted", as used in the lease, has only one *reasonable interpretation*. Words in a contract are to be understood in their ordinary and popular sense. *Okla. Stat. Tit. 15 § 160*. The "ordinary" and "popular" meaning⁷ of "desert" is defined by *The American Heritage Dictionary* as "to forsake or leave especially when most needed; abandon." *Webster's Collegiate Dictionary* defines desert as "to withdraw from or leave...without intent to return."⁸

A precise definition seems virtually impossible, given that dictionaries do not define the word in the exact same fashion. At first blush, that fact suggests that a "plain" and "clear" meaning of the word is difficult since it is not defined by the lease. However, even beyond that, it is unclear -- from the language in the lease -- whether Wal-Mart deserted the premises. From OPI's perspective, Wal-Mart, by closing its retail store, deserted

⁶ The standard of review on this matter is *de novo*. *Aetna Casualty v. Pinular Corp.*, 948 F.2d 1507, 1511 (9th Cir. 1991).

⁷ The statute reads that "the words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." The word is not defined in the lease and it is unclear to this Court whether a "special meaning" was given to the word "desert" or any other language in question here.

⁸ Volume 26A of *Corpus Juris Secundum*, page 861, states: "The word [desert] connotes an act essentially voluntary, intentional, and willful in nature, and has been defined as meaning to abandon, forsake, or leave; to withdraw at certain times, when assistance and cooperation are required, or to separate oneself from that to which one ought to be attached."

(foresook, withdrew from, left especially when most needed, abandoned) the shopping center. On the other hand, Wal-Mart -- despite closing its discount store -- remained at the shopping center in a limited capacity; it continued to pay rent and use the facility for storage and/or meetings. That presence, albeit limited, arguably does not constitute deserting or abandoning in the ordinary and popular sense of the word.

The Bankruptcy Court, however, also looked at other language of the lease in reaching its decision. Beside the word "deserted", the Bankruptcy Court looked to language in the Use of Premises Clause to make its decision. That clause reads: "It is understood and agreed that the demised premises being leased will be used by the Lessee [Wal-Mart] in the operation of a discount store, but Lessor [OPI] agrees the store may be used for any lawful purpose other than the operation of a supermarket... From the Bankruptcy Court's viewpoint, that language clarified the intent of the parties. It wrote:

The Use of Premises Clause provides that Wal-Mart will use the premises for a discount store, but can use the store for any lawful purpose. This clause merely means that while Wal-Mart is operating a discount store it can also use the store for any other lawful purpose. It does not mean Wal-Mart can discontinue using the premises for a store and use them for any other lawful purpose without being in default. In any event, the use of the premises for storage or meetings after a complete closing of the store is mere subterfuge to try to avoid the consequences of obvious desertion.

The undersigned, however, finds the premises clause to be of limited value in defining the word "deserted" or determining the intent of the parties in making the lease. In fact, the premises clause itself is **ambiguous**; it has more than one reasonable meaning within the context of the lease. For **example**, it can be read the way the Bankruptcy Court interpreted it: Wal-Mart must use the premises to operate a discount store in addition to

any other lawful purpose. But the clause also can mean that Wal-Mart may use the premises to operate a discount store or "for any lawful purpose" (including storage and a meeting facility) other than the operation of a supermarket.⁹ Under the former interpretation, Wal-Mart deserted and defaulted because it did not operate a discount store in the shopping center. Under the latter interpretation, Wal-Mart did not desert or default because it used the facility for storage and meeting -- a lawful purpose.¹⁰

Had the parties expressly intended for Wal-Mart to operate a retail discount store on the premises for the life of the lease, why not say so in clear and precise words? Why not define "deserted" within the four corners of the lease? For reasons not in the record, the parties failed to expressly spell out such key provisions in the lease. As a result, the lease is ambiguous. The Court concludes that extrinsic evidence should be examined before determining the "meaning" of the lease. Consequently, the case is REMANDED¹¹ See *Republic Resources Corporation v. ISI Petroleum West Caddo Drilling Program* 1981, 836 F.2d 462, 465 (10th Cir. 1987)(The interpretation of an ambiguous contract is a question of

⁹ A similar clause was interpreted in *Cascade Drive Ltd. v. Wal-Mart Stores, Inc.*, 934 F.2d 61 (5th Cir. 1991). In that case, the Use of Premises clause read: "the Demised Premises being leased will be used by the Lessee in the operation of a discount department store, but Lessor agrees the store may be used for any lawful retail purpose except for a theatre or prescription pharmacy." The Fifth Circuit interpreted that to mean that Wal-Mart could not (1) use the premises for an illegal or non-retail purpose. In this case, the word "retail" was not used here and, as a result, it is unclear to the undersigned as to whether the parties intended a "retail" purpose.

¹⁰ The undersigned has examined the cases cited by the parties on this issue. They shed little light on the issue of the meaning of "deserted." Arguably, the cases, taken as a whole, support this Court's position that the lease is ambiguous.

¹¹ Another concern about the Bankruptcy Court's decision is that it considered circumstances outside the four corners of the lease. Wrote the Bankruptcy Court: "A savings and loan advanced money to construct the premises and the Debtor purchased the shopping center after Wal-Mart had entered into its lease. Additionally, Wal-Mart is the major or anchor tenant in the shopping center and all other tenants depend on it to create customer traffic." In essence, it appears the Bankruptcy Court took a "common-sense" approach in interpreting the lease as it did. And, once it examines the surrounding circumstances, the Bankruptcy Court may very well come to the same conclusion (i.e. Wal-Mart breached the lease). However, at this juncture, the Bankruptcy Court erred, as a matter of law.

fact, which an appellant court may not make.)¹²

III. Conclusion

The Oklahoma Supreme Court states: "But where 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. The intention of the parties cannot be determined from the surrounding circumstances, but must be gathered from a four-corners' examination of the contractual instrument in question." *Mercury Investment Co.*, 706 P.2d at 529.

The Bankruptcy Court found that the language of the lease to be unambiguous; this Court reverses that finding. The intention of the parties cannot be determined from a four-corners' examination of the lease. For example, the word "deserted" -- a key term in this dispute -- is capable of more than one reasonable meaning within the context of the lease. Moreover, the lease, taken as a whole, is ambiguous, including the Use of Premises Clause. The question as to whether Wal-Mart deserted and consequently breached the lease cannot be answered simply by reading the lease. Therefore, the case must be REMANDED so that the Bankruptcy Court, as trier of fact, can examine relevant extrinsic evidence. *Seiden*, 959 F.2d at 428.

SO ORDERED this 14th day of January, 1994.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

¹² After review of the record, this Court affirms the Bankruptcy Court's decision regarding (1) the issue of 11 U.S.C. §365 (2) denial of Wal-Mart's defenses and (3) the issue of implied covenants in the lease. The remaining issues are intertwined with the question of whether Wal-Mart breached the lease, and, as a result, should be re-examined on remand.

ENTERED ON FILE
DATE 1-18-94

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

DOLLAR RENT-A-CAR SYSTEM,
INC., a California
corporation,

Plaintiff,

vs.

CASSAN ENTERPRISES, INC.,
a Washington corporation and
TODD INVESTMENT COMPANY, an
Oregon corporation,

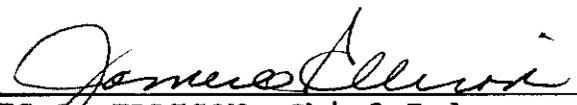
Defendants.

No. 93-C-716-E ✓
FILED
JAN 19 1994
FBI
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
MUSKOGEE

ORDER

The Court has for consideration the Motion of Defendant Cassan Enterprises to Dismiss or Stay (docket #4). The Court has reviewed the arguments advanced by the parties and finds that, on balance, convenience and interests of justice factors weigh in favor of the action filed in the State of Washington which predates the filing of the instant action. Therefore, this action should be dismissed. Defendant's Motion to Dismiss is GRANTED.

ORDERED this 14th day of January, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE JAN. 18 1994

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

PAT JOHNSON,
Plaintiff
v.
ERNIE MILLER PONTIAC-GMC, INC.,
an Oklahoma corporation,
Defendant and
Third-Party Plaintiff,
v.
I-44 AUTO AUCTION, INC.,
Third-Party Defendant.

Case No. 93-C-662-B

FILED
JAN 14 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

This matter comes on for consideration of Third-Party Defendant I-44 Auto Auction, Inc.'s (I-44) Motion For Summary Judgment (docket entry # 9). This motion relates only to the cause of action alleged by Ernie Miller Pontiac-GMC, Inc.'s Third-Party Petition under 15 U.S.C. § 1981 et seq. (docket entry #4)

The undisputed facts are essentially as follows:

1. On August 14, 1987 I-44 Auto Auction brokered the sale of a 1986 Pontiac Parisenne, between C & H Used Cars¹ and Defendant/Third-Party Plaintiff Ernie Miller Pontiac-GMC, Inc. (EMP).
2. I-44 acted as an agent of the parties, i.e. the seller of the

¹ I-44, in its statement of undisputed facts, erroneously listed the vehicle owner as "B & M". Apparently this discrepancy is not alleged to be a "material fact" dispute herein.

2/1

car, C & H Used Cars, and the buyer of the car, Ernie Miller Pontiac.

I-44 argues that in view of the admitted and undisputed fact that it was only an agent of the parties, it is not a "transferor" under 15 U.S.C. §1988 and is therefore not liable for false odometer disclosure.² EMP avers the opposite position.

Title 15, U.S.C. §1988(a) requires any transferor to give a transferee written disclosure of a motor vehicle's mileage when ownership is transferred. EMP used the same mileage figure given it when it acquired title from C & H when EMP sold the vehicle to Plaintiff. I-44 made no disclosure statement to EMP.

I-44 argues that an auction company like it has only possession, not ownership of the vehicles that pass through its place of business, *ergo* it is not a transferor with exposure for improper odometer readings, citing Industrial Indem. v. Arena Auto Auction, 638 F. Supp. 1030 (D.Minn. 1986). EMP counters that Industrial was decided before the Truth in Mileage Act of 1986, 15 U.S.C. §1981 *et seq*, amended the Motor Vehicle Information Cost Saving Act, 15 U.S.C. §1981 *et seq*. The Court concludes Industrial is persuasive but not controlling. In that case the auction company clearly disclaimed in writing any guarantee or warranty of the accuracy of the car's odometer reading

The vehicle sale in the present case occurred in 1987, after

² Although not set forth as an undisputed fact it is apparently without dispute that EMP sold the vehicle to Plaintiff Pat Johnson who discovered the alleged odometer discrepancy.

the passage of the 1986 amendment but before the regulations were amended in 1988. The then existing regulations, CFR §580.3 (1987), defined transferor under the 1986 Act as:

"Transferor means any person who transfers his ownership or any person who as agent, transfers the ownership of another, in a motor vehicle by sale, gift or other means other than creation of a security interest."

EMP cites Davis v. Dickerson and Dickerson Ford-Mercury, Inc. et al, 803 P.2d 1170 (1990 Okla.App., approved for publication by order of the Oklahoma Supreme Court) for the proposition that Oklahoma courts have recognized Federal law as providing that an individual acting as an agent for one who holds title can be liable under the Federal Odometer Act even though the agent did not hold title to the transferred vehicle.

Davis persuades the Court that indeed an agent for one who holds title can be liable under the Federal Odometer Act even though the agent did not hold title to the transferred vehicle; however, this does mean that every agent of a vehicle owner is liable for an improper odometer disclosure by the owner. The Court's view of Davis is that the imposition of liability requires at a minimum that the agent had knowledge of the improper odometer reading and knowingly participated in the faulty disclosure. EMP has cited to the Court no authority to the contrary.

Further, the pertinent regulations were again amended in 1989 which, in the Court's view, clarifies the definitions of transferor and transferee where a person acts as an agent for one or both of the parties. The newer regulation reads:

"Transferor means any person who transfers his ownership

of a motor vehicle by sale, gift, or any means other than by the creation of a security interest, and any person who, as agent, signs an odometer disclosure statement for the transferor." (emphasis supplied)

It is undisputed that I-44 neither transferred ownership of the Pontiac nor signed the odometer disclosure statement for the seller. Moreover, there is nothing in the undisputed facts to establish that I-44 was actually aware of an improper odometer reading on the vehicle in issue.

Under the admitted facts now in the record the Court concludes I-44 is entitled to summary judgment as a matter of law. The Court further concludes that I-44's Motion For Summary Judgment should be and the same is hereby GRANTED.

IT IS SO ORDERED, this 14 day of January, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JAN-18 1994

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

FILED
JAN 14 94
CLERK OF COURT

WILLIAM LOCKETT MARKLEY)
)
 Petitioner,)
)
 vs.)
)
 R. MICHAEL CODY,)
)
 Respondent.)

Case No. 91-C-444-B

ORDER

Now before the Court is Respondent William Lockett Markley's (Markley) Motion for Enlargement of Time to Object to the Magistrate's Report and Recommendation (Docket #32) and his Objection to Report and Recommendation of United States Magistrate Judge (Docket #33). For good cause shown, the Motion for Enlargement of Time is GRANTED.

Facts

Petitioner was convicted of Shooting With Intent to Kill After Former Conviction of Two or More Felonies in Washington County District Court, Case No. CRF-84-20. The judgment was affirmed on appeal and his petition for post-conviction relief was denied. In his Petition for a Writ of Habeas Corpus, Petitioner raised four issues: 1) the trial court abused its discretion in refusing to grant a continuance resulting in ineffective assistance of counsel; 2) the court erred in failing to consider whether Petitioner was competent to stand trial; 3) the trial court abused its discretion by limiting defense counsel's cross examination of a state witness; and 4) prosecutorial misconduct during closing arguments deprived

Petitioner of his right to a fair and impartial jury.

In a Report and Recommendation dated January 21, 1992, the Magistrate considered Markley's Petition for a Writ of Habeas Corpus and recommended dismissal of Petitioner's claims regarding limiting defense counsel's cross examination of the victim's sister and for prosecutorial misconduct during closing arguments. The Magistrate found that the only remaining contentions were that the trial court abused its discretion in failing to grant a continuance, resulting in ineffective assistance of counsel, and that Petitioner was denied a fair trial because he was mentally incompetent at the time of trial. The Magistrate ordered the production of certain documents so he could consider whether Petitioner was competent to stand trial. Neither party objected to the Magistrate's Report and Recommendation, and it was affirmed on February 12, 1992.

In compliance with his Order, the parties provided numerous court records and medical records to the Magistrate. The records demonstrated that Petitioner was adjudged mentally ill due to a "chronic brain syndrome" on February 27, 1964. In conjunction with a first degree burglary charge dated September 28, 1968, Dr. Loraine Schmidt performed a psychiatric evaluation on December 18, 1968 and found that petitioner was not mentally ill. On April 12, 1969, Dr. Harold B. Mindell found Petitioner to be mentally ill and to have difficulty distinguishing right from wrong. Petitioner was subsequently found not guilty by reason of insanity on the first degree burglary charge. He was found to be restored to

mental competency and discharged to self custody approximately one month later.

Petitioner was subsequently charged with burglary in the second degree (twice) and feloniously carrying a firearm. In each of these instances, plaintiff pled guilty and there is no evidence that his competence was an issue.

He was admitted to the VA Hospital on June 1, 1983, and discharged on June 30, 1983. His physician, Dr. Sidelnik stated that Markley had "no impairment of his cognitive functions and he has no evidence of any learning disability or brain damage."

Petitioner's trial counsel for the charges at issue in this case, Terrill Corley, stated that he believed Petitioner to be competent at the time of trial. Mr. Corley stated "Regarding any question as to Mr. Markley's competency to stand trial at the time, there was none." (See Affidavit of Terrill Corley). His additional counsel, Mr Riley, stated "It was my opinion that Mr. Markley was competent at the time the offense was committed and that he was competent to aide in his own defense at the time of trial." (See Affidavit of Stephen B. Riley).

Petitioner has submitted a letter by Dale R. Jordan, Ph.D., director of the Jordan Diagnostic Center in Oklahoma City, Oklahoma, wherein Jordan discusses Markley's reaction to sugar which "drives him wild" and causes his "emotions [to] become unbalanced." Markley also submitted the affidavit of his wife in which she states Petitioner's sugar intake was abnormally high and his behavior was extremely erratic "approximately 6 months before

the incident occurred."

After considering this evidence, the Magistrate Judge recommended denial of the petition for habeas corpus and found that "there is no merit to petitioner's claim that he was mentally incompetent at the time of his conviction. . . ." The Magistrate Judge found there was no evidence of irrational behavior, suggestion of incompetency, or evidence of prior medical opinions challenging competency which would require the trial court to hold a sua sponte competency hearing.

Legal Analysis

Petitioner, relying on United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990) and Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987), argues that the Magistrate Judge erred in finding that the trial judge did not abuse his discretion in denying the motion for continuance. Petitioner contends that the denial of the continuance was error pursuant to Rivera, 900 F.2d at 1475, because it was "arbitrary or unreasonable and materially prejudiced" him. He asserts that "had the defense of insanity been fully developed and asserted in this case, to include the facts represented in his wife's affidavit, as well as those in Dr. Jordan's Diagnostic - Report, there is a reasonable likelihood he would have been acquitted, or, if convicted, would nevertheless have been given a lesser sentence than he actually received." The Court, however, agrees with the finding of the Magistrate Judge that denial of the continuance did not prejudice Petitioner because he was at all

times represented by counsel¹ and was vigorously defended at trial. Moreover, Petitioner's assertion that the result would have been different with additional time is not supported by any evidence.

Profitt does not require rejection of the Magistrate's Report and Recommendation. The court in Profitt recognized that the test for assistance-of-counsel cases was the one set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), and that prejudice (likelihood of a different outcome) was a required element of the claim. The Profitt court found that the defendant was prejudiced by his counsel's failure to present an insanity defense at trial when defendant had been adjudicated insane eight months prior to his commission of the crime for which he was imprisoned.

In the present case, Petitioner had not been found to be insane within a short time prior to his commission of the crime. In fact, Petitioner had last been found to be mentally ill in 1969 and was found to be competent shortly thereafter. Moreover, in 1983, Petitioner was found to "have no impairment of his cognitive functions." The Magistrate found that Petitioner had not presented a reasonable probability that the outcome of the trial would have been different had the insanity defense been used, and the Court agrees with that finding.

¹ Petitioner was represented by Mr. Riley from start to finish although Mr. Riley did not intend to act as trial counsel. In addition, Petitioner was represented by Lewis B. Ambler until approximately two months before trial, when he withdrew because of a conflict of interest. Approximately one week before trial, Mr. Ambler was replaced by Mr. Corley, who ultimately took the lead in trying the case and was assisted by Mr. Riley.

Petitioner also argues that the Magistrate erred in finding that the Petitioner was competent to stand trial. Relying on Lafferty v. Cook, 949 F.2d 1546, (10th Cir. 1991), Petitioner argues that in order to be found competent to stand trial, he must have a sufficient contact with reality so as to have a "rational understanding." Id. at 1551. Since there was testimony that Lafferty was delusional, the Circuit Court of Appeals held that it was error to find that Lafferty was competent. Id. at 1556.

Lafferty does not support Petitioner's position. First, there was a competency hearing in Lafferty, and in the present case there was no competency hearing nor any indication that a competency hearing was necessary. Petitioner displayed no irrational or incompetent behavior at the time of trial that would necessitate such an inquiry. There is no evidence in the record to suggest that Petitioner was delusional or irrational at the time of trial.

The evidence does not support Petitioner's assertion that he was incompetent at the time of the shooting (or that he was prejudiced by the failure to timely assert this defense) or that he was incompetent at the time of trial. For the reasons stated herein, the Report and Recommendation of the Magistrate (Docket #31) is ADOPTED and AFFIRMED and the Objection to Report and Recommendation of United States Magistrate Judge (Docket #33) is DENIED.

IT IS SO ORDERED THIS 14th DAY OF JANUARY, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

JAN 18 1994

FILED

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

JAN 14 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NELSON BROWN,
Plaintiff,
vs.
RON CHAMPION, et al.,
Defendants.

92
No. ~~93~~-C-1180-B ✓

ORDER

Before the court is plaintiff's motion for default judgment filed on January 6, 1994.

Plaintiff requests a default judgment against the defendants because they failed to comply with the court's order of November 23, 1993. Plaintiff is mistaken. The November 23, 1993 order merely granted the parties an opportunity to supplement their respective motion and response. Accordingly, the court hereby denies plaintiff's motion for a default judgment as it lacks any basis. The court will, however, consider the exhibits submitted with the motion when ruling on defendants' motion to dismiss or for summary judgment.

Plaintiff is reminded that he must furnish the defendants a copy of all motions and pleadings in this case. Although plaintiff's motion contains a certificate of service, the certificate does not certify that plaintiff mailed a copy of this motion to the defendants. Information and Instruction #8 for filing a civil rights action specifically provides:

You must furnish an original and one copy of all motions, pleadings, correspondence or other documents (except the

22

original complaint which requires an original and two copies) submitted to the court for filing and consideration. In addition you must furnish the opposing party or his attorney with a copy of all such documents submitted to the court. Each original document (except the original complaint) must include a certificate stating the date a copy of the document was mailed to the opposing party or his attorney and the address to which it was mailed. Any pleading or other document received which fails to include a certificate of service may be disregarded by the court or returned.

(Emphasis added.)

The court will direct the clerk to mail a copy of plaintiff's motion for default judgment to the defendants for this time. Plaintiff is warned, though, that if future pleadings and motions do not comply with Instruction #8 above, the court will disregard them.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiff's motion for a default judgment [docket #21] is **denied.**
- (2) The Clerk shall **mail** to the defendants a copy of Plaintiff's motion for default judgment [docket #21].

SO ORDERED THIS 14 day of Jan, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

JAN 13 1994

FILED

JAN 14 1994

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

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

BETTY J. BROWN,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Defendant.

92-C-0753-B

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 28, 1993 in which the Magistrate Judge recommended that the case be **REMANDED**.

On remand, the ALJ must, at a minimum, have Plaintiff examined by an eye specialist and have this specialist testify at a supplemental hearing. In addition, the ALJ must call a vocational expert to testify at the hearing. Once this is done, the ALJ is to re-examine the evidence and determine whether Plaintiff can return to her past relevant work. If she can not, the burden shifts to the Secretary to show Plaintiff can work elsewhere in the national economy.

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.

rmads a

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

SO ORDERED THIS 14 day of Jan, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED
DATE 1/14/94

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

FILED

JAN 12 1994

DOLLAR SYSTEMS, INC., a Delaware Corporation,

Plaintiff,

vs.

OBSIDIAN LIVERY, INC., a Louisiana Corporation, and LES MATTHEWS, an individual,

Defendants.

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

No. 92-C-1018-B

JOURNAL ENTRY OF JUDGMENT

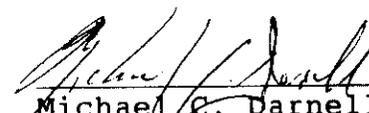
Now on this 11 day of Jan., 1994, by agreement of the parties, the Court finds that Dollar Systems, Inc., is entitled to Judgment against Les Matthews, and judgment is hereby entered against Les Matthews and in favor of Dollar Systems, Inc. in the amount of One Million Dollars (\$1,000,000.00), each party to bear its own attorneys fees and costs.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM AND CONTENT:


Michael J. Gibbens
Attorney for Dollar Systems, Inc.


Michael E. Darnell
Attorney for Les Matthews

JAN 14 1984

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA 94

JAMES JACKSON,)
)
 Plaintiff,)
)
 vs.)
)
 MYRNA LANSDOWN, EDDIE MASON,)
 DONALD CRANE, TIM MORGAN, et al.)
 Eddie Mason, et al.,)
)
 Defendants.)

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

Case No. 93-C-775-B

ORDER

Now before the Court is Plaintiff, James Jackson's (Jackson) Application to Seek Leave of Court Before Filing of any Document, Etc., Concerning Plaintiff's Objections to Magistrates Report and Recommendation (Docket #28) (to which Plaintiff attaches his Objection to Report and Recommendation of U.S. Magistrate Judge Recommending Denial of Application to File Amended Complaint). The Court grants Plaintiff leave to file his objection (addendum to Docket #28) to the Report and Recommendation of the United States Magistrate Judge recommending Denial of Application to File Amended Complaint and considers that objection herein.

Facts

Plaintiff brings this §1983 action against Myrna Lansdown (Judge Lansdown), a State District Judge for Washington County, Oklahoma, Donald Crane (Crane), District Attorney for Washington County, Oklahoma, and Tim Morgan (Morgan) and Eddie Mason (Mason), Police Officers for the municipality of Bartlesville, Oklahoma. Plaintiff alleges in his Complaint that Defendants violated his

constitutional rights under the Fourth, Fifth, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution. The only factual basis Jackson provides for his claims is that he, an African American, was discriminated against in favor of Cherlyn Derrick, a white female; that he was "framed" and a probable cause affidavit was issued without an investigation and without probable cause; that he was falsely arrested and given excessive bail (\$10,000 in case CRF-91-286, \$10,000 in case CRF-91-287, and \$1000 in case CRM-91-580); and that the false affidavit, bail, and subsequent three week imprisonment were racially motivated.

At the Status and Scheduling Conference on November 4, 1993, Jackson requested leave to file an amended complaint naming C.M. Miller (Miller) as a Defendant. Jackson was ordered to file an application to amend his complaint, setting forth the factual basis for a claim against Miller. He filed an Application to File Amended Complaint, asserting that Miller submitted a probable cause affidavit in cases no. CRF-91-286 and CRM-91-580. Jackson asserts that Miller submitted an affidavit not based on probable cause, because he never investigated the scene, and relied solely on Cherlyn Derrick's statements.

Jackson also seeks to amend his complaint to add an additional claim against Eddie Mason, asserting:

Eddie Mason came to my residence along with two other police officers and demanded that I give Eddie Mason a two by four. I signed a release statement under coercion and or duress. Eddie Mason later used this 2 X 4 in his probable cause report saying I had broke (sic) Cheryl Derrick's leg when I had not, and he refused to take a broken glass wine bottle she pulled on me, as he said he only wanted what concerned Derrick, the 2 X 4.

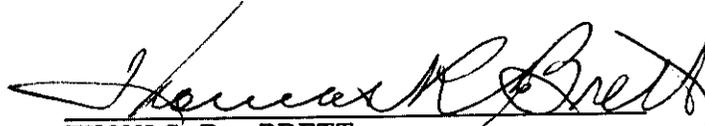
(Application to File Amended Complaint, p. 2). Mason and Morgan objected to Jackson's application.

Legal Analysis

On December 7, 1993, the Magistrate recommended denial of Jackson's application to amend, finding that Miller would be immune from suit based on qualified immunity. Jackson filed his application to file an objection to this Report and Recommendation on January 3, 1994. The objection is untimely, and is therefore waived. The Report and Recommendation contains the following language: "Any objections to this Report and Recommendation must be filed with the Clerk of the Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to Appeal the District Court's Order." This language is consistent with the requirements of the Tenth Circuit in Moore v. United States, 950 F.2d 656 (10th Cir. 1991), and is therefore sufficient to apply the waiver rule to a pro se litigant. Id. at 659.

Accordingly, the Report and Recommendation of United States Magistrate Judge Recommending Denial of Application to File Amended Complaint is Adopted and Affirmed, and the objection of Plaintiff (appended to Docket #28) is Denied.

IT IS SO ORDERED THIS 11th DAY OF JANUARY, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

JAN 12 1994

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

FILED

JAN 12 94

JAMES JACKSON,)
)
 Plaintiff,)
)
 vs.)
)
 MYRNA LANSDOWN, EDDIE MASON,)
 DONALD CRANE, TIM MORGAN, et al.)
 Eddie Mason, et al.,)
)
 Defendants.)

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

Case No. 93-C-775-B

ORDER

Now before the Court is Plaintiff, James Jackson's (Jackson) Application to Seek Leave of Court Before Filing of any Document, Etc., Concerning Plaintiff's Objections to Magistrates Report and Recommendation (Docket #29) (to which Plaintiff attaches his Objection to Magistrates Report and Recommendation Granting Defendants' Motion to Dismiss) and Plaintiff's Application to Seek Leave of Court Before Filing of any Document, Etc., Concerning Plaintiff's Objections to Magistrates Report and Recommendation (Docket #30) (to which Plaintiff attaches his Objections to Magistrates Report and Recommendation Denying Plaintiff's Motion for Extension of Time). The Court grants Plaintiff leave to file his Objection (addendum to Docket #29) to the Magistrate's Report and Recommendation Granting Defendants Motion to Dismiss (Docket #23), and further grants Plaintiff leave to file his Objection (addendum to Docket #30) to the Magistrate's Order Denying Plaintiff's Motion for Extension of Time (Docket #22) and considers

those objections herein.

Facts

Plaintiff brings this **1983** action against Myrna Lansdown (Judge Lansdown), a State District Judge for Washington County, Oklahoma, Donald Crane (Crane), District Attorney for Washington County, Oklahoma, and Tim Morgan (Morgan) and Eddie Mason (Mason), Police Officers for the municipality of Bartlesville, Oklahoma. Plaintiff alleges in his Complaint that Defendants violated his constitutional rights under the Fourth, Fifth, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution. The only factual basis Jackson provides for his claims is that he, an African American, was discriminated against in favor of Cherlyn Derrick, a white female; that he was "framed" and a probable cause affidavit was issued without an investigation and without probable cause; that he was falsely arrested and given excessive bail (\$10,000 in case CRF-91-286, \$10,000 in case CRF-91-287, and \$1000 in case CRM-91-580); and that the false affidavit, bail, and subsequent three week imprisonment were racially motivated.

Defendants Crane and Judge Lansdown filed a Motion to Dismiss based on absolute prosecutorial and judicial immunity. Jackson requested and was granted twenty additional days in which to respond to this Motion to Dismiss, making his response due on November 3, 1993. On November 4, 1993, at the Status and Scheduling Conference, Jackson requested additional time in which to respond asserting he had lost his response. The Magistrate denied Jackson's application for additional time, and subsequently

recommended granting the Motion to Dismiss of Crane and Judge Lansdown.

Legal Analysis

Jackson complains of not being allowed additional time within which to respond to the Motion to Dismiss. The Court notes, however, that Jackson does object to the Report and Recommendation of the Magistrate and does, in that objection, which is being considered herein, address the merits of the Motion to Dismiss. Thus, since Jackson's arguments on the merits are being considered, the Court denies his Objection (addendum to Docket #30) to the Magistrate's Order Denying Plaintiff's Motion for Extension of Time as moot.¹ The issue, then is whether immunity shields Crane and Lansdown from suit in this instance.

Prosecutorial Immunity

Crane argues that a prosecutor is entitled to absolute immunity from suits that are predicated upon the prosecutor's performance of functions in "initiating a prosecution and in presenting the State's case." Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Jackson does not dispute that

¹ The Court also notes the untimeliness of Plaintiff's objections as an independent basis for their denial. Plaintiff's application to file these objections (to which the objections were attached) was filed on January 3, 1994. The Reports and Recommendations to which Jackson objects were dated December 7, 1993, and state that "Any objections to this Report and Recommendation must be filed with the Clerk of the Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to Appeal the District Court's Order."

prosecutors are entitled to absolute immunity in some instances, but argues here that Crane was involved in an investigative function which entitles him to qualified immunity only. For this assertion, Jackson relies on Clark v. Lutchner, 436 F.Supp. 1266 (M.D. Pa. 1977), wherein the court held that the act of causing someone to be arrested and incarcerated without probable cause was part of the prosecutor's investigative function and was therefore protected by qualified immunity instead of absolute immunity.

Jackson complains that the information in the probable cause affidavit was insufficient, and specifically that Crane filed a "mis-information that was not based on probable cause." Under Tenth Circuit law, this act is within the judicial phase of the prosecutor's responsibilities, and Crane is therefore entitled to absolute immunity. Lerwill v. Johnson, 712 F.2d 435, 438 (10th Cir. 1983). Crane filed the information in order to procure an arrest warrant. Filing charges, seeking an arrest warrant, and seeking a particular bail amount are part of "initiation and presentation" which is protected by absolute immunity. Id. The Court concludes that Crane is protected by absolute immunity and that he should be dismissed from this action.

Judicial Immunity

The Magistrate recommended dismissal of the claim against Judge Lansdown because of judicial immunity. Jackson, in arguing that immunity does not protect Judge Lansdown in this instance, asserts that:

Giving a black man a higher bond as opposed to giving Caucasians lower bonds in the same or similar situations

is not a function that is protected activity for purposes of being immune from damages for duties performed in their official capacity. The Duty performed by Myrna Lansdown was outside the duties performed in her official capacity.

(Plaintiffs' objection to Magistrate's Report and Recommendation Granting Defendants' Motion to Dismiss, p. 5). This assertion is completely unsupported by law. Judges are liable only when they act in "clear absence of all jurisdiction." Moreover, they are absolutely immune "even when their action is erroneous, malicious, or in excess of their judicial authority." Van Sickle v. Holloway, 791 F.2d 1431, 1435 (10th Cir. 1986) (citing Stump v. Sparkman, 435 U.S. 349, 356-357, 98 S.Ct. 1099, 1104-1105, 55 L.Ed.2d 331 (1978)). There is no allegation that Judge Lansdown did not have jurisdiction to set bail for Jackson in the matters pending before her. Thus, absolute judicial immunity is applicable and Judge Lansdown should be dismissed.

In considering the merits of the Motion to Dismiss and Jackson's response thereto (as found in his Objection to the Report and Recommendation of the Magistrate), the Court finds that both Crane and Judge Lansdown must be dismissed from this suit on the basis of absolute immunity. Thus, the Report and Recommendation of the Magistrate (Docket #23) should be and hereby is adopted and affirmed, the Motion to Dismiss of Defendants Crane and Judge Lansdown (Docket #3) is GRANTED and Jackson's Objection (addendum to Docket #29) is DENIED.

IT IS SO ORDERED THIS 11th DAY OF JANUARY, 1994.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 12 94

JAMES JACKSON,

Plaintiff,

vs.

MYRNA LANSDOWN, EDDIE MASON,
DONALD CRANE, TIM MORGAN, et al.
EDDIE MASON, et al.,

Defendants.

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

Case No. 93-C-775-B

O R D E R

Now before the Court is Motion to Dismiss or, in the Alternative, Motion for Summary Judgment of Defendants Tim Morgan (Morgan) and Eddie Mason (Mason) (Docket #8).

Facts

Plaintiff brings this §1983 action against Myrna Lansdown (Judge Lansdown), a State District Judge for Washington County, Oklahoma, Donald Crane (Crane), District Attorney for Washington County, Oklahoma, and Morgan and Mason, Police Officers for the municipality of Bartlesville, Oklahoma. Plaintiff alleges in his Complaint that Defendants violated his constitutional rights under the Fourth, Fifth, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution. The only factual basis Jackson provides for his claims is that he, an African American, was discriminated against in favor of Cherlyn Derrick, a white female; that he was "framed" and a probable cause affidavit was issued without an investigation and without probable cause; that he was falsely arrested and given excessive bail (\$10,000 in case CRF-91-286, \$10,000 in case CRF-91-287, and \$1000 in case CRM-91-580); and

that the false affidavit, bail, and subsequent three week imprisonment were racially motivated.

The following facts are undisputed¹:

1) Defendants Tim Morgan and Eddie Mason were employed as Bartlesville Police Officers at the time of Plaintiff's complained of events contained in his Complaint.

2) Defendant Tim Morgan took a report from Cherlyn A. Derrrick concerning a domestic assault and battery disturbance in which Plaintiff was involved in Cases N. CRF-91-286 and CRM-91-580.

3) Defendant Tim Morgan filed this report. It was later used in an affidavit for a finding of probable cause in which Defendant Tim Morgan was not the Affiant.

4) Defendant Tim Morgan's only involvement with Cases No. CRF-91-286 and CRM-91-580 against Plaintiff was the filing of the report as taken from Cherlyn A. Derrick.

5) Defendant Tim Morgan did not submit any affidavit to support the issuance of any Arrest Warrant for James Jackson in Cases No. CRF-91-286 or CRM-91-580.

6) Defendant Tim Morgan at no time sought a determination of probable cause based on any information personally known to him in reference to Cases No. CRF-91-286 or CRM-91-580.

7) Defendant Eddie Mason at no time sought a determination of probable cause based on any information personally known to him in reference to Cases No. CRF-91-286 or CRM-91-580.

¹ These facts were set forth in Defendants' Brief and were not disputed by Plaintiff. Thus, pursuant to Local Rule 56.1, they are deemed admitted.

8) Defendant Eddie Mason did not submit an affidavit in support of a probable cause determination in Cases No. CRF-91-286 or CRM-91-580, both of which name Plaintiff as the defendant.

9) Defendant Myrna Lansdown is a District Court Judge for the County of Washington.

10) Defendant Myrna Lansdown set the bond on Plaintiff in Cases No. CRF-91-286, CRF-91-287 and CRM-91-580.

11) Defendant Myrna Lansdown, at the time of setting bail, was not aware of the fact that the victim involved in these charges was of another race than Plaintiff.

Legal Analysis

In the present case, Defendants move to dismiss Jackson's Complaint, arguing that the Complaint fails to provide the factual basis for Jackson's claims against them. Plaintiff must do more than state a conclusion to state a constitutional claim; plaintiff must state a compensable claim for relief that details the facts forming the basis for the claim. Blinder, Robinson & Co. v. United States Securities and Exchange Commission, 748 F.2d 1415, 1419 (10th Cir. 1984) This requirement is applicable to pro se plaintiffs. See Baker V. Smith, 771 F.Supp 1156, 1158 (D.Kan. 1991). Jackson has failed to make any factual statements in his complaint that would "detail the basis for the claim." In fact, the Complaint contains nothing but conclusory statements, and is completely devoid of any facts that reveal the actions of Mason and Morgan of which he complains. For this reason Plaintiff's claim is subject to dismissal as to the moving Defendants but is being

considered on said Defendants alternative Motion for Summary Judgment as hereafter stated.

The Court also notes that the undisputed facts in the record do not support Jackson's Claim, therefore summary judgment is appropriate pursuant to Fed.R.Civ.P. 54.² 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); Winton 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."

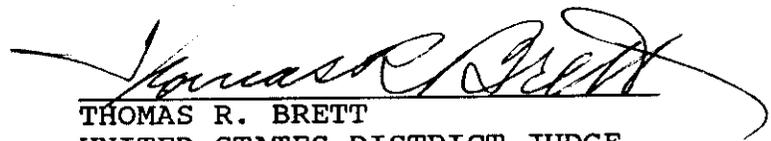
To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical

² Morgan and Mason's motion was framed in the alternative: a motion to dismiss or a motion for summary judgment. On October 21, 1993, the Court entered an Order granting Morgan and Mason's application to treat their motion to dismiss as one for summary judgment. A copy of Fed.R.Civ.P. 56 was appended to the Order and Jackson was given 20 days from the date of the Order to come forward with evidence to defeat summary judgment. Plaintiff filed his own affidavit December 17, 1993. This affidavit was filed well beyond the 20 days permitted by the Court and it failed to cure the defects in Plaintiff's Complaint or defeat Defendants' motion for summary judgment.

doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Neither Mason nor Morgan was involved with the Probable Cause Affidavit. (See undisputed facts # 3-8). The gravamen of Plaintiff's complaint is that the probable cause affidavit was filed after talking to Cherlyn Derrick, and without a sufficient investigation to determine the truthfulness of her statements. However, since it is undisputed that neither Mason nor Morgan was involved with drafting or presenting the affidavit, the facts do not support Jackson's claim against them.³ The Motion for Summary Judgment of Defendants Mason and Morgan should be and hereby is GRANTED.⁴

IT IS SO ORDERED THIS 12th DAY OF JANUARY, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

³ The Court also notes that Jackson has failed to come forward to articulate a clearly established constitutional right which reasonable officers knew or should have known which was violated by Mason or Morgan. For this reason, it appears Mason and Morgan would be entitled to qualified immunity.

⁴ The Court notes that the Application to Seek Leave of Court Before Filing Of Any Document, Etc., Concerning Plaintiff's Objections to Magistrate's Report and Recommendation (Docket #31) (to which Plaintiff attaches his Objection to Report and Recommendation of United States Magistrate Judge recommending dismissal of Jackson's claim against Tim Morgan) need not be considered and is moot because of the disposition of Morgan's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment.

JAN 14 1994

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

FILED
JAN 13 94

VOICE SYSTEMS AND SERVICES, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 VMX, INC.)
)
 Defendant and)
 Counterclaim-Plaintiff,)
)
 vs.)
)
 VOICE SYSTEMS AND SERVICES, INC.)
 AND PETER ZUYUS,)
)
 Counterclaim-Defendants.)

APPROPRIATE CONFERENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

Case No. 91-C-88-B

ORDER

Now before the Court is Counterclaim-Defendant Peter Zuyus' (Zuyus) Motion to Dissolve Preliminary Injunction (Docket # 173).

Facts

Voice Systems and Services (VSSI) brought suit against VMX, Inc (VMX) seeking a declaration that it was not infringing the VMX patent on voice systems. Subsequently, VSSI filed bankruptcy. VMX counterclaimed against and VSSI and Zuyus (president of VSSI) for patent infringement. Zuyus moved to quash the summons. VMX then moved for a preliminary injunction, and the Court heard the Motion for Preliminary Injunction without ruling on Zuyus' Motion to Quash. Zuyus was present, but without counsel, at the hearing on the preliminary injunction. Counsel for VSSI had been admonished by the Bankruptcy Judge that he could not represent Zuyus.

The Court entered a preliminary injunction against VSSI and

Zuyus on November 20, 1992. The Court stated in its Findings of Fact and Conclusions of Law entered on November 5, 1992:

31. VSSI's president Peter Zuyus is also a party to this lawsuit. Under the terms of 35 U.S.C. §271(b), anyone who "actively induces infringement of a patent shall be liable as an infringer." Inducement covers any activity that aids and abets infringement. Mr. Zuyus has himself committed acts of infringement by selling infringing VSSI products, and he has controlled and directed VSSI's infringement. Mr. Zuyus, as an officer of VSSI, also falls within the scope of Rule 65(d), Fed.R.Civ.P., which extends the binding scope of an injunction to the officers of a party to the action.

32. VMX has a reasonable likelihood of success in proving . . . that Zuyus has committed acts of infringement and has induced infringement of the patents in suit.

Zuyus filed a Motion to Amend the Findings of Fact and Conclusions of Law on the grounds that there was no evidence to justify piercing the corporate veil and that a preliminary injunction cannot issue without notice to the adverse party. The preliminary injunction was entered against VSSI and Zuyus after the filing of the Motion to Amend.

Legal Analysis

Zuyus attempts to dissolve the preliminary injunction against him personally because he was unrepresented at the hearing and because VMX did not "pierce the corporate veil" which would justify entering an injunction against him personally. He further seeks to dissolve the preliminary injunction because of "false advertising" of the effect of the preliminary injunction. Zuyus' arguments are without merit.

Rule 65(d), Fed.R.Civ.P. provides:

Every order granting an injunction and every restraining

order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. (Emphasis added)

Thus under the express language of Rule 65(d), a preliminary injunction is binding on an officer of a party to the action. In the present case, Zuyus, president of VSSI, had actual notice of the injunction, and was present at the hearing on the injunction. The fact that he was not represented at the hearing does not prevent the injunction from being applicable to him in light of Rule 65(d). Obviously, if the injunction is held applicable to a VSSI, but not to Zuyus, the injunction affords no protection to VMX. Rule 65(d) prevents this result.

The absence of any evidence as to piercing of the corporate veil is irrelevant. First, Manville Sales Corp. v. Paramount Systems, Inc., 917, F.2d 544 (Fed. Cir. 1990), upon which Zuyus relies, discusses liability for patent infringement, not the entry of a preliminary injunction. Moreover, the court in Manville recognizes personal liability on the part of corporate officers "who actively assist with their corporations infringement. . . regardless of whether the circumstances are such that a court should disregard the corporate entity and pierce the corporate veil." Id. at 553. Rule 65, not Manville, addresses who is bound by an injunction.

Additionally, Zuyus' good faith belief that his actions did

not infringe VMX's patent is not material to the entry of the injunction. As noted above, if the injunction is found to be appropriate, it is, by rule 65(d), applicable to Zuyus as president of VSSI. The evidence Zuyus refers to regarding his knowledge of patent infringement may be material to his personal liability for infringement, but has no bearing on whether Zuyus is bound by the injunction. Id., Fed.R.Civ.P. 65.

Lastly, the injunction should not be dissolved because of "false advertising." Zuyus argues that the injunction should be dissolved because of a statement in Voice Technology News, February 9, 1993, that "The court's ruling is the final action in a lengthy legal process that began with a lawsuit filed against the San Jose firm by Voice Systems and Services Inc. (VSSI), of Mannford, Okla." Citing Meyers v. Skinner, 186 F. 347 (CC NY 1911) and Rollman Mfg. Co. v. Universal Hardware Works, 229 F. 579 (DC Pa. 1916), Zuyus asserts that "where a party advertises an injunction falsely for effect upon others, or sends out misleading notices or exaggerated statements as to the scope of the preliminary injunction, the court should dissolve the preliminary injunction upon motion of a party as to that party." In the present case, there is no evidence that VMX is responsible for the inaccurate statement that the preliminary injunction is the "final action" or that Zuyus was damaged by the statement. The Court declines to dissolve the injunction on the basis of the statement in Voice Technology News.

The Motion to Dissolve Preliminary Injunction as to Counterclaim-Defendant Zuyus (Docket #173) is denied.

IT IS SO ORDERED THIS 12th DAY OF JANUARY, 1994.

A handwritten signature in cursive script, reading "Thomas R. Brett". The signature is written in dark ink and is positioned above the printed name and title.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE 1-14-94

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

GLEN D. SHEPPARD,
Plaintiff,

vs.

HENRY BELMON, Governor,
et al.,
Defendants.

No. 93-C-449-EU

F I L E D

JAN 13 1994

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

ORDER

Before the court are plaintiff's objection to defendant's motion to dismiss and plaintiff's motion to dismiss filed on January 10, 1994.

Although plaintiff's objection and motion are very hard to understand, the court construes Plaintiff's pleadings as a request to dismiss this case without prejudice at this time. **ACCORDINGLY, IT IS HEREBY ORDERED** that plaintiff's motion to dismiss [docket #16] be granted and that the above captioned case be dismissed without prejudice.

SO ORDERED THIS 12th day of January, 1994.

James O. Ellison
JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-14-93

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

JAN 15 1993

JACK MORRIS, Legal Guardian)
 for REBEKKAH MORRIS, a minor,)
)
 Plaintiff,)
)
 vs.)
)
 NATIONAL REALTY ADVISORS (NOW)
 KNOWN AS BASIC CAPITAL MANAGEMENT,)
 INC.), PHOENIX APARTMENTS, VINLAND)
 PROPERTY TRUST, SUNRIDGE MANAGEMENT)
 GROUP, DON W. CARLSON ET AL.)
 TRUSTEES CONSOLIDATED CAPITAL)
 INSURANCE,)
)
 Defendants.)

Case No. 93-C-0094-E

STIPULATION OF DISMISSAL

All of the parties to the above-captioned cause, pursuant to Rule 41(a)(1), Fed.R.Civ.P., stipulate that the above-captioned cause may be dismissed by Plaintiff with prejudice to his rights to refile same and is hereby dismissed with prejudice to Plaintiff's right to refile same.

SANDRA L. TOLLIVER

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 Sandra L. Tolliver, OBA #11117
 P. O. Box 14271
 Tulsa, Oklahoma 74159-1271
 (918) 488-8922

Attorneys for Plaintiff

RHODES, HIERONYMUS, JONES, TUCKER
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(918) 582-1173

Attorneys for Defendant

C:\WORD\NATIONAL\PLEADING\STIP.DIS.sa

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

JAN 12 94

JAMES JACKSON,

Plaintiff,

vs.

MYRNA LANSDOWN, EDDIE MASON,
DONALD CRANE, TIM MORGAN, et al.
EDDIE MASON, et al.,

Defendants.

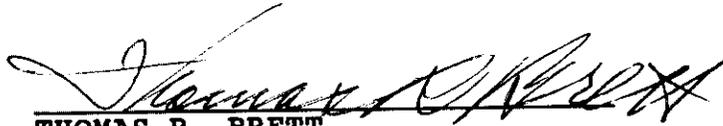
CLERK OF COURT
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 93-C-775-B

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Eddie Mason and Tim Morgan, and against the Plaintiff, James Jackson. Plaintiff shall take nothing of his claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 54.1, and each party is to pay its respective attorney's fees.

Dated, this 12th day of January, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE JAN 13 1993

FILED

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

13 94
REARNEY & WATSON
COURT
CLERK

HOUSTON AND KLEIN, INC., and THE)
TRUSTEES OF THE HOUSTON AND KLEIN,)
INC. EMPLOYEE PROFIT SHARING PLAN)
AND TRUST,)

Plaintiffs,)

vs.)

THE AETNA CASUALTY AND SURETY)
COMPANY)

Defendant.)

Case No. 93-C-432-B

O R D E R

Now before the Court is the Motion for Summary Judgment of Defendant Aetna Casualty and Surety Company (Aetna) (docket #9) and the Cross Motion for Summary Judgment of Plaintiffs Houston and Klein, Inc, and the Trustees of the Houston and Klein, Inc. Employee Profit Sharing Plan and Trust (collectively, H&K) (docket #13).

Undisputed Facts

H&K brings this action against Aetna, requesting a declaratory judgment that Aetna has an obligation to defend H&K in a wrongful termination suit (the Cunningham suit) which is pending in federal district court. H&K also requests damages for the expenses it has incurred in the Cunningham suit, and for any judgment that may be awarded against them.

In May, 1992, H&K purchased Aetna Pension and Welfare Fund Fiduciary Responsibility Insurance Policy NO. 40 FF 100753902 BCA. The insuring agreement is as follows:

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The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as Damages on account of any claim made against the Insured for any Wrongful Act and the Company shall have the right and duty to defend such claim against the Insured seeking such Damages, even if any of the allegations of the claim are groundless, false or fraudulent, and may make such investigation and settlement of any claim as it deems expedient, but the Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

With respect to "insured," the policy provides as follows:

Each of the following is an Insured to the extent set forth below:

(1) The Trust or Employee Benefit Plan designated in the Declarations and any additional Trust or Employee Benefit Plan created during the policy period by the sole sponsor referred to in item (2) below, . . . provided written notice of such is given to the Company within 90 days.

(2) An employer who is the sole sponsor of such Trust or Employee Benefit Plan.

(3) Any natural person who at any time holds or shall have held the position of:

(a) Trustee of such Trust or Employer Benefit Plan.

"Wrongful Act" as referred to in the insuring agreement, is defined:

"Wrongful Act" means a breach of fiduciary duty by the Insured in the discharge of duties as respects the Trust or Employee Benefit Plan designated in the Declarations: the term includes any negligent act, error or omission of the Insured in the "Administration" of "Employee Benefits."

Damages are defined in the Policy:

(3) "Damages" shall mean sums of money payable as compensation for loss. . .

The Word "Damages shall not include:

(b) Benefits due or to become due under the terms of the

Trust or Plan, unless and to the extent that recovery for such benefits is based upon a Wrongful Act and is payable as a personal obligation of an Insured.

On or about November 18, 1992, Aetna was advised by H&K of a potential claim for wrongful termination of employment by Ruth Cunningham (Cunningham). On January 27, 1993, Cunningham filed suit against "Houston & Klein, Inc., an Oklahoma professional corporation" for wrongful termination.¹ On February 20, 1993, Aetna declined to provide a defense to H&K in the Cunningham suit. This suit followed to determine Aetna's obligations under the policy. Both sides claim they are entitled to summary judgment on whether H&K is an insured under the policy.

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

¹ The Second Amended Complaint contains claims for overtime wages pursuant to the Fair Labor Standards Act, age and sex discrimination, breach of agreement to provide health insurance for the 18 months following termination, benefits under the Defendant Plan pursuant to the Employment Retirement Income Security Act (ERISA). In the Pretrial Order, the parties stipulate to the dismissal with prejudice of the claim for breach of agreement to provide health insurance and for benefits under the Defendant Plan. Cunningham does seek damages for "loss of benefits" in her suit.

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).

Aetna moves for summary judgment based on the grounds that H&K is not an insured within the terms of the policy. The policy provisions and the substance of the underlying lawsuit are undisputed. Each side argues that the unambiguous terms of the policy support its position.

Under Oklahoma law, general rules of contract interpretation apply to an insurance contract. Oklahoma Publishing Co. v. Kansas City Fire and Marine Ins., 805 F.Supp. 905, 908 (W.D. Okla. 1992). If the contract is found to be ambiguous, however, the contract is construed in favor of the insured. Continental Casualty Company v. Beaty, 455 P.2d 684, 688 (Okla. 1969). Terms of an insurance policy must be construed in accordance with their plain, ordinary, and accepted meaning. Webb v. Allstate Ins. Co., 536 F.2d 336, 339 (10th Cir. 1976). In interpreting a contract, neither forced nor strained construction will be indulged, nor will provisions be considered out of context. . ." Dodson v. St.Paul Ins. Co., 812 P.2d 372, 376 (Okla. 1991). The interpretation of a contract, and whether it is ambiguous, is a matter of law to be determined by the

Court. Id.

Under Oklahoma law, an insurer does not have a duty to defend if it would not be liable under its policy for any recovery in the suit. Massachusetts Bay Ins. Co. v. Gordon, 708 F.Supp. 1232, 1234 (W.D. Okla. 1989). However, if the insured can show a non-frivolous possibility that the claim against it may fall within the coverage of the insurance contract, the insurer has an obligation to defend. American Motorists Ins. Co. v. General Host Corporation, 946 F.2d 1489, 1490 (10th Cir. 1991). In determining whether there is a duty to defend, "we must examine the complaints in the [] underlying actions and decide whether there are any allegations that arguably or potentially bring the action within the protection purchased or a reasonable possibility that coverage exists." Id., (citing EAD Metallurgical, Inc. v. Aetna Casualty and Surety Co., 905 F.2d 8, 11 (2d Cir. 1990)).

The question is, then, whether under the plain language of the policy, or when construing any ambiguity against Aetna, there are any provisions which would support H&K's position that the policy covers the claims made by Cunningham. To make this determination, the Court must consider both the language of the policy and the allegations contained in Cunningham's Complaint. Under the terms of the policy, H&K is an insured if it is 1) an employee benefit plan designated in the Declarations,² 2) an additional Trust or Employee Benefit Plan created during the policy period, 3) an employer who

² The Profit Sharing Plan is the "Trust or Employee Benefit Plan designated in the Declarations."

is the sole sponsor of the Trust or Employee Benefit Plan, or 4) a natural person who is the Trustee of the Trust or Employee Benefit Plan.

In arguing that it is entitled to summary judgment, Aetna points out that the only Employee Benefit Plan referred to in Cunningham's Complaint in H&K's group medical plan, and that the medical policy does not qualify for coverage under the policy because it was not listed in the Declarations and was created prior to the beginning of the policy period.³ Aetna also argues that H&K, as sponsor of the plan or Trustee of the plan could be an insured, but that the Policy covers the actions of H&K only insofar as its actions relate to the Profit Sharing Plan. Aetna asserts that the claims of the Cunningham's Complaint are not made against the Profit Sharing Plan or against H&K as the sponsor or Trustee of the Profit Sharing Plan.

H&K, referring to the Pretrial Order in the Cunningham case, argues that Cunningham's claims do implicate H&K as sole sponsor or Trustee of the Profit Sharing Plan:

Plaintiff (Cunningham) seeks to recover losses and/or money damages resulting from Defendants (H&K's) alleged breach of fiduciary duty in allegedly wrongfully terminating Plaintiff's participation in Defendant's profit sharing plan.

H&K also argues that the damages Cunningham requests include benefits under the Profit Sharing Plan, and that the damages are within the definition of damages included in the policy.

³ H&K does not argue this point. It does not contend that the medical plan is an insured which affords coverage for Cunningham's claims.

Viewing the policy in its entirety, in light of the claims that Cunningham makes against Houston and Klein, Inc., the Court concludes that the policy is not applicable. The unambiguous language of the policy provides coverage for breach of fiduciary responsibility in connection with employee benefit plans. To hold otherwise would be to convert the policy into a general liability policy, a result which is not supported by the language of the policy.

An examination of Cunningham's Complaint, Amended Complaints, and the Pretrial Order reveals that Cunningham's only claims are for violation of the Fair Labor Standards Act and age and sex discrimination. Cunningham's claim is not for a "breach of fiduciary duty" by H&K in the "discharge of duties as respects the" Profit Sharing Plan. Further, Cunningham does not allege a "negligent act, error, or admission" in the "'administration' of 'employee benefits.'" Rather, Cunningham alleges intentional wrongful acts in failing to pay her overtime and in discriminating against her by terminating her employment. While Cunningham claims loss of benefits under the Profit Sharing Plan as an element of her damages, the Court is persuaded by Carpenters District Council v. Dillard Department Stores, 778 F.Supp. 297, 317 (E.D. La. 1991), that the element of damages does not mean that the claim is for a "breach of fiduciary duty in connection with an employee benefit plan."

For these reasons the Motion for Summary Judgment of Defendant Aetna is granted and the Cross Motion for Summary Judgment of

Plaintiff H&K is denied.

IT IS SO ORDERED THIS 13th DAY OF JANUARY, 1994.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 1-13-94

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

F I L E D

JAN 12 1994

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

BILL LACKEY,)
)
Plaintiff(s),)
)
v.)
)
WORLD CHANGERS, INC.)
)
Defendant(s).)

93-C-0795-E ✓

**ORDER SEALING FILE AND ADMINISTRATIVELY CLOSING CASE
AND MAINTAINING CASE FILE IN THIS COURT UNTIL SEPTEMBER 1994**

A Status and Scheduling Conference was held January 11, 1994 for the purpose of scheduling the foregoing case for trial. During the course of the Conference the court requested the presence of the parties and counsel; whereupon a settlement conference was held and following discussions, the case settled as to all parties.

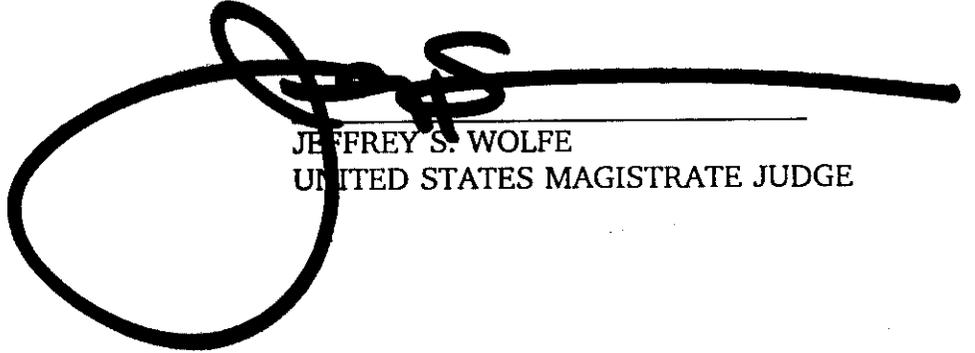
Due to the nature of the settlement, the parties agree and the court hereby orders as follows:

1. That the Case File and Docket Sheet be hereby sealed from review by any person except counsel and the parties, unless upon further order of the court, with reasonable notice being first given to all parties and their lawyers.
2. That the Case File be administratively closed, but be maintained within this District through and inclusive of September 30, 1994.
3. That the Certified Mail letter bearing the address of Bill Lackey, opened and sealed by the Court on January 11, 1994, be maintained by the Court as an exhibit to be kept with the

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file under seal until further order of the Court.

SO ORDERED THIS 12th day of Jan, 1994.

A large, stylized handwritten signature in black ink, appearing to read 'J.S. Wolfe', is written over a horizontal line. The signature features a large, looping initial 'J' and a distinct 'S'.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 1-13-94

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

F I L E D

JAN 17 1994

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

IN RE:)	
FIRST SECURITY MORTGAGE CO.,)	Bankruptcy # 89-03147-W
)	(Chapter 7)
Debtor,)	
)	
PATRICK J. MALLOY III, Trustee,)	
)	
Plaintiff,)	
)	
vs.)	Adversary # 92-0081-W
)	
MRS. ROMAYNE BLACK TORR,)	Case No. 92-C-436-E
et al.,)	
)	
Defendants.)	

ORDER OF DISMISSAL

THIS MATTER having come on to be heard this 12 day of
January, 1994, upon Stipulation for Dismissal, the Court finds
that the case should be dismissed.

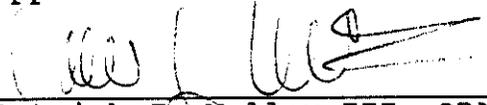
IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the
claim is hereby dismissed with prejudice.

DATED this 12 day of Jan, 1994.

S/ JAMES O. ELISON

UNITED STATES DISTRICT JUDGE

Approved As To Form:


 Patrick J. Malloy III, OBA 5647
 MALLOY & MALLOY, INC.
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 MRS. ROMAYNE BLACK TORR

Sidney K. Swinson

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James E. Weger, OBA 9437
Rebecca Brett, OBA 14190
JONES, GIVENS, GOTCHER & BOGAN
3800 First National Tower
Tulsa, OK 74103-4309
ATTORNEYS FOR DEFENDANT
HUGHES & JONES COMPANY

DATE 1-13-94

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

JUDY BISHOP,

Plaintiff,

v.

SHOWA DENKO AMERICA, INC.
et al.,

Defendants.

No. 90-C-875-E

FILED
1/13/94
FBI
U.S. District Court
Oklahoma City, Oklahoma

ORDER

This matter having come before the Court on the motion of plaintiff, **Judy Bishop**, by and through her attorneys of record, and defendants Showa Denko America, Inc., Showa Denko K.K., General Nutrition Corporation, and Solgar Co., Inc., to dismiss this action with prejudice, and the Court being fully advised **FINDS** a good cause exists for granting the motion and that all questions and controversies have been compromised and settled.

Therefore, the Court **ORDERS AND DIRECTS** that this action and all claims asserted therein be and they hereby are dismissed with prejudice, with each party to bear his, her, or its costs and attorneys fees previously incurred, with plaintiff to bear any remaining court costs.

DATED: Jan 12, 1993.

JAMES O. ELLISON

JAMES O. ELLISON
United States District Judge

APPROVED:



GENE STIPE, OBA #8642
ROBERT K. MCCUNE, OBA #5939
CLYDE KIRK, OBA #10572

Of the Firm

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COUNSEL FOR PLAINTIFFS



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SOLGAR CO., INC.

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MATTHEW P. BLISCHAK
CLEARY, GOTTLIEB, STEEN, &
HAMILTON
1752 N. Street, N.W.
Washington, D.C. 20036

COUNSEL FOR DEFENDANTS
SHOWA DENKO AMERICA, INC.
and SHOWA DENKO K.K.

1/13/94

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

FILED

JAN 12 1994

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

EDWARD S. SCOTT, III)
)
Petitioner,)
)
vs.)
)
RON CHAMPION,)
)
Respondent.)

No. 93-C-1117-B

ORDER

Petitioner has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

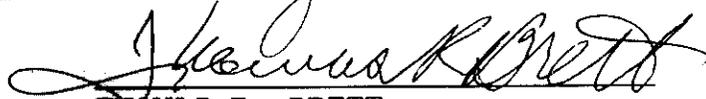
The certificate by an authorized officer reveals that Petitioner has \$277.48 in his inmate accounts. Okla. Stat. Ann. tit. 57, § 549(A)(5) (West Supp. 1994) states that funds from an inmate's savings account may be used for fees or costs in filing a civil action. Accordingly, because Petitioner has cash and securities in his prison accounts exceeding \$200.00, Petitioner's motion for leave to proceed in forma pauperis should be denied. See Uniform Rule 8 for United States District Courts,

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motion for leave to proceed in forma pauperis is denied.
- (2) Petitioner's application for a writ of habeas corpus is **dismissed without prejudice** at this time for failure to pay the required filing fee. See Local Rule 5.1.F. The court may reopen this action if Petitioner submits to the court the \$5.00 filing fee within thirty (30) days from

the date of entry of this order.

SO ORDERED THIS 11 day of Jan, 1994.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON BOOKS
DATE JAN 13 1993

FILED

JAN 13 94

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

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

HOUSTON AND KLEIN, INC., and THE)
TRUSTEES OF THE HOUSTON AND KLEIN,)
INC. EMPLOYEE PROFIT SHARING PLAN)
AND TRUST,)

Plaintiffs,)

vs.)

THE AETNA CASUALTY AND SURETY)
COMPANY)

Defendant.)

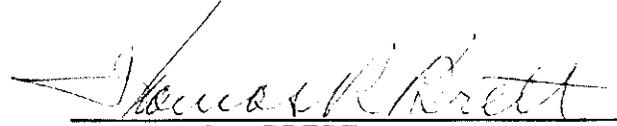
Case No. 93-C-432-B

J U D G M E N T

Pursuant to the Order entered simultaneously herewith, granting summary judgment in favor of Defendant The Aetna Casualty and Surety Company and against the Plaintiffs, Houston and Klein, Inc. and the Trustees of the Houston and Klein Inc. Employee Profit Sharing Plan and Trust, and denying summary judgment in favor of the Plaintiffs, Houston and Klein, Inc. and the Trustees of the Houston and Klein Inc. Employee Profit Sharing Plan and Trust and against the Defendant The Aetna Casualty and Surety Company, the Court enters judgment in favor of Defendant The Aetna Casualty and Surety Company and against the Plaintiffs, Houston and Klein, Inc. and the Trustees of the Houston and Klein Inc. Employee Profit Sharing Plan and Trust on all claims. Costs are assessed against Plaintiffs if timely applied for pursuant to Local Rules 54.1, with each party to pay its own respective attorneys fees.

22

IT IS SO ORDERED THIS 13th DAY OF JANUARY, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 11 1994

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

MOUNTAIN STATES FINANCIAL)
RESOURCES, CORP.,)
)
Plaintiff,)
)
vs.)
)
TANYA SALIBA; ANGELA SALIBA;)
FREDDIE K. SALIBA and The FEDERAL)
DEPOSIT INSURANCE CORPORATION,)
)
Defendants.)

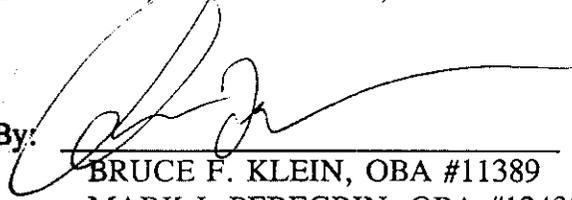
CASE NO.: 93-C1017 B

NOTICE OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Mountain States Financial Resources, Corp. and pursuant to Federal Rule of Civil Procedure 41(a) hereby dismisses the above-styled action with prejudice to refiling against the above named Defendants.

Respectfully submitted,

CLEMENS, HOLSHOUSER, PATE & KLEIN

By: 

BRUCE F. KLEIN, OBA #11389
MARK J. PEREGRIN, OBA #12438
205 N.W. 63rd, Suite 160
Oklahoma City, OK 73116
(405) 848-8842

ENTERED ON DOCKET

DATE 1-11-94

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

FILED

JAN 11 1994

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

LINDA K. TIPPIT,

Plaintiff,

v.

CITY OF TULSA, OKLAHOMA, a municipal
corporation;

Defendant.

No. 93-C-0144E

JOURNAL ENTRY OF JUDGMENT

Now on this 11 day of January, 1994, this matter comes before this Court pursuant to request by the parties. This Court, having examined the pleadings filed herein, having heard statements of counsel and being fully apprised in the premises finds as follows:

1. This Court has jurisdiction of the parties and the subject matter of this action;

2. Plaintiff should have judgment against the Defendant for personal injuries in the amount of Thirty-Four Thousand, Two Hundred Ninety-Five Dollars (\$ 34, 295.00);

3. Said judgment represents all of Plaintiff's claims against Defendant, including, but not limited to, damages for violations of the Equal Pay Act and the Civil Rights Act of 1964; Workers Compensation Act of the State of Oklahoma; and any other state or federal law as of the date of this judgment and related to her employment with the City of Tulsa.

4. Said judgment also includes Plaintiff's claims for attorney fees, costs and interest related to this action;

5. Said judgment is part of an agreed settlement of Plaintiff's claims and is not an admission by Defendant of any of

Plaintiff's allegations and is not a finding of liability for any violations of any law; and,

6. As part of this settlement, Plaintiff's employment with the City will be terminated ^{as part of a reduction in force WF-P.T. 01/9} upon payment of the judgment, she agrees to never apply for employment with the City of Tulsa, and she waives any right of reemployment she might otherwise have.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff should have judgment against Defendant in the amount of \$ 34,295.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall take all steps necessary to comply with all terms of their settlement as outlined above.

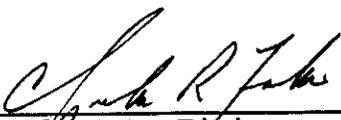
S/ JAMES O. ELLISON

JUDGE

APPROVED:


Linda Tippit
Plaintiff


Laura Frossard
Attorney for Plaintiff


Charles R. Fisher
Attorney for Defendant

ENTERED ON DOCKET

DATE 01-11-94

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

FILED
IN OPEN COURT

JAN 10 4

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

GERALD L. HEADLEY, ROBERT A.)
FRANDEN, and JOHN O. DEAN,)

Plaintiffs,)

vs.)

No. 90-C-891-E

CONNER & WINTERS, an Oklahoma)
partnership, and ALTHEIMER &)
GRAY, a foreign partnership,)

Defendants.)

ORDER AND FINAL JUDGMENT

Pursuant to this Court's Order of November 24, 1993, (the "Hearing Order"), a hearing was held before this Court upon the Settlement Agreement dated November 17, 1993, a copy of which is hereto attached as Exhibit "A" in the above entitled action (the "Otasco Litigation"). It appears that due notice of the hearing was given in accordance with the Hearing Order to all persons eligible to participate as members of the class certified pursuant to the Hearing Order (the "Class"). The settling parties appeared by their respective counsel of record and the Court heard argument from counsel. An opportunity to be heard has been given to all persons desiring to be heard or to object to the proposed settlement and the proposed settlement has been fully considered by the Court.

THEREFORE IT IS ORDERED, ADJUDGED and DECREED AS FOLLOWS:

1. On or before November 30, 1993, the Notice of Class Action and Settlement Hearing (the "Notice") was sent to:

ALL PARTICIPANTS OF THE OTASCO EMPLOYEES' RETIREMENT TRUST (the "TRUST") WHO, AT ANY TIME ON OR AFTER JANUARY 31, 1988, HAD ANY

**INTEREST IN CLASS "A" COMMON STOCK OF OTASCO
HOLDING CORP.**

2. Further, on December 5, 1993, an approved form of Notice was published in *USA Today*, a copy of which Notice is appended hereto as Exhibit B.

3. Pursuant to Fed.R.Civ.P. 23(b)(1), the Court has previously determined this Action shall proceed as a class action as described in the Court's Order dated November 24, 1993.

4. Due and adequate notice of the proceedings has been provided to members of the Class, a full opportunity has been offered to the Class to participate in this hearing, and it is hereby determined that all members of the Class are bound by the Order and Final Judgment entered herein.

5. The Settlement Agreement is fair, reasonable, adequate, and in the best interests of the Trust, its participants, and current and former owners of Holding stock, and is hereby approved by the Court. The Plaintiffs' attorneys fees in the following amounts are hereby approved as fair and reasonable:

Attorneys Fees: \$1,000,000.00

6. The Otasco Litigation and all claims which the Plaintiffs or the members of the Class, as defined in the Hearing Order, or any of them ever had, now have or hereafter can, shall or may have by reason of or arising out of or relating to any of the facts, transactions, actions or conduct, actual or purported, alleged or which could have been alleged in the Otasco Litigation, in the Complaint, or which were or could have been alleged in any other forum, including without limitation, any and all matters arising

out of or relating to the Otasco Litigation, or arising out of the Otasco Transaction as defined in the Settlement Agreement or the subsequent events arising therefrom, are dismissed on the merits and with prejudice and with respect to Conner & Winters, formerly an Oklahoma partnership and now a professional corporation, and Altheimer & Gray, an Illinois partnership (collectively the "Settling Defendants"), and each of their present and former respective parents, affiliates, subsidiaries, predecessors, officers, directors, shareholders, employees, insurers, agents, partners, successors, heirs, administrators, executors, assigns, and attorneys.

7. Plaintiffs and all members of the Class, and each of them, are hereby permanently barred and enjoined from instituting or prosecuting, whether individually, directly, representatively, derivatively, or in any other capacity, any action against the Settling Defendants or other persons which action asserts claims which in any way relate to or which arise out of the Otasco Transaction or the Plaintiffs' relationship to Otasco or the Trust as those terms are defined in the Settlement Agreement, and/or the claims raised in the Otasco Litigation and which have been, could have been, or ever could be, now or in the future, asserted against any of the Settling Defendants.

8. This Court has fully considered the claims and defenses of each Plaintiff and of each Settling Defendant, has reviewed the amount contributed to the settlement by each Settling Defendant and finds that the contribution of each Settling Defendant is a fair

and reasonable contribution to this settlement considering the defenses available. The Settlement Agreement is accordingly approved as fair and reasonable in every respect.

9. This Court as a part of its review has fully considered the negotiations that have occurred between the various parties and finds that this Settlement Agreement is non-collusive, and it is therefore further approved as having been made in good faith.

10. The Court has reviewed the pleadings and statements of counsel, and has heard evidence, and hereby expressly determines that there is no just reason for delay of the finality of the orders and judgments made in this Order. The Court hereby directs that this order be entered as a final judgment dismissing these actions against the Settling Defendants. The time to appeal shall run from the date of the entry of such judgment.

11. No costs shall be taxed in connection with the Otasco Litigation, except the attorney fees and costs as set out in paragraph F of the Settlement Agreement and as referred to in the Notice attached to this Court's Hearing Order of November 24, 1993.

Dated: Jan 10, 1994



JAMES O. ELLISON
United States District Judge

otasco.o&j

SETTLEMENT AGREEMENT

I. This Settlement Agreement is entered into this 17 day of November, 1993.

II. The PARTIES to this Agreement are:

A. PLAINTIFFS

1. Gerald L. Headley.
2. Robert A. Franden.
3. John O. Dean.

(Hereinafter collectively referred to as "TRUSTEES.")

4. Headley, as representative of a Class of participants in the OTASCO Employees' Retirement Trust (hereinafter referred to as the "TRUST") who, at any time after January 1, 1988, had an interest in the Class A common stock of OTASCO Holding Corp. (hereinafter referred to as the "CLASS").
5. The TRUST.

The term PLAINTIFFS will hereinafter be used to refer to all of the foregoing, including all CLASS members.

B. DEFENDANTS

1. Conner & Winters, an Oklahoma partnership;¹.
2. Altheimer & Gray, an Illinois partnership.

The term DEFENDANTS will hereinafter be used to refer to both of the foregoing, as well as their affiliates, predecessors, directors (past and present), shareholders (past and present), partners (past and present), employees, insurers, agents, attorneys, successors and assigns.

¹ During all times relevant to the Transaction, the DEFENDANT, Conner & Winters, was a general partnership. Subsequently, Conner & Winters was dissolved, but continues for the sole purpose of winding up its affairs.

C. COUNSEL

1. Joseph R. Farris
Gray M. Strickland
Jacqueline O. Haglund
FELDMAN, HALL, FRANZEN, WOODARD & FARRIS
1400 Park Centre
525 South Main
Tulsa, Oklahoma 74103
(Counsel for PLAINTIFFS)
2. Peter B. Bradford
Timothy J. Bornhoff
DAUGHERTY, BRADFORD, HAUGHT & TOMPKINS
Suite 900
204 North Robinson Avenue
Oklahoma City, Oklahoma 73102
(Counsel for Conner & Winters)
3. Reuben Davis
R. Tom Hillis
BOONE, SMITH, DAVIS, HURST & DICKMAN
500 ONEOK Plaza
100 West 5th Street
Tulsa, Oklahoma 74103
(Counsel for Altheimer & Gray)

III. AGREEMENT

- A. The PLAINTIFFS have filed a lawsuit in the United States District Court for the Northern District of Oklahoma styled as *Headley, et al. v. Conner & Winters, et al.*, Case No. 90-C-891-E (referred to as the "OTASCO LITIGATION"), in which the PLAINTIFFS assert on behalf of themselves and the participants of the TRUST claims against the DEFENDANTS related to the acquisition by OTASCO Holding Corp. ("Holding") on October 23, 1984, of 100% of the common stock of OTASCO, Inc. The TRUST purchased 100% of the Class A common stock of Holding and certain members of management of OTASCO, Inc. purchased 100% of the Class B common stock of Holding. Holding purchased the OTASCO, Inc. common stock from McCrory Corporation. The term "OTASCO Transaction" as used in this agreement includes:
 - a. The acquisition by the TRUST of the Class A common stock of Holding;

- b. The acquisition by managers, officers, directors and employees of OTASCO of the Class B stock of Holding;
 - c. The purchase by Holding of 100% of the common stock of OTASCO, Inc.
 - d. The allocation and, from time to time, reallocation of Class A Holding stock among the various trust accounts of the TRUST Participants;
 - e. All disclosures, decisions not to disclose, and actions pursuant to or contrary to the TRUST Participants' instructions, in any way affecting a participant's trust account balance or the participant's holding of Class A Holding stock;
 - f. All valuations or revaluations of Holding stock;
 - g. All alleged prohibited transactions by any person related to any of the other elements of the OTASCO Transaction;
 - h. All alleged conflicts of interest of any party to the OTASCO Transaction;
 - i. All legal advice and services rendered in connection with the OTASCO Transaction;
 - j. All other actions that are described or referred to, or in any way related to the subject matter of, any Complaint, or any pleading currently proposed and/or on file, in the OTASCO LITIGATION as hereinafter defined; and
 - k. All procedures, actions and alleged omissions which in any way relate to any of the foregoing.
- B. PLAINTIFFS and their counsel have evaluated the expense and length of time necessary to prosecute the OTASCO LITIGATION against DEFENDANTS, taking into account the uncertainties of predicting the outcome of complex litigation such as this; have concluded that further proceedings against DEFENDANTS will be protracted, complex and expensive, and that the outcome of complex litigation such as this is uncertain; and have concluded that it is desirable and in the best interests of PLAINTIFFS to settle the OTASCO LITIGATION and to release all claims of any nature whatsoever against all of the DEFENDANTS as set forth in this Agreement, which will result in substantial and immediate benefit to the TRUST members.
- C. DEFENDANTS believe and maintain that all allegations of wrongdoing in the OTASCO LITIGATION are without merit and that neither of the DEFENDANTS is liable for any of the purported acts of breach of duty or law

alleged therein. DEFENDANTS maintain that all actions and/or their failures to act have been in full accord with their duties under both federal and state law. DEFENDANTS expressly deny any and all wrongdoing of any kind whatsoever and deny any liability to anyone in connection with the matters alleged in or arising out of the OTASCO LITIGATION.

D. The PARTIES to this Agreement have agreed to settle and finally resolve the disputes between them as described in the following release provisions. This Agreement will become final and effective only after approval of the Court, the expiration of the annulment period provided for in paragraph III.J., and after any and all applicable appeal periods have run and any and all appeals have been finally resolved.

E. Upon the filing of the Orders of Dismissal and the receipt by the TRUST of the Settlement Funds, as described in Paragraph III.F, the following releases and terms will become effective:

1. PLAINTIFFS release all claims, demands, rights, causes of action, suits, debts, damages, judgments, decrees, controversies, agreements or other claims in law or equity or statutory rights whatsoever, whether CLASS or individual in nature, whether arising out of federal or state law, and whether or not now known, or capable of being known, which have been, could have been or ever could be, now or in the future, asserted against any of the DEFENDANTS by PLAINTIFFS, or their successors, assigns or heirs in connection with, arising out of, or in any way related to any acts, failures to act, omissions, misrepresentations, facts, events, transactions, occurrences, breaches of common law, statutory law, or other duties, or other matters alleged in or related to the OTASCO Transaction or the Complaint filed in the OTASCO LITIGATION or which could have been brought against DEFENDANTS. PLAINTIFFS further release any and all claims for breaches of fiduciary duty of any nature whatsoever whether or not now known against DEFENDANTS and against any other individual currently known or unknown who had any fiduciary obligation to PLAINTIFFS and/or any purchaser at any time of stock in Holding, in any way related to the OTASCO Transaction or to their relationship to OTASCO or the TRUST. PLAINTIFFS further release any and all claims for aiding and abetting, participating in, or committing a breach of any fiduciary duty released above.

2. PLAINTIFFS hereby agree that they are and, upon consummation of the Settlement and entry of the Final Order and Judgment, all PLAINTIFFS will be permanently barred and enjoined by the Court from instituting or prosecuting, whether individually, directly, representatively, derivatively, or in any other capacity, any action against DEFENDANTS or other persons which action asserts claims which, in any way relate to or which arise out of, the OTASCO Transaction and/or the claims raised in the OTASCO LITIGATION and which have been,

could have been, or ever could be, now or in the future, asserted against any of the DEFENDANTS.

3. The parties stipulate to and agree to ask the Court to issue the following findings and conclusions:
 - a. This Court as a part of its review has fully considered the negotiations that have occurred between the parties and finds that this Settlement Agreement is non-collusive, and it is therefore further approved as having been made in good faith.
 - b. The Settlement Agreement is fair, reasonable, adequate, and in the best interests of the TRUST, its participants and current and former owners of Holding stock, and is hereby approved by the Court.
 - c. The Court has reviewed the pleadings and statements of counsel, and has heard evidence, and hereby expressly determines that there is no just reason for delay of the finality of the orders and judgments made in this Order. It is therefore ordered, adjudged and decreed, that all of the orders and judgments made herein are final on the date on which this document is signed, and that the time for appeal shall run from such date.

If the Court fails to issue these findings and conclusions, or findings and conclusions having the same legal effect, then any PLAINTIFF or DEFENDANT may nullify this agreement by notifying the other parties in writing within 10 days after such party receives the order failing to issue such findings.

4. The TRUST agrees to save, indemnify and hold harmless DEFENDANTS from any claim made by CLASS Members with respect to the OTASCO Transaction or the OTASCO LITIGATION.

F. **Payment and Distribution of Funds**

The PARTIES agree to request the Court to treat the OTASCO LITIGATION as a CLASS action solely for purposes of settlement with the CLASS. Within five (5) business days of the signing of this Agreement, DEFENDANTS shall pay the sum of \$4,000,000.00 (the "SETTLEMENT PROCEEDS") into interest bearing accounts. Interest on these deposits shall accrue at the prevailing daily market rates. Interest earned in these accounts will first be used to pay for the costs of providing notice to CLASS Members as required by this Agreement and for any other costs associated with completing this SETTLEMENT if so ordered by the Court. Under no circumstances will any of the DEFENDANTS be required to pay for these expenses other than out of interest earned on the deposited settlement funds. Other than for payment of these costs, interest will be retained in the accounts set forth in this paragraph and, if the

SETTLEMENT is completed, will be paid along with the principal to the TRUST after the expiration of the appeal period from the entry by the Court of a Fed.R.Civ.P. 54(b) JUDGMENT approving the SETTLEMENT, an Order certifying the CLASS Action and dismissing PLAINTIFFS' claims as to DEFENDANTS consistent with this Agreement and dismissing DEFENDANTS from the OTASCO LITIGATION with prejudice or after the completion of any appeal which results in final approval of this SETTLEMENT, whichever occurs later. Provided, however, that in the event no objection is filed to the proposed SETTLEMENT by any interested party, then the SETTLEMENT PROCEEDS may be distributed to the TRUST upon entry of the JUDGMENT certifying the CLASS Action, approving the SETTLEMENT, dismissing PLAINTIFFS' claims and dismissing DEFENDANTS with prejudice from the OTASCO LITIGATION. In the event that the SETTLEMENT is not concluded, such payments (with interest after the deductions contemplated by this Agreement) shall be returned to DEFENDANTS.

G. If this SETTLEMENT is consummated, the TRUST has advised DEFENDANTS it intends to distribute the SETTLEMENT FUNDS as follows:

- (1) After deducting attorney fees and costs, the remaining funds will be distributed among the trust accounts of the individual TRUST Members. The monies are to be distributed on a pro rata basis based on each TRUST Participant's then current trust account ownership of Class A common stock of Holding as shown on the books of the TRUST.
- (2) The total attorney fees and costs paid to all counsel for PLAINTIFFS, including such costs and fees related to the resolution of the Settlement of this matter, will be paid exclusively from the SETTLEMENT PROCEEDS. DEFENDANTS will not be required to pay such attorney fees and costs or other fees.

DEFENDANTS will neither endorse, recommend nor oppose this distribution of the SETTLEMENT FUNDS.

H. The Bank of Oklahoma will examine the books of the TRUST and calculate the sums due to the trust account of each Participant.

I. The Undersigned and their counsel agree that with respect to (1) the terms of this Settlement Agreement; (2) the identity of the parties to this litigation; and (3) the identity of the parties to this Settlement Agreement, they will not (a) disclose any of the terms or amount of this Settlement Agreement to any third parties, (b) issue any press release or other public writing, (c) grant any interviews to the press, and (d) discuss them as part of any presentation made at a seminar or other public presentation; except as required by law or to obtain insurance coverage.

- J. The PARTIES agree to request the Court to treat the OTASCO LITIGATION as a CLASS Action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. This Settlement Agreement is expressly contingent upon the Court certifying a CLASS pursuant to Rule 23(b)(3) consisting of the TRUST Participants who, at any time after January 1, 1988, had an interest in the Class A stock of Holding. This Settlement Agreement is further expressly conditioned upon all members of the CLASS being bound by the dismissal of the OTASCO LITIGATION. In the event any prospective CLASS Member elects to opt out of the CLASS Action, then DEFENDANTS, or either of them, have the right to annul this Settlement Agreement *ab initio* by providing written notice to PLAINTIFFS' counsel within thirty days after DEFENDANTS' receipt of notice of the prospective CLASS Member(s) electing to opt out of the CLASS. In the event this Agreement is annulled pursuant to this section, then the principal and any remaining interest will be returned to DEFENDANTS.

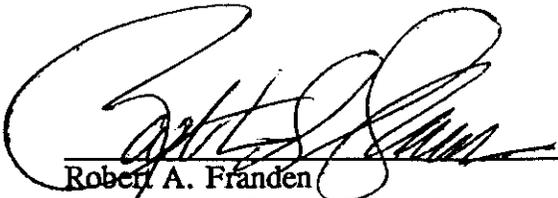
IV. PROCEDURES

- A. PLAINTIFFS and DEFENDANTS will agree to Forms of Mail and Publication Notice to the Settlement Class and an Order Approving Notice and Certifying Class for settlement purposes not later than December 1, 1993, and will confer with the Judge and seek approval of:
1. Certification of this as a CLASS Action under Rule 23(b)(3), for settlement purposes only.
 2. Form of Notice of the Class Action and Settlement Hearing.
 3. The scheduling of a hearing date for any objections to this settlement and/or any of the proposed orders and judgments.
- B. Notices, if approved by the Court, will be mailed by the TRUSTEES to each CLASS Member at the last known address of such CLASS Member as shown on the records of the TRUST and published according to the Order of the Court.
- C. At the close of the Objections Hearing, the PARTIES will ask the Court to enter a form of Order and Final Judgment to be agreed upon by the PARTIES not later than December 31, 1993.
- D. If the SETTLEMENT is consummated then after the SETTLEMENT PROCEEDS are paid to the TRUST, counsel for TRUSTEES will notify counsel for DEFENDANTS that monies have been distributed in accordance with the plan approved by the Court.

V. MISCELLANEOUS

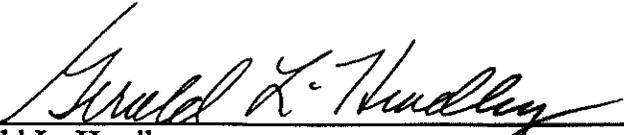
- A. The parties agree to cooperate in good faith to the extent necessary to effectuate all terms and conditions of this Agreement.
- B. If this SETTLEMENT is not approved by the Court on all of its terms, or is approved by the Court but such approval is reversed or modified on appeal, the SETTLEMENT proposed herein and any actions to be taken in connection therewith (including the signing of both the Notice Order and the Order and Final Judgment) shall be vacated and terminated and shall become null and void for all purposes, the OTASCO LITIGATION shall be restored to the status quo ante, and all negotiations, transaction and proceedings connected with this Settlement Agreement: (a) shall be without prejudice to any right of any party; (b) shall not be deemed or construed as evidence or an admission by any party of any fact, matter or things; and (c) shall not be admissible in evidence for use for any purpose in any subsequent proceedings in the OTASCO LITIGATION or any other action or proceeding.
- C. This Agreement has been prepared and may be executed in counterparts, and all of such counterparts shall be considered together as one agreement. Any copy of the true and correct original agreement shall have the full force and effect as the original.
- D. All PLAINTIFFS and DEFENDANTS stipulate, and will ask the Court to find, that PLAINTIFFS have not asserted that any person breached any fiduciary duty at any time in or after 1989.
- E. Notices under this Agreement, including those to DEFENDANTS or PLAINTIFFS, may be given to the other counsel listed in this Agreement and shall be given to the other counsel listed in this Agreement by hand, overnight carrier or telecopy.
- F. This Settlement Agreement contains a full, complete and integrated statement of each and every term and provision agreed by and among the PARTIES hereto. The PARTIES represent that they have relied only on the representations specifically set forth in this Agreement in agreeing to the terms herein. This Settlement Agreement may be amended or any of its provisions waived only by a writing executed by or on behalf of all signatories hereto.
- G. This Settlement Agreement shall be governed by and construed under Oklahoma law.

VI. SIGNATURES

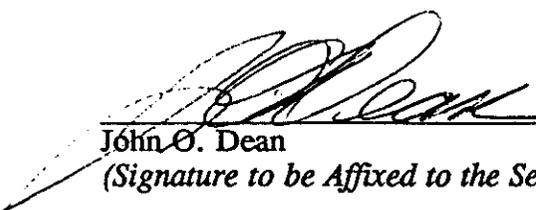


Robert A. Franden
(Signature to be Affixed to the Settlement Agreement)

DATE: November 17, 1993


Gerald L. Headley
(Signature to be Affixed to the Settlement Agreement)

DATE: November 17, 1993



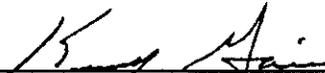
John O. Dean

(Signature to be Affixed to the Settlement Agreement)

DATE:

November 17, 1993

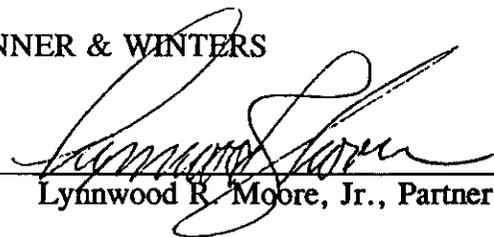
ALTHEIMER & GRAY

By: 
Kenneth Gaines, Managing Partner
(Signature to be Affixed to the Settlement Agreement)

DATE: November 17, 1993

CONNER & WINTERS

By:



Lynnwood R. Moore, Jr., Partner

(Signature to be affixed to the Settlement Agreement)

As counsel for Alzheimer & Gray in this litigation, I, individually and on behalf of my firm, agree to be bound by the provisions of Paragraph III.I of the SETTLEMENT AGREEMENT entered in this case on the 17 day of November, 1993.

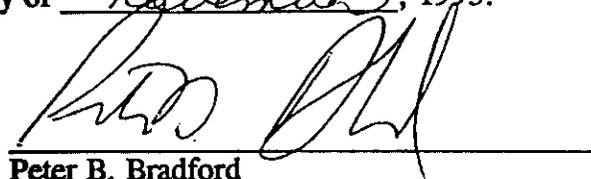
November 17, 1993
DATE



Reuben Davis
BOONE, SMITH, DAVIS, HURST
& DICKMAN
500 ONEOK Plaza
100 West 5th Street
Tulsa, Oklahoma 74103

As counsel for Conner & Winters in this litigation, I, individually and on behalf of my firm, agree to be bound by the provisions of Paragraph III.I of the SETTLEMENT AGREEMENT entered in this case on the 17 day of November, 1993.

November 17, 1993
DATE



Peter B. Bradford
DAUGHERTY, BRADFORD, HAUGHT
& TOMPKINS
Suite 900 Plaza
204 North Robinson Avenue
Oklahoma City, Oklahoma 73102

As counsel for Robert A. Franden, Gerald L. Headley and John O. Dean in this litigation, I, individually and on behalf of my firm, agree to be bound by the provisions of Paragraph III.I of the SETTLEMENT AGREEMENT entered in this case on the 17 day of November, 1993.

November 17, 1993
DATE

Joseph R. Farris
Joseph R. Farris
FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS
Suite 1400
525 South Main Street
Tulsa, Oklahoma 74103-4523

NOTICE TO FORMER OTASCO EMPLOYEES OF CLASS ACTION DETERMINATION AND OF HEARING ON PROPOSED SETTLEMENT

Pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure and an Order of the United States District Court for the Northern District of Oklahoma, this is to advise you that there is now pending in the Court a class action for legal malpractice against the attorneys for the Trust in connection with the Trust's purchase of Otasco Holding Corp.'s Class A common stock in October, 1984. This is also to advise you of a proposed settlement with the defendant law firms that represented the Trust and Otasco Holding Corp. and the Court's certification of a settlement class.

DEFINITION OF THE SETTLEMENT CLASS

Pursuant to the Order dated November 24, 1993, the Court has certified the following Class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure for settlement purposes only:

All persons who were participants of the Otasco Employees' Retirement Trust who, at any time on or after January 31, 1988, had any interest in Class A stock of Otasco Holding Corp. (hereinafter, the "Class")

CLASS REPRESENTATIVE:

The Court has designated Gerald L. Headley, 3840 South 103rd East Avenue, Suite 104, Tulsa, Oklahoma 74147, to be the Settlement Class Representative. The attorney representing the Class Members is Joseph R. Farris, Feldman, Hall, Franden, Woodard & Farris, Suite 1400, 525 South Main Street, Tulsa, Oklahoma 74103.

BRIEF SUMMARY OF LITIGATION

This litigation began with the Trustees of the Trust filing a lawsuit against Defendant law firms. The Class Representative alleges that the Defendant law firms breached their duty of care they owed to the Trust with respect to legal advice and services rendered in connection with the Trust's acquisition of Otasco Holding Corp.'s Class A common stock on October 23, 1984.

The Defendants deny that they breached any duty to the Trust that would entitle any Trust Participant to any damages. If the Defendants should prevail at a trial of these lawsuits, the members of the Class would receive no recovery whatsoever. The Court has not passed on any of the issues involving the Defendant law firms' liability, if any. This Notice is not to be understood as an expression of an opinion by this Court as to the merits of any of the claims or defenses asserted in this litigation or the appropriateness of the proposed settlement.

PROPOSED SETTLEMENT

The Class Representative, on behalf of the Class as defined above, has entered into a proposed settlement with the Defendant law firms. The proposed Settlement Agreement is not to be taken as an indication that liability or damages would have been found against the settling Defendants. The settling Defendants have agreed to the proposed Settlement Agreement in an effort to avoid lengthy, costly and time-consuming litigation and to obtain a final settlement of the claims asserted by the Class representative and other members of the Class.

The proposed Settlement Agreement, in summary, provides for the Defendant law firms to establish a settlement fund of \$4,000,000.00. The interest earned on this settlement fund will be used to pay for the cost of providing Notice of the Class Action and proposed Settlement Agreement. The proposed Settlement Agreement further provides that, in the event there are no Class Members electing to opt-out of the Class (as explained below), then the net proceeds will be paid over to the Trustees for distribution to all Class Members. Out of these proceeds, the attorneys representing the Trust will ask the Court to approve an award to them of fees of approximately \$1,000,000.00. This amount, if approved by the Court, will be deducted from the settlement fund. Each Class Member will receive a proportionate share of the net settlement fund based upon his or her percentage of Class A stock owned by that Class Member as shown on the books and records of the Trust. The proposed settlement further provides that the Defendants may annul the Settlement Agreement in the event any Class Members opt-out of the Class. In the event the proposed Settlement Agreement is annulled, then the proceeds will be repaid to the settling Defendants, and the Class Members will not be entitled to any of the proceeds.

The proposed Settlement Agreement is an important document and is filed as part of the record in this case. The proposed Settlement Agreement may be examined at the offices of the Clerk of the United States District Court, Northern District of Oklahoma, 4411 U.S. Courthouse, 333 West 4th Street, Tulsa, Oklahoma 74103, during normal business hours.

NOTICE OF HEARING ON PROPOSED SETTLEMENT

The Court must determine that the proposed Settlement Agreement is fair, reasonable and adequate, and that determination is made upon a record developed at a hearing on the fairness of the proposed settlement. This hearing is scheduled for January, 10, 1994 at 1:00 pm in the Courtroom of Judge James O. Ellison, 4th Floor, 333 West 4th Street, Tulsa, Oklahoma 74103. At the present time, the Court has only determined that the proposed settlement falls within a range of reasonableness that justifies sending Class Members notice of the proposed Settlement Agreement and holding a formal hearing on the merits of the proposed Settlement Agreement.

Any Class Member may appear at the hearing and show cause, if any, why the settlement should not be approved as fair, reasonable and adequate. You need not appear at this hearing unless you object to the proposed Settlement Agreement.

No person will be heard at the hearing unless, on or prior to January 5, 1994, written notice of intention to appear, stating all grounds for objection or other statement of position, together with all supporting papers and briefs, are delivered to:

Otasco Employees' Retirement Trust Litigation, c/o Richard M. Lawrence, Court Clerk
United States District Court for the Northern District of Oklahoma
4411 U.S. Courthouse, 333 West 4th Street, Tulsa, Oklahoma 74103

Failure to timely file written objections shall constitute a waiver of any objections and shall foreclose the raising of the objection to the proposed Settlement Agreement.

**CONSEQUENCES OF SETTLEMENT CLASS
MEMBERSHIP ELECTION TO OPT OUT OF THE CLASS**

If you come within the definition of the Class set forth above in this Notice, you will automatically become a Class Member unless you opt out of the Class. A Class Member opts out of the Class by filing an election to be excluded from the Class, discussed below. In other words, you have a choice in remaining in the Class or electing to opt out of the Class. Either choice has certain consequences, and you are advised to discuss your decision with your own attorney. Some of the consequences are discussed below.

As a Class Member, you will be represented by the attorneys acting on behalf of the Class. However, you may enter an appearance through another attorney by mailing a Notice of Appearance to the Clerk of the Court at the address of the Clerk set forth above.

If you elect to opt out of the Class, the Defendants may annul the Settlement Agreement. In the event the Settlement Agreement is annulled, then the proceeds will be repaid to the Settling Defendants, and Class Members will not be entitled to any of the proceeds.

As a Class Member, you will be bound by any judgment or settlement of the Class lawsuit. Also, if the settlement is approved and becomes effective, you will participate in a distribution of the net settlement proceeds. If you elect to be excluded from the Class, you will not be bound by the settlement as set out in the proposed settlement outlined in this Notice and you will retain the claims, if any, you may have against the Defendants. If you elect to be excluded from the Class, you will not share in the settlement fund. This settlement will result in a payment to shareholders of approximately \$3.00 per share of Class A stock of Otasco Holding Corp. In determining whether you want to be excluded from the Class, you are advised to consult with your own attorney as there are significant legal issues which require consideration.

If you wish to be a member of the Class in this case, you need do nothing further. If it is later determined that you are a member of the Class, you will automatically be in the Class. If you wish to be excluded from the Class, you must complete the "Election to be Excluded" at the bottom of this Notice and return it to the following address so that it is actually received on or before January 5, 1994.

Otasco Employees' Retirement Trust Litigation
c/o Richard M. Lawrence, Court Clerk
United States District Court for the Northern District of Oklahoma
4411 U.S. Courthouse, 333 West 4th Street, Tulsa, Oklahoma 74103

Please allow sufficient time for mail delivery of anything sent to the above address. The sender bears the responsibility for any delay in delivery and non-delivery.

NOTICE TO ATTORNEYS OF RECORD

Copies of all documents filed with the Clerk of the Court should be sent to the following counsel of record:

Joseph R. Farris, Gray M. Strickland, Jacqueline O. Haglund,
FELDMAN, HALL, FRANDEN, WOODARD & FARRIS
525 South Main Street, Suite 1400
Tulsa, Oklahoma 74103

Rueben Davis, R. Tom Hillie,
BOONE, SMITH, DAVIS, HURST & DICKMAN
600 ONEOK Plaza
Tulsa, Oklahoma 74103

Peter B. Bradford, Timothy J. Bomhoff
DAUGHERTY, BRADFORD, HAUGHT & TOMPKINS
Suite 900, 204 North Robinson Avenue
Tulsa, Oklahoma 74103

additional credits he ha[d] thus far accumulated under 57 O.S. (1991) § 138," the amended version.

On December 21, 1993, Respondent abandoned his motion to dismiss the petition for failure to exhaust state remedies. [Docket #8.]

I. BACKGROUND

A. Statutory Provisions

At the time of Petitioner's convictions, the DOC awarded each inmate credits according to the type of job or activity he was engaged in. Every inmate who worked or attended school earned one-credit day for each day he engaged in such activity. Okla. Stat. tit. 57, § 138(A) (Supp. 1985). Every inmate who worked for the Oklahoma State Industries, Private Prison Industries, or Agricultural Production or satisfactorily participated in a vocational training program earned two-credit days for each day he engaged in such activity. Id. § 138(B). Every inmate who instead worked for a state, county, or municipality earned three-credit days for each day he worked. Okla. Stat. tit. 57, § 224(A) (1981).

In addition to these earned time credits, an inmate was entitled to a deduction of twenty days for each pint of blood he donated to the American Red Cross or to any approved agency or hospital. Okla. Stat. tit. 57, § 138(B) (1981). However, no inmate could receive credit for more than four donations in any twelve-month period. Id. The statute further provided that blood-time credits could not be revoked by the Department of Corrections

or any of its delegated authorities. Id.

Effective November 1, 1988, the Oklahoma Legislature amended section 138 so that "[e]very inmate . . . shall have their term of imprisonment reduced monthly, based upon" the assignment to one of four class levels. Okla. Stat. tit. 57, § 138(A) (Supp. 1988). Under this system, possible credits range from zero per month (Class 1) to 44 per month (Class 4). Id. § 138(C)(2). Educational achievement and completion of departmentally approved programs also entitle an inmate to earn credits, but in no case more than ninety credits per calendar year. Id. § 138(F). Section 224, amended at the same time, also displaces the set credits for work assignments with a state, county, or municipality, and instead, references section 138 for calculations of those credits. Okla. Stat. tit. 57, § 224(A) (Supp. 1988). The 1988 amendments further provided that as of November 1, 1988, "all inmates currently under the custody of the Department of Corrections shall receive their assignments and all credits from that date forward shall be calculated pursuant to this act." Id. § 138(H) (Supp. 1988).

B. Case Law and DOC's Response

In Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1990), abrogated on other grounds, Waldon v. Evans, 861 P.2d 311 (Okla. Crim. App. 1993), the Oklahoma Court of Criminal Appeals found that:

[A]fter a comparison of the statutes, before and after the amendment, it is obvious that 57 O.S. Supp. 1988, §§ 138 and 224 are disadvantageous to petitioner and other similarly situated prisoners. On its face, the amended

statute adds requirements and reduces the number of monthly earned credits available to an inmate who abides by prison rules and adequately performs his or her assigned tasks. By definition, this reduction lengthens the period that someone in petitioner's position must spend in prison. Thus, the amended statute constricts an inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result simply runs afoul of the prohibition against ex post facto laws.

The court then held that inmates "who are disadvantaged by the amended statute, shall be entitled to the credits allotted under the statute effective on the date their crime was committed." Id.

In State ex. rel. Maynard v. Page, 798 P.2d 628, 629 (Okla. Crim. 1990), the Oklahoma Court of Criminal Appeals clarified its holding in Ekstrand by stating that an inmate was not entitled to benefits under both the original (1981) and amended (1988) statutes, but was entitled only to credits allotted under the statute effective on the date the crime was committed.

Following the Ekstrand opinion, the DOC implemented a procedure whereby all inmates received credits on a monthly basis under the amended version. If an inmate believed he had been disadvantaged by application of the credit under the amended version, he could apply for the additional credits he would have received under the old version. The DOC, however, did not award the pre-1988 credits until thirty days before discharge, and required the inmates to keep track of their pre-1988 credits. The DOC had apparently misinterpreted the Ekstrand holding to mean that a sentence could not be reduced by the pre-November 1, 1988 credits until the prisoner was entitled to immediate discharge.

In April 1993, the Eastern District of Oklahoma held that the

amended version of sections 138 and 224 was ex post facto as applied to inmates whose crimes were committed before November 1, 1988, and thus, that inmates with pre-1988 crimes were entitled to credits only under the pre-1988 statute. The court held that the amended version was so dissimilar to the pre-existing statute that the statutes could not be compared. The court further held that it was not clear that the Oklahoma legislature had intended to make available credits under the amended version to inmates whose crimes were committed before November 1, 1988. Lastly, the Court held that the DOC should provide each inmate a monthly computation of the pre-November 1, 1988 credits. Scales v. Reynolds, CIV-90-369-S and CIV-90-375-S, Order (adopting Report and Recommendation) (E.D. Okla. Apr. 7, 1993).

Following the Scales opinion, the DOC developed a new procedure for the monthly comparison and award of credits. Although all inmates still receive credits under the amended-credit statute, the DOC now makes a month-end comparison of the number of credits an inmate (who is incarcerated for a crime pre-dating the 1988 amendment) received under the amended statute and the number of credits he would have received under the pre-amended statute. If the credits under the pre-amended statute exceed those under the amended statute, the inmate's sentence is reduced according to the number of credits under the pre-amended statute for that month. If, on the other hand, the credits under the amended statute exceed those under the pre-amended statute, the inmate's sentence is reduced according to the number of credits under the amended

statute for that month. The DOC then provides each inmate a monthly print-out showing the total credits received.¹

II. DISCUSSION

A. Work Credits

In his first two grounds for relief, Petitioner contends that the amended version of sections 138 and 224 is ex post facto as applied to him, and thus, that the DOC should calculate his earned-time credits under the pre-amended version of sections 138 and 224.

Respondent submits that under the new procedure Petitioner cannot be disadvantaged, and thus, cannot be subject of an ex post facto violation. If the credits under the old system exceed those under the new system, the Petitioner's sentence is reduced in accordance with the number of credits received under the old system for that month. If, on the other hand, credits under the new system are more advantageous, the new system is applied that month.

A statute is not applied in violation of the ex post facto clause as long as it does not disadvantage an individual. Devine v. New Mexico Dept. of Corrections, 866 F.2d 339, 341 (10th Cir. 1989) (for a law to be ex post facto, it must be retrospective, and it must disadvantage the offender affected by it). As noted above, the DOC has implemented a procedure whereby the Petitioner's circumstances are evaluated on a monthly basis, and the Petitioner

¹To implement this new policy, the DOC made a lump sum award in August 1993, of those credits which prior to that date had been carried on DOC's records but had not yet been awarded to eligible inmates pursuant to DOC's previous policy.

receives credits under the most advantageous version. Thus under the new procedure, it is impossible that the Petitioner will be disadvantaged, and therefore, it is equally impossible that he will be the subject of an ex post facto violation. Accordingly, the Court concludes the Petitioner is not entitled to relief on his first two grounds.

B. Blood Credits

In his third ground for relief, Petitioner asserts that the amended version of section 138 which deletes the opportunity to earn credits for blood donations is an ex post facto alteration of the length of his imprisonment. In the alternative, Petitioner asserts that the pre-amended statute created a liberty interest in the opportunity to earn credits for blood donations.

"[A] state creates a protected liberty interest by placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983). "[A]n individual claiming a protected [liberty] interest must have a legitimate claim of entitlement to it." Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459 (1989). An abstract desire or unilateral hope does not establish a protected interest. Id.

Even if the statutory directive--that a "prisoner . . . shall be entitled" to reduce his sentence by donating blood--created a liberty interest and required the DOC to establish a blood donation program, see Hewitt v. Helms, 459 U.S. 460, 469 (1983) (statutory "language of an unmistakably mandatory character" creates a liberty

interest), Petitioner should **not** be allowed to donate blood for the purpose of earning credits if **there** is no need or request for it. See Raso v. Moran, 551 F.Supp. 294, 298-299 (D.R.I. 1982) (although state statute permitting prisoners to donate blood in exchange for reductions of their sentences **created** a liberty interest, it was possible that inmates would **not** be able to give blood if there was no need for it). Accordingly, Petitioner would not be entitled to relief, even if he had a liberty interest in earning credits by donating blood.

Nor would Petitioner be **entitled** to relief on the basis of the ex post facto clause. Petitioner does not dispute that he was not allowed to earn credits by donating blood prior to the 1988 amendments due to the lack of approved agencies or hospitals who were willing to take prisoners' donated blood. Therefore, the deletion of the blood donation program has not disadvantaged Petitioner under the ex post facto clause.

C. Availability of Benefits under Pre-amended Version of § 224

In ground four of his **petition**, Petitioner contends that the benefits of the pre-amended **version** of section 224 were available to a selected number of inmates in violation of federal due process and equal protection. He **alleges** that the availability and assignment to work depended on the geographic location of the prison and the "subjective whims of [the] individual case managers or other administrative support staff." In substance, Petitioner argues that he could have **earned** three-credit days for doing the

exact same work if he had been assigned to work with a state, county, or municipality. Petitioner, thus, requests three-credit days for each day he worked regardless of whether he worked under section 138(A), 138(B), or 224(A).

Petitioner does not have a constitutional right in prison employment, and he has failed to demonstrate that he has any cognizable interest under state law or prison regulation. See Ingram v. Papalia, 804 F.2d 595, 596-97 (10th Cir. 1986). In any case, the classification and work assignments of prisoners are matters of prison administration within the discretion of prison administrators, and beyond reach of the Due Process and Equal Protection Clauses. See Altizer v. E.L. Paderick, 569 F.2d 812, 813 (4th Cir.), cert. denied, 435 U.S. 1009 (1978) (classification and work assignments were within discretion of prison administrators beyond reach of Due Process Clause); see also Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980) (prisoners do not have liberty or property interest in maintaining a certain prison job); Bryan v. Werner, 516 F.2d 233, 240 (3rd Cir. 1975) (same). But see Dupont v. Saunders, 800 F.2d 8, 10 (1st Cir. 1986) (prisoners do not have a property interest in obtaining or maintaining prison jobs, unless state laws or regulations show otherwise). Additionally, Petitioner has not alleged that prison officials discriminated against him on the basis of his age, race, or handicap, in choosing whether to assign him a job or in choosing what job to assign him. See Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) (prison officials cannot discriminate on the basis

of age, race, or handicap, in deciding whether to assign prisoner to a job or in deciding which job to assign him). Accordingly, Petitioner is not entitled to earn three-credit days for each day he worked.

D. Dual Credits

Lastly, Petitioner argues he is entitled to credits under both the pre-amended and the amended versions of the earned-time-credit statute because "the additional obligations imposed on him by the 1988 amendment create a liberty interest in the additional earned credits under that amendment."

The Court disagrees. In Maynard v. Page, 798 P.2d at 629, the Oklahoma Court of Criminal Appeals expressly held that an inmate was entitled to earn credits under either the pre-amended or the amended earned-time-credit statute. The plain language of the amended version of section 138 further shows that the legislature did not intend inmates to earn credits under both the pre-amended and the amended version of the earned-time-credit statute. Okla. Stat. tit. 57, § 138(A) & (H) (1988). See Weaver v. Graham, 450 U.S. 24, 38-39 (1981) (Rehnquist, J. concurring).

Petitioner's contention that he is entitled to additional credits under the amended statute for maintaining a clean cell, personal hygiene, and good conduct is frivolous. While the ex post facto portions of new laws should be void, and any severable provisions which are not ex post facto may still be applied, Weaver, 450 U.S. at 36-37 n.22, the Court here has concluded that

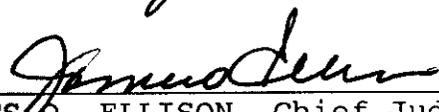
the amended statute, as presently applied by the DOC, does not raise ex post facto concerns. See also Kelly v. Evans, CIV-92-698-C, Order (adopting Report and Recommendation) (W. D. Okla. Oct. 18, 1993) (holding that the ex post facto clause simply protects Petitioner from the retroactive application of the 1988 amendments when such application would be disadvantageous to him, and that nothing in the ex post facto prohibition entitles Petitioner to earn credits under both versions of the statute). In any case, the Court notes that the pre-amended statute indirectly required good conduct as it was entitled "credits for good conduct, blood donations, training program participation, etc." Okla. Stat. tit. 57, § 138 (Supp. 1985). Accordingly, Petitioner is not entitled to dual credits.

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Respondent's motion to dismiss for failure to exhaust state remedies [docket #3] is moot.
- (2) The petition for a writ of habeas corpus is denied.

IT IS SO ORDERED THIS 10th day of January 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT