



DATE FEB 28 1994

FILED

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

FEB 24 1994

Lawrence, Clerk  
COURT  
OKLAHOMA

FEDERAL DEPOSIT INSURANCE CO. )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UTICA NATIONAL BANK & TRUST CO., )  
 et al )  
 )  
 Defendants. )

Case No. 92-C-3-B

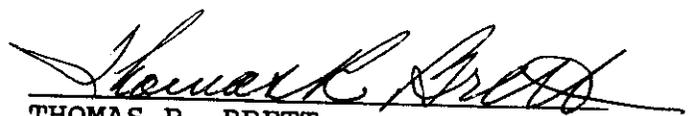
**JUDGMENT DISMISSING ACTION  
BY REASON OF SETTLEMENT**

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

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

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

**IT IS SO ORDERED** this 24<sup>th</sup> day of February, 1994.

  
 THOMAS R. BRETT  
 UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE 2/28/94

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

IN RE: )  
)  
LISA ANN WARREN, a/k/a Lisa A. )  
Warren, p/k/a Lisa Anne Dulek )  
)  
Debtor, )  
)  
GARY B. EASLEY, )  
)  
Plaintiff, )  
)  
vs. )  
)  
LISA A. DULEK, now Warren, )  
)  
Defendant. )

**FILED**  
FEB 25 1994  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 93-C-1070-B ✓

O R D E R

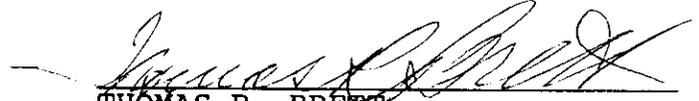
Now before the Court is Plaintiff Gary Easley's "Request for Jury Trial and Withdrawal of Referral, or in the Alternative, for Bifurcation of Trial by Removal of Certain Issues to State Court Proceedings, and Motion for Relief from Stay" (Docket #1).

The Bankruptcy Court addressed the issues raised by Plaintiff's motion in an order dated January 7, 1994, and filed of record with this Court on January 10, 1994. The Bankruptcy Court abstained from hearing the issue of liability, stayed further proceedings in the adversary case, and modified the automatic stay of 11 U.S.C. §362 to permit the State court action to proceed. This Court hereby adopts the reasoning and analysis of the Bankruptcy Court and concludes Plaintiff's "Request for Jury Trial and Withdrawal of Referral, or in the Alternative, for Bifurcation of Trial by Removal of Certain Issues to State Court Proceedings, and Motion for Relief from Stay" should be and is hereby granted in

5

part and denied in part as set out in the Bankruptcy Court's Order of January 7, 1994.

IT IS SO ORDERED THIS 25 DAY OF FEBRUARY, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DATE 2/28/94

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DONALD R. MCKNIGHT, et al., )  
 )  
 Defendants. )

Case No. 93-C-479-B ✓

**FILED**

FEB 25 1994

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

O R D E R

Now before the Court is the "Advice of Bankruptcy and Notice of Automatic Stay" (Docket #6) filed by the Defendant. For good cause shown, all further proceedings in this matter are hereby stayed pursuant to the provisions of 11 U.S.C. §362.

IT IS SO ORDERED THIS 25 DAY OF FEBRUARY, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

1

DATE 2/28/94

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

DARRELL CRAWFORD and MARK  
GERNHARDT, )

Plaintiffs, )

vs. )

GRAPHICS UNIVERSAL, INC., and  
the GRAPHICS UNIVERSAL, INC.  
EMPLOYEE STOCK OWNERSHIP PLAN  
AND TRUST, )

Defendants. )

Case No. 93-C-305-B ✓

**FILED**

FEB 25 1994

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

J U D G M E N T

The Court hereby enters Judgment as follows:

1. In favor of Plaintiff, Darrell K. Crawford, and against Defendants, Graphics Universal, Inc. and the Graphics Universal, Inc. Employee Stock Ownership Plan and Trust, on Count 1; jointly and severally, in the sum of \$25,177.18, with interest accruing thereon from January 1, 1992 to February 23, 1994 at the rate of 9.58% per annum, in the amount of \$5,193.33, with post-judgment interest accruing thereon at the rate of 3.74% per annum;

2. In favor of Plaintiff, Mark Gernhardt, and against Defendants, Graphics Universal, Inc. and the Graphics Universal, Inc. Employee Stock Ownership Plan and Trust, on Count 1, jointly and severally, in the sum of \$18,373.82, with interest accruing thereon from January 1, 1992 to February 23, 1994 at the rate of 9.58% per annum, in the amount of \$3,789.78, with post-judgment interest accruing thereon at the rate of 3.74% per annum;

3. In favor of Plaintiffs and against Defendants, jointly and severally, for attorneys' fees pursuant to 29 U.S.C. §1132(g),

2/

in the amount of \$9,913.75, with post-judgment interest thereon accruing at the rate of 3.74% per annum.

DATED this 25<sup>th</sup> day of February, 1994.



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

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

JESSIE MAE HENDERSON,  
Plaintiff,  
  
vs.  
  
INDEPENDENT SCHOOL DISTRICT  
NO. 1 OF TULSA COUNTY,  
OKLAHOMA, D. BRUCE HOWELL  
and BLAINE G. SMITH,  
Defendants.

Case No. 93-C-0426 B

**FILED**

FEB 25 1994

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

ADMINISTRATIVE CLOSING ORDER

FOR GOOD CAUSE SHOWN upon review of the parties' joint application for administrative closing order, it is ordered that this case be administratively closed as follows:

1. Pending completion of the settlement terms which have been agreed by the parties, no further action shall be taken in this case, whether in discovery or otherwise.
2. Upon completion of the terms of the settlement, the parties shall again, within five (5) days jointly move to dismiss the case, and shall again provide the Court with an agreed order to that effect.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the foregoing findings are ordered by the Court and this case is administratively closed pending completion of the settlement terms or advised by the parties that settlement agreement has been breached or is otherwise not performed.

SO ORDERED this 25 day of February, 1994.

THOMAS R. BRETT

THOMAS R. BRETT, DISTRICT JUDGE  
UNITED STATES DISTRICT COURT

ENTERED FOR RECORD  
DATE 2/28/94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

FEB 25 1994

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

UNITED STATES OF AMERICA )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PHILIP MEYERS, )  
 )  
Defendant. )

CIVIL ACTION NO. 92-C-318-B

ORDER OF DISMISSAL

Now on this 25 day of February, 1994, it appears that the Defendant in the captioned case has not been located within the Northern District of Oklahoma, and therefore attempts to serve Philip Meyers have been unsuccessful.

IT IS THEREFORE ORDERED that the Complaint against Defendant, Philip Meyers, be and is dismissed without prejudice.

S/ THOMAS B. BRETT

United States District Judge

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney



KATHLEEN BLISS ADAMS, OBA #13625  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

KBA/11f

FILED  
DATE FEB 28 1994

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 CAROLYN JOYCE BENIGHT; )  
 THE STATE OF OKLAHOMA, ex rel. )  
 OKLAHOMA TAX COMMISSION; )  
 CITY OF BROKEN ARROW, OKLAHOMA; )  
 COUNTY TREASURER, )  
 Tulsa County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma; )  
 )  
 Defendants. )

CASE NO. 93-C-484B

**FILED**

FEB 24 1994

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

AMENDED JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24 day of Feb., 1994. The plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, appears by Assistant General Counsel Kim D. Ashley; the defendant, City of Broken Arrow, Oklahoma, appears by City Attorney Michael R. Vanderburg; the defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Assistant District Attorney J. Dennis Semler; and the defendant Carolyn Joyce Benight, appears not, but makes default.

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

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

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

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

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

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

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

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

5. On September 22, 1988, Mercury Mortgage Co., Inc. assigned the note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns by an assignment recorded with the Tulsa County Clerk September 22, 1988, in book 5129 at page 2398.

6. On October 1, 1988, the defendant, Carolyn Joyce Benight, a single person, entered into an agreement with the plaintiff lowering the amount of the monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose. Superseding agreements were reached on February 1, 1990; March 1, 1991; and January 1, 1992.

7. The defendant, Carolyn Joyce Benight has defaulted under the terms of the note, mortgage and forbearance agreement due to her failure to pay installments when due. Because of such default, the defendant, Carolyn Joyce Benight is indebted to the plaintiff in the amount of \$98,435.91, plus interest at the rate of 8.625% per annum from May 20, 1993, until the date of this judgment, plus interest thereafter at the legal rate of 3.74 % until fully paid; plus the

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

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

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

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

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

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

**IT IS THEREFORE ORDERED** that the plaintiff have and recover judgment against the defendant, Carolyn Joyce Benight,

in the principal sum of \$98,435.91, plus interest at the rate of 8.625% per annum from May 20, 1993, until judgment, plus interest thereafter at the legal rate of 3.74 % until paid, plus the costs of this action in the amount of \$178.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the Property.

**IT IS FURTHER ORDERED** that the defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, has no right, title or interest in the Property.

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

**IT IS FURTHER ORDERED** that the defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$102.00, plus penalties and interest.

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

**IT IS FURTHER ORDERED** that upon the failure of the defendant, Carolyn Joyce Benight, to satisfy the money judgment of the plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District

of Oklahoma, commanding him to advertise and sell the Property, according to the plaintiff's election with or without appraisal and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

**Third:**

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

**Fourth:**

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

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

**IT IS FURTHER ORDERED** that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them, be

forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

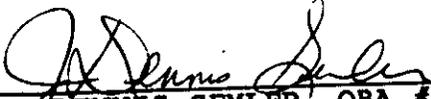
APPROVED:

STEPHEN C. LEWIS  
United States Attorney



NEAL B. KIRKPATRICK  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

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

  
\_\_\_\_\_  
J. DENNIS SEMLER, OBA #8076  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

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

*Michael R. Vanderburg*

MICHAEL R. VANDERBURG, OBA #9180  
City Attorney  
Attorney for defendant,  
City of Broken Arrow, Oklahoma

FEB 28 1994

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

**FILED**

FEB 24 1994

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

CURTIS COTT, et al )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 INDEPENDENT SCHOOL DISTRICT NO. )  
 1001 OF TULSA, TULSA COUNTY )  
 OKLAHOMA, et al )  
 )  
 Defendants. )

Case No. 93-C-544-B

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

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

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

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

**IT IS SO ORDERED** this *24<sup>th</sup>* day of February, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

FEB 25 1994

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

**FILED**

FEB 24 1994

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

THRIFTY RENT-A-CAR SYSTEM, )  
INC., an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DESERT WHEELS, INC., and )  
SIDNEY J. WILSON, )  
 )  
Defendants. )

Case No. 93-C-936-B

**JUDGMENT**

This matter comes on for hearing this 24 day of Feb., 1994, upon Application and Affidavit of the Plaintiff duly made for judgment by default. It appears that Desert Wheels, Inc. and Sidney J. Wilson, Defendants herein (collectively, the "Defendants"), are in default and that the Clerk of the United States District Court for the Northern District of Oklahoma has previously searched the records and entered the default of the Defendants. It further appears upon Plaintiff's Affidavits that Defendants are indebted jointly and severally to Plaintiff in the sum of \$407,909.37, together with prejudgment interest in the sum of \$197.31 per day from January 24, 1994, plus Plaintiff's costs, including attorneys fees, incurred in the collection of said indebtedness in the amount of \$1,795.24, that default has been entered against Defendants for failure to appear, and that Defendants are not infants or incompetent persons, and not in the military service of the United States of America. The Court, being fully advised, finds that judgment should be entered for the Plaintiff.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Plaintiff recover from Defendants, jointly and severally, the sum of \$407,909.37, together with prejudgment interest in the sum of \$197.31 per day from January 24, 1994 through the date of judgment, costs and expenses, including a reasonable attorney fee in the sum of \$1,795.24, and postjudgment interest at the rate of 3.74%, for all of which let execution issue.

Judgment rendered this 24 day of Feb., 1994

**S/ THOMAS R. BRETT**

UNITED STATES DISTRICT JUDGE

ENTERED IN CLERK'S OFFICE  
DATE FEB 25 1994

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

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

BILL E. DOWELL, et al )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 FARMERS INSURANCE CO. INC. )  
 )  
 Defendant. )

Case No. 93-C-497-B

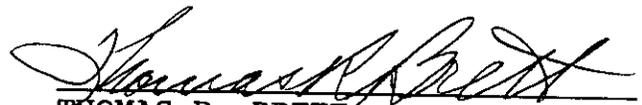
JUDGMENT DISMISSING ACTION  
BY REASON OF SETTLEMENT

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

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

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

IT IS SO ORDERED this 24<sup>th</sup> day of February, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

24

ENTERED ON DOCKET

DATE 2-25-94

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

MAGGIE HARREL,	)
	)
Plaintiff,	)
	)
vs.	)
	)
WAL-MART ASSOCIATES GROUP	)
HEALTH PLAN,	)
	)
Defendant.	)

No. 91-C-503-E

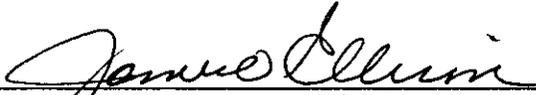
FILED  
 ✓ FEB 25 1994  
 Clerk  
 COURT

JUDGMENT

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

IT IS THEREFORE ORDERED that the Plaintiff take nothing from the Defendant, that the action be dismissed on the merits, and that the parties shall each bear their own costs of action.

ORDERED this 25<sup>th</sup> day of February, 1994.

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

DATE 2-25-94

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

RONALD JACKSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RON CHAMPION, et al., )  
 )  
 Defendants. )

No. 93-C-1067-E ✓

**FILED**  
FEB 25 1994

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

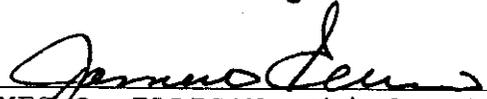
ORDER

The plaintiff has repeatedly failed to submit a signed civil rights complaint and motion for leave to proceed in forma pauperis although the court has notified him of the deficiency.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) This case is **dismissed without prejudice** for failure to submit a signed civil rights complaint and motion for leave to proceed in forma pauperis;
- (2) The court **may reopen** this action if plaintiff submits properly signed pleadings within twenty (20) days from the date of entry of this order.

SO ORDERED THIS 25<sup>th</sup> day of February, 1994.

  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

ENTERED ON CLERK'S OFFICE  
DATE FEB 25 1994

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

**FILED**

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

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

Appeal No. 92-C-1164-*LB*  
Bky. No. 92-01413-W  
Chapter 11

ORDER

This order pertains to the appeal of the Resolution Trust Corporation ("RTC"), as Receiver for Commonwealth Federal Savings Association, from the final order of the United States Bankruptcy Court for the Northern District of Oklahoma confirming the first amended plan entered on December 9, 1992.

Interchange Warehouse Investors I ("Interchange") is a general partnership composed of Tully Dunlap Jr. (Dunlap) and William W. Ramsey (Ramsey). Its sole asset is a warehouse/office complex in Tulsa, Oklahoma. On April 23, 1992, when Interchange filed this Chapter Eleven (11) proceeding, the complex was fully leased and generating approximately \$700,000.00 of annual net income. The principal creditor, the Resolution Trust Corporation ("RTC"), was owed approximately \$8,477,955.39. The debt was secured by the complex, valued at approximately \$6,750,000.00, leaving a deficiency unsecured claim in favor of the RTC in the amount of \$1,727,955.39. In addition, the law firm of

*22*

Norman and Wohlgemuth held an unsecured claim in the amount of \$1,911.55, the accounting firm of Stanfield and O'Dell held an unsecured claim in the amount of \$3,545.00, and the law firm of Hall, Estill, Hardwick, Gable, Golden and Nelson held an unsecured claim in the amount of \$5,996.17. Two insider entities held unsecured claims, Express Storage Management Corporation in the amount of \$23,165.96 and Mingo Valley Development Company in the amount of \$1,584,792.55.

On October 6, 1992, Interchange filed its First Amended Plan of Reorganization ("Plan"). The hearing to consider confirmation of the Plan was held on November 24, 1992 and December 3, 1992. All creditors approved the Plan with the exception of the RTC.

At the conclusion of the evidence and arguments of counsel, the Bankruptcy Court entered its findings and conclusion. The court found that "this is the most fair and equitable single asset Chapter 11 which has ever been presented to me" (Transcript of Hearing on Confirmation of Plan, "TR", p. 231) and approved the Plan conditioned upon the Debtor's filing of a minor amendment. The Bankruptcy Court denied the RTC's "Motion to Dismiss or, in the Alternative, Motion for Relief from the Automatic Stay" and the RTC's "Application for Order Regarding Pursuit of Recovery of Payments to Insiders or, in the Alternative, Motion for Relief from the Automatic Stay" as therefore moot. On December 8, 1992, the Debtor filed the amendment and on December 9, 1992 the court entered the order confirming the Plan, which is the subject of this appeal.

RTC contends that the Bankruptcy Court should not have confirmed the Plan because, had the Bankruptcy Court properly classified the unsecured claims, no class of

impaired claims would have accepted the Plan, and because Interchange, Dunlap and Ramsey were allowed to retain ownership of the property, contrary to 11 U.S.C. § 1129(b). Following a review of the record, the court concludes the bankruptcy court erred in confirming the first amended plan entered on December 9, 1992, for the reasons hereafter stated.

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

The parties agree that on April 12, 1985, Commonwealth Federal Savings Association ("Commonwealth") made a construction loan of approximately \$5,350,000.00 to Interchange, Dunlap and Ramsey, which was primarily secured by a mortgage and security interest covering the to-be-constructed Interchange Warehouse Property. Dunlap and Ramsey guaranteed the indebtedness. Ramsey also advanced over one million dollars to the project through Mingo Development Company. The loan to Commonwealth came due April 12, 1987, but was extended several times. Interchange did not pay the debt on the final due date of July 1, 1989.

On November 8, 1990, RTC brought suit in Tulsa County District Court to foreclose its mortgage and security interests and collect any deficiency from Dunlap and Ramsey. Judgment was obtained on September 6, 1991. RTC requested the state court appoint a receiver for the Interchange Warehouse Property, and this Chapter 11 proceeding was filed. RTC concluded that reorganization was inappropriate under the circumstances and filed a motion to dismiss, which was set for hearing with the hearing on confirmation of the Plan. In its Application for Order to Recover Payments to Outsiders, RTC also alleged that rents had been converted by Interchange and its general partners prior to the filing of the bankruptcy and that insiders had received substantial preferential payments of more than \$400,000.00. The RTC requested that unsecured creditors except RTC be paid out of funds on hand or recovery of the alleged preferential transfers to prevent their vote in support of the Plan, allowing "cram down" under of 11 U.S.C. § 1129(b)(1). The Bankruptcy Court denied the RTC's request.

Under the Plan adopted by the Bankruptcy Court, the secured claim of RTC in the amount of \$7,040,000.00, the appraised value of the facility plus \$400,000.00 of funds on hand at the time of confirmation, was placed in Class One. Subsequent to confirmation, \$600,000.00 was to be paid to the RTC to be applied against this claim. The balance of the unpaid secured claim would be the subject of a balloon note providing principal and interest payments over an eight year period at the rate of 8.75% with a balloon payment of all unpaid principal at the end of the eight years.

The unsecured deficiency claim of the RTC in the amount of \$1,727,955.39 was placed in Class Two of the Plan. The Plan provided for monthly payments on this claim

plus 7% interest per annum for twelve years until the claim was paid in full. This claim was to be paid prior to any payments to other unsecured creditors.

The remaining unsecured creditors were placed in Class Three. After payment of the RTC's secured and unsecured claims, the net income would be used to pay these claims until paid in full with 7% interest per annum.

The RTC voted to reject this Plan. The voting members of Class Three approved it. In approving the Plan, the Bankruptcy Court noted that Ramsey had advanced over one million dollars to "save the project" in 1986, that the "extraordinary effort" and "excellent management" of Ramsey and Dunlap had resulted in the leasing of the entire property at a fair price, that the 100% occupancy would produce \$71,700.00 per month in 1993 and forward, and that this "is all this property will produce at its best use." (TR pp. 228-229).<sup>1</sup>

The Bankruptcy Court concluded that separate classification of the RTC unsecured deficiency claim and the other unsecured claims was proper. The court found that "[it] is not the intent of the [bankruptcy] code to allow, in a single asset eleven case, veto power over the entire bankruptcy by the particular lender" (TR p. 232), that the RTC in its secured position was in "direct conflict" with its unsecured position, requiring separate classification of the two to avoid impropriety (TR pp. 232-233), that failure to so classify would terminate the bankruptcy, resulting in liquidation, and offer nothing to the

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<sup>1</sup> An expert called by Interchange at the hearing testified that the project had several strengths: (1) solid lease commitments and income flow from them, (2) the excellent condition of the facilities, (3) the continued oversight and participation of Ramsey and Dunlap, and (4) the project's ability to liquidate the entire RTC debt, including the unsecured claim of almost two million dollars. In his twenty years of banking experience, the expert had never seen a "workout" with the potential of liquidating the entire deficiency claim. (TR 110, pp. 129-133).

unsecured creditors (TR p. 234), and that the Class Three unsecured creditors were not insiders and "this is not an artificial classification." (TR p. 234). The Bankruptcy Court also found that \$200,000.00 was to be "inserted as new value" into the case. (TR p. 237).

RTC argues that, had they been classified together, its unsecured claim could have clearly outvoted the three other unsecured claims, and prevented approval of the plan<sup>2</sup> so it was "disenfranchised" by the Bankruptcy Court by the separate classification. RTC points out that "artificial classifications" of similar claims are not permitted under bankruptcy law. It cites In re: Greystone III, Joint Venture, 948 F.2d 134 (5th Cir. 1991), amended on petition for reh'g, 948 F.2d 142 (5th Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 72, 121 L.Ed.2d 37 (1992), which found that similar claims cannot be classified differently.

In Greystone, where the debtor's only asset was an office building and the lender opposed the plan, Greystone had to obtain plan approval of at least one class of "impaired" claims. The Bankruptcy Court confirmed the plan, after separately classifying the lender's unsecured deficiency from the unsecured claims of the trade creditors. The Fifth Circuit reversed, saying: ". . . thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan." Id. at 139. While separate classification is not prohibited, it "may only be undertaken for reasons independent of the debtor's motivation to secure the vote of an impaired, assenting class of claims." Id.

The Greystone court went on to say: "[T]here must be some limit on the debtor's power to classify creditors in such a manner . . . . Unless there is some requirement of

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<sup>2</sup> Under 11 U.S.C. § 1129(a)(10), the bankruptcy court can confirm a plan only if, when a class of claims is impaired under the plan, "at least one class of claims that is impaired . . . has accepted the plan, determined without including any acceptance of the plan by any outsider."

keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class." Id. (quoting In re: U.S. Truck Co., 800 F.2d 581, 586 (6th Cir. 1986)). The court in Greystone noted that 11 U.S.C. § 1122(a) only governs permissible inclusions of claims in a class, rather than requiring all similar claims be grouped together. But if § 1122(a) is only permissive, there would be no need for § 1122(b), which authorizes a class of smaller unsecured claims.<sup>3</sup> Reading both sections together suggests that ordinarily "substantially similar" claims, sharing common priority and rights against the bankruptcy estate, should be placed in the same class, unless the court creates a separate class of small unsecured claims for its convenience.

Other cases cited by RTC which have held that separate classification of a secured lender's deficiency claim should not be allowed include In re: Bryson Properties, XVIII, 961 F.2d 496 (4th Cir. 1992); In re: Lumber Exchange Bldg. Ltd. Partnership, 968 F.2d 647 (8th Cir. 1992); In re: Cantonwood Assoc. Ltd. Partnership, 138 B.R. 648 (Bankr. D. Mass. 1992); and In re: L.G. Salem Ltd. Partnership, 140 B.R. 932 (Bankr. D. Mass. 1992).

In its Application to Supplement Appellant's Brief (Docket #8), RTC also cites John Hancock Mut. Life Ins. Co. v. Route 37 Business Park Assocs., 987 F.2d 154 (3rd Cir. Jan 22, 1993). In that case the unsecured claim of Hancock was classified separately from the

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<sup>3</sup>Title 11 of the U.S. Code, §1122, prescribes classification of claims for a reorganization as follows:

(a) Except as provided in subsection (b) or this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such claims.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

rest of the unsecured claims, and the Court of Appeals found this to be improper. The court said "[t]he Code was not meant to allow a debtor complete freedom to place substantially similar claims in separate classes" to create an accepting class of impaired creditors for cram down purposes. Id. at 1539. The critical confirmation requirements in § 1129(a)(8) and § 1129(a)(10) would be seriously undermined if such gerrymandering of classes were allowed. Id. The court concluded that each class must represent a voting interest that is "sufficiently distinct and weighty" to merit a separate voice in the decision whether a proposed reorganization should occur, or the requirement of § 1129(a)(10) would be rendered moot. Id. The court rejected the argument that the two classes of unsecured creditors had different reasons for voting to accept or reject reorganization based on their possibility of recovery under the Plan and thus should be classified separately. "The distinction between those who do and do not 'truly act[ ] in their interests as unsecured creditors' finds no support in the Code and seems inconsistent with economic reality." Id. at 1541. The court pointed out that, absent bad faith or illegality under § 1126(e), the Code is not concerned with a claimholder's reason for voting one way or another and that undoubtedly most claimholders vote in accordance with their overall economic interests as they see them. Id.

The Tenth Circuit has not ruled on the impropriety of "artificial classifications" discussed in Greystone. The district court of Kansas followed the reasoning of Greystone in In re: Drimmel, 135 B.R. 410 (D.Kan 1991), aff'd, Unruh v. Rushville State Bank, 987 F.2d 1506 (10th Cir. 1993), and In re: Stratford Associates Ltd. Partnership, 145 B.R. 689, 695 (D.Kan 1992).

RTC also argues that the Bankruptcy Court should not have confirmed the plan because Interchange, Dunlap and Ramsey were allowed to retain ownership of the property. Under 11 U.S.C. § 1129(b)(2)(B),<sup>4</sup> the "absolute priority rule," a plan should not allow junior interests or classes to retain any interest in the debtor's property. However, debtors have attempted to circumvent this requirement by finding that "new value"<sup>5</sup> has been contributed by a junior class, thereby justifying the continued ownership as an "exception" to the absolute priority rule. RTC notes that some courts have concluded that the "new value" exception did not survive enactment of the Bankruptcy Reform Act of 1978. In re: Outlook/Century Ltd., 127 B.R. 650, 656 (Bankr. N.D. Cal. 1991). The Bankruptcy Code now specifically omits any exception for new value, while incorporating the absolute priority rule. In Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 203 n.3

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<sup>4</sup> Title 11 of the United States Code, § 1129(b)(2)(B), states that a plan can be affirmed if:

With respect to a class of unsecured claims -

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

<sup>5</sup> The "new value" exception to the absolute priority rule was articulated in Case v. Los Angeles Lumber Co., 308 U.S. 106, 121-22 (1939):

It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor . . . this Court stress[ed] the necessity, at times, of seeking new money "essential to the success of the undertaking" from the old stockholders. Where that necessity exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made . . .

. . . [W]e believe that to accord "the creditor his full right of priority against the corporate assets" where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder.

(1988), the Supreme Court concluded that the continued viability of the "new value exception" was undecided.

Courts have made several arguments against the "new value exception." The language of § 1129(b) in the 1978 Act replaced the judicially created definition of "fair and equitable" and does not contain language installing a "new value exception." In re: Drimmel, 135 B.R. at 416. In addition, the legislative history does not support it. Id. That history indicates that Congress "considered proposals which would have broadened the reorganization opportunities of debtors," but the proposals were rejected. Id. The Drimmel court quoted extensively from an article in the Michigan Law Review, "Rethinking Absolute Priority After Ahlers", 87 Mich. L. Rev. 963 (1989). In the article the author closely examined congressional action in enacting the Bankruptcy Reform Act of 1978 and reported that the new value issue was vigorously debated but removed from the original proposed draft of the Code in the end. Id. The Drimmel court also noted that no test for the new value exception has been set out, so this vagueness is a practical problem with the application of such an exception to the absolute priority rule, which a court could not easily solve. Id. The Drimmel court concluded that Congress had legitimate policy reasons favoring its decision to disallow a new value exception and to permit creditors to have greater control in deciding when plans are confirmed. Id.

RTC also argues that there is no "new value" present in this case. While the Bankruptcy Court found that Ramsey's contribution of \$200,000.00 constituted "new value", RTC notes that this ignores the fact that Ramsey withdrew in excess of \$246,000.00 for Mingo Valley Development Company alone within one year prior to the bankruptcy,

which he did not repay. RTC claims that Ramsey owes more than the "new value" to the debtor estate.

RTC also claims it is not "made whole" by the Plan, because its interest rate is lowered and timing of repayment postponed, its pre-petition rents have been paid to insiders and current rents are being consumed contrary to its desires, and it has been denied collection from Dunlap and Ramsey.

Interchange contends that the Bankruptcy Court found that, in fact, the RTC deficiency claim was dissimilar from the claims of the remaining unsecured creditors and there is substantial evidence in the record to support that finding. The principal basis for the court's findings on this issue concerned the RTC's "voting incentive," recognized as a legitimate reason for separate classification in the case of U.S. Truck, 800 F.2d at 587. In that case, the court allowed separate classification of the teamster union's claims because the union had a different stake in the future viability of the reorganized company, and its vote might be affected by a non-creditor interest in the ongoing employment relationship.

Interchange cites several bankruptcy court decisions that have held that a secured creditor's deficiency claim can be classified separately from other unsecured claims if it has unique attributes or interests for purposes of voting and application of 1129(a)(10). In re: Aztec Co., 107 B.R. 585, 587 (Bankr. M.D. Tenn. 1989); In re: Mortgage Invest. Co., 111 B.R. 604, 613 (Bankr. W.D. Tex. 1990); In re: 222 Liberty Associates, 108 B.R. 971, 990 (Bankr. E.D. Pa. 1990).

Interchange argues that the "voting incentive rationale" is applicable to separate classification of RTC's deficiency claim, because of its involvement in the affairs of

Interchange and countless other debtors throughout the country as a result of the collapse of the savings and loan industry. RTC contends that, unlike local financial institutions, the RTC has no ties to, or connection with, the local community and thus no concern for the interests of Interchange and other creditors.

Interchange portrays the RTC as a "bureaucratic quagmire whose sole interest is in liquidation at any cost," which acts through privately owned "contractors" whose modus operandi is to package secured loans and sell them on the market -- in many, if not most, instances to other "contractors." (Appellee's Answer Brief, page 12). Interchange argues that the fact that the RTC's unsecured claim would receive nothing in a liquidation is largely irrelevant, because it is a highly unusual circumstance where it is ever an unsecured creditor in a situation like this. (Appellee's Answer Brief, page 16). Therefore, Interchange contends that, because the principal motivation involved in the RTC's vote is the proposed treatment of its secured claim, it has a conflict of interest with other unsecured creditors and should not be classified with them and permitted to veto the plan. RTC also holds a post-petition security interest in rents. As those rents are received post-petition or post-plan, they become subject to that interest and are not available for distribution to the other unsecured creditors.

Interchange points out the Bankruptcy Court's finding that "we must keep in our minds the difference between classification and treatment." (TR 110, p. 233). Interchange argues that the RTC cannot complain that separate classification is a device to treat it unfairly, as its unsecured claim is being provided prior treatment over the other general unsecured creditors.

Interchange also contends that, under the "absolute priority rule," 11 U.S.C. § 1129(b)(2)(B), the threshold question is whether or not the plan provides that all classes senior to the partners will be paid in full, as this Plan provides, prior to the reversion of any interest to the partners. Thus, Interchange claims that the absolute priority rule is not applicable, and even if it is, courts have recognized a "new value" exception to the absolute priority rule. In re: Potter Material Service Inc., 781 F.2d 99, 101 (7th Cir. 1986).

The argument in favor of the new value concept is based on legislative intent. Since Congress undoubtedly was aware of the judicially created new value exception, and did not affirmatively act to change it when it enacted the 1978 Act, it is presumed that Congress adopted the judicial interpretations. In re: Sovereign Group 1985-27, Ltd., 142 B.R. 702, 707 (E.D.Penn. 1992). The same equitable considerations and need for flexibility that prompted the courts to create the exception have not changed under the 1978 Act.

The court in In re: Bryson Properties, XVIII, 961 F.2d at 504, pointed out that no clear bankruptcy policy dictates that the new value exception apply. "On the one hand, Congress might have intended that some exception continue because an infusion of new capital may be essential to the success of a new venture and the equity-holders are a natural source for this capital." Id. On the other hand, if a reorganization plan represents a reasonable business risk, creditors should be willing to forego immediate recovery in expectation of greater recovery in the future, in which case they would consent to viable plans providing for new capital infusions. Id. The court noted that the Bankruptcy Code is seen by some as an accommodation between two competing interests, protection of

creditors' rights and the need for successful reorganization, and the absolute priority rule and the new capital exception are "surrogates for these two competing goals." Id. at n.12.

In this case, the bankruptcy court found that Ramsey's contribution of \$200,000.00 of new cash value upon plan confirmation represented new value. (TR 110, p. 237). Whether or not new value exists is a question of fact which will not be disturbed on appeal unless it is clearly erroneous. In re: Brown's Industrial Uniforms, 58 B.R. 139 (N.D. Ill. 1985). For the reasons hereafter stated, when examined in terms of the total debt, such "new value" sum is insubstantial.

This court recognizes that the Bankruptcy Court has broad discretion to determine proper classification according to the factual circumstances of each individual case. In re: U.S. Truck Co., 800 F.2d at 586. Similar claims may be placed in different classes as long as the classification is not designed for abusive or manipulative purposes. In re: Club Assoc., 107 B.R. 385, 401 (N.D.Ga. 1989). There is no question that the only similarity between RTC's unsecured claim and the claims of the creditors in Class Three is that they are unsecured; in both amount and character, they differ significantly. The two classes differ in their connection to the enterprise. There are claims that those in Class Three are intimately connected to the enterprise (RTC claims they are "insiders"), while RTC is not so connected. Certainly the creditors in Class Three have "a different stake in the future viability of the reorganized company" than does the RTC. 800 F.2d at 587. When the unsecured creditors are compared, RTC has a "virtually unique interest". Id.

The RTC, like the FDIC in In re: Bjolmes Realty Trust, 134 B.R. 1000, 1003 (Bankr. D.Mass. 1991), has a mortgage interest that greatly influences how it will vote. As the

bankruptcy court found in In re: Aztec Co., 107 B.R. at 587, the RTC has every incentive to vote its large deficiency claim to affect the treatment of its secured claim by defeating confirmation of the Plan. While this court does not agree with Interchange that the RTC is a "bureaucratic quagmire whose sole interest is in litigation" or "a liquidator" whose "perspective is antithetical to the reorganization process" (Docket #10, pgs. 10 and 12), there is undoubtedly some distinction between the interests of the RTC and the other unsecured creditors. The Bankruptcy Court's finding of fact that the RTC's claim was so dissimilar from that of the other unsecured creditors that it merited separate classification was therefore not clearly erroneous. The finding of fact that two of the Class Three creditors, the law firms and accounting firm, were not "insiders" under 11 U.S.C. § 101(31), also was not clearly erroneous, as there was no evidence in the record that Ramsey and Dunlap controlled their vote. The vote of these Class Three creditors was properly considered when no "insider" acceptance was found under 11 U.S.C. § 1129(a)(10).

The conclusion that the classification in this case was not clearly an attempt by the Bankruptcy Court to gerrymander an affirmative vote in the reorganization Plan does not automatically result in adoption of the Plan. RTC is still protected by the provisions of 11 U.S.C. § 1129(b) that the Plan be fair and equitable with respect to the RTC claim. 800 F.2d at 587. A plan is fair and equitable if it provides each unsecured claim holder receive property of a value equal to the allowed amount of its claim on the effective date of the plan and holders of an unsecured claim junior to the class will not receive or retain property under the plan on account of their claim (Statute is cited in footnote 4).

The Bankruptcy Court was required to find that the Plan was fair and equitable with respect to the classes of unsecured claims. The Bankruptcy Court could not find that the Plan provided each holder of an unsecured claim received property equal to the allowed amount of his claim under § 1129(B)(i), so the court merely said it was "well aware ... as to the, quote, fair and equitable requirement of 1129(b), and that this Court has previously held that there is a new value exception." It found that the Plan required Ramsey to pay the RTC \$200,000.00 (First Amended Plan, Article III, pg. 4), that this was new value for the benefit of RTC, and that the Plan "is fair and equitable." (Transcript of Court's Ruling Following Confirmation Hearing, pg. 13).

This court concludes that this case does not require it to reach the issue of whether the "new value exception" continues to exist. The Supreme Court found in Case v. Los Angeles Lumber Co., 308 U.S. at 121-22, that new value must be substantial, necessary to the success of the reorganization, and equal to or exceeding the value of the retained interest in the estate. See also, Unruh v. Rushville State Bank, 987 F.2d at 1510.

Here the \$200,000.00 is approximately 2% of the total pre-petition debt of over \$9 million. In In re: SLC Limited V, 137 B.R. 847, 855-56 (Bankr. D. Utah 1992), the court concluded that a capital contribution of 3% of the total pre-petition debt was not substantial. The small amount also cannot be seen as enhancing the debtor's prospects for effective reorganization. In In re: Sovereign Group 1985-17, Ltd., 142 B.R. at 708, the court noted that "partial payment of a pre-existing debt to an objecting creditor, particularly in such an insignificant amount, will not facilitate the reorganization."

The Bankruptcy Court's conclusion that the Plan was fair and equitable was in error when viewed in light of the uncontroverted majority unsecured creditor position of RTC. The order of the U. S. Bankruptcy Court for the Northern District of Oklahoma confirming the Plan is reversed and the case is remanded for further proceedings to consider RTC's Motion to Dismiss or, in the Alternative, Motion for Relief from the Automatic Stay and the RTC's Application for Order Regarding Pursuit of Recovery of Payments to Insiders or, in the Alternative, Motion for Relief from the Automatic Stay.

Dated this 24 day of Feb., 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

FEB 24 1994

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

GERALD R. PETERS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MCDONNELL DOUGLAS CORPORATION, )  
 a Maryland corporation, Tulsa )  
 Division, )  
 )  
 Defendant. )

Case No. 93-C-376-B

O R D E R

Now before the Court is Plaintiff's Motion To Dismiss Certain Claims (Docket #19) and Plaintiff's Motion in Limine (Docket #20). For good cause shown, and there being no objection by the Defendant, both motions should be and are hereby GRANTED.

IT IS SO ORDERED THIS 24 DAY OF FEBRUARY, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET  
DATE FEB 28 1994

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

STATE FARM FIRE & CASUALTY CO. )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CHARLES AND KATHERINE WHITEKILLER, )  
and CHRIS AND WILLIE WHITEKILLER, )  
Natural Mother and Father and )  
Guardians of SAMANTHA WHITEKILLER, )  
a minor. )  
 )  
Defendants. )

Case No. 93-C-0203-B ✓

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

ORDER

Now before the Court for consideration is Plaintiff State Farm Insurance Company's Motion for Summary Judgment (Docket #17) filed December 3, 1993.

This action arises from an attack by a dog on a minor child on March 27, 1992. On this day, Katherine Whitekiller ("Katherine") was babysitting her niece Samantha Whitekiller ("Samantha"). While playing outside, Samantha was bitten about the face by Katherine's dog. As a result of this incident, Samantha's parents, Chris and Willie Whitekiller ("Parents") brought suit in the District Court of Tulsa County, Tulsa, Oklahoma, against Katherine and her husband to recover damages for among other things, their loss of Samantha's comfort and expenses for medical care.

Katherine and her husband had a homeowners insurance policy ("the Policy") with State Farm at the time of the attack. State Farm filed this suit against Katherine and her husband, and

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Samantha's Parents seeking a declaratory judgment from this Court that it is under no obligation to provide coverage for any damages claimed by the Parents, or to provide a defense to Katherine and her husband against claims made by the Parents. The undisputed facts in this matter are as follows:

1. On or about March 27, 1992, the Defendant Katherine Whitekiller, was baby sitting her niece, Samantha Whitekiller. (See Pre-Trial Order (Docket #29), Admitted fact #5).

2. On or about March 27, 1992, while she was under the care of the Defendant, Katherine Whitekiller, Samantha Whitekiller was bitten by a dog. (See Pre-Trial Order (Docket #29), Admitted fact #6).

3. State Farm had issued its policy of homeowner's insurance No. 36-27-5336-4 to Charles and Katherine Whitekiller which was effective from December 28, 1991 to December 28, 1992, which states under Section II-Liability Coverage, Coverage L-Personal Liability, (page 14) that:

If a claim is made or a suit brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:

1. Pay up to our limit of liability for damages for which the insured is legally liable, and;

2. Provide a defense...

The limit of liability is \$300,000 for each occurrence, as reflected on the declarations page. (See Pre-Trial Order (Docket #29), Admitted fact #7).

4. The "Section II-Exclusions" portion of the policy, found at page 15 through 16, provides:

Coverage L and M do not apply to:

- i. any claim made or suit brought against any insured by:
  - (1) any person who is in the care of any insured because of child care services provided by or at the direction of:
    - (a) any insured;
    - (c) any other person actually or apparently acting on behalf of any insured.
  - (2) any person who makes a claim because of bodily injury to any person who is in the care of any insured because of child care services provided by or at the direction of:
    - (a) any insured;
    - (c) any other person actually or apparently acting on behalf of any insured.

This exclusion does not apply to the occasional child care services provided by any insured, or to the part-time child care service provided by any insured who is under 19 years of age;

(See Pre-Trial Order (Docket #29), Admitted fact #8).

5. Katherine and Charles Whitekiller are both over 19 years of age. (See Plaintiff's Complaint (Docket #1), Exhibit 1, Defendant's application of insurance).

6. The Defendant, Katherine Whitekiller provided regular child care for the minor plaintiff, Samantha Whitekiller, age three, for three months prior to the dog bite incident and for approximately five months thereafter. The child care she provided was during normal working hours, five days a week, excepting

holidays or vacations.<sup>1</sup> The Defendant, Katherine Whitekiller, was paid \$40 a week by Chris and Willie Whitekiller for taking care of Samantha. (See Pre-Trial Conference Transcript (January 21, 1994)).

7. Katherine Whitekiller reported to the Internal Revenue Service that she had received money for providing child care. (See Defendant's Response to Plaintiff's Motion for Summary Judgment (Docket #25), Exhibit A).

8. Katherine Whitekiller looked after Samantha in September 1991, and again from January 1992 to some time after the attack on March 27, 1992. (See Defendant's Answers to Plaintiff's First Interrogatories (Docket #7)).

9. Katherine Whitekiller began working for a State Farm agent in November of 1989. Her job entailed completing applications for insurance, and checking for any discrepancies against the final policy. (See Defendant's Response to Plaintiff's Motion for Summary Judgment (Docket #25), pg. 4).

10. During her employment with State Farm, Katherine Whitekiller occasionally read policy manuals regarding the criteria by which issued policies would be governed. (See Defendant's Response to Plaintiff's Motion for Summary Judgment (Docket #25), pg. 4).

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<sup>1</sup> At the pre-trial conference, the Court specifically asked if the child care was provided on an "eight to five, Monday through Friday" basis. Although Plaintiff's attorney answered, "That was my understanding," Defendant's attorney made no objection or any suggestion that the child care did not occur as asked. In fact, Defendant's attorney characterized the child care as "fairly regularly," and "pretty steady."

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. Plaintiff's Proposition I.

Plaintiff first argues that the damages alleged in the state court petition are excluded by the child care exclusion in the Policy because the activity that Katherine was engaged in (watching her niece and being paid \$40 per week) was "child care services." To support this proposition, the plaintiff points out that Katherine stated in her deposition that she was "doing child care for Samantha."<sup>2</sup> The plaintiff also notes, and the parties agree, that Katherine was paid \$40 a week to look after Samantha. In addition, Katherine reported this income to the Internal Revenue Service as payment received for providing child care. Each of these undisputed facts, the plaintiff contends, supports the claim

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<sup>2</sup>. See, Plaintiff's Motion for Summary Judgment (Docket #17), Exhibit E pg. 7, ln. 22.

that Katherine was engaged in providing child care services, and thus the damages sought by the parents are excluded under the policy.

The Defendants, on the other hand, admit Katherine was "babysitting" Samantha, but deny this constituted "child care services" within the meaning of the Policy exclusion. Defendants assert that the babysitting was not done for profit, and none was ever made<sup>3</sup>. Defendants state that the weekly payment of \$40 was only intended to cover Katherine's costs in babysitting Samantha. Defendants point out, and plaintiff does not deny, that Katherine did not advertise to babysit for others, and did not hold herself out as a child care provider.

The Court is persuaded that caring for a child (whether a relative or not) on a regular basis is precisely the sort of activity excluded by the policy. The exclusion does not require the homeowner to be making a profit or attempting to make a profit before the exclusion applies. That the defendant stated she provided child care in her deposition, typed child care on her income tax return, and was paid \$40 a week for her services, by themselves is not dispositive. Far more significant is the fact that the Defendant does not deny the child care was provided on a regular basis. While it is true the exclusion does not apply to occasional child care provided by the insured, it is clear that the Defendant provided child care on a regular basis. It is also clear

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<sup>3</sup> Katherine Whitekiller's 1992 tax return shows an income of \$1,684 and expenses of \$1,684. (Plaintiff's Brief in Support for its Motion for Summary Judgment (Docket #17), Exhibit A).

that the child care was to be provided for an indefinite period of time.

The defendants assert that the language of the child care exclusion is ambiguous. Although the policy does not define "child care services," the Court finds this assertion to be without merit.

Defendants have also raised the affirmative defense of estoppel. The Defendants contend State Farm should be estopped from denying coverage because State Farm knew the Defendant did not have a child care endorsement and knew the Defendant was caring for her niece. The plaintiff directs the Court's attention to the fact that Katherine worked for a State Farm agent and thus knew or should have known of the child care exclusion. Katherine admits to reviewing policy manuals while working for State Farm and to the existence of a child care endorsement.<sup>4</sup> However, the Defendants contend that Katherine had no way of learning about the intricacies of the child care exclusion, nor did she know what every provision in the Policy meant.

While it is true, as the defendant points out, that the plaintiff does not have to make an affirmative action to justify the insured's reliance, it is clear that the defendant's "reliance" in this case was unreasonable. Katherine could have easily contacted any State Farm agent and inquired as to exactly what was covered and what was excluded. Katherine's reliance on her own belief that she did not need an endorsement is not grounds for

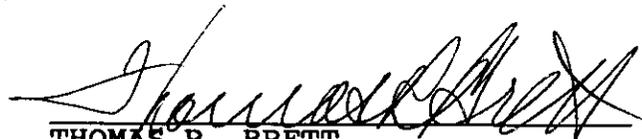
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<sup>4</sup> Brief in Support of Plaintiff's Motion for Summary Judgment (Docket #17), Exhibit E, pg. 30, ln. 14-25.

estoppel.<sup>5</sup> There is no evidence that State Farm concealed any facts or made any misrepresentations to her.

For the reasons stated above, State Farm's Motion for Summary Judgment should be and is hereby GRANTED.<sup>6</sup>

IT IS SO ORDERED THIS 24 DAY OF FEBRUARY, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

---

<sup>5</sup> Katherine admits she discussed a child care endorsement with an employee of State Farm and that she told the employee she did not need one. Katherine Whitekiller's Deposition, page 30, lines 14-25.

<sup>6</sup> The Plaintiff also contends the Policy is void due to the Defendant's fraud and false swearing. Because of the Court's ruling on the exclusion issue, there is no need to address this contention.

DATE FEB 25 1994

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

GWENDOLYN G. PARTNEY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SAINT FRANCIS HOSPITAL, INC., )  
 an Oklahoma Corporation, )  
 )  
 Defendant. )

Case No. 92-C-335-B ✓

**FILED**

FEB 24 1994 *PK*

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

ORDER

Now before the Court is Defendant's Motion to Strike Plaintiff's seventy-three (73) page response to Defendant's Motion In Limine and Motion for Summary Judgment (Docket entry #59). Defendant's Motion is now essentially irrelevant, since Plaintiff has subsequently amended the aforementioned response.<sup>1</sup>

The Court notes that Plaintiff's AMENDED RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION IN LIMINE (Docket entry #65) consists of twenty-five (25) pages and the AMENDED BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION IN LIMINE (Docket entry #66) consists of twenty-four (24) pages, which together exceed the twenty-five (25) page limitation imposed on opening and response

<sup>1</sup>Defendant's Motion also requests that the Court suspend the scheduling order, suspend the time in which Defendant has to file a reply brief, and strike the present trial date. The Court declines to address these concerns, except for the provisions subsequently made for Defendant's Reply.

69

briefs by Local Court Rule 7.2.<sup>2</sup> Plaintiff's Response and Brief in Support of the Response must not jointly exceed the page restrictions of Rule 7.2.

IT IS THEREFORE ORDERED that Plaintiff's Amended Response and Amended Brief in Support of Plaintiff's Response are both stricken, and Plaintiff is allowed seven (7) days from the entry of this order to file her response not to exceed twenty-five (25) pages. Defendant shall have eleven (11) days after the filing of Plaintiff's Response to file its Reply to Plaintiff's Response.

IT IS SO ORDERED THIS 24 DAY OF FEBRUARY, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

---

<sup>2</sup>Plaintiff has also filed a four (4) page Memorandum in Response to Defendant's Motion in Limine (Docket entry #57), for a total of 53 pages of combined filings in response to Defendant's Motion for Summary Judgment and Motion in Limine. All but the four pages of the Memorandum and one paragraph in Plaintiff's Response address the Defendant's Motion for Summary Judgment.

ENTERED ON DOCKET  
DATE FEB 25 1994

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

Julie Biggs,  
Plaintiff  
v.  
John Q. Hammons Hotels, Inc.,  
a corporation in the State of  
Missouri, and Mark Saxton,  
Defendants.

Case No. 93-C-1097-B ✓

**FILED**

FEB 24 1994

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

ORDER

This matter comes on for consideration of Defendant John Q. Hammons Hotels, Inc.'s (Hotel) Motion To Dismiss (docket entry # 2), for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

Plaintiff filed this action pursuant to 42 U.S.C. §2000e et seq, alleging sex discrimination in her employment in violation of Title VII of the Civil Rights Act of 1964. Plaintiff alleges that "[D]uring the course (sic) of her employment, Plaintiff was forced to take a leave of absence until her baby was born and her request to be moved to another position in the hotel was denied."

Hotel asserts Plaintiff's Complaint fails to allege the requisite exhaustion of administrative remedies and, therefore, has failed to state a claim.

Exhaustion of administrative remedies is a prerequisite to filing an employment discrimination action under Title VII in federal court. Gulley v. Orr, 905 F.2d 1383 (10th Cir. 1990); Brown

v. Hartshorne Public School District No. 1, 864 F.2d 680 (10th Cir. 1988); Hogan v. Orr, 672 F.Supp. 1388 (W.D.Okla. 1986); Abdul-Raheem v. Orr, 672 F.Supp. 1389 (W.D.Okla. 1986). A Plaintiff must file a timely charge of discrimination and receive an agency determination or a notice of the right-to-sue. 42 U.S.C. §2000e-et seq. Plaintiff's Complaint fails to contain such allegations.

Hotel's motion was filed herein on January 24, 1994. Plaintiff has failed to respond within the time allowed under local rules. Local Rule 7.1 (C). Failure to timely respond authorizes the Court, in its discretion, to deem the matter confessed, and enter the relief requested. Id.

The Court concludes Hotel's Motion should be and the same is herewith GRANTED. The Court dismisses, without prejudice, this action as to Defendant, John Q. Hammons Hotels, Inc. and further dismisses, without prejudice, this action, sua sponte, as to Defendant Mark Saxton.<sup>1</sup>

IT IS SO ORDERED, this 24 day of February, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

---

<sup>1</sup> Plaintiff's Complaint fails to contain allegations of exhaustion of administrative remedies as to Defendant Mark Saxton.

FILED  
DATE FEB 25 1994

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

REV. HERBERT RAY LEWIS, )  
 )  
 Plaintiff )  
 )  
 v. )  
 )  
 JAY HULTS HAUSER and )  
 LARRY EDWARDS, )  
 )  
 Defendants. )

Case No. 94-C-76-B ✓

**FILED**  
FEB 24 1994 *DR*

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

O R D E R

This matter comes on for consideration of the Report and Recommendation entered herein on February 3, 1994 by the Magistrate Judge recommending that Plaintiff Rev. Herbert Ray Lewis' Motion To Proceed In Forma Pauperis and Civil Rights Complaint Pursuant to 42 U.S.C. §1983 be GRANTED and DISMISSED, respectively.

Plaintiff Lewis (Lewis) filed this action against Tulsa Count Assistant District Attorneys Jay Hults Hauser and Larry Edwards alleging they defamed Lewis' character during a state court criminal proceeding.

The Magistrate Judge concluded Lewis' Complaint was frivolous on two grounds: (1) That a defamation claim, by itself, does not constitute a §1983 claim, citing Siegert v. Gilley, 111 S.Ct. 1789, 1794 (1991) and Paul v. Davis, 96 S.Ct. 1155, 1165 (1976); and (2) That prosecutors enjoy absolute immunity when initiating a prosecution and presenting the state's case, citing Imbler v. Pachtman, 96 S.Ct. 984, 992-994 (1976) and Buckley v. Fitzsimmons,

H

113 S.Ct. 2606 (1993).

The Report and Recommendation granted the parties ten days from the date filed to enter any objection thereto. No objections have been filed by either party.

The Court concludes the Report and Recommendation of the Magistrate Judge should be and the same is ADOPTED and AFFIRMED. The Court further concludes this action should be and the same is herewith DISMISSED.

IT IS SO ORDERED, this 24 day of February, 1994.

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

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

SECRET  
DATE FEB 25 1994

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

JERRY NELSON DUNCAN, Ph.D., an )  
individual, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STATE FARM MUTUAL AUTOMOBILE )  
INSURANCE COMPANY, an Illinois )  
Insurance Corporation, )  
 )  
Defendants. )

Case No. 93-C-37-B ✓

**FILED**

FEB 24 1994

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

ORDER

This matter comes before the Court upon Plaintiff, JERRY NELSON DUNCAN's Motion in Limine. (Docket Entry #14). Plaintiff has requested the Court to exclude evidence relating to six (6) matters.

Plaintiff first request seeks to exclude evidence of the limits of the underlying tortfeasor's insurance policy, prior payment made by the tortfeasor, health insurance collections which Plaintiff has made in this case, automobile Medical Payments (non-subrogable and non-offsetable) received by Plaintiff in this case, and all other collateral sources and their recoveries. Defendant agrees with Plaintiff on this matter unless Plaintiff opens the door. The Court will grant Plaintiff's motion with the caveat that if Plaintiff first introduces evidence on these matters, Defendant will be allowed to further inquire.

Plaintiff's second and third requests are that the Court

✓

exclude evidence as to a claim being made on an automobile collision in which Plaintiff was involved subsequent to the one at issue in this case, as well as evidence relating to a prior auto accident Plaintiff suffered while in college. It is a fundamental principle of law that prior and subsequent accidents are irrelevant to the issue of negligence. Atkinson v. Atchison, Topeka & Santa Fe Ry. Co., 197 F.2d 244, 245-46 (10th Cir. 1952). However, evidence, irrelevant to the issue of negligence, may be admissible if otherwise relevant and material. Id. at 246. Plaintiff, in this case, claims injury to the same areas of his body which he injured in the other two accidents. The prior and subsequent accidents are therefore relevant and admissible "as tending to show that the injury and damage of which Plaintiff complains may have originated otherwise than out of the collision for which Defendant is sued." Witt v. Merrill, 210 F.2d 132, 133-34 (4th Cir. 1954). See also, Segal v. Cook, 329 F.2d. 278 (6th Cir. 1964). Therefore Defendant will be allowed to inquire about the other accidents, but only for the purpose of ascertaining the extent of Plaintiff's damages.

In his fourth request Plaintiff moves the Court to limit any comment or introduction to the jury of information concerning where Plaintiff had gone, what he was doing and what his home circumstances on the date of the incident. Defendant claims this is relevant in determining whether there was anything that would bear upon his driving ability or physical or mental condition at the time of the incident. The circumstances surrounding the

incident, for example, where Plaintiff had gone and what he did are not, per se, improper inquiries. The Court will, however, reserve ruling on this matter until the time of trial.

In his fifth request, Plaintiff moves that Defendant be restricted from making any comments regarding the likelihood of Plaintiff misrepresenting his injuries because he is a psychologist or a trained health care provider. Any reference to Plaintiff's misrepresenting his injuries because of his occupation would not be proper conduct for Defendant's counsel. The potential for unjust bias bars the use of any such argument. Fed. R. Evid. 403. The Court will grant this request.

Plaintiff's final request, seeks to exclude evidence relevant to the policy limits of the Plaintiff's insurance policy, previous payments/nonpayments by any entity, and the extent and evaluation of the Plaintiff's injury. Defendant makes no objection to this limitation. Plaintiff's final request is therefore granted.

It is therefore ORDERED that Plaintiff's Motion in Limine is GRANTED in part, and DENIED in part as set forth herein.

IT IS SO ORDERED THIS 24 DAY OF February, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DATE 2-25-94

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

**F I L E D**

FEB 25 1994

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

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
GEORGE L. GRAYSON, )  
 )  
Defendant. )

Civil Action No.

**93 C1016 E**

FINAL JUDGMENT OF PERMANENT INJUNCTION

This matter comes before the Court on the Complaint of the United States seeking to enjoin the defendant, George L. Grayson, from preparing income tax returns. Defendant has, by his Consent, which has been annexed hereto, waived the entry of findings of fact and conclusions of law, and, without either admitting or denying the allegations of the Complaint except for admitting the jurisdiction of the Court over him and over the subject matter of this action, consented to the entry of this Final Judgment of Permanent Injunction. IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. This Court has subject-matter jurisdiction over this suit pursuant to 28 U.S.C., Sections 1340 and 1345, and Sections 7402(a), 7407, and 7408 of the Internal Revenue Code (26 U.S.C.) ("the Code");

2. This Court has personal jurisdiction over the defendant, who was properly served with a copy of the Summons and Complaint;

3. The Court finds defendant, George L. Grayson, has neither admitted nor denied the allegations that he has engaged

in conduct subject to penalty under Sections 6694 and 6701 of the Code;

4. The Court finds that defendant George L. Grayson has consented to the imposition of injunctive and other relief pursuant to Sections 7402, 7407, and 7408 of the Code.

5. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant George L. Grayson, together with his officers, agents, servants, employees, and attorneys, and persons in active concert or participation with him, is hereby enjoined, directly or indirectly, by the use of any means or instrumentality, from:

a. Taking any action in furtherance of aiding, assisting, advising, or preparing for compensation tax returns of third-party taxpayers;

b. Aiding or assisting in, or procuring or advising with respect to, the preparation or presentation of any portion of a return, affidavit, claim or other document for a third party in connection with any matter arising under the internal revenue laws;

c. Interfering with and/or impeding the proper administration of the internal revenue laws.

6. The Court shall retain jurisdiction over this action for purpose of implementing and enforcing the final judgment and all additional decrees and orders necessary and appropriate to the public interest.

Dated: 2/25, 1993<sup>4</sup>

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-25-94

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

NORTH AMERICAN MECHANICAL )  
SERVICES CORPORATION, a Texas )  
corporation d/b/a NORTH AMERICAN )  
CONSTRUCTION CORPORATION, )

Plaintiff, )

vs. )

BERTREM PRODUCTS, INC., an )  
Oklahoma corporation and EQUAL )  
PRODUCTS, INC., an Oklahoma )  
corporation, )

Defendants, )

BERTREM PRODUCTS, INC., an )  
Oklahoma corporation, )

Third-Party Plaintiff, )

vs. )

G & N MANUFACTURING, INC., an )  
Oklahoma corporation, ZURN )  
INDUSTRIES, a Pennsylvania )  
corporation, and DICKSON )  
WELDING, a Louisiana corporation, )

Third-Party Defendants. )

No. 93-C-0034E

**F I L E D**

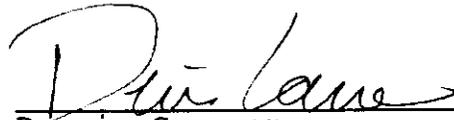
FEB 25 1994

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

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties, by and through their counsel of record, pursuant to Rule 41 (A) (1), hereby stipulate to dismissal of the above-captioned case with prejudice to future filing.

Respectfully submitted,



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Dennis Cameron  
GABLE & GOTWALS  
2000 Bank IV Center  
15 West 6th Street  
Tulsa, Oklahoma 74119-5447  
(918) 582-9201

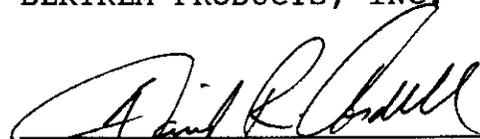
ATTORNEYS FOR PLAINTIFF



---

W. Kirk Turner  
NICHOLS, WOLFE, STAMPER, NALLY  
& FALLIS, INC.  
Suite 400  
Old City Hall Building  
124 East Fourth Street  
Tulsa, Oklahoma 74103-5010

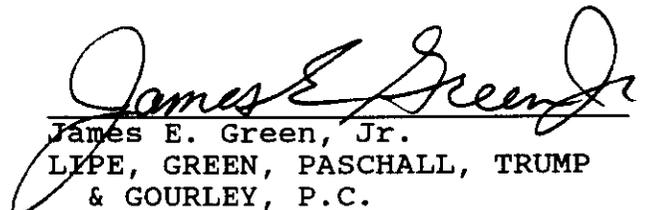
ATTORNEYS FOR DEFENDANT  
BERTREM PRODUCTS, INC.



---

David R. Cordell  
CONNER & WINTERS  
2400 First National Tower  
5 East 5th Street  
Tulsa, Oklahoma 74103-4391

ATTORNEYS FOR DEFENDANT,  
DICKSON GMP INTERNATIONAL INC.



---

James E. Green, Jr.  
LIPE, GREEN, PASCHALL, TRUMP  
& GOURLEY, P.C.  
Suite 3700  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4344

ATTORNEYS FOR DEFENDANT,  
ZURN INDUSTRIES



---

Robert J. Bartz  
BARBER & BARTZ  
Suite 200  
One Ten Occidental Place  
110 West 7th Street  
Tulsa, Oklahoma 74119-1018

ATTORNEYS FOR DEFENDANTS,  
EQUAL PRODUCTS, INC. and  
G & N MANUFACTURING, INC.

ENTERED ON DOCKET

DATE 2-25-94

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

JOHN C. GOGETS,

Plaintiffs,

vs.

THE TULSA CITY-COUNTY HEALTH  
DEPARTMENT; THE TULSA CITY-COUNTY  
BOARD OF HEALTH; BOARD OF COUNTY  
COMMISSIONERS OF THE COUNTY OF  
TULSA, STATE OF OKLAHOMA; CITY OF  
TULSA, STATE OF OKLAHOMA; HOGAN  
ASSESSMENT SYSTEMS, INC., and  
ROBERT HOGAN,

Defendants.

Case No. 93-C-388-~~B~~<sup>E</sup>

FILED

FEB 24 1994

FILED  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER OF DISMISSAL WITH PREJUDICE AND CONFIDENTIALITY**

Plaintiff and Defendants have submitted their Joint Application for Dismissal With Prejudice and Order of Confidentiality, and the Court, being advised that the parties have reached a resolution of this litigation, finds that this proceeding should be and is hereby dismissed against all Defendants, with prejudice, each party to bear its own costs and attorneys' fees. The terms and conditions of the resolution of this litigation by and between the parties is to remain privileged and confidential, subject to disclosure only to the parties to this litigation and their attorneys, and is not to be disclosed to any other persons or entities without further Order of this Court.

SO ORDERED this 24 day of February, 1994.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

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

JOHN C. GOGETS,

Plaintiffs,

vs.

THE TULSA CITY-COUNTY HEALTH  
DEPARTMENT; THE TULSA CITY-COUNTY  
BOARD OF HEALTH; BOARD OF COUNTY  
COMMISSIONERS OF THE COUNTY OF  
TULSA, STATE OF OKLAHOMA; CITY OF  
TULSA, STATE OF OKLAHOMA; HOGAN  
ASSESSMENT SYSTEMS, INC., and  
ROBERT HOGAN,

Defendants.

Case No. 93-C-388-B/E

F I L E D

ORDER OF DISMISSAL WITH PREJUDICE AND CONFIDENTIALITY

Plaintiff and Defendants have submitted their Joint Application for Dismissal With Prejudice and Order of Confidentiality, and the Court, being advised that the parties have reached a resolution of this litigation, finds that this proceeding should be and is hereby dismissed against all Defendants, with prejudice, each party to bear its own costs and attorneys' fees. The terms and conditions of the resolution of this litigation by and between the parties is to remain privileged and confidential, subject to disclosure only to the parties to this litigation and their attorneys, and is not to be disclosed to any other persons or entities without further Order of this Court.

SO ORDERED this 24 day of February, 1994.

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-25-94

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

KRISTOPHER M. BRYANT,	)
	)
Plaintiff,	)
	)
v.	)
	)
DEPARTMENT OF HEALTH AND HUMAN	)
SERVICES, Donna Shalala, Secretary,	)
	)
Defendant.	)

**F I L E D**

FEB 24 1994

92-C-1131-E

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

ORDER

Now before the Court is Plaintiff Kristopher M. Bryant's appeal of the Secretary's decision to terminate his benefits. The issue is whether the Secretary properly applied 20 C.F.R. §416.1165. For the reasons discussed below, the case is **remanded**.

The pertinent facts are as follows: At the time of the Secretary's decision, Claimant Bryant was a 5-year-old child born with *spinal bifida*. There is no question that Claimant is disabled. As a result, in January of 1989, he began receiving some \$100 a month in Supplemental Security Income ("SSI") benefits.

The events leading to the termination of Claimant's benefits began on July 27, 1991 when his parents had a baby girl. When the parents did not respond to requests by the Social Security Administration for a wage update, the Administration estimated the parents' monthly earned income at \$1,980 and unearned income at \$.87. The Administration terminated Claimant's benefits on November 7, 1991 pursuant to 20 C.F.R. §416.1165.

Claimant's parents requested a hearing before an Administrative Law Judge ("ALJ"). Following the hearing, the ALJ found that Claimant was no longer entitled to benefits

under §416.1165. The ALJ wrote:

A reading of the regulations, and a review of the income query, clearly indicates that under the regulations, as they now stand, the claimant is not eligible to continue to receive Supplemental Social Security Income benefits. This is a most unfortunate result. The ALJ is personally aware that the birth of a new child into a family does not create more income to be spent on the disabled child, it produces less. However, this is the way the regulations now read. *Record at page 10.*

### I. Legal Analysis

The standard of review for this case is limited to "ascertaining whether the Secretary has exceeded her statutory authority or whether the regulation is arbitrary and capricious." *Fleshman v. Heckler*, 709 F.2d 999, 1002-1003 (5th Cir. 1983).

The first step in such a standard of review is determining how the Secretary/ALJ reached its decision to terminate benefits. Under 20 C.F.R. §416.1165, the ALJ must, in effect, mathematically determine whether a particular claimant such as Claimant is eligible for SSI benefits. Part of that determination requires information on (1) the amount of Claimant's parents' "monthly earned income", (2) the parents' "unearned monthly income", (3) the allocations for their one "ineligible" child and (4) a "federal benefit rate for the month." *See 20 C.F.R. §416.1165 (a)-(e).*

Unfortunately, for the purposes of review, neither the ALJ's decision nor other evidence in the record discusses specifically how the Secretary/ALJ made his calculation under §416.1165. As a result, the undersigned is unaware of what specific amounts were used by the ALJ/Secretary in making its decision. The record contains little to aid this review.

For example, a computer printout appears on pages 31-33 of the Record. But the Record is far from self-explanatory. It includes a litany of abbreviations, making it difficult to decipher without further clarification. Information concerning the parents' monthly "earned income" is included in the printout, but it is unclear what "unearned income" was attributed to the parents. The undersigned also is unable to determine whether the ALJ used the computer printout, and if he did, what numbers he applied in Claimant's case. More to the point, whose numbers are on the computer printout? Are these the Secretary's "estimates", or do these numbers represent actual evidence of real-time fact?

Review does little to clarify the question. The Secretary's Brief includes a chart -- which attempts to illustrate how the calculation was made. In that chart, the Secretary lists the "earned income" of both parents is listed at \$2,292.25. That figure, however, does not appear to coincide with the computer printout. In addition, the Secretary's Brief does not help explain how the ALJ/Secretary arrived at the parents' "unearned income." It also is unclear as to what time frame was used by the ALJ/Secretary in calculating the Federal Benefit Rate.<sup>1</sup>

In this case, the question for the Court is whether the Secretary exceeded her authority or whether 20 C.F.R. §416.1165 is "arbitrary and capricious." Under these circumstances, however, that question cannot be answered because it is unclear, at best, as to what "amounts" were used by the Secretary/ALJ in terminating the claimant's SSI benefits. Without such information, any review of whether the Secretary exceeded her

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<sup>1</sup> As discussed earlier, the Secretary "estimated" the parents' monthly earned income at \$1,980 and unearned income at \$.87. The undersigned is unsure as to how those figures were calculated, if indeed they were "calculated" at all. Who arrived at these numbers and by what process? In addition, the "earned income" figure of \$1,980 is different from what the Secretary cites in her brief. Exhibit 1 of the Secretary's Brief states annual earnings of the parents, but again, with no reference to real-time.

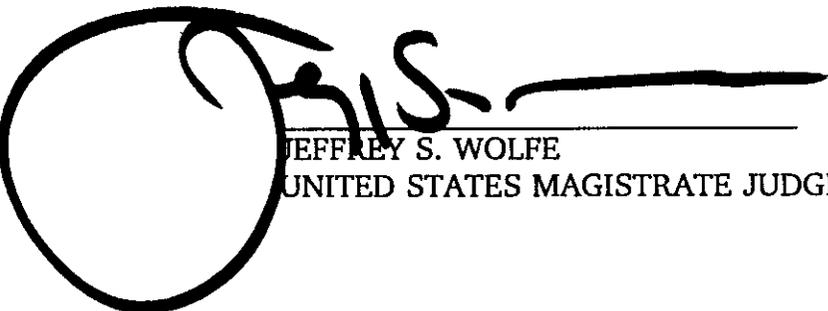
authority is meaningless.

## II. Conclusion

Given the foregoing, the undersigned concludes that the Secretary has not provided this Court with a sufficient basis to determine whether 20 C.F.R. §416.1165 has been followed. Therefore, any ruling on the Secretary's decision will be held in abeyance, pending receipt of the more information. The Secretary must provide the following information to the Court no later than March 4, 1994:

1. The exact amounts used by the ALJ (and specifically how they were derived) for the claimant's parents in determining that Claimant was no longer entitled to benefits. This includes the categories of "earned income" and "unearned income." The information also must include the amount of the Federal Benefit Rate used by the ALJ and a discussion of the amount used for the "allocation for ineligible children".
2. A detailed step-by-step explanation of how the ALJ used the above figures in computing whether Claimant was entitled to benefits (i.e. an explanation of the calculation used.)
3. Claimant maintains that there are at least two different ways to calculate whether Claimant is entitled to benefits. See Plaintiff's Brief. If the Secretary does have the option of using an alternative method to compute benefits, that step-by-step analysis for claimant also must be provided.<sup>2</sup>

SO ORDERED THIS 24<sup>th</sup> day of Feb, 1994.

  
JEFFREY S. WOLFE  
UNITED STATES MAGISTRATE JUDGE

<sup>2</sup> One of the "alternate" methods would be a calculation under the 1994 version of §416.1165.

ENTERED IN DOCKET

DATE FEB 23 1994

#93-C-1076

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION  
FILED

Jan. 28, 1994

PATRICIA D. HOWARD  
CLERK OF THE PANEL

DOCKET NO. 926

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION  
IN RE SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY  
LITIGATION

**FILE**

FEB 18 1994

Richard M. Lawrence  
U.S. DISTRICT COURT

(SEE ATTACHED SCHEDULE CTO-38)

CONDITIONAL TRANSFER ORDER

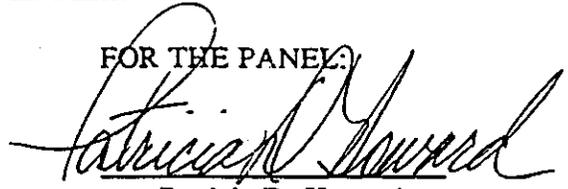
On June 25, 1992, the Panel transferred 78 civil actions to the United States District Court for the Northern District of Alabama for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 4350 additional actions have been transferred to the Northern District of Alabama. With the consent of that court, all such actions have been assigned to the Honorable Sam C. Pointer, Jr.

It appears that the actions listed on the attached schedule involve questions of fact which are common to the actions previously transferred to the Northern District of Alabama and assigned to Judge Pointer.

Pursuant to Rule 12 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 147 F.R.D. 589, the actions on the attached schedule are hereby transferred under 28 U.S.C. §1407 to the Northern District of Alabama for the reasons stated in the opinion and order of June 25, 1992, (793 F.Supp. 1098) and, with the consent of that court, assigned to the Honorable Sam C. Pointer, Jr.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the Northern District of Alabama. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:



Patricia D. Howard  
Clerk of the Panel

Inasmuch as no objection is pending at this time, the stay is lifted and this order becomes effective

FEB 15 1994

Patricia D. Howard  
Clerk of the Panel

20

INVOLVED CLERKS FOR SCHEDULE CTO-38

Alfred L. Wilson  
P.O. Box 1805  
Pittsburgh, PA 15230

Bruce Rifkin  
308 U.S. Courthouse  
1010 Fifth Avenue  
Seattle, WA 98104

Bruce Rifkin  
1717 Pacific Avenue  
Room 3100  
Tacoma, WA 98402

Cameron Burke  
Federal Building, #304  
220 East 5th Avenue  
Moscow, ID 83843

Carl R. Brents  
P.O. Box 869  
Little Rock, AR 72203

Carol C. FitzGerald  
300 Las Vegas Boulevard, South  
Las Vegas, NV 89101

Carol C. FitzGerald  
5003 U.S. Courthouse  
300 Booth Street  
Reno, NV 89509

Charles W. Vagner  
Hemisfair Plaza  
655 East Durango Boulevard  
San Antonio, TX 78206

Christopher R. Johnson  
P.O. Drawer I  
Hot Springs, AR 71901

David J. Maland, Clerk  
P.O. Box 1499  
Marshall, TX 75672

David L. Edwards  
P.O. Box 53558  
Jacksonville, FL 32201

David L. Edwards  
611 U.S. Courthouse  
80 North Hughey Avenue  
Orlando, FL 32801

David L. Edwards  
105 U.S. Courthouse  
611 North Florida Avenue  
Tampa, FL 33602

David R. Sherwood  
133 U.S. Courthouse  
231 West Lafayette Boulevard  
Detroit, MI 48226

Don B. Hendrix  
940 Front Street  
San Diego, CA 92189

Donald Cinnamond  
503 Gus J. Solomon  
U.S. Courthouse  
620 S.W. Main Street  
Portland, OR 97205

Donald Cinnamond  
102 U.S. Courthouse  
211 East 7th Street  
Eugene, OR 97401

H. Stuart Cunningham  
219 South Dearborn Street  
Chicago, IL 60604

Henry R. Crumley, Jr.  
P.O. Box 1130  
Augusta, GA 30903

Henry R. Crumley, Jr.  
P.O. Box 8286  
Savannah, GA 31412

J. Franklin Reid  
950 Federal Building  
167 North Main Street  
Memphis, TN 38103

J.T. Noblin  
245 E. Capitol Street, Suite 416  
Jackson, MS 39201

J.T. Noblin  
725 Washington Loop, Suite 243  
Biloxi, MS 39530

Jack L. Wagner  
2546 U.S. Courthouse  
650 Capitol Mall  
Sacramento, CA 95814

James M. Parkison  
U.S. Courthouse, Foley Square  
New York, NY 10007

James R. Larsen  
P.O. Box 1493  
Spokane, WA 99210

James R. Manspeaker  
U.S. Courthouse, Room C-145  
1929 Stout Street  
Denver, CO 80294

Jesse W. Grider  
P.O. Box 538  
Owensboro, KY 42302

John A. O'Neal  
105 U.S. Courthouse  
46 East Ohio Street  
Indianapolis, IN 46204

John V. O'Brien  
Box 11, U.S. Courthouse  
113 St. Joseph Street  
Mobile, AL 36602

Kenneth J. Murphy  
P.O. Box 970  
Mid City Station  
Dayton, OH 45402

Kevin F. Rowe  
141 Church Street  
New Haven, CT 06510

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION  
FILED

Jan. 28, 1994

PATRICIA D. HOWARD  
CLERK OF THE PANEL

SCHEDULE CTO-38 — TAG ALONG CASES  
DOCKET NO. 926  
IN RE SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY LITIGATION

| <u>DISTRICT DIV CIVIL ACTION#</u> |
|-----------------------------------|-----------------------------------|-----------------------------------|-----------------------------------|
| <b>ALABAMA SOUTHERN</b>           | <b>CONNECTICUT</b>                | <b>GEORGIA SOUTHERN</b>           | <b>MICHIGAN EASTERN</b>           |
| ALS 1 93-780                      | CT 3 93-2404                      | GAS 1 93-209                      | MIE 2 94                          |
| ALS 1 93-781                      |                                   | GAS 1 93-210                      |                                   |
| ALS 1 93-782                      | <b>FLORIDA MIDDLE</b>             | GAS 1 93-211                      | <b>MISSOURI EASTERN</b>           |
| ALS 1 93-783                      | FLM 3 93-1580                     | GAS 1 94-5                        | MOE 4 93                          |
| ALS 1 93-784                      | FLM 5 94-17                       | GAS 4 93-293                      | MOE 4 93                          |
|                                   | FLM 6 94-34                       |                                   | MOE 4 93                          |
| <b>ARKANSAS EASTERN</b>           | FLM 8 93-2152                     | <b>IDAHO</b>                      | <b>MISSOURI WESTERN</b>           |
| ARE 4 93-777                      | FLM 8 93-2159                     | ID 3 94-4                         | HOW 4 93                          |
| ARE 4 94-39                       | FLM 8 93-2160                     |                                   |                                   |
|                                   | FLM 8 93-2161                     | <b>ILLINOIS NORTHERN</b>          | <b>MISSISSIPPI SOUTH</b>          |
| <b>ARKANSAS WESTERN</b>           | FLM 8 93-2176                     | ILN 1 93-5365                     | MSS 1 93                          |
| ARW 6 94-6003                     | FLM 8 93-2177                     | ILN 1 94-95                       | MSS 1 93                          |
|                                   | FLM 8 93-2178                     |                                   | MSS 1 93                          |
| <b>CALIFORNIA CENTRAL</b>         | FLM 8 93-2181                     | <b>ILLINOIS SOUTHERN</b>          | MSS 1 93                          |
| CAC 2 93-6413                     | FLM 8 93-2186                     | ILS 3 93-965                      | MSS 1 94                          |
| CAC 2 93-6415                     | FLM 8 93-2187                     | ILS 3 94-2                        | MSS 1 94                          |
| CAC 2 93-6417                     | FLM 8 93-2190                     |                                   | MSS 1 94                          |
| CAC 2 93-6419                     | FLM 8 93-2212                     | <b>INDIANA SOUTHERN</b>           | MSS 1 94                          |
| CAC 2 93-6421                     | FLM 8 93-2247                     | INS 1 93-1522                     | MSS 1 94                          |
| CAC 2 93-6812                     | FLM 8 93-2248                     |                                   | MSS 1 94                          |
| CAC 2 93-7216                     | FLM 8 94-6                        | <b>KENTUCKY WESTERN</b>           | MSS 1 94                          |
| CAC 2 93-7343                     | FLM 8 94-14                       | KYW 4 94-4                        | MSS 1 94                          |
| CAC 2 93-7396                     | FLM 8 94-19                       |                                   | MSS 1 94                          |
| CAC 2 93-7602                     | FLM 8 94-21                       | <b>LOUISIANA EASTERN</b>          | MSS 3 94                          |
|                                   | FLM 8 94-26                       | LAE 2 93-2893                     | MSS 5 94                          |
| <b>CALIFORNIA EASTERN</b>         | FLM 8 94-28                       | LAE 2 93-4284                     |                                   |
| CAE 2 93-1486                     | FLM 8 94-30                       | LAE 2 93-4295                     | <b>MONTANA</b>                    |
| CAE 2 93-1917                     | FLM 8 94-31                       | LAE 2 94-36                       | MT 4 94                           |
|                                   |                                   | LAE 2 94-37                       |                                   |
| <b>CALIFORNIA NORTHERN</b>        | <b>FLORIDA SOUTHERN</b>           | LAE 2 94-38                       | <b>NORTH CAROLINA WESTERN</b>     |
| CAN 3 93-4176                     | FLS 0 93-7064                     | LAE 2 94-42                       | NCW 2 94                          |
|                                   | FLS 1 94-42                       | LAE 2 94-55                       |                                   |
| <b>CALIFORNIA SOUTHERN</b>        | FLS 9 93-8550                     | LAE 2 94-61                       | <b>NEW JERSEY</b>                 |
| CAS 3 93-1876                     | FLS 9 93-8558                     | LAE 2 94-62                       | NJ 2 94                           |
| CAS 3 93-1958                     | FLS 9 93-8641                     | LAE 2 94-63                       | NJ 2 94                           |
|                                   | FLS 9 93-8694                     | LAE 2 94-64                       | NJ 2 94                           |
| <b>COLORADO</b>                   | FLS 9 93-8718                     | LAE 2 94-137                      |                                   |
| CO 1 93-2446                      | FLS 9 93-8719                     | LAE 2 94-138                      | <b>NEVADA</b>                     |
| CO 1 93-2447                      | FLS 9 94-8014                     | LAE 2 94-187                      | NV 2 94                           |
| CO 1 93-2544                      |                                   |                                   | NV 3 94                           |
| CO 1 93-2551                      | <b>GEORGIA NORTHERN</b>           | <b>LOUISIANA MIDDLE</b>           | NV 3 94                           |
| CO 1 93-2556                      | GAN 1 93-2695                     | LAM 3 93-806                      | NV 3 94                           |
| CO 1 93-2557                      | GAN 1 94-49                       |                                   | NV 3 94                           |
| CO 1 93-2558                      | <del>GAN 1 94-87 opp</del>        | <b>MASSACHUSETTS</b>              |                                   |
| CO 1 93-2559                      | GAN 4 94-1                        | MA 1 93-11728                     | <b>NEW YORK EASTERN</b>           |
| CO 1 93-2560                      |                                   | MA 1 93-11758                     | NYE 1 94                          |
| CO 1 93-2584                      |                                   | MA 4 93-40220                     | NYE 1 94                          |
| CO 1 93-2617                      |                                   | MA 4 93-40221                     | NYE 1 94                          |
|                                   |                                   |                                   | NYE 1 94                          |
|                                   |                                   |                                   | NYE 1 94                          |

INVOLVED CLERKS FOR SCHEDULE CTO-38 (Cont.) MDL NO. 926

William T. Walsh  
U.S. Post Office & Courthouse  
P.O. Box 419  
Newark, NJ 07101

Thomas McGraw  
309 U.S. Courthouse  
100 Otis Street  
Asheville, NC 28801-2611

CRW  
ENTERED ON DOCKET  
FEB 23 1994

ENTERED. 2/18/94

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION  
FILED  
Jan. 26, 1994  
PATRICIA D. HOWARD  
CLERK OF THE PANEL

CLERK OF COURT  
DOCKET NO. 875

1029

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

FILED  
FEB 22 1994

FILED  
FEB 17 1994  
93-1123-B

IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. 71)

(SEE ATTACHED SCHEDULE CTO-47)

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

CONDITIONAL TRANSFER ORDER

MICHAEL E. KUNZ, Clerk  
Dep. Clerk

On July 29, 1991, the Panel transferred 27,696 civil actions to the United States District Court for the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 12,200 additional actions have been transferred to the Eastern District of Pennsylvania. With the consent of that court, all such actions have been assigned to the Honorable Charles R. Weiner.

It appears that the actions listed on the attached schedule involve questions of fact which are common to the actions previously transferred to the Eastern District of Pennsylvania and assigned to Judge Weiner.

Pursuant to Rule 12 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 147 F.R.D. 589, 596, the actions on the attached schedule are hereby transferred under 28 U.S.C. §1407 to the Eastern District of Pennsylvania for the reasons stated in the opinion and order of July 29, 1991, (771 F.Supp. 415), as corrected on October 1, 1991, October 18, 1991, November 22, 1991, December 9, 1991, January 16, 1992, and March 5, 1992, with the consent of that court, assigned to the Honorable Charles R. Weiner.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the Eastern District of Pennsylvania. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

A TRUE COPY CERTIFIED TO FROM THE RECORD  
DATED: 2/18/94  
ATTEST: *Arda Uyala*  
DEPUTY CLERK, UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

FOR THE PANEL:

*Patricia D. Howard*  
Patricia D. Howard  
Clerk of the Panel

Inasmuch as no objection is pending at this time, the stay is lifted and this order becomes effective  
FEB 14  
Patricia D. Howard  
Clerk of the Panel

A CERTIFIED TRUE COPY  
FEB 14 1994  
ATTEST *C. Funder*  
FOR THE JUDICIAL PANEL OF  
MULTIDISTRICT LITIGATION

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION  
FILED

Jan. 26, 1994

PATRICIA D. HOWARD  
CLERK OF THE PANEL

SCHEDULE CTO--47 — TAG ALONG CASES  
DOCKET NO. 875  
IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)

DISTRICT	DIV	CIVIL ACTION#	DISTRICT	DIV	CIVIL ACTION#	DISTRICT	DIV	CIVIL ACTION#	DISTRICT	DIV	CIVIL ACTION#
CONNECTICUT			OHN	1	93-14182	OHN	1	93-14234	SC	2	93-1739
CT	2	91-694	OHN	1	93-14183	OHN	1	93-14235	SC	2	93-3294
			OHN	1	93-14184	OHN	1	93-14236	SC	2	94-13
FLORIDA SOUTHERN			OHN	1	93-14185	OHN	1	93-14237	SC	2	94-14
FLS	1	93-1576	OHN	1	93-14186	OHN	1	93-14238	SC	2	94-15
			OHN	1	93-14187	OHN	1	93-14239	SC	2	94-16
GEORGIA SOUTHERN			OHN	1	93-14188	OHN	1	93-14240	SC	2	94-17
GAS	1	94-9	OHN	1	93-14189	OHN	1	93-14241	SC	2	94-18
GAS	2	94-8	OHN	1	93-14190	OHN	1	93-14242	SC	2	94-19
GAS	2	94-9	OHN	1	93-14191	OHN	1	93-14243	SC	2	94-20
GAS	3	94-3	OHN	1	93-14192	OHN	1	93-14244	SC	2	94-21
GAS	5	94-5	OHN	1	93-14193	OHN	1	93-14245			
			OHN	1	93-14194	OHN	1	93-14246	TEXAS WESTERN		
MAINE			OHN	1	93-14195	OHN	1	93-14247	TXW	6	93-402
ME	1	94-10	OHN	1	93-14196	OHN	1	93-14248			
ME	1	94-13	OHN	1	93-14197	OHN	1	93-14249	VIRGINIA EASTERN		
ME	1	94-14	OHN	1	93-14198	OHN	1	93-14250	VAE	2	94-19
ME	1	94-16	OHN	1	93-14199	OHN	1	93-14251	VAE	2	94-20
ME	1	94-17	OHN	1	93-14200	OHN	1	93-14252	VAE	2	94-22
ME	1	94-18	OHN	1	93-14201	OHN	1	93-14253	VAE	2	94-47
ME	1	94-19	OHN	1	93-14202	OHN	1	93-14254	VAE	2	94-48
ME	1	94-20	OHN	1	93-14203	OHN	1	93-14255	VAE	2	94-49
ME	1	94-22	OHN	1	93-14204	OHN	1	93-14256	VAE	2	94-50
ME	1	94-23	OHN	1	93-14205	OHN	1	93-14257	VAE	2	94-51
ME	1	94-24	OHN	1	93-14206	OHN	1	93-14258	VAE	2	94-52
ME	1	94-25	OHN	1	93-14207	OHN	1	93-14259	VAE	2	94-53
ME	1	94-26	OHN	1	93-14208	OHN	1	93-14260	VAE	2	94-54
ME	1	94-27	OHN	1	93-14209	OHN	1	93-14261	VAE	2	94-55
ME	2	94-10	OHN	1	93-14210	OHN	1	93-14262			
ME	2	94-17	OHN	1	93-14211	OHN	1	93-14263	WASHINGTON EASTERN		
			OHN	1	93-14212	OHN	1	93-14264	WAE	2	94-10
NORTH CAROLINA MIDDLE			OHN	1	93-14213	OHN	1	93-14265			
NCM	3	94-9	OHN	1	93-14214	OHN	1	93-14266	WISCONSIN WESTERN		
			OHN	1	93-14215	OHN	1	93-14267	WIW	3	94-20
NORTH DAKOTA			OHN	1	93-14216				WIW	3	94-21
ND	2	94-3	OHN	1	93-14217	OKLAHOMA NORTHERN			WIW	3	94-33
			OHN	1	93-14218	OKN	4	93-1123	WIW	3	94-34
NEW JERSEY			OHN	1	93-14219				WIW	3	94-35
NJ	3	94-275	OHN	1	93-14220	OREGON			WIW	3	94-36
			OHN	1	93-14221	OR	3	93-1595			
OHIO NORTHERN			OHN	1	93-14222						
OHN	1	93-14172	OHN	1	93-14223	PENNSYLVANIA WESTERN			WVS	3	93-4036
OHN	1	93-14173	OHN	1	93-14224	PAW	2	93-984	WVS	3	93-4037
OHN	1	93-14174	OHN	1	93-14225				WVS	3	93-4113
OHN	1	93-14175	OHN	1	93-14226	RHODE ISLAND					
OHN	1	93-14176	OHN	1	93-14227	RI	1	93-476			
OHN	1	93-14177	OHN	1	93-14228						
OHN	1	93-14178	OHN	1	93-14229						
OHN	1	93-14178	OHN	1	93-14230	SOUTH CAROLINA					
OHN	1	93-14179	OHN	1	93-14231	SC	2	92-3225			
OHN	1	93-14180	OHN	1	93-14232	SC	2	92-3247			
OHN	1	93-14181	OHN	1	93-14233	SC	2	93-1738			

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ENTERED ON DOCKET

DATE FEB 23 1994

#93-C-1077-B ✓

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION  
FILED

Jan. 28, 1994

PATRICIA D. HOWARD  
CLERK OF THE PANEL

DOCKET NO. 926

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION  
IN RE SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY  
LITIGATION

**FILED**

FEB 18 1994

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

(SEE ATTACHED SCHEDULE CTO-38)

**CONDITIONAL TRANSFER ORDER**

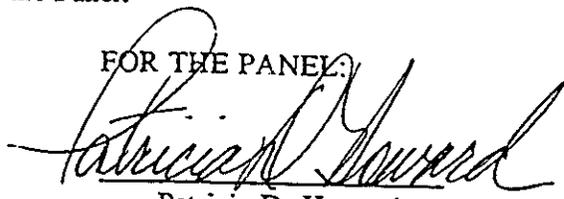
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FOR THE PANEL:



Patricia D. Howard  
Clerk of the Panel

Inasmuch as no objection is pending at this time, the stay is lifted and this order becomes effective

FEB 15 1994

Patricia D. Howard  
Clerk of the Panel

INVOLVED CLERKS FOR SCHEDULE CTG-38

Alfred L. Wilson  
P.O. Box 1805  
Pittsburgh, PA 15230

Bruce Rifkin  
308 U.S. Courthouse  
1010 Fifth Avenue  
Seattle, WA 98104

Bruce Rifkin  
1717 Pacific Avenue  
Room 3100  
Tacoma, WA 98402

Cameron Burke  
Federal Building, #304  
220 East 5th Avenue  
Moscow, ID 83843

Carl R. Brents  
P.O. Box 869  
Little Rock, AR 72203

Carol C. FitzGerald  
300 Las Vegas Boulevard, South  
Las Vegas, NV 89101

Carol C. FitzGerald  
5003 U.S. Courthouse  
300 Booth Street  
Reno, NV 89509

Charles W. Vagner  
Hemisfair Plaza  
655 East Durango Boulevard  
San Antonio, TX 78206

Christopher R. Johnson  
P.O. Drawer I  
Hot Springs, AR 71901

David J. Maland, Clerk  
P.O. Box 1499  
Marshall, TX 75672

David L. Edwards  
P.O. Box 53558  
Jacksonville, FL 32201

David L. Edwards  
611 U.S. Courthouse  
80 North Hughey Avenue  
Orlando, FL 32801

David L. Edwards  
105 U.S. Courthouse  
611 North Florida Avenue  
Tampa, FL 33602

David R. Sherwood  
133 U.S. Courthouse  
231 West Lafayette Boulevard  
Detroit, MI 48226

Don B. Hendrix  
940 Front Street  
San Diego, CA 92189

Donald Cinnamon  
503 Gus J. Solomon  
U.S. Courthouse  
620 S.W. Main Street  
Portland, OR 97205

Donald Cinnamon  
102 U.S. Courthouse  
211 East 7th Street  
Eugene, OR 97401

H. Stuart Cunningham  
219 South Dearborn Street  
Chicago, IL 60604

Henry R. Crumley, Jr.  
P.O. Box 1130  
Augusta, GA 30903

Henry R. Crumley, Jr.  
P.O. Box 8286  
Savannah, GA 31412

J. Franklin Reid  
950 Federal Building  
167 North Main Street  
Memphis, TN 38103

J.T. Noblin  
245 E. Capitol Street, Suite 416  
Jackson, MS 39201

J.T. Noblin  
725 Washington Loop, Suite 243  
Biloxi, MS 39530

Jack L. Wagner  
2546 U.S. Courthouse  
650 Capitol Mall  
Sacramento, CA 95814

James M. Parkison  
U.S. Courthouse, Foley Square  
New York, NY 10007

James R. Larsen  
P.O. Box 1493  
Spokane, WA 99210

James R. Manspeaker  
U.S. Courthouse, Room C-145  
1929 Stout Street  
Denver, CO 80294

Jesse W. Grider  
P.O. Box 538  
Owensboro, KY 42302

John A. O'Neal  
105 U.S. Courthouse  
46 East Ohio Street  
Indianapolis, IN 46204

John V. O'Brien  
Box 11, U.S. Courthouse  
113 St. Joseph Street  
Mobile, AL 36602

Kenneth J. Murphy  
P.O. Box 970  
Mid City Station  
Dayton, OH 45402

Kevin F. Rowe  
141 Church Street  
New Haven, CT 06510

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION  
FILED

Jan. 28, 1994

PATRICIA D. HOWARD  
CLERK OF THE PANEL

SCHEDULE CTO-38 — TAG ALONG CASES  
DOCKET NO. 926  
IN RE SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY LITIGATION

| <u>DISTRICT DIV CIVIL ACTION#</u> |
|-----------------------------------|-----------------------------------|-----------------------------------|-----------------------------------|
| <b>ALABAMA SOUTHERN</b>           | <b>CONNECTICUT</b>                | <b>GEORGIA SOUTHERN</b>           | <b>MICHIGAN EASTERN</b>           |
| ALS 1 93-780                      | CT 3 93-2404                      | GAS 1 93-209                      | MIE 2 94-70050                    |
| ALS 1 93-781                      | <b>FLORIDA MIDDLE</b>             | GAS 1 93-210                      | <b>MISSOURI EASTERN</b>           |
| ALS 1 93-782                      | FLM 3 93-1580                     | GAS 1 93-211                      | MOE 4 93-2375                     |
| ALS 1 93-783                      | FLM 5 94-17                       | GAS 1 94-5                        | MOE 4 93-2576                     |
| ALS 1 93-784                      | FLM 6 94-34                       | GAS 4 93-293                      | MOE 4 93-2699                     |
| <b>ARKANSAS EASTERN</b>           | FLM 8 93-2152                     | <b>IDAHO</b>                      | <b>MISSOURI WESTERN</b>           |
| ARE 4 93-777                      | FLM 8 93-2159                     | ID 3 94-4                         | MOW 4 93-1124                     |
| ARE 4 94-39                       | FLM 8 93-2160                     | <b>ILLINOIS NORTHERN</b>          | <b>MISSISSIPPI SOUTHERN</b>       |
| <b>ARKANSAS WESTERN</b>           | FLM 8 93-2161                     | ILN 1 93-5365                     | MSS 1 93-617                      |
| ARW 6 94-6003                     | FLM 8 93-2176                     | ILN 1 94-95                       | MSS 1 93-623                      |
| <b>CALIFORNIA CENTRAL</b>         | FLM 8 93-2177                     | <b>ILLINOIS SOUTHERN</b>          | MSS 1 93-624                      |
| JAC 2 93-6413                     | FLM 8 93-2178                     | ILS 3 93-965                      | MSS 1 93-625                      |
| CAC 2 93-6415                     | FLM 8 93-2181                     | ILS 3 94-2                        | MSS 1 94-8                        |
| CAC 2 93-6417                     | FLM 8 93-2186                     | <b>INDIANA SOUTHERN</b>           | MSS 1 94-14                       |
| CAC 2 93-6419                     | FLM 8 93-2187                     | INS 1 93-1522                     | MSS 1 94-15                       |
| CAC 2 93-6421                     | FLM 8 93-2190                     | <b>KENTUCKY WESTERN</b>           | MSS 1 94-16                       |
| CAC 2 93-6421                     | FLM 8 93-2212                     | KYW 4 94-4                        | MSS 1 94-17                       |
| CAC 2 93-6812                     | FLM 8 93-2247                     | <b>LOUISIANA EASTERN</b>          | MSS 1 94-18                       |
| CAC 2 93-7216                     | FLM 8 93-2248                     | LAE 2 93-2893                     | MSS 1 94-19                       |
| CAC 2 93-7343                     | FLM 8 94-6                        | LAE 2 93-4284                     | MSS 1 94-22                       |
| CAC 2 93-7396                     | FLM 8 94-14                       | LAE 2 93-4295                     | MSS 3 94-23                       |
| CAC 2 93-7602                     | FLM 8 94-19                       | LAE 2 94-36                       | MSS 5 94-3                        |
| <b>CALIFORNIA EASTERN</b>         | FLM 8 94-21                       | LAE 2 94-37                       | <b>MONTANA</b>                    |
| CAE 2 93-1486                     | FLM 8 94-26                       | LAE 2 94-38                       | MT 4 93-147                       |
| CAE 2 93-1917                     | FLM 8 94-28                       | LAE 2 94-42                       | <b>NORTH CAROLINA WESTERN</b>     |
| <b>CALIFORNIA NORTHERN</b>        | FLM 8 94-30                       | LAE 2 94-55                       | NCW 2 94-1                        |
| CAN 3 93-4176                     | FLM 8 94-31                       | LAE 2 94-61                       | <b>NEW JERSEY</b>                 |
| <b>CALIFORNIA SOUTHERN</b>        | <b>FLORIDA SOUTHERN</b>           | LAE 2 94-62                       | NJ 2 93-5418                      |
| CAS 3 93-1876                     | FLS 0 93-7064                     | LAE 2 94-63                       | NJ 2 93-5439                      |
| CAS 3 93-1958                     | FLS 1 94-42                       | LAE 2 94-64                       | NJ 2 93-5449                      |
| <b>COLORADO</b>                   | FLS 9 93-8550                     | LAE 2 94-137                      | NJ 2 94-84                        |
| CO 1 93-2446                      | FLS 9 93-8558                     | LAE 2 94-138                      | <b>NEVADA</b>                     |
| CO 1 93-2447                      | FLS 9 93-8641                     | LAE 2 94-187                      | NV 2 93-1206                      |
| CO 1 93-2544                      | FLS 9 93-8694                     | <b>LOUISIANA MIDDLE</b>           | NV 3 93-539                       |
| CO 1 93-2551                      | FLS 9 93-8718                     | LAM 3 93-806                      | NV 3 93-618                       |
| CO 1 93-2556                      | FLS 9 93-8719                     | <b>MASSACHUSETTS</b>              | NV 3 93-653                       |
| CO 1 93-2557                      | FLS 9 94-8014                     | MA 1 93-11728                     | <b>NEW YORK EASTERN</b>           |
| CO 1 93-2558                      | <b>GEORGIA NORTHERN</b>           | MA 1 93-11758                     | NYE 1 93-3615                     |
| CO 1 93-2559                      | GAN 1 93-2695                     | MA 4 93-40220                     | NYE 1 93-5749                     |
| CO 1 93-2560                      | GAN 1 94-49                       | MA 4 93-40221                     | NYE 1 93-5805                     |
| CO 1 93-2584                      | <del>GAN 1 94-87</del> <i>Opp</i> | <b>MICHIGAN WESTERN</b>           | NYE 1 93-5876                     |
| CO 1 93-2617                      | GAN 4 94-1                        | MOW 4 93-1124                     | NYE 1 93-5877                     |

William T. Walsh,  
U.S. Post Office & Courthouse  
P.O. Box 419  
Newark, NJ 07101

Thomas McGraw  
309 U.S. Courthouse  
100 Otis Street  
Asheville, NC 28801-2611

2-23-94

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

CHARLES SCHUSTERMAN and )  
LYNN N. SCHUSTERMAN, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Defendant. )

**FILED**

FEB 18 1994

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

No. 92-C-590-E

**FILED**

FEB 23 1994

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

ORDER AND JUDGMENT

The Court has for consideration the cross-motions of the parties for summary judgment (docket numbers 7 and 11, respectively). This is a tax refund case. The parties have stipulated to the following facts:

1. Plaintiffs are Charles Schusterman and Lynn N. Schusterman (collectively the "Plaintiffs"), who are husband and wife and are both residents of Tulsa, Oklahoma, and citizens of the United States of America.

2. Defendant is the United States of America.

3. Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1346(a)(1).

4. As Plaintiffs are residents of Oklahoma, venue for this action is in the Northern District of Oklahoma pursuant to 28 U.S.C. Section 1396.

FIRST TRANSACTION

5. On September 21, 1980 Plaintiff Charles Schusterman transferred 420 shares of Tilco, Inc. ("Tilco") Class "B" common stock to five irrevocable trusts, the beneficiaries of which are

his descendants (the "Trusts"). The trustees of the Trusts executed and delivered promissory notes made to Plaintiff Charles Schusterman (the "Notes") in exchange for the Tilco stock. The total principal amount of the Notes was \$7,954,046.60, and the terms of the Notes provided for interest at six percent (6%) per annum. The Notes were executed on September 21, 1980. The face amount, maturity date and maker of each Note is set forth below:

<u>Maker</u>	<u>Date of Maturity</u>	<u>Face Amount</u>
Stacy Helen Schusterman		
Irrevocable Trust (three notes, secured by 153 shares of Tilco stock)	10-1-80 1-4-82 9-21-00	\$ 144,877.28 144,877.28 <u>2,607,791.04</u>
Total of three notes		<u>2,897,545.60</u>
Jerome Reed Schusterman		
Irrevocable Trust (three notes, secured by 153 shares of Tilco stock)	10-1-80 1-4-82 9-21-00	\$ 144,877.28 144,877.28 <u>2,607,791.04</u>
Total of three notes		<u>2,897,545.60</u>
Stacy Helen Schusterman's Children's		
Irrevocable Trust (three notes, secured by 38 shares of Tilco stock)	10-1-80 1-4-82 9-21-00	\$ 35,982.59 35,982.59 <u>647,686.62</u>
Total of three notes		<u>719,651.80</u>
Jerome Reed Schusterman's Children's		
Irrevocable Trust (three notes, secured by 38 shares of Tilco stock)	10-1-80 1-4-82 9-21-00	\$ 35,982.59 35,982.59 <u>647,686.62</u>
Total of three notes		<u>719,651.80</u>
Harold Josey Schusterman's Children's		
Irrevocable Trust (three notes, secured by 38 shares of Tilco stock)	10-1-80 1-4-82 9-21-00	\$ 35,982.59 35,982.59 <u>647,686.62</u>
Total of three notes		<u>719,651.80</u>

Total Face Amount of the Notes

\$ 7,954,046.60

6. Relying on the recommendation of professional advisors, whose opinion was based on their interpretation of the language of Internal Revenue Code Section 483(a) and Treasury Regulations Sections 1.483-1(a)(1) and 1.483-1(d)(1)(ii)(B), Plaintiff Charles Schusterman and the trustees of the Trusts set the interest rate on the Notes at the rate of six percent (6%) per annum.

7. In examining this transfer of stock between Plaintiff Charles Schusterman and the Trusts, the Internal Revenue Service (the "IRS") determined that a gift had been made to the Trusts. The IRS disregarded the interest rate on the Notes, and instead applied an annual discount rate of eleven and one-half percent (11.5%), citing Internal Revenue News Release IR-84-60, dated May 11, 1984 (subsequently reprinted in Revenue Procedure 85-46, 1985-2 C.B. 507). The IRS characterized as a gift the difference between the fair market value of the Tilco stock transferred to the Trusts and the present value of the Notes as calculated using the 11.5% discount rate.

8. Plaintiffs each properly consented to having the alleged gift considered as having been made one-half by Plaintiff Lynn N. Schusterman and one-half by Plaintiff Charles Schusterman.

9. Plaintiffs each timely filed gift tax returns and each timely paid to the IRS the gift tax as assessed by the IRS for the quarter ending September 30, 1980, in the amount of \$528,043.61, plus interest thereon in the amount of \$578,563.86, and each timely filed a proper claim for refund of the tax and interest paid by

them, plus interest thereon as allowed by law.

10. In their claims for refund, each of Plaintiffs claimed as follows:

"Taxpayer [Plaintiff Charles Schusterman] made installment sales to trusts he established for the benefit of his children and grandchildren in 1980. These sales were subject to the provisions of Internal Revenue Code Section (IRC) 483. Under the provisions of that section, if the loan bears an interest rate at the minimum test rate of Treasury Regulation Section 1.483-1(d)(1)(ii), then no portion of the loan can be recharacterized as something other than principal. The test rate which applies to the loan at issue is 6% which is the interest rate which the loans bear.

The examining agent concluded that the interest rate should have been 11.5% and the difference between the present values of the loan at 6% and 11.5% would be a gift subject to gift tax. The agent maintained that IRC 483 did not apply to the gift tax provisions of the Internal Revenue Code.

The taxpayer maintains that the statement in the statute itself (IRC 483(a)), Treasury Regulation Section 1.483-1(a)(1), and in the Committee Reports (see page 332 of 1964-1 C.B. (Part 2)) that IRC 483 is to apply for all purposes of the Internal Revenue Code means just that. Therefore, no gift was made and the taxpayer claims a refund of the tax paid."

11. Following the disallowance of their claims by the IRS, Plaintiffs timely filed the instant refund action in the United States District Court for the Northern District of Oklahoma.

12. If the Court determines that the 6% rate used by Plaintiffs is inapplicable to the stock-transfer transaction, then the 11.5% rate used by the IRS is applicable.

#### Second Transaction

13. In a separate and unrelated transaction, Plaintiff Charles Schusterman made loans in 1981 to two of the Trusts. The

trustees of these Trusts executed and delivered non-interest bearing demand promissory notes made to Plaintiff Charles Schusterman in exchange for the loans. The trustees of these Trusts repaid each of the loans on December 31, 1983. The names of the borrowing Trusts, the amount of each loan and the date on which each loan was made is set forth below:

<u>Borrower</u>	<u>Date on which loan was made</u>	<u>Amount</u>
Stacy Helen Schusterman Irrevocable Trust	7-31-81 11-17-81	\$ 1,180,860 969,500
Jerome Reed Schusterman Irrevocable Trust	7-31-81 11-17-81	\$ 1,180,860 969,500

14. In examining these loan transactions between Charles Schusterman and these Trusts, the IRS determined that gifts had been made to the Trusts for the quarters ending September 30, 1981 and December 31, 1981, and for the years ending December 31, 1982 and December 31, 1983. The IRS asserted that Plaintiff Charles Schusterman's failure to charge interest on the amounts loaned constituted gifts to the trusts of the right to use the money. The IRS based its determination of the values of these alleged gifts on the interest rates set forth in Internal Revenue News Release IR-84-60, dated May 11, 1984 (subsequently reprinted in Revenue Procedure 85-46, 1985-2 C.B. 507). The interest rates used by the IRS in valuing the alleged gifts were as follows: for 1981, 12 percent; for 1982, 10.6 percent; and for 1983, 8.6 percent.

15. Plaintiffs each properly consented to having the alleged gifts arising from the loan transactions considered as having been made one-half by Plaintiff Lynn N. Schusterman and one-half by

Plaintiff Charles Schusterman.

16. Plaintiffs each timely filed gift tax returns and each timely paid to the IRS the gift tax as assessed by the IRS, plus interest thereon, for the quarters ending September 30, 1981 and December 31, 1981, and for the years ending December 31, 1982 and December 31, 1983. The payments made to the IRS are summarized as follows:

Plaintiff Charles Schusterman

<u>For Quarter (Q) or Year (Y) Ending</u>	<u>Gift Tax Paid</u>	<u>Interest Paid</u>	<u>Total Paid</u>
(Q) 9-30-81	\$ 6,127.63	\$ 5,550.24	\$ 11,677.87
(Q) 12-31-81	22,337.99	19,051.75	41,389.74
(Y) 12-31-82	86,772.17	43,929.74	130,701.91
(Y) 12-31-83	67,474.52	21,724.24	89,198.76

Plaintiff Lynn N. Schusterman

<u>For Quarter (Q) or Year (Y) Ending</u>	<u>Gift Tax Paid</u>	<u>Interest Paid</u>	<u>Total Paid</u>
(Q) 9-30-81	\$ 6,127.63	\$ 5,550.24	\$ 11,677.87
(Q) 12-31-81	22,337.99	19,051.75	41,389.74
(Y) 12-31-82	86,772.17	43,929.74	130,701.91
(Y) 12-31-83	67,474.52	21,724.24	89,198.76

17. Plaintiffs each timely filed a proper claim for refund of the tax and interest paid by them, plus interest thereon as allowed by law.

18. In their claims for refund, each of Plaintiffs claimed as follows:

"Taxpayer [Plaintiff Charles Schusterman] made non-interest bearing demand notes to trusts which he had established for his children.

The taxpayer agrees that these non-interest bearing loans constitute gifts and has previously filed gift tax returns reporting these gifts. The taxpayer's position is that the interest rates utilized to determine the

amount of the gift should be those interest rates specified in Treasury Regulations 25.2512-5 and 25.2512-9 for the years in question. This claim is being filed to claim a refund of the additional gift tax paid because the examining agent used the interest rates from Internal Revenue News Release IR-84-60, May 11, 1984, rather than those rates specified in the above-mentioned regulations."

19. Plaintiffs concede that the values of the use of the amounts of money loaned to the trusts constitute gifts, but contend that in calculating the amount of the gifts the IRS should have used an interest rate of 6% for 1981, 1982 and the first 11 months of 1983, which rate is contained in Treasury Regulations Section 25.2512-9, and an interest rate of 10% for December of 1983, which rate is contained in Treasury Regulations Section 25.2512-5 (which first became effective on December 1, 1983).

20. Following the disallowance of their claims by the IRS, Plaintiffs timely filed the instant refund action in the United States District Court for the Northern District of Oklahoma.

21. If the Court determines that the interest rates urged by Plaintiffs are inapplicable to the loan transactions, then the interest rates used by the IRS are applicable.

As to the First Transaction, the issue presented to this Court may be stated as follows:

1. Were the Plaintiffs entitled to rely on §483 of the Internal Revenue Code in computing interest on the Notes which were taken in exchange for the Tilco Stock at 6% per annum and thereby claim a safe-harbor from the imputation of gift tax to the transaction?

Section 483 of the Code states in pertinent part as follows:

For purposes of this title, in the case of any payment under any contract for the sale or exchange of any property, and to which this section applies, there shall be treated as interest that portion of the total unstated interest under such contract which ... is properly allocable to such payment.

Plaintiffs urge this Court to adopt a broad application of §438. In support of their position the Plaintiffs cite to the express language of the Section, its legislative history and its corresponding regulation: 'Treas.Reg/§1.483-1(a)(1) and to the cases of Ballard v. Comm'r, 854 F.2d 185 (7th Cir. 1988), rev'g TCM 1987-128 (1987); Fox v. USA, 62 AFTR2d 88-5947 (D.C. Va. 1988); Kingsley v. Comm'r, 662 F.2d 539 (9th Cir. 1981), affg 72 TC 1095 (1979) (one of the "reorganization cases" in which §483 is deemed to be applicable to the reorganization provisions of the Code because it was enacted for the purpose of preventing parties from converting any part of a payment from interest income into capital gain). Plaintiffs further assert that taking the position asserted by the USA would create a conflict in the calculations of the income tax basis of the transferred property in the hands of the transferee and the amount of gain to be recognized by the transferor. Finally, they cite Crown v. Comm'r, 585 F.2d 234, 240 (7th Cir. 1978) for the general proposition that equity does not favor the imputation of a gift.

In considering Plaintiffs' position the Court has compared the reasoning of the Ballard case and its construction of §483 with that of the Krabberhoft case which Defendant cites in support of its position that §483 cannot be employed as a "safe harbor" from

the application of market interest rates for purposes of gift tax valuation. Krabberhoft v. Commissioner, 939 F.2d 529 (8th Cir. 1991). In making its evaluation of the relative merits of the approach taken by each case, this Court must bear in mind that it is Plaintiffs' burden to rebut the presumption of the validity of a federal tax assessment. Dolese v. Commissioner, 811 F.2d 543 (10th Cir. 1987).

In Ballard Plaintiff executed a contract for conditional sale of real estate in favor of her children for the purchase of her farm. Under the installment terms of the contract the children agreed to pay six per cent interest on the principal. Plaintiff then reported a gift to the extent of the difference between the fair market value of the property and the face value of the contract. Id. at 186. The Service contested the six per cent interest rate claiming that Section 483 did not apply to the transaction. The U.S. Tax Court agreed:

The issue in this case is valuation, namely, the value for gift tax purposes of the consideration received by petitioner in transferring the real estate described in the contract for sale ... Section 483 has nothing to do with valuation ...

Id. at 187, quoting the Tax Court (citation omitted). On appeal, the Seventh Circuit reversed, finding the Plaintiff's construction of the plain meaning of the statute compelling. The Plaintiff argued, and the Circuit agreed, that the Section's prefatory language: "For purposes of this title" meant exactly what it said. That is, Congress intended the Section to apply to all sections of the Code, including the gift tax provisions. Finding the plain

meaning of the statute clear and unambiguous the Circuit did not consider the legislative history of the section. Id. at 188. It seems to this Court that the Circuit's decision begs the question. While §483 indisputably applies to the entire Code, the question at bar is - how should it apply. Put another way, were Plaintiffs entitled to rely on §483 for valuation purposes under the factual scenario herein?

Finding the analysis of §483 presented by the Eighth Circuit in Krabberhoft v. Commissioner, 939 F.2d 529 (8th Cir. 1991) both applicable and persuasive, the Court concludes that Plaintiffs were not so entitled. In Krabberhoft, Plaintiffs transferred realty to their children by way of a contract for deed which provided for thirty annual installment payments and a per annum interest rate of 6 per cent. The transaction is clearly analogous to the pivotal facts in the instant case. Further, the Krabberhofts claimed safe harbor protection by designating a §483 six per cent interest rate. The Tax Court affirmed the Service's determination that §483 was inapplicable to the valuation of the transaction for purposes of computing gift tax liability and that the Plaintiffs failed to prove that the eleven per cent interest rate employed by the Service was improper. The Eighth Circuit concurred. It found that while §483 applies to the entire Code, as asserted by Plaintiffs, the Section does not speak to valuation.

The section merely characterizes payments as principal or interest, while gift tax valuation is concerned with the value of all payments, whether principal or interest. The character of a payment does not affect its value for gift tax purposes.

Id. at 532.

Thus, §483 is irrelevant to a 26 U.S.C. §2512 valuation of gifts. As an ancillary issue, then, the Court must reject Plaintiffs' argument that the government's position will result in a conflict over which sales price to compute: the one pursuant to §2512 or the one "mandated by §483". It is the opinion of this Court that §483 is inapplicable to "sales price" or valuation determination, hence no conflict arises.

In Krabberhoft, the Circuit found that the Service's designation of an eleven per cent interest rate for purposes of ascertaining the present value of the contract was not erroneous. The evidence adduced at trial of rates for similar transactions substantiated the Service's computation of fair market value. Thus, Plaintiffs failed to meet their burden of showing the method was incorrect. Id. at 544-534. In the instant case, the Service properly rejected the use of §483 for valuation purposes of the transaction and Plaintiff has failed to rebut the presumption that the evidence produced by the Service in support of its use of an eleven and one-half per cent discount rate was proper. See, United States Memorandum in Support of Motion for Summary Judgment p. 2, n. 2. Pursuant to Stipulation #12 of the parties, supra, the Court finds that the eleven and one-half percent rate is proper.

Regarding the Second Transaction, the following issue is presented:

2. Whether the retroactive application of the interest rates set forth in Rev. Proc. 85-46 was proper for purposes of

calculating the gifts Plaintiffs made by providing interest-free demand loans to the descendants' trusts?

The Service cites Dickman v. Commissioner, 465 U.S. 330, 344 (1984) for the now well-settled rule that an interest-free demand loan is deemed a gift in the amount to the value of the money lent. Guidelines for the valuation of gifts are set forth in various regulations.

Although Dickman considered whether an interest free demand loan would result in imputation of a gift in the amount of the interest, it did not address the method by which such gift is to be valued. In a footnote, the Dickman Court recognized the valuation issue was not raised on the record before it, but noted that in order to impute a gift in the context of an interest free (or low interest) loan, the Service had to establish that "a certain yield could readily be secured and that the reasonable value of the use of the funds could be reliably ascertained." Id. at 1094-95, n. 14.

On May 11, 1984, following Dickman, the Service issued IRS News Release 84-60, which explained its method for valuation of gifts created by interest-free demand loans for periods before 1984 and establishing the interest rates for such valuations. That News Release was followed by publication of Rev.Proc. 85-46, 1985-2, CB 507, which officially provided the rules for valuing and reporting gifts from interest-free demand loans for 1984 and prior years. In those publications the Service states that the value of gifts which result from below-market demand loans may be computed by applying

the lesser of the interest rate set forth in §6621 of the Code or the average annual rate for three-month Treasury Bills. It is the Service's position that these post-Dickman publications apply in the instant case.

Prior to the issuance of IRS News Release 84-60 and Rev.Proc. 85-46, the Treasury Regulations issued under IRC §2512 (Treas. Regs. §25.2512-1, -5, -9) set forth the valuation rules to be used in determining the amount of taxable gifts. These regulations provided that if the interest to be valued is the right to receive income from property, or to use non-income producing property for a term of years, the value of the interest is the value of the property multiplied by the present worth of an income interest determined at 6% for transfers occurring prior to December 1, 1983, at 10% for transfers occurring after November 30, 1983. Valuation of and rates for interest-free demand loans are not specifically addressed in these regulations. Plaintiffs assert that these pre-Dickman publications are applicable to the instant case.

Thus, the Service employed the procedure set forth in Rev.Proc. 85-46 for determining the value of gifts resulting from interest-free demand loans for 1984 and prior years. And Plaintiffs argue that use of the procedure for gifts in 1981-1983 is improper. The Service cites Cohen v. Commissioner, 910 F.2d 422 (7th Cir. 1990) in support of its position. Plaintiffs rejoin that Cohen's reasoning is flawed. In Cohen Plaintiffs made interest-free demand loans to their descendants' trusts in reliance upon the pre-Dickman rule that interest-free demand loans made to family

members created gift tax liability. Crown v. Comm'r, 585 F.2d 234 (7th Cir. 1978). After Crown was overruled by Dickman, Plaintiffs filed amended tax returns declaring the loans as taxable gifts. In determining the value of the gifts, Plaintiffs employed the rates set forth in sections 25.2512-5(e) and 25.2512-9(e) of the Regulations, as did the Schustermans in the instant case. The Service valued the gifts pursuant to Rev.Proc. 85-46, as it did in the instant case. The Tax Court and the Circuit found the interest rates set forth in Rev.Proc. 85-46 reasonable because they are consistent with gift valuation principles and Congressional efforts at dealing with valuation of below market loans outstanding after June 6, 1984. Id. at 425-426. The Circuit found the Service's retroactive application of the rates acceptable pursuant to Dickman, 465 U.S. at 343, 104 S.Ct. at 1094. The Court finds no flaw in the Circuit's reasoning. The Court is persuaded that the Seventh Circuit's analysis should be applied to this case as it relates to the applicable rate of interest for determining the value of a gift in the context of an interest-free demand loan. Plaintiffs have failed to meet their burden of rebutting the presumption that the Service's approach is erroneous.

Accordingly, the Service's determinations as to both issues will be upheld; Plaintiffs' Motion for Summary Judgment will be DENIED; Defendant's Motion for Summary Judgment will be GRANTED. Judgment will be entered in favor of Defendant and against the Plaintiffs. Plaintiffs will take nothing from this action. Case DISMISSED.

ORDERED this 18<sup>th</sup> day of February, 1994.

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

ENTERED ON DOCKET

DATE 2-23-94

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

**FILED**

FEB 22 1994

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

TARBY, INC., )  
)  
Plaintiff, )  
)  
vs. )  
)  
DRILLING MEASUREMENTS, INC. )  
)  
Defendant. )

Case No. 93-C-891-E

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, Plaintiff Tarby, Inc. and Defendant Drilling Measurements, Inc. stipulate to the dismissal of and do hereby dismiss with prejudice the above-captioned cause, including all claims and counterclaims asserted or which might have been asserted herein, each party to bear their own costs and attorneys' fees.

John A. Bugg  
John A. Bugg, OBA #13665  
CONNER & WINTERS  
A Professional Corporation  
2400 First National Tower  
15 East 5th Street  
Tulsa, Oklahoma 74103-4391  
(918) 586-5711

Attorneys for Plaintiff  
TARBY, INC.

Brinda K. White  
Conner L. Helms, OBA #12115  
Brinda K. White, OBA #9535  
LINN & HELMS  
1200 Bank Of Oklahoma Plaza  
201 Robert S. Kerr Avenue  
Oklahoma City, Oklahoma 73102-4289  
(405) 239-6781

Attorneys for Defendant  
DRILLING MEASUREMENTS, INC.

ENTERED ON DOCKET

DATE 2-22-94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Muhammad Almansur, )  
 )  
 Defendant. )

Civil Action No. 93-C-909-B

**FILED**

FEB 18 1994

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

DEFAULT JUDGMENT

This matter comes on for consideration this 18 day of Feb., 1994, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Muhammad Almansur, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Muhammad Almansur, was served with Summons and Complaint on December 7, 1993. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Muhammad Almansur, for the principal amount of \$4,671.92, plus administrative charges in the amount of \$8.02, plus accrued interest of \$1,560.38 as of February 15, 1994, plus interest

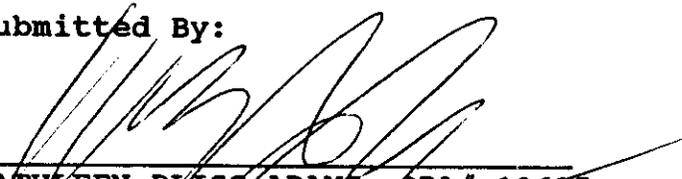
thereafter at the rate of 11.49% per annum until judgment, and in the principal amount of \$2,834.28, plus administrative charges in the amount of \$8.02, plus accrued interest in the amount of \$803.29 as of February 15, 1994, plus interest thereafter at the rate of 8% per annum until judgment, plus a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 3.74 percent per annum until paid, plus costs of this action.

S/ THOMAS R. BRETT,

---

United States District Judge

Submitted By:

---

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

ENTERED ON DOCKET

DATE 2-22-94

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

THRIFTY RENT-A-CAR SYSTEM )  
INC., an Oklahoma )  
corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DONALD R. POTEAT, )  
 )  
Defendant. )

**FILED**

FEB 18 1994

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA  
No. 93-C-85

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that settlement has not been completed and further litigation is necessary.

ORDERED this 18<sup>th</sup> day of February, 1994.

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

DATE 2-22-94

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

BRENDA TABBYTITE,  
Plaintiff,  
vs.  
WAL-MART STORES, INC., a  
Delaware Corporation d/b/a  
Wal-Mart,  
Defendant.

No. 93-C-307-E ✓

**FILED**  
FEB 18 1994

ORDER AND JUDGMENT

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

The Court has for consideration the Motion of the Defendant for Summary Judgment (docket #11). This is a trip and fall case. Plaintiff tripped on drawstrings hanging from a display of sweatshirts while she was shopping in one of Defendant's stores. The undisputed evidence on this record is that the hazard was open and obvious (See Plaintiff's Deposition and Affidavit). Based upon settled law in this jurisdiction, then, Plaintiff's claim must fail because Defendant breached no duty to her. See, Nicholson v. Tucker, 512 P.2d 156 (Okl. 1973); Southerland v. Wal-Mart Stores, Inc., 848 P.2d 68 (Okl.App. 1993). Accordingly, it is the Order of the Court that Defendant's Motion for Summary Judgment is GRANTED; Plaintiff will take nothing for her claim; JUDGMENT will be entered IN FAVOR OF DEFENDANT and AGAINST PLAINTIFF; this case is DISMISSED.

ORDERED this 18<sup>th</sup> day of February, 1994.

  
JAMES G. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT