

ENTERED ON DOCKET

DATE 1-31-94

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

FILED

JAN 31 1994

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

JIMMIE ELSKEN,

Plaintiff,

vs.

BRENTWOOD PROPERTIES, LTD.,
et al.,

Defendants.

No. 89-C-263-E

ORDER AND JUDGMENT

The Court has for consideration Defendant's Motion to Dismiss (docket #233) and Plaintiff's Motion to Reconsider (docket #241). Defendant's Motion to Dismiss will be GRANTED on the grounds that Plaintiff has failed to present a colorable claim under the Deceptive Trade Practices Act. Therefore the Second Amended Complaint will be DISMISSED. Plaintiff's Motion to Reconsider will be DENIED. The Court remains persuaded that Fretwell is dispositive of the pivotal issue: unequal bargaining power.

This case is therefore ordered DISMISSED. Judgment will be entered in favor of Defendant and against the Plaintiff.

ORDERED this 28th day of January, 1994.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

AMERICAN STATES INSURANCE COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 LINDA BROWN, GENERAL ELECTRIC)
 COMPANY, FRANK DYER, III d/b/a)
 WEST-DYER'S TV, DULANEY'S, Inc.,)
 and WM. F. "Bill" KNEDLER, d/b/a)
 BILL'S ELECTRONIC SERVICE CENTER,)
)
 Defendants.)

Case No. 93-C-0226-B ✓

FILED

JAN 28 1994

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

ORDER

Before the Court for decision is Plaintiff's Motion for Summary Judgment (Docket # 11), pursuant to Rule 56 of the Federal Rules of Civil Procedure. In its Complaint, the Plaintiff, American States Insurance Company ("American States"), seeks a declaration that 1)the Insurance Policy Plaintiff issued to Defendant Frank Dyer III d/b/a West-Dyer's TV ("Dyer") does not obligate the Plaintiff to provide coverage to Dyer; and 2)the Plaintiff has no duty to defend Dyer in the Kay County Court action (Case No. C-92-282) filed by Linda Brown ("Brown") on November 4, 1992.

Defendant Brown sustained damage to real and personal property as a result of a fire at her residence on April 8, 1992. On November 4, 1992, she filed suit in Kay County District Court against Defendants, General Electric Company ("GE") and Frank Dyer, III d/b/a West-Dyer's TV ("Dyer"), alleging that a television manufactured by GE and sold and serviced by Dyer was defective.

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She later amended her Petition, on July 12, 1993, by adding Dulaney's, Inc. ("Dulaney's") and Wm. F. "Bill" Knedler d/b/a Bill's Electronic Service Center ("Knedler") as Defendants, and alleging that the defective television was manufactured by GE, sold by Dulaney's to Dyer, sold by Dyer to Brown, and it was serviced by Dyer and/or Knedler.

During the entire course of these events, the Plaintiff, American States, had in full force and effect a commercial package insurance policy issued to Dyer. On March 16, 1993, the Plaintiff filed the above styled declaratory judgment action and subsequently amended its Complaint on August 17, 1993, to add Dulaney's and Knedler as additional Defendants. The Plaintiff filed a Motion for Summary Judgment (Docket # 11) and a Motion for Order of Default and Default Judgment (Docket #13) on November 1, 1993. Defendant Brown filed a timely answer and on November 16, 1993, she responded to the Motion for Summary Judgment by confessing that Plaintiff is entitled to declaratory relief. Defendant GE filed an answer on April 23, 1993, but never responded to Plaintiff's Motion for Summary Judgment or Plaintiff's Motion for Order of Default. Defendant Dulaney's filed an answer to the Amended Complaint on September 9, 1993, but has also failed to respond to Plaintiff's Motion for Summary Judgment or Plaintiff's Motion for Order of Default. Finally, Defendants Dyer and Knedler have neither filed an Answer to the Complaint nor a Response to the pending motions.

Pursuant to Local Rule 7.1(C), response briefs shall be filed within fifteen (15) days after the filing of a Motion. The failure

to respond to a Motion authorizes the Court, in its discretion, to deem the matter confessed, and enter the relief requested. In the instant case, the Plaintiff filed a Motion for Summary Judgment on November 1, 1993. Defendant Brown confessed that the Plaintiff is entitled to declaratory relief, and the remaining Defendants, (GE, Dyer, Dulaney's, and Knedler), have all failed to respond to the Plaintiff's Motion for Summary Judgment within the fifteen (15) days allowed. The Court concludes that these Defendants have waived any objection to the Plaintiff's motion and the matters asserted therein are deemed confessed.

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

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

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

viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the moving party can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

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

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

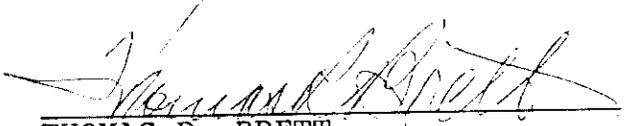
In its motion for summary judgment, Plaintiff asserts that the commercial package policy issued to Dyer does not provide coverage because the property damage suffered by Defendant Brown is specifically excluded by the "products-completed operations hazard" exclusion in the Plaintiff's policy. The policy excludes coverage for all "bodily injury" and "property damage" occurring away from the policyholder's premises and arising out of "your product" or

"your work" except for products still in the policyholder's possession or work that has not been completed or abandoned. "Your product" is defined as any goods or products manufactured, sold, handled, distributed or disposed of by the policyholder, and "your work" is defined as materials and parts used and any other work performed by the policyholder.

Plaintiff contends, and the Court agrees, that the subject Insurance Policy does not provide coverage for any damages arising out of products (in this case, a television) that the insured, Defendant Dyer, sold or serviced.¹ Thus, the Court concludes the policy does not provide coverage for Defendant Brown's damages.

For the reasons stated herein, the Court declares the Plaintiff, American States, has no duty to defend or to provide coverage for any claims arising out of the fire in Defendant Brown's home. The Court further concludes that the Plaintiff's Motion for Summary Judgment (Docket #11) should be and is hereby GRANTED.²

IT IS SO ORDERED THIS 28th DAY OF JANUARY, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹ The policy also provides that the duty to defend extends only to claims for which there is coverage.

² Plaintiff's Motion for Order of Default and Default Judgment (Docket #13) is now moot.

FILED ON DOCKET
DATE: JAN 31 1994
FILED
JAN 31 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

RED RIVER FEDERAL SAVINGS)
AND LOAN ASSOCIATION, et al,)

Plaintiffs,)

vs.)

CHERRY HILLS ASSOCIATES, L.P.,)
et al,)

Defendants.)

Case No. 91-C-621-B

ORDER OF DISMISSAL WITH PREJUDICE
OF CLAIMS AGAINST DEFENDANT, SAM P.
DANIEL, RELATING TO GUARANTY AGREEMENT

This matter comes on before me the undersigned Judge on this 26 day of January, 1994, pursuant to the Motion of the Plaintiff, Resolution Trust Corporation ("RTC"), and the Defendant, Sam P. Daniel ("Daniel"), for an order dismissing with prejudice all claims brought by the RTC against Daniel for personal liability relating to the guaranty agreement more particularly described in Plaintiff's petition. For good cause shown, the Court finds that the Movants' Motion should be granted.

IT IS THEREFORE ORDERED that all claims asserted by the Plaintiff, RTC, against the Defendant, Daniel, for personal liability relating to the guaranty agreement alleged herein, including Plaintiff's fourth cause of action, to the extent it seeks recovery against the Defendant, Daniel, are hereby dismissed with prejudice. Each party to pay his or its own costs, provided that this Order shall not prejudice the RTC's rights to seek full recovery of its costs and attorney's fees against Defendants other than Daniel or on an in rem basis against the real property being foreclosed herein.


UNITED STATES DISTRICT COURT JUDGE

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

AMERICAN STATES INSURANCE COMPANY,)

Plaintiff,)

vs.)

LINDA BROWN, GENERAL ELECTRIC)
COMPANY, FRANK DYER, III d/b/a)
WEST-DYER'S TV, DULANEY'S, Inc.,)
and WM. F. "Bill" KNEDLER, d/b/a)
BILL'S ELECTRONIC SERVICE CENTER,)

Defendants.)

Case No. 93-C-0226-B

FILED

JAN 20 1994

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

JUDGMENT

Pursuant to the Court's Order sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby declares that the Plaintiff has 1)no duty to provide coverage for any claims arising out of the fire in Defendant Brown's home; and 2)no duty to defend its insured against any of the claims or lawsuits arising from such fire. Costs are hereby assessed against the Defendants, if timely applied for pursuant to Local Rule 54.1, and each party is to pay its own respective attorney's fees.

DATED THIS 20th DAY OF January, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 1-31-94

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

IN RE:

MATHEWS AUTO ELECTRIC, INC.,
d/b/a Mathews Automotive
Warehouse Distributors,

Employer Tax I.D. #73-0759902

Debtor.

MATHEWS AUTO ELECTRIC, INC.,
d/b/a Mathews Automotive
Warehouse Distributors,

Plaintiff,

vs.

ASSOCIATION OF AUTOMOTIVE
AFTERMARKET DISTRIBUTORS,
an Illinois Not-for-Profit
corporation, et al.,

Defendants.

Case No. 89-02275-C
(Chapter 11)

Adversary Proceeding
No. 91-0208-C

Case No. 92-C-818-E ✓

FILED

JAN 23 1994

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

ORDER

Plaintiff's Motion to Withdraw Reference to the United States Bankruptcy Court for the Northern District of Oklahoma is denied.

Debtor chose to file this adversary proceeding in the Bankruptcy Court and thereby waived its right to a jury trial. See In Re: Lion Country Safari, 124 B.R. 566, 571 (Bkrcty.C.D. Ca. 1991); and In Re: Haile, 132 B.R. 979 (Bkrcty.S.D. Ga. 1991).

In addition the motion is untimely. Under the provisions of Local Bankruptcy Rule Misc. No. M-128, District Court Rules for Bankruptcy Practice and Procedure, Rule B-6(2) requires such motion to be filed within twenty (20) days after commencement of the

proceeding.

ORDERED this 27th day of January, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-31-94

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

FILED

JAN 31 1994

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

BERNARD SCHWARTZ,)
)
 Plaintiff,)
)
 v.)
)
 AETNA LIFE INSURANCE)
 COMPANY,)
)
 Defendant.)

Case No. 93-C-1095-E

STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff, Bernard Schwartz, and the defendant, Aetna Life Insurance Company, by and through its attorneys, Jimmy Goodman and Mark D. Spencer of Crowe & Dunlevy, being all parties who have appeared in this action, hereby stipulate to the dismissal with prejudice of the plaintiff's claims and action against the defendant pursuant to Fed. R. Civ. P. 41(a)(1)(ii).


BERNARD SCHWARTZ
3120 East Fourth Place
Tulsa, Oklahoma 74104-2499


JIMMY GOODMAN, OBA #3451
MARK D. SPENCER, OBA #12493

-Of the Firm-

APPEARING PRO SE

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

ATTORNEYS FOR DEFENDANT
AETNA LIFE INSURANCE
COMPANY

SECRET
DATE 1-28-94

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

FILED

JAN 27 1994

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

ANNETTE DELAHAY,)
)
 Plaintiff,)
)
 vs.)
)
 PHILLIPS PETROLEUM COMPANY,)
)
 Defendant.)

No. 92-C-1028-B

J U D G M E N T

In accord with the Jury Verdict accepted and filed of record January 26, 1994, the Court hereby enters judgment in favor of the Defendant, Phillips Petroleum Company, and against the Plaintiff, Annette Delahay, on Plaintiff's Oklahoma public policy wrongful termination claim. Relative to Plaintiff's Title VII (42 U.S.C. 2000e et seq.) claim, the Court adopts the verdict of the jury, which finds no gender based employment termination, and grants Defendant, Phillips Petroleum Company, judgment herein against Plaintiff, Annette Delahay, on said claim. Plaintiff shall take nothing on her claims against the Defendant, Phillips Petroleum Company, and same are hereby dismissed. Costs are assessed against Plaintiff, if timely applied for under Local Rule 54.1, and each party is to pay its own respective attorney's fees.

Dated, this 27th day of January, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

55

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

FILED

JAN 27 1994

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

KIRK W. LEMMON,

Plaintiff,

vs.

B. F. WILLIAMS, *et al.*,

Defendants.

Case No. 90-C-697-B

JOURNAL ENTRY ON CONFESSION OF JUDGMENT

This cause comes on for hearing on this 27th day of January, 1994. Plaintiff, Kirk Wayne Lemmon, appears through his attorneys of record, John Echols and Bryan Dupler. Defendant Stanley Glanz, Tulsa County Sheriff, appears through his attorney of record, M. Denise Graham, Assistant District Attorney, and John Wesley Johnson, appears through his attorney of record, Doris L. Fransein. The Court finds that these parties have entered the following stipulations:

1. On January 24, 1994, the Board of County Commissioners of Tulsa County, Oklahoma approved the recommendation of the District Attorney of Tulsa County, Oklahoma, to confess judgment in the case herein in the amount of Twenty Thousand Dollars (\$20,000.00) under the following conditions:
 - a. The Defendants are in no way admitting any liability or fault on the part of Defendants Stanley Glanz, Tulsa County Sheriff, John Wesley Johnson or any other unnamed employees of the Tulsa County Sheriff or Tulsa County, Oklahoma;

- b. That the settlement of this case will result in a full release of any and all, past, present, or future claims against Defendants Stanley Glanz, Tulsa County Sheriff, John Wesley Johnson and any other unnamed employees of the Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff Kirk Wayne Lemmon has or may have as a result of the incidents alleged to have occurred herein;
- c. That the settlement of this case will result in a full release of any and all, past, present, or future claims for attorney's fees under 42 U.S.C. § 1988, and costs associated therewith against Defendants Stanley Glanz, Tulsa County Sheriff, John Wesley Johnson and any other unnamed employees of the Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff Kirk Wayne Lemmon or his attorneys, Greg Morris, John Echols, Bryan Dupler, Randy Rankin or the law firms of *Morris and Morris* and *Echols and Dupler* may have as a result of this judgment.

2. Plaintiff will obtain a written release from Greg Morris of the attorney's lien filed herein on behalf of Morris and Morris law firm on August 16, 1990.

3. Plaintiff is fully aware of the conditions upon which this confession of judgment is made and hereby fully accepts said conditions.

The Court accepts these stipulations and based upon said stipulations finds that the Plaintiff is entitled to recover the sum of Twenty Thousand Dollars (\$20,000.00) against the Board of County Commissioners of the County of Tulsa, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff recover judgment against the Board of County Commissioners of Tulsa County, Oklahoma, in the sum of Twenty Thousand Dollars (\$20,000.00), with interest from the date hereof at 3.67% per annum.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

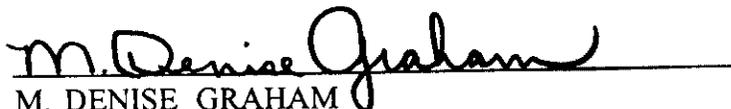
JUDGMENT IN CASE NO. 90-C-697-B APPROVED AS TO FORM AND CONTENT:



John Echols
Bryan Dupler
Attorneys for Plaintiff



DORIS L. FRANSEIN
Attorney for Defendant Johnson



M. DENISE GRAHAM
Assistant District Attorney
*Attorney for Board of County Commissioners of the
County of Tulsa and for Defendant Stanley Glanz*

ENTERED ON DOCKET
DATE JAN 28 1994

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

FILED
JAN 27 1994

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

ATLANTIC RICHFIELD COMPANY,)
)
Plaintiff,)
)
vs.)
)
AMERICAN AIRLINES, INC., et al.,)
)
Defendants.)

Case No. 89-C-868-B
89-C-869-B
89-C-859-B

ORDER

Now before the Court is the "Objection to Magistrate Judge's Order Requiring Payment of Seventh and Eighth Assessments" (Docket #1155) filed by Defendants Shannon Drum Service and Norton Shannon (collectively, "Shannon").

These Defendants assert that they should not be separately assessed from the Ponca Barrel & Drum entities because they are merely "a successor in title to such entities" and any work done for them was duplicitous of the work done for the Ponca Barrel & Drum entities. The Magistrate Judge concluded in his Order of October 29, 1993, (Docket #1142) that the Shannon entities have acted as separate parties and asserted separate defenses in this matter and thus were properly assessed Group and Liaison counsel fees. This Court agrees. Thus, the Objection to Magistrate Judge's Order Requiring Payment of Seventh and Eighth Assessments (Docket #1155) is **OVERRULED** and Defendants Shannon Drum Service and Norton Shannon are Ordered to pay such assessments.

IT IS SO ORDERED, this 27th day of January, 1994.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

JAN 28 1994

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

FILED

JAN 27 1994

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

ATLANTIC RICHFIELD COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN AIRLINES, INC., et al.,)
)
 Defendants.)

Case No. 89-C-868-B ✓
89-C-869-B
89-C-859-B

ORDER

Now before the Court is the Motion of Miller Truck Lines, Inc., to Review Denial of Costs by Court Clerk (Docket #1152) filed November 8, 1993.

In an Order dated October 1, 1993, the Court granted Miller Truck Line's Motion for Summary Judgment on the grounds it had provided no hazardous materials to the Glenn Wynn site and further that it was neither a successor or a continuing enterprise of Miller Trucking Company.¹ The Judgment entered in favor of Miller Truck Lines, Inc., assessed costs against the Plaintiff, Atlantic Richfield Company.

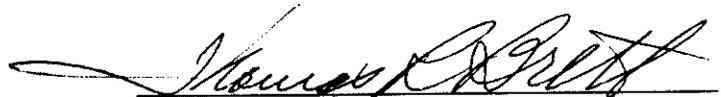
Miller Truck Lines filed a verified bill of costs October 18, 1993, seeking \$11,048.75 in costs. The Court Clerk held a Bill of Cost Hearing November 2, 1993, and awarded the Plaintiff \$358.75. The Court Clerk disallowed the remaining \$10,690.00 which Miller Truck Lines had sought as the costs incurred as a result of Court-ordered and approved payments to the Court-appointed liason counsel

¹ It was not disputed that Miller Trucking Company contributed hazardous waste to the Glenn Wynn Site.

(William Anderson) and the Court-appointed lead counsel for Group 4 defendants (John Tucker). Miller Truck Lines contends these payments were reasonable and necessary and thus are recoverable under 28 U.S.C. §1920.

The Court concludes the assessments in this case for liaison counsel fees and lead counsel fees are not costs properly taxable pursuant to 28 U.S.C. §1920.² For this reason, the Court Clerk's taxing of costs is affirmed and Miller Truck Lines, Inc., is awarded \$358.75 in costs.

IT IS SO ORDERED, this 27th day of January, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

² Section 1920 specifically provides what items may be taxed as costs:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

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

WORLD HIGH INVESTMENTS, INC.)
a Panamanian corporation,)
Plaintiff,)

vs.)

No. 91-C-892-~~F~~ B

JAMES W. McCABE, W. JAMES)
HUGHES, HCM SYSTEMS CORPORATION,)
a Florida corporation, HORIZON-)
TAL SYSTEMS, INC., a Florida)
corporation, UNITED PETRO-CORP.,)
a Florida corporation, and)
DIRECTIONAL DRILLING SYSTEMS,)
INC., a Delaware corporation,)
Defendants,)

and)

JAMES H. McCABE, ET AL.,)
Third Party Plaintiffs,)

vs.)

JOHN E. NASH and ANTONY J. NASH,)
Third Party Defendants,)

and)

SIDEWINDER TOOLS CORPORATION,)
a Delaware corporation, SIDE-)
WINDER TOOLS COMPANY, L.L.C.,)
an Oklahoma Limited Liability)
Company, S. ERICKSON GRIMSHAW,)
PRAY, WALKER, JACKMAN,)
WILLIAMSON & MARLAR, S.G.)
WARBURG COMPANY, INC. and)
SALOMON BROTHERS, INC.)
Additional Third Party)
Defendants.)

FILED

JAN 26 1994

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

ORDER OF DISMISSAL

The Court, having considered the unopposed motion to dismiss with prejudice Salomon Brothers, Inc. as an Additional Third-Party Defendant, and for good cause shown, herewith dismisses Salomon Brothers, Inc. with prejudice as an Additional Third-Party Defendant.

Done this 20th day of January, 1994.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 1-28-94

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

BEVERLY UHL,
Plaintiff,
v.
CHICKASAW TELECOM, INC.,
An Oklahoma Corporation,
Defendant.

Case No. 93-C-0048-E

FILED

JAN 27 1994

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

ENTRY OF JUDGMENT

The above-styled and numbered case was tried to a jury beginning on December 20, 1993.

On December 23, 1993, the jury returned a verdict for Defendant on all claims.

Judgment is entered on behalf of the Defendant on all claims.

S/ JAMES O. ELLISON

The Honorable James O. Ellison, Chief Judge
United States District Court for the Northern
District of Oklahoma

ENTERED ON DOCKET

DATE 1-28-94

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

UNITED STATES OF AMERICA,)
)
) *Plaintiff,*)
)
 vs.)
)
) ANTHONY J. AARONSON;
) STANLEY D. AARONSON;
) FELIX AARONSON;
) VIOLET AARONSON,
)
) *Defendants*)

F I L E D

JAN 27 1994

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

CIVIL ACTION NO. 92-C-849-E

ORDER

This matter comes on before the court upon the stipulation of all parties and the court being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, United States of America, against Anthony J. Aaronson, Stanley D. Aaronson, Felix Aaronson and Violet Aaronson are hereby dismissed without prejudice.

Dated this 28 day of January, 1994.

57 JAMES G. LARSON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:


KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3900 U.S. Courthouse
333 West 4th Street
Tulsa, OK 74103
(918) 581-7463
Attorney for Defendant


WENDELL W. CLARK, OBA #1714
Attorney at Law
15165 South Yale
Tulsa, OK 74135-6244
(918)496-9200
Attorney for Plaintiff

ENTERED ON DOCKET

DATE 1-28-94

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

FILED

JAN 27 1994

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

IN RE:)
)
THOMAS A. CARTER and)
MARILYN J. CARTER,)
)
Debtors.)
)
RCB BANK,)
)
Appellant,)
)
v.)
)
THOMAS A. CARTER and)
MARILYN J. CARTER,)
)
Appellee.)

Bky. No. 91-03018-W

Adv. No. 91-0323-W

Case No. 93-C-212-E ✓

ORDER

This order pertains to the appeal of RCB Bank ("the Bank") from the final judgment of the United States Bankruptcy Court for the Northern District of Oklahoma entered on March 4, 1993. Debtors filed this adversary proceeding seeking relief from a mortgage said to be obtained by duress.

Facts

Prior to their bankruptcy, debtors operated pet stores under a franchise with Doktor Pet Center, Inc. Mr. Carter also practiced veterinary medicine in Claremore, Oklahoma. Their first franchise stores were located at Woodland Hills Mall in Tulsa, Oklahoma and in Ft. Smith, Arkansas. In late 1985, they decided to purchase a third franchise to locate a store in Promenade Mall in Tulsa. They claim that in December of 1985 they discussed a loan with Robert McKinney ("McKinney"), executive vice-president of the Bank, who had

sought treatment for his pet at the veterinary clinic. They allege that McKinney took them to lunch in January of 1986 to discuss the deal and that they firmly told him that they would not mortgage their homestead to secure a loan (See Transcript of Trial Proceedings, April 14, 1992 ("Transcript"), at pgs. 29-34 (Marilyn Carter's testimony) and pgs. 68-71 (Thomas Carter's testimony). They claim they were led to believe the Bank would lend them the money with no mortgage on their homestead and proceeded to borrow approximately \$600,000.00 and spent several thousand more during the next four months preparing to open the new store (Transcript at pgs. 31-35).

Debtors contend that McKinney called them in late April of 1986 and took information for a financial statement and in the middle of May, 1986, an appraiser appeared at their home on instructions from McKinney (Transcript at pg. 36). When Mrs. Carter went to make her first draw on the Bank's loan to repay her start-up costs, shortly after that, she was told by McKinney for the first time that the Bank would not lend the money without a mortgage on the homestead (Transcript at pgs. 36 and 49). The Bank advanced her \$21,000.00 without the mortgage and she returned home (Transcript at pg. 37).

When Mrs. Carter told her husband what had occurred, he said he would not sign a mortgage and became so angry that he refused to speak to his wife for days (Transcript at pgs. 38 and 73). However, the debtors were unable to secure a loan elsewhere and their creditors needed to be paid, so they felt compelled to sign the loan papers on June 5, 1986, including a mortgage on their homestead (Transcript at pgs. 39-43, 49-50, 53-54).

McKinney denies the lunch meeting in January 1986 ever occurred and claims he never promised the debtors a loan with no mortgage on their homestead (Transcript at pgs. 108 and 162). He claims he first spoke with the Carters about a loan in December 1985, but at that time he merely expressed interest (Transcript at pg. 95). He contends that he did not meet them or speak with them again until late February or early March of 1986, when they came to his office to discuss the general terms of such a loan (Transcript at pgs. 98, 109-110).

McKinney testified that he took the Carters' request to the Bank's loan committee on March 13, 1986, and the committee told him to get more collateral (Transcript at pgs. 98-104, 112, 152). McKinney claims he told Mrs. Carter of this by telephone on March 17 or 18 and asked for information for a financial statement (Transcript at pgs. 153-154). At the beginning of April he claims he phoned her again and obtained from her the location of the Carters' real estate (Transcript at pg. 154). The real estate was "evaluated" during the first week of April, but McKinney admitted that an appraiser never did appraise the homestead property itself (Transcript at pg. 154).

McKinney then contends he telephoned Mrs. Carter and told her that a mortgage on the homestead would be necessary (Transcript at pg. 155). McKinney contends that early in May Mrs. Carter made a definite loan request and promised to mortgage her homestead (Transcript at page 156). He contends that the documents were drawn up and signed without further difficulty, and he discussed an early release of the mortgage with Mr. Carter (Transcript at pgs. 114-115, 131-135, 157).

The Bank's documentation of the transaction is very limited. The Carters never submitted a formal written loan application. Minutes of a loan committee meeting, dated "3-13-86" report a loan to "M.J. Carterm [sic] Inc. . . . To pay off BOK & money for new store," secured by "Leasehold imprpove. [sic], equip, fix, inv. and Accts Rec" with "pers. sign by Marilyn & Thomas Carter." The minutes also report: "Committee would prefer real estate as additional collateral. [McKinney] will check with the Carters and bring back[.]" A "loan worksheet" exists, bearing no date, but referring to a note dated "6/5/86." This document consists of a pre-printed form with blanks filled in by handwriting reporting collateral consisting of "leasehold improvements/Real Estate/equipment/inventory/fixtures: Woodland Hills Mall/Promenade Mall/45 acres R/E." After the words "Real Estate" is added the note "(2nd)" in different handwriting.

The closing documents included one unusual item designated as a "Loan Agreement" and dated "June 5, 1986." It provides as follows:

This agreement is between Rogers County Bank of Claremore, Oklahoma, the lender, and M.J Carter, Inc., the borrower, and covers the note dated June 5, 1986 in the amount of \$125,000.00.

The lender agrees to release the second mortgage real estate collateral on the above mentioned note in June, 1989, if approximately one-half of the note is paid, and if the payments and loan have been handled in a satisfactorily [sic] manner.

This document is signed by McKinney and by Mr. and Mrs. Carter.

Standard of Review

This court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous"

standard for appellate review of bankruptcy rulings with respect to findings of fact. In re Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. In re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988).

Factual Determinations Not Clearly Erroneous

Having reviewed the applicable transcript and exhibits, the court finds that the Bankruptcy Court's factual conclusion that the debtors' version of the story was more reliable than McKinney's is not clearly erroneous. The debtors began obligating themselves on the new pet store at a time when McKinney claimed they had not even discussed with him the general terms of a possible loan. They had fully committed themselves to the new venture and were beginning construction of the store at a time when McKinney claimed they had not made a loan request or settled the requirements of collateral. The bankruptcy court had sufficient basis to conclude that such conduct, especially by those who had previously shown themselves careful and capable business people, without a loan commitment, was unlikely.

McKinney's testimony that negotiations were conducted in his office in an ordinary manner is suspect because there is no ordinary loan application. His statement that the Bank "evaluated" the Carters' real estate is inconsistent with his admission that no appraisal of the homestead was accomplished. His statement that the closing was routine and that he did not suspect any difficulty about the homestead mortgage is refuted by the unusual

"loan agreement" of June 5, 1986, which indicates that on that date McKinney himself had reservations about the homestead mortgage.

The Bankruptcy Court concluded that the Bank's documentation of the transaction was also more consistent with the debtors' version of the story than with McKinney's. The minutes of the loan committee meeting on March 13, 1986 indicate that the deal which was brought before the committee was for a loan secured only by "Leasehold improve., equip, fix., inv. and Accts Rec." It was noted that the committee was uncomfortable with this arrangement and stated it would "prefer real estate." As the Bankruptcy Court surmised, the real estate which the loan committee had in mind may have been the Carters' half-interest in land just outside Claremore, which was already subject to a mortgage which the new loan was expected to pay off, and which the Carters admitted discussing with McKinney as possible collateral.

At some point McKinney focused instead on the debtors' homestead. The loan worksheet dates the Carters' note as "6/5/86." Since, even according to McKinney, the Carters did not make a formal "loan request" until May, the closing date could not have been known until shortly before the closing occurred on June 5, 1986. Therefore the loan worksheet must have been prepared not long before June 5, 1986. The notation "(2nd)" was inserted sometime after the first version of the worksheet had been prepared. This evidence supports the bankruptcy court's conclusion that the Bank must have finally determined to take a second mortgage on the Carters' homestead not long before June 5, 1986, and that the loan was originally contemplated without a mortgage on the debtors' homestead.

Procedural History

Subsequently, the pet stores began to fail and the debtors ceased making mortgage payments to the Bank in November, 1990. In 1991, their company filed Chapter 7 bankruptcy. No assets were available for distribution to unsecured creditors, and the case was closed at the beginning of September, 1991. No discharge was entered because, as guarantors, the debtors were individually liable for unsatisfied and undischarged debts of the company. On August 23, 1991, they personally filed Chapter 7 bankruptcy, reporting debts totalling \$636,178.68 and assets totalling \$163,967.06. All assets were secured or exempt.

On October 22, 1991, the Bank filed its "Motion to Modify Automatic Stay [and] for Abandonment . . . ," announcing an intent to foreclose its mortgage on the Carters' homestead. The Carters objected pursuant to 11 U.S.C. § 502(b)(1)¹ and commenced this adversary proceeding.

The debtors' complaint sought to determine the validity and extent of the Bank's lien under § 506(d) of the Bankruptcy Code, and asserted that it was not an allowed secured claim and therefore void. Under 11 U.S.C. § 506(d), when a claim against a bankruptcy estate is disallowed under § 502(b), any lien securing the claim fails together with the underlying claim and is void. Dewsnup v. Timm, ___ U.S. ___, 116 L.Ed.2d 903, 112 S.Ct. 773 (1992). Debtors asserted that the Bank's mortgage on their homestead was unenforceable under Oklahoma law, because said mortgage was "obtained . . . contrary to

¹Title 11 of the United States Code, § 502(b), provides that a claim may be disallowed "to the extent that -- (1) such claim is unenforceable against the debtor and property of the debtor, under any . . . applicable law for a reason other than because such claim is contingent or unmatured."

prior agreements and loan commitments . . . through . . . over reaching and fraud . . . [and] wholly without consideration." (Complaint ¶¶ 5, 6, 7).

The debtors admit that they owe the Bank an enforceable debt properly secured by collateral other than their homestead. The Bankruptcy Court was not asked to invalidate the Bank's claim, but only to determine that the claim was not secured by the homestead. The debtors asked the Bankruptcy Court to declare the Bank's mortgage on their homestead unenforceable as a matter of Oklahoma law.

The Bankruptcy Court properly concluded that the action, though grounded in state law, was within bankruptcy subject-matter jurisdiction under 28 U.S.C. § 1334(b) and was a core proceeding under 28 U.S.C. § 157(b)(2). The Bank admitted that the action constituted a core proceeding in its amended answer.

Bankruptcy Court's Legal Conclusions

The debtors asserted that the Bank's mortgage on their homestead was unenforceable and should be rescinded because of lack of genuine consent, or presence of "duress," and lack of consideration. The Bankruptcy Court examined the definitions of duress, menace, actual and constructive fraud, undue influence, and mistake of fact and law in the Oklahoma Statutes and concluded as follows:

[T]he evidence herein is clear and convincing that the Carters' consent to mortgage their homestead to secure Mrs. Carter's business loan was obtained by constructive fraud under 15 O.S. § 53(3), § 59(1), and by undue influence under 15 O.S. § 53(4), § 61(3) -- but not by "duress" as narrowly defined by 15 O.S. § 53(1), § 55, or by menace under 15 O.S. § 53(2), § 56, or by actual fraud under 15 O.S. § 53(3), § 58, or by that type of constructive fraud specified in 15 O.S. § 59(2), or by those types of undue influence specified in 15 O.S. § 61(1), (2), or by mistake of fact or law under 15 O.S. § 53(5), §§ 63-65.

The Bankruptcy Court based these conclusions on the following facts revealed through the parties' testimony: (1) McKinney did not kidnap anyone or steal or impound any of the debtors' property, so there was no "duress" within the meaning of Okla. Stat. tit. 15, § 53(1) or § 55; (2) McKinney did not threaten to kidnap anyone, to smash up any property, or to ruin anyone's reputation, so there was no "menace" within the meaning of Okla. Stat. tit. 15, § 53(2) or § 56; (3) there was no clear and convincing evidence that McKinney knew that his promise to lend money without a mortgage on the homestead was false when he made it or not warranted by his information at the time or that it was made without any intention of performing or was in any manner intended to deceive, so the debtors failed to show actual fraud within the meaning of Okla. Stat. tit. 15, § 53(3) and § 58; (4) McKinney had a duty to perform his original agreement and breached that duty by refusing to lend money under the terms he had agreed to, gaining an advantage, indirectly for himself and directly for the Bank, by misleading the debtors and causing them to mortgage their homestead to their prejudice, so there was constructive fraud within the meaning of Okla. Stat. tit. 15, § 53(3) and § 59(1), but no constructive fraud under Okla. Stat. tit. 15, § 59(2); (5) while McKinney did not abuse a position of confidence or authority under Okla. Stat. tit. 15, § 61(1) and neither of the debtors suffered from "weakness of mind" which might be taken advantage of under Okla. Stat. tit. 15, § 61(2), McKinney helped create and then took oppressive and unfair advantage of their financial needs and distress in a grossly oppressive and unfair way and obtained their consent through undue influence within the meaning of Okla. Stat. tit. 15, §§ 53(4) and 61(3); (6) there was no factual mistake by the parties, but merely a decision by McKinney to change

the original terms agreed upon and a belief by debtors that McKinney would keep his word, so there was no showing of a mistake of fact under Okla. Stat. tit. 15, §§ 53(5), § 63, or § 65; and (7) there was no showing of a misapprehension of the law by any of the parties, so there was no mistake of law under Okla. Stat. tit. 15, §§ 53(5) and § 64.

The Bankruptcy Court found that the Bank's mortgage on the debtors' homestead was obtained by economic duress, more properly designated as a type of constructive fraud or undue influence, since their consent to the contract was only given because of a misuse of economic pressure.

The Doctrine of Economic Duress

In its brief, the Bank focuses on the Bankruptcy Court's discussion of the doctrine of economic duress and argues that the elements of economic duress laid out in Centric Corp. v. Morrison-Knudsen Co., 731 P.2d 411 (Okla. 1986), are not present in this case.

In Centric, the court held that the theory of economic duress could be a basis for avoiding a mutual release and settlement agreement, recognizing that equity precludes wrongful exploitation to obtain "disproportionate exchanges of value" and courts may correct inequitable exchanges between those with unequal bargaining power. Id. at 414. The court set out the elements of economic duress: (1) the contract was the result of a wrongful or unlawful act, initiated and committed with knowledge of its impact and for the purpose of coercion, (2) the coerced party had no reasonable alternative to the contract, and (3) the coercion caused detriment to the coerced party. Id. at 417.

The Bankruptcy Court found that Centric and much earlier Oklahoma court decisions "purport to rewrite state statutes to fit the judges' notions of 'the evolving common law,'"

resulting in an "arrogation of judicial power . . . not justified even by necessity" which expanded the concept of "duress" far beyond statutory limits. (Memorandum Opinion and Order, pgs. 26-27)(citing Centric, 731 P.2d at 415). The Bankruptcy Court noted that these courts could have reached the same result on other grounds provided by statute, such as "menace," "constructive fraud," or "undue influence." (Memorandum Opinion, pg. 27). It concluded that these decisions could be legitimized by treating their doctrine of "economic duress" as an ill-chosen name for "constructive fraud" under Okla. Stat. tit. 15, § 59 or "undue influence" under Okla. Stat. tit. 15, § 61(3). Pointing out that Okla. Stat. tit. 15, § 55 restricts the meaning of "duress," it found that the wrongful obtaining of a show of consent by unconscionable misuse of economic pressure is actionable as "constructive fraud" or "undue influence."

Legal conclusions are reviewed de novo. The bankruptcy court erred in rejecting the doctrine of "economic duress" recognized by the Oklahoma Supreme Court.

Constructive Fraud

"Constructive fraud" is defined in § 59 as consisting of "any breach of duty which, without an actually fraudulent intent, **gains** an advantage to the person in fault...." A bank has no duty to make a loan on the **precise** terms requested by its customer; here the bankruptcy court found that there was an oral offer to make a loan and an acceptance, resulting in a contract which was **later modified** through the use of economic pressure to include additional, oppressive terms. **However**, the loan agreement was finalized on terms that the Carters were fully aware of. **The Bank** made the loan, and fulfilled the contractual

obligations it undertook in connection with the loan as finalized. It did not breach the loan contract, or any legal duty.

No tort cause of action is available under these circumstances. To obtain relief, the Carters must rely on the equitable doctrine of economic duress.

The Oklahoma Supreme Court made this clear in Cimarron Pipeline Constr. Inc. v. United States Fidelity & Guar. Ins. Co., 848 P.2d 1161 (Okla. 1993), where it recognized that economic duress was an equitable doctrine in contract law, but refused to find that it gave rise to an independent tort under Oklahoma law. Id. at 1162. It held that Okla. Stat. tit. 15, § 52 authorizes a claim for relief from a consent obtained through economic duress. Id.

Undue Influence

"Undue influence" is defined in § 61 as follows:

Undue influence consists:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.
2. In taking an unfair advantage of another's weakness of mind; or,
3. In taking a grossly offensive and unfair advantage of another's necessities or distress.

While the text of § 61(3) seems, at first glance, to apply to the facts of this case, the context in which it appears belies this.² The court has been unable to find any case that applies this language to an arm's length business transaction where economic coercion has been used to gain unfair advantage. Instead, the statute has been consistently invoked in

² The reference to "necessities" in this statutory context more likely pertains to "necessaries" such as food, drink, clothing, shelter, and medical care (and the term "distress" to the lack thereof), than to any economic or business urgency.

obligations it undertook in connection with the loan as finalized. It did not breach the loan contract, or any legal or equitable duty which would give rise to a separate cause of action.

To obtain relief, the Carters must rely on the equitable doctrine of economic duress to assert a defense to the Bank's foreclosure action.

The Oklahoma Supreme Court made this clear in Cimarron Pipeline Constr. Inc. v. United States Fidelity & Guar. Ins. Co., 848 P.2d 1161 (Okla. 1993), where it recognized that economic duress was an equitable doctrine in contract law, but refused to find that it gave rise to an independent tort under Oklahoma law. Id. at 1162. See also, Roberts v. Wells Fargo AG Credit Corp., 990 F.2d 1169 (10th Cir. 1993), where the Tenth Circuit recognized Oklahoma's acceptance of economic duress as a defensive doctrine, but refused to apply it where the bank simply exercised its contractual right not to renew a line of credit.

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applies this language to an arm's length business transaction where economic coercion has been used to gain unfair advantage. Instead, the statute has been consistently invoked in personal situations where the prospect of undue influence has arisen out of confidential interaction. See, for example In Re Estate of Webb v. Okla. Nat. Bank and Trust of Chickasha, 1993 Okla. Lexis 88, 64 O.B.A.J. 1737 (Okla. 1993). The type of personal relationship needed to give foundation to a charge of "undue influence" did not exist between the Carters and the Bank. There was no confidential or fiduciary relationship between the parties here -- they dealt with each other only at arm's length in a business setting.

Analysis of Centric

This court agrees with the result reached by the Bankruptcy Court, and quarrels only with its method of reaching that result. Rather than jettison the doctrine of economic duress established by the Oklahoma Supreme Court in Centric, the court concludes that it should be applied to this case.

The Centric decision involved the repudiation of a settlement agreement and release, not a homestead mortgage. This factual distinction is notable, because different equitable considerations attach depending upon the type of contract involved. In discussing the equitable basis for setting aside settlement agreements, the Centric court emphasized that it is not enough for an alleged victim of economic duress to merely show its reluctance to settle, financial embarrassment, or business necessities.

The bank seizes upon the "business necessity" dictum in Centric, and argues that the Carters' consent was motivated by "business necessity", and is therefore specifically placed

outside the remedial reach of the doctrine of economic duress. "Business necessity" is not specifically defined in the Centric opinion. However, for this exclusion to make sense in the overall context of the opinion, it must be construed to apply to independent or undisclosed business necessity, as opposed to disclosed business necessity that arises as a direct result of the offending coercive acts, such as we have here.³

When the cost of ongoing litigation poses a threat to the continuing economic viability of a litigant, settlement makes sense and should be encouraged. Usually, settling parties go to great lengths to conceal or minimize any economic difficulties during the course of settlement negotiations, in order to avoid any appearance of weakness, present a stronger posture, and gain an advantageous deal. To allow a settlement negotiated at arm's length to be later set aside on the grounds of economic duress due to some previously undisclosed or latent "business necessity" would be unfair to the party who compromised in good faith. Put in proper context, the Centric dictum regarding "business necessity" makes sense.

However, it makes no sense to extend the "business necessities" exclusion recognized in Centric to the facts of the present case, where the bank had exquisite knowledge of the Carter's financial circumstances and the disastrous impact its action could have. To do so would cut against the essence of the economic duress doctrine articulated in the opinion.

³ The facts giving rise to the Centric opinion bear this out. Centric was a subcontractor which alleged that Morrison-Knudsen, a construction company that acted as the construction manager for the General Motor assembly plant in Oklahoma City, "was fully aware of its precarious financial position", when it presented Centric with a "take it or leave it" low-ball offer. Centric claimed it accepted that offer only to avoid bankruptcy, and later attempted to repudiate the offer on the basis of economic duress.

The court also discussed other cases in its opinion that followed a similar fact pattern. Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co., 584 P.2d 15 (Alaska 1978) ("Alyeska deliberately withheld payment of an acknowledged debt, knowing that Totem had no choice but to accept an inadequate sum in settlement of that debt" or face bankruptcy); Rich & Whillock, Inc. v. Ashton Development, Inc., 157 Cal.App. 3rd 1154, 204 Cal. Rptr. 86 (4th Dist. 1984) (at the time of the settlement offer, "the contractor knew that the subcontractor was overextended, and that it faced imminent bankruptcy if the final bills were not paid.")

Centric requires a court to look at **the** circumstances of each case. The circumstances here involve the coerced compromise of a homestead by means of the bank's willful creation of pressing business necessity which did not exist prior to its wrongful conduct. This court believes that the Oklahoma Supreme Court, when confronted with facts such as these, would apply the doctrine of economic duress, grant relief from the oppressive mortgage, and limit the doctrine's "business necessity" exception to situations where equity would not be served. The Centric court said "[t]he doctrine of economic duress comes into play only when conventional alternatives and remedies are unavailable to correct aberrational abuse.... It is available solely to prevent injustice, not to create injustice." 731 P.2d at 414 (emphasis in original).

Conclusion

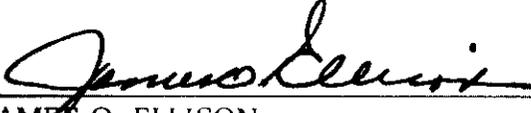
In this case the theory of economic duress must be applied to prevent injustice and do equity. While a bank may request additional collateral to secure a loan, it is not fair to wait until the borrowers are hopelessly committed to the loan transaction to inform them of the new requirement. Given the timing of the homestead mortgage, the Carters had no reasonable alternative but to sign the loan and mortgage agreements. The Centric court made clear that an equitable remedy is available when the acts of the coercing party "have deprived the coerced party of its free will, leaving no adequate legal remedy nor reasonable alternative available." 731 P.2d at 416. The court said that "each case must rise and fall on its own merits" and that "the issue is one of fact to be determined after consideration of all the circumstances surrounding the transaction." Id. at 417.

The court concludes that rescission was proper under Okla. Stat. tit. 15, § 233,

because the debtors' consent to mortgage their homestead was obtained by economic duress. The debtors rescinded promptly enough, as required by Okla. Stat. tit. 15, § 235⁴, because they were not free from economic duress until their complete financial collapse and bankruptcy rendered them immune to further economic pressure by the Bank. They brought their adversary proceeding as soon as they were aware of their right to rescind. The bankruptcy court's factual finding that the Bank had first agreed to lend them funds on the strength of a mortgage on other items was not clearly erroneous. Because they received no additional value from the Bank in return for the mortgage on their homestead, they need return nothing to the Bank.

The Bankruptcy Court's decision in this matter is affirmed.

Dated this 27th day of January 1994.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

⁴ Okla. Stat. tit. 15, § 235, regarding the duty of a party attempting rescission, states as follows:

Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

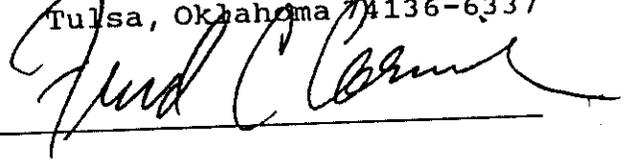
2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable, or positively refuses to do so.

CERTIFICATE OF MAILING

I, the undersigned, certify that on the 27th day of January, 1994, a true and correct copy of the above and foregoing document was mailed by First Class, U.S. Mail to the following attorneys of record with sufficient postage prepaid thereon:

James E. Frasier
Frasier & Frasier
1700 Southwest Blvd.
Post Office Box 799
Tulsa, Oklahoma 74101

Ray H. Wilburn
Wilburn, Masterson &
Smiling,
7134 S. Yale Ave., Ste 560
Tulsa, Oklahoma 74136-6337



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

FILED

JAN 27 1994

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

MINA DOUBLIN-LESCHER,

Plaintiff,

v.

RIVAL MANUFACTURING COMPANY,

Defendant.

Case No. 92-C-1167-W

FILED

JAN 27 1994

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

JUDGMENT

Judgment is entered in favor of Defendant, Rival Manufacturing Company.

Dated this 27th day of January, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

JAN 27 1994

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

ROLANDA STRANGE, now
BECKMANN,

Plaintiff,

vs.

WINDWARD ENERGY & MARKETING
COMPANY, incorporated
the state of Oklahoma, and
MARK A. PERRY,

Defendants.

Case No. 93-C-582-B ✓

FILED

JAN 26 1994

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

O R D E R

Now before the court for consideration is Defendant Windward Energy & Marketing's Motion for Summary Judgment (Docket #10) filed October 15, 1993.

On February 25, 1991, Rolanda Beckmann ("Beckmann") accepted an offer of employment from Mark A. Perry ("Perry"), the president and sole-shareholder of Windward Energy & Marketing ("Windward"). The agreement between Beckmann and Windward provided for a review of the plaintiff's performance after six months, but no term was set for the length of employment. In addition to Beckmann's compensation, Windward provided a profit sharing plan ("the Plan") through Merrill Lynch.

Beckmann began work on April 1, 1991, and continued working until she was terminated in July of 1992.¹ Beckmann asserts that Perry, as administrator of the Plan, failed to contribute to the

¹ It is unclear on which date Beckmann was terminated; Beckmann claims July 30, 1992, and Windward claims July 15, 1992.

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Plan on behalf of Beckmann. Beckmann further contends that according to the terms of her employment, Windward was to contribute a sum equal to 15% of the plaintiff's salary into the Plan. Beckmann asserts that because Perry failed to contribute to the Plan on behalf of Beckmann, Perry has breached his fiduciary duty, and breached the employment contract. Beckmann also asserts Windward wrongfully terminated her in retaliation for seeking these benefits under the Plan. She also claims she was denied severance benefits and a bonus. The undisputed facts in this matter are as follows:

1. Beckmann's employment with Windward was at-will. (See Plaintiff's Reply Brief (Docket #22) page 8).

2. On or about February 25, 1991, Plaintiff and Defendant entered into an oral employment contract, with the Plaintiff beginning work on April 1, 1991. (See Defendant's Brief (Docket #10) page 2, paragraph 1).

3. Beckmann was paid her full salary (\$38,500), moving expenses (\$10,127), and a Christmas bonus (\$1,604). (See Defendant's Brief (Docket #10) Exhibit B, page 2).

4. Beckmann was eligible for health insurance and enrollment in Windward's profit sharing plan. (see Defendant's Brief (Docket #10) page 3, paragraph 6).

5. Windward provided a profit sharing plan through Merrill Lynch known as the Merrill Lynch Flexible Prototype Defined Contribution Plan. (See Defendant's Brief (Docket #10) Exhibit C)

6. The pension plan is a qualified plan within the meaning of

29 U.S.C. 1002(2)(a) of the Employee Retirement Income Security Act of 1974. (See Defendant's Answer (Docket #7) Paragraph 7)

7. No contributions were made for the 1991 profit sharing year for any employee. (See Defendant Brief (Docket #10) Exhibit B, Paragraph 3)

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

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

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

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

1375, 1381 (10th Cir. 1980).

Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

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

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

Analysis and Authorities

A. Breach of fiduciary duty under ERISA

Plaintiff alleges that Perry breached his fiduciary duty by not contributing into the Plan on behalf of Beckmann; thus not exercising his duties under the Plan in the sole interest of the plan participants. In his Answer, Perry denies he is a fiduciary under the plan. However, Perry does not argue in either of his briefs that he is not a fiduciary. It is clear that Perry is a fiduciary pursuant to the provisions of ERISA.

"A person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority

or control respecting management or disposition of its assets, ... or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

29 U.S.C §1002(21)(A)(i,iii). Perry qualifies as a fiduciary under either provision. Defendant correctly states that where plan fiduciaries are entitled to exercise discretion, judicial review is limited to determining whether the decision is arbitrary or capricious. Naugle v. O'Connell, 833 F.2d 1391, 1393 (10th Cir. 1987). A decision is not arbitrary or capricious if it is a reasonable interpretation of the terms and made in good faith. Torix v. Ball Corp, 862 F.2d 1428, 1429 (10th Cir. 1988).

Under the terms of the instant Plan, the amount of any annual contributions by the employer is left to the discretion of the employer. "The level of Employer contributions is to be determined for each Plan Year by the Employer."² Perry did not contribute any amount of money for any employee of Windward for the 1991 profit sharing year. Although plaintiff generally agrees that according to the provisions of the plan the amount of contributions are discretionary, she argues that the amount is not discretionary in her case because Perry specifically stated he would contribute 15% on her behalf. The plaintiff thus argues Perry was obligated to contribute a sum equal to 15% of her salary into the Plan for the 1991 profit sharing year.

The Court does not agree. It is clear from the written terms

² See Defendant's Brief In Support of Motion for Summary Judgment (Docket #10), Exhibit C, Paragraph 5.

of the Plan that any amount, even zero, contributed to the plan is at the complete discretion of the employer. The terms of Windward's profit sharing plan in no way require a contribution to be made every year. Furthermore, the terms of an ERISA plan can not be orally modified. Straub v. Western Union Telegraph Co., 851 F.2d 1262, 1265 (10th Cir. 1988).

The plaintiff is required to show that Perry's decision not to contribute to the plan in 1991 was arbitrary or capricious. Plaintiff merely makes vague allegations of corporate waste but does not provide any supporting documentation. The plaintiff has failed to raise any issue of material fact suggesting that Perry's decision not to contribute was arbitrary or capricious. For this reason, the Court concludes that Windward's Motion for Summary Judgment (Docket #10) on plaintiff's first cause of action of Breach of Fiduciary Duty should be and is hereby GRANTED.

B. Breach of Contract and Estoppel

Plaintiff claims that Perry breached the employment contract between the parties by not paying into the profit sharing plan in 1991 and by failing to pay her severance and a bonus, and further, that she relied to her detriment on his representations. More specifically, she claims that his failure to fulfill his oral representations regarding such benefits constitutes a breach of contract or alternatively that his representations should be enforced under a theory of estoppel. The plaintiff argues that Perry breached the following terms of the oral contract or she

relied to her detriment on the following representations: (1) Perry would contribute a sum equal to 15% of her salary into the plan each year, (2) he would pay her a severance equal to four months salary, and (3) he would pay her a bonus. Plaintiff states she detrimentally relied on those representations by giving up a "good job" in New Mexico.

It is undisputed that no written contract was drafted and that all communications regarding the plaintiff's employment were oral.³ Defendant contends the alleged terms of the contract regarding the plaintiff's employment require a written memorandum to be enforceable. In Oklahoma,

The following contracts are invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:

1. An agreement that, by its terms, is not to be performed within a year from the making thereof....

Okla. Stat. tit 15 §136 (1983). Applying this statute to the instant facts, the court concludes a written memo is not required in order to enforce the provisions of the contract. The contract did not state a term of employment and in fact contemplated a review after six months of service. Windward was entitled to terminate the plaintiff's employment at anytime. The Court concludes the contract could be completed within one year and thus

³ Plaintiff did attach a copy of a document containing notations regarding the terms of her employment that she claims was written by Perry while they were discussing the employment opportunity with Windward. (See, Plaintiff's Brief in Response to Defendant's Motion for Summary Judgment (Docket #14) Exhibit A). The document is not signed by either party. Because the Statute of Frauds requires the party to be charged to subscribe to the memorandum, and no such signature exists, the document is of no assistance in this matter.

no written memo is required to enforce the provisions of the contract.

1. Plaintiff's Profit Sharing Claim

a. Breach of Contract

Windward's profit sharing plan is an ERISA governed plan. Under ERISA, any state law that relates to any employee benefit plan will be preempted by the provisions in the act.⁴ The Supreme Court noted in Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46, (1987), (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981), that "the express preemption provisions of ERISA are deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern."

Plaintiff's claim of breach of contract is a state law claim. The Supreme Court in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983), stated that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Here the plaintiffs claim clearly references the plan in that she asserts she is entitled to benefits under the plan. The plaintiff provides no reason why her claim should not be preempted by 29 U.S.C §1143. Thus, the plaintiff's claim regarding contributions to the Plan must be

⁴ 29 U.S.C. 1144(a)

Except as provided in subsection (b) of this section, the provisions of the subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

brought pursuant to ERISA.⁵ Her breach of contract claim is not an action provided for under ERISA and for this reason the Court concludes that Windward's Motion for Summary Judgment on plaintiff's claim of breach of contract regarding her unpaid benefits under the profit sharing plan should be and is hereby GRANTED.

b. Estoppel

Plaintiff argues that Perry represented to her that he would contribute into the plan and that she detrimentally relied by giving up a good job. The Court must view the facts in the light most favorable to the plaintiff and therefore the Court must assume that Perry did make such representations to the plaintiff. However, the plaintiff's claim can only succeed "if oral agreements or representations can modify the terms of an ERISA-governed employee benefit plan." Straub v. Western Union Telegraph Co., 851 F.2d 1262, 1265 (10th Cir. 1988). Windward's profit sharing plan allows complete discretion by the employer to determine the amount to be contributed. Assuming Perry told the plaintiff he would contribute a sum equal to 15% of her salary to the plan each year, such representation would modify the terms of the profit sharing plan by restricting his discretion under the plan. ERISA specifically provides that, "Every employee benefit plan shall be established and maintained pursuant to a written instrument". 29 U.S.C §1102 (a) (1). The Tenth Circuit has stated that ERISA plans cannot be orally modified. "[T]his requirement that ERISA plans be

⁵ See 29 U.S.C 1132.

maintained in writing precludes oral modification of the Plans; the common law doctrine of estoppel cannot be used to alter this result." Straub, 851 F.2d at 1265, (quoting Nachwalter v. Christie, 805 F.2d 956, 959 (11th Cir. 1986)). There is a strong policy argument to prohibit oral modifications of ERISA plans.

A central policy goal of ERISA is to protect the interests of employees and their beneficiaries in employee benefit plans. This goal would be undermined if we permitted oral modifications of ERISA plans because employees would be unable to rely on these plans if their expected retirement benefits could be radically affected by funds dispersed to other employees pursuant to oral agreements. This problem would be exacerbated by the fact that these oral agreements often would be made many years before any attempt to enforce them.

Id. Even if Perry made the alleged representations to the plaintiff, her claim is of the very sort ERISA was intended to protect against. For this reason, the Court concludes that Windward's Motion for Summary Judgment on plaintiff's claim of estoppel regarding her unpaid benefits under the profit sharing plan should be and is hereby GRANTED.

2. Plaintiff's Severance Claim

a. Breach of Contract

Plaintiff alleges that prior to accepting the job with Windward, Perry stated plaintiff would receive a severance equal to four months salary. Plaintiff now claims she was not paid such a severance, and thus the oral employment contract was breached. The defendants deny that such a severance was a term of the employment contract in their Answer. However, Defendant's Brief in Support of

a Motion for Summary Judgment⁶, suggests that severance was at least discussed. The record is unclear as to whether severance was actually made a term of the oral employment contract. Therefore, a fact question exists as to the Plaintiff's severance. Because a reasonable jury could find from the facts that severance pay was an element of the oral employment contract, the Court concludes that Windward's Motion for Summary Judgment on plaintiff's claim of breach of contract regarding her unpaid severance pay should be and is hereby DENIED.

b. Estoppel

Plaintiff claims that she detrimentally relied on the representation she would be entitled to severance if her employment was terminated. Because a fact question exists as to whether severance was offered to the plaintiff, the Court can not now determine as a matter of law, whether the plaintiff did or did not rely on any representations regarding severance. This determination must be left to the fact finder. For this reason, the Court concludes that Windward's Motion for Summary Judgment on plaintiff's claim of estoppel regarding her unpaid severance pay should be and is hereby DENIED.

3. Plaintiff's Bonus Claim

a. Breach of Contract

Plaintiff alleges that Perry told her he would pay her a bonus, and that because he did not pay the bonus, he breached the agreement. It is undisputed that a bonus was a part of the

⁶ See (Docket #10) Exhibit F.

compensation package. However, the plaintiff provides no evidence to establish what bonus she is claiming she was entitled to, the amount of the bonus, or any requirements for receiving the bonus. Without such evidence the plaintiff cannot survive a motion for summary judgment by merely alleging she is entitled to some unspecified bonus. Furthermore, there is undisputed evidence that the plaintiff did receive a Christmas bonus.⁷ The plaintiff does not deny she received this bonus and furnishes no evidence she was entitled to another bonus.

For this reason, Windward's Motion for Summary Judgment on plaintiff's claim of breach of contract regarding her unpaid bonus should be and is hereby GRANTED.

b. Estoppel

Plaintiff contends that one of the reasons she accepted the job at Windward was because of a promise to pay her a bonus. It is undisputed that plaintiff received a Christmas bonus and plaintiff has failed to present any evidence of what other bonus she was promised. The record is void of any facts regarding the terms of this alleged additional bonus. For the reasons set forth above, the Court concludes that Windward's Motion for Summary Judgment (Docket #10) on the plaintiff's claim of estoppel regarding her unpaid bonus should be and is hereby GRANTED.

c. Wrongful Termination

⁷ See Defendant's Brief in Support of a Motion for Summary Judgment (Docket #10), Exhibit B, paragraph 4.

The plaintiff alleges she was terminated in retaliation for seeking benefits she was entitled to under the employment agreement.⁸ This termination, she further argues, violates public policy and is the basis of her third cause of action.

It is undisputed that the plaintiff's employment was at will. In Oklahoma, the law relating to termination of employment-at-will contracts is firmly set out in Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). An employer may discharge an at-will employee for good cause, for no cause or even a cause morally wrong, without being liable of a legal wrong. Id. at 26. Although the Supreme Court of Oklahoma has rejected the implication of an obligation of good faith and fair dealing in relation to the employer's decision to terminate at-will contracts, an employer may not however, discharge an employee where the termination is contrary to a clear mandate of public policy. Id. at 28. The public policy can be defined by constitutional, statutory, or decisional law. Id.

Plaintiff contends that 29 U.S.C §1140⁹ provides the public policy which was violated. The defendant accepts that if a public policy claim exists, it will be pursuant to this statute. Assuming

⁸ In her first brief (Docket #14), the plaintiff argues that she was denied benefits under the pension plan and was denied health insurance coverage for her husband. The plaintiff makes no reference to the health insurance benefits in her petition or in any other part of the record.

⁹ 29 U.S.C. 1140 Interference with protected rights:
It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan....

arguendo, that §1140 establishes a "clear mandate of public policy", the plaintiff has failed to establish a genuine issue of material fact with respect to her wrongful termination claim. In order to establish a claim pursuant to §1140, the plaintiff must show that it was the specific intent of the defendant to interfere with her pension rights by terminating her.¹⁰

[E]RISA guarantees that no employee will be terminated where the purpose of the discharge is the interference with one's pension rights. Consequently, it is necessary to separate the firings which have an incidental, albeit important, effect on an employee's pension rights from the actionable firings, in which the effect of the firing on the employer's pension obligation was a motivating factor in the firing decision.

Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 238 (4th Cir. 1991). Here, the plaintiff's cause of action fails for three reasons. First, the plaintiff has not shown any evidence that it was the specific intent of the defendant to deny her any rights she may have had under the plan.

Second, and more significantly, is that fact that the plaintiff has failed to provide any evidence that she was entitled to benefits under the Plan in the first place. The Plan clearly allows discretion by the employer as to the amount of contribution, and further provides that the benefits are not vested until a

¹⁰ See Dister v. Continental Group Inc., 859 F.2d 1108 (2nd Cir. 1988); Gavalik v. Continental Can Co., 812 F.2d 834 (3rd Cir. 1987); Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231 (4th Cir. 1991). Although the Tenth Circuit has not addressed this issue, the Second, Third, and Fourth Circuit Courts require the plaintiff to show specific intent and this Court is persuaded this is the best approach.

contribution is made.¹¹ The profit sharing year of 1991 would have been the first opportunity for a contribution to be made on behalf of the plaintiff. For the 1991 profit sharing year, no amount was contributed into the plan for any employee, therefore no benefits had vested for the plaintiff.

Finally, to the extent the plaintiff is alleging retaliation for seeking pension or health benefits, the plaintiff has failed to provide any evidence she ever requested the benefits she claims she was "entitled" to. Plaintiff's termination could not be in retaliation for seeking benefits, if she did not claim she was entitled to such benefits until after she was terminated. For the reasons set forth above, the Court concludes that Windward's Motion for Summary Judgment (Docket #10) on the plaintiff's third cause of action of wrongful termination should be and is hereby GRANTED. In summary, Windward's Motion for Summary Judgment is GRANTED as to all of Plaintiff's claims except her breach of contract and estoppel claims regarding severance benefits.

In light of the Court's ruling herein, the October 19, 1993, Scheduling Order is stricken and the following accelerated schedule is hereby entered:

2-4-94	Discovery Cutoff
2-11-94	Motion in Limine Cutoff
2-18-94	Responses to Motions in Limine
2-18-94	Exchange of Premarked Exhibits

¹¹ See, Defendant's Brief in Support of Motion for Summary Judgment (Docket #10), Exhibit C, Paragraph 5.

2-21-94 Deposition/Videotape/Interrogatory Designations
2-25-94 Counter-Designations
2-29-94 Transcripts Annotated With Objections & Optional
Briefs on Unusual Objections
3-2-94 Agreed Pretrial Order
3-4-94 Pretrial Conference at 9:30 a.m.
3-11-94 Requested Jury Instructions, Voir Dire
3-11-94 Trial Briefs
3-22-94 Jury Trial at 9:30 a.m.

IT IS SO ORDERED THIS 26th 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 26 1994

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

Case No. 90-C-444-B

NANCY L. TRENERRY,)
)
Plaintiff,)
)
vs.)
)
INTERNAL REVENUE SERVICE,)
)
Defendant.)

O R D E R

Now before the Court is Defendant's Motion for Clarification and/or Motion for Relief from Judgment (Docket #76).

On October 28, 1993, the Court entered an Order ruling on "Plaintiff's Cross Motion for Partial Summary Judgment on Remand for Refund of Improper Charges; Costs of Litigation and Production of Documents Responsive to Plaintiff's Third Cause of Action." The Court concluded that Plaintiff was entitled to a refund of \$16.35 and entered a judgment for the Plaintiff for this amount. Defendant now asks the Court to clarify its ruling regarding any award of costs.

The Court's Order of October 28, 1993, denied Plaintiff's request for attorney fees and/or litigation costs pursuant to 5 U.S.C. §552(a)(4)(E) on the grounds that Plaintiff's FOIA requests were basically personal to her and were of no general public interest. The Judgment entered simultaneously therewith assessed costs against the Defendant pursuant to Local Rule 6.¹

It was the intention of the Court that Plaintiff be awarded

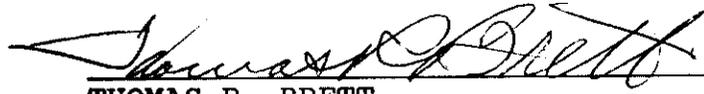
¹ As of December 1, 1993, this rule was redesignated as Local Rule 54.1.

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costs - as the prevailing party - pursuant to 28 U.S.C. §1920 and the corresponding Local Rule. Thus, the Court Clerk is instructed to tax the necessary costs as is routinely done in favor of the prevailing party. It is not the intention of the Court that Plaintiff be awarded costs of transportation, costs of supplies, or any other costs not properly taxed pursuant to 28 U.S.C. §1920.

For the reasons stated herein, Defendant's Motion for Clarification is GRANTED and Defendant's Motion for Relief from Judgment is DENIED.

DATED this 26th day of January, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JAN 27 1994

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

FILED
JAN 27 1994

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

ROBERT EDWARD JONES, JR.

Plaintiff,

vs.

RON CHAMPION

Defendants.

No. 93-C-383-B

ORDER

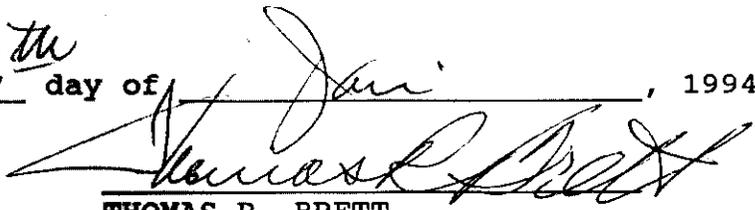
Before the court are petitioner's motion to dismiss without prejudice filed on January 10, 1994, and respondent's motion for enlargement of time filed on January 24, 1994.

Petitioner requests the court to dismiss this habeas corpus action because he is currently unable to properly prove his claims. The court will, thus, grant petitioner's motion to dismiss without prejudice and deny as moot respondent's motion for an enlargement of time.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Petitioner's motion to dismiss without prejudice [docket #3] is granted.
- (2) Respondent's motion for enlargement of time [docket #4] is moot.

SO ORDERED THIS 26th day of Jan, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

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

JAN 26 1994

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 -vs-)
)
 TIMOTHY R. HUFF,)
 567-15-6962)
)
 Defendant,)

CIVIL NUMBER 93-C-452 B

JUDGMENT BY DEFAULT

Upon application of the Plaintiff, the Court, having examined the records and files in this cause, and being fully advised in the premises, finds that service of process in manner and form provided by law was had upon the defendant, more than twenty days prior to this date.

And it further appearing to the court that the defendant has failed to appear, plead or answer, but has wholly made default, whereupon said defendant is adjudged in default.

And it further appearing to the court that the said plaintiff has filed an Affidavit pursuant to the Soldiers' and Sailors' Civil Relief act of 1940, as amended, and the court finds that the possibility of impairing any right thereunder of the defendant, is remote and that an order should be issued herein directing entry of judgment.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, United States of America, have and recover from the defendant, the sum of \$2,640.74 with interest at the rate of 3.67% until paid, plus a surcharge of ten (10) percent of the amount of Plaintiff's claim in accordance with the provisions of 28 U.S.C. 3011, and the costs of this action accrued and accruing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that this judgment be entered.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CLIFTON R. BYRD
District Counsel



LISA A. SETTLE
Staff Attorney
Department of Veterans Affairs
Office of District Counsel
125 South Main Street
Muskogee, OK 74401
(918) 687-2191

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

JAN 27 1994

GENERAL ACCIDENT INSURANCE)
COMPANY OF AMERICA,)

Plaintiff,)

vs.)

Case No. 88-C-254-C

FIRST NATIONAL BANK AND TRUST)
COMPANY OF TULSA, a national)
banking association, as Successor)
Personal Representative of the)
Estate of F. Paul Thieman,)
deceased; and, NORMA APPLGATE,)
Successor Trustee of the Gladys)
M. Thieman Trust, and F. Paul)
Thieman and Gladys M. Thieman)
Trust,)

Defendants.)

F I L E D

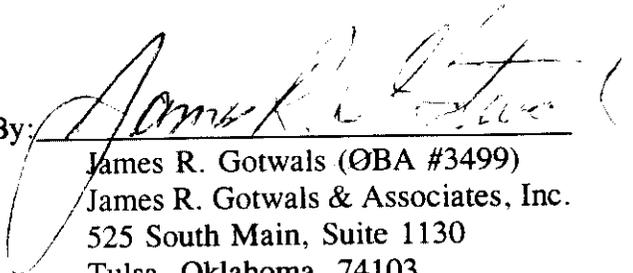
JAN 26 1994

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

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The undersigned, counsel for (i) Defendant and Cross Claimant, Norma Applegate ("Applegate"), as Successor Trustee of the Gladys Thieman Trust, and as Successor Trustee of the F. Paul Thieman and Gladys M. Thieman Trust, and (ii) Defendant, Liberty Bank and Trust Company of Tulsa, National Association (formerly The First National Bank and Trust Company of Tulsa), as Successor Personal Representative of the Estate of F. Paul Thieman, Jr., deceased, hereby stipulate pursuant to Rule 41 (a) of the Federal Rules of Civil Procedure to the dismissal with prejudice of all claims asserted by Applegate on behalf of the Gladys Trust and the Children's Trust against Liberty, both in its individual and representative capacities, and stipulate that no costs, expenses or attorneys fees shall be assessed against either party.

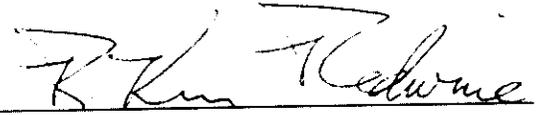
JAMES R. GOTWALS

By: 

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Successor Trustee of the Gladys M.
Thieman Trust and as Successor
Trustee of the Gladys M. Thieman and
F. Paul Thieman Trust

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Attorneys for Liberty Bank and Trust
Company of Tulsa, National
Association (formerly The First
National Bank and Trust Company of
Tulsa), as Successor Personal
Representative of the Estate of F. Paul
Thieman, Jr., deceased

IT IS SO ORDERED this 26 of January, 1994.

(Signed) H. Dale Cook

United States District Judge

ENTERED ON DOCKET
JAN 26 1994

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

FILED

JAN 26 1994

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

FLOYD LAUDERDALE,)	
)	
Plaintiff,)	
)	
vs.)	No. 93-C-160-B ✓
)	
SWEEDEN, Captain,)	
)	
Defendant.)	

ORDER

Before the Court are defendant's motion for summary judgment, the special report, plaintiff's response, and plaintiff's motion for summary judgment (previously construed as a supplemental response).

I. BACKGROUND

On November 22, 1993, Officer Jim Cauger found two pieces of white paper containing a leafy green substance in a pair of blue jeans during a search of plaintiff's cell. Plaintiff and his cell-mate received a misconduct report. Investigator Bill McKenzie tested the substance with a valtox drug screening kit and found it to be positive for marijuana. Plaintiff and his cell-mate were charged with "possession/manufacture of contraband" in accordance with the "Living Quarters" section of the inmate handbook. That section reads: "You will be assigned to a living area which must be kept clean, neat and free from contraband. You are responsible for items in your assigned living areas." [Special Report.]

During an investigation on November 23, 1993, plaintiff and his cell-mate did not claim ownership of the marijuana and declined to make a statement. At a disciplinary hearing on November 25,

1993, Captain Sweeden found plaintiff and his cell-mate guilty of possessing/manufacturing contraband because it could not be determined to whom the substance belonged. Captain Sweeden then awarded each of them thirty days of segregation and a \$15.00 fine. [Id.]

In February 1993, plaintiff brought this civil rights action against Captain Sweeden, alleging that Sweeden's failure to investigate properly plaintiff's disciplinary charge and his gross indifference during the investigation violated plaintiff's due process rights and amounted to cruel and unusual punishment. He contended that Sweeden should have inquired who owned the jeans where the marijuana was found. Plaintiff sought monetary damages and an order expunging the misconduct from his record.

In May 1993, defendant moved to dismiss plaintiff's complaint under Fed. R. Civ. P. 12(b)(6) on the basis of the special report. Defendant argued there was enough evidence to support the finding that plaintiff and his cell-mate were guilty of possession of contraband in their cell; plaintiff had failed to establish an eighth amendment violation; and defendant was entitled to qualified immunity. In his response, plaintiff restated that defendant's failure to investigate properly amounted to reckless disregard for his constitutional rights.

In November 1993, the court treated defendant's motion to dismiss as one for summary judgment and granted the parties an opportunity to supplement their respective motion and response under Fed. R. Civ. P. 56.

In his supplemental response, plaintiff argued there was insufficient evidence to prove that he possessed the contraband "because there [was] no showing of corpus delicti" or that he "knowingly and willfully" shared the right to control the contraband. He further argued that the result of the drug test were not reliable and that the defendant should have examined the substance a second time to confirm that it was in fact marijuana. Plaintiff's response and supplemental response are not supported by affidavits or evidence, except for a copy of the result of the drug screening kit (previously submitted with the special report).¹

III. SUMMARY JUDGMENT STANDARDS

The court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those

¹The court denies plaintiff's attempt to amend his complaint by way of his supplemental response because his proposed amended complaint would not withstand a motion to dismiss. E.g., Foman v. Davis, 371 U.S. 178, 182 (1962) (futility of amendment is an adequate justification to refuse to grant leave to amend).

dispositive matters for which it carries the burden of proof." Id. Conclusory allegations are insufficient to establish a genuine issue of fact. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). Nor does the existence of an alleged factual dispute defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

The court may treat the Martinez report as an affidavit in support of the motion for summary judgment, but may not accept the factual findings of the report if the prisoner has presented conflicting evidence. See Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991). This process aids the court in determining possible legal bases for relief for unartfully drawn pro se prisoner complaints, and not to resolve material factual issues. Id. at 1109. The court must also construe the Plaintiff's pro se pleadings liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

IV. DISCUSSION

In considering defendant's motions for summary judgment, the court has examined the special report. Although plaintiff has responded to the motion, he has presented no evidence to refute the facts in defendant's motion and special report. Plaintiff's response merely contains conclusory allegations that the report is inadequate and erroneous, and does not controvert defendant's summary judgment evidence. Accordingly, because plaintiff has not presented conflicting evidence, the court accepts the factual findings of the report. See Hall, 935 F.2d at 1111.

A court's review of a prison disciplinary hearing, even when it results in a loss of good time and administrative segregation, is quite limited. Due process requires advance notice of the charges, the right to call witnesses and present evidence if doing so does not jeopardize institutional safety or correction goals, and a written statement of the evidence relied on and the reasons for the disciplinary action. Wolff v. McDonnell, 418 U.S. 539, 566 (1974). Once an inmate receives this due process, the Supreme Court has instructed in Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445, 454-55 (1985), that the findings of the prison disciplinary board need only be supported by "some evidence in the record."

Plaintiff does not dispute that he was provided the initial due process required by Wolff. He merely argues that the investigation was insufficient. The court will, thus, determine whether there was sufficient evidence to support the conclusion of the disciplinary board.

After carefully reviewing the special report and plaintiff's responses, the court concludes that "some evidence" existed to support the conclusion of the disciplinary board that plaintiff was guilty of possessing contraband. Plaintiff does not dispute that the contraband was found in a pair of jeans in his cell and that neither he nor his cell-mate claimed ownership of it at the time of the investigation. Plaintiff's contention that the investigator should have inquired who owned the jeans and conducted an alternative drug test lacks any merit. Nor is "a corpus delicti"

necessary to find plaintiff guilty of possessing contraband under the "Living Quarters" section of the inmate handbook. The "some evidence" standard does not require proof with certainty, proof beyond a reasonable doubt, or even proof by a preponderance of the evidence. All that is necessary is "any evidence in the record that could support the conclusion reached by the disciplinary board." Id. at 455-56.

Because the conclusion of the disciplinary board is supported by some evidence, the court rejects plaintiff's claim that the investigator's reckless disregard subjected plaintiff to cruel and unusual punishment.

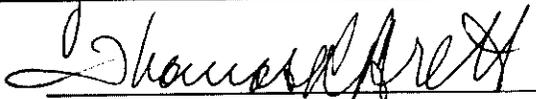
V. CONCLUSION

After viewing the evidence in the light most favorable to the plaintiff, the court concludes that the defendant has made an initial showing negating all disputed material facts, that plaintiff has failed to controvert defendant's summary judgment evidence, and that the defendant is entitled to judgment as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendant's motion for summary judgment [docket #5] is **granted**; and
- (2) Plaintiff's motion for summary judgment [docket #9] is **denied**.

DATED this 26th day of Jan, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

JAN 26 1994
FILED

JAN 26 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

FRANKLIN F. HOLLAND,)
Plaintiff,)
vs.)
DONNA E. SHALALA, M.D.,)
Secretary of Health & Human Services,)
Defendant.)

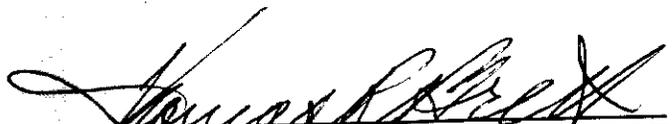
Case No. 93-C-414-B

ORDER OF DISMISSAL

NOW on this 26 day of Jan, 1994, before me, the undersigned, Plaintiff's *Motion to Dismiss Without Prejudice* comes on for hearing. The Court, having reviewed Plaintiff's *Motion* and based upon the presentations of counsel, FINDS that Plaintiff's *Motion to Dismiss Without Prejudice* should be:

GRANTED
(or)
DENIED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this action is hereby dismissed without prejudice.


UNITED STATES MAGISTRATE JUDGE
DISTRICT

15

ENTERED ON DOCKET
DATE JAN 26 1994

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

UGLY JOHNS CUSTOM BOATS, INC.,)
an Oklahoma corporation,)

Plaintiff,)

vs.)

EXCESS INSURANCE CO., LTD.;)
et al.)

Defendants.)

Case No. 92-C-11518

FILED

JAN 26 1994

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

ORDER OF DISMISSAL WITHOUT PREJUDICE

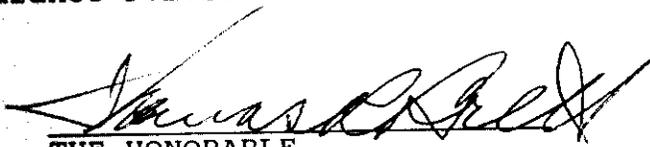
NOW on this 24 day of Jan, 1994, there

comes on for consideration, Plaintiff, Ugly John's Custom Boats, Inc., and the Defendants, Excess Insurance Company, Ltd., Ocean Marine Insurance Company Ltd., Prudential Assurance Company, Ltd., No. 2 A/C, Phoenix Assurance P.L.C. "L" A/C, Phoenix Assurance P.L.C. "A" A/C, Hansa Marine Insurance Co. (UK) Ltd. "T" A/C, Vesta (UK) Insurance Co. Ltd., Sovereign Marine & General Insurance Co. Ltd., The Tokio Marine & Fire Insurance Co. (UK) Ltd., Cornhill Insurance P.L.C., Allianz International Insurance Co. Ltd., Legal & General Assurance Society Ltd., No. 1 A/C, Minister Insurance Company Ltd., No. 3 A/C, Norwich Union Fire Insurance Society Ltd., No. 1 A/C, Anglo American Insurance Company P.D.C., Indemnity Marine Assurance Co. Ltd., Commercial Union Assurance Company PLC, Northern Assurance Co. Ltd., No. 6 A/C, The Prudential Assurance Co. Ltd., Trust A/C No. 2, The Threadneedle Insurance Co. Ltd., The Yorkshire Insurance Co. Ltd., Atlas Assurance Co Ltd., T A/C, London & Hull Maritime Insurance Co. Ltd., T A/C, Sirius (UK) Insurance PLC, Stipulation of Dismissal, under Rule 41, F.R.C.P.

104

Being fully advised of the premises herein, this Court hereby dismisses without prejudice the following Defendants.

1. Legal and General Assurance Society, Ltd. No. 1 A/C
2. Anglo American Insurance, Co., P.L.C. ✓
3. Indemnity Marine Assurance Co., Ltd. ✓
4. Commercial Union Assurance Co., P.L.C.
5. Northern Assurance Co., Ltd. No. 6 A/C
6. The Prudential Assurance Co., Ltd., Trust A/C No. 2
7. The Threadneedle Insurance Co., Ltd.
8. The Yorkshire Insurance Co., Ltd.
9. Atlas Assurance Co., Ltd., "T" A/C
10. Sirius (UK) Insurance P.L.C.



THE HONORABLE
JUDGE THOMAS R BRETT

FILED

JAN 26 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

FLOYD LAUDERDALE,
Plaintiff,
vs.
SWEEDEN, Captain,
Defendants.

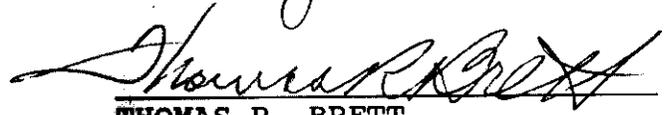
No. 93-C-160-B

ENTERED ON DOCKET
DATE JAN 26 1994

JUDGMENT

In accord with the Order granting Defendants' motions for summary judgment, the Court hereby enters judgment in favor of all Defendants and against the Plaintiff, Floyd Lauderdale. Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees.

SO ORDERED THIS 26th day of Jan, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

12

DATE 1-26-94

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

BENNY R. JENKINS,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, Donna Shalala, Secretary,)
)
Defendant.)

92-C-1083-B ✓

FILED

JAN 26 1994

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

ORDER

Now before the Court is Plaintiff **Benny R. Jenkins's** appeal of the Secretary's denial of Social Security benefits.¹ Mr. **Jenkins** raises the following issues on appeal: (1) Does substantial evidence support the Secretary's finding?; (2) Did the Administrative Law Judge ("ALJ") improperly rely on the "grids"? and (3) Did the ALJ properly question the vocational expert? For the reasons discussed below, the United States Magistrate Judge recommends the Secretary's decision be **affirmed**.

II. Legal Analysis

The major issue is whether substantial evidence supports the ALJ's finding that Mr. Jenkins could return to work.² Courts define substantial evidence as what "a reasonable

¹ The parameters of this Court's review is framed in 42 U.S.C. § 405(g) that states: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

² Other findings by the ALJ were: (1) The medical evidence established that Jenkins had severe neck pain and right arm limitations; (2) Jenkins' testimony was not fully credible and (3) Plaintiff's residual functional capacity for the full range of light work is reduced by a need to alternate between sitting and standing, only occasional reaching overhead or bending neck, numbness on the right side and right hand with occasional swelling.

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mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). The court will make a finding of "no substantial evidence" only where a conspicuous change in master **absence** of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).³ Below is a summary of the evidence in the record.

At the time of the hearing before the ALJ, Mr. Jenkins was 51 years old, had a high school education and had worked as a truck driver for 15 years. He applied for disability benefits after he injured both his right shoulder and arm while at work.⁴ Mr. Jenkins also contends that, in addition to the physical injuries, he suffers from depression.

Following the injury and prior to the hearing, claimant was examined by several doctors. In April of 1990, Dr. George Mauerman operated on Mr. Jenkins' shoulder, which improved his range of motion. A month later, Dr. Mauerman concluded that Mr. Jenkins had a 20 percent impairment rating and was "temporarily totally disabled." *Id. at 194*.

In May and June of 1990, Dr. Karl Detweiler examined Mr. Jenkins. Dr. Detweiler concluded that claimant did not need further surgery, but wrote that he had "markedly decreased elevation of the arm to approximately 40 degrees abduction." *Id. at 280*. Dr. Detweiler also indicated that Mr. Jenkins's strength and sensation was intact and symmetric. *Id.*

³ Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).

⁴ According to an October 8, 1990 medical report, Plaintiff's right shoulder and arm were jerked with a ratchet bar when he attempted to break a trailer away from his truck on December 7, 1989. *Record at 184*. Benefits were denied as of December 28, 1991 by the ALJ. The Appeals Council declined review in October, 1992.

On October 1, 1990, Dr. John Hallford examined Mr. Jenkins. Dr. Hallford found that Mr. Jenkins had a 20 percent permanent partial impairment. Dr. Hallford concluded that Mr. Jenkins's temporary total disability had ended and that he was capable of returning to work "with the common sense avoidance of heavy lifting and other strenuous...activities." *Id. at 310-311.*

On October 8, 1990, Dr. T. Jeffrey Emel, a treating physician who had examined claimant several times since January of 1990, wrote that Mr. Jenkins had a 28 percent permanent partial physical impairment that prevented him from returning to work as a truck driver. However, Dr. Emel stated that claimant should be retrained in other types of work. *Record at 184.*

On October 29, 1990, Dr. Griffith Miller examined Mr. Jenkins and found him to be 94 percent disabled. *Id. at 300.* Dr. Miller also concluded that he believed claimant had been "temporarily totally disabled from the time of the injury to today." *Id. at 299.* But Dr. Miller also indicated that Mr. Jenkins needed vocational rehabilitation. *Id.*

On January 25, 1991, Dr. Tom Russell examined Mr. Jenkins. Dr. Russell wrote that he "did not find any evidence that the patient would have any limitations in any work related activities" and that Mr. Jenkins did not "appear to have any mental impairment." *Id. at 289.*⁵

On March 18, 1991, Dr. Donald Inbody, a consultant for the Defendant, gave Mr. Jenkins a psychiatric evaluation. Dr. Inbody opined that Mr. Jenkins did not have any

⁵ On December 27, 1991, Dr. Kenneth Trinidad examined Jenkins. Dr. Trinidad concluded that Jenkins had a 29 percent permanent partial impairment. *Record at 22.* Trinidad's report took place after the ALJ's decision, but the Appeals Council reviewed the report. *Id. at 8.*

significant abnormalities and diagnosed him with an episode of severe major depression treatable with medication. Dr. Inbody also stated that Mr. Jenkins had a current global assessment of 40. *Id. at 313-317.*

On November 18, 1991, the ALJ held a hearing where Mr. Jenkins and a vocational expert testified. Mr. Jenkins testified that, at the time of the hearing, he had a job assembling instruments for a plane. *Id. at 47.* He said that he worked 40 hours a week, but indicated he has problems lifting tools over his head. Mr. Jenkins also testified that it is painful to lift his right arm to shoulder level, has neck pain and had difficulty using his right hand. *Id. at 49-51.* Mr. Jenkins also testified that he cannot lay on his right side, that he has problem with depression and he has thought about suicide. *Id. at 51-67.* The vocational expert testified that Mr. Jenkins could do light assembly work. *Id. at 69.*⁶

After a review of the foregoing, the Court finds that substantial evidence supports the ALJ's decision of no disability. First, none of the medical evidence states that Mr. Jenkins can no longer work. Second, while the doctors' opinion as to the percentage of Mr. Jenkins' disability varies, Drs. Emel, Hallford and Russell indicate that Jenkins can return to work. Third, the vocational expert testified that Jenkins could return to work. The evidence, while conflicting, is nonetheless substantial.

Mr. Jenkins obviously points to evidence in his favor, including parts of his testimony, a report by Dr. Miller and a report by Dr. Inbody. But neither that evidence or any other material in the record support a finding of no substantial evidence. *See, Trimiar,*

⁶ Jenkins argues that the ALJ's hypothetical question was improper and, as a result, the vocational expert's testimony cannot constitute substantial evidence to support the finding of no disability. *Harris v. Sullivan*, 945 F.2d 1482 (10th Cir. 1992). This argument is without merit as the ALJ's hypothetical questioning discussed the alleged impairments of Jenkins.

supra (A finding of no substantial evidence can take place only where a conspicuous absence of credible choices or no contrary medical evidence exists.)⁷

The final issue meriting discussion is Mt. Jenkins' claim that the ALJ improperly applied the "grids". That argument is also without merit. The ALJ did not rely on the grids. Instead, as noted on page 33 of the Record, the ALJ used the grids as a "framework" for his decision. This was proper.

III. Conclusion

Mr. Jenkins contends that he is **disabled** due to pain in his neck, right shoulder and depression. The ALJ found, however, that Mr. Jenkins could return to work and, as a result, is not disabled. After reviewing the record, the undersigned concludes that substantial evidence does support the ALJ's decision of no disability. The ALJ did not err. Consequently, the Court **AFFIRMS** the Secretary's decision.

SO ORDERED THIS 26th day of Jan, 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁷ Of particular importance is that the ALJ is entitled to make credibility determinations and weigh the evidence. More specifically, while Dr. Müller found Jenkins to have a 94 percent impairment, he also recommended vocational rehabilitation. At a minimum, this suggests that he believed Jenkins could work at another type of job. Dr. Inbody's examination of Jenkins found a global assessment of 40. While that fact certainly weighs in Jenkins' favor, Dr. Inbody also noted that medication could control the claimant's depression. Parts of Jenkins' testimony supports his disability claim, but it should be noted that the ALJ found such testimony to be not "fully credible." The undersigned is not considering the fact that Jenkins was working at the time of the hearing as evidence of no disability. See Walker v. Secretary of Health & Human Services, 943 F.2d 1257, 1260 (10th Cir. 1991) (Trial work period cannot be considered in determining eligibility for disability insurance benefits.)

ENTERED ON DOCKET

FILED

DATE 1-26-94

JAN 25 1994

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

PUBLIC SERVICE COMPANY OF OKLAHOMA,)
)
Plaintiff,)
)
v.)
)
HAMON OPERATING COMPANY,)
)
Defendant.)

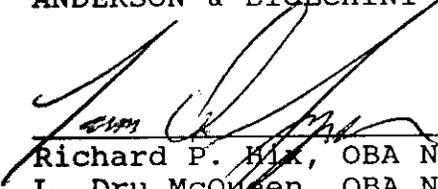
Case No. 92-C-394-B

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41, the parties hereby stipulate that Plaintiff's claims, and Defendant's counterclaims, are hereby dismissed with prejudice. The parties agree that they shall bear their own respective attorneys' fees and costs incurred in connection with this action.

DOERNER, STUART, SAUNDERS, DANIEL
ANDERSON & BIOLCHINI

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Attorneys for Hamon Operating Company

ENTERED ON DOCKET

DATE 1-26-94

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

FILED

JAN 25 1994

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

WAYNE F. BOWMAN,)
)
Plaintiff,)
)
v.)
)
LOUIS W. SULLIVAN, M.D.,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

92-C-212-E ✓

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of **this matter** was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.¹

¹ Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.² He found that plaintiff had the residual functional capacity prior to June 30, 1986 to perform the physical exertion requirements of work, except for those work activities over and above those required of medium level exertional activity. He found no nonexertional limitations. He found that plaintiff was unable to perform his past relevant work as a carpet layer as of that date. He found that, because plaintiff had the residual functional capacity to perform the full range of medium work, was 49 years old, which is defined as a younger individual, and had a ninth grade education, the issue of transferability of work skills was not material and that he was not disabled under the Social Security Act at any time through June 30, 1986, the date he last met the disability insured status requirements.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) That the ALJ's decision that plaintiff was not disabled and could perform a full range of medium work prior to June 30, 1986 is not supported by substantial evidence.
- (2) That the ALJ erred in mechanically relying on the grids when plaintiff was suffering nonexertional impairments, including pain.
- (3) That the ALJ should have called a vocational expert witness to testify as to occupations available that plaintiff could perform.

² The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

It is important to note that plaintiff alleged December 11, 1984 as the date of onset of his disability and that he last met the insured status requirements of the Social Security Act on June 30, 1986 (TR 22 and 93). Therefore, he must prove that his disability arose, if at all, prior to the expiration of his insured status on June 30, 1986. Flint v. Sullivan, 951 F.2d 264, 267 (10th Cir. 1991). The Secretary's decision is based only on the medical reports in the record which reflect plaintiff's mental and physical condition between December 11, 1984 and June 30 1986. Plaintiff was subsequently found disabled for purposes of Title XVI as of February 1, 1990 as the result of a brain tumor and its removal and his application for Supplemental Security Income benefits was allowed (TR 13).

The legal standard for determining disability under Title II of the Social Security Act is whether the plaintiff is unable to perform substantial gainful activity for a continuous period of not less than twelve consecutive months because of a medically determinable impairment. 42 U.S.C. § 423(d)(1)(A). A doctor's note suggests that plaintiff was laying carpet up until December 17, 1986 (TR 182) and plaintiff's sister-in-law reported to a psychiatrist that plaintiff had continued working until the day before brain surgery, which was performed in March 1990 after a single grand mal seizure episode on February 25, 1990 (TR 204-212, 246-247).

However, at the hearing on March 18, 1991, held after he had undergone the brain surgery, plaintiff testified coherently about the headaches and back pain he had suffered

since 1981. He went to the hospital because of the headaches in that year (TR 62) and was given pain medication, which did not end the pain (TR 63). The CAT scan performed on December 21, 1981 was normal and no lesions were observed (TR 267). He started stuttering in 1983 (TR 66). At that time he had headaches periodically, but by 1988 he had them almost every day (TR 49-50). Finally in 1990 he testified that he suffered a seizure and a brain tumor was discovered and removed (TR 50).

Plaintiff also testified that he had suffered chronic lower back pain since 1979. He had been seeing chiropractors for the pain (TR 50). He reported that he moved a piano in 1983 and after that he stepped off a little curb and could not move for three or four days because of the pain (TR 51). After that he had good days when he could lift "say 120 pounds, maybe more" and bad days when he "couldn't even hardly get out of bed." (TR 52). In an average week, he had "probably two" such bad days (TR 52).

With time, plaintiff had more bad days when it took an hour before he could "really get up and start just moving around now and then." (TR 53). He took Tegretol, Zantac, Tylenol IV, and Tylenol for the pain (TR 53-54). He took Tylenol IV for ten years or more (TR 54). In the early 1980s, he took regular aspirin and had to stop taking it because it caused stomach problems (TR 54). Dilanta and Percodan were prescribed, but the Percodan made him so sick he stopped taking it (TR 54-55).

Plaintiff testified that on a typical day he will "just loaf around" or go "riding around or something". (TR 55). He spends most of his days watching television, going to neighbors', or riding around with his son when he measures jobs or sells carpet (TR 56). He stated that he did not work the day before he was taken to the hospital because of his

seizure, as his sister-in-law reported (TR 66-67). He explained that the hospital report showing he was "employed by Miller Brothers" in 1990 was not correct, but he was merely going to Miller Brothers "a good part of the day" at that time to be with a woman he was dating who worked there (TR 67-68). He was trying to advise her about selling carpet, was there only two weeks, and received no pay (TR 68). He testified that he was unable to work before June 30, 1986, because he "had these different parts of [his] spine that was messed up and [his] leg was -- when [he]'d get down it would go, get numb ... [his] legs would where [he] couldn't get back up." (TR 69)

The medical records of his hospitalization on September 18, 1979 showed that plaintiff suffered "multiple ligations of bleeding points of the stomach caused by severe gastritis induced by aspirin." (TR 278). He sustained a vagotomy, pyloroplasty, and a gastrotomy with suture ligation of multiple bleeding sites (TR 278-291). He told the doctors he had been taking four to six aspirins a day for chronic lower back pain for several years (TR 278-279, 290, 293, 297). Because of his history of pain, lumbosacral spine x-rays were obtained, which revealed degenerative changes and questionable narrowing of the L4-5 disc space (TR 290-291 and 309). The doctor concluded that his back pain was due to his chronic degenerative disc disease and he was placed in a program of exercises and Tylenol #3, Tagemet, and antacids were prescribed (TR 291). The doctor found it significant "that the patient is a chronic aspirin user, taking two to three tablets a day for low back pain" (TR 295).

The records of plaintiff's visits with Dr. Frederick Northrop show that he reported back pain on June 19, 1973, November 8, 1974, October 20, 1976, and December 13,

1985 (TR 175). He was given medication for the pain. On January 13, 1986, he reported he was suffering back pain and his leg was numb (TR 178). There are no objective medical tests relating to his back complaints in the record covering the period of December 11, 1984 to June 30, 1986.

Dr. Donald R. Inbody reported on July 23, 1990 that plaintiff had told him he had not worked for four or five years (TR 246-247). Claimant reported on March 13, 1991, that he had been taking Tylenol #4 for back and leg pain since 1980 and aspirin for headaches every day (TR 311). The doctor had told him to stop taking the Tylenol, because he would become addicted to it (TR 311).

When plaintiff filed for disability benefits, he listed as impairments status post removal of a brain tumor, back and leg pain, a seizure disorder, and headaches (TR 104). In February of 1990, hospital records show a cerebral arteriogram was done and revealed the presence of a meningioma (TR 204). Plaintiff underwent surgical removal of the tumor the next month (TR 206-218). Later in March 1990, plaintiff suffered a pulmonary infarction and pulmonary embolism (TR 222-227). In July 1990, his doctor stated that he was incapable of handling his own funds due to organic brain syndrome (secondary to brain surgery) (TR 248). This evidence was relied on to find a disability onset date for plaintiff's February 1990 Supplemental Security Income benefits claim (TR 31).

Records from Springer Clinic dated September 22, 1986, stated that plaintiff reported "life long" trouble with his back and thigh and right foot numbness the last six months (TR 185). He also described episodes of back spasms and aching (TR 185). The records show that the following was reported: "LUMBAR SPINE: The vertebral body

height appears maintained. There are degenerative osteophytes at multiple levels. There is disc space narrowing at L4-5 and L5-S1 with apparent gas-containing disc at L4-5. No other abnormalities are detected. IMPRESSION: Degenerative disc disease at L4-5 and L5-S1." (TR 184). On December 17, 1986, the doctor at Springer Clinic reported that plaintiff was still suffering pain, especially at night, and spasms in his calf, but that he was "still laying carpet". (TR 182). However, the ALJ reviewed plaintiff's earnings record and found no earnings shown for the years after 1984 (TR 15). The ALJ found this conflict troubling, but concluded that plaintiff had not engaged in substantial gainful activity after 1984 (TR 15).

An EMG was performed at Springer Clinic on October 6, 1986, and evidence was found of "acute denervation in the right anterior tibial muscle innervated L4, 5 and chronic denervation/reinnervation in the right gastric nemius muscle L5, S1. Motor nerve conduction studies and distal latencies are normal." (TR 183). A CAT scan was also done on October 6, 1986, and the findings were as follows:

- 1) There is felt to be a focal right lateral disc herniation at L5-S1 which appears to be impinging on the S1 root.
- 2) There is a degenerative disc at L4-5 with narrowing and vacuum phenomenon. No definite herniation is noted.
- 3) The 3-4 level is not remarkable.
- 4) Spinal canal and neural foramina appear of adequate dimensions. IMPRESSION: Degenerative L4-5 disc. Focal herniation at L5-S1 on the right. (TR 184).

Listing 1.05(C) of the Listing of Impairments³ requires that to show a disabling

³ Listing 1.05 of the Listing of Impairments pertains to "Disorders of the Spine." Section A pertains to arthritis, Section B to osteoporosis, and Section C describes the following:

C. Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

disorder of the spine there must be pain, muscle spasm, and significant limitation of spinal motion, together with radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss. Plaintiff did not meet this listing prior to June 30, 1986.

However, there is substantial evidence to support plaintiff's claim that he suffers disabling pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, No. 92-7090 (10th Cir. Mar. 3, 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the

-
1. Pain, muscle spasm, and significant limitation of motion in the spine; and
 2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a back problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423 (d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

If the ALJ finds that a claimant's pain is not disabling, he must also demonstrate that sufficient jobs exist in the national economy that the claimant may perform given the level of pain he suffers. Hargis, 945 F.2d at 1490.

There is not substantial evidence in the record to support the conclusion of the ALJ

that plaintiff did not suffer disabling pain prior to June 30, 1986. There is no evidence that plaintiff could work, with or without prescription medication -- the doctors simply do not say. He claims he could not do so **after stepping** off a curb caused intense back pain in 1983. Certainly there is ample evidence in the record that he suffered constant back pain for years and still managed to work; **while** no medical evidence directly confirms that the pain became so severe in 1983 that he could no longer endure it when he worked, there is no reason to doubt his testimony. No medical evidence refutes his claim. He took large amounts of pain relievers with **adverse** consequences and eventually curtailed his daily activities significantly. A loose **nexus** between his degenerative disc disease and his pain has been shown. Additionally, the ALJ failed to demonstrate what jobs plaintiff could perform given his pain.

There is merit to plaintiff's claim that the ALJ erred in mechanically relying on the grids. Use of the Medical-Vocational Guidelines ("the grids"), 20 C.F.R. § 404, Subpt. P, App. 2, is predicated on an impairment that limits the physical strength or exertional capacity of a claimant. Talbot v. Heckler, 814 F.2d at 1460. The grids "help evaluate whether there exist sufficient jobs that can be performed given the claimant's age, education, and physical limitations." Hargis, 945 F.2d at 1490. "[T]he grids are a shortcut that eliminate the need for calling in vocational experts." Trimiar v. Sullivan, 966 F.2d 1326, 1332 (10th Cir. 1992) (citing Bohr v. Bowen, 849 F.2d 219, 221 (6th Cir. 1988)).

The Social Security Regulations **note**, however, that certain mental, sensory, or skill impairments, environmental restrictions, or postural and manipulative restrictions may be independent from exertional limitations. Id. at 515-16. "[W]here nonexertional

impairments are also present, the grids **alone** cannot be used to determine the claimant's ability to perform alternative work." Campbell v. Bowen, 822 F.2d 1518, 1523 n.2 (10th Cir. 1987) (citation omitted). Such **nonexertional** impairments were present, and the ALJ erred in failing to call a vocational **expert witness** to testify as to what types of jobs exist in the national economy that plaintiff **could perform**. However, at this point this would be futile, since plaintiff has undergone **brain surgery**, and he has been found disabled as a result.

There is not substantial evidence for the ALJ's decision that plaintiff had the residual functional capacity to perform the full **range** of medium work prior to June 30, 1986 and had no nonexertional limitations. The **Secretary's** decision that plaintiff was not disabled during the relevant time period of December 11, 1984 to June 30, 1986 is not supported by substantial evidence and is not a **correct application** of the pertinent regulations. The Secretary's decision is reversed and the **Secretary** is ordered to compute and pay benefits accordingly.

Dated this 25th day of January, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
DATE JAN 26 1994

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

JOSEPH W. CATHCART,
Plaintiff,
vs.
MARGARET STRIPLING, et al.,
Defendants.

No. 93-C-13-B

FILED

JAN 26 1994

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

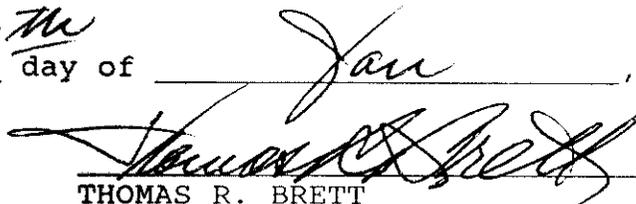
ORDER

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

IT IS HEREBY ORDERED that:

- (1) Plaintiff's motion to dismiss without prejudice [docket #14] is granted;
- (2) Defendants' motion for summary judgment [docket #6] is deemed moot;
- (3) The Clerk shall **dismiss** without prejudice the above captioned case.

SO ORDERED THIS 24th day of Jan, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

15

ENTERED ON DOCKET
DATE JAN 26 1994

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

FILED

JAN 26 1994

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

EVERETT S. WILLIAMS, JR., an
individual, and as TRUSTEE of the
EVERETT S. WILLIAMS, JR. FAMILY
TRUSTS, and WILLIAMS MANAGEMENT
SERVICE, INC., an Oklahoma
corporation,

Plaintiffs,

v.

ROYCE WILLIE, an individual,

Defendant.

Case No. 93-C-978-B

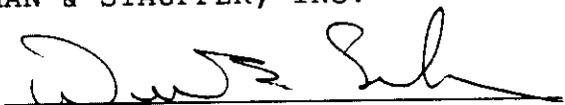
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs Everett S. Williams, Jr., an individual, and as Trustee of the Everett S. Williams, Jr. Family Trusts, and Williams Management Service, Inc., an Oklahoma corporation, and the Defendant, Royce Willie, an individual, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure hereby file this Stipulation of Dismissal With Prejudice of the above-styled case. The parties hereby stipulate that the matter has been resolved and is to be dismissed with prejudice.

Respectfully submitted,

SELMAN & STAUFFER, INC.

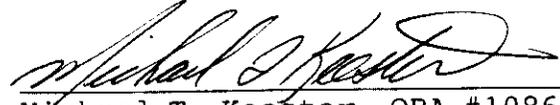
By:



William B. Selman, OBA #8072
700 Petroleum Club Building
601 South Boulder
Tulsa, Oklahoma 74119
(918) 592-7000

ATTORNEYS FOR PLAINTIFFS,
EVERETT S. WILLIAMS, JR.,
INDIVIDUALLY AND AS TRUSTEE OF THE
EVERETT S. WILLIAMS, JR. FAMILY
TRUSTS, AND WILLIAMS MANAGEMENT
SERVICE, INC.

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

By: 

Michael T. Keester, OBA #10869
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-4580

ATTORNEYS FOR DEFENDANT
ROYCE WILLIE

owned or jointly owned.)

none. Husband lost his job
with American Airlines our home is
currently in the process of foreclosure.

Signed Monica J. Robinson
(Complainant)

Subscribed and sworn to before me this 18 day of 1994

FILED

Notary Public

My Commission Expires:

JAN 25 1994

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

94-C-48-B *ML*

In reliance upon the representations and information set forth in the above affidavit, it is Ordered that:

- The movant herein is permitted to file and maintain this action to conclusion without prepayment of fees or costs.
- The movant herein is permitted to file this action without prepayment of fees or costs, however any further proceedings in this matter must be specifically authorized in advance by the Court.
- This motion for leave to proceed IN FORMA PAUPERIS is denied.

Thomas R. [Signature]
UNITED STATES DISTRICT JUDGE

1-24-94
(Date)

ENTERED ON BOOKET
DATE JAN 25 1994

ENTERED ON DOCKET
DATE JAN 25 1994

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

WILLIAM ALLEN JORDAN,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF COLLINSVILLE, OKLAHOMA,)
 a municipal corporation,)
)
 Defendant.)

Case No. 93-C-1051-B ✓

FILED

JAN 24 1994

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

O R D E R

Before the Court for decision is Defendant's Partial Motion to Dismiss (Docket #4) seeking dismissal of Counts I and IV of the Plaintiff's Complaint for failure to timely file a tort claim notice, pursuant to the Oklahoma Governmental Tort Claims Act, Okla. Stat. tit. 51, § 156 (1988).

The Plaintiff, William Allen Jordan, filed a notice of his tort claim with the City Clerk, Fern Young, on September 22, 1993. On November 9, 1993, the Plaintiff filed a Petition with the District Court of Tulsa County, State of Oklahoma, against the Defendant, the City of Collinsville, Oklahoma, alleging that: 1) the Defendant violated Oklahoma public policy when it wrongfully terminated Plaintiff in retaliation for Plaintiff's refusal to violate state law (Count I); 2) Defendant violated Plaintiff's constitutional rights of due process and equal protection (Count II); 3) Defendant deprived Plaintiff of his employment in violation of 42 U.S.C. § 1983 (Count III); and 4) Defendant violated Oklahoma public policy by terminating Plaintiff following a meeting held in

violation of Oklahoma law (Count IV). On November 26, 1993, Defendant removed the action to this Court and filed an Answer and the Partial Motion to Dismiss, which is now before the Court.

Pursuant to Local Rule 7.1 (C), response briefs shall be filed within fifteen (15) days after the filing of a Motion. The failure to respond to a Motion authorizes the Court, in its discretion, to deem the matter confessed, and enter the relief requested. In the instant case, the Defendant filed a Partial Motion to Dismiss on November 26, 1993. The Plaintiff failed to respond to the Defendant's Motion within the fifteen (15) days allowed, and indeed, has not yet filed a response. The Court concludes Plaintiff has waived any objection to Defendant's motion, and the matters asserted therein are deemed confessed.

Defendant asserts Counts I and IV of Plaintiff's complaint should be dismissed for failure to timely file his wrongful discharge tort claim. Under the Oklahoma Governmental Tort Claims Act, Okla. Stat. tit. 51 § 156 (1988), claims against the state or a political subdivision (including municipalities) are to be presented within ninety (90) days of the date of loss. In the event such a claim is brought after this ninety (90) day period, but within one year of the date of loss, any judgment from the claim shall be reduced by ten percent (10%). However, a claim will be forever barred if notice is not given to the state or political subdivision within one year of the date of loss. The Plaintiff, William Jordan, was terminated from the City of Collinsville Police Department on September 15, 1992. However, he did not notify the

City of his wrongful discharge claim until September 22, 1993, more than one year after his termination. Pursuant to § 156, Plaintiff's claims are therefore forever barred.

For the reasons stated herein, the Court concludes that the Defendant's Partial Motion to Dismiss (Docket #4) should be and is hereby GRANTED and Counts I and IV of the Plaintiff's Petition are hereby DISMISSED.

IT IS SO ORDERED THIS 24th DAY OF January, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE JAN 25 1994

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

FILED

SUZAN ROHRBAUGH, BARBARA ANN
CLAY, and DEBRA MAE AMBLER,
Individually and as the Personal
Representatives of the Estate of
Dorothy Mae Palmer,

Plaintiffs,

vs.

OWENS-CORNING FIBERGLAS, INC.,
and CELOTEX CORPORATION,

Defendants.

JAN 25 1994

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

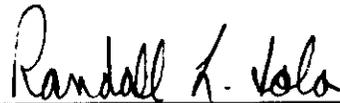
No. 88-C-90-B

STIPULATION OF
DISMISSAL WITHOUT PREJUDICE
AGAINST CELOTEX CORPORATION

COME NOW the Plaintiffs, Suzan Rohrbaugh, Barbara Ann Clay, and Debra Mae Ambler, individually and as the Personal Representatives of the Estate of Dorothy mae Palmer, pursuant to Fed. R. Civ. P. 41(a)(1) and hereby dismiss without prejudice Defendant, Celotex Corporation, only.

Respectfully submitted,

UNGERMAN & IOLA



Randall L. Iola OBA #13,085
1323 E. 71st St., Suite 300
P. O. Box 701917
Tulsa, OK 74170-1917
(918) 495-0550
ATTORNEYS FOR PLAINTIFF



Kevin T. Gassaway OBA #3281
P. O. Box 52052
Tulsa, Oklahoma 74152
(918) 583-2052
ATTORNEY FOR DEFENDANT,
CELOTEX CORPORATION

CERTIFICATE OF MAILING

The undersigned hereby certifies that a full, true and correct copy of the within and foregoing Stipulation of Dismissal Without Prejudice Against Celotex Corporation was mailed this 25th day of January, 1994, with proper postage fully prepaid thereon to:

Scott M. Rhodes, Esquire
Pierce, Couch, Hendrickson,
Baysinger & Green
1109 North Francis
P. O. Box 26350
Oklahoma City, OK 73126
ATTORNEY FOR OWENS-CORNING FIBERGLAS
CORPORATION



Randall L. Iola

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

ATLANTIC RICHFIELD COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN AIRLINES, INC.,)
 et al.,)
)
 Defendants.)
)
 AND CONSOLIDATED ACTIONS.)
)

No. 89-C-868-B ✓
~~89-C-869-B~~
 90 ~~89-C-859-B~~

FILED
 JAN 24 1994
 Richard M. Lawrence, Clerk
 U. S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

In accord with the Findings of Fact and Conclusions of Law filed this date, the Court hereby enters judgment as follows:

1) Judgment is entered in favor of Defendants, Container Products, Inc. and Container Products of Oklahoma and against Plaintiff Atlantic Richfield Company on each of Plaintiff's claims.

2) Judgment is entered in favor of Plaintiff Atlantic Richfield Company and against Defendants Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation and Phillips Petroleum Company in the amount of \$0.00 on its claims under 42 U.S.C. §9607 and §9613(f).

3) Defendants Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply,

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Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation and Phillips Petroleum Company are adjudged jointly and severally liable to Plaintiff Atlantic Richfield Company pursuant to 42 U.S.C. §§ 9607 and 9613(g) for the necessary response costs related to the Glenn Wynn Site incurred by ARCO, after exhausting the \$800,488.33 overage, which are consistent with the National Contingency Plan, less 10% of such costs, as ARCO's allocable share.

4) Defendants Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation and Phillips Petroleum Company are adjudged severally liable (according to the percentages set out herein) to Plaintiff Atlantic Richfield Company by way of contribution pursuant to 42 U.S.C. § 9613(f) for the costs which ARCO may be required to pay in the future, after exhausting the \$800,488.33 overage, to the United States or any other party, in connection with the Glenn Wynn Site, less 10% of such costs, as ARCO's allocable share.

5) Defendants Baker Hughes Incorporated, Borg-Warner

Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation and Phillips Petroleum Company are each adjudged severally liable to one another by way of contribution, pursuant to 42 U.S.C. § 9613(f), for the costs any defendant may be required to pay in the future, to ARCO, the United States or any other party, in connection with the Glenn Wynn Site and ROD I and/or ROD II, in excess of that defendant's allocable share of the Defendants' 90% allocation, as set forth below:

<u>Defendant</u>	<u>Percentage of Group I's 90% Allocation</u>
Baker-Hughes, Inc.	1.96
Borg Warner	10.06
Burgess-Norton Mfg. Co.	2.68
Chief Chemical & Supply, Inc.	1.00
Crane Carrier Corporation	3.86
Dover Corporation	19.24
Groendyke Transport, Inc.	3.27
Jerry Inman Trucking, Inc.	.23
Kansas Ind. Environ. Serv.	1.21
McDonnell Douglas	6.13
MK&O Coach Lines	1.45
Paccar, Inc.	5.48
Phillips Petroleum Co.	13.52
Ramsey Winch	3.23
Ryder Truck Rental, Inc.	2.23
Uniroyal/Goodrich Tire Co.	5.78
Webco/Southwest Tube	6.92
Whirlpool Corporation	<u>11.75</u>
Total	100.00%

6) Plaintiff Atlantic Richfield Company shall not recover any costs against the Defendants until the existing overage of

\$800,488.33 is exhausted through paying necessary costs already incurred but not yet paid, and/or through paying future necessary remediation costs not yet incurred pursuant to ROD I and/or ROD II.

7) Defendants Phillips Petroleum Company, Kansas Industrial Environmental Services, Inc., Whirlpool Corporation and The Uniroyal Goodrich Tire Company, are entitled to a credit for the past remediation costs incurred by such defendants in excess of their respective allocation of responsibility against any future payments due by said Defendants as follows:

	<u>Amount of Credit</u>
Phillips Petroleum	\$319,473.97
Kansas Industrial Environmental Services, Inc.	\$193,371.99
Whirlpool Corporation	\$ 33,534.37
Uniroyal/Goodrich	\$ 4,390.10

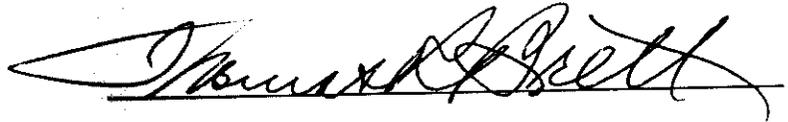
Any future payments due by these defendants (up to the credit amount) shall be paid by the Plaintiff and the remaining 17 defendants according to their respective shares or responsibility, as set forth herein.

8) Costs are assessed against Defendants Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation and Phillips Petroleum Company and in favor of Plaintiff Atlantic Richfield, less its 10%

share of liability, if timely applied for pursuant to Local Rule 54 (Costs do not include litigation attorneys' fees as per the Court's Order of August 3, 1993).

9) The Defendants' Fed.R.Civ.P. 68 offer of judgment of August 1993 and application for fees, costs, and expenses pursuant thereto, is hereby DENIED.

DATED this 24th day of January, 1994.

A handwritten signature in black ink, 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

ATLANTIC RICHFIELD COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN AIRLINES, INC., et al.,)
)
 Defendants.)
)
 AND CONSOLIDATED ACTIONS.)
)

Case No. 89-C-868-B ✓
89-C-869-B
90 ~~89~~-C-859-B

FILED
JAN 24 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") case brought pursuant to 42 U.S.C. § 9601 et seq., was tried to the Court without a jury on December 7, 8, 9, 13 and 14, 1993, with the Plaintiff and all remaining Defendants present at trial. The issues for trial are as follows:

- (1) Whether Defendants Phillips Petroleum Company ("Phillips") and Container Products, Inc. ("CPI") and Container Products of Oklahoma ("CPO") are liable parties pursuant to CERCLA at the Glenn Wynn portion of the Sand Springs Petrochemical Complex Superfund Site ("Site");
- (2) The amount of money Atlantic Richfield Company ("ARCO") is entitled to recover from the Defendants as appropriate response costs consistent with the National Contingency Plan ("NCP") at the Glenn Wynn portion of the Site;
- (3) The proper allocation of the amounts ARCO has, through

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settlements, recovered (or will recover) in excess of the total amount this court determines constitutes ARCO's reimbursement for appropriate costs of response incurred consistent with the NCP;

- (4) The share of future liability for ROD II at the Glenn Wynn portion of the Site to be born by ARCO;
- (5) The share of future liability for ROD II at the Glenn Wynn portion of the Site to be borne by each remaining Defendant;¹
- (6) Whether the Group I Defendants (all remaining Defendants less CPI and CPO) are entitled to an award of costs pursuant to Fed.R.Civ.P. 68.

After review of the evidence, arguments of counsel, and the applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law pursuant to Fed.R.Civ.P. 52:

FINDINGS OF FACT

Introduction

1. These consolidated actions, Atlantic Richfield Co. v. American Airlines, Inc., et al., Nos. 89-C-868-B; 89-C-869-B; and 90-C-859-B, were brought by Atlantic Richfield Company ("ARCO") against numerous Defendants, who have been divided into Defendant Groups I through V, arising out of the remediation of hazardous

¹Any future potential claim for Rod III, IV, etc., is not covered by this order because of the uncertainty concerning the nature of the claim, cause, contributor(s), etc. In a previously approved settlement, the Sand Springs Home agreed to pay 6.19% of any future liability for ROD III, IV, etc.

substances at the Sand Springs Petrochemical Complex ("Sand Springs Site" or "Site"). Pursuant to Amended Joint Pre-Trial Order filed on November 5, 1993, ARCO now makes claims for reimbursement of its response costs under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, for contribution under CERCLA § 113 (f), 42 U.S.C. § 9613 (f), requests entry of a judgment declaring the Defendants liable for future response costs, and requests entry of a judgment declaring the parties liable for future contribution, all other claims having been voluntarily dismissed. (Amended Joint Pre-Trial Order at 26-27.)

2. The Court hereby incorporates by reference the Findings of Fact set forth in this Court's Findings of Fact and Conclusions of Law and Order (Docket No. 914, filed August 23, 1993) (hereafter "Home Findings"), and the Findings of Fact set forth in this Court's Order (Docket No. 1084, filed October 1, 1993). For ease of reference, the Court reiterates in the following paragraphs some of the facts previously found by this Court that are relevant to the present Judgment. In addition to the facts so reiterated, this Court's prior findings are fully incorporated herein by this reference.

Background

3. In 1930, Sinclair Refining Company ("Sinclair") acquired a refinery located on a portion of the Site. Sinclair operated the refinery until 1948 when a portion of the refinery was closed, and later dismantled. All remaining refinery operations on the Site

were shut down in 1952. (Home Findings, Finding No. 2 at p. 3.)

4. On or about September 21, 1953, the Sand Springs Home ("Home") acquired in excess of 100 acres of the Site from Sinclair. (Home Findings, Finding No. 3 at p. 3.)

5. Sinclair retained approximately 38 acres of the Site, which Plaintiff Atlantic Richfield Company ("ARCO") acquired in its 1969 merger with Sinclair. (Home Findings, Finding No. 4 at p. 3.)

6. Beginning in 1964 and continuing into the early 1980's, the Home leased a portion of the Site (known as the "Glenn Wynn Site," which is an approximately 6.2 acre tract located south and east of the intersection of Adams Road and Morrow Road in Sand Springs), to Defendant Vacuum & Pressure Tank Truck Services, Inc. ("V&P") and Recyclon Corporation. (Home Findings, Finding No. 5 at p. 3.)

7. Deliveries of materials to the Glenn Wynn Site terminated approximately mid-1982. (Home Findings, Finding No. 5 at p. 4.)

8. In 1986, the EPA identified the Site as a Superfund site containing hazardous substances, as defined in Section 101(14) of the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"), 42 U.S.C. § 101(14), including petroleum wastes, acids and acid sludge, heavy metals, solvents, chlorinated hydrocarbons, and other chemicals, and the EPA placed the Site on the National Priorities List. (Home Findings, Finding No. 6 at p.p. 4-5.)

9. The EPA divided the response action for the Site into two operable units: the Source Control Operable Unit ("SCOU"), which

includes all surface liquids, sludges, and heavily-contaminated soils; and the Main Site (Groundwater) Operable Unit ("MSOU"), which includes minimally-contaminated soil and groundwater. (Home Findings, Finding No. 7 at p. 5.)

10. In 1986, the EPA entered into a cooperative agreement with the Oklahoma State Department of Health ("OSDH") to conduct a Remedial Investigation and Feasibility Study ("RI/FS"). (Home Findings, Finding No. 8 at p. 5.)

11. On September 29, 1987, the EPA issued a Record of Decision pertaining to the SCOU ("ROD I"). ROD I mandated a remedy calling for excavation and off-site thermal destruction of sludges from the Glenn Wynn Site, and stabilization/solidification of all remaining sludges, with containment of the solidified material in a hazardous waste cell. In the ROD, EPA required that the stabilization/solidification remedy be demonstrated to meet EPA criteria, and in the event such a demonstration was not made, an on-site incineration remedy of the non-Glenn Wynn wastes was required. (Home Findings, Finding of Fact no. 15 at p. 7.)

12. In 1987 and 1988, ARCO and EPA negotiated a Consent Decree by which ARCO agreed to implement the entire SCOU remedy set forth in ROD I. ARCO also agreed to pay for past costs which EPA incurred in response to Site contamination. ARCO further agreed to pay for EPA's future oversight of the remedy's implementation. (Home Findings, Findings of Fact No. 17 at p. 7.)

13. The Consent Decree was filed in May 1989, and entered by this Court on October 10, 1990, United States v. Atlantic Richfield

Co., No. 89-C-447-B (N.D. Okla. 1990). (Home Findings, Finding of Fact No. 18 at pp. 7-8.)

14. Pursuant to the Consent Decree, ARCO has remediated the Glenn Wynn Site, which consists largely of the Glenn Wynn lagoons. ARCO has submitted a final construction report containing data related to the Glenn Wynn Site remediation. (Home Findings, Finding of Fact No. 19 at p. 8.)

15. A letter from the EPA to ARCO, dated June 30, 1993, stated as follows:

The Environmental Protection Agency (EPA) and the Oklahoma State Department of Health (OSDH) have reviewed the Glenn Wynn confirmation results and acknowledge that ARCO has remediated the Glenn Wynn lagoons as specified in the Sand Springs Source Control Record of Decision (ROD) and Section 6.1 of the Consent Decree Statement of Work (SOW);

It is EPA's position at this time that an unacceptable direct contact risk to human health does not exist due to the Glenn Wynn lagoons and further remediation in the Glenn Wynn lagoons is not necessary.

(Home Findings, Finding of Fact No. 21 at p. 8.)

16. ARCO's response actions in remediating the Glenn Wynn Site have been carried out in compliance with the Consent Decree, except as disallowed herein. Therefore, ARCO's response actions in remediating the Glenn Wynn Site were basically consistent with the National Contingency Plan. (Docket No. 1084 at 7.)

Findings Pertaining to Liability of Group I Defendants, including Phillips, and Liability of Container Products, Inc. and Container Products of Oklahoma

17. As found in this Court's Order, filed as Docket No. 1084 on October 1, 1993, the Glenn Wynn Site is a "facility" within the meaning of 42 U.S.C. § 9601(9). (Docket No. 1084 at 4.)

18. A "release" of "hazardous substances" within the meaning of 42 U.S.C. §§ 9601(14) and 9601(22) has occurred from the facility at the Glenn Wynn Site. (Docket No. 1084 at 4-5.)

19. The following Defendants are liable to ARCO for past and future necessary response costs incurred by ARCO related to the Glenn Wynn Site, less any share of response costs attributable to ARCO: Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., and Whirlpool Corporation. (Docket No. 1084 at 10; Judgment at 2; Docket No. 1085, entered October 5, 1993.)

20. Defendant Phillips Petroleum Company ("Phillips") has stipulated to all the elements necessary to establish liability to ARCO under CERCLA (Stipulation between Atlantic Richfield Company and Phillips Petroleum Company (Docket No. 794, filed June 8, 1993)).

21. Phillips and ARCO have stipulated that Phillips sent the following gallons of waste to the Site:

493,010	Primarily from the Phillips Research Center (Docket No. 794)
<u>+ 25,000</u>	Waste Oil from Phillips Operated Service Stations (Docket No. 1218)
518,010	Total gallons generated by Phillips

- 65,124

Incinerated by Phillips (Docket No. 1203)

452,886

Total

All of the residue in the tank designated tank number one came from Phillips (Tr. 438:21-439:3). However, Phillips waste was not put solely into that tank. The material from the research center was put first into a holding tank or dump pan (Tr. 439:4-18; Exhibit 1834, ¶ 4). On occasion, waste in tank number one would also overflow into tank number two (Tr. 446:6-8). There is no evidence that this second tank was dedicated solely to Phillips.

22. Phillips has stipulated that Vacuum & Pressure Tank Truck Service (V&P) picked up 25,000 gallons of waste oil from Phillips' operated service stations. It is undisputed that this waste oil was not segregated, but was mixed with the other waste oil picked up or present on the Site (Tr. 440:14-441:9, 460:21-461:5).

23. Phillips' waste like that of the other Defendants, was being picked up with the intention of being ultimately sold as fuel (Tr. 445:7-16). Evidence established that materials were spilled at the Site when connecting and disconnecting hoses to the tanks (Tr. 445:3-6), and also that during the time waste was stored in the "Phillips tank," material around this and other storage tanks was allowed to flow into the unlined lagoons (Tr. 447:7-15).

24. ARCO has shown that Phillips sent hazardous substance to the Site, and that a release of the same type of substances occurred at the Site, causing ARCO to incur response costs. The evidence indicates that during the time V&P picked up waste from the research center, employees at the center were using various

solvents, including trichloroethylene, acetone, hexane, toluene, benzene and heptane (Tr. 311:8-11, 318:23-319:2, 320:15-321:6). V&P picked up hydrocarbon-based waste, including solvents (Tr. 419:25-420:9; 410:25-421:1). Evidence reflected that V&P did not knowingly pick up chlorinated solvents from Phillips, and that Phillips had been requested to segregate hydrocarbon materials from chlorinated and sulfonated waste, but Phillips was not diligent in doing so (Tr. 441:20-442:1; 443:16-19). Except in the beginning, V&P did not sample Phillips' waste (Tr. 441:18-442:14).

25. Phillips has failed to prove that its waste was entirely divisible or removed. Although Phillips incinerated 65,127 gallons of Research Center waste, Phillips has not accounted for the remaining 427,886 gallons. Moreover, except for V&P's collection of the residue of Phillips' waste into one tank, V&P treated the Phillips waste like the other waste received from all the other generators. Thus, as to the handling and sale of the waste, Phillips is no different than all the other Group I Defendants. However, since Phillips expended \$363,733.00 in removing from the Glenn Wynn Site 65,127 gallons of waste, Phillips is entitled to credit against future Rod II charges in said amount. Credit is also due to the following Defendants in the amount specified for necessary cleanup costs previously paid:

Kansas Industrial Environmental Services, Inc.	\$195,501.00
Whirlpool Corporation	\$ 37,500.00
Uniroyal/Goodrich	\$ 4,631.00

26. Defendant Phillips Petroleum Company is jointly and severally liable under 42 U.S.C. §§ 9607 and 9613(g) for the

necessary response costs which ARCO has incurred or will incur in the future related to the Glenn Wynn Site that are consistent with the National Contingency Plan, less any portion of such costs attributable to ARCO.

27. Defendants Container Products, Inc. ("CPI") and Container Products of Oklahoma ("CPO") have stipulated that Drum Services, Inc., and its successor, Great Lakes Container Corporation ("GLCC"), were generators under CERCLA. (Pre-Trial Order, Ex. A ¶ 13.)

28. CPO and CPI have stipulated that Drum Services, Inc. and Great Lakes Container sent at least 323,615 gallons of material to the Site (Stipulation, Docket No. 1213, filed on December 7, 1993).

29. GLCC is the successor to Drum Services, Inc. (Tr. 476:15-17). GLCC was a Michigan corporation which operated a drum reconditioning and drum manufacturing facility in Tulsa (Tr. 476:9-13). GLCC was owned by Irving Rubin, who was its president and for many years its sole director (Tr. 478:13-480:25; 481:14-19).

30. In September, 1983, Rubin formed CPI (Tr. 490:6-8). Like GLCC, Rubin is the principal and controlling shareholder of CPI, sole director, and was at one time its president (Tr. 476:24-477:4; 481:7-12). CPO is a wholly-owned subsidiary of CPI (Tr. 481:4-6).

31. The evidence has not established CPO and CPI are successors under the mere continuation or continuity of enterprise or the *de facto* merger theories. Thus, Container Products of Oklahoma, Inc. and Container Products, Inc., are not liable under 42 U.S.C. §§ 9607 or 9613(g) for the necessary response costs which

ARCO has incurred or will incur in the future related to the Glenn Wynn Site and also are not liable by way of contribution under § 9613(f).

32. As set forth in this Court's Order Clarifying and Confirming Report and Recommendation of United States Magistrate Judge (Docket No. 182, filed January 28, 1992), and the Report and Recommendation of United States Magistrate Judge (Docket No. 137, filed September 20, 1991), all Defendants who are liable to ARCO are jointly and severally liable under § 9607 for response costs ARCO directly incurred or will incur. (Docket No. 182 at 3.)

33. Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation, and Phillips Petroleum Company are jointly and severally liable under 42 U.S.C. § 9607 for the necessary response costs incurred by ARCO related to the Glenn Wynn Site which are consistent with the National Contingency Plan, less any portion of such costs attributable to ARCO. (Docket No. 1085 at 2.)

34. Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services,

Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation, and Phillips Petroleum Company are jointly and severally liable under 42 U.S.C. §§ 9607 and 9613(g) for the necessary response costs which ARCO incurs in the future related to the Glenn Wynn Site which are consistent with the National Contingency Plan, less any portion of such costs attributable to ARCO. (Docket No. 1085 at 2.)

35. Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation and Phillips Petroleum Company are severally liable to ARCO by way of contribution under 42 U.S.C. § 9613 for the costs which ARCO has paid or may be required to pay in the future, to the United States or any other party, in connection with the Glenn Wynn Site, less any portion of such costs attributable to ARCO. (Docket No. 1085 at 2-3.)

36. Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services,

Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation and Phillips Petroleum Company are each severally liable to one another by way of contribution, pursuant to 42 U.S.C. §9613, for the costs any defendant may be required to pay in the future, to ARCO, the United States or any other party, in connection with the Glenn Wynn Site and ROD I and/or ROD II, in excess of that defendant's allocable share of the Group I Defendants' 90% allocation, as set forth in paragraph 38.

ARCO's Share of the Response Costs:

37. ARCO is not entitled to recover any portion of response costs incurred in the future in excess of the existing overage of \$800,488.33 (see paragraph 46) which are attributable to ARCO. Any future recoverable response costs incurred by ARCO, relating to the Glenn Wynn Site, in excess of the existing overage, shall be paid by ARCO and the remaining 18 Defendants based on a 10% - 90% ratio as set out below and subject to the credits recognized herein.

38. ARCO, through its predecessor Sinclair Refining, was for many years a former owner of the Glenn Wynn Site, carrying on refinery operations. There was evidence presented of refinery tanks that had previously been located near or on the future site of the Glenn Wynn lagoons (Tr. 450:5-13). V&P did not test the materials left by Sinclair before it began using the lagoons (Tr. 450:5-13). The chemical content of such materials is not known but the nature of refinery operations is such that a small percentage

of such materials would permeate the soil. Such materials would in all probability be similar to materials furnished the Glenn Wynn Site by other oil company or automotive service station potentially responsible party defendants. Small quantities of materials may have come onto the Glenn Wynn Site from the Sinclair acid sludge pits and the Sinclair oil/water separator. None of the 7,576 gallons of waste oil from ARCO-branded stations is assessable to ARCO because the contributors were independent lessees over whom ARCO had no direct control. Defendants' contention that ARCO bears allocable responsibility for remedy selection or for indemnities with previously settled parties is without merit. A reasonable allocation to ARCO for future ROD II costs and expenses is ten percent (10%) of the total, and the remaining liable eighteen Defendants ninety percent (90%) allocated in accordance with the following gallonage percentages:

<u>Defendant</u>	<u>Stipulated Gallons</u>	<u>Percentage of Group I Gallons</u>
Baker-Hughes, Inc.	74,900	1.96
Borg Warner	385,173	10.06
Burgess-Norton Mfg. Co.	102,608	2.68
Chief Chemical & Supply, Inc.	38,240	1.00
Crane Carrier Corporation	147,778	3.86
Dover Corporation	737,175	19.24
Groendyke Transport, Inc.	125,148	3.27
Jerry Inman Trucking, Inc.	8,700	.23
Kansas Ind. Environ. Serv.	46,520	1.21
McDonnell Douglas	234,870	6.13
MK&O Coach Lines	55,550	1.45
Paccar, Inc.	209,700	5.48
Phillips Petroleum Co. ²	518,010	13.52

² Total Phillips Gallons	675,847
Less Phillips independent stations	<u>157,837</u>
Total gallons	518,010

Ramsey Winch	123,650	3.23
Ryder Truck Rental, Inc.	85,342	2.23
Uniroyal/Goodrich Tire Co.	221,459	5.78
Webco/Southwest Tube	264,890	6.92
Whirlpool Corporation	<u>449,833</u>	<u>11.75</u>
Total	3,829,546	100.00%

ARCO's COSTS:

39. This Court previously has ruled that ARCO's response costs were consistent with the National Contingency Plan ("NCP") if they were carried out in compliance with the Consent Decree entered by this Court. (Docket No. 1084 at 7.)

40. The Court concludes ARCO has incurred reasonable and necessary costs of response consistent with the NCP in remediating the Glenn Wynn Site in the amount of \$8,652,212.83. This figure is arrived at by taking ARCO's paid cost and expense to date in the sum of \$8,841,984.29, and deducting therefrom the sums of \$11,263.00, for drainage dike construction and the sum of \$178,508.46, for outside nonlitigation attorneys' fees (Sidley & Austin). The Court concludes the \$11,263.00 was off Glenn Wynn Site dike construction and is not recoverable, and that only 22% of the Sidley & Austin outside non-litigation expense of \$228,857.00 is applicable as necessary to the Glenn Wynn site. This is because the \$228,857.00 Sidley & Austin non-litigation attorney's fees and costs includes the entire Sand Springs site as there is no allocation between the Glenn Wynn portion and the balance of the Sand Springs site. (Group I, Ex. 1909, 1910 and Tr. 507:25 thru 520:10). The Court finds that a 22% allocation of these Sidley & Austin non-litigation attorney's fees and costs to the Glenn Wynn

site is reasonable and necessary.

ARCO is entitled to recover the \$54,610 of non-litigation Cigna fees because ARCO ultimately paid such sum. The Court concludes that all other ARCO paid remediation costs at the Glenn Wynn Site are recoverable as reasonable and necessary response costs, and the Defendants challenge of them is denied. The Court accepts as reasonable ARCO's 22% allocation of EPA and pre-1991 staff costs at the Glenn Wynn Site (Tr. 60:25-61:5), and the 15% allocation for Morris-Knudsen and other contractor costs to the Glenn Wynn Site (Tr. 62:2-18).

41. ARCO is also entitled to recover its Glenn Wynn Site necessary response costs incurred and not yet paid, as well as future necessary costs regarding ROD I and ROD II, less the ten percent (10%) allocable to ARCO. ARCO's ten percent (10%) is not to be applied until the present overage from settling party's payments is exhausted.

ARCO's Recovery:

42. The parties have stipulated that ARCO is entitled to recover as pre-judgment interest the sum of \$155,043.00 (Tr. 530:23-532:24).

43. In some of its settlements in this matter, with *de minimis* parties, ARCO received a "premium" designed to compensate it for any future response costs incurred at the Glenn Wynn Site. That "premium" will be allocated to cover ARCO's current response costs as well.

44. ARCO has recovered in settlements more than the response

costs it has incurred to date, exclusive of attorneys' fees arising from the litigation of this matter. In keeping with the above, ARCO has been paid to date \$9,607,744.16, and is entitled to recover for Glenn Wynn Site response costs paid to date, including pre-judgment interest, the sum of \$8,807,255.83.

45. Because ARCO has recovered in settlements at least as much as it has incurred to date in response costs associated with the Glenn Wynn Site (exclusive of litigation attorneys' fees incurred in prosecuting this action, which this Court has held are not recoverable), ARCO is entitled to a judgment of \$0.00 for costs incurred to date on its claims under 42 U.S.C. § 9607 and 9613(f).

46. Once the existing overage of \$800,488.33 is exhausted in paying costs already incurred but not yet paid, or future necessary not yet incurred remediation costs for ROD I and/or ROD II, then the balance of such costs is to be allocated and paid ten percent (10%) by ARCO and ninety percent (90%) by the remaining 18 defendants, as provided in the individual percentages set out in paragraph 38 above.

Regarding such future payment of allocated remediation costs for ROD I and/or ROD II, the Defendants Phillips Petroleum Company, Kansas Industrial Environmental Services, Uniroyal/Goodrich Tire Co. and Whirlpool Corporation, are entitled to credit for the past remediation costs incurred by such defendants in excess of their respective allocation of responsibility (see paragraph 38) against any future payments due by said Defendants as follows:

	<u>Amount of Credit</u>
Phillips Petroleum	\$319,473.97 ³
Kansas Industrial Environmental Services, Inc.	\$193,371.99 ⁴
Whirlpool Corporation	\$ 33,534.37 ⁵
Uniroyal/Goodrich	\$ 4,390.10 ⁶

While said amounts expended by these four Defendants were not explicitly a part of the National Contingency Plan, the Court believes equity supports this acknowledged credit as their expenditures assisted in the overall remediation effort. (If the share of the future payments due of Phillips Petroleum, Kansas Industrial Environmental Services, Inc., Whirlpool Corporation and Uniroyal/Goodrich do not equal their respective credit, said Defendants are not entitled to recoup such amounts from ARCO or the other Defendants by way of contribution or indemnity).

47. The settlement offer by the Group I Defendants of \$1.3

³ This credit amount is arrived at by taking the costs incurred by Phillips (\$363,733.00) and subtracting the percentage of responsibility allocated to Phillips (13.52% of 90%, or \$44,259.03).

⁴ This credit amount is arrived at by taking the costs incurred by the Kansas Industrial Environmental Services, Inc. (\$195,501.00) and subtracting the percentage of responsibility allocated to the Kansas Industrial Environmental Services, Inc. (1.21% of 90%, or \$2,129.01).

⁵ This credit amount is arrived at by taking the costs incurred by the Whirlpool Corporation (\$37,500.00) and subtracting the percentage of responsibility allocated to the Whirlpool Corporation (11.75% of 90%, or \$3,965.63).

⁶ This credit amount is arrived at by taking the costs incurred by Uniroyal/Goodrich (\$4,631.00) and subtracting the percentage of responsibility allocated to Uniroyal/Goodrich (5.78% of 90%, or \$240.90).

million dollars in August, 1993, which provides the basis for their Fed.R.Civ.P. 68 claim for costs and attorneys' fees, includes the understanding that ARCO would perform and pay for the costs of ROD II. The Court cannot at this time determine what the actual cost of performing ROD II will be or what the Group I Defendants' share of ROD II response costs would be, and therefore Group I has not shown that its offer was greater than the judgment ultimately rendered. Thus, Group I's application for costs and attorney's fees pursuant to Fed.R.Civ.P. 68 is DENIED.

48. Any Conclusion of Law below which might be properly characterized a Finding of Fact is incorporated herein.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §§ 9607 and 9613(f).

2. Any Finding of Fact above which might be properly characterized a Conclusion of Law is incorporated herein.

3. The declarations of liability set forth in the Findings of Fact above shall be binding in any subsequent action or actions to recover response costs or damages relative to Rod I and Rod II.

4. This Court has ruled that settlement proceeds are to be applied using the *pro tanto* rule. See, August 3, 1993 Order [Docket No. 913]; Transcript of November 2, 1993 Hearing, at 29-32.

5. ARCO has the burden of proving that it (1) incurred necessary costs of response (2) at the Glenn Wynn portion of the Site (3) consistent with the National Contingency Plan. United

States v. Hardage, 982 F.2d 1436, 1447 (10th Cir. 1992), *cert. denied*, _____ U.S. _____, 114 S.Ct. 300 (1993). *See also*, FMC Corp. v. Aero Indus., Inc., 998 F.2d 842 (10th Cir. 1993); County Line Inv. Co. v. Tinney, 933 F.2d 1508 (10th Cir. 1991). ARCO is not the government, and therefore it is not entitled to automatically recover all its costs. United States v. Hardage, 982 F.2d at 1441.

6. As set forth in this Court's Order filed as Docket No. 912 and its Order filed as Docket No. 1082, ARCO is entitled to recover those administrative costs and non-litigation attorneys' fees which are necessary costs of response. Order at 4-5 (Docket No. 912, filed Aug. 3, 1993); Order at 1 (Docket No. 1082, filed Oct. 1, 1993). ARCO is not entitled to recover litigation attorneys' fees arising from this action. Docket No. 912 at 5.

7. As set forth in this Court's Order Clarifying and Confirming Report and Recommendation of United States Magistrate Judge (Docket No. 182, filed Jan. 28, 1992), and the Report and Recommendation of United States Magistrate Judge (Docket No. 137, filed Sept. 20, 1991), all defendants who are liable to ARCO are jointly and severally liable under § 9607 and 9613(g) for response costs ARCO directly incurred or will incur in reference to ROD I and ROD II, and are severally liable under § 9613(f) for the costs ARCO has paid or may be required to pay in the future, to the United States or any other party, in connection with the Glenn Wynn Site. Docket No. 182 at 3.

8. Where a plaintiff has clearly incurred costs, it is entitled to a reasonable estimate of such costs where precise

calculation is impossible. See, United States v. American Cyanamid Co., 786 F.Supp. 152 (D. R.I. 1992) ("While certain portions of the indirect cost calculations were based on estimates, this fact alone does not preclude recovery"), citing Hardage, 750 F.Supp. at 1503-1504.

9. CERCLA does not require a plaintiff to prove causation. Plaintiffs need only show that a defendant sent hazardous substances to the site, and that a release of the same type of material occurred there, causing ARCO to incur response costs. United States v. Monsanto, 858 F.2d 160, 169-70 (4th Cir. 1988); see also, United States v. Hardage, 761 F.Supp. 1501, 1511 (W.D. Okla. 1990) (evidence must be presented only that "'a generator defendant's waste was shipped to a site and that hazardous substances similar to those contained in the defendant's waste remained present at the time of the release.'" (quoting Monsanto, 858 F.2d at 169 and n.15). See also, O'Neil v. Picillo, 883 F.2d 176, 178-81 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990).

10. Oklahoma's collateral source rule recognizes that "payments made to the injured party from other sources are not credited against the tort-feasor's liability." Handy v. Handy, 835 P.2d 870, 874 (Okla. 1992). Group I's challenge to nonlitigation fees initially paid by CIGNA are barred by the collateral source rule. The evidence established ARCO ultimately paid said \$54,000.00 sum initially paid by CIGNA.

11. The record does not support that Container Products, Inc.

or Container Products of Oklahoma should be liable herein to ARCO on theories of successor liability or continuity of enterprise. Therefore, Container Products, Inc. and Container Products of Oklahoma's Fed.R.Civ.P. 50 motion is sustained, and Container Products, Inc., and Container Products of Oklahoma are granted judgment on ARCO's claims herein.

12. Phillips Petroleum Company has not established that its product contribution to the Glenn Wynn Site was or is divisible. Thus, ARCO is entitled to judgment against Phillips Petroleum Company as set forth in Findings of Fact No. 33-35.

13. The Court denies Group I's application for costs and attorneys' fees pursuant to its offer of judgment under Fed.R.Civ.P. 68 in August 1993, because the Court cannot conclude Group I's offer of judgment exceeds the ultimate response costs related to ROD II. At this time the ultimate response costs related to ROD II are unknown.

14. The Defendants, Phillips Petroleum Company, Kansas Industrial Environmental Services, Inc., Whirlpool Corporation and Uniroyal/Goodrich Tire Company are hereby entitled to the credits set forth in Finding of Fact No. 45.

15. Section 113(f) authorizes courts to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). In apportioning liability under Section 113(f), several courts have followed the "Gore Factors," a list of criteria

for allocation of liability set forth in section 113(f)'s legislative history. See H.R. Rep. No. 253 (III), 99th Cong., 2d Sess. 18 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 2835. See also, Environmental Transp. Systems, Inc. v. Ensco, 969 F.2d 503, 508 (7th Cir. 1992); 2 S. Cooke, The Law of Hazardous Waste § 16.01[4][b], at 16-23 (1991). Other factors courts have considered include the financial resources of the parties, see B. F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1206 (2d Cir. 1992), and public interest considerations, CERCLA § 122(e)(3)(A), 42 U.S.C. § 9622(e)(3)(A).

16. Defendants Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation, and Phillips Petroleum Company are jointly and severally liable to ARCO under CERCLA § 9607 for response costs ARCO has incurred or will incur related to ROD I and ROD II of the Glenn Wynn Site.

17. Defendants Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental

Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation, and Phillips Petroleum Company are liable in contribution under 42 U.S.C. § 9613(f) for a share and an equitable portion of any orphan shares of the EPA oversight and other costs which ARCO has paid or will pay to the United States or any other party for actions pertaining to the Glenn Wynn Site. Docket No. 182 at 3; Docket No. 1084 at 10; Docket No. 1085 at 2. In any action for contribution under CERCLA Section 113 after the existing coverage is exhausted, the defendants in that action shall be severally liable, according to the percentages set out in Finding of Fact No. 38, for the entire amount paid by ARCO in excess of its share, ten percent (10%). Docket No. 182 at 3, *affirming* Docket No. 137. As to the oversight costs, the recoverability of these costs will be decided based upon whether such particular EPA oversight costs are recoverable response costs. Docket No. 1082 at 1-2.

18. Any pending counterclaims pled against ARCO are dismissed with prejudice.

19. ARCO is entitled to judgment against the Group I Defendants as stated and set forth in Findings of Fact No. 45 and No. 46.

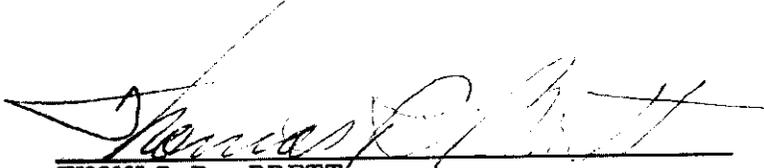
20. Each Defendant is entitled to a declaratory judgment against each other defendant as stated and set forth in Finding of Fact No. 36.

21. Plaintiff is awarded its costs of suit, less its 10%

share of liability.

22. A separate Judgment in keeping with these Findings of Fact and Conclusions of Law shall be entered in favor of ARCO and against Defendants, Baker Hughes Incorporated, Borg-Warner Corporation, Burgess-Norton Mfg. Co., Chief Chemical & Supply, Inc., Crane Carrier Corp., Dover Corporation, Groendyke Transport, Inc., Jerry Inman Trucking, Inc., Kansas Industrial Environmental Services, Inc., McDonnell Douglas Corporation, MK&O Coach Lines, Paccar, Inc., Ramsey Winch Company, Ryder Truck Rental, Inc., The Uniroyal Goodrich Tire Company, Webco Industries, Inc., Whirlpool Corporation, and Phillips Petroleum Company, as aforesaid.⁷

DATED this 24th day of January, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁷ The Court is genuinely appreciative of the splendid pretrial services of Magistrate Judge John Wagner and Adjunct Settlement Judge Martin Frey for their patient oversight of this case for so many years. Trial on the merits was considerably simplified by their prior efforts refining the issues and parties through settlements.

ENTERED ON DOCKET

DATE 1-25-94

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

F I L E D

JAN 21 1994

The Nanci Corporation
International, an Oklahoma
Corporation,

Plaintiff,

v.

B.G.C. Marketing, Inc.,
d/b/a UniQuest, a foreign
corporation,

Defendant.

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

Case No. 92-C-261-B

J U D G M E N T

Pursuant to Order entered simultaneously herewith, granting Default Judgment in favor of Plaintiff Nanci Corporation International and against Defendant B.G.C. Marketing, Inc. d/b/a UniQuest, judgment is hereby granted in favor of Plaintiff Nanci Corporation International and against Defendant B.G.C. Marketing, Inc. d/b/a UniQuest in the amount of \$576,537.08 plus interest from the date of this judgment at the rate of 3.67% per annum until paid. Costs and attorneys fees are assessed against Defendant if timely applied for pursuant to Federal Rules of Civil Procedure and Local Rules for the Northern District of Oklahoma.

DATED this 21 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 21 1994

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

ROBIN SPRINGER,)
)
Plaintiff(s),)
)
v.)
)
THE CITY OF BIXBY, et al,)
)
Defendant(s).)

93-C-913-B ✓

ORDER

Now before the Court is Defendants' Motion To Dismiss Complaint (docket #4) and Plaintiff's Motion For Additional Time. The lawsuit stems from Plaintiff's allegations that Defendants violated the American With Disabilities Act of 1992 by wrongfully terminating him.

The facts pertinent to the instant motions are as follows: On October 8, 1993, Plaintiff filed his Complaint. On November 29, 1993, Defendants filed this Motion To Dismiss, arguing that the lawsuit should be dismissed because Plaintiff had not received a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"). Plaintiff failed to timely respond to the Motion To Dismiss. Instead, Plaintiff filed a Motion For Additional Time on January 10, 1994.

The first issue is whether Plaintiff's failure to respond confesses the Defendants' Motion To Dismiss. Local Rule 7.1 (C) states that response briefs shall be filed within 15 days after the filing of a motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed.

7

In this case, Plaintiff had until December 13, 1993 to file a response. He did not. Instead, he waited until January 10, 1994 -- nearly a month after his response was due to file a request for additional time.¹ In addition, Plaintiff offers no sufficient reason as to why he failed to timely respond to the motion. Consequently, Defendants' Motion To Dismiss is deemed confessed.

The case also is dismissed on the merits of Defendants' motion. In *Kent v. Director of Missouri Department of Elementary and Secondary Education*, 792 F.Supp. 59, 62 (E.D. Mo. 1992), the court wrote:

In order for a discrimination defendant to be subject to suit in district court, he must first be given notice of the charges filed against him with the EEOC and/or the appropriate state agency and be afforded the opportunity to conciliate the charges. A right-to-sue letter is no longer considered a jurisdictional prerequisite to bringing a Title VII claim; however, receipt of the right-to-sue letter is a statutory prerequisite, that is, a condition precedent to bringing a discrimination suit.

In the instant case, Plaintiff's January 10, 1994 motion admits that he has not yet received a "right-to-sue" letter. Therefore, following the ruling in *Kent*, the prerequisite for filing a Title VII discrimination suit has not been met.² The case is DISMISSED without prejudice.

¹ *The motion for additional time is denied.*

² *On January 13, 1994, a Case Management conference was held. At that time, Plaintiff's attorney stated that he had filed a similar lawsuit in state court.*

SO ORDERED THIS 21 day of Jan, 1994.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett".

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 1-25-94

FILED

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

JAN 21 1994

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

RONALD ORTIZ,)
)
Plaintiff,)
)
v.)
)
LOUIS W. SULLIVAN, M.D.,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

Case No. 91-C-790-B ✓

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed November 19, 1993, in which the Magistrate Judge recommended that the Secretary be reversed and that claimant be found to be disabled and entitled to disability insurance benefits under §§ 216(i) and 223 of Title II of the Social Security Act, 42 U.S.C. §§ 416(i) and 423. It is also recommended that the Secretary be ordered to compute and pay benefits accordingly. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is therefore Ordered that the Secretary be reversed and that claimant is found to be disabled and entitled to disability insurance benefits under §§ 216(i) and 223 of Title II of the Social Security Act, 42 U.S.C. §§ 416(i) and 423. It is also ordered that the Secretary compute and pay benefits accordingly.

N: 08-9212

Dated this 21st day of Jan, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 1-25-94

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

JAMES RICHARD COOK and
MARGARET ANN COOK,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,

Defendant.

No. 93-C-231-E

FILED

JAN 25 1994

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

ORDER OF DISMISSAL

Now on this 24 day of January, 1993, there comes on for hearing the Motion of Dismissal of the Plaintiffs, James Richard Cook and Margaret Ann Cook, and the Defendant, The Atchison, Topeka and Santa Fe Railway Company, in the above-entitled cause. The Court finds that said cause has been satisfactorily settled by and between the parties hereto and that the consideration therefore has been accepted by Plaintiffs, in full settlement, satisfaction, release and discharge of their cause of action and claims against the Defendant, and the Court, after due consideration, finds that said dismissal should be approved.

IT IS THEREFORE ORDERED that the cause of action of Plaintiffs, James Richard Cook and Margaret Ann Cook, be hereby dismissed with prejudice, each party to bear its own costs.

S/ JAMES G. ELLISON

UNITED STATES DISTRICT JUDGE

Kenneth G. Cole

ED ABEL

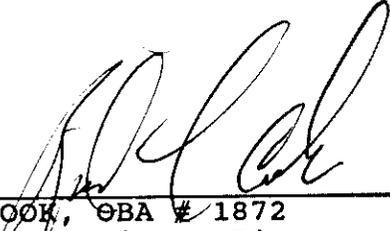
KENNETH G. COLE

Abel, Musser, Sokolosky & Associates

One Leadership Square, Suite 600

Oklahoma City, OK 73102

(405) 239-7046



ROD. L. COOK, OBA # 1872
Rainey, Ross, Rice & Binns
735 First National Center West
Oklahoma City, OK 73102
(405) 235-1356

45001812.93M

ENTERED ON DOCKET

DATE 1-24-94

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

FILED

JAN 24 1994

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

JOHN W. SHERROD,

Plaintiff,

vs.

RON CHAMPION, et al,

Defendants.

No. 93-C-120-E

JUDGMENT

In accord with the Order granting Defendants' motions for summary judgment, the Court hereby enters judgment in favor of all Defendants and against the Plaintiff, John W. Sherrod. Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees.

SO ORDERED THIS 21st day of January, 1994.

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

ENTERED ON DOCKET

DATE 1-24-94

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

FILED

JAN 24 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
No. 93-C-800

JONATHAN R. THOMAS,
Plaintiff,
vs.
STANLEY GLANZ, et al.,
Defendants.

ORDER

Before the court is plaintiff's motion "to withdraw without prejudice to petitioner."

The court construes plaintiff's motion as one to dismiss the above captioned case without prejudice at this time. While the court does not accept plaintiff's contention that he received ineffective assistance from a fellow inmate in filing this action, the court will grant plaintiff's motion to dismiss without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiff's motion to dismiss without prejudice [docket #12] is **granted**;
- (2) Defendants' motion to dismiss or for summary judgment [docket #5] is **moot**;
- (3) The Clerk shall **dismiss** this case without prejudice.

SO ORDERED THIS 21st day of January, 1994.

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

ENTERED ON DOCKET

DATE 1-24-94

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

WALTER E. MAHER,)
)
Plaintiff,)
)
vs.) Civil Action No. 93-C-0093-E
)
ASSOCIATED MILK PRODUCERS, INC.,)
a corporation,)
)
Defendant.)

FINAL JUDGMENT

On December 2, 1993, the Court granted Plaintiff's Motion to file an Amended Complaint in this case, which Amended Complaint was filed on December 9, 1993. On December 8, 1993, the Court granted Defendant's Motion for Summary Judgment as to Plaintiff's original Complaint. By Stipulation of Dismissal filed on January 5, 1994, the parties dismissed, without prejudice, the Counterclaim and Count III of Plaintiff's Amended Complaint, which were the only remaining claims in the Amended Complaint after the granting of Defendant's Motion for Summary Judgment. By Joint Motion, the parties have requested that the Court enter Final Judgment on its Order dated December 8, 1993, granting Defendant's Motion for Summary Judgment.

It is therefore ORDERED, ADJUDGED and DECREED that, for the reasons given in the Court's Order dated December 8, 1993, granting Defendant's Motion for Summary Judgment, which Order is incorporated herein by reference in its entirety, judgment is hereby entered in favor of Defendant, Associated Milk Producers,

Inc., and against Plaintiff, Walter E. Maher, with each party to pay its own respective attorneys' fees.

ORDERED this 20 day of January, 1994.

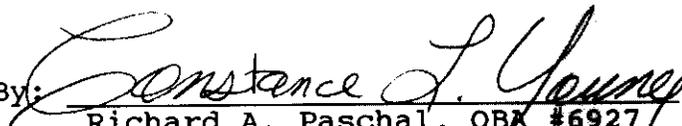
S/ JAMES O. ELLISON

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

Approved as to form:

LIPE, GREEN, PASCHAL,
TRUMP & BRAGG, P.C.

By:


Richard A. Paschal, OBA #6927
Constance L. Young, OBA #14537
3700 First National Tower
15 East 5th Street, Suite 3700
Tulsa, Oklahoma 74103-4344

Attorneys for Plaintiff

- and -

MCCORMICK, ANDREW & CLARK

By:


Stephen L. Andrew, OBA #294
D. Kevin Ikenberry, OBA #10354
Tulsa Union Depot
111 East First Street, Suite 100
Tulsa, OK 74103

Attorneys for Defendant

DATE 1-24-94

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

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

Six shipping cases, more or less)
of an article of drug, each case)
containing 425/1.5 ounce unlabeled)
packets, labeled in part:)

(case))

**** JIANAS BROS. PACKAGING CO.)
2533 SOUTHWEST BLVD., KANSAS CITY,)
MISSOURI 64108 *** CONTENTS:)
425/42.5 G. Packets ****")

(box))

**** ZYDOT Special Blend Cleanse)
your Urine of Unwanted Toxins ***)
safely and effectively helps)
eliminate unwanted toxins from)
your urinary system ***)
Manufactured for ZYDOT UNLIMITED,)
INC. Tulsa, Oklahoma *** One 1.5)
oz. Pkt. ****")

(insert))

**** ZYDOT *** Special Blend ***)
your urine will be cleansed of)
any unwanted toxin for 4 to 5)
hours *** cleanse your urine of)
any unwanted impurities. *** TM)
Manufactured for: Zydol)
Unlimited, Inc. ****")

(poster))

**** CLEANSE YOUR URINE OF)
UNWANTED TOXINS *** ZYDOT ***)
Special Blend ****")

and)

all other articles of drug)
similarly labeled, or unlabeled,)
including in-process and finished)
drugs in any size or type)

CIVIL ACTION
NO. 93-C-683-E

CONSENT DECREE
OF CONDEMNATION
AND DESTRUCTION

FILED

JAN 21 1994

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

or by written literature, and it is not exempt from this requirement under 21 C.F.R. § 201.115.

Pursuant to the Warrant for Arrest issued by the Clerk of this Court, the United States Marshal for this District seized the article on August 26, 1993. Thereafter, on September 3, 1993, Zydor Unlimited, Inc., (claimant) of Tulsa, Oklahoma, intervened and filed a claim to the seized article, and filed an answer on September 22, 1993, stating that it is the owner of the article and seeking release of it. Claimant affirms that it is the sole owner of the seized article and that no other person has an interest in it. Further claimant agrees to indemnify and hold plaintiff harmless should any party or parties hereafter file or seek to file a claim to the seized article or seek to intervene in this action and obtain any part of the article subject to this decree.

Claimant now consents that a decree, as prayed for in the Complaint, be entered condemning the property under seizure.

The Court being fully advised in the premises, it is on motion of the parties hereto:

ORDERED, ADJUDGED, AND DECREED that the article under seizure is an article of drug within the meaning of 21 U.S.C. § 321(g) which may not be introduced or delivered for introduction into interstate commerce pursuant to the Act, 21 U.S.C. § 355(a), in that it is a "new drug" within the meaning of 21 U.S.C. § 321(p), and no approval of application filed pursuant to 21 U.S.C. § 355(b) is in effect for such drug; and it is further

ORDERED, ADJUDGED, AND DECREED that the article of drug is misbranded while held for sale after shipment in interstate commerce within the meaning of the Act, 21 U.S.C. § 352(f)(1), in that its labeling fails to bear adequate directions for its intended use, as alleged in the Complaint; and it is further

ORDERED, ADJUDGED, AND DECREED that, pursuant to 21 U.S.C. § 334(d)(1), the United States Marshal for this District shall destroy the condemned article forthwith and make due return to this Court; and it is further

ORDERED, ADJUDGED, AND DECREED, pursuant to 21 U.S.C. § 334(e), that the plaintiff shall recover from claimant court costs and fees, storage costs, and other proper expenses, including the costs of destruction, and such additional proper expenses as may hereafter be incurred and taxed; and it is further

ORDERED, ADJUDGED, AND DECREED that this Court expressly retains jurisdiction over the subject matter and the parties to issue such further decrees and orders that may be necessary.

Dated: 20 day of January, 1994.

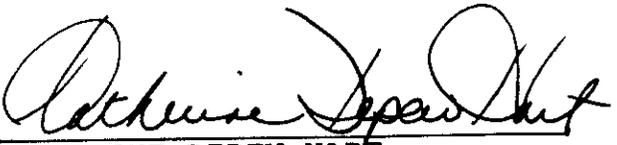
ST. JAMES O. GATON

UNITED STATES DISTRICT JUDGE

We hereby consent to the entry of the foregoing decree.

STEPHEN C. LEWIS
United States Attorney

By:



CATHERINE DEPEW HART
Assistant United States Attorney



JERRY E. PERIGO
STEVEN E. EDGAR
Claimant's Attorney



DAN ASHLOCK, President
of Zydor Unlimited, Inc.

OF COUNSEL:

MARGARET JANE PORTER
Chief Counsel

RUTH ANN CASTILLO
Assistant Chief Counsel for Enforcement
5600 Fishers Lane
Room 6-71, GCF-1
Rockville, MD 20857
(301) 443-7272

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION,)
as Liquidating Agent for TOWN & COUNTRY BANK;)

Plaintiff,)

vs.)

LARRY G. WEBB and LYNN M. WEBB, husband)
and wife; THE LIBERTY NATIONAL BANK AND)
TRUST COMPANY OF OKLAHOMA CITY;)
UNITED STATES OF AMERICA by and through the)
Department of Treasury ex rel INTERNAL)
REVENUE SERVICE; TULSA COUNTY)
TREASURER and BOARD OF TULSA COUNTY)
COMMISSIONERS;)

Defendants.)

ENTERED ON DOCKET
JAN 24 1994
DATE _____

Case No. 93-C-447B

FILED

JAN 21 1994

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

JUDGMENT OF FORECLOSURE

This cause coming before the court on this 21 day of Jan,

1993, before the undersigned Judge of the United States District Court of the Northern District of Oklahoma; plaintiff, being present by its attorney, Works, Lentz & Pottorf, Inc., through K. Jack Holloway; the defendants, LARRY G. WEBB and LYNN M. WEBB, husband and wife, appearing by and through their attorney, Scott P. Kirtley; the defendant, THE LIBERTY NATIONAL BANK AND TRUST COMPANY OF OKLAHOMA CITY, appearing by and through its attorney, Don J. Timberlake; the defendant UNITED STATES OF AMERICA by and through the Department of the Treasury ex rel INTERNAL REVENUE SERVICE, appearing by and through its attorney, Phil Pinnell; the defendant, TULSA COUNTY TREASURER and BOARD OF TULSA COUNTY COMMISSIONERS, appearing by and through their attorney, J. Dennis Semler.

Thereupon said cause coming on for hearing before _____ Court, and the Court, after having considered the pleadings filed herein and hearing the statements of counsel, finds that all of the allegations contained in the Petition of the plaintiff filed herein are true.

The court finds that the plaintiff's mortgages are in default and plaintiff is entitled to a decree of this Court foreclosing its mortgages upon the real property described below in satisfaction of its claim.

The Court further finds that Title 68 O.S., Section 1171, et seq., of the Statutes of the State of Oklahoma regarding mortgage tax has been satisfied by the plaintiff.

The Court finds that there is due from said notes and mortgages sued on in this action, \$250,993.83 with interest thereon, accrued from the date of default per annum until judgment, plus interest thereafter at the legal rate until fully paid, plus \$675.00 for abstracting expense, plus \$1,800.00 for attorney's fees, with interest from the date of judgment at the legal rate until fully paid, together with costs of this action, both accrued and accruing, and expenses which plaintiff continues to incur while this action is pending.

The Court finds that the plaintiff has a first and prior lien on the property described in the mortgages set out in the petition, to secure the payment of indebtedness, interest, late charges, abstracting costs, attorneys' fees continuing expenses and costs, said property being described as follows, to-wit:

The North 60 feet of tract of land located in the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 10, Township 19 North, Range 13 East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the U.S. Government survey thereof, more particularly described as follows, to-wit: COMMENCING at a point in the Northerly boundary of said NE $\frac{1}{4}$ of NE $\frac{1}{4}$ a distance of 380 feet from the NE corner thereof; thence South and parallel with the East boundary of said NE $\frac{1}{4}$ of NE $\frac{1}{4}$ a distance of 250 feet to a Point of Beginning; thence South and parallel with the East boundary of said NE $\frac{1}{4}$ of NE $\frac{1}{4}$ a distance of 127.39 feet; thence North and parallel with the East boundary of said NE $\frac{1}{4}$ of NE $\frac{1}{4}$ a distance of 380 feet; thence North 89°27'40" East and parallel with the Northerly boundary of

said NE¼ NE¼ a distance of 127.39 feet to Point of Beginning.

Lot Three (3), Block One (1), BIXBY INDUSTRIAL PARK, an addition to the Town of Bixby, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

The court finds that there is due from the defendants, LARRY G. WEBB and LYNN M. WEBB, husband and wife, to the defendant, UNITED STATES OF AMERICA by and through the Department of the Treasury ex rel INTERNAL REVENUE SERVICE, the amount of \$17,023.99 together with penalty, interest, and credits accruing thereon from the date of tax assessment until paid and UNITED STATES OF AMERICA by and through the Department of the Treasury ex rel INTERNAL REVENUE SERVICE, has a valid lien on the property to secure said amounts by virtue of a federal tax lien, Serial Number 739301649, dated filed in Book 5477 at Page 493, in the office of the Tulsa County Clerk. The lien is junior and inferior to the mortgage liens of the plaintiff.

The court finds that plaintiff's interest in and to the real property described as Lot Thirteen (13), Block Three (3), HOUSER ADDITION, a subdivision to Tulsa County, State of Oklahoma, according to the recorded plat thereof, is subject to the first mortgage lien interest claimed by the defendant, THE LIBERTY NATIONAL BANK AND TRUST COMPANY OF OKLAHOMA CITY, by virtue of that certain mortgage filed in Book 4484 at Page 212 of the Tulsa County Land Records. Said mortgage is not in default at this time.

The plaintiff has elected to have the property sold with appraisalment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that all of the allegations of plaintiff's Petition are true and plaintiff shall have and recover judgment in personam of and from the defendants, LARRY G. WEBB and LYNN M. WEBB, husband and wife, for \$250,993.83 with interest thereon, accrued from the date of default, through the date of judgment at the rate of 10.000% per annum, plus \$675.00 for abstracting

expense; plus \$1,800.00 attorney's fees, together with costs of this action, both accrued and accruing, and expenses which plaintiff continues to incur while this action is pending, for all of which let execution issue against the property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the mortgages in favor of plaintiff set forth in plaintiff's Petition is established and adjudged to be a valid and first lien upon the real property described as follows, to-wit:

The North 60 feet of tract of land located in the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 10, Township 19 North, Range 13 East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the U.S. Government survey thereof, more particularly described as follows, to-wit: COMMENCING at a point in the Northerly boundary of said NE $\frac{1}{4}$ of NE $\frac{1}{4}$ a distance of 380 feet from the NE corner thereof; thence South and parallel with the East boundary of said NE $\frac{1}{4}$ of NE $\frac{1}{4}$ a distance of 250 feet to a Point of Beginning; thence South and parallel with the East boundary of said NE $\frac{1}{4}$ of NE $\frac{1}{4}$ a distance of 127.39 feet; thence North and parallel with the East boundary of said NE $\frac{1}{4}$ of NE $\frac{1}{4}$ a distance of 380 feet; thence North 89°27'40" East and parallel with the Northerly boundary of said NE $\frac{1}{4}$ of NE $\frac{1}{4}$ a distance of 127.39 feet to the Point of Beginning.

Lot Three (3), Block One (1), BIXBY INDUSTRIAL PARK, an addition to the Town of Bixby, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

This lien is prior and superior to the right, title, interest, and lien of each defendant and of all persons claiming by, through, or under any defendant since the filing of the Notice of Pendency of Action in the office of the county clerk. The amounts found due on the note set forth in plaintiff's Petition and for which judgment is rendered for plaintiff are secured by said mortgages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the defendant, UNITED STATES OF AMERICA by and through the Department of the Treasury ex rel INTERNAL REVENUE SERVICE, has a good and valid lien against the defendants, LARRY G. WEBB and LYNN M. WEBB, husband and wife, in the amount of \$17,023.99, together with penalty, interest, and credits thereon from the date of tax assessment

until paid, on the real property described heretofore, subject, however, to the prior lien of the plaintiff as described above, and further subject to foreclosure as hereinafter directed, provided the United States of America shall have its statutory right of redemption pursuant to 28 U.S.C. § 2410.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that plaintiff's interest in and to the real property described as Lot Thirteen (13), Block Three (3), HOUSER ADDITION, a subdivision to Tulsa County, State of Oklahoma, according to the recorded plat thereof, is subject to the first mortgage lien interest claimed by the defendant, THE LIBERTY NATIONAL BANK AND TRUST COMPANY OF OKLAHOMA CITY, by virtue of that certain mortgage filed in Book 4484 at Page 212 of the Tulsa County Land Records.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that either the United States Marshal for the Northern District of Oklahoma or the Sheriff of Tulsa County, Oklahoma, shall levy upon the above described real property and advertise and sell the same, with appraisal, according to law. The proceeds from said sale shall be distributed according to law as follows:

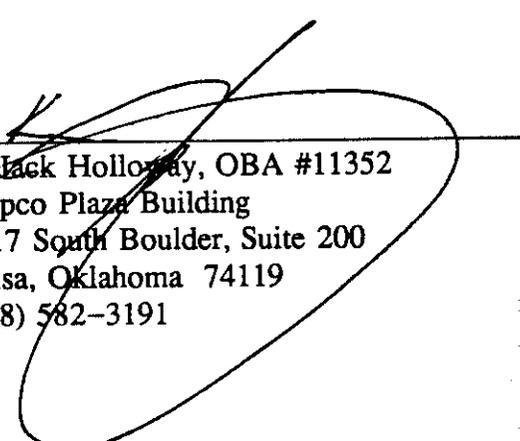
- a. To payment of the costs of said sale and of this action;
- b. To payment of any real property ad valorem taxes which are due or owing in favor of the defendant, TULSA COUNTY TREASURER;
- c. To payment of the judgment of the plaintiff;
- d. To payment of the judgment lien of the defendant, UNITED STATES OF AMERICA by and through the Department of the Treasury *ex rel* INTERNAL REVENUE SERVICE;
- e. The residue, if any, shall be paid to the Clerk of the Court to await the further Order of the Court.

Upon completion of the sale, the United States Marshal of said District or the Sheriff of said County shall execute and deliver a good and sufficient deed to the premises to the purchaser which shall convey all the right, title, interest, estate, and equity of all defendants, and all persons claiming by, through, or under such defendants since the filing of the Notice of Pendency of Action in the office of the County Clerk, in and to said real property, except as provided by law, and except as to the real property described as Lot Thirteen (13), Block Three (3), HOUSER ADDITION, an addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof, which is the subject of the first mortgage lien interest claimed by the defendant, THE LIBERTY NATIONAL BANK AND TRUST COMPANY OF OKLAHOMA CITY; and save and except the statutory right of redemption accorded the United States of America pursuant to 28 U.S.C. § 2410; upon application of the purchaser, the Court Clerk shall issue a Writ of Assistance to the United States Marshal or the Sheriff, who shall forthwith place the purchaser in full and complete possession and enjoyment of the premises.

S/ THOMAS R. BHETT
JUDGE OF THE DISTRICT COURT

APPROVED:

WORKS, LENTZ & POTTORF, INC.

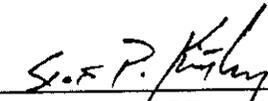
By 
K. Jack Holloway, OBA #11352
Mapco Plaza Building
1717 South Boulder, Suite 200
Tulsa, Oklahoma 74119
(918) 582-3191

2675.003

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity,
vs. LARRY G. WEBB et al
United States District Court Case No. 93-C-447 B
Journal Entry of Judgment

APPROVED:

ROBINSON, LEWIS, ORBISON
SMITH & COYLE

By: 

Scott P. Kirtley, OBA #11388
P O Box 1046
Tulsa, Oklahoma 74101
(918) 583-1232

Attorney for Defendants
LARRY G. WEBB and LYNN M. WEBB

2675.004.5

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity,
vs. LARRY G. WEBB et al
United States District Court Case No. 93-C-447 B
Journal Entry of Judgment

APPROVED:



Phil Pinnell
Phil Pinnell, OBA #7169
Assistant United States Attorney
3900 U S Courthouse
Tulsa, Oklahoma 74104
(918) 581-7463

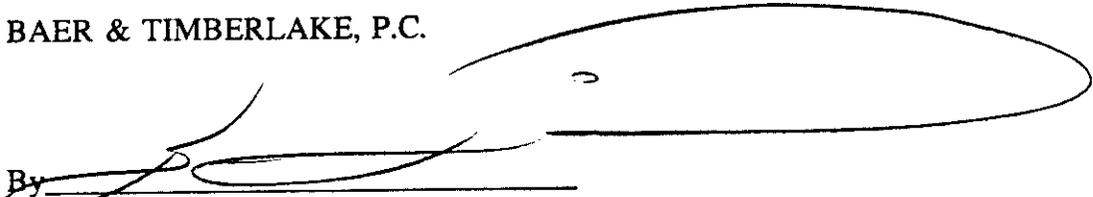
Attorney for Defendant
UNITED STATES OF AMERICA by and
through the Department of the Treasury
ex rel INTERNAL REVENUE SERVICE

2675.004.5

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity,
vs. LARRY G. WEBB et al
United States District Court Case No. 93-C-447 B
Journal Entry of Judgment

APPROVED:

BAER & TIMBERLAKE, P.C.

By 

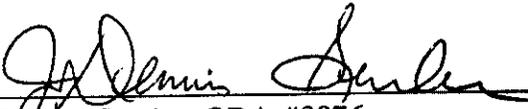
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FEDERAL DEPOSIT INSURANCE CORPORATION,
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Journal Entry of Judgment

APPROVED:

By 
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Assistant District Attorney
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Tulsa OK 74103
(918) 596-4841

Attorney for Defendants
BOARD OF COUNTY COMMISSIONERS and
TULSA COUNTY TREASURER
COMPANY OF OKLAHOMA CITY

2675.004.5

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

ENTERED ON DOCKET
JAN 21 1994

HOWARD HILL and BONNIE HILL,)
husband and wife,)
)
Plaintiffs,)
)
vs.)
STEVEN R. BAILEY, et al.,)
)
Defendants.)

JAN 21 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Consolidated Case No.
92-C-975-C

**ORDER DISMISSING CLAIMS OF HOWARD HILL
AND BONNIE HILL AGAINST PIEDMONT OF MICHIGAN, INC.,
BILLY M. HOLLINGSWORTH, AND AMERISURE INSURANCE
COMPANY WITH PREJUDICE, PRESERVING ALL
PLAINTIFFS' RIGHTS, CAUSES OF ACTION AND
CLAIMS AGAINST STEVEN R. BAILEY, SANTISI
TRUCKING COMPANY AND RANGER INSURANCE COMPANY**

The Court, having before it the application of Howard Hill and Bonnie Hill for an Order of Dismissal with Prejudice of all their claims against Defendants, Billy M. Hollingsworth, Piedmont of Michigan, Inc. and Amerisure Insurance Company, and being duly advised in the premises, finds that the application should be granted and that all of said Plaintiffs' claims against Steven R. Bailey, Santisi Trucking Company and Ranger Insurance Company are preserved.

Billy M. Hollingsworth, Piedmont of Michigan, Inc. and Amerisure Insurance Company are hereby dismissed from this litigation with prejudice.


U.S. DISTRICT JUDGE

59

DATE JAN 21 1994

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

JAN 17 1994

HOWARD HILL and BONNIE HILL,)
husband and wife,)
)
Plaintiffs,)
)
vs.)
STEVEN R. BAILEY, et al.,)
)
Defendants.)

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

Consolidated Case No.
92-C-975-C

**ORDER DISMISSING CLAIMS OF HOWARD HILL
AND BONNIE HILL AGAINST PIEDMONT OF MICHIGAN, INC.,
BILLY M. HOLLINGSWORTH, AND AMERISURE INSURANCE
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TRUCKING COMPANY AND RANGER INSURANCE COMPANY**

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Billy M. Hollingsworth, Piedmont of Michigan, Inc. and Amerisure Insurance Company are hereby dismissed from this litigation with prejudice.

(Signature)

U.S. DISTRICT JUDGE

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

ALLEN EUGENE SUENRAM,)
)
 Plaintiff,)
)
 v.)
)
 M/J/L CORPORATION, et al.,)
)
 Defendants.)

Case No. 90-C-1019-B

FILED

JAN 20 1994

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

ORDER

The Application for Removal of David P. Warning is granted. This case is removed to the Bankruptcy Court for the Northern District of Oklahoma.

Dated this 20th day of January, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE