



and the Home-Stake Royalty Corporation ("HSRC") are Oklahoma corporations, having Tulsa, Oklahoma as their principal place of business.

5. Defendant Jarrell B. Ormand is an individual residing in and about Dallas, Texas.

6. The Complaint seeks declaratory relief as to the true owners of certain stock and further alleges breach of the agreements between the Plaintiffs and Tri Texas known as the HSRC Exchange Agreement, HSRC Escrow Agreement, HSOG Exchange Agreement, HSOG Escrow Agreement and the Collateral Agreement. Plaintiff Helen Grey Trippet also alleges breach of a promissory note and guaranty agreement by Tri Texas, Inc. and Charles S. Christopher as to a Pavillion Bank loan. Plaintiff further allege fraud in the inducement by Christopher and Tri Texas as well as a claim for conversion of property by Christopher and Tri-Texas. Plaintiffs also assert their positions as sureties for Christopher and Tri-Texas as a result of losing collateral on the Pavillion Bank transaction.

7. Defendants Tri-Texas and Charles S. Christopher allege counterclaims for declaratory judgment for title and ownership of stock certificates, breach of the agreements between Tri-Texas and Plaintiffs and for tortious interference with business relationship with Pavillion Bank.

8. Federal jurisdiction is invoked on the grounds of diversity of citizenship and U.S.C. §1332.

#### FINDINGS OF FACT

1. In April of 1991, Plaintiffs and Tri-Texas entered into

the HSRC Exchange Agreement, the HSRC Escrow Agreement, the HSOG Exchange Agreement, the HSOG Escrow Agreement and the Collateral Agreement. The exchange agreements and escrow agreements were modified and amended in May of 1991.

2. The April 1991 agreements provided for an exchange of Plaintiffs' stock in The Home-Stake Royalty Corporation and The Home-Stake Oil and Gas Company for common and preferred stock of Tri-Texas, Inc. Plaintiffs also agreed to exchange all their shares of common stock of AGO Company and AGR Corporation for common stock of Tri-Texas. The escrow agreements provided that the Home-Stake stock would be put in escrow (Ormand to be escrow agent and Paine Webber the depository) until Tri-Texas performed its obligation under the Exchange Agreements.

3. Under the Agreements Tri-Texas was contractually obligated to file a registration statement under federal and state security laws to register (1) shares issued to Plaintiffs, (2) additional shares to be issued to Plaintiffs as required by the Agreements and (3) shares of Tri-Texas stock to enable the purchase of HSRC and HSOE, shares through the exercise of options held by companies controlled by Tri-Texas. The agreements state that the registration statement should be filed by June 30, 1991; Tri-Texas to employ best efforts.

4. Dividends earned on Plaintiffs HSOG and HSRC stock were to be paid to the Plaintiffs until they received a guaranteed price of \$2.50 per share of the Tri-Texas stock issued to them, no later than June 30, 1992.

5. The Pavillion note was personally guaranteed by Christopher.

6. Helen Grey Trippet, by and through Robert S. Trippet as attorney in fact, executed Third Party Pledge Agreements and Hypothecation Agreements offering as collateral on the Pavillion note a \$100,000 City of St. Petersburg Utility Tax Revenue Bond and 700 shares of General Electric Stock.

7. Tri-Texas emphasizes the effort it undertook to attempt control of HSRC and HSOG following execution of the exchange agreements, and the money it spent in that regard. Tri-Texas presented no credible evidence that it made any effort whatever to issue and register additional shares to further its objective to buy HSOG and HSRC shares from third parties.

8. The Exchange Agreements and Escrow Agreements were amended in writing on May 30, 1991. Under the original exchange agreements, Tri-Texas was to maintain an effective registration statement until at least June 30, 1992. The amended exchange agreements restated the registration filing date, as June 30, 1991 but extended the date for which the registration was to remain effective, from June 30, 1992 to December 31, 1992. Subsequently, Tri-Texas requested an extension to file the registration statement. Robert Trippet (acting on behalf of the Plaintiffs) consented to a July 31, 1991 extension to file the registration statement. Thereafter, Tri-Texas requested another extension to file a registration statement. Plaintiffs consented in writing, to an August 31, 1991 registration date. In September, 1991, Tri-

Texas requested another extension which prompted a meeting between the parties on September 17, 1991. Charles Christopher (Tri-Texas President), Jarrell Ormand (Tri-Texas lawyer), and Kathryn Previte, (Tri-Texas employee), Robert Trippet (Plaintiffs' Agent), Ken Anderson (Plaintiffs' lawyer), and Bill Moore (advisor to Robert Trippet) were present. The parties dispute the terms of any agreement reached in the September 17, 1991 meeting. Mr. Christopher and Jarrell Ormand testified that February 28, 1992 was to be the new registration date filing deadline. Robert Trippet and Ken Anderson testified that December 31, 1991 was the agreed date provided the agreement, with all additional terms, be reduced to writing. Tri-Texas concedes it issued its letter and proposed consent form on October 4, 1991 claiming an agreement existed for a December 31, 1991 extension. Mr. Christopher testified that the letter was approved on his behalf and sent by his assistant Kathryn Previte with the participation of Mr. Ormand (Tri-Texas' lawyer). The letter states in part: "... extension is necessary to enable Tri-Texas to avoid being in default with respect to its obligations to the former Home-Stake shareholders." (emphasis added) The letter also states an intention to: "... document the verbal agreements we reached in Tulsa ...". The consent form states in part:

"In connection with the obligation of Tri-Texas, Inc. ... to file a registration statement ..."

"The date on which the aforesaid registration statement is required to be filed is hereby **extended** until **December 31, 1991.**" (emphasis added)

The tendered form was received but never approved by Plaintiffs. On October 17, 1991, Ken Anderson (Plaintiffs' counsel at the time) wrote Mr. Ormand, enclosing his draft of an agreement which he stated at trial, reflects the discussion of the parties on September 17, 1991. Mr. Anderson's draft says "such registration statement will be filed on or before December 31, 1991."

Regardless of whether an enforceable verbal agreement was made extending the registration filing date to December 31, 1991, two things are certain and undisputed by the parties: (1) Tri-Texas did not file its registration statement by August 31, 1991 or before December 31, 1991 and (2) there is no credible evidence that Tri-Texas intended to file a registration statement at any time before December 31, 1991. The contract requirement to file a registration statement was breached. The evidence indicates that Tri-Texas had no intent to file a legitimate Registration Statement at the time of contracting in April, 1991, or thereafter.

9. Registration of Plaintiffs' Tri-Texas shares so they could be offered for sale to the public was the only practical mechanism under the contract for Tri-Texas to raise funds to pay the agreed guaranteed price or for Plaintiffs to sell their shares and receive an equivalent price. Absent an effective registration, the Tri-Texas shares issues to Plaintiffs could not be sold to the public as freely trading shares. Failure to timely register denied the Plaintiffs their entire bargained for consideration under the contract. Failure to register timely was a material breach of the parties' contract.

10. On or about February 26, 1992, Tri-Texas filed a document labeled "Registration Statement" with the SEC. On March 24, 1992, the SEC sent its letter of criticism about the Registration Statement. Considering these two documents, and the expert testimony of Mr. Ken Anderson, it is evident that:

- (a) The Registration Statement filed was seriously deficient, having failed to provide such basic matters as consents from present and prior accountants.
- (b) The attempted filing was not a good effort or best effort but rather a sham filing to only make it appear that Tri-Texas was attempting compliance with the registration filing requirements of the exchange agreements.
- (c) Mr. Ormand testified that a consent from prior accountants was not forthcoming, due in part to the fact that they had not been paid (along with numerous other creditors), and that without a consent, the registration statement would never become effective. Tri-Texas presented no evidence of any effort to cure the defect of the consents.
- (d) None of the deficiencies noted by the SEC in its comment letter were ever cured. Tri-Texas presented no evidence of any attempt to cure any of the defects described.
- (e) Tri-Texas later withdrew its registration statement.

11. Plaintiffs sent a letter of rescission of the April 1991 agreements as amended on December 27, 1991.

12. The exchange agreements require Tri-Texas to pay over to

Plaintiffs, all dividends received on Plaintiffs HSRC and HSOG shares until the guaranteed \$2.50 per share is received. Tri-Texas claims this requirement was modified verbally allowing Tri-Texas to hold the dividend, and pay it over to Plaintiffs with funds received from a subsequent dividend. Plaintiffs claim the dividend arrangement was altered, also verbally, to allow Tri-Texas to hold the dividend monies for 30 days only, and then pay the held monies over to Plaintiffs. The exchange agreements forbid such oral changes. Tri-Texas concedes it received the October dividend as reflected on DX101 (entry for October 31, 1991 in the amount of \$35,331.00), and that the dividend was never paid to Plaintiffs. The failure to pay over the dividend was a material breach of the conditions of the parties' written agreement.

13. The promissory note matured and was not renewed. On July 10, 1992 Pavillion Bank sold Helen Grey Trippet's collateral (bond and G.E. Stock) for \$156,354.19.

14. On July 20, 1992, Helen Grey Trippet purchased the Pavillion Note, the Christopher guaranty and all of the security interest held by the bank and she is currently the owner and holder of the note and the collateral.

15. The principal amount owed on the Pavillion note is \$193,645.81.

16. The interest accrued on the Pavillion note through August 2, 1993 (date of trial) is \$49,367.15.

17. Interest accrues after August 2, 1993 at a rate of \$64.99 per diem.

18. Helen Grey Trippet is entitled to recover monies on her surety claims against Tri-Texas and Christopher as a result of the sale of her collateral (G.E. Stock, St. Petersburg bond), subject to any offsets Defendants may establish, if any.

19. Mr. Trippet, at all relevant times, acted and had full authority to act for all Plaintiffs concerning all matters material to the agreements in question.

20. Plaintiffs' fraud by misrepresentation claims are as follows: (1) the financial condition of Tri-Texas was misrepresented; (2) Mr. Christopher falsely represented that he had a loan lined up; and (3) Mr. Christopher falsely represented that Tri-Texas would get control of the Home-Stake Companies at the May 6 shareholders' meeting. The pivotal facts related to each of these claims, i.e. that the representations were made at all, are expressly rebutted in the contractual agreements that Plaintiffs signed. Such express language defeats a fraud claim as a matter of law. See, e.g., Grumman Allied Indus. v. Rohr Indus. Inc., 748 F.2d 729, 734 (2nd Cir. 1984); Landale Enters. Inc. v. Berry, 676 F.2d 506, 508 (11th Cir. 1982); Galvatron Indus. Corp. v. Greenberg, 96 A.D.2d 881, 466 N.Y.S.2d 35 (N.Y.App.Div.2d 1983).

21. In addition, the defenses of ratification and waiver are an absolute bar to Plaintiffs' fraud claims. By early to mid May, Mr. Trippet admittedly knew that Tri-Texas had not secured the "lined up" loan or gained control of the Home-Stake Companies as it supposedly promised it would at the May 6th meeting. Nevertheless, Plaintiffs modified the controlling agreements on May 30. In the

summer of 1991, Mr. Trippet admittedly received the Form 10, which reflected the purported differences between the preliminary financial statements he received before closing and the final audited statement filed with the Form 10. Nevertheless, following the receipt of this information Plaintiffs admittedly modified the arrangement for paying the dividends, extended in writing the date for filing the registration statement, orally agreed to further extensions for filing the registration statement, and encouraged the further acquisition of stock and the filing of the option litigation. Given these admitted facts, the defenses of ratification and waiver defeat the fraud claims as a matter of law. See, e.g., Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014 (5th Cir. 1990).

22. In addition, not just any statement will support a claim of fraud. Statements of opinion, judgment, probabilities, expectation, or future predictions will not support a claim of fraud. Zar v. Omni Indus., Inc., 813 F.2d 689, 693 (5th Cir. 1987); Presidio Enters. Inc. v. Warner Bros. Distr. Corp., 784 F.2d 674, 678-79 (5th Cir. 1986); Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983); McCollum v. P/S Investments, Ltd., 764 S.W.2d 252 (Tex.App.-Dallas 1988, writ denied). See, also, Hall v. Edge, 782 P.2d 122, 126-27 (Okla. 1989).

23. Plaintiffs' fraud claim is solely founded upon the common law. Under the common law, fraud may not be founded upon a non-disclosure unless there was a duty to disclose. See, e.g., Tempo Tamers, Inc. v. Crow-Houston Four, Ltd., 715 S.W.2d 658, 669

(Tex.App.-Dallas 1987, writ ref'd n.r.e.). See also, Silk v. Phillips Petroleum Co., 760 P.2d 174, 179 (Okla. 1988). Because this was an arms-length business transaction, there was no duty to disclose. See, e.g., Moore & Moore Drilling Co. v. White, 345 S.W.2d 550, 555 (Tex.Civ.App.-Dallas 1961, writ ref'd n.r.e.); Rutherford v. Exxon Co., 855 F.2d 1141, 1145 (5th Cir. 1988); Cyrrix Corp. v. Intel Corp., 803 F.Supp. 1200, 1213 (E.D. Tex. 1992); Keasler v. Natural Gas Pipeline Co., 569 F.Supp. 1180, 1186 (E.D.Tex. 1983), aff'd, 741 F.2d 1380 (5th Cir. 1984). See also, Silk v. Phillips Petroleum Co., 760 P.2d 174, 179 (Okla. 1988). As a result, all of Plaintiffs' fraud claims founded upon purported non-disclosures fail as a matter of law.

24. In addition, Mr. Trippet admits that he learned about every single alleged, material non-disclosure except for the Diamond Benefits litigation when he reviewed the Form 10 during the summer of 1991. As discussed above, Plaintiffs then waited some six months before asserting their demand for rescission. Under these circumstances, the defenses of ratification and waiver bar these claims. See, e.g., Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014 (5th Cir. 1990).

#### CONCLUSIONS OF LAW

1. The Court concludes by a preponderance of the evidence, for the reasons stated in Findings of Fact, that Defendants breached material contractual obligations.

2. The remedy of rescission is available if the contract was procured through fraud or deceit or if the consideration fails in

whole (or in part if the partial failure defeats the object of the contract), or if a failure of performance defeats the object of the contract. The Court finds that the failure of performance on the part of the Defendants, defeated the object of the contract, thus entitling Plaintiffs to rescind.

3. Oklahoma law is the law to be applied to the remedy of rescission.

4. The choice of law provisions in the agreements have no impact on the outcome of this action for rescission due to the failure of performance by Tri-Texas which defeats the object of the contract so as to render rescission available under both the law of Texas and Oklahoma.

5. As a result of Defendants' breach of contract by failing to register Plaintiffs' Tri-Texas stock, the value of the consideration received by Plaintiffs is so disparate in value to that with which Plaintiffs parted as to work a total failure of consideration as well as a defeat of the entire object of the parties' bargain. Plaintiffs are entitled to rescission of the agreements.

6. The Court has considered Defendants argument of entitlement for reimbursement of expenses as a return to the status quo and the Court concludes this argument to be unpersuasive and without merit. The Court considers the case of Medlin v. Oklahoma Motor Hotel Corporation, 545 P.2d 217 (Okla. 1975), to be dispositive. Medlin is strikingly similar in that the parties entered into an agreement where Defendants put up land for

consideration and the Plaintiffs' consideration was to use "best efforts" to raise money. Suite was commenced for rescission. The Court granted the rescission and did not allow Plaintiff to recover expenses incurred in pursuit of its contractual obligation. The Court stated that "... rescinder under §235 is not required to restore the other party to complete status quo but only to return that which is of value which he has received." The Court notes that Defendants seek reimbursement for expenses incurred pursuing its own objectives, not contract obligations. Defendants' authority for reimbursement is distinguishable. There a party was reimbursed for labor and material which rescinder had received and a court of equity will not allow the rescinding party to retain benefits under the contract. Here, no benefits were received by Plaintiffs.

7. Plaintiffs have failed to prove by clear and convincing evidence that Defendant Charles S. Christopher and Tri-Texas did fraudulently misrepresent facts to Plaintiffs, fraudulently concealed facts from Plaintiffs, deceived Plaintiffs and fraudulently induced Plaintiffs to enter into the agreements.

ORDERED as aforesaid this 30<sup>th</sup> day of March, 1994.

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

DATE 3-31-94

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

IN RE: )  
 )  
 FITZGERALD, DeARMAN & ROBERTS, )  
 INC., FDR INSURANCE AGENCY and )  
 FDR COMMUNICATIONS, INC., )  
 )  
 Debtor, )  
 )  
 P. DAVID NEWSOME, JR., Trustee for )  
 the Liquidation of Fitzgerald, )  
 DeArman & Roberts, Inc., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ELVIN ALLEN, ANNETTE ALLEN, BRIAN )  
 BLAIN, WALTER DODDS, HUBERT )  
 EARLEY, THORPE EARLEY, WALTER E. )  
 HAWKINS, DOUGLAS R. JOHNSON, )  
 CARL MARTIN, LISA NORDIN, LOUIS )  
 PESCE, JANE PESCE, RASE CORP., )  
 HILARIE ROBINSON, DORIS C. SIMS, )  
 G. SCOTT SIMS, WILLIAM C. SIMS, )  
 VICTOR VANDENOEVER, LINDA )  
 WERNER, RICK YAGI, and RANDY )  
 YAGI, )  
 )  
 Defendants. )

Civ. No. 92-C-1146-E  
 Case No. 88-01859-W (SIPA)  
 (substantively consolidated)

**FILED**

MAR 30 1994

Richard M. [unclear], Clerk  
 U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF OKLAHOMA

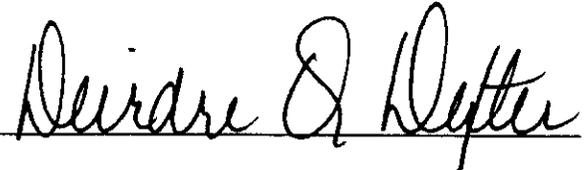
Adversary No. 92-0117-W

**JOINT STIPULATION OF DISMISSAL OF APPEAL WITH PREJUDICE**

Plaintiff P. David Newsome, Jr., Trustee for the Liquidation of Fitzgerald,  
 DeArman and Roberts, Inc. and Defendants Hubert Earley, Thorpe Earley, Walter E.  
 Hawkins, Louis Pesce, Jane Pesce, and Linda Werner, by and through their

attorneys of record and, pursuant to Fed.R.Civ.P. 41(a)(1) and Bankruptcy Rule 8001(c)(2), stipulate to the dismissal of, and do hereby dismiss with prejudice, the above-captioned appeal, each party to bear its own costs and attorneys' fees.

DEIRDRE O. DEXTER, OBA #10780  
G.W. TURNER, III, OBA #11182

By 

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and LINDA WERNER

DATE 3-31-94

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

ROBIN R. ROBINSON d/b/a )  
TULSA DISCOUNT VACUUMS, )  
) )  
Plaintiff, ) )  
) )  
vs. ) )  
) )  
UNITED STATES FIDELITY AND )  
GUARANTY COMPANY, a Maryland )  
corporation, ) )  
) )  
Defendant. ) )

No. 92-C-696-E

FILED

MAR 30 1994

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

ORDER AND JUDGMENT

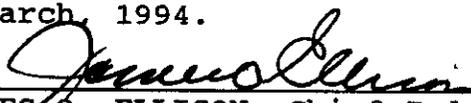
A jury trial was held in the above-captioned matter from February 28 through March 3, 1994. The jury returned a verdict for the Plaintiff and against the Defendant in the following sums:

- 1) \$46,987 on Plaintiff's breach of contract claim;
- 2) \$25,000 on Plaintiff's bad faith claim; and
- 3) \$10,000 in punitive damages,

for a total award of \$81,987. The Defendant has filed, at docket #75, a Renewed Motion for Judgment as a Matter of Law, or Alternatively, for Judgment notwithstanding the Verdict. The Court has reviewed the record in light of the applicable law and does not find Defendant's position persuasive. Therefore, the jury's verdict will stand and Defendant's Motion will be denied.

Judgment is hereby entered in favor of Plaintiff and against the Defendant in the sum of \$81,987. The case is DISMISSED.

ORDERED this 30<sup>th</sup> day of March, 1994.

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

DATE 3-31-94

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

**FILED**

STACEY PATTERSON, )  
 )  
 Plaintiff(s), )  
 )  
 v. )  
 )  
 ROBERT RAY HAILEY, et al, )  
 )  
 Defendant(s). )

MAR 31 1994

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

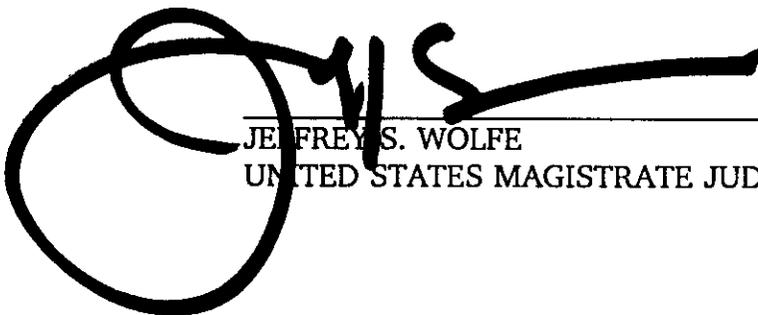
92-C-0715-E

**ORDER GRANTING PLAINTIFFS  
APPLICATION FOR DISMISSAL WITH PREJUDICE**

Upon Plaintiff's Application for Dismissal with Prejudice, the Court being fully advised in the premises and for good cause shown, finds it should be granted.

IT IS HEREBY ORDERED that the above-styled cause of action be and is hereby dismissed with prejudice, with each party to bear his/its own costs and attorney fees; provided, however, that the Court shall retain superintending authority over disposition of the monies received by the minor child, all in accord with 12 O.S. §83, until the minor, Stacey Patterson shall have obtained the age of majority.

SO ORDERED THIS 31<sup>st</sup> day of Mar, 1994.



\_\_\_\_\_  
 JEFFREY S. WOLFE  
 UNITED STATES MAGISTRATE JUDGE

10

DATE MAR 30 1994

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

ROBERT G. GOUMAZ, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ROCKWELL INTERNATIONAL )  
 CORPORATION, )  
 )  
 Defendant. )

No. 93-C-580-B ✓  
**FILED**  
MAR 30 1994  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

The Court has for decision the Motion for Summary Judgment of Defendant, Rockwell International Corporation ("Rockwell") (Docket # 25), pursuant to Fed.R.Civ.P. 56.

UNCONTROVERTED FACTS

1. Between 1966 and 1979, Robert G. Goumaz ("Goumaz") was employed by Rockwell-Tulsa in the accounting and financial planning areas of the finance department, supervising 10 or fewer employees. [Goumaz Depo. pp. 7-18].

2. In 1979, Goumaz quit Rockwell to work for an oil field supply company. [Goumaz Depo. p. 18, ln. 16-p. 19, ln. 20].

3. In 1984, Goumaz (then age 50) was rehired by Rockwell by Jim Richey ("Richey"), then Controller at Rockwell-Tulsa, and Dave Kelley ("Kelley"), then Manager of Financial Operations. [Goumaz Depo. p. 21, ln. 25 to p. 26, ln. 19].

4. In 1986, Kelley promoted Goumaz (then age 53) to the position of Supervisor of General Accounting Rockwell-Tulsa, a labor grade 10 position. [Goumaz Depo. p. 32, ln. 10-12; p. 33, ln. 4-14].

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5. Goumaz's various positions after returning to Rockwell-Tulsa were all (until 1991) within the accounting or financial planning functions of the finance department. [Goumaz Depo. pp. 29-45]. The largest staff he supervised was approximately 15. [Goumaz Depo. p. 37, ln. 4-6].

6. Sometime in 1988, several employees at Rockwell-Tulsa discovered that certain costs incurred on the Tomahawk Missile fixed fee contract had been improperly and inadvertently allocated to the B1-B cost plus contract. [Goumaz Depo. p. 81, ln. 14 to p. 83, ln. 24]. Goumaz and Mike McFadden ("McFadden"), another employee in the accounting department, analyzed the problem. [Goumaz Depo. p. 87, ln. 15-20]. They determined that an error of approximately \$56,000 resulted from employees on the shop floor using the wrong card to scan labor expense into Rockwell's automatic scan system. There was no evidence that the mistake was intentional. [Goumaz Depo. p. 88, ln. 1 to p. 89, ln. 19; McFadden Aff. ¶ 4].

7. Goumaz and McFadden prepared an accounting entry to correct the problem and took it to Kelley for approval. Kelley elected to not make the adjusting entry. [Goumaz Depo. p. 90, ln. 1-2; McFadden Aff. ¶5].

8. Goumaz brought the results of his report and proposed entry to the attention of Mark Jenkins, who had succeeded Richey as Controller. Jenkins told Goumaz that he would look into it and directed Kelley to look at the issue and take whatever action, if any, was appropriate. Again, Kelley decided that no correction

would be made. [Goumaz Depo. p. 92, ln. 3 to p. 93, ln. 21; Jenkins Depo. p. 39, ln. 3 to p. 42, ln. 9].

9. Rockwell has an internal ombudsman program which provides for the anonymous reporting of alleged mistakes, errors, or wrongdoing which any employee feels is not being handled appropriately. The office then investigates the allegations and takes whatever corrective action is necessary. It is Rockwell's policy to encourage the use of the ombudsman because it is very important to correct misallocation of costs in contracts. [Goumaz Depo. p. 102, ln. 4 to p. 103, ln. 14].

10. In January, 1989, Rockwell's ombudsman's office conducted an investigation of the mischarging problem. [Goumaz Depo. p. 111, ln. 7-9; Jenkins Depo. p. 66, ln. 10-13]. The investigator met with a number of people, including Kelly, but Goumaz and McFadden were the primary individuals who assisted the investigator in developing the financial information. [Goumaz Depo. p. 113, ln. 25 to p. 114, ln. 20; McFadden Aff. ¶6].

11. Kelley was "somewhat paranoid" about the investigation and became very upset with Goumaz and McFadden. Kelley confronted them and called them "insubordinate sons of bitches" because they refused to tell him what was going on in the investigation. He also complained to others in the department, including Jenkins, about his unhappiness with Goumaz. [Kelley Depo. p. 49, ln. 20 to p. 52, ln. 6; Goumaz Depo. p. 115, ln. 19 to p. 116, ln. 22; McFadden Aff. ¶¶ 7, 8].

12. The result of the investigation was that the corrective

entry should have been made as suggested by Goumaz and McFadden. [Goumaz Depo. p. 118, ln. 8-12; McFadden Aff. ¶6]. Kelley received an oral reprimand from Jenkins as a result of his handling of the matter. [Kelley Depo. p. 62, ln. 12-23].

13. Kelley was the only person that ever treated Goumaz differently because of Goumaz's participation in the investigation. [Goumaz Depo. p. 135, ln. 23 to p. 136, ln. 5]. McFadden never witnessed any negative treatment of Goumaz other than the single confrontation by Kelley referred to above. [McFadden Aff. ¶¶ 8, 12].

14. McFadden was also never harassed, criticized or retaliated against because of his participation in the investigation which was as open and obvious as was Goumaz's. [McFadden Aff. ¶13].

15. Goumaz received only "excellent" performance reviews after the investigation (including a review performed by Kelley) and does not claim in this lawsuit that any raises he received after the investigation were negatively affected because of his participation in the investigation. [Goumaz Depo. pp. 64-69; p. 142, ln. 25 to p. 143].

16. Kelley retired from Rockwell in June of 1990. [Goumaz Depo. p. 119, ln. 2-4]. The only retaliatory action attributed to Kelley by Goumaz is Goumaz' belief that Goumaz should have been selected by Jenkins to replace Kelley as Manager of Financial Operations. [Goumaz Depo. p. 121, ln. 13 to p. 122, ln. 3].

17. When Kelley retired, a three-person committee composed of

Jenkins, Richey and R. H. Pfeffer (a representative from Human Resources) evaluated 4 candidates including Goumaz and selected John Kadel based upon work experience and evaluation of 9 separate criteria. [Jenkins Depo. p. 77, ln. 23 to p. 78, ln. 25; Jenkins Memo to File dated May 16, 1990 (Tab G)].

18. Kadel had more experience in the most difficult areas of the finance department, was the key interface with west coast management, had a better working relationship with his subordinates, and had already functioned as Kelley's "second in command" whenever Kelley was out of the office. [Richey Depo. p. 40, ln. 2-13; McFadden Aff. ¶9]. McFadden recognized Kadel was the "logical replacement" for Kelley. [McFadden Aff. ¶9].

19. Goumaz's participation in the mischarging investigation was neither discussed nor a factor in the decision. [Jenkins Depo. p. 79, ln. 1-7; Richey Depo. p. 43, ln. 1-5]. Richey considered Kadel the most qualified candidate for Manager of Financial Operations. [Richey Depo. p. 39, ln. 24 to p. 40, ln. 2]. Richey did not know that Goumaz was involved in the ombudsman investigation. [Richey Depo. p. 31, ln. 9-14].

20. Goumaz admits that he has no evidence that his participation in the ombudsman investigation played any part in the decision and further admits that Kadel may have been awarded the job for any number of reasons that had nothing to do with the investigation. [Goumaz Depo. p. 132, ln. 24 to p. 133, ln. 12].

21. On November 3, 1990, Goumaz (then age 57) received a promotion from labor grade 10 to labor grade 11 and a substantial

increase in salary. [Goumaz Depo. p. 296, ln. 24 to p. 297, ln. 8].

22. In March of 1991, Jenkins, as instructed by Rockwell's corporate office, implemented a reorganization of the finance department to structure it like Rockwell's California division. Rockwell's Tulsa division was composed of two separate business units, one in charge of commercial work and the other in charge of government programs. Jenkins created two liaison positions entitled Business Manager, Commercial Programs, and Business Manager, Military Programs. These positions were to provide a single "representative" from the finance department to serve as the interface between finance and each business unit director. Neither position carried any staff. [Jenkins Depo. p. 91, ln. 1-19; p. 92, ln. 7-16; p. 200, ln. 17 to p. 201, ln. 1].

23. These positions did not require experience and technical knowledge in the finance functions (program control, scheduling, order control, pricing, etc.) since the business managers were not responsible for supervising those functions. The individuals selected needed only to have sufficient tenure within the finance department to know who to contact to provide the specific type of support requested by the business unit directors. [Richey Depo. p. 57, ln. 9 to p. 58, ln. 5].

24. Jenkins promoted Goumaz (then age 57), with Richey's approval, to the newly-created position of Business Manager, Military Programs. Goumaz was promoted two (2) more labor grades, from labor grade 11 to labor grade 13, and received another substantial raise. [Goumaz Depo. p. 142, ln. 16-22; p. 145, ln. 5-

20; p. 297, ln. 9-22; Jenkins Depo. p. 90, ln. 21-25].

25. It is undisputed that problems were created by the 1991 reorganization and that the finance department needed substantial change in order to effectively support the business units. [Goumaz Depo. p. 153, ln. 22 to p. 155, ln. 17; Jenkins Depo. p.98, ln. 16 to p. 100, ln. 25].

26. Therefore, on May 27, 1992, Jenkins announced a second reorganization of the department. [Jenkins Depo, p. 162, ln. 7-15]. The personnel in each functional area (program control, scheduling, order control, pricing, etc) had been required to serve two masters -- both the government and commercial business units -- and had difficulty prioritizing between the work of each unit. Therefore, the functional areas were each divided into two parts, each to consist of personnel dedicated to a single business unit. For example, instead of a single group in charge of program control for both the commercial and government programs, there were two separate program control groups, one for commercial and one for government. [Jenkins Memo to File dated May 26, 1992 (Tab J); Organization Charts dated October 10, 1991 (Tab H) and May 27, 1992 (Tab I)].

27. The liaison positions held by Goumaz and Pitts were eliminated. [Jenkins Depo. p. 107, ln. 21 to p. 108, ln. 2]. Two new positions were created to supervise the finance staff for each business unit. Unlike the liaison positions, these new jobs required technical knowledge and experience in the subordinate functions. Instead of serving merely as an interface between

finance and the business unit directors, the new managers would have direct line responsibility over each of the subordinate functions. The new Manager, Government Business Management position, the promotion Goumaz claims he should have received<sup>1</sup>, had direct management responsibility over a staff of 28 people. [Jenkins Depo. p. 200, ln. 4 to p. 201, ln. 5; Jenkins Memo to File dated May 26, 1992 (Tab J); Goumaz Depo. p. 185, ln. 14-19].

28. Jenkins considered four (4) candidates including Goumaz for Manager, Government Business Management. Goumaz was not selected. Jenkins and Richey, with whom Jenkins consulted, both believed that Goumaz, while experienced in general accounting and financial planning, lacked sufficient experience in most of the finance functions including program control and scheduling, which were to comprise approximately 50% of the job. [Jenkins Depo. p. 204, ln. 1 to p. 206, ln. 9; Richey Depo. p. 79, ln. 21 to p. 81, ln. 3; Jenkins Memo to File dated May 26, 1992 (Tab J)].

29. The Manager, Government Business Management requires experience in and detailed knowledge of the following finance functions in support of the government business unit:

- a) Program control,
- b) Scheduling,
- c) Pricing.

It is also responsible for the order control function for the entire facility. [Jenkins Depo. p. 200, ln. 4-12; Richey Depo. p. 79, ln. 24 to p. 80, ln. 7].

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<sup>1</sup>This is the position which Goumaz mistakenly calls "Manager of Program Control" in his Compliant.

30. Goumaz admits that the new position was different from his manager position and required supervisory skills that his position did not. [Goumaz Depo. 184, ln. 2 to p. 185, ln. 11]. He also admits that actual experience in the functional areas would be more important in the new position than in his interface-type position. [Goumaz Depo. p. 191, ln. 1-9].

31. Goumaz admits that although he had experience in financial planning and accounting, he had no experience in or detailed knowledge of program control, scheduling, or pricing, other than some "exposure" he had gained in the past year. [Goumaz Depo, p. 192, ln. 9-20; p. 246, ln. 1-13].

32. Goumaz specifically admitted in his deposition that he was "less than totally qualified" for the position of Manager, Government Business Management. [Goumaz Depo. p. 241, ln. 20-23].

33. The position was assigned to Greg Robson, a 36-year old employee who was transferred from Rockwell's California division. [Jenkins Depo. p. 187, ln. 18-23]. The position was not a promotion for Robson; it was a lateral move which carried no increase in his 14 labor grade. [Jenkins Depo. p. 208, ln. 4-5, p. 201, ln. 14-15].

34. Robson had substantial experience supervising program control and scheduling functions. Over 50% of the people reporting to Robson in the new position perform these functions. He was also familiar with government budgeting, had prepared annual operating plans, and developed and reviewed estimates at completion, all important skills in government contract work which Goumaz lacked.

Additionally, Robson had previously managed a staff of approximately 50 people. [Jenkins Depo. p. 204, ln. 1 to p. 206, ln. 9].

35. Greg Robson was identified as a "high potential performer." [Mark Jenkins Depo., 11/25/93, p. 246, ln. 18-22]. "High potential performers" are individuals who demonstrate the kinds of capabilities that cause Rockwell management to believe that the individual has the ability to move significantly up the organization. [William Paul Sweich Depo., 11/24/93, p. 47, ln. 22 thru p. 48, ln. 20].

36. All individuals placed on the list of "high potential performers" in Tulsa were under the age of 40 at the time they were placed there, except one. [William Paul Sweich Depo., 11/24/93, p. 46, ln. 14-19].

37. Based upon Robson's experience in program control and scheduling and greater supervisory experience, both Jenkins and Richey believed that Robson was more qualified than Goumaz for the position. [Jenkins Depo. p. 208, ln. 4-13; Richey Depo. p. 87, ln. 17 to page 88, ln. 11].

38. Goumaz's basis for claiming that he was more qualified than Robson is that Robson was transferring from Rockwell's California division and thus did not have Goumaz's familiarity with the personnel and procedures in Rockwell's Tulsa facility. [Goumaz Depo. p. 251, ln. 13 to p. 252, ln. 9].

39. On May 27, 1992, Jenkins assigned Goumaz to Team Leader, Program Control and Scheduling. While not a management position,

Goumaz would have directed the activities of 14 individuals in the program control and scheduling groups and would have reported to Robson. [Jenkins Depo. p. 184, ln. 9 to p. 185, ln. 9; p. 209, ln. 5-10].

40. Jenkins told Goumaz that Team Leader would be given a labor grade of 12 and assured Goumaz that he would experience no reduction in salary or benefits. [Goumaz Depo. p. 177, p. 211, p. 235, ln. 22 to p. 236, ln. 1; Jenkins Depo. p. 186, ln. 11-22].

41. Goumaz was not the only employee that was reassigned from a management to a non-management position in the 1992 organization. James Campbell was moved from Manager of Order Control to Team Leader, Order Control for Government Business. Steve Stewart was moved from Supervisor of Cost Management and Commercial Program Control to Team Leader, Program Control and Scheduling for the commercial business unit. Rajan Shah was moved from Supervisor of Scheduling to Team Leader, Scheduling for commercial business. [Goumaz Depo. p. 210, ln. 7 to p. 211, ln. 18; Jenkins Depo. p. 188, ln. 4-23; Organizational Charts dated 10/10/91 and 5/26/92 (Tabs H and I); McFadden Aff. ¶ 16].

42. Stewart, Campbell and Shah were not involved in the ombudsman investigation. [Goumaz Depo. p. 211, ln. 22-24; McFadden Aff. ¶16]. All three of them accepted their assignments to Team Leader. [McFadden Aff. ¶16].

43. Goumaz decided within days of his meeting with Jenkins on May 27 to refuse the assignment and to retire. [Goumaz Depo. p. 216, ln. 21 to p. 217, ln. 3]. He never asked if a position other

than Team Leader or a transfer to another department might be available. [Goumaz Depo. p. 217, ln. 4-14].

44. On June 10, 1992, Goumaz told Jenkins that he intended to retire on June 19, 1992. [Goumaz Depo. p. 199, ln. 25 to p. 200, ln. 15].

45. When he learned that Goumaz was retiring, William Swiech, General Manager of the Tulsa facility, set up a meeting with Goumaz to encourage Goumaz to stay with the company. [Goumaz Depo. p. 200, ln. 16-21; p. 204, ln. 7-12].

46. It was in this meeting on June 10, 1992, that Goumaz states that Swiech told him that "Bob, you know they're taking care of the younger workers. He's [referring to Robson] the fair-haired boy." [Goumaz Depo. p. 200, ln. 16 to p. 202, ln. 9].

47. Chris Bader, Director of Government Programs, also encouraged Goumaz to stay with the company. [Goumaz Depo. p. 204, ln. 7-12].

48. Goumaz carried out his intention and did quit his employment with Rockwell on June 19, 1992. [Goumaz Depo. p. 203, ln. 13-14. He never accepted or assumed the duties of the Team Leader position, but rejected the position. [Goumaz Depo. p. 183, ln. 4 to p. 184, ln. 1].

49. Goumaz had planned on retiring at age 65. In June 1992, Goumaz was 59 years of age. [Goumaz Depo. p. 205, ln. 16-21].

**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); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

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

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

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

short of 'significantly probative.' . . .

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

#### LEGAL ANALYSIS AND CONCLUSION

Authority of the Tenth Circuit Court of Appeals requires sustaining the Defendant's motion for summary judgment regarding alleged constructive discharge. In Mitchell v. Mobil Oil Corp., 896 F.2d 463, 467 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990) (quoting from Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986), the court said:

"To establish a *prima facie* case of age discrimination by constructive discharge, an employee must prove that his 'employer by its illegal discriminatory acts has made the working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign.'"

Under the facts and circumstances herein, no reasonable employee would have felt compelled to resign. Jurgens v. E.E.O.C., 903 F.2d 386 (5th Cir. 1990); McCann v. Litton Systems, Inc., 986 F.2d 946 (5th Cir. 1993), *reh'g denied*, 992 F.2d 326 (5th Cir. 1993); Wagner v. Sanders Associates, Inc., 638 F.Supp. 742 (C.D. Cal. 1986); Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536 (11th Cir. 1987); Flanagan v. McKesson Corp., 708 F.Supp. 1287 (N.D. Ga. 1988), *aff'd*, 874 F.2d 820 (11th Cir. 1989); Wilson v. Firestone Tire

& Rubber Co., 932 F.2d 510, 515 (6th Cir. 1991); Frazer v. KFC Nat'l Management Co., 491 F.Supp. 1099 (M.D. Ga. 1980), *aff'd*, 636 F.2d 313 (5th Cir. 1981); Smith v. Goodyear Tire & Rubber Co., 895 F.2d 467, 472 (8th Cir. 1990); Pena v. Battlebro Retreat, 702 F.2d 322, 325 (2nd Cir. 1983); Doscherholman v. Walters, 575 F.Supp. 1552, 1553 (D. Minn. 1984), *aff'd*, 754 F.2d 377 (8th Cir. 1984); and Muller v. United States Steel Corp., 509 F.2d 923, 930 (10th Cir. 1975), *cert. denied*, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975).

Plaintiff's contention that his voluntary retirement under the circumstances and Rockwell's Standard Operating Manual F-8.02 (Plff. Ex. A to Response Brief filed 3-1-94) amounted to a discharge from his employment is unsupported by the facts. Plaintiff simply quit his employment with Rockwell-Tulsa because he thought he should have been the new Manager, Government Business Management, and he did not want the offered Team Leader, Program Control and Scheduling position, although there was no reduction in his pay or benefits.

To establish a *prima facie* case of discriminatory demotion, the Plaintiff must establish that he was: (a) within the protected age group, (b) adversely affected by the Defendant's employment decision, (c) qualified for the position at issue, and (d) replaced by a person outside of the protected group. McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Texas Dept. of Community Affairs v. Burdine, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207, 215-16 (1981); and Hooks v. Diamond Crystal Specialty

Foods, Inc., 997 F.2d 793, 799 (10th Cir. 1993).

Plaintiff conceded that he was less than totally qualified for the Manager, Government Business Management position. Thus, no genuine issue of fact remains concerning Plaintiff's qualifications for the position.

Moreover, the record reflects Rockwell articulated a legitimate business reason to support its employment decision. Plaintiff has not demonstrated by proper evidence that Rockwell's decision to assign him to the position of Team Leader, Program Control and Scheduling, was a pretext for age discrimination. Saint Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993). An employer exercising its legitimate business judgment has a right to employ a qualified younger "fair-haired" "high potential performer" employee to fill a new position over that of a less qualified older employee.

The Tenth Circuit Court of Appeals has consistently supported the right of an employer to restructure an organization based on business needs. Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988); Lucas v. Dover Corp., Norris Division, 857 F.2d 1397 (10th Cir. 1988); and Bechold v. IGW Systems, Inc., 817 F.2d 1282, 1284-85 (7th Cir. 1987). The Tenth Circuit stated in Lucas, 857 F.2d at 1403-04:

"This court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives. See Branson, 853 F.2d at 772 ('As courts are not free to second guess an employer's business judgment, this assertion [that plaintiff was equally or more qualified than the person

retained] is insufficient to support a finding of pretext.');

Jorgensen v. Modern Woodmen of America, 761 F.2d 502, 505 (8th Cir. 1985) ('[t]he ADEA is not intended to be used as a means of reviewing the propriety of a business decision on the part of [an employer]';

Kephart, 630 F.2d at 1223 app. ('[t]he [ADEA] ... was not intended as a vehicle for judicial review of business decisions.')."

In Branson, 853 F.2d at 772, the court affirmed a summary judgment for an employer due to lack of credible evidence of pretext and stated:

"[P]laintiffs' mere conjecture that their employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment.

\* \* \*

"As courts are not free to second-guess an employer's business judgment, this assertion [that plaintiff was equally or more qualified than the people retained] is insufficient to permit a finding of pretext. It is the perception of the decision maker which is relevant, not plaintiff's perception of [him]self."

The essence of Goumaz's claim that he was more qualified than Robson is that he "had worked at Tulsa with their systems, with the people, with Mr. Bader, with Mr. Jenkins . . ." [Goumaz Depo. p. 251, ln. 13 to p. 252, ln. 9]. Rockwell had the right to exercise its business judgment that Robson's technical and supervisory experience was more important in filling the position than was Goumaz's local familiarity.

In Plaintiff's fifth claim for relief he alleges a state public policy tort contending that his demotion was in retaliation for his participation in the internal ombudsman investigation. *See,*

Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). Also, in Plaintiff's third claim for relief he alleges his demotion was retaliatory and prohibited by the "whistleblower" provision of the False Claims Act. See, 31 U.S.C. § 3730(h).

A necessary element of his retaliation claims is that he was engaged in protected activity. See, Burk, 770 P.2d at 29; X Corp. v. Doe, 816 F.Supp. 1086 (E.D. Va. 1993) (construing § 3730(h)). The Plaintiff must also prove a causal nexus between the protected activity and the employment decision. *Id.*; White v. American Airlines, Inc., 915 F.2d 1414, 1419 (10th Cir. 1990). For the purposes of the Court's decision herein, it will assume Goumaz was engaged in protected activity in reference to the ombudsman investigation. A review of the record demonstrates that there is no probative evidence in the record of a retaliatory motive or nexus between Plaintiff's participation in the ombudsman investigation and the decision to assign him to the position of Team Leader, Program Control and Scheduling.

Goumaz participated in the investigation in January, 1989. The subject demotion occurred three and one-half years later in May, 1992.

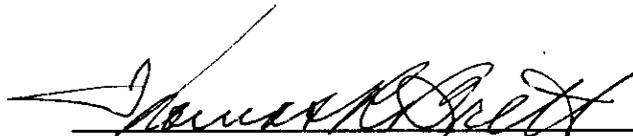
Following the investigation the Plaintiff received only excellent performance appraisals and three promotions as well as consistent raises.

Employee Kelley, who had made the negative comments concerning Goumaz back in the 1989 ombudsman investigation, retired in June, 1990. It is undisputed that employee Jenkins made the decision in

1992 to demote Goumaz and the record reflects no evidence that Kelley affected the decision. Goumaz has failed to present evidence from which a jury could infer that he was demoted as a result of participation in the ombudsman investigation. The events of the ombudsman investigation and the subsequent demotion are too remote in time and the intervening employment events involving the Plaintiff are contraindicative of retaliation. See, Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982), *cert. denied*, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982); Clark v. Chrysler Corp., 673 F.2d 921, 930 (7th Cir.), *cert. denied*, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982); Lloyd v. Bridgeport Brass Corp., 811 F.Supp. 401, 407 (S.D. Ind. 1993); Oliver v. Digital Equipment Corp., 846 F.2d 103, 110-111 (1st Cir. 1988); Mesnick v. General Electric Co., 950 F.2d 816, 828 (1st Cir. 1991), *cert. denied*, 112 S.Ct. 2965, 119 L.Ed.2d 586; see, Crader v. Concordia College, 724 Fed.Supp. 558, 568 (N.D. Ill. 1989); McCarthy v. Kemper Life Ins. Cos., 924 F.2d 683, 687 (7th Cir. 1991); Bechold v. IGW Systems, Inc., 635 F.Supp. 695, 697 (S.D. Ind. 1986), *aff'd*, 817 F.2d 1282, 1284-85 (7th Cir. 1987); Guthrie v. Tifco Industries, 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1267, 117 L.Ed.2d 495 (1992); La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1412 (7th Cir. 1984); McDonald v. Union Camp Corp., 898 F.2d 1155, 1158 (6th Cir. 1990); and Frieze v. Boatmen's Bank of Belton, 950 F.2d 538, 541 (8th Cir. 1991).

For the reasons stated above, the Defendant Rockwell's motion for summary judgment pursuant to Fed.R.Civ.P. 56 is hereby sustained and a separate Judgment for the Defendant against the Plaintiff will be filed contemporaneously herewith.

DATED this 30<sup>th</sup> day of March, 1994.

  
\_\_\_\_\_  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED

MAR 30 1994

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

ROBERT G. GOUMAZ,

Plaintiff,

vs.

ROCKWELL INTERNATIONAL  
CORPORATION,

Defendant.

No. 93-C-580-B

**FILED**

MAR 30 1994

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

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Rockwell International Corporation, and against the Plaintiff, Robert G. Goumaz.

Plaintiff shall take nothing on his claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 54.1, and each party is to pay its respective attorney's fees.

Dated, this 30<sup>th</sup> day of March, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

44

ENTERED ON DOCKET

DATE MAR 30 1994

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

THE FEDERAL DEPOSIT INSURANCE )  
CORPORATION, as Manager of the Federal )  
Savings and Loan Insurance Corporation )

Plaintiff, )

v. )

C.L. MAYBERRY; WILLIAM E. BECKMAN, JR.; )  
DELOITTE & TOUCHE, a partnership; and )  
DELOITTE HASKINS & SELLS, )  
a partnership, )

Defendants. )

Case No. 91-C-679-B

**FILED**

MAR 30 1994

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

**FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE**

IT IS ORDERED, ADJUDGED AND DECREED that, by stipulation and agreement of the parties, this case and all claims and causes of action between the Federal Deposit Insurance Corporation and Deloitte & Touche and Deloitte Haskins & Sells which were or could have been or could be asserted herein are hereby dismissed with prejudice, with each party to bear its own attorneys' fees and costs.

ENTERED this 30<sup>th</sup> day of March, 1994.

S/ THOMAS R. BRETT

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3-30-94

**FILED**

MAR 30 1994

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

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

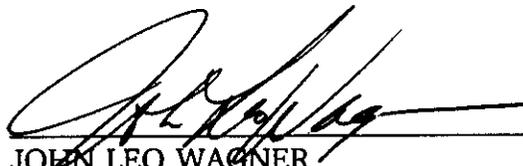
JEANNIE HYATT, individually and as )  
 mother and next friend of )  
 LANCE HALE, a minor child, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 CITY OF OWASSO, OKLAHOMA, )  
 et al., )  
 )  
 Defendants. )

92-C-292-W ✓

**JUDGMENT**

Judgment is entered in favor of the defendants and against the plaintiffs in accordance with this court's Order filed February 8, 1994.

Dated this 29<sup>th</sup> day of March, 1993.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 3-30-94

MCW/tmm

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

STEPHANIE GAIL FARMER, and )  
SARAH LYNN FARMER, minors, )  
who sue by and through )  
STEVEN DEWAYNE FARMER and )  
SHERRY L. FARMER, their )  
parents, next friends, and )  
guardians ad litem, and )  
STEVEN DEWAYNE FARMER and )  
SHERRY L. FARMER, )  
individually, )

Plaintiffs, )

vs. )

ALLSTATE INSURANCE COMPANY, )

Defendant. )

Case No. 93-C-723-E

*[Faint, illegible stamp or handwritten notes]*

ORDER OF REMAND

The defendant, Allstate Insurance Company, has withdrawn its objection to the plaintiffs' Motion for Remand. This case, therefore, is to be remanded to the Oklahoma District Court for Creek County, Sapulpa Division. The parties are to bear their own costs and fees associated with the removal and remand.

Dated this 29 day of March, 1994.

S/ JAMES O. ELISON

JUDGE OF THE U.S. DISTRICT  
COURT FOR THE NORTHERN DISTRICT  
OF OKLAHOMA

ENTERED ON DOCKET

DATE MAR 30 1994

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

MAR 29 1994

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

BRISTOL RESOURCES CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ATLANTIC RICHFIELD COMPANY, )  
 )  
 Defendant. )

Case No. 94-C-70-B

**DISMISSAL WITHOUT PREJUDICE**

Plaintiff, Bristol Resources Corporation, pursuant to Rule 41(a)(1)(i) hereby dismisses its Complaint filed on January 25, 1994, without prejudice.

Respectfully submitted,

  
James W. Rusher, OBA #11501  
Gerald R. Shrader, OBA #13051  
**ALBRIGHT & RUSHER**  
2600 Bank IV Center  
15 West Sixth Street  
Tulsa, Oklahoma 74119-5434  
(918) 583-5800

ATTORNEYS FOR PLAINTIFF

DATE 3-29-94

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

BROOKE A SHULL,  
PLAINTIFF,

v.

Case No. 92-C-807-E ✓

LA PARMIGIANA,  
DEFENDANT.

ORDER

Rule 41(b) of the Federal Rules of Civil Procedure provides as follows:

*(b) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.*

In the action herein, notice pursuant to Rule 41(b) was mailed to counsel of record or to the parties, at their last address of record with the Court, on February 8, 1994. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 29<sup>th</sup> day of March, 19 94.

United States District Judge

2

ENTERED ON DOCKET

DATE 3-29-94

**FILED**

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

MAR 29 1994

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

ANTHONY J. HARRIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 90-C-448-E
	)	90-C-475-E
RON CHAMPION,	)	
	)	
Respondent.	)	

**ORDER**

At issue before the Court in Anthony J. Harris's individual habeas corpus action are Respondent's motion to dismiss for failure to exhaust state remedies [docket #264], and Harris's response and motion for immediate release [docket #270].

**I. BACKGROUND**

Anthony J. Harris ("Petitioner") was convicted in Oklahoma state court of the related crimes of forcible sodomy and assault and battery with a dangerous weapon. On September 29, 1988, Petitioner received a sentence of fifteen years on the forcible sodomy conviction and a consecutive sentence of five years on the assault and battery conviction. Through no fault of Petitioner, his appeal was not timely initiated. On May 11, 1989, the Oklahoma Appellate Public Defender ("Public Defender"), applied for leave to file an appeal out of time which the Oklahoma Court of Criminal Appeals granted on May 18, 1989.

On May 22, 1990, while his state appeal was still pending, Petitioner, pro se, filed the present habeas corpus petition under 28 U.S.C. § 2254, alleging constitutional violations of due process, equal protection, and his right to counsel because of the

delays encountered in getting the Public Defender to prepare his brief on appeal. Petitioner also alleged (1) that his trial counsel provided ineffective assistance, (2) that he was denied the opportunity to have blacks to select as jurors; (3) that his sentence was above the statutory limit; (4) that he was denied a pre-sentence investigation; and (5) that he was denied the right to commence his appeal within ten days. [Docket #1.]

The district court initially dismissed the petition without prejudice for failure to exhaust state remedies because Petitioner's direct appeal was still pending. The Tenth Circuit reversed and remanded, holding that the district court should have excused Petitioner's failure to exhaust his state remedies before seeking federal habeas relief in light of extensive delay by the Public Defender in filing an opening brief in Petitioner's direct criminal appeal. Harris v. Champion, 938 F.2d 1062, 1065-66, 1071 (1991) (Harris I). The Tenth Circuit further directed the district court to investigate the possibility of systemic delay in the entire criminal appellate process in Oklahoma, and to appoint competent counsel. Harris I, 938 F.2d at 1071; Hill v. Reynolds, 942 F.2d 1494, 1496-97 (10th Cir. 1991).

On April 20, 1992, while the district court was organizing the common delay issues on remand, the Public Defender filed Petitioner's appellate brief, raising the following grounds of error:

1. The trial court abused its discretion by limiting Petitioner in his cross-examination of the state's witnesses;

2. The trial court erred by allowing the introduction of involuntary custodial statements made by Petitioner;
3. The trial court erred in allowing inadmissible hearsay to be admitted into evidence;
4. Prosecutorial misconduct deprived Petitioner of a fair trial; and
5. No error can be considered harmless.

The Attorney General filed the appellee's brief on July 1, 1992. The Oklahoma Court of Criminal Appeals affirmed Petitioner's convictions on June 3, 1993.

On June 23, 1993, Petitioner, pro se, moved for rehearing on the basis of numerous new claims not previously raised by the Public Defender.<sup>1</sup> (Defendants' ex. 3 at the June 29, 1993 hearing.) Petitioner argued that he was entitled to raise new issues on rehearing because there was "a well documented conflict of interest between the Appellant and his Court Appointed Appellate Attorney," and because his appellate attorney "ignored all issues of substance and of a fundamental nature" in "a deliberate attempt" to have Petitioner's conviction affirmed. Petitioner further argued that, although he had requested the Public Defender to furnish him the transcript in his case on January 25, 1993, he did not receive a response and an incomplete set of transcripts until May 26, 1993, when it was too late to file a supplemental brief.

Meanwhile, the Chief Judge of the Tenth Circuit designated a Three-Judge District Court Panel to adjudicate the common issues of law and fact in all the habeas cases alleging delay in the

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<sup>1</sup>The Public Defender also filed a petition for rehearing on the same date. (Defendant's ex. 2 at the June 29, 1993 hearing.)

adjudication of direct criminal appeals. On May 6, 1993, the Three-Judge Panel entered its first findings of fact and conclusions of law concerning delay by the Public Defender and certified its ruling as final for purposes of appeal pursuant to Rule 54(b). On June 29, 1993, the Honorable Thomas R. Brett conducted a hearing in Petitioner's individual case to determine if his constitutional rights were violated by the failure of the Public Defender to timely perfect his appeal. During closing argument, David Booth (Petitioner's counsel on the appellate delay issue) requested that the Court rule on the delay issue and grant the Petitioner an opportunity "to brief and file in this court all of [Petitioner's] 2254 [substantive] issues." (Transcript at 68-69.) The District Court reserved ruling on the delay question until after the hearing and ordered that Petitioner "file all documentation and all briefing on the substantive habeas matters that we have been discussing here" within 30 days of a ruling on Petitioner's latest petition for rehearing. (Transcript at 69.)

On August 10, 1993, following a denial of Petitioner's petition for rehearing, the Honorable Thomas R. Brett entered the Court's Findings of Fact and Conclusions of law, denying Petitioner's habeas corpus petition on the delay issue. [Docket # 234 and #235.] Petitioner timely appealed on September 8, 1993. On the same date, the Three-Judge Panel entered its second findings of fact and conclusions of law concerning delay by the Attorney General and the Oklahoma Court of Criminal Appeals, as well as cumulative delay through the appellate system. The Panel again

certified its findings and conclusions as final pursuant to Rule 54(b).

On September 17, 1993, Petitioner filed his "brief in support of petitioner's supplement to his 28 U.S.C. 2254 as ordered by the Court." [Docket #258.] In that brief, Petitioner raised for the first time the following grounds for relief:

1. Appellate attorney deliberately failed to raise issues of substance on direct appeal in an attempt to have Petitioner's appeal affirmed.
2. Ineffective assistance of appellate counsel;
3. Petitioner was prejudiced by the consolidation of other cases with his;
4. Double jeopardy violation;
5. Erroneous jury instructions; Petitioner was not bound over on the Assault and Battery Charge; and insufficient information on the Assault and Battery Charge.

Petitioner also moved for immediate release on the ground that he received adverse publicity as a result of the consolidated action and his direct appeal was adjudicated by judges who were his adversaries in the consolidated action.

On October 7, 1993, Respondent moved to dismiss for failure to exhaust state remedies. [Docket #264.] Respondent argued that Petitioner had not raised in his direct appeal any of the issues alleged in his original and supplemental petition, and that there was an available remedy by which he could pursue those claims. Respondent further argued that the Petitioner had not been denied review on those claims as a result of the delay in processing his direct appeal.

On October 14, 1993, Petitioner objected to Respondent's

motion to dismiss and again moved for immediate release.<sup>2</sup> [Docket #270.] He argued that the Respondent had in effect waived the exhaustion argument by failing to object to his counsel's oral motion to raise new issues at the June 29, 1993 hearing. In the alternative, Petitioner argued that he had given the State an opportunity to rule on all the new issues, except for the one regarding the neutral judges, in his motion for rehearing. Petitioner also argued that "it would be unreasonable to force him to . . . exhaust the issue of being denied a neutral and detached judge, as the petitioner would be forced to exhaust the issues before the judge or judges which he now complains of."

On January 26, 1994, the Tenth Circuit affirmed in part and reversed in part the findings of fact and conclusions of law of the Three Judge Panel as to appellate delay. The Tenth Circuit held that "there is a rebuttable presumption that the State's process is not effective and, therefore, need not be exhausted, if a direct criminal appeal has been pending for more than two years without final action by the State." Harris v. Champion, No. 93-5123 & 93-5209, slip op. at 5 (10th Cir. Jan. 26, 1994). The Tenth Circuit also recognized that delay in adjudicating an appeal may also give rise to independent claims under the Due Process and Equal Protection Clauses.

On February 1, 1994, Petitioner filed a petition for a writ of mandamus asking the Tenth Circuit to issue an order requiring this

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<sup>2</sup>The record does not contain a "motion for summary disposition" as Petitioner argues in his application for a writ of mandamus to the Tenth Circuit. (Mandamus at 3.)

Court to rule on Respondent's motion to dismiss for failure to exhaust state remedies, and Petitioner's motion for immediate release. On March 10, 1994, The Tenth Circuit issued an order requiring this Court to respond to Petitioner's application for a writ of mandamus within twenty days.

## II. DISCUSSION

At the outset the Court notes that Petitioner's supplemental claims are not properly before the Court. Petitioner's counsel did not expressly move for leave to amend the petition at the June 29, 1993 hearing, and the Petitioner has not submitted a written motion for leave to amend. See Local Rule 9.3.C. Even construing counsel's oral request at the hearing as a motion for leave to amend the petition to raise additional substantive claims, the Court notes that the Honorable Thomas R. Brett at no time granted that request. The transcript reveals that the Honorable Thomas R. Brett was "interested in getting the entire Harris habeas matter, all individual aspects of it, at issue so it can be addressed," and that he merely granted Petitioner an opportunity to submit a brief and any document in support of his substantive habeas claim. (Transcript of June 29, 1993 Hearing at 65-69.)

In any case, even assuming Petitioner properly supplemented his petition, the Court concludes that Petitioner's substantive habeas issues should be dismissed for failure to exhaust state remedies. The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not

exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991); 28 U.S.C. § 2254(b) and (c). To exhaust a claim, a prisoner must have "fairly presented" that specific claim to the state courts. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that the Petitioner has not exhausted his available state remedies. The Public Defender never raised on direct appeal Petitioner's substantive habeas claims. Additionally, Petitioner's attempt to raise some of his substantive claims in his pro se petition for rehearing was not sufficient to fairly present those issues to the Oklahoma Court of Criminal Appeals for exhaustion purposes. See Hamburg v. Meyer, No. 92-8076, slip op. at 2 (10th Cir. 1993) (unpublished opinion attached to this order) (raising new issues by petition for rehearing in the Wyoming courts was not sufficient to fairly present those issues to the state court for purposes of exhaustion). The Supreme Court has held that a claim is not fairly presented if done for the first time in a procedural context in which the reviewing court exercises only discretionary review. Castille v. People, 489 U.S. 346, 351 (1989) (petitioner's failure

to present his new claims prior to his allocatur petition fell short of the requisite exhaustion of his state remedies).

A petition for rehearing under Rule 3.14 of the Rules of the Court of Criminal Appeals, like the allocatur petition in Castille, invokes only the discretionary power of the Oklahoma Court of Criminal Appeals. Rule 3.14 specifically provides that a petition for rehearing shall not be filed as a matter of course except (1) if the Oklahoma Court of Criminal Appeals overlooked a decisive question which the attorney of record had properly submitted, or (2) if "the decision is in conflict with an express statute or controlling decision" not previously cited to the Court. Rehearing is not a proper method to raise new claims which were not a part of the original appeal. See Daniels v. State, 441 P.2d 494, 496 (Okla. Crim. App. 1967) (concurring opinion). Accordingly, the Court concludes that the Petitioner has failed to exhaust his state remedies. See Hamburg, slip op. at 2; Verdin v. O'Leary, 972 F.2d 1467, 1479 n.13 (7th Cir. 1992) (citing Cruz v. Warden of Dwight Correctional Center, 907 F.2d 665, 669 (7th Cir. 1990) (submitting claim to highest court on discretionary review does not constitute fair presentment); see also Satterwhite v. Lynaugh, 886 F.2d 90, 92 (5th Cir. 1989) (holding that pro se brief seeking discretionary review, filed in addition to appellate counsel's brief did not fairly present issues for purposes of habeas corpus exhaustion); Williams v. Wyrick, 763 F.2d 363 (8th Cir. 1985) (holding that issues presented in a motion to recall a mandate were not fairly presented for exhaustion purposes). Compare Bowser v. Boggs, \_\_\_\_

F.3d \_\_\_, No. 92-1187, slip op. at 6 (10th Cir. Mar. 4, 1994) (raising issues by petition for certiorari to the Colorado Supreme Court satisfied the exhaustion requirement, although petitioner had initially raised the new issues on petition for rehearing to the Colorado Court of Appeals); Creekmore v. District Court of Eighth Judicial District, 745 F.2d 1236, 1238 (9th Cir. 1984) (where petitioner noted claim in brief to Montana Supreme Court and argued it extensively in his petition for rehearing, Montana Supreme Court had adequate opportunity to consider the claim so that habeas corpus exhaustion requirement was met).

Next the Court addresses whether the Petitioner should be exempted from the exhaustion requirement. "An exception [to the exhaustion requirement] is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam); White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988). The exhaustion rule, for instance "does not apply if the petitioner . . . would now find the claims procedurally barred." Coleman v. Thompson, 111 S. Ct. at 2557 n.1.

The Petitioner, however, has neither argued nor provided any evidence that resort to the state courts would be unavailable or futile.<sup>3</sup> See Castille v. Peoples, 489 U.S. 342, 350-51 (1989). On the contrary it appears that adequate post-conviction is

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<sup>3</sup>Whether exhaustion should be excused on the basis of inordinate delay is now moot because the Oklahoma Court of Criminal Appeals has affirmed Petitioner's conviction.

available to him. See Okla. Stat. Ann. tit. 22, § 1080 et seq. While one could argue that some of Petitioners claims may be in fact exhausted because they could have been raised on direct appeal, see section 1086, the Court chooses not to predict what the state courts will do in this case.<sup>4</sup> Petitioner's state proceedings have been limited to a direct appeal, and there is a possibility that the state courts may apply some exception to allow review. Moreover, Petitioner's contention that it would be unreasonable to require him to exhaust the issue of a "neutral and detached judge" is meritless. On December 27, 1993, the Three-Judge Panel dismissed the judges of the Oklahoma Court of Criminal Appeals as parties in the damages action under 42 U.S.C. § 1983 on the basis of absolute immunity. (Docket #283.)

Petitioner's reliance on "cause and prejudice" and "a fundamental miscarriage of justice" is misplaced. These standards are available to excuse a state prisoner's failure to follow applicable state procedural rules, rather than a state prisoner's failure to exhaust state remedies. See Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992); Murray v. Carrier, 477 U.S. 478, 496 (1986). Similarly, the recent Supreme Court opinion in Keeney v. Tamayo-

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<sup>4</sup>Oklahoma law provides a procedure for seeking post-conviction relief. Okla. Stat. Ann. tit. 22, § 1080; Okla. R. Crim. App. 5.4, Okla. Stat. Ann. tit. 22, Chap. 18, App. However, authority exists to the effect that a post-conviction petitioner in Oklahoma is barred from asserting any claims which had been or could have been raised in the petitioner's direct appeal. Johnson v. State, 823 P.2d 370, 372-73 (Okla. Crim. App. 1992); Hale v. State, 807 P.2d 264, 266-67 (Okla. Crim. App.), cert. denied, 112 S. Ct. 280 (1991); Okla. Stat. Ann. tit. 22, § 1086; see also Coleman v. Saffle, 869 F.2d 1377, 1382-83 (10th Cir. 1989).

Reyes, 112 S. Ct. 1715 (1992) does not create an exception to the exhaustion requirement in this case because the Petitioner may still seek post-conviction relief in state court. In Keeney, the Supreme Court determined that "cause and prejudice" is the correct standard to apply when a habeas petitioner seeks an evidentiary hearing in federal court because of his counsel's failure to develop material facts in a previous state post-conviction proceeding.

Lastly, the Court rejects Petitioner's contention that the Respondent waived the defense of nonexhaustion by failing to object to Petitioner's oral motion to raise new issues at the June 29, 1993 evidentiary hearing. Even though Petitioner's counsel and the Court briefly discussed exhaustion at the June 29, 1993 hearing, the transcript indisputably shows that the Honorable Thomas R. Brett reserved ruling on Petitioner's substantive claims until the parties had a chance to fully brief the issues. (Transcript at 69.) Additionally, the Honorable Thomas R. Brett explicitly pointed out that "as far as I'm concerned, he [the Petitioner] [i]s still in the process of attempting to exhaust." (Transcript at 67.) Accordingly, Respondent's failure, if any, to comment on the exhaustion issue at the hearing does not amount to waiver.

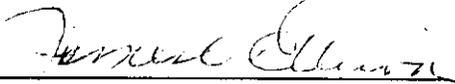
### III. CONCLUSION

After carefully reviewing the record, the Court concludes that Petitioner's substantive claims should be dismissed for failure to exhaust state remedies.

**ACCORDINGLY, IT IS HEREBY ORDERED:**

- (1) that Respondent's motion to dismiss [docket #264] be **granted**;
- (2) that Petitioner's motion for immediate release [docket #270] be **denied**;
- (3) that Petitioner's substantive issues be **dismissed** without prejudice; and
- (4) that Petitioner's individual habeas corpus action be **dismissed** at this time as all the issues have now been ruled on.

SO ORDERED THIS 29<sup>th</sup> day of March, 1994.

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

Citation	Database	Mode
92 F.2d 1222 (Table)	CTA	Page
UNPUBLISHED DISPOSITION	FOUND DOCUMENT	
(CITE AS: 992 F.2D 1222,	1993 WL 118863 (10TH CIR.(WYO.)))	

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Albert HAMBURG, Petitioner-Appellant,

v.

WYOMING ATTORNEY GENERAL, also known as Joseph Meyer, Respondent-Appellee.  
No. 92-8076.

United States Court of Appeals, Tenth Circuit.

April 15, 1993.

D. Wyo., No. 92-119-J.

D.Wyo.

AFFIRMED.

Before SEYMOUR, ANDERSON, and EBEL, Circuit Judges. [FN\*]  
ORDER AND JUDGMENT [FN\*\*]

EBEL, Circuit Judge.

\*\*1 In this pro se appeal, the appellant contests the dismissal of his 28 U.S.C. s 2254 habeas petition for non-exhaustion. We affirm. [FN1]

The appellant was convicted by a jury in 1990 of two counts of forging election petitions. His sentence was suspended and he was placed on probation for two consecutive three-year terms. The appellant, represented by counsel, took a direct appeal to the Wyoming Supreme Court. The Supreme Court reversed the appellant's conviction on one of the counts and modified his sentence. *Hamburg v. State*, 820 P.2d 523, 533 (Wyo.1991). The appellant subsequently filed a pro se "Petition for Rehearing" in which he alleged additional grounds for relief. The Wyoming Supreme Court denied the appellant's petition without opinion.

On June 8, 1992, the appellant filed a pro se petition for a writ of habeas corpus, pursuant to 28 U.S.C. s 2254. He asserted three general claims-- ineffective assistance of counsel, the lack of an impartial and fair jury, and the lack of constitutional safeguards during pretrial handwriting testing. The district court found that these general claims raised seven discrete issues. [FN2] The district court, examining the record from the state court appeal, found that four of the issues had never been raised in the Wyoming courts, two had been raised only in the pro se petition for rehearing, and that only one of the issues had been fully raised and considered by the state courts. Accordingly, the district court dismissed the appellant's petition for failure to exhaust his state court remedies. This appeal followed.

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(CITE AS: 992 F.2D 1222, 1993 WL 118863, \*\*1 (10TH CIR.(WYO.)))

It is well established as a matter of comity, that, except in unusual circumstances, federal courts should not consider habeas corpus claims until the state has had an opportunity to consider the matters alleged therein. 28 U.S.C. s 2254(b) and (c); Ex parte Hawk, 321 U.S. 114, 117 (1944). In Rose v. Lundy, 455 U.S. 509, 522 (1982), the Supreme Court held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." A claim is considered exhausted if it is "fairly presented" to the state court. Picard v. Connor, 404 U.S. 270, 275 (1971). It is essential that the petitioner have brought the substance of the claim on which he relies to the attention of the state court. Id. at 278.

In his habeas petition, the appellant has raised seven issues. Several of those issues were not fairly presented to the state court. First, the appellant never raised the issues of (i) ineffective assistance of counsel concerning the refusal to allow the appellant to proceed with a pro se defense, or (ii) the claim that the jury was not impartial and fair because there was inadequate voir dire of opinions on the appellant's political party.

Second, only in the pro se petition for rehearing did the appellant raise the issues that (i) the jury was prejudiced in their contacts with the court clerk, whose deceased husband's signature was alleged to have been forged by the appellant, and (ii) that he was denied constitutional protections, including the right to an attorney, when he was asked to provide handwriting exemplars. We agree with the district court's conclusion that the appellant's attempts to raise issues on a petition for rehearing were not sufficient to fairly present them to the state courts for purposes of exhaustion.

\*\*2 The petition for rehearing is a motion which seeks discretionary review of a prior appellate decision based on errors committed therein.

Wyo.R.App.Pro. 8.01. Rehearing is not a proper method to raise new claims which were not a part of the original appeal; issues raised for the first time are deemed to be waived for those proceedings and "may not be considered on a petition for rehearing." State Board of Equalization v. Jackson Hole Ski Corp., 745 P.2d 58, 60 (Wyo.1987). We find that raising new issues in that context does not, for purposes of exhaustion, constitute fair presentation. See Castille v. Peoples, 489 U.S. 346, 350-51 (1989) (holding that raising new issues in petition for allocature not fair presentation because of procedural context in which court would only consider merits upon showing of special and important reasons); Satterwhite v. Lynaugh, 886 F.2d 90, 92 (5th Cir.1989) (holding that pro se brief seeking discretionary review, filed in addition to appellate counsel's brief did not fairly present issues for purposes of habeas corpus exhaustion); Williams v. Wyrick, 763 F.2d 363 (8th Cir.1985) (holding that issues presented in motion to recall a mandate were not fairly presented for exhaustion purposes).

Third, given the liberal construction which we afford to the submissions of pro se petitioners, we disagree with the district court's analysis concerning two issues, and find that the appellant adequately raised the claims of ineffective assistance of counsel concerning both (i) the refusal to make use of certain information and to call certain witnesses in the defense, and (ii) the failure to discover and expose the "faked" handwriting samples. [FN3]

Fourth, the appellant's direct appeal to the Wyoming Supreme Court clearly raised the issue that the jury was not impartial and fair because there was inadequate voir dire regarding familiarity with forged signatures.

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(CITE AS: 992 F.2D 1222, 1993 WL 118863, \*\*2 (10TH CIR.(WYO.)))

The appellant apparently would have us consider motions that he put before the trial court both during and after trial in determining whether he has raised the issues for purposes of exhaustion. We decline to do so. In order to have exhausted his state court remedies, we require the appellant to have brought his allegations of error before the highest state court either on direct appeal of his conviction or in a postconviction attack. 17A Wright, Miller & Cooper, Federal Practice and Procedure, s 4264.1 at 340-43 (1988). That is because, as a matter of comity, we desire to give the appellate courts in the state where the alleged error occurred a full opportunity to correct any errors. See United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 17-19 (1925). Although bringing errors to the attention of the trial judge is often required as a prerequisite to appeal, that rule serves other purposes such as the efficiency and accuracy of the trial process.

We find that the appellant has failed to exhaust his state court remedies with respect to some of his habeas claims. The appellant has not provided us with evidence that resort to the state courts would be futile. See Castille v. Peoples, 489 U.S. 346, 350-51 (1989). On the contrary it appears that adequate postconviction relief is available to him. See Wyo.Stat. s 7-14-101 through 108. Accordingly, the order of the district court dismissing the appellant's petition is AFFIRMED.

FN\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. Therefore, the case is ordered submitted without oral argument.

FN\*\* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

FN1. We believe that Hamburg's appeal is not frivolous and is pursued in good faith; therefore, we grant his motion for a certificate of probable cause.

FN2. Regarding the claim of ineffective assistance of counsel, the district court found three independent issues: (i) the refusal to allow the appellant to proceed with a pro se defense, (ii) the refusal to make use of certain information and to call certain witnesses in the defense, and (iii) the failure to discover and expose the "faked" handwriting samples.

Regarding the claim that the jury was not impartial and fair, the district court found three distinct issues: (i) inadequate voir dire of opinions on the appellant's political party, (ii) inadequate voir dire regarding familiarity with forged signatures, and (iii) jury prejudice as a result of contacts with the court clerk, whose deceased husband's signature was alleged to have been forged by the appellant.

There was no division of the third claim in which the appellant alleged that he was denied constitutional protections, including the right to an attorney, when he was asked to provide handwriting exemplars.

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FN3. The district court found that these two issues had not been properly raised before the state court, although it did note that a "somewhat similar" or "related" issue that was raised in the direct appeal. Our review of the record convinces us that the issues were fairly presented to the Wyoming Supreme Court. Nichols v. Sullivan, 867 F.2d 1250, 1252-53 (10th Cir.1989).

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DATE 3-29-94

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

**F I L E D**

MAR 28 1994

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

FIGGIE ACCEPTANCE CORPORATION,	)
	)
Plaintiff(s),	)
	)
v.	)
	)
ABATEMENT SYSTEMS, INC.,	)
	)
Defendant(s).	)

92-C-1100-B ✓

ORDER

Now before the Court is an appeal by Figgie Acceptance Corporation ("Figgie"). The appeal stems from a Bankruptcy Court action where Abatement Systems Inc. ("ASI") sued Figgie for equitable subrogation. ASI prevailed in that lawsuit and requested that Figgie pay \$39,830.50 in attorney fees. After reviewing the record, however, the Bankruptcy Court awarded ASI \$24,467.90.

Both parties now challenge that decision. Figgie contends that ASI, as a matter of law, should not have been awarded fees. On the other hand, ASI claims the Bankruptcy Court erred by reducing its original request. For the reasons stated below, the Court finds both arguments to be without merit and, as a result, the Bankruptcy Court's decision is affirmed.

*I. Summary of Facts*

On November 27, 1991, Figgie filed a Complaint for Declaratory Judgment in Bankruptcy Court. Figgie asked the court to determine the priority of Figgie's mortgage lien over ASI's mechanic's lien and to decline to subordinate Figgie's lien (pg. 2). ASI's

answer and counterclaim asserted two affirmative defenses. ASI claimed that their lien should be given priority on the basis of either the state law doctrine of equitable estoppel or the principle of equitable subordination under the Bankruptcy Code. (Answer and Counterclaim of Defendant Abatement Systems, Inc., December 16, 1991). ASI prevailed.

On June 25, 1992, ASI filed a request for attorney fees pursuant to 42 Okla.Stat. §176. ASI's request for attorney fees and costs included the following:

- (1) Attorney fees and costs for the lien priority contest,
- (2) paralegal fees for the lien priority contest,
- (3) attorney fees and costs for the bankruptcy action to stop the sale of the collateral to Figgie,<sup>1</sup> and
- (4) 50% of the attorney's fees and costs for a companion federal court action brought against Figgie for breach of contract.<sup>2</sup> (Application for Attorney Fees and Affidavit of Lewis N. Carter, June 25, 1992.)

ASI also filed a Supplemental Affidavit of Lewis N. Carter on October 1, 1992 requesting an additional amount of \$3,455.00 for attorney and paralegal time incurred from June 1, 1992 to August 30, 1992. The total amount requested was \$39,830.50.

On October 5, 1992, the Bankruptcy Court held a hearing on the issue of attorney fees and costs. The Court then awarded ASI attorney fees pursuant to 42 O.S. §176 but reduced the award to ASI to \$24,467.90. The deductions included (among other reductions and set-offs not at issue in this cross-appeal by ASI):

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<sup>1</sup> This action was styled *In re 5000 Skelly Corporation*, 90-2657-C (Chapter 7). The Bankruptcy Court allowed the sale but required Figgie to post a bond in anticipation of the establishment of the liens.

<sup>2</sup> This action was styled *Abatement Systems, Inc. v. Figgie Acceptance Corp.*, USDC, Northern District of Oklahoma, Case No. 90-C-900-B. Figgie was granted summary judgment against ASI because the court found no written contract existed. However, discovery information and depositions gathered in this action were later used by ASI to help determine the priority of the liens. Therefore, ASI seeks compensation for 50% of the costs for the discovery and deposition material used in both actions.

- (1) \$2,022.50 for paralegal services incurred in the lien contest,
- (2) \$2,425.00 for attorney fees and costs incurred in the effort to stop the sale of the collateral to Figgie, and
- (3) \$8,338.00 for attorney fees incurred in the companion federal court action.

Following the Bankruptcy Court's decision, Figgie appealed to this Court on November 30, 1992. ASI filed their cross-appeal on December 4, 1992.

## II. Standard of Review

The standard of review for factual findings is "clearly erroneous". A *de novo* review is applied to determinations of law. *First Bank of Colorado Springs v. Mullet*, 817 F.2d 677 (10th Cir. 1987). In addition, as a general rule, the standard of review for awarding attorney fees is whether the court abused its discretion. *Duran v. Carruthers*, 885 F.2d 1492, 1494-95 (10th Cir. 1989). An abuse of discretion has been defined as a judgment that is "arbitrary, capricious or whimsical". *United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987). For purposes of this appeal, the standard of review is whether the Bankruptcy Court abused its discretion.

## III. Legal Analysis

Two issues are raised. First, Figgie contends that the Bankruptcy Court erred by awarding ASI any attorney fees. Second, ASI claims that it should have been awarded more attorney fees. For the reasons stated below, this Court finds that the Bankruptcy Court did not abuse its discretion in awarding ASI \$24,467.90 in attorney fees.

### *A. Figgie's Contention that No Attorney Fees Should Have Been Awarded*

At trial, the Bankruptcy Court subordinated Figgie's mortgage lien on the basis of both the state law doctrine of equitable estoppel and equitable subordination under the

Bankruptcy Code (Judgment, November 25, 1992). Once the court determined that the lien of ASI had priority over Figgie's lien, the Court looked to 42 Okla. Stat §176 to examine ASI's request for attorney fees. Section 176 states:

**In an action to enforce any lien the party for whom judgment is rendered shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action.**

The court held that "ASI is entitled to the recovery of attorneys' fees pursuant to 42 Okla. Stat. §176". (Judgment, pg. 2 November 25, 1992.) Figgie disagrees with the Bankruptcy Court's application of 42 §176, contending that it is inapplicable under both Oklahoma and Bankruptcy law. This Court disagrees.

First, Figgie argues that 42 §176 applies only to "classic" lien priority contests where the question of priority rests solely on the timeliness or adequacy of the filing. According to Figgie, the instant action was not a "classic" lien contest because priority was decided on the basis of their inequitable conduct, not the timeliness or adequacy of their filing, and therefore, Figgie is not subject to an award of attorney fees under §176. Under this argument, a party who files a deficient lien is subject to an attorney fees award while a party who acted inequitably is not. Section 176, however, should not be interpreted to confer a benefit on a party who acted inequitably. As a result, Figgie's argument is without merit.

In addition, Oklahoma law supports the application of 42 §176 in the instant action. In *Ivey v. Henry's Diesel Service, Inc.*, 418 P.2d 634 (Okla. 1966), two creditors claimed liens on the debtor's property. The plaintiff loaned the debtor money and as security, held a mortgage on a tractor and trailer. The defendant towed and repaired the tractor and

trailer, and when the debtor was unable to pay for the repair work, kept the property. The plaintiff brought an action to foreclose on the mortgage and replevin the tractor and trailer. The defendant, however, claimed a lien on the property and refused to surrender possession. The court found for the defendant and awarded attorney fees under 42 §176. The court stated:

**...where the plaintiff and defendant each affirmatively assert a first lien on the property and claim a right of possession, the party for whom judgment is rendered is entitled to recover a reasonable attorney's fee....**

The instant case is similar to *Ivey*. Both ASI and Figgie assert prior liens, affirmatively challenging the superiority of the other's lien. Figgie, in its Complaint for Declaratory Judgment filed November 27, 1991, asked the Court to "determine the priority of Figgie's mortgage lien over ASI's lien and to decline to subordinate Figgie's mortgage". ASI's cross-claim challenged the priority of Figgie's lien. (Answer and Counterclaim of Defendant Abatement Systems, Inc., p. 1-2, filed December 16, 1991.) The pleadings leave little doubt that this is a case where both parties assert a first lien against each other. The holding in *Ivey* supports ASI's award under 42 §176. As a result, under Oklahoma law, the Bankruptcy Court did not err.

Figgie's second argument is that bankruptcy law follow the American Rule, which requires each party to bear their own expenses in the absence of applicable contractual or statutory fee-shifting provisions. This, too, is without merit. First, the applicability of §176 to the instant action, as discussed above, defeats Figgie's American Rule argument. Second, the authority relied on by Figgie is unpersuasive.

*In re 641 Associates, Ltd.*, 140 B.R. 619 (Bankr. E.D. Pa. 1992) is cited by Figgie as a case in which the court construes equitable subordination and denies the prevailing party its attorney fees. The debtor in *In re 641 Associates, Ltd.*, requested equitable subrogation of a claim on the basis of the creditor's inequitable acceleration of a note and mortgage. The court, however, refused to subrogate the claim. Therefore, while *In re 641 Associates, Ltd.* does construe the doctrine of equitable subordination, the Court finds against the party requesting it and on that basis denies attorney fees. ASI, on the other hand, succeeded in its claim for equitable subordination against Figgie. For that reason, Figgie's authority is distinguishable from the facts of the instant case and is unpersuasive.

A second case relied on by Figgie, *In re Firearms Import and Export Corp.*, 131 B.R. 1009 (Bankr. S.D. Fla. 1991), is also distinguishable. The debtor successfully challenged the priority of an insurance company's claim in the bankrupt's estate. The prevailing party then attempted to apply a broadly worded Florida statute that granted attorney fees to parties who prevailed against insurance companies.<sup>3</sup> The Florida court found that the statute was intended to apply only in cases where coverage is wrongfully denied and not to a successful challenge of an insurance claim in bankruptcy court. Therefore, the debtor's request for attorney fees was denied. In contrast, 42 §176 specifically addresses the issue presented in the instant action. The statute explicitly grants attorney fees to the prevailing party in a lien enforcement contest. Therefore, ASI, as the prevailing party whose lien was

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<sup>3</sup> Florida Statute §627.428 provides that "(u)pon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had." *In re Firearms Import and Export corp.*, 131 B.R. 1009, 1017 (Bankr. S.D. Fla. 1991).

found superior, is entitled to an award of attorney fees.

Figgie's last argument is that attorney fees should be awarded only against the "principal debtor" and not "incidental parties". Figgie contends that it is an incidental party and 5000 Skelly Corporation, as the Debtor, is the principal party. This argument is unpersuasive because Figgie initiated the action against ASI to determine the priority of the liens, and Oklahoma law refutes Figgie's contention that it is an incidental party.

*Travis v. Del State Bank*, 430 F.Supp. 312, 315 (W.D. Okla. 1976), like the instant action, involved three parties. The plaintiff asserted ownership over shares of stock in the defendant bank which were registered in the name of the debtor. The defendant bank argued that it was entitled to complete ownership of the stock by virtue of a statutory lien. The court found the plaintiff's lien to be superior and awarded attorney fees against the defendant bank pursuant to 42 O.S. §176. Like Figgie, the defendant bank argued that it was not subject to an award of attorney fees because it was an incidental defendant and not the principal debtor. The court rejected this argument and stated:

**(i)n the instant proceeding there can be no question as to the principal parties. They were the plaintiff and the defendant... Each relied upon and sought to enforce their respective liens against the other. The sole issue was which lien was superior. The enforcement sought by either party was sufficient to invoke the application of the statute.<sup>4</sup>**

The holding in *Travis* rejects Figgie's claim that it is an incidental defendant. Figgie and ASI were the plaintiff and defendant who both sought to enforce their lien against the other. Therefore, as a principal party who failed to prove the superiority of its lien against ASI, Figgie is subject to an award of attorney fees pursuant to 42 O.S. §176.

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<sup>4</sup> *The rationale of this holding is supported by the definition of "incidental". Incidental means of a "minor, casual, or subordinate nature." The American Heritage Dictionary 650 (2d college ed. 1985). Figgie's role in this case was not of a minor, casual or subordinate nature.*

In conclusion, we find that the Bankruptcy Court did not err by applying 42 O.S. §176. We affirm the Bankruptcy Court's decision to award attorney fees to ASI.

*B. ASI's Contention That the Award Request Should Not Have Been Reduced*

The next question is whether the Bankruptcy Court abused its discretion by reducing the fees requested by ASI. ASI requested \$39,830.50; the Bankruptcy Court awarded \$24,467.90. ASI contends that the Bankruptcy Court erred by subtracting \$2,022.50 for paralegal services incurred in the underlying action, \$2,425.00 for a related bankruptcy action and \$8,338.00 for a related federal action.

The Bankruptcy Court's Judgment (Nov. 25, 1992) does not provide a detailed rationale for its attorney fee decision. It is preferable for a lower court to "articulate specific reasons for fee awards" in order to provide an adequate basis for review. *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983).<sup>5</sup> Nonetheless, the Bankruptcy Court did not abuse its discretion on this issue.

The Bankruptcy Court ruled that paralegal or legal assistant fees are not recoverable under the statutes awarding attorney fees to the prevailing party in an action (Judgment p. 3, November 25, 1992). ASI contends that it is the general practice of this Court and federal courts throughout the country to award paralegal or legal assistant fees. (Brief in Chief of Appellee and Cross-Appellant, p. 17). However, ASI does not cite mandatory authority requiring the inclusion of paralegal fees in an attorneys' fee award. The only

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<sup>5</sup> *Ramos* suggests the consideration of several factors in determining the amount of attorney fees to be awarded. *Ramos*, 713 F.2d at 552. The factors referred to are listed in *Francia v. White*, 594 F.2d 778, 782 (10th Cir. 1979) as follows: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputations, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Tenth Circuit case cited is *Ramos v. Lamm* which states that "the court may award (paralegal fees) separately as part of the fee for legal services". *Ramos v. Lamm*, at 558. The permissive language ("may award") appears to allow a judge discretion in making such an award. Therefore, this court finds that the Bankruptcy Court did not abuse its discretion by denying compensation for the paralegal services.

The other two deductions also were within the discretion of the Bankruptcy Court. Both the bankruptcy action to stop the sale of the collateral and the federal breach of contract action were separate from the lien priority contest. ASI did not succeed in stopping the sale of the collateral to Figgie and Figgie was awarded \$2,978.44 against ASI in the federal court action. (Judgment, November 25, 1992, p. 3). Therefore, it was within the Bankruptcy Court's discretion to deny ASI compensation by Figgie for expenses incurred in these actions.

In conclusion, the Court affirms the award of attorney fees in the amount of \$24,467.90.

SO ORDERED THIS 28<sup>th</sup> day of Mar., 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3-29-94

**FILED**

MAR 28 1994

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

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

DON E. CRAVENS,

Plaintiff,

v.

WILLBROS BUTLER ENGINEERS, INC.

Defendant.

No. 93-C-512-B ✓

O R D E R

This matter comes on for consideration of Defendant Willbros Butler Engineers, Inc.'s Motion to Dismiss (docket entry #14) based upon failure to prosecute.

By Order entered February 14, 1994 this Court allowed the withdrawal of counsel of record Jeff Nix, requiring attorney Nix to forward to his former client all pleadings received for twenty days therefrom. Plaintiff was directed to immediately secure other legal representation or to appear in propria persona within twenty days.

No appearance has been made by Plaintiff Don E. Cravens nor by any counsel on his behalf.

Counsel for Defendant noticed Plaintiff for deposition scheduled to be taken February 16, 1994. Defendant's counsel alleges it notified Plaintiff's then counsel Jeff Nix of the scheduled deposition prior to Nixes' withdrawal from the case.

On February 16, 1994, neither Plaintiff nor anyone on his behalf appeared at the scheduled deposition.

The Court concludes this case should be and the same is hereby **DISMISSED** with prejudice for failure to prosecute.

IT IS SO ORDERED, this 28<sup>th</sup> day of March, 1994.

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

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

DATE 3-29-94

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

**F I L E D**

MAR 28 1994

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

IN RE: )  
 )  
 THEODORE VICTOR ANDERSON, )  
 )  
 Debtor. )  
 )  
 THEODORE VICTOR ANDERSON, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Appellee. )

93-C-0124-B ✓

ORDER

Now before this court is Anderson's appeal of a decision by the United States Bankruptcy Court for the Northern District of Oklahoma. The Bankruptcy Court found that the tax assessments made by the Internal Revenue Service (IRS) were timely and the debtor must pay the tax principal plus any interest under 26 U.S.C. § 6601(a)(2).

*I. Statement of Facts & Procedural History*

Debtor was a limited partner in Davenport Recycling Association ("Partnership"). One of his partners, Samuel L. Winer, was designated the "tax matters partner." Taxes were owed by Debtor and the partnership for 1982, 1983 and 1984.

The dispute at issue in this case began when Winer, pursuant to 26 U.S.C. §6229((b)(1)(B), filed Form 872-P: Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership for 1982, 1983 and 1984. The IRS then had until December 31,

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1989 to assess the debtors taxes attributable to the partnership. However, the Debtor contends that Winer did not notify him of the extension.

In 1989 -- before a correct assessment of the partnership taxes had been made -- the IRS determined that the partnership was an "abusive tax shelter."<sup>1</sup> As a result, the IRS disallowed several of the Debtor's previous tax deductions for 1982, 1983, and 1984 and, on May 15, 1989, notified Debtor that he owed more taxes for those years as a result of his participation in the partnership.<sup>2</sup>

On August 1, 1990, following the IRS notification, Debtor filed Chapter 7 bankruptcy. Consequently, under 26 U.S.C. § 6229(f), the IRS had one year to file a Notice of Deficiency against Debtor. The IRS filed such a notice on May 7, 1991 -- 86 days before the one-year deadline expired. Then, in October of 1991, the IRS assessed some \$200,000 in back taxes against the Debtor.

On January 10, 1992, Debtor asked the Bankruptcy Court to discharge those taxes. The Bankruptcy Court however, concluded that Debtor must pay the taxes owed to the IRS. As a result, Debtor filed the instant appeal.

## II. Legal Analysis

Two issues are raised by Debtor. The first is whether the IRS timely notified and assessed taxes against Debtor. The second issue is whether Debtor's Fifth Amendment due process rights were violated by the IRS. Each issue is discussed below.

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<sup>1</sup> It is unclear from the record as to why the IRS deemed the partnership an "abusive tax shelter."

<sup>2</sup> The May 15, 1989 notice to Debtor was a "Notice of Final Partnership Administrative Adjustment" for assessments arising from the debtor's partnership interest in Davenport and based on the Tax Equity Fiscal Responsibility Act ("TEFRA").

A. *Notification and Assessment of Taxes*

Debtor contends that the Bankruptcy Court incorrectly calculated the period of limitation, therefore the assessment was not timely. However, for the reasons discussed below, the Bankruptcy Court's decision is affirmed.

The principle of "tacking" has been widely accepted and was illustrated by *Ramirez v. United States*, 538 F.2d 888 (Cl. Ct. 1976). See also, *Continental Oil Co. v. United States*, 14 F.Supp 533 (1936). In *Ramirez*, the appellant argued that the government's assessment was barred by the statute of limitations. The appellant had entered into an agreement to extend the period for assessment until June 30, 1972. The agreement included the language,

[E]xcept that if a notice of a deficiency in tax is sent to the taxpayers ... then the time for making any assessment shall be *extended* beyond that date by the number of days during which an assessment is prohibited and for 60 days thereafter.<sup>3</sup>

*Ramirez*, 538 F.2d at 889 (emphasis added). The debtor argued that the 150 days ran from the date of notice, but the court concluded that in essence, the 150 day period is "tacked" to the end of the one-year assessment period allowed by 26 U.S.C. § 6229(f), not to the day notice is sent. The court in *Ramirez* explained "tacking" as "taking the original period of limitations allowing a number of days of suspension during which the period was tolled, and then at the end adding the unexpired period." *Ramirez* 538 F.2d at 892. See also, *Meridian Wood Products Co., Inc. v. United States*, 725 F.2d 1183, 1187 (1984) and *Aufleger v. Commissioner*, 99 T.C. No. 5 (1992).

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<sup>3</sup> *Although the Consent form signed by Winer, the tax matters partner, did not include such language, 26 U.S.C. § 6503(a) states "the running of the period of limitations shall be suspended ...."*

In the case at hand, when Debtor filed bankruptcy on August 1, 1990, his partnership items became nonpartnership items<sup>4</sup> according to Temporary Treasury Regulation 301.6231(c)-7T.<sup>5</sup> Upon that conversion, pursuant to 26 U.S.C. § 6229(f), a one-year period of limitations for the IRS to assess a deficiency took effect. In other words, the IRS had until August 1, 1991 to issue a Notice of Assessment. The IRS issued such a Notice of Assessment on May 7, 1991, 86 days before the end of the one-year period. When the IRS issued the notice, the one-year period was suspended for "the period during which the Secretary is prohibited from making the assessment," --90 days during which the debtor had the opportunity to petition the Tax Court, § 6213(a) --and for "60 days thereafter." 26 U.S.C. § 6503(a). Therefore, the one-year period of limitations was "suspended" for a total of 150 days, or until October 4, 1991.<sup>6</sup> On October 4, 1991, the one-year period in 26 U.S.C. § 6229(f) was no longer "suspended" and it resumed running with 86 days remaining. In other words, the 86 days that the notice was filed in advance of the expiration date of August 1, 1991, were "tacked" on to the October 4, 1991 deadline, making the final day of assessment December 30, 1991. Therefore, the assessments made by the IRS on October 14, 1991 and October 28, 1991 were timely.

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<sup>4</sup> "Nonpartnership item" means "an item which is (or is treated as) not a partnership item." 26 U.S.C. § 6231(a)(4).

<sup>5</sup> Temporary Treasury Regulation 301.6231(c)-7T states: "The treatment of items as partnership items with respect to a partner named as a debtor in a bankruptcy proceeding will interfere with the effective and efficient enforcement of the internal revenue laws. Accordingly, partnership items of such partner ... shall be treated as nonpartnership items as of the date the petition naming the partner as debtor is filed in bankruptcy."

<sup>6</sup> This court interprets "suspend" as "to interrupt; to cause to cease for a time, to postpone; to stay, delay, or hinder; to discontinue temporarily, but with an expectation or purpose of resumption." *Black's Law Dictionary*, 5th ed. (1979).

Debtor contends that *Clark v. Commissioner*, 90 T.C. 68 (1988), should control.<sup>7</sup> The court disagrees. The issue in *Clark* involved the IRS's assessment of deficiency during or directly after the lifting of the automatic stay provision in § 362 of the Bankruptcy Code. *Clark* did not address the period of limitations which controls this case because of the partnership items. In the case at hand, it is not the automatic stay provision that is at issue, but the period of limitations provided by Temporary Treasury Regulation 301.6231(c)-7T and 26 U.S.C. § 6229(f). Instead, *Clark* cited only the provision in 26 U.S.C. § 6503(i), which does not pertain to partnership items. Although the period of limitations referred to in 26 U.S.C. § 6503(i) was extended by agreement in this case, the one year period in 26 U.S.C. § 6229(f) took over when the Bankruptcy petition was filed.

*B. Fifth Amendment Due Process Violation*

The debtor also raises the issue of whether the delegation to a tax matters partner of the authority to extend the limitations period for assessment of partnership taxes satisfied the due process requirements of the Fifth Amendment to the United States Constitution.

Appellant did not raise this issue before the Bankruptcy Court and this court may not review issues raised for the first time on appeal. *Gundy v. United States*, 728 F.2d 484, 488 (10th Cir. 1984). In any event, when one buys into a partnership, they become

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<sup>7</sup> *Petitioner also contends that the Bankruptcy Court abused its discretion by not accepting his argument under Clark as it was presented in his "Debtor's Response to United States' Reply in Support of Supplemental Memorandum in Support of Motion for Summary Judgment". The Bankruptcy Court declared that the argument was "beyond the scope of argument permitted by this court's order for supplemental briefing" Order p.5.*

*Generally, procedural decisions are within the sound discretion of the court. See Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 330-32 (1971) (trial court within discretion to reject attempt to amend pleadings). It is well settled that unless the court's decision is a gross abuse of that discretion, it is not reviewable. Mexican Cent. Ry. Co. v. Pinkney, 149 U.S. 194 (1893). This procedural decision by the court does not constitute a gross abuse of discretion. Even if it did, this court has determined that the argument put forth by petitioner is not meritorious.*

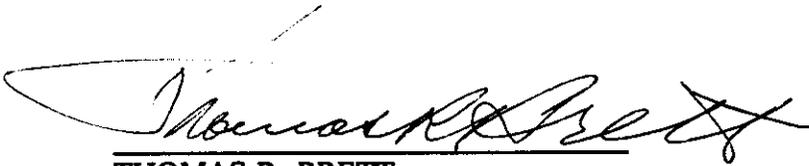
subject to certain laws and regulations. These include, "[t]he period described in subsection (a) may be extended ... with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner." 26 U.S.C. § 6229(b)(1)(B).

By vesting this authority in the tax matters partner, Congress does not deprive the other partners of any property right, regardless of whether the tax matters partner notifies them of his actions. Any deprivation of property occurs with the Final Partnership Administrative Adjustment ("FPAA"). Debtor received notice of FPAA on May 15, 1989 and had sufficient time to protect his rights. *See, Byrd Investments v. Commissioner*, 89 T.C. No. 1 (1987).

### III. Conclusion

This court holds that the Bankruptcy Court correctly calculated the period of limitations, thus the IRS's assessment of taxes was timely. Furthermore, the vesting of power in the tax matters partner did not violate Debtor's Fifth Amendment due process rights as Debtor had sufficient time to protect his property rights. Therefore, the decision of the Bankruptcy Court is affirmed.

SO ORDERED THIS 28<sup>th</sup> day of Mar., 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**FILED**

IN THE NORTHERN DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA MAR 29 1994

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

CLIFFORD, and REBA HARRIS, )  
 )  
 Plaintiff, )  
 )  
 VS. )  
 )  
 OKLAHOMA HORSE RACING COMMISSION, )  
 et al., )  
 )  
 Defendant )

Case No. 93-C-81B ✓

O R D E R

Now before the Court for consideration is Defendant Oklahoma Horse Racing Commission's Motion to Dismiss Plaintiff's Second Amended Complaint (Docket#48) filed December 20, 1993.

**I. Standard of Fed.R.Civ.P. 12(b) Motion to Dismiss**

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to Dismiss under Fed.R.Civ.P. 12(b) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), cert. denied, 397 U.S. 1074 (1970).

**II. Arguments and Authorities**

Plaintiff Clifford Harris ("Harris") is a horse owner and trainer. Harris was also an occupational licensee of the Oklahoma Horse Racing Commission during all times relevant to this action.

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His wife Reba, is not so licensed. The Oklahoma Horse Racing Commission ("OHRC"), is an administrative agency of the state of Oklahoma created pursuant to Okla. Stat. tit 3A §201. The five individually named Defendants are employees of the OHRC, and are named in both their official and individual capacities.

The Plaintiff manufactured and sold small electrical devices known as "buzzers" or "bugs," which were used in the racing industry to stimulate horses. The Plaintiff also employed a black jockey to ride the Plaintiff's horse. Prior to running of a pari-mutual race at Remington Park on June 1, 1991, the Clerk of the Scales allegedly advised Harris that he should employ a different jockey because black jockeys were unacceptable. Nevertheless, Harris disregarded the Clerk's comments and ran his horse in the tenth race, employing his usual black jockey. Harris' horse was the first to cross the finish line, but was subsequently disqualified for allegedly interfering with another horse. As a result, Harris was denied any portion of the prize money for that race.

Harris asserts that following the disqualification he requested a formal hearing before the OHRC. However, no official hearing was ever held. Harris claims that he continued to protest the disqualification and was told by an unknown OHRC official, there would be repercussions for pursuing his protest. On September 19, 1991, agents of the OHRC Law Enforcement Division obtained a search warrant in Tulsa County District Court to search Harris' home and to seize any items related to the manufacture and

sale of electronic buzzers. Harris' home was searched and items were seized. On September 25, 1991, criminal charges were filed against Harris and his wife Reba on three felony counts of "Possession of Electrical Horse Racing Devices with Intent to Sell," in violation of Okla. Stat. tit. 3A §208.7. On November 26, 1991, the charges were dismissed.

The Plaintiffs contend that the above stated actions by the Defendants violate their constitutional rights in violation of 42 U.S.C. §1983, and they further assert state law claims of malicious prosecution, abuse of process, and intentional interference with business relations. The court has previously dismissed all claims under 42 U.S.C. §1983 against the OHRC and each named defendant in his official capacity since these claims are barred by the Eleventh Amendment.<sup>1</sup> The Plaintiff's second amended complaint again asserts claims against the OHRC and the named defendants in their official capacity. These claims are once again dismissed for the reasons stated in the Court's previous order. The only remaining causes of action are the §1983 claims against the named defendants in their individual capacities and the pendent state law tort claims.<sup>2</sup>

A. §1983 Claim against Defendants in their Individual Capacity

To succeed under a §1983 action, two elements must be present: (1) the conduct complained of must have been committed by a person

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<sup>1</sup> See Order filed July 17, 1993.

<sup>2</sup> These claims were not addressed in the Court's previous order as the Defendant did not move for dismissal of these claims.

acting under color of state law, and (2) the conduct deprived the Plaintiff of rights, privileges, or immunities under the Constitution or laws of the United States.<sup>3</sup> Plaintiff alleges in five different counts, the Defendants, in their individual capacities, acted under color of state law and violated the Plaintiff's Constitutional rights under the First Amendment, and the due process clause of the Fourteenth Amendment.

Defendants contend that state employees are immune from any and all tort claims made against them solely because of their status as state employees. While state employees are immune from any claims brought against them in their official capacity for conduct within the scope of their employment, they are not immune from suit if they are sued in their individual capacity for actions outside the scope of their employment.<sup>4</sup>

Plaintiff has alleged that each of the named Defendants, acting under color of state law, deprived him of certain Constitutional rights. The Court must accept as true all well-pleaded allegations of the complaint and construe them in a light most favorable to the Plaintiff.<sup>5</sup> Thus, it is enough to withstand a motion to dismiss that the Plaintiff has made factual allegations

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<sup>3</sup> Parratt v. Taylor, 451 U.S. 527, 535 (1981).

<sup>4</sup> See, e.g., Scheuer v. Rhodes, 416 U.S. 232 (1973); Duckworth v. Frazen, 780 F.2d 645 (7th Cir. 1985); Coffin v. South Carolina Dept. of Social Services, 563 F.Supp. 579 (D.S.C. 1983); Rolf v. State of Ariz., 578 F.Supp. 1467 (D.Az. 1983); Jones v. State of Rhode Island, 724 F.Supp 25 (D.R.I. 1989); Blaylock v. Schwinden, 862 F.2d 1352 (9th Cir. 1988).

<sup>5</sup> Helstoski v. Goldstein, 552 F.2d 564, 565 (3rd. Cir. 1977).

which state a basis for relief.<sup>6</sup> Here, the Plaintiff alleges that the Defendants violated his constitutional rights by, among other things, improperly using a search warrant, obtaining a search warrant without probable cause, and disqualifying his horse because he employed a black jockey. The Court concludes that the Plaintiffs have sufficiently alleged a claim against each of the individual Defendants in their personal capacity, and as a result, Defendants' Motion to Dismiss Plaintiff's First Cause of Action as to all Counts made against them in their individual capacity is hereby DENIED.<sup>7</sup>

B. Conspiracy under §1983

In Count I, Plaintiff contends that Defendants Charlie Cox, and David Southard, both racing stewards at Remington Park, conspired to deprive the Plaintiff of his constitutional rights by among other things, using an allegedly fraudulent enlargement of a photograph depicting the Plaintiff's horse interfering with another horse. Defendants' counter that these named Defendants, who made the determination of interference, had no knowledge of any racial remarks made to the Plaintiff about his jockey by the clerk of the scales, and thus would have no reason to discriminate against the Plaintiff or deprive him of any rights.

"The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that

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<sup>6</sup> United States v. Jones, 570 F.2d 761, 765 (8th Cir. 1978).

<sup>7</sup> Defendants have not asserted a qualified immunity defense.

a recovery is very remote and unlikely but that is not the test."<sup>8</sup> Here the Court finds that the Plaintiff has alleged sufficient facts to survive a 12(b)6 motion as to Count I. Although the allegations regarding the Defendants' conduct and the constitutional harm suffered by the Plaintiff are rather vague, the Court is reluctant to deny the Plaintiff the opportunity to offer evidence to support his claim.

In Count II, the Plaintiff claims that each of the named defendants conspired to harass, embarrass, and deprive the Plaintiff of equal rights. The Defendant counters by stating that no such factual basis exists for such a claim. Defendants cite Dixon v. City of Lawton<sup>9</sup> to support their claim that the "Plaintiff must plead and prove, not only a conspiracy, but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient."<sup>10</sup> Plaintiff on the other hand cites Snell v. Tunnell<sup>11</sup> to support his claim that "an express agreement among all the conspirators is not a necessary element of a civil conspiracy."<sup>12</sup>

The cases are not inconsistent. Although the plaintiff need not show that the conspirators knew all the details of the plan, he

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<sup>8</sup> Scheuer v. Rhodes, 416 U.S. 232, 236 (1973).

<sup>9</sup> 898 F.2d 1143 (10th Cir. 1990).

<sup>10</sup> Id. at 1449.

<sup>11</sup> 920 F.2d 673 (10th Cir. 1990).

<sup>12</sup> Id. at 702.

must still provide sufficient facts "that there was a single plan."<sup>13</sup> Unlike Count I, where the Plaintiff has furnished at least minimal facts, the Plaintiff has simply not done so here. Contrary to Defendants' assertions, the Plaintiff does allege such a conspiracy existed, but the Plaintiff's allegations are conclusory and no factual basis is pleaded to support the allegations. Plaintiff provides no facts that somehow tie the OHRC law enforcement agents' actions with those of the racing stewards. It is not pleaded that either had any knowledge of what the other was doing.

Finally, for the same reasons stated in the Court's earlier order, the Plaintiff's conspiracy claim against the Defendants' in their official capacity is hereby dismissed. In addition, the Court finds the Defendant's statute of limitations argument lacking merit as the Plaintiff's initial complaint was filed prior to the statute of limitations deadline. As a result, Defendants' Motion to dismiss Plaintiff's Second Cause of Action as to Count I, is hereby DENIED, and as to Count II, is hereby GRANTED.

#### C. The State Law Tort Claims

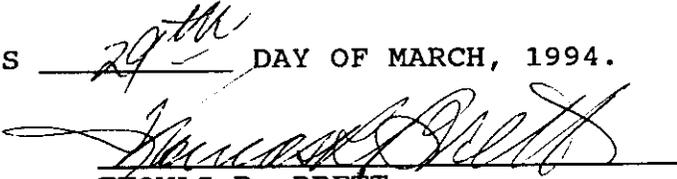
The Plaintiff makes three separate state law claims in addition to the §1983 claim. Again, as to any claims made against the Defendants' in their official capacity, such claims are dismissed. After this Court dismissed such claims on July 12, 1993, the Plaintiff subsequently filed suit against the Defendants', correctly naming the OHRC as Defendant, in state

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<sup>13</sup> Id.

court.<sup>14</sup> Defendants assert that the claims against them in their individual capacity should also be dismissed in this Court because "one simply cannot bring a tort claim against a state employee."<sup>15</sup> Such is not the case. A state employee acting outside the scope of his employment is not afforded immunity from personal liability solely because he or she is a state employee. Okla.Stat.tit. 51, §152.1(A). The Court concludes that because the state law claims arise out of the same facts<sup>16</sup> as the federal §1983 claim, the Court should exercise its discretion in favor of keeping the supplemental state law claims.<sup>17</sup> As result, Defendants' Motion to Dismiss Plaintiff's Third, Fourth, and Fifth causes of action is hereby DENIED.

IT IS SO ORDERED THIS 29<sup>th</sup> DAY OF MARCH, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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<sup>14</sup> Tulsa County District Court (CJ-93-3962).

<sup>15</sup> See, Defendants' Brief (Docket #48), page 18.

<sup>16</sup> See, United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

<sup>17</sup> 28 U.S.C. §1367.

ENTERED ON DOCKET

DATE 3-28-94

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

RADCO, INC., an  
Oklahoma corporation,

Plaintiff,

vs.

MAYHAN FABRICATORS, INC.,  
a Texas corporation,

Defendant,

and

LITWIN ENGINEERS &  
CONSTRUCTORS, INC.,

Interpleader in Intervention,

vs.

GLASS DESIGN, INC., an  
Oklahoma corporation, and  
CALLIDUS TECHNOLOGIES, INC.,

Defendants in Intervention

Case No. 92-C-1034-E

**JOURNAL ENTRY OF JUDGMENT**

On this 14th day of March, 1994, this matter came on for trial to a duly selected jury, the Honorable James O. Ellison presiding. The jury having rendered its verdict herein on March 17, 1994, the Court makes this Journal Entry of Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED, in accordance with such verdict, that Defendant Mayhan Fabricators, Inc., a Texas corporation, should have and recover from the Plaintiff, Radco, Inc., an Oklahoma corporation, judgment in the amount of \$251,500.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that interest shall accrue on the judgment amount at the rate of 4.22% per annum from March 17, 1994, until paid in full.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall reserve for further hearing the issues of prejudgment interest, attorneys' fees and costs.

IT IS SO ORDERED.

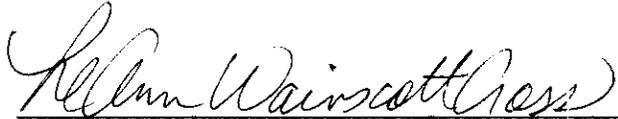
DATED this 8 day of March, 1994.

S/ JAMES O. ELLISON

---

James O. Ellison, Judge of the  
District Court of the Northern  
District of Oklahoma

APPROVED AS TO FORM:



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LeAnn Wainscott Cross, TX Bar #17688700  
BAILEY AND WILLIAMS, L.L.P.  
1650 Maxus Energy Tower  
717 N. Harwood Street  
Dallas, Texas 75201

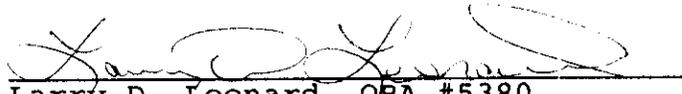
and



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Richard D. Black, OBA #12218  
SNEED, LANG, ADAMS & BARNETT  
2300 Williams Center Tower II  
Two West Second Street  
Tulsa, Oklahoma 74103

Attorneys for Defendant,  
Mayhan Fabricators, Inc.



Larry D. Leonard, OBA #5380  
ZARBANO, LEONARD, SCOTT & FEHRLE  
5051 South Lewis, Suite 200  
Tulsa, Oklahoma 74105-6061

Attorneys for Plaintiff,  
Radco, Inc.

ENTERED ON DOCKET

DATE 3-28-94

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

PAUL FLOYD and DIANA FLOYD, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE TOWN OF SKIATOOK; LEE WERT, )  
 individually and in his )  
 representative capacity, and )  
 RICHARD BARNES, in his capacity )  
 as a Trustee of the Town of )  
 Skiatook; CHARLES LACEY, )  
 in his capacity as a Trustee of )  
 the Town of Skiatook; )  
 HORACE PASLEY, in his capacity )  
 as a Trustee of the Town of )  
 Skiatook; MATT NEIGHBORS, )  
 in his capacity as a Trustee of )  
 the Town of Skiatook; and )  
 BOB RYAN, in his capacity )  
 as a Trustee of the Town of )  
 Skiatook, )  
 )  
 Defendants. )

Case No. 94-C-138-E  
**JURY TRIAL DEMANDED**  
 Attorneys Lien Asserted

*FILED*  
 MAR 29 1994  
 Richard Barnes, Charles Lacey, Horace Pasley, Matt Neighbors, Bob Ryan  
 U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF OKLAHOMA

**ORDER OF DISMISSAL OF TRUSTEES**

NOW on this 25 day of March, 1994, upon the Stipulation of the parties, the Court finds that the Trustees should be dismissed from all tort claims arising from this action, with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Trustees, Richard Barnes, Charles Lacey, Horace Pasley, Matt Neighbors and Bob Ryan, and each of them, are hereby dismissed from all tort claims arising from this action with prejudice.

*S/* JAMES O. ELLISON

---

HONORABLE JAMES O. ELLISON  
 United States District Judge

ENTERED ON DOCKET

DATE 3-28-94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )

vs. )

RONALD DWAYNE COTHRAN a/k/a )  
RONALD D. COTHRAN; DENISE KAY )  
COTHRAN a/k/a DENISE K. )  
COTHRAN; STATE OF OKLAHOMA )  
ex rel. OKLAHOMA TAX )  
COMMISSION; COUNTY TREASURER, )  
Tulsa County, Oklahoma; BOARD )  
OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )

Defendants. )

CIVIL ACTION NO. 93-C-1034-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 25 day  
of March, 1994. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Phil Pinnell, Assistant United States Attorney;  
the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission,  
appears not, having previously disclaimed any right, title or  
interest in the subject property; the Defendant, County  
Treasurer, Tulsa County, Oklahoma, appears by J. Dennis Semler,  
Assistant District Attorney, Tulsa County, Oklahoma; the  
Defendant, Board of County Commissioners, Tulsa County, Oklahoma,  
appears not, having previously claimed no right, title or  
interest in the subject property; and the Defendants, Ronald  
Dwayne Cothran a/k/a Ronald D. Cothran and Denise Kay Cothran  
a/k/a Denise K. Cothran, appear not, but make default.

The Court, being fully advised and having examined the  
court file, finds that the Defendant, Ronald Dwayne Cothran a/k/a

Ronald D. Cothran, acknowledged receipt of Summons and Complaint on November 27, 1993; that the Defendant, Denise Kay Cothran a/k/a Denise K. Cothran, acknowledged receipt of Summons and Complaint on November 27, 1993; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on November 22, 1993; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 22, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 22, 1993.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on December 13, 1993; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on December 13, 1993, claiming no right, title or interest in the subject property; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on December 9, 1993; and that the Defendants, Ronald Dwayne Cothran a/k/a Ronald D. Cothran and Denise Kay Cothran a/k/a Denise K. Cothran, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 5, 1990, Ronald Dwayne Cothran and Denise Kay Cothran filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-03393-W. On October 29, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order

modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

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

Lot Two (2), Block One (1), LANELL ACRES, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on June 16, 1987, the Defendants, Ronald Dwayne Cothran and Denise Kay Cothran, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$57,000.00, payable in monthly installments, with interest thereon at the rate of 9 percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Ronald Dwayne Cothran and Denise Kay Cothran, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated June 16, 1987, covering the above-described property. Said mortgage was recorded on June 18, 1987, in Book 5032, Page 1012, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Ronald Dwayne Cothran a/k/a Ronald D. Cothran and Denise Kay Cothran a/k/a Denise K. Cothran, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Ronald Dwayne Cothran a/k/a Ronald D. Cothran and Denise Kay Cothran a/k/a Denise K. Cothran, are indebted to the Plaintiff in the principal sum of \$54,843.42, plus interest at the rate of 9 percent per annum from April 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$645.00, plus penalties and interest, for the year of 1993. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of 1993 personal property taxes in the amount of \$38.00 which became a lien on the property. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, Ronald Dwayne Cothran a/k/a Ronald D. Cothran and Denise Kay Cothran a/k/a Denise K. Cothran, are in default and have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment in rem against the Defendants, Ronald Dwayne Cothran a/k/a Ronald D. Cothran and Denise Kay Cothran a/k/a Denise K. Cothran, in the principal sum of \$54,843.42, plus interest at the rate of 9 percent per annum from April 1, 1992 until judgment, plus interest thereafter at the current legal rate of 4 1/2 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$645.00, plus penalties and interest, for ad valorem taxes for the year 1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$38.00 for personal property taxes for the year 1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Ronald Dwayne Cothran a/k/a Ronald D. Cothran and Denise Kay Cothran a/k/a Denise K. Cothran have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, Ronald Dwayne Cothran a/k/a Ronald D. Cothran and Denise Kay Cothran a/k/a Denise K. Cothran, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisal, the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$645.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

**Third:**

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

**Fourth:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$38.00, personal property taxes which are currently due and owing.

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

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

S/ JAMES O. ELLISON

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UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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



J. DENNIS SEMLER  
Assistant District Attorney  
Attorney for Defendant,  
County Treasurer,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 93-C-1034-E

PP/esf

ENTERED ON DOCKET

DATE MAR 28 1994

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RACHEL E. UNDERWOOD n/k/a )  
 RACHEL E. COLWELL; JAMES T. )  
 SCHAFFER; EVE, INC., an Oklahoma )  
 corporation; STATE OF OKLAHOMA )  
ex rel. OKLAHOMA EMPLOYMENT )  
 SECURITY COMMISSION; COUNTY )  
 TREASURER, Tulsa County, )  
 Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma; and STATE OF OKLAHOMA )  
ex rel. OKLAHOMA TAX COMMISSION, )  
 )  
 Defendants. )

**FILED**

MAR 25 1994

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

CIVIL ACTION NO. 92-C-853-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 25 day of March, 1994, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and the Defendant, Rachel E. Underwood n/k/a Rachel E. Colwell, appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies of Plaintiff's Motion and Declaration were mailed by first-class mail to Rachel E. Underwood n/k/a Rachel E. Colwell, 8891 West Nichols Drive, Littleton, Colorado 80123, and to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on March 10, 1993, in favor of the Plaintiff United States of America, and against the Defendant, Rachel E. Underwood

n/k/a Rachel E. Colwell, with interest and costs to date of sale is \$31,699.66.

The Court further finds that the appraised value of the real property at the time of sale was \$4,500.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered March 10, 1993, for the sum of \$3,864.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on March 15, 1994.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Rachel E. Underwood n/k/a Rachel E. Colwell, as follows:

Principal Balance plus pre-Judgment Interest as of 3-10-93	\$29,459.25
Interest From Date of Judgment to Sale	593.29
Late Charges to Date of Judgment	356.16
Appraisal by Agency	500.00
Abstracting	415.00
Publication Fees of Notice of Sale	150.96
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$31,699.66
Less Credit of Appraised Value	- <u>4,500.00</u>
DEFICIENCY	\$27,199.66

plus interest on said deficiency judgment at the legal rate of 4.2% percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

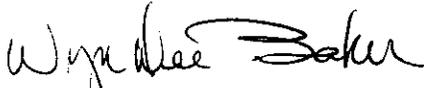
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Rachel E. Underwood n/k/a Rachel E. Colwell, a deficiency judgment in the amount of \$27,199.66, plus interest at the legal rate of 4.22 percent per annum on said deficiency judgment from date of judgment until paid.

**S/ THOMAS R. BRETT**

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



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

WDB/esr

MAR 29 1994

FILED

MAR 28 1994

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

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

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

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

O R D E R

Now before the Court is the Motion of Atlantic Richfield Company to Review Denial of Costs by the Court Clerk (Docket #1285).

On February 18, 1994, the Court entered an Amended Judgment in favor of plaintiff ARCO and against the Group 1 defendants. The Court also assessed costs against the Group 1 defendants in favor of Plaintiff ARCO.<sup>1</sup> On February 25, 1994, ARCO's Bill of Costs came on for hearing before the Court Clerk. ARCO was seeking \$263,649.58 in costs but was only awarded \$10,791.54 by the Court Clerk. ARCO contends the Court Clerk improperly denied costs for deposition transcripts and service costs for parties not before the Court at trial, hearing transcripts not introduced at trial, and fees for the Settlement Judge, Professor Martin Frey. ARCO asks the Court to now review the Court Clerk's award.<sup>2</sup>

The Court's authority to award costs is set forth in 28 U.S.C.

<sup>1</sup> The Court's amended judgment assessed costs in favor of ARCO, less its 10% share of liability.

<sup>2</sup> ARCO now contends its total taxable costs is \$120,253.56.

1299

§1920, which provides:

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

- (1) Fees of the clerk and marshall;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title.

The Court has discretion to determine whether ARCO's particular expenses in the Bill of Costs fall within Section 1920. Crawford Fitting Co., v. J.T. Gibbons, Inc., 482 U.S. 437, 441 (1987).

ARCO first contends it should be permitted to recover costs for deposition transcripts, service of Summons and Complaint and witness fees relating to parties who were dismissed from these actions prior to trial. ARCO further points out that it sued many of these defendants in accordance with the procedures set forth by Professor Frey, the Settlement Judge, in his effort to minimize third party actions. Upon review of the briefs and supporting documentation, the Court concludes the Court Clerk was correct in only awarding the costs that related to the parties against whom judgment was rendered.

ARCO next argues it is entitled to costs for pre-trial hearing transcripts and deposition transcripts that were not actually introduced at trial. ARCO states that such transcripts were necessary for the effective and efficient prosecution of this complex, multi-party litigation. In order to be recoverable, the

stenographic transcript must have been "necessarily obtained for use in the case." 28 U.S.C. §1920(2).

The Court concludes that the \$4,477.90 in costs sought by ARCO for hearing and trial transcripts was properly denied by the Clerk as such transcripts were neither approved by the Court in advance nor were they "necessarily obtained for use in the case." ARCO seeks \$26,362.30 as costs incurred for deposition transcripts. The Court Clerk awarded \$3,756.80 for such transcripts, denying the costs of all transcripts not introduced at trial. ARCO contends, that it is also entitled to the costs of the transcripts that ARCO designated and counterdesignated for trial. This Court agrees with the Court Clerk and concludes that ARCO should only be permitted to recover the costs associated with the deposition transcripts actually used at trial.

ARCO is also seeking taxation of costs for fees for witnesses in the total amount of \$12,641.63. The Court Clerk disallowed all fees for witnesses that did not actually testify at the trial as well as all fees for ARCO's party representative, and awarded \$3,149.00. The Court agrees that ARCO should only be permitted costs for witnesses who actually testified and that \$3,149.00 is the proper amount of such costs.

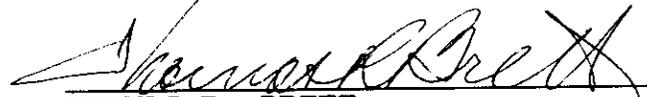
ARCO seeks a total of \$33,318.73 for copies and photographs. The Court Clerk awarded \$4,534.80 as the amount of copying costs incurred for the documents actually admitted into evidence. ARCO has failed to document its additional copying costs or persuade the Court that such additional documents were "necessarily obtained for

use in the case." Therefore, the Court concludes the Clerk properly awarded \$4,534.80 for copies and photographs.

ARCO also seeks to recover \$39,908.73 for payments made to Adjunct Settlement Judge Frey. The Court Clerk concluded, and this Court agrees, that such payments to the settlement judge are not properly taxable costs.

For the reasons set out herein, ARCO's Motion to Review Denial of Costs by Court Clerk (Docket #1285) is hereby DENIED and the Court's Clerk's award of \$10,791.54 in costs is hereby AFFIRMED.

IT IS SO ORDERED, this 28<sup>th</sup> day of March, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED DOCKET  
DATE MAR 28 1994

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GEORGE W. ANDERSON a/k/a )  
 GEORGE WAYNE ANDERSON; EVELYN )  
 ANDERSON; LYDELL L. ANDERSON )  
 a/k/a LYDELL LAMAR ANDERSON; )  
 TERRY ANDERSON a/k/a TERRY M. )  
 ANDERSON a/k/a TERRY McDONALD )  
 ANDERSON; STATE OF OKLAHOMA )  
 ex rel. OKLAHOMA TAX )  
 COMMISSION; TULSA TEACHERS )  
 CREDIT UNION; COUNTY )  
 TREASURER, Tulsa County, )  
 Oklahoma; and BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. )

CIVIL ACTION NO. 93-C-69-B

FILED  
MAR 28 1994  
Richard J. ... Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

DEFICIENCY JUDGMENT

This matter comes on for consideration this 25 day of March, 1994, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, George W. Anderson a/k/a George Wayne Anderson appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies of Plaintiff's Motion and Declaration were mailed by first-class mail to George W. Anderson a/k/a George Wayne Anderson, 424 E. Marshall St., Tulsa, Oklahoma 74106, and to all answering parties and/or counsel of record. The Court further finds that the amount of the Judgment rendered on August 24, 1993, in favor of the Plaintiff United States of America, and against the Defendant, George W. Anderson a/k/a

George Wayne Anderson, with interest and costs to date of sale is \$12,589.29.

The Court further finds that the appraised value of the real property at the time of sale was \$5,750.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered August 24, 1993, for the sum of \$4,936.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on March 15, 1994.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, George W. Anderson a/k/a George Wayne Anderson, as follows:

Principal Balance plus pre-Judgment Interest as of 8-24-93	\$11,146.96
Interest From Date of Judgment to Sale	101.61
Late Charges to Date of Judgment	148.72
Appraisal by Agency	500.00
Abstracting	280.00
Publication Fees of Notice of Sale	187.00
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$ 12,589.29
Less Credit of Appraised Value	- <u>5,750.00</u>
DEFICIENCY	\$ 6,839.29

plus interest on said deficiency judgment at the legal rate of 4.22 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, George W. Anderson a/k/a George Wayne Anderson, a deficiency judgment in the amount of \$6,839.29, plus interest at the legal rate of 4.22 percent per annum on said deficiency judgment from date of judgment until paid.

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

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

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

PB/esf

MAR 28 1994  
DATE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )

vs. )

ANN MARIE SCOTT a/k/a ANN M. )  
 SCOTT THROUGH NORMA EAGLETON, )  
 GUARDIAN AD LITEM; THE )  
 TIMEPLAN CORPORATION; MUTUAL )  
 PLAN OF TULSA, INC.; )  
 BRIERCROFT SERVICE )  
 CORPORATION; STATE OF )  
 OKLAHOMA ex rel. OKLAHOMA TAX )  
 COMMISSION; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; and )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )

Defendants. )

CIVIL ACTION NO. 93-C-290-B

**FILED**

MAR 25 1994

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 25 day  
of March, 1994. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Kathleen Bliss Adams, Assistant United States  
Attorney; the Defendant, Ann Marie Scott a/k/a Ann M. Scott,  
appears through Norma Eagleton, Guardian ad litem; the  
Defendants, County Treasurer, Tulsa County, Oklahoma, and Board  
of County Commissioners, Tulsa County, Oklahoma, appear not,  
having previously claimed no right, title or interest in the  
subject property; the Defendant, State of Oklahoma ex rel.  
Oklahoma Tax Commission, appears not, having disclaimed any  
right, title or interest in the subject property; and the  
Defendants, Briercroft Service Corporation, The Timeplan

Corporation, and Mutual Plan of Tulsa, Inc., appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Ann Marie Scott a/k/a Ann M. Scott, acknowledged receipt of Summons and Amended Complaint on November 22, 1993 through Norma H. Eagleton, Guardian ad litem; that Defendant, Briercroft Service Corporation, was served with Summons and Complaint on July 16, 1993; that Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on April 6, 1993; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 5, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 5, 1993.

The Court further finds that the Defendants, The Timeplan Corporation and Mutual Plan of Tulsa, Inc., were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning November 29, 1993, and continuing to January 3, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Timeplan Corporation and Mutual Plan of Tulsa, Inc., and service cannot be

made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Timeplan Corporation and Mutual Plan of Tulsa, Inc.. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

The Defendant, Ann Marie Scott a/k/a Ann M. Scott, filed her Answer to the Amended Complaint on November 22, 1993. The Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on April 23, 1993, claiming no right, title or

interest in the subject property; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on April 23, 1993, claiming no right, title or interest in the subject property; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on April 27, 1993; and that the Defendants, Briercroft Service Corporation, The Timeplan Corporation, and Mutual Plan of Tulsa, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Thirteen (13), Block One (1), Lloyd Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on May 19, 1967, Alex Scott a/k/a Alex J. Scott and Ann Marie Scott a/k/a Ann M. Scott became the record owners of the real property involved in this action by virtue of that certain Warranty Deed from W.J. Driver, as Administrator of Veterans Affairs, to Alex Scott and Ann Marie Scott, husband and wife, as joint tenants and not as tenants in common, with full right of survivorship, the whole estate to vest in the survivor in the event of the death of either, which Warranty Deed was filed of record on May 22, 1967 in Book 3807,

Page 1140 in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that on May 19, 1967, Alex Scott and Ann Marie Scott executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$7,700.00, payable in monthly installments, with interest thereon at the rate of six percent (6%) per annum.

The Court further finds that as security for the payment of the above-described note, Alex Scott and Ann Marie Scott, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated May 19, 1967, covering the above-described property. Said mortgage was recorded on May 22, 1967, in Book 3807, Page 1201, in the records of Tulsa County, Oklahoma.

The Court further finds that Alex Scott a/k/a Alex J. Scott died on January 12, 1988, and the subject property vested in his surviving joint tenant, Ann Marie Scott a/k/a Ann M. Scott, by operation of law.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Alex Scott a/k/a Alex J. Scott and of judicially terminating the joint tenancy of Alex Scott a/k/a Alex J. Scott and Ann Marie Scott a/k/a Ann M. Scott.

The Court further finds that on October 21, 1993, the Court appointed Norma Eagleton Guardian ad litem for Ann Marie Scott a/k/a Ann M. Scott for the purpose of acting on her behalf in the subject foreclosure action.

The Court further finds that the Defendant, Ann Marie Scott a/k/a Ann M. Scott, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Ann Marie Scott a/k/a Ann M. Scott, is indebted to the Plaintiff in the principal sum of \$1,501.99, plus interest at the rate of 6 percent per annum from May 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$323.10 (\$44.25 fees for service of Summons and Complaint, \$278.85 publication fees).

The Court further finds that the Defendant, Ann Marie Scott a/k/a Ann M. Scott, has admitted that she is indebted in rem according to the terms of the Mortgage and Plaintiff is entitled to have the subject real property sold to satisfy her indebtedness.

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

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, Briercroft Service Corporation, The Timeplan Corporation, and Mutual Plan of Tulsa, Inc., are in default and have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment in rem against the Defendant, Ann Marie Scott a/k/a Ann M. Scott, in the principal sum of \$1,501.99, plus interest at the rate of 6 percent per annum from May 1, 1992 until judgment, plus interest thereafter at the current legal rate of 4.25 percent per annum until paid, plus the costs of this action in the amount of \$323.10 (\$44.25 fees for service of Summons and Complaint, \$278.85 publication fees), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Ann Marie Scott a/k/a Ann M. Scott, is indebted in rem to the Plaintiff, and Plaintiff is entitled to have the subject real property sold to satisfy her indebtedness.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma; Briercroft Service Corporation; The Timeplan Corporation; and Mutual Plan of Tulsa, Inc., have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission,

disclaims any right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the death of Alex Scott a/k/a Alex J. Scott be and the same hereby is judicially determined to have occurred on January 12, 1988 in the City of Tulsa, Tulsa County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the joint tenancy of Alex Scott a/k/a Alex J. Scott and Ann Marie Scott a/k/a Ann M. Scott in the above described real property be and the same hereby is judicially terminated.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, with appraisement, with the option of selling without appraisement upon order of the Court, in the event that there are no qualifying bids which satisfy the required two-thirds of the appraised value of the subject property as required by 12 O.S. § 762, and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

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

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

**THOMAS R. BRETT**

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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



NORMA H. EAGLETON, OBA #13271  
Guardian ad litem for  
Defendant Ann Marie Scott  
a/k/a Ann M. Scott

Judgment of Foreclosure  
Civil Action No. 93-C-290-B

KBA/esf

ENTERED  
MAR 28 1994  
DATE

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MARIE A. BRADLEY,  
Plaintiff,  
vs.  
BLOUNT, INC., a Delaware  
corporation, licensed to do  
business in the State of  
Oklahoma; GEAR PRODUCTS, INC.,  
an Oklahoma corporation;  
BERNELL JILES, an individual;  
and JIM HURT, an individual,  
Defendants.

Case No. 92-C-254-B

**FILED**

MAR 25 1994

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

**ORDER ALLOWING DISMISSAL WITH PREJUDICE**

This matter came on before the Court this 25<sup>th</sup> day of March, 1994, upon the parties' Joint Stipulation of Dismissal With Prejudice, and for good cause shown, it is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff's action against these Defendants are hereby dismissed with prejudice with each of thoe parties to bear their own costs and attorneys' fees.

**THOMAS R. BHETT**

UNITED STATES DISTRICT JUDGE

DATE MAR 28 1994

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

ALBERT BOWENS,	)
	)
Plaintiff,	)
	)
v.	)
	)
DEPARTMENT OF HEALTH AND HUMAN	)
SERVICES, Donna Shalala, Secretary,	)
	)
Defendant.	)

93-C-0012-B

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

ORDER

Now before this Court is Plaintiff's Request For Remand (docket #7). The Secretary denied Social Security disability benefits to Plaintiff Albert Bowen. Since that decision, however, Bowen has presented the Court with additional evidence concerning his disability claim. He now asks that the case be remanded so the Secretary will consider that additional evidence.

Below is a summary of the pertinent facts. Mr. Bowen -- who said he was unable to work because of lower back surgery, heart problems, high blood pressure, ulcerated stomach and stress -- applied for disability benefits as of March 23, 1989. On December 27, 1991, the Administrative Law Judge ("ALJ") denied his application. The ALJ found that Mr. Bowen, 42 years old at the time of the decision, could return to work as a taxi driver and in construction maintenance. *Record at 28.*

Following the ALJ's decision, Mr. Bowen filed a Request For Review with the Appeals Council. Attached to the request was a report from Dr. Thomas L. Ashcraft, M.D. However, the Appeals Council refused to review the ALJ's decision.

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Mr. Bowen subsequently filed the instant request for remand and attached 14 exhibits. According to Mr. Bowen, none of the 14 exhibits were examined by the ALJ and apparently only one of the exhibits was given to the Appeals Council for review.

Of particular interest to the undersigned is a January 24, 1992 letter from Dr. Ashcraft to Mr. Bowen's counsel. It stated, in part: **"This gentleman will never be able to work due to his problems of chronic pain secondary to his degenerating lumbar disc disease and laminectomy. In addition, he has had a pacemaker which means that there is considerable heart disease...I see no way he will ever be employed again...The patient has been permanently totally disabled since 12/12/88 and will remain so for an undetermined number of weeks in the future."** *Plaintiff's Brief, Exhibit 3.*

A second pertinent piece of evidence is a March 27, 1992 letter from Dr. Ralph Richter, a M.D. who had examined Plaintiff several times. Dr. Richter stated that he considered Mr. Bowen "permanently and total[y] disabled". *Id.*

### **I. Legal Analysis**

The ALJ denied benefits to Mr. Bowen on December 27, 1991 without examining the evidence discussed above. The issue, therefore, is whether this Court should remand the case to the ALJ to examine such evidence. 42 U.S.C. § 405(g) states:

**The court may...order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for failure to incorporate such evidence into the record in a prior proceeding...**

The evidence is new because it is not duplicative or cumulative.<sup>1</sup> *Wilkins v. Secretary*, 953 F.2d 93, 96 (4th Cir. 1991). The next question is whether the evidence is

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<sup>1</sup> *The ALJ did consider some of Dr. Richter's evidence, although it is unclear as to how much.*

material. Evidence is material if it relates to the time period for which benefits were denied. *Haywood v. Sullivan*, 888 F.2d 1463, 1471 (5th Cir. 1989). Evidence is not material if it relates to a later-acquired disability or a subsequent deterioration of the previously non-disabling condition. *Id.* Also, see *Hargis v. Sullivan*, 945 F.2d 1482, 1493 (Proffered evidence must relate to the time period for which benefits were denied).

In the instant case, Dr. Ashcraft's examinations are material because he states that Mr. Bowen was disabled since March of 1988 -- subsequent to Mr. Bowen's alleged onset date of March 23, 1989 and before the ALJ's December 27, 1991 denial decision. Dr. Richter's letter (*Exhibit 4*) also is material because it discusses Mr. Bowen's condition during that time period.<sup>2</sup>

Since the examinations of Drs. Ashcraft and Richter are new and material, the next issue is whether there is good cause to remand the case. A remand is proper when a reviewing court concludes that the Secretary's decision "might reasonably have been different" had he considered the new evidence. *Cagle v. Califano*, 638 F.2d 219, 221 (10th Cir. 1981).<sup>3</sup>

Here, after reviewing the record, the undersigned finds that the Secretary's decision may have been different had he reviewed the new evidence. In deciding that Mr. Bowen had no disability, the ALJ discounted statements by Dr. Lawrence A. Reed -- one of Bowen's treating physicians. Dr. Reed, who had examined Bowen six times between May of 1989 and October of 1990, opined that Mr. Bowen was "permanently, physically and

---

<sup>2</sup> *Exhibits 1, 5, 6, 7, 8, 9, 10, 11, 12 and 14 are not material because they discuss Bowen's condition after December 27, 1991. Exhibits 2 and 13 are material and should be considered.*

<sup>3</sup> *It is unclear as to why the reports of Dr. Ashcraft were not before the ALJ initially.*

economically disabled." *Record at 22*. But the ALJ concluded that Dr. Reed's opinion was of limited value. He concluded, after reviewing the other medical evidence, that Mr. Bowen could perform sedentary and light work. *Id.*<sup>4</sup>

By adding the "new" evidence of Dr. Ashcraft, the record indicates that two "treating physicians" -- Ashcraft and Reed -- describe Mr. Bowen as unable to work. The ALJ discounted part of Dr. Reed's evidence, but, in doing so, it is unclear whether he properly followed the "treating physician" rule. See, generally, *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984)(If the treating physician's opinion is disregarded, specific and legitimate reasons must be set forth by the Secretary.) The evidence of Dr. Ashcraft, coupled with that of Dr. Reed, are clearly material additions to the evidentiary base, affecting the Secretary's decision.<sup>5</sup> The goal, after all is said and done, is to properly evaluate the claimant's true condition and need for assistance. Remand, in light of these treating physician's reports is thus appropriate.

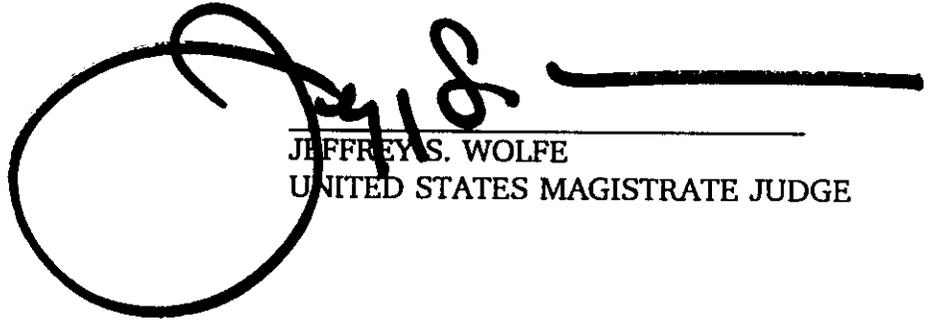
Consequently, good cause exists for remanding the case. Therefore, the case is REMANDED so that the ALJ can examine the new and material evidence submitted by Mr. Bowen. Once the evidence is re-examined, the ALJ shall weigh all material evidence in the record in making his determination, particularly in light of the opinions of Mr. Bowen's treating physicians.

---

<sup>4</sup> The ALJ wrote: "It is notable that the claimant's treating physician, Dr. Reed, opined that the claimant is "permanently, physically, and economically disabled." The medical use of the word disabled does not utilize the same criteria as that used on a Social Security Disability evaluation. The medical doctor typically uses the American Medical Association guidelines whereas the Social Security Administration utilizes specific listings. On the basis of the anatomical findings furnished by Dr. Reed and Dr. Richter, clearly the claimant could perform at sedentary and light work activity levels." *Record at 22*.

<sup>5</sup> See *Dorsey v. Heckler*, 702 F.2d 597, 605 (5th Cir. 1983) ("Where it is clear that material evidence was either not before the Secretary or was not explicitly...considered by him...the matter should be remanded").

SO ORDERED THIS 25<sup>TH</sup> day of March 1994.

  
\_\_\_\_\_  
JEFFREY S. WOLFE  
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE MAR 28 1994

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CHARLES MORRELL; LINDA MORRELL; )  
 JANE DOE, Tenant; CITY FINANCE )  
 COMPANY OF OKLAHOMA, INC.; )  
 LOMAS MORTGAGE USA, INC.; )  
 EMIGRANT SAVINGS BANK; COUNTY )  
 TREASURER, Tulsa County, )  
 Oklahoma; and BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. )

**FILED**

MAR 25 1994

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

CIVIL ACTION NO. 93-C-0062-B

DEFICIENCY JUDGMENT

This matter comes on for consideration this 25 day  
of March, 1994, upon the Motion of the Plaintiff, United  
States of America, acting on behalf of the Secretary of Veterans  
Affairs, for leave to enter a Deficiency Judgment. The Plaintiff  
appears by Stephen C. Lewis, United States Attorney for the  
Northern District of Oklahoma, through Kathleen Bliss Adams,  
Assistant United States Attorney, and the Defendants, Charles  
Morrell and Linda Morrell, appear neither in person nor by  
counsel.

The Court being fully advised and having examined the  
court file finds that copies of Plaintiff's Motion and  
Declaration were mailed by first-class mail to Charles Morrell  
and Linda Morrell, 1616 E. 2nd St., Tulsa, Oklahoma 74120, and  
to all answering parties and/or counsel of record. The Court  
further finds that the amount of the Judgment rendered on

August 9, 1993, in favor of the Plaintiff United States of America, and against the Defendants, Charles Morrell and Linda Morrell, with interest and costs to date of sale is \$10,734.35.

The Court further finds that the appraised value of the real property at the time of sale was \$2,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered August 9, 1993, for the sum of \$1,717.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on March 15, 1994.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendants, Charles Morrell and Linda Morrell, as follows:

Principal Balance plus pre-Judgment Interest as of 8-9-93	\$9,270.42
Interest From Date of Judgment to Sale	101.84
Late Charges to Date of Judgment	171.60
Appraisal by Agency	500.00
Abstracting	303.00
Publication Fees of Notice of Sale	162.49
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$ 10,734.35
Less Credit of Appraised Value	- <u>2,000.00</u>
DEFICIENCY	\$ 8,734.35

plus interest on said deficiency judgment at the legal rate of 4.22 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

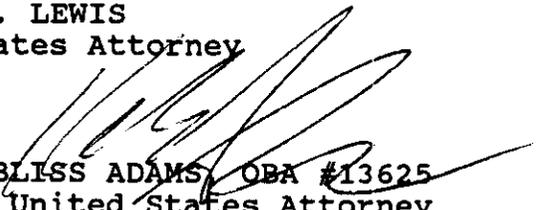
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendants, Charles Morrell and Linda Morrell, a deficiency judgment in the amount of \$8,734.35, plus interest at the legal rate of 4.22 percent per annum on said deficiency judgment from date of judgment until paid.

**S/ THOMAS R. BRETT**

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

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

KBA/esf

ENTERED ON DOCKET

DATE 3-25-94

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

**FILED**

MAR 24 1994

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

ASSOCIATES COMMERCIAL CORPORATION, )  
 a Delaware corporation, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PASCALE TRUCKING, INC., )  
 an Oklahoma corporation, )  
 )  
 Defendant. )

No. 94-C-65-B

J U D G M E N T

This action having been commenced on January 21, 1994, and Pascale Trucking, Inc., Defendant herein, having executed a Waiver of Service of Summons which has heretofore been filed in this matter and said Defendant having agreed to a judgment against it as is evidenced by the signature of its counsel hereinbelow;

IT IS ORDERED AND ADJUDGED that the Plaintiff, ASSOCIATES COMMERCIAL CORPORATION, recover judgment from Pascale Trucking, Inc. in the principal sum of \$363,422.00 with interest thereon from January 1, 1994, at 18% per annum, plus a reasonable attorney's fee to be determined at a subsequent hearing upon application of either party hereto, pursuant to Local Rule 54.2, together with the costs of this action.

DATED this 24th day of March, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND CONTENT:

Stewart E. Field

Stewart E. Field, OBA #2891  
HANSON, HOLMES FIELD & SNIDER  
5918 East 31st Street  
Tulsa, Oklahoma 74135  
(918) 627-4400  
Attorneys For Plaintiff

David A. Cheek

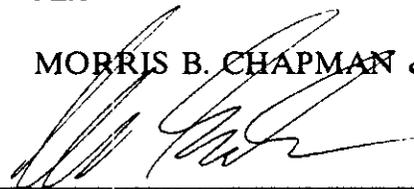
David A. Cheek, OBA # 1638  
McKinney, Stringer & Webster, P.C.  
101 N. Broadway, Suite 800  
Oklahoma City, Oklahoma 73102  
(405) 239-6444  
Attorneys For Defendant



And

MORRIS B. CHAPMAN & ASSOCIATES, LTD.

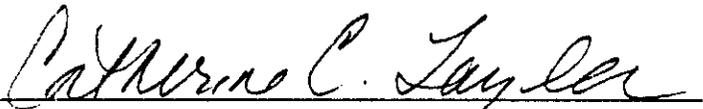
BY

  
\_\_\_\_\_  
ROBERT W. BOSSLET  
1406 Niedringhaus Avenue  
P. O. Box 519  
Granite City, IL 62040  
(618) 876-8440

Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on this 24<sup>th</sup> day of ~~February~~ March, 1994, I mailed a true and correct copy of the within and foregoing instrument to: Mr. Rodney Cook, Holloway, Dobson, Hudson, and Bachman, One Leadership Square, #900, 211 N. Robinson, Oklahoma City, OK 73102-7102, and Michael C. Taylor, 1718 S. Cheyenne Ave., Tulsa, OK 74119-4612, with postage prepaid thereon.

  
\_\_\_\_\_



This matter came on for hearing on the 23<sup>rd</sup> day of March, 1994, upon application of Defendants for a hearing for approval of settlement on behalf of the minor child, Joshua David Hollingsworth. After hearing statements of counsel for the parties concerning the terms of the settlement, it appears to the Court that Defendants, Steven R. Bailey, Donald Santisi Trucking Company and Ranger Insurance Company have made an offer of settlement of all claims which were brought or could have been brought by Plaintiffs, Billy Monroe Hollingsworth, Jr. and Gina Maxine Hollingsworth, on behalf of Joshua David Hollingsworth, in regard to a vehicle accident on or about February 14, 1991, on the Turner Turnpike near the town of Bristow, Creek County, State of Oklahoma. The Court finds that it has jurisdiction over the subject matter and persons at issue, that the settlement agreement, a copy of which is attached hereto as Exhibit "A" (the "Agreement"), is made in good faith, is fair and reasonable and should be approved, extinguishing all claims of Billy Monroe Hollingsworth, Jr. and Gina Maxine Hollingsworth on behalf of Joshua David Hollingsworth against Defendants, Steven R. Bailey, Donald Santisi Trucking Company and Ranger Insurance Company.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Agreement is approved in its entirety, that Billy Monroe Hollingsworth, Jr. and Gina Maxine Hollingsworth are hereby authorized and directed to sign the Agreement and all necessary papers settling the claims and that all parties shall execute, through their counsel of record, file, and have entered as a matter of record a joint motion for dismissal with prejudice of all claims regarding Joshua David Hollingsworth, each party to bear his or her own costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amounts set out in the Agreement to be paid on behalf of Joshua David Hollingsworth be paid as set out

in the Agreement.

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

**BY JOHN LEO WAGNER**  
**UNITED STATES MAGISTRATE JUDGE**

---

UNITED STATES ~~DISTRICT~~ JUDGE

*Wagner*



FOR AND IN CONSIDERATION of the payment to Billy Monroe Hollingsworth, Jr. and Gina Maxine Hollingsworth, individually and as natural parents and next friends of Joshua David Hollingsworth, a minor, at this time of the sum of Two Hundred Ninety-Nine Thousand and 00/100ths Dollars (\$299,000.00) to Billy Monroe Hollingsworth, Jr., Thirty-Seven Thousand Five Hundred and 00/100ths Dollars (\$37,500.00) to Gina Maxine Hollingsworth and One Thousand and 00/100ths Dollars (\$1,000.00) to Joshua David Hollingsworth, the receipt of which is hereby acknowledged, we, being of lawful age, do hereby release, acquit, hold harmless, indemnify and forever discharge Steven R. Bailey, an individual, Donald Santisi Trucking Company and Ranger Insurance Company, and any and all others, persons, firms and/or corporations, their heirs, successors and assigns of and from any and all actions, causes of action, claims, demands, liens, medical liens, damages, costs, loss of services, expenses and compensation, on account of, or in any way growing out of, any and all known and unknown personal injuries and property damage resulting or to result from a vehicle accident on or about February 14, 1991, on the Turner Turnpike near the town of Bristow, Creek County, State of Oklahoma.

We hereby declare and represent that the injuries sustained are permanent and progressive and in making this release and agreement it is understood and agreed that we rely wholly upon our own judgment, belief and knowledge of the nature, extent and duration of said injuries, and that we have not been influenced to any extent whatever in making this release by any representations or statements regarding said injuries, or regarding any other matters, made by the persons, firms or corporations who are hereby released, or by any person or persons representing him or them, or by any physician or surgeon by him or them employed.

It is further understood and agreed that this settlement is the compromise of a

doubtful and disputed claim, and that the payment is not to be construed as admissions of liability on the part of Steven R. Bailey, an individual, Donald Santisi Trucking Company and Ranger Insurance Company, and any and all other persons, firms and/or corporations, their heirs, successors and assigns, by whom liability is expressly denied.

Each party hereto shall bear all of its attorney fees and costs arising from the actions of its own counsel in connection with the Complaint, the resulting lawsuit, this Release and Settlement Agreement, and all related matters necessary to the conclusion of the litigation and culmination of its settlement.

This Release and Settlement Agreement contains the ENTIRE AGREEMENT between the parties hereto and the terms of this release are contractual and not a mere recital.

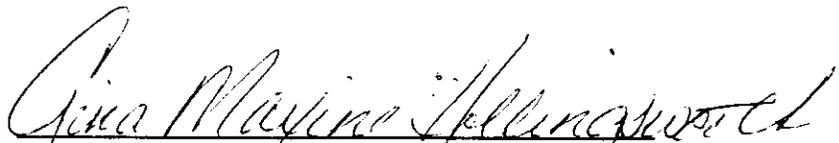
We further state that we have carefully read the foregoing release and know the contents thereof, and sign the same as our own free act.

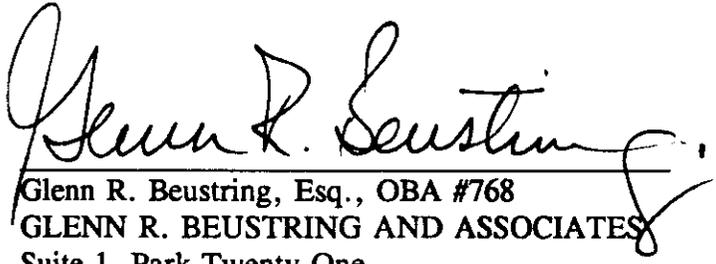
WITNESS my hand and seal this 22<sup>nd</sup> day of March, 1994.

**CAUTION! READ BEFORE SIGNING**



~~Billy Monroe Hollingsworth, Jr.~~  
BILLY MONROE HOLLINGSWORTH, JR.,  
individually and as natural parent and next friend of  
Joshua David Hollingsworth, a minor

  
GINA MAXINE HOLLINGSWORTH, individually  
and as natural parent and next friend of Joshua  
David Hollingsworth, a minor



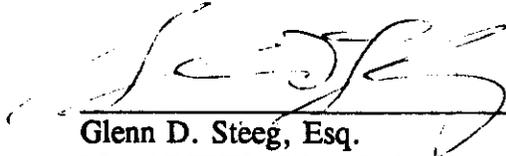
Glenn R. Beustring, Esq., OBA #768

GLENN R. BEUSTRING AND ASSOCIATES

Suite 1, Park Twenty-One

2624 E. 21st Street

Tulsa, Oklahoma 74114



Glenn D. Steeg, Esq.

McCARTHY, STEEG & NEWTON, P.C.

6011 Stadium Drive

P.O. Box 328

Oshtemo, Michigan 49077

Attorneys for Billy M. Hollingsworth, Jr. and Gina  
M. Hollingsworth, individually and as natural  
parents and next friends of Joshua David  
Hollingsworth, a minor

STATE OF Oklahoma  
COUNTY OF Kingston ss.

Before me, the undersigned, a Notary Public in and for said County and State, on this 22<sup>nd</sup> day of March, 1994, personally appeared Billy Monroe Hollingsworth, Jr. and Gina Maxine Hollingsworth, to me known to be the identical persons who executed the within and foregoing Release In Full Of All Claims And Settlement Agreement in regard to Case No. 92-C-975-C, filed in the United States District Court for the Northern District of Oklahoma, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal of office the day and year last above written.

Doris B. Wheeler  
Notary Public

My Commission Expires:  
at my death  
(S E A L)

ENTERED ON DOCKET

DATE 3-25-94

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

IN RE: )  
 )  
 DENNIS J. DOWNING and )  
 MARGARET GAY DOWNING, )  
 )  
 Debtors, )  
 )  
 DENNIS J. DOWNING and )  
 MARGARET GAY DOWNING, )  
 )  
 Appellants, )  
 )  
 v. )  
 )  
 G.L.'s PLASTERING COMPANY, )  
 INC., )  
 Appellee. )

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

Case No. 92-C-576-E ✓

ORDER

This order pertains to the Motion to Dismiss of G.L.'s Plastering Company, Inc. ("Plastering") (Docket #2)<sup>1</sup> seeking dismissal of the appeal of the Debtor, Dennis J. Downing ("Downing"), for failure to comply with Bankruptcy Rules 8001(a) and 8006. Plastering argues that Downing has failed to diligently prosecute the appeal pursuant to Bankruptcy Rule 8001(a), which states in part: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal."

In addition, Plastering contends that Downing failed to file a designation of record on appeal and statement of issues within 10 days after filing the Notice of Appeal as

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<sup>1</sup> "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

required by Bankruptcy Rule 8006. This Rule provides in part:

Within 10 days after filing the notice of appeal as provided by rule 8001(a) or entry of an order granting leave to appeal the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented . . . .

On June 22, 1992, the bankruptcy court entered a Judgment Order and a Memorandum Opinion, granting Plastering's Application for Relief from Stay and denying Downing's request to void the state court summary judgment entered against him in Tulsa County District Court on December 19, 1991. Downing had failed to inform the Tulsa court that he had filed for Chapter 11 bankruptcy over two years earlier.

On June 23, 1992, the Judgment Order was docketed by the clerk for the United States Bankruptcy Court, Northern District of Oklahoma. On July 2, 1992, Downing filed a timely Notice of Appeal. The Designation of Record on Appeal and Statement of Issues should have been filed on July 13, 1992 pursuant to Bankruptcy Rule 8006, but these were not filed until January 19, 1993. In addition, Downing's brief should have been filed on July 18, 1992 pursuant to Bankruptcy Rule 8009(a)(1). This was not filed until February 18, 1993 (Docket #4). Downing never sought any extensions of time in which to comply with Bankruptcy Rules 8006 or 8009(a)(1).

Plastering filed this Motion to Dismiss on January 28, 1993. Pursuant to Bankruptcy Rule 8011(a) and Local Rule 15 of the United States District Court for the Northern District of Oklahoma, the Response to the Motion to Dismiss should have been filed on February 12, 1993. This court improvidently granted an extension to file the Response for good cause shown on April 27, 1993 (Docket #8). Subsequently, the

Response was filed on May 12, 1993 (Docket #11).

Having reviewed Plastering's Motion to Reconsider and to Strike Application for Extension of Time, the court notes that Plastering's attorney states that he called Downing's attorney to inquire whether he would object to a request for additional time to file a responsive brief. During this conversation, the Downing's attorney learned of the possible existence of a Motion to Dismiss. Unable to confirm that he had actually received a copy of the Motion to Dismiss, the attorney sent Downing to the court to obtain a copy of the motion and the brief in support. The file-stamped copy of the Application to Extend Time for Appellee to File Responsive Brief shows that this conversation took place on or before February 23, 1993. Yet, a copy was not obtained until April 15, 1993.

Courts have dismissed appeals for lack of diligence or outright default in following the bankruptcy rules. In re Duncan, 95 B.R. 672, 676 (Bankr. W.D. Mo. 1988) (failure to provide file-stamped copies of documents for record on appeal); In re Colombian Coffee Co., Inc., 71 B.R. 258, 259 (Bankr. S.D. Fla. 1987) (failure to timely file the designation of record on appeal and statement of issues).

In determining whether or not to dismiss an appeal, the district courts must consider alternative measures in lieu of dismissal and whether the conduct involved was entirely caused by a party's attorney. Greco v. Stubenberg, 859 F.2d 1401, 1404 (9th Cir. 1988). In In re Benhil Shirt Shops, Inc., 82 B.R. 7, 9 (S.D.N.Y. 1987), the court dismissed the appeal for failure to timely prosecute where the debtor did not timely serve an issue statement on appellees, failed to file the appeal brief, failed to respond to the motion to dismiss the appeal, and never requested an extension of time. A similar ruling was made

in In re Wilson, 53 B.R. 123, 125 (D. Mont. 1985), where three months after the appeal was filed appellant had not filed the contents of the record on appeal and a statement of issues and had failed to file a brief, motion for continuance, or opposition to the motion to dismiss. In In re Webster, 47 B.R. 1012, 1013 (M.D.N.C. 1985), the court concluded that the dismissal of the appeal was warranted for untimely filing of the designation of the record on appeal and statement of issues, noting that the appellants also ignored the appellate briefing rules, the local rule for responses to motions, and a direct communication from the Court Clerk.

In this case, Downing was more than six months late in filing the Designation of Record on Appeal and Statement of Issues, as well as his appellate brief. Furthermore, a request for an extension of time to file was never made in either instance. In addition, upon discovery of the possible existence of a Motion to Dismiss, Downing delayed for almost two months in obtaining a copy of the motion and subsequently requesting an extension of time to respond to it. This court finds these delays to be evidence of a pattern of disregard for the Bankruptcy Rules and Procedures. Furthermore, these practices are dilatory in nature and are prejudicial to the interests of Plastering. Therefore, the court concludes that dismissal of the appeal is appropriate in this case and the Motion to Dismiss is hereby granted in favor of Appellee.

Dated this 23<sup>rd</sup> day of March, 1994.

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

n:Downing.or

ENTERED ON DOCKET

DATE 3-24-94

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

RON and BEVERLY LARGE,  
husband and wife,

Plaintiffs,

vs.

STATE FARM FIRE AND CASUALTY  
COMPANY, an Illinois Corpora-  
tion for Insurance Company  
Defendant,

Defendant.

Case No.: 93-C-726E

FILED

MAR 23 1994

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

ORDER OF DISMISSAL

This matter comes before the Court on the parties Joint application/Stipulation of Dismissal with Prejudice. Upon due consideration, it is hereby

ORDERED, ADJUDGED, AND DECREED that the above entitled action is hereby dismissed with prejudice.

Dated this 23 day of March, 1994.

S/ JAMES O. ELLISON

~~Magistrate Judge John L. Wagner~~

*[Handwritten signature]*

DATE 3-24-94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Gladys Greenleaf aka )  
 Gladys Phillips aka )  
 Gladys Greenleaf Phillips; )  
 COUNTY TREASURER, Tulsa County, )  
 Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

**FILED**  
 MAR 23 1994  
 Richard M. Lawrence, Clerk  
 U. S. DISTRICT COURT  
 NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 219E

ORDER

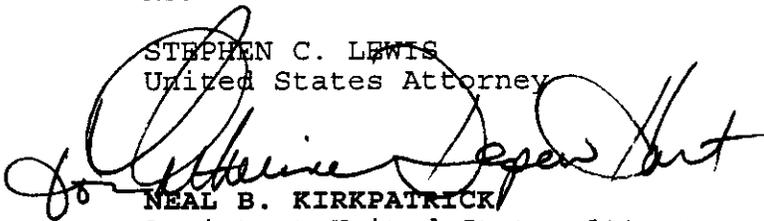
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 23 day of March, 1994.

S/ JAMES O. ELLISON  
 UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
 United States Attorney



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

NBK:lg

DATE 3-24-94

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

**FILED**  
MAR 23 1994

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

MARVIN R. WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RON CHAMPION, et al., )  
 )  
 Defendants. )

No. 93-C-247-E

**JUDGMENT**

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

SO ORDERED THIS 23<sup>d</sup> day of March, 1994.

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

ENTERED ON DOCKET

DATE 3-24-94

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

GLORIA JEAN SCHAFFER- )  
BOWMAN, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
GLORIA M. NICOLELLI, )  
 )  
Defendant. )

**FILED**

MAR 23 1994

Case No. 93-C-838-E Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Upon oral stipulation of the parties at the status and scheduling conference held on February 24, 1994, this case is hereby dismissed with prejudice in its entirety. This order will serve to dismiss both the claim by Gloria Jean Schaffer-Bowman and counter-claim of Gloria M. Nicolelli with prejudice.

Dated this 23<sup>d</sup> day of March, 1994.

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

ENTERED ON DOCKET

DATE 3-24-94

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

**FILED**

MAR 23 1994

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

T.G. & Y. STORES CO.,  
Plaintiff,  
vs.  
ATWOOD DISTRIBUTING, INC.,  
Defendants.

Case No. 93-C-262-E

**ADMINISTRATIVE CLOSING ORDER**

The Court has before it for consideration, the parties' Joint Motion For Entry Of Administrative Closing Order.

Finding that good cause exists for the granting of that motion, IT IS HEREBY ORDERED that the Clerk of this Court administratively close this case, pending approval by the Bankruptcy Court in New York of the Settlement Agreement reached by the parties. The Court has been advised that following that approval, the Plaintiff intends to dismiss this case, with prejudice.

IT IS SO ORDERED this 23 day of March, 1994.

*BY JAMES O. WILSON*

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3-24-94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ROBERT WAYNE CROSBY; )  
 ELOIS MAE CROSBY; )  
 COUNTY TREASURER, Creek County, )  
 Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Creek County, Oklahoma, )  
 )  
 Defendants. )

**FILED**  
 MAR 23 1994  
 Richard M. Lawrence, Clerk  
 U. S. DISTRICT COURT  
 NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 93-C-379-E ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23<sup>rd</sup> day of March, 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 Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, appear by Wesley R. Thompson, Assistant District Attorney, Creek County, Oklahoma; and the Defendants, Robert Wayne Crosby, and Elois Mae Crosby appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, Robert Wayne Crosby and Elois Mae Crosby, were served with Summons and Complaint on July 2, 1993; that Defendant, County Treasurer, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on April 28, 1993.

It appears that the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek

7

County, Oklahoma, filed their Answer on May 5, 1993; and that the Defendants, Robert Wayne Crosby and Elois Mae Crosby, have failed to answer and default has therefore been entered by the Clerk of this Court.

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

Lot Seventeen (17), Block Two (2), LAZY "H" ADDITION to the City of Sapulpa, in Creek County, State of Oklahoma, according to the recorded Plat thereof.  
Also known as 209 West Monterey, Sapulpa, Oklahoma.

The Court further finds that on August 15, 1983, the Defendants, Robert Wayne Crosby and Elois Mae Crosby, husband and wife, executed and delivered to The United States of America Acting by and through The Secretary of Housing and Urban Development a mortgage note in the amount of \$39,000.00, payable in monthly installments, with interest thereon at the rate of Eight percent (8%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Robert Wayne Crosby and Elois Mae Crosby, husband and wife, executed and delivered to The United States of America Acting by and through The Secretary of Housing and Urban Development a mortgage dated August 15, 1983, covering the above-described property. Said mortgage was recorded on August 29, 1983, in Book 143, Page 1592,

in the records of Creek County, Oklahoma. The mortgage tax due thereon was paid.

The Court further finds that the Defendants, Robert Wayne Crosby and Elois Mae Crosby, husband and wife, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, Robert Wayne Crosby and Elois Mae Crosby, husband and wife, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Robert Wayne Crosby and Elois Mae Crosby, husband and wife, are indebted to the Plaintiff in the principal sum of \$44,249.47, plus interest at the rate of Eight (8%) percent per annum from April 19, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$210.00 (\$202.00 for abstracting and \$8.00 for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Creek County, Oklahoma, and defendant, Board of County Commissioners, Creek County, Oklahoma have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$33.47, plus penalties and interest, for the year of 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that 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, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, Robert Wayne Crosby and Elois Mae Crosby, in the principal sum of \$44,249.47, plus interest at the rate of Eight (8%) percent per annum from April 19, 1993, until judgment, plus interest thereafter at the current legal rate of 4.22 percent per annum until paid, plus the costs of this action in the amount of \$210.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, have and recover judgment in the amount of \$33.47, plus penalties and interest, for personal property taxes for the year 1992, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, Robert Wayne Crosby and Elois Mae Crosby, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for

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

**First:**

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

**Second:**

In payment of Defendants, County Treasurer, Creek County, Oklahoma, and the Board of County Commissioners, Creek County, Oklahoma, in the amount of \$33.47, plus penalties and interest, for personal property taxes which are presently due and owing on said real property;

**Third:**

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

**Fourth:**

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

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

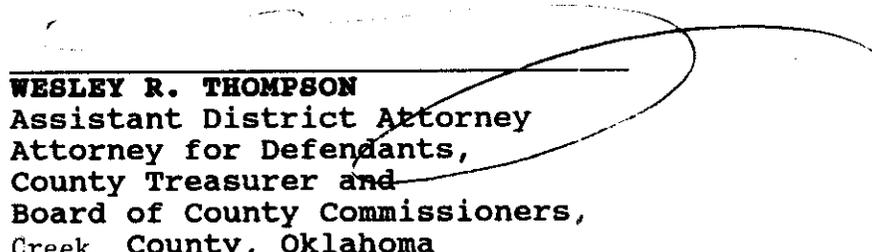
  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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



**WESLEY R. THOMPSON**  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Creek County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 93-C-379-E

NBK:flv

ENTERED ON DOCKET

DATE 3-24-94

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

LILA MURRAY,  
an individual,  
  
Plaintiff,  
  
vs.  
  
CIRCLE K CORP.,  
a corporation,  
  
Defendant.

No. 93-C-386-E

**F I L E D**

MAR 23 1994

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

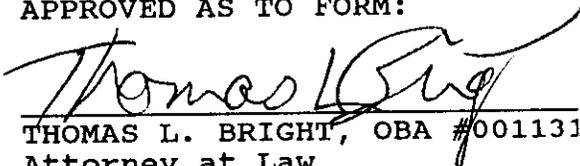
**ORDER OF DISMISSAL**

This matter comes on for hearing on Motion to Dismiss of Plaintiff in the above-entitled cause. The Court finds that said cause has been satisfactorily settled by and between the parties hereto and that the consideration therefore has been accepted by Plaintiff, in full settlement satisfaction, release and discharge of her cause of action, claims, demands, suits, debts, dues, sums of money, accounts, reckonings, executions, bills, bonds, specialties, covenants, contracts, controversies, attorneys' fees, claims and demands whatsoever against the Defendant, Circle K Corporation, and the Court, after due consideration, finds that said dismissal should be approved.

IT IS THEREFORE ORDERED that the claims of Plaintiff, be hereby dismissed with prejudice, each to party to bear its own costs.

S/ JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

  
THOMAS L. BRIGHT, OBA #001131  
Attorney at Law  
7130 South Lewis, Suite 501  
Tulsa, OK 74136  
(918) 492-0008  
ATTORNEY FOR PLAINTIFF



---

H.D. BINNS, JR., OBA #799  
ROBERTA BROWNING FIELDS, OBA #10805  
Rainey, Ross, Rice & Binns  
735 First National Center West  
Oklahoma City, Oklahoma 73102  
(405) 235-1356  
ATTORNEYS FOR DEFENDANT

35004103.94M

ENTERED ON BOOKS  
DATE MAR 24 1994

**FILED**

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

MAR 23 1994

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

CHARLES EATON and CHARLES EATON )  
and DEE EATON, as parents and )  
next friends of SARAH EATON, )  
a minor, )  
Plaintiffs, )

v. )

No. 92-C-1078 B

ANTONE J. BUCHMANN, )  
Defendant. )

AMENDED JOURNAL ENTRY OF JUDGMENT

This case comes for trial, pursuant to regular setting, on the 20th day of December, 1993. Noting that the claim of minor plaintiff Sarah Eaton was dismissed without prejudice on the eve of trial, trial of the case of Charles Eaton, individually, proceeded. Mr. Eaton appeared in person, and through counsel of record, Mr. Mark Stanley. Defendant Antone J. Buchmann appeared personally, and through counsel of record, William A. Fiasco. On December 20, 1993, a jury of seven individuals was empaneled and sworn. On the day of December 21, 1993, both parties presented evidence through oral testimony, stipulations and exhibits. Both parties rested their cases. Trial resumed on December 22, 1993, including the argument of counsel and instructions to the jury. The jury retired to deliberate, and subsequently returned with the following verdict:

"We the jury, empaneled and sworn in the above-entitled cause, do find the issues in favor of the plaintiff, Charles Eaton, individually, and fix damages in the amount of \$2,500."

The Court polled the jury, who ratified their verdict. Plaintiff Charles Eaton thereafter moved the Court to grant a new trial, based upon the insufficiency of the verdict. That motion for new trial was denied in open court on December 22, 1993.

The Court notes that Plaintiff filed his Petition in state court on October 20, 1992. The Court further notes that on September 30, 1993, the Defendant filed an Offer Of Judgment, pursuant to F.R.C.P. 68. The F.R.C.P. 68 Offer Of Judgment totalled \$12,500. The subsequent verdict of \$2,500 is not more favorable than the offer. The Court therefore finds that Plaintiff is entitled to appropriate costs incurred from the date of filing until September 30, 1993. The Court also finds that the Defendant is entitled to appropriate costs incurred from September 30, 1993, and continuing through verdict. The Court finds that the parties have stipulated to their costs in this regard. The Plaintiff has incurred appropriate costs, including interest at the taxable rate, in the amount of \$243.11. The Defendant has incurred appropriate costs in the total amount of \$961.15. The Court further finds that on December 10, 1993, the Defendant obtained judgment against the Plaintiff, for attorney's fees in a discovery dispute, in the total amount of \$1,011.50. The Defendant is entitled to a set-off, against any judgment taken against him, by that amount. Thus, the Plaintiff is entitled to judgment, costs and interest totalling \$2,743.11. The Defendant is entitled to judgment for costs and fees totalling \$1,972.65. Applying set-off of the Defendant's judgment and costs, and discharging and releasing the judgment and costs of the Defendant, the Court finds that judgment is left due and owing to the Plaintiff in the total amount of \$770.46.

UPON JUDGMENT, LET EXECUTION ISSUE.

**S/ THOMAS R. BRETT**

---

Judge of the District Court

APPROVED:



---

Mark S. Stanley  
Attorney for Plaintiff



---

William A. Fiasco  
Attorney for Defendant

DATE MAR-24 1994

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

**FILED**

MAR 24 1994

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

RESOLUTION TRUST CORPORATION, )  
as Receiver for Red River Federal )  
Savings and Loan Association, F.A., )

Plaintiff, )

vs. )

Case No. 91-CV-621-C

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

Defendants. )

PARTIAL JOURNAL ENTRY OF JUDGMENT

NOW on this 24th day of March, 1994, the above cause came on before me, the undersigned United States District Judge, pursuant to Plaintiff's Motion for Summary Judgment. The Substitute Plaintiff, Riviera West Corp. as successor to original Plaintiff, Resolution Trust Corporation, as Receiver for Red River Federal Savings and Loan Association, F.A., appears by its attorney of record, Steven A. Heath of MYSOCK & CHEVAILLIER; the remaining Defendants appear not as further identified below.

The Court thereupon examined the pleadings, process and files in this cause, and being fully advised in the premises, finds that the due and regular services of Summons with copy of Plaintiff's Petition attached, has been made upon the Defendants, Cherry Hills Associates, L.P., an Oklahoma limited partnership (Cherry Hills), Royal Manor South II, an Oklahoma limited partnership (Royal Manor II), Richard H. Hughes, an individual (Richard Hughes), Sam P. Daniel, Jr., an individual (Daniel), George A. Switlyk, an individual (Switlyk), John F. Cantrell, Tulsa County Treasurer and the Tulsa County Board of Commissioners (County), the City of

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Tulsa, Oklahoma, Public Service Company of Oklahoma, an Oklahoma corporation (PSO), and William E. Kite d/b/a Kite Service Company (Kite), and that due and regular services of Summons with copy of Plaintiff's Petition and Amended Complaint attached, has been made upon the Defendants United States of America ex rel. Department of Housing and Urban Development (HUD), Bank of Oklahoma, N.A., as successor in interest to the National Bank of Tulsa, a national banking association (BOK); Philip N. Hughes, an individual (Philip Hughes); Richard H. Hughes and Philip N. Hughes d/b/a Southbank Development Company, Joint Adventure (Southbank); Royal Manor South, an Oklahoma limited partnership (Royal Manor) by serving Richard Hughes, an authorized agent to receive Summons on behalf of Royal Manor; Equidyne Industries, Inc., an Oklahoma corporation (Equidyne); Equidyne Capital Corporation, an Oklahoma corporation (Equidyne Capital); Fourth National Bank of Tulsa, a national banking association (Fourth National); Harvey L. Hunter d/b/a Harvey Hunter Construction Company (Hunter), and Continental Casualty Company, an Illinois insurance corporation (Continental) as provided by law, and that said Summons and said service thereof is legal and regular in all respects. That the Defendants Royal Manor II and County have heretofore filed their separate Answers to the Petition of the Plaintiff on file herein. The Defendant Richard Hughes has filed his Entry of Appearance on file herein. The Defendants Cherry Hills, Switlyk, BOK, Southbank, Royal Manor, Equidyne, Equidyne Capital, Fourth National and Hunter have failed to answer or otherwise plead herein to the Petition and Amended

Complaint of the Plaintiff and are in default and are hereby adjudged in default.

That the Defendant known or unknown Heirs, Successors, and Assigns of James E. Nuckolls, Deceased (Nuckolls), and Lloyd M. Creekmore and Quida M. Nuckolls, Co-Administrators of the Estate of James E. Nuckolls, Deceased (Estate of Nuckolls) have been duly and regularly served by publication herein, said publications running for a period of six (6) consecutive weeks prior to the date thereof, and the Court having examined the Affidavit for Service by Publication, Notice by Publication and Proof of Publication, finds the same legal and regular in all respects, and said Publication Service is hereby approved by the Court. That the answer date as provided in said Notice by Publication has expired, and that said Defendants Nuckolls and Estate of Nuckolls have failed to appear, answer or otherwise plead herein, and are in default, and are hereby adjudged in default.

The Court thereupon conducted a judicial inquiry into the sufficiency of the Plaintiff's search to determine the names and whereabouts of the said Defendants served by publication herein, and based on the evidence adduced, the Court finds that the Plaintiff has exercised due diligence and has conducted a meaningful search from all reasonably available sources at hand, and the Court approved the publication service given herein as meeting both statutory requirements and the minimum standards of state and federal due process.

The Court further finds that the Defendants Kite, HUD, Daniel, Philip Hughes, and Continental have filed their separate Disclaimers whereby said Defendants have disclaimed any right, title, or interest in and to the property which is the subject of this action.

The Court further finds that the Plaintiff has filed Dismissals as to the Defendants City of Tulsa and PSO.

Upon consideration of Plaintiff's Motion for Summary Judgment and after examining the files and records of the case, the Court finds that the Defendants Cherry Hills, Switlyk, Royal Manor II, Richard Hughes, Daniel, County, BOK, Southbank, Royal Manor, Equidyne, Equidyne Capital, Fourth National, and Hunter have been duly served with Plaintiff's Motion for Summary Judgment filed on May 24, 1993. The Court further finds that the Defendants Cherry Hills, Switlyk, Royal Manor II, Richard Hughes, County, BOK, Southbank, Royal Manor, Equidyne, Equidyne Capital, Fourth National, and Hunter have failed to file a Response to Plaintiff's Motion for Summary Judgment as required under Rule 15 of the Rules of Civil Procedure for the United States District Court Northern District of Oklahoma and the facts in said Motion are therefore deemed confessed.

The Court further finds that Plaintiff dismissed with prejudice the issue of Defendant Daniel's personal liability concerning this matter.

Thereupon, the parties so appearing as above set forth, the Plaintiff introduced the Notes and Mortgages, Guaranty Agreement,

Assumption Agreement and Security Agreements herein sued upon by way of the Summary Judgment, and the Court, being fully advised in the premises, finds generally in favor of the Plaintiff and against the Defendants above-named, and each of them, and that the allegations of Plaintiff's Petition and Amended Complaint are true.

The Court further finds that defaults have occurred under the terms and conditions of said Notes, Mortgages, Guaranty Agreement and Security Agreements as alleged in Plaintiff's Petition and that the Plaintiff is entitled to a foreclosure of its Mortgages and Security Agreements sued upon in this cause, as against all of the Defendants in and to this cause, and each of them.

The Court further finds that said Mortgages owned, held and sued upon by the Plaintiff herein expressly waives appraisalment or not at the option of the owner and holder thereof, such option to be exercised at the time judgment is rendered herein, and that the Plaintiff elects to have said property sold with appraisalment.

The Court further finds that the respective liens, if any, of the Defendants and each of them, against the real estate and premises hereinafter described, of the dates, nature and amounts as hereinabove set forth, are junior, inferior and subject to the prior mortgage and lien of the Plaintiff as hereinabove set forth and adjudged, but that the matter of the priority of their respective liens, if any, each to the other, is not herein adjudicated, but is continued by the Court to a later date, to be set by agreement or upon order of the Court; that in the event that a surplus remains upon the sale of said property to satisfy the

Plaintiff's judgment herein, same shall be paid to the Court Clerk and the Court shall, upon due hearing, determine the priorities of the respective liens, if any, of the Defendants.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by the Court that the Plaintiff have judgment, in rem, against the Defendants County, BOK, Southbank, Royal Manor, Equidyne, Equidyne Capital, Fourth National, Hunter, Kite, HUD, Continental, Nuckolls and Estate of Nuckolls, and judgment, in personam and in rem, against the Defendants Cherry Hills, Switlyk, Royal Manor II, and Richard Hughes, and each of them, in the principal amount of \$1,024,124.93, accrued interest of \$33,838.79 to July 3, 1989, per diem interest thereafter at the rate of \$277.37, the amount of \$78,940.64 on the tax escrow account, late charges of \$2,360.10 to July 3, 1989, with late charges accruing thereafter at the rate of \$393.53 per month until paid, costs of this action of \$1,500.00, with costs accruing hereafter and a reasonable attorney's fee; abstract expense of \$500.00 with interest per annum thereon, until paid; advances for preservation of subject property represented by the receiver's certificates in the sum of \$81,000.00 with interest per diem thereon, until paid. These amounts are secured by said Mortgages and Security Agreements and constitute first and second, prior and superior liens upon the real estate and premises located in Tulsa County, Oklahoma, described as follows:

Lot One (1), Block One (1), ROYAL MANOR SOUTH, an addition to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof; and

all personal property, including without limitation, all furniture and furnishings, carpeting, drapes, appliances, fixture, supplies, equipment, contract rights, trade names, partitions, floor coverings, motors, boilers, furnaces, pipes, plumbing, fire extinguishing apparatus and systems, water tanks, heating, ventilating, air conditioning and cooling equipment and systems, music, alarm systems, gas and electric facilities of all kinds, together with future replacements, substitutions, betterments and additions thereto, situated on and used in connection with the building(s) now owned or which may be constructed by debtor(s) on the real property described above;

and that any and all right, title or interest which the Defendants or any of them, have or claim to have, in or to said real estate and premises is subsequent, junior and inferior to the Mortgages and liens of the Plaintiff.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** by the Court that the Defendants, Daniel and Philip Hughes, have disclaimed any interest in and to the real estate and premises described above and that by virtue of said disclaimers are found to have no interest in said real estate and premises.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** by the Court that the respective liens, if any, of the Defendants, against the real estate and premises hereinafter described, of the dates, nature and amounts as hereinabove set forth, are junior, inferior and subject to the prior Mortgages and liens of the Plaintiff as hereinabove set forth and adjudged, but that the matter of the priority of their respective liens if any, each to the other, is not herein adjudicated, but is continued by the Court to a later date, to be set by agreement or upon order of the Court; that in the event that

a surplus remains upon the sale of said property to satisfy the Plaintiff's judgment herein, same shall be paid to the Court Clerk and the Court shall, upon due hearing, determine the priorities of the respective liens, if any, of the Defendants herein.

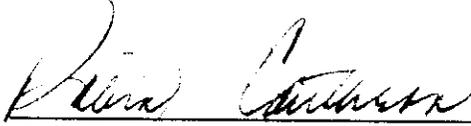
**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** by the Court that the Mortgages and liens of the Plaintiff hereinabove are found and adjudged to be foreclosed, and a Special Execution and Order of Sale issue out of the office of the District Court Clerk in this cause, directed to the Sheriff to levy upon, advertise and sell, after due and legal appraisalment the real estate and premises described, subject to unpaid taxes, advancements by Plaintiff for taxes, insurance premiums, or expenses necessary for the preservation of the subject property, if any, and pay the proceeds of said sale to the Clerk of this Court, as provided by law, for application as follows:

- First: To the payment of real property ad valorem taxes, if any.
- Second: To the payment of the Receiver's Certificates and costs and fees due the Receiver.
- Third: To the payment of the costs herein accrued and accruing.
- Fourth: To the payment of the judgments and liens of the amounts herein set out and any advancements made by Plaintiff for taxes, insurance premiums or expenses necessary for the preservation of the subject property.

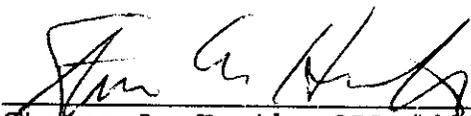
The balance, if any, to be paid to the Clerk of this Court, to await the further order of this Court.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** by the Court that upon confirmation of said sale, the Defendants herein, and each of them, and all persons claiming by, through or under them since the commencement of this action, be forever barred, foreclosed and enjoined from asserting or claiming any right, title, interest, estate, or equity of redemption in or to said real estate and premises, or any part thereof; except that the United States of America shall have a statutory right of redemption for a period of 120 days from date of Sheriff's Sale as provided by 28 USCA Section 2410(c).

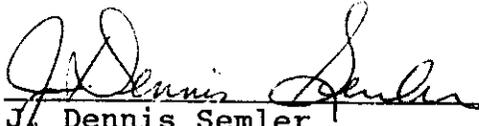
**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** by the Court that upon confirmation of the sheriff's sale of the property described herein, the Receiver is to deliver immediate possession of said real property to the buyer, and turn over all proceeds generated from said real and personal property to the Plaintiff.

  
UNITED STATES DISTRICT JUDGE

Approval:

  
Steven A. Heath, OBA #4036  
MYSOCK & CHEVAILLIER  
2021 S. Lewis, Suite 700  
Tulsa, OK 74104  
(918) 747-6099

ATTORNEY FOR SUBSTITUTE PLAINTIFF  
RIVIERA WEST CORP.

  
J. Dennis Semler  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, OK 74103

ATTORNEY FOR DEFENDANT  
TULSA CO. BD. OF COMMISSIONERS

ENTERED ON DOCKET

DATE MAR 24 1994

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

**FILED**

MAR 23 1994

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

SHIRLEY DANIELS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 DONNA SHALALA, )  
 SECRETARY OF HEALTH AND )  
 HUMAN SERVICES, )  
 )  
 Defendant. )

92-C-377-B

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for supplemental security income benefits under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

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

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

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

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.<sup>2</sup> He found that claimant had the residual functional capacity to perform the physical exertion and nonexertional requirements of work, except for lifting more than 20 pounds occasionally, 10 pounds frequently, no prolonged walking or standing, chronic pain relieved by medication sufficient that she could perform work, and the need to change positions from time to time. He found that claimant was unable to perform her past relevant work as a laundry worker. He concluded that the claimant's residual functional capacity for the full range of light work is reduced by these limitations, she is 53 years old, which is defined as closely approaching advanced age, she has a limited education, and she does not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work. He determined that, although the claimant's additional nonexertional limitations do not allow her to perform the full range of light work, there were a significant number of jobs in the national economy which she could perform, such as bench assembly, inspector, cashier, office helper, and telephone solicitor. Having determined that there were a significant number of jobs in the national economy that claimant could perform, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

---

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

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

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

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

- (1) That the ALJ mischaracterized the claimant's exertional residual functional capacity.
- (2) That the ALJ misapplied the medical vocational guidelines.
- (3) That the ALJ ignored the social security regulations and rulings as to the definition of "light work".

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

The medical evidence establishes that the claimant has severe right and left knee pain. She first sought medical care for the pain on October 5, 1984. On examination she showed an increased Q angle of 20 degrees and chronic subluxation (TR 128). She was tender around the patella and over the pes (TR 128). The knee and pes were injected with Xylocaine and Celestone (TR 128). On October 23, 1984, the doctor reported that she had a "marked chronic subluxation" of the patella (TR 128).

On November 6, 1984, she had an arthrotomy, arthroplasty, and lateral retinacular release on her right knee, after the doctor diagnosed a chronic subluxating right patella and chondromalacia in her right knee (TR 124). She did well following surgery and made slow improvement regarding her quadriceps ability exercises (TR 124). On her application for benefits filed on July 23, 1990, she reported that her condition made her stop working on November 15, 1984 (TR 77).

On November 21, 1984, she reported doing ten leg lifts a day and was told to increase that amount (TR 128). By November 27, 1984, she was working "very hard on

range of motion" and doing over 100 leg lifts a day (TR 128). However, on January 24, 1985, she told the doctor she could hardly walk and her knee was worse. The doctor reported: "She said it feels like it has a tin band on it real tight. She thinks it has bleed [sic] inside. She also thinks there are blood streaks in it. It feels like there is a bone going crossways inside it." (TR 128).

Claimant admitted on her application for benefits that her doctor had not told her to cut back or limit her activities in any way (TR 80). She stated: "The doctor did say to excercise [sic] the knee some, such as lying down and doing leg lifts." (TR 80). She admitted on the application that she had some social contacts "if walking to and from social event isn't far" and that she can drive some "as we [have] automotive transmission." (TR 80). She stated that she takes two Motrin and three Tylenol capsules a day (TR 101).

At the hearing she claimed that she does only light housework, no cooking, can only stand twenty minutes without pain, and spends the day watching television and sewing (TR 31, 33-34). She testified that she can lift things, but sometimes she falls over if she bends to lift (TR 35). She uses crutches to provide support when she walks (TR 36). She said the medication she takes "controls the hurting in the knee", but then claimed she has constant pain (TR 39).

On August 9, 1990, Dr. Ron R. Barney reported that claimant suffers bursitis of the right knee, which causes her to fall frequently (TR 130). On October 15, 1990, Dr. Richard G. Cooper examined her and reported as follows:

Straight leg raising test negative, both seated and supine. Knee structural exam, there is a click in the right knee and crepitation in the right knee and some degree of crepitation under the left kneecap; however, the gait was normal within the confines of the office.

\* \* \*

In summary then, this lady has had surgical procedure for dislocating the right patella and chondromalacia patella. There was a retinacular release and a tuck on the medial musculature. She continues to have significant difficulties with that knee with the click and pain and crepitation. Knee causes her to fall from time to time. In my opinion, she would be impaired in many activities that require prolonged standing, walking, bending, twisting, lifting. (TR 133-34, 162-63).

The doctor who examined her at the Indian Health Center on March 5, 1991, did not find claimant "to be disabled for any work" (TR 137). On May 24, 1991, Dr. M. R. Workman examined her and reported:

On examination the patient exhibits the old, well healed, curvilinear vertical surgical incision over the anteriomedial aspect of the joint. The joint appears to be stable. There is no effusion or edema noted. Palpation about the knee reveals marked tenderness over the pes anserina as well as tenderness over the patella itself. There is a Q angle of 18°. With manipulation of the patella she does have crepitation.

Examination of the left knee reveals similar findings except that there is no crepitation.

X rays obtained in this office ... show developing arthritic changes of the medial compartment as well as moderately severe patellofemoral arthritic changes. (TR 155).

At the hearing a vocational expert responded to the ALJ's questions as follows:

Q ... Let me give you a hypothetical situation. Let's assume that we have a female individual who is 53 years old. Has a 9th grade education with the ability to read and write and use numbers. And let's assume further that this individual in general has the physical capacity to perform sedentary or light work. However, assume that the individual might have the following physical limitations. She would be restricted from prolonged walking or standing. And that this individual in endeavoring to function from a sedentary and light level, would have a symptomatology from a variety of sources. Despite such symptoms, the claimant would be able to remain attentive to conversations and respond appropriately -- during the process, and handle matters as part of the normal work situation. And we'll assume that this individual is afflicted with a symptomatology of chronic pain, of

sufficient severity as to be noticeable to her at times. But nonetheless, she can carry out work assignments satisfactorily. We'll assume that due to the fact that she's restricted by this pain in prolonged walking and standing, that she would it [sic] necessary to change positions from time to time to relieve her symptomatology. And that she's taking medication for relief of the chronic pain, but the medication would not preclude her from functioning at the sedentary level. And she will remain reasonably alert -- presented by a work setting. Assuming all the foregoing, could this individual return to any of her past relevant work?

A No.

Q All right, now again assume the foregoing hypothetical and the previous -- functional restrictions, can you identify any light or sedentary occupations which you believe can be performed by such an individual?

A Yes. It would be primarily at a sedentary level, it would be classified as unskilled or entry level. And these jobs, the numbers I'm going to give are in Oklahoma.

Q All right.

A At sedentary there are bench assembler job, approximately 3,000. 750 inspector jobs. 4,000 cashier. 2,000 office helper. 1,500 telephone solicitor. At a light exertional level there would be approximately 2,000 assembly, which is a reduction of 50 percent. 500 inspection, which is a reduction of 2/3. 3,000 cashiers, which is a reduction of 3/4. 4,000 office helpers, which is reduction of 3/5. And that's all I would name.

Q All right. Now are there any other vocational factors that we haven't addressed -- you think should be considered?

A No. (TR 43-45) (emphasis added).

The ALJ properly considered claimant's allegations of disabling pain in his decision. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754

F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

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

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

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

Because there was some objective medical evidence to show that plaintiff had a knee problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). "[T]he absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court finds that the ALJ properly concluded that claimant's testimony was not credible, as her weight had increased, which is uncharacteristic of a person who has pain as alleged, and the circumference of her legs was equal bilaterally. He also applied the factors in Luna to claimant's case in making his decision.

There is no merit to the errors asserted by claimant in this appeal. She suggests that the ALJ's findings are contradictory because he found that she could not perform her past work in a laundry, which is classified as light work, but could perform the full range of light work. However, the ALJ clearly found that she could not perform the full range of light work and that her ability to perform the full range of light work was reduced by the inability to perform prolonged walking and standing, lifting more than twenty pounds, chronic controllable pain, and the need to change positions from time to time (TR 13-14). Plaintiff further asserts that the ALJ misapplied the Medical-Vocational Guidelines ("the Grids") to direct a finding of not disabled in this case. Again, the decision reveals that the ALJ relied on the vocational expert's testimony, and merely made findings concerning the relevant factors in the Grids. Eggleston v. Bowen, 851 F.2d 1244, 1248 (10th Cir. 1988).

The ALJ did not find, as claimant argues, that she could only perform sedentary work. Rather, he concluded she could do jobs allowing a change in position from standing to sitting from time to time. While the vocational expert noted that most light jobs which claimant could perform would be sedentary ones, there were several jobs listed which would require some time on the worker's feet, such as cashier and office helper. Thus claimant's argument that the "Sedentary Table" set out in the Grids would direct a finding of "disabled" has no merit. Claimant's exertional residual functional capacity was not "mischaracterized".

The Secretary's decision that claimant is not disabled is supported by substantial evidence and is a correct application of the pertinent regulations. It is affirmed.

Dated this 23<sup>rd</sup> day of March, 1994.



JOHN LEG WAGNER  
UNITED STATES MAGISTRATE JUDGE

n: daniels.ord

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

RECEIVED IN COURT  
MAR 23 1994

MARGARET M. DOWNEY, Personal  
Representative for George S.  
Deceased,

Plaintiff

Vs.

FIRST FIDELITY EXCHANGE CORPORATION,  
a California corporation; WAYNE K.  
RICHARDSON; and EUGENE HUNTER,

Defendants

No. 92 C 967 C

FILED

MAR 22 1994

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

JOURNAL ENTRY OF DEFAULT JUDGMENT

The Court having reviewed the Motion for Default Judgment filed herein by plaintiff, the Entry of Default by Clerk and the file of this action finds that defendants, First Fidelity Exchange Corporation and Wayne K. Richardson have failed to respond to plaintiff's Complaint within the time allowed and are in default.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED That plaintiff, Margaret M. Downey, Personal Representative of the Estate of George S. Downey, deceased, be granted judgment against the defendants, First Fidelity Exchange Corporation and Wayne K. Richardson in the amount of \$345,840.80 together with interest thereon.

Dated March 22<sup>nd</sup>, 1994

*[Signature]*  
JUDGE OF DISTRICT COURT

19

MAR 23 1994  
FILED

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

MAR 20 1994

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

RANDAL G. BROOKS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE CITY OF TULSA, OKLAHOMA, )  
 )  
 Defendant. )

No. 92-C-990-C

AGREED JUDGMENT INCLUDING AWARD OF ATTORNEY FEES AND COSTS

On February 22, 1994, both parties announced ready for trial. On said date, a jury of eight (8) persons was selected, and on February 23, 1994, the jury heard the opening statements of opposing counsel.

Also on February 23, 1994, the jury heard the testimony of witnesses, duly sworn and examined in open court. Documentary exhibits were admitted into evidence, and both parties rested, all on February 23, 1994.

After the jury was excused on February 23, 1994, this Court in camera heard the requests, objections, and arguments of opposing counsel concerning jury instructions.

On February 24, 1994, jurors heard the closing arguments of opposing counsel, and then heard Instructions read to them by the Court. On the same date, the jury retired to deliberate, returned to open court, and rendered a unanimous verdict in favor of Plaintiff and against Defendant, awarding Plaintiff actual damages in the amount of Five Thousand Dollars (\$5,000.00).

This Court, having reviewed said verdict, announced in open court on February 24, 1994, that the Court accepted and approved the verdict, and rendered judgment thereupon.

This matter now comes on before the Court for entry of that judgment and for consideration of awarding a reasonable attorney's fee and costs.

By their signatures below, opposing counsel have agreed to the following stipulations on behalf of their respective clients:

1. Plaintiff is the prevailing party in this action and, under the Americans with Disabilities Act, is entitled to be awarded, and should receive, a reasonable attorney's fee in this action.

2. Since Plaintiff is the prevailing party, Plaintiff is also entitled to receive an award of his costs.

3. A reasonable attorney's fee for the prosecution of the instant action is Ten Thousand Dollars (\$10,000.00).

4. Plaintiff has incurred necessary and recoverable costs in the total amount of Five Hundred Dollars (\$500.00).

5. Plaintiff is entitled to receive, and should be awarded, the total sum of Ten Thousand Five Hundred Dollars (\$10,500.00) for attorney's fees and costs.

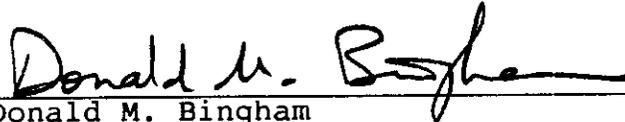
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff should be, and he hereby is, granted Judgment in his favor and against Defendant in the total amount of Fifteen Thousand Five Hundred Dollars (\$15,500.00).

Signed this 22<sup>nd</sup> day of March, 1994.



H. DALE COOK  
U. S. District Court Judge

APPROVED AS TO FORM AND CONTENT:



Donald M. Bingham  
Attorney for Plaintiff



Charles R. Fisher  
Attorney for Defendant

ENTERED ON DOCKET

MAR 23 1994

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

MARGARET M. DOWNEY, Personal  
Representative for George S.  
Deceased,

Plaintiff

Vs.

FIRST FIDELITY EXCHANGE CORPORATION,  
a California corporation; WAYNE K.  
RICHARDSON; and EUGENE HUNTER,

Defendants

No. 92 C 967 C

FILED

MAR 22 1994

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

JOURNAL ENTRY OF DEFAULT JUDGMENT

The Court having reviewed the Motion for Default Judgment filed herein by plaintiff, the Entry of Default by Clerk and the file of this action finds that defendants, First Fidelity Exchange Corporation and Wayne K. Richardson have failed to respond to plaintiff's Complaint within the time allowed and are in default.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED That plaintiff, Margaret M. Downey, Personal Representative of the Estate of George S. Downey, deceased, be granted judgment against the defendants, First Fidelity Exchange Corporation and Wayne K. Richardson in the amount of \$345,840.80 together with interest thereon.

Dated March 22<sup>nd</sup>, 1994

*[Signature]*  
JUDGE OF DISTRICT COURT

19

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

RECEIVED ON DOCKET  
MAR 23 1994

FILED

MARGARET M. DOWNEY, Personal  
Representative for George S.  
Deceased,

Plaintiff

Vs.

FIRST FIDELITY EXCHANGE CORPORATION,  
a California corporation; WAYNE K.  
RICHARDSON; and EUGENE HUNTER,

Defendants

MAR 27 1994

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

No. 92 C 967 C

JOURNAL ENTRY OF DEFAULT JUDGMENT

The Court having reviewed the Motion for Default Judgment filed herein by plaintiff, the Entry of Default by Clerk and the file of this action finds that defendants, First Fidelity Exchange Corporation and Wayne K. Richardson have failed to respond to plaintiff's Complaint within the time allowed and are in default.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED That plaintiff, Margaret M. Downey, Personal Representative of the Estate of George S. Downey, deceased, be granted judgment against the defendants, First Fidelity Exchange Corporation and Wayne K. Richardson in the amount of \$345,840.80 together with interest thereon.

Dated March 22, 1994

(Signed) H. Dale Cook

JUDGE OF DISTRICT COURT

*[Handwritten signature and notes]*



DATE MAR 23 1994

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

**FILED**

MAR 23 1994

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

ROY DALE SPARKS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RON CHAMPION, et al., )  
 )  
 Defendants. )

No. 93-C-0090-B ✓

ORDER

At issue before the Court in this prisoner's civil rights action is Defendants's motion to dismiss this action as moot because the Oklahoma Department of Correction has rescinded its grooming code policy. The Plaintiff has not responded.

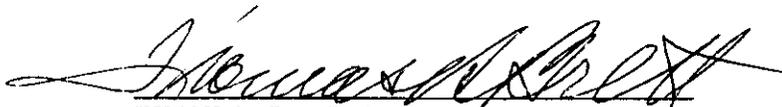
Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule. 7.1.C. In any case, the Court concludes that this action is moot because the plaintiff is no longer subject to the condition about which he complains. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985).

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

- (1) The administrative stay is **lifted**;
- (2) Defendants' motion to dismiss this case as moot [docket #18] is **granted**;
- (3) Defendants' motion for summary judgment [docket #12] is **denied as moot**; and

(4) This case is dismissed as moot.

SO ORDERED THIS 22<sup>nd</sup> day of Mar, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

MAR 22 1994

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FRANCIS SCHMIDT,  
SSN 448-36-8223,

Plaintiff,

vs.

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

Defendant.

**FILED**

MAR 22 1994

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

CASE NO. 93-C-1088-B

ORDER

Upon the motion of the defendant, Secretary of Health and Human Services, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Secretary for rehearing.

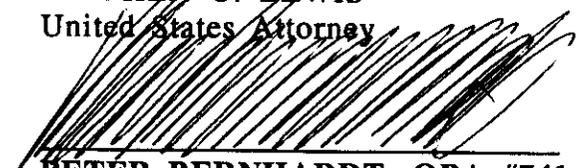
DATED this 22 day of March, 1994.

S/ THOMAS W. SMITH

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney



PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103

PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

ENTERTAINMENT WEEKLY  
DATE MAR 23 1994

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

**FILED**

MAR 22 1994

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

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

No. 93-C-165-B

ORDER

At issue before the Court in this prisoner's civil rights action is Defendants' motion to dismiss this action as moot because the Oklahoma Department of Corrections has rescinded its grooming code policy. The Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule. 7.1.C. In any case, the Court concludes that this action is moot because the Plaintiff is no longer subject to the condition about which he complains. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985).

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

- (1) The administrative stay is **lifted**;
- (2) Defendants' motion to dismiss this case as moot [docket #15] is **granted**;
- (3) Defendants' motion to dismiss [docket #5] is **denied** as

6

moot;

(4) This action is dismissed as moot.

SO ORDERED THIS 22<sup>nd</sup> day of Mar., 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED IN DOCKET  
DATE MAR 23 1994

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

**FILED**

MAR 22 1994

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

KEVIN DON COLE, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RON CHAMPION, et al., )  
 )  
 Defendants. )

No. 92-C-1145-B

ORDER

At issue before the Court in this prisoner's civil rights action is Defendants' motion to dismiss this action as moot because the Oklahoma Department of Corrections has rescinded its grooming code policy. The Plaintiff has not responded.

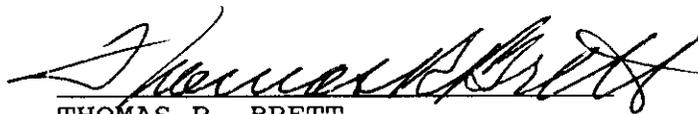
Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule. 7.1.C. In any case, the Court concludes that this action is moot because the Plaintiff is no longer subject to the condition about which he complains. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985).

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

- (1) The administrative stay is **lifted**;
- (2) Defendants' motion to dismiss this case as moot [docket #15] is **granted**;
- (3) Defendants' motion for summary judgment [docket #13] is **denied as moot**;

(4) This action is dismissed as moot.

SO ORDERED THIS 22<sup>nd</sup> day of Mar., 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAR 23 1994

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

GLORIA YVETTE' ROBISON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TULSA UNIVERSITY, )  
 )  
 Defendant. )

Case No. 94-C-48 B

**ORDER DISMISSING WITH PREJUDICE**

Upon the Plaintiff's motion, the Plaintiff's action for discrimination under Title VII of the Civil Rights Act, and for other discrimination, is hereby DISMISSED WITH PREJUDICE.

**S/ THOMAS R. BRETT**

\_\_\_\_\_  
Judge of the District Court

David B. McKinney, OBA #6032  
Of BOESCHE, McDERMOTT & ESKRIDGE  
100 W. 5th St., Suite 800  
Tulsa, OK 74103-4216  
(918) 583-1777

ATTORNEYS FOR DEFENDANT

DATE MAR 23 1994

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GLENDA D. MORTON aka Glenda D. )  
 Haralson aka Glenda Haralson )  
 aka Glenda Stewart; )  
 MYNATT CARROLL MORTON; )  
 COUNTY TREASURER, Ottawa County, )  
 Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Ottawa County, )  
 Oklahoma, )  
 )  
 Defendants. )

**FILED**

MAR 23 1994

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

CIVIL ACTION NO. 93-C-974-B

ORDER

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

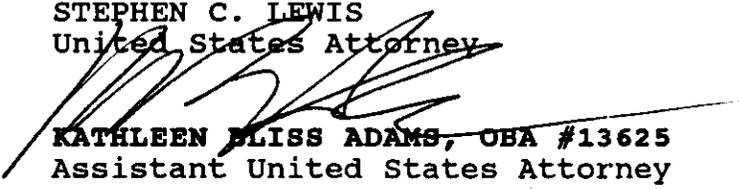
Dated this 22nd day of March, 1994.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

  
KATHLEEN BLISS ADAMS, OBA #13625  
Assistant United States Attorney  
3600 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

KBA:css

ENTERED ON DOCKET

DATE MAR 23 1994

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

**FILED**

MAR 22 1994

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

THE UNITED STATES OF AMERICA, )  
for the use and benefit of )  
BRAZEAL MASONRY, INC., an )  
Oklahoma corporation, )

Plaintiff, )

vs. )

Case No. 93 C 1008 B

NATIONAL INTERIOR CONTRACTORS, )  
INC., a corporation; WESTCHESTER )  
FIRE INSURANCE COMPANY, )

Defendants. )

JUDGMENT

This matter comes on before the Clerk on this 22nd day of Mar., 1994, upon Plaintiff's Request for Entry of Default by the Clerk and the Clerk after having an opportunity to examine the file and being fully advised herein, finds that the Plaintiff has sued the Defendant, National Interior Contractors, Inc., for a sum certain of \$7,802.00; that the said Defendant has been served with Summons and no response has been filed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the ~~Clerk~~ *Court* that Plaintiff is entitled to Judgment of and against the Defendant, National Interior Contractors, Inc. in the sum of \$7,802.00 with interest thereon at the rate of 6% from the date said Complaint was filed before the Court and for the cost of this action.

S/ THOMAS H. BRETT

~~Clerk~~, UNITED STATES DISTRICT *Judge*  
~~Court~~ FOR THE NORTHERN DISTRICT  
OF OKLAHOMA

ENTERED ON DOCKET

DATE MAR 23 1994

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

**FILED**

MAR 22 1994

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

BOB D. MCDANIEL,  
Plaintiff,

vs.

BECKY LAWMASTER, et al.,  
Defendants.

No. 93-C-79-B

**JUDGMENT**

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

SO ORDERED THIS 22<sup>nd</sup> day of Mar, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

2/0

ENTERED ON DOCKET  
DATE MAR 23 1994

FILED

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

MAR 22 1994

CLERK OF COURT  
NORTHERN DISTRICT OF OKLAHOMA

BOB D. MCDANIEL, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BECKY LAWMASTER, et al., )  
 )  
 Defendants. )

No. 93-C-79-B

ORDER

At issue before the Court in this prisoner's civil rights action are Defendants' motions to dismiss which the Court treated as one for summary judgment, Plaintiff's response, and Plaintiff's motion for an extension of time to amend and to identify Jane Doe. This action arises from the revocation of Plaintiff's parole in June of 1992.

I. BACKGROUND

In January 1993, Plaintiff, pro se, filed this action against Becky Lawmaster and Dee Bernaud, probation and parole officers; Patsy J. McDaniel, Plaintiff's wife at the time of the events in question; and an unknown Defendant Jane Doe. He alleged the Defendants acted in concert to revoke his parole in June of 1992 in violation of his First, Fourth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights under 28 U.S.C. §§ 1343 and 1983, and 42 U.S.C. §§ 1985 and 1986. Plaintiff also alleged numerous state law claims: libel, slander, fraud, conversion, malicious prosecution, false arrest, false imprisonment, assault, battery, contempt, and trespass. He sought a declaratory judgment, and

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compensatory and punitive damages.<sup>1</sup>

In support of his conspiracy claims, Plaintiff alleged that Patsy McDaniel (1) solicited Plaintiff's parole officers to revoke Plaintiff's parole; (2) employed two private detectives to follow Plaintiff; (3) lured Plaintiff to the Showplace Club (a strip bar) on February 12, 1992, and paid Jane Doe to put cocaine in his drink. As a result of the cocaine, Plaintiff alleged that he suffered a myocardic infarction and was hospitalized. Plaintiff further alleged that Lawmaster and Bernaud (1) forced Plaintiff to submit to a drug test on February 13, 1992; (2) encouraged Patsy McDaniel to enter Plaintiff's business and to search for confidential documents in violation of a restraining order; and (3) illegally permitted Patsy McDaniel to take possession of his car following his arrest in violation of a restraining order.

In August 1993, Lawmaster and Bernaud moved to dismiss Plaintiff's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) on the basis of a special report. Patsy McDaniel, pro se, moved to adopt Lawmaster and Bernaud's motion to dismiss. Plaintiff objected to Defendants' motions to dismiss on the basis of an affidavit, and several pleadings in an unrelated state case.

---

<sup>1</sup>In his response to Defendants' motion to dismiss (docket #24 at 2 f.n.1), Plaintiff abandoned his fifth amendment claim and sought to amend his complaint to add a thirteenth amendment allegation. Even though Plaintiff's request to amend his complaint does not comply with Fed. R. Civ. P. 15(a) and Local Rule 9.3.C, the Court denies that request because the proposed amended complaint would not withstand Defendants' motion to dismiss or for summary judgment. See Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992) (futility of amendment is an adequate justification to refuse to grant leave to amend).

In November 1993, the Court treated Defendants' motions to dismiss as one for summary judgment and granted the parties an opportunity to supplement their respective motion and response under Fed. R. Civ. P. 56. Neither party, however, filed supplemental pleadings.

## II. SPECIAL REPORT

From June 1986 until February 1992, Plaintiff was under the supervision of Probation and Parole Officer Dee Bernaud and violated his parole agreement several times. On July 6, 1988, Plaintiff was arrested for driving under the influence. That charge was later reduced to reckless driving. On December 3, 1991, and on February 3, 1992, Plaintiff traveled to Las Vegas, Nevada, and Dallas, Texas, without permission from his parole officer. On February 12, 1992, Plaintiff entered a strip bar and began drinking. Although Bernaud instructed the Plaintiff to take a cab home, Plaintiff went to his place of business and had an employee drive him to the Thrifty Rent-A-Car where he rented a car. Plaintiff passed out in the car for several hours and when he awakened he drove himself to the hospital. The hospital records indicate that Plaintiff had suffered a heart attack, possibly cocaine induced, and that Plaintiff had both cocaine and alcohol in his system.

On February 21, 1992, a violation report was submitted to the Executive Hearing officer Milton Gilliam requesting an arrest warrant based on alleged violations of the Rules and Conditions of Parole. A warrant was issued on February 25, 1992, and Plaintiff

was arrested the following day at the parole office. Pursuant to the procedures outlined in the Probation and Parole Manual, Plaintiff was afforded the opportunity to a two part hearing process. On February 27, 1992, Plaintiff waived his right to a probable hearing and an executive hearing. Based on the waiver of hearings the alleged violations were forwarded to the Pardon and Parole Board for disposition. Plaintiff's parole was then revoked on June 16, 1992.

### III. SUMMARY JUDGMENT STANDARDS

The court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Conclusory allegations are insufficient to establish a genuine issue of fact. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). Nor does the existence of an alleged factual dispute defeat an otherwise properly supported motion for summary judgement.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

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

#### IV. DISCUSSION

##### A. Jane Doe and Motion for Leave to Amend

At the outset the Court addresses Plaintiff's failure to serve Defendant Jane Doe within 120 days from the filing of the complaint. See DiCesare v. Stuart, 12 F.3d 973, 980 (10th Cir. 1993) (a pro se litigant is obligated to follow the requirements of Federal Rule of Civil Procedure 4); Jones v. Frank, 973 F.2d 872 (10th Cir. 1992) (affirming district court's dismissal of pro se litigant's action under Rule 4(m) due to lack of proper service). Although the Plaintiff has moved for an extension of time to amend the complaint to name Jane Doe, the Court concludes as set out in detail in part "B" that an amended complaint would not withstand a motion to dismiss or for summary judgment. See Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992) (futility of amendment is an adequate justification to refuse to grant leave to amend).

Accordingly, the Court will dismiss Jane Doe for failure to serve under Fed. R. Civ. P. 4(m) (effective Dec. 1, 1993) and deny Plaintiff's request for an extension of time within which to amend and identify Jane Doe.

## B. Conspiracy

Next the Court addresses Plaintiff's claim that Defendants joined in one conspiracy to deprive him of his civil rights. The Court liberally construes the Plaintiff to allege a conspiracy under section 1983 as well as under section 1985(3).

### 1. Section 1983

To establish a prima facie case of a conspiracy to violate rights protected by section 1983, "a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights." Snell v. Tunnel, 920 F.2d 673, 701 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991) (quoting Dixon v. City of Lawton, 898 F.2d 1443, 1449 (10th Cir. 1990)); see also Scherer v. Balkema, 840 F.2d 437, 441 (7th Cir.), cert. denied, 486 U.S. 1043 (1988). A section 1983 conspiracy claim may arise even where a private actor conspires with a state actor to deprive a person of a constitutional right under color of state law. See Dennis v. Sparks, 449 U.S. 24, 29 (1980); Adickes v. S.H. Kress & Co., 398 U.S. 144, 149-52 (1970). In that event, the conspiracy provides the requisite state action.

After carefully reviewing the record in this case, the Court

concludes that the Plaintiff has failed to demonstrate that the Defendants "'reached an understanding' to violate his rights." Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988) (quoted case omitted). Plaintiff's claim that the cumulative effect of Defendants' actions constituted a conspiracy is unsupported by any description of particular overt acts suggesting a meeting of the minds among the alleged co-conspirators. See Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989) (an implied agreement cannot be garnered from the nature of the conspiracy itself). Nor has the Plaintiff rebutted Lawmaster's and Bernaud's affidavit that they deny conspiring with Patsy McDaniel. Plaintiff's affidavit and response are completely devoid of any claim as to when and how the Defendants' agreed to violate his civil rights.

Even assuming Plaintiff could establish an agreement among the parole officers, his wife, and Jane Doe, there remain no genuine issues of material fact that the Plaintiff has not shown a violation of any of his constitutional rights. Cf. Vukadinovich v. Zentz, 995 F.2d 750, 756 (7th Cir. 1993) (court properly directed verdict on civil conspiracy claims where jury found officers did not violate plaintiff's constitutional rights). Plaintiff has not specified the deprivation of his First, Sixth, and Ninth Amendment rights. Plaintiff's reliance on the Cruel and Unusual Punishment Clause of the Eighth Amendment is misplaced as the actions in questions relate to a period when Plaintiff was outside of the jail. See Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (the Cruel and Unusual Punishment Clause is applicable to conditions of

confinement while in jail). Nor does Patsy McDaniel's entry into Plaintiff's place of business in violation of the state restraining order amount to a constitutional violation under the Fourth Amendment. In any case, the special report reveals, and Plaintiff has not controverted, that Patsy McDaniel "came forward with the receipts" in question. (Special Report, ex. B at 2.)

Lastly, the Plaintiff has not established a due process violation. The minimum requirements of due process in the context of parole revocation include, among other things, written notice of the claimed violations of parole; disclosure to the parolee of the evidence against him; and the opportunity to be heard in person and to present witnesses and documentary evidence, as well as the right to confront and cross-examine adverse witnesses. Morrisey v. Brewer, 408 U.S. 471, 485-89 (1972). Because Plaintiff agrees in his response that he waived his right to a probable cause hearing and an executive hearing, and his right to call witnesses, (Plaintiff's Response at 11; Special Report, ex. F, G, H), the Court concludes the Defendants did not violate Plaintiff's due process rights. Likewise, Plaintiff's claim that he was not served with copies of the charges against him when he was arrested does not amount to the deprivation of a constitutional right. See id. at 486-89 (due process, in the context of parole revocation does not require written notice of charged parole violation at time of arrest).

Accordingly, the Defendants are entitled to judgment as a matter of law on Plaintiff's conspiracy claim under section 1983.

2. Sections 1985(3) and 1986

Plaintiff's claims under section 1985(3) and 1986 fare no better. Assuming again that the Plaintiff could establish an agreement among the Defendants to deprive him of his civil rights, the Plaintiff has not shown any racial or class-based discriminatory animus. See Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (in addition to proof of a conspiracy, a plaintiff seeking relief under section 1985(3) must show "some racial, or perhaps other class-based invidiously discriminatory animus behind the conspirator's action"). As a recovery under section 1986 is dependent upon the existence of a claim under section 1985, Plaintiff cannot establish a cause of action under section 1986. See Taylor v. Nichols, 558 F.2d 561, 568 (10th Cir. 1977). Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's conspiracy claim under section 1985(3) and on the derivative section 1986 claim.

C. **State Law Claims**

In view of the disposition of Plaintiff's federal claims, the Court declines to exercise jurisdiction over his numerous pendent state law claims. 28 U.S.C. § 1367(c)(3); see United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

**IV. CONCLUSION**

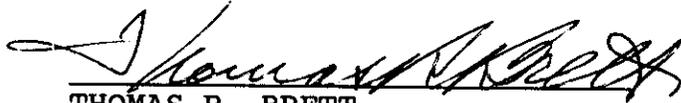
After viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that Defendants have made an initial

showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgement as a matter of law.

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

- (1) Defendants' motions for summary judgment [docket #18 and #20] are **granted**;
- (2) Jane Doe is **dismissed** for lack of service under Fed. R. Civ. P. 4(m);
- (3) Plaintiff's motion for an extension of time within which to amend the complaint to identify Jane Doe ("to amend and bring in John Doe Defendants") [docket #34] is **denied**.

SO ORDERED THIS 22<sup>nd</sup> day of Mar, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
MAR 23 1994  
DATE

FILED

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

MAR 22 1994

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

RONDA FLYNN,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS  
OF OTTAWA COUNTY, OKLAHOMA;  
STATE OF OKLAHOMA; AND CITY  
OF MIAMI, OKLAHOMA,

Defendants.

Case No. 93-C-1139-B

ORDER

Now before the Court for its consideration is Defendant's Motion to Dismiss Plaintiff's State Pendent Law Tort Claim and Punitive Damages Claim by Defendant City of Miami, Oklahoma (Docket entry #19) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Plaintiff brings a Title VII<sup>1</sup> case alleging that during 1992, she was employed by Defendant in the Ottawa County multi-jurisdictional task force; and while working with the task force, Plaintiff alleges that she was sexually harassed by her immediate supervisor, as well as various other employees also employed by the State. Plaintiff further alleges that "[t]he termination of Plaintiff's employment with the Defendant[] was a result of the sexual harassment." Plaintiff's Complaint, filed Dec. 23, 1993, para. VI, p.2.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted, it must appear beyond doubt that

<sup>1</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

24

Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to Dismiss under Fed.R.Civ.P. 12(b) admit all well pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969).

Defendant claims that Plaintiff's State Tort Claim action should be dismissed for failure to comply with the provisions of the Oklahoma Governmental Tort Claims Act.<sup>2</sup> Section 156 (A) of the Act provides that a person having a claim against the state or political subdivision within the scope of the act must first present a claim to the state or political subdivision for appropriate relief including the award of money damages. Furthermore, a person may not initiate a suit against the state or a political subdivision unless and until the claim has been denied either in whole or in part. Okla.Stat. tit. 51, § 157 (A) (1988). Plaintiff never filed a tort claim with the City of Miami as required by the act, and thus, the failure to comply with the act requires dismissal of Plaintiff's pendant state tort claim. See Willborn v. City of Tulsa, 721 P.2d 803 (Okla. 1986).

Defendant also contends that Plaintiff's claim for punitive damages is barred by the terms of the Civil Rights Act of 1991. Title 42 U.S.C. § 1981a(b)(1) specifically states:

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<sup>2</sup> Okla.Stat. tit. 51, § 151 et seq. (1988 & Supp.).

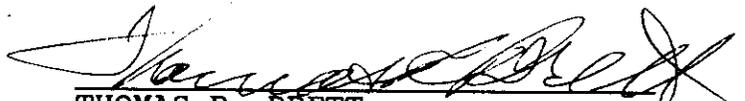
"A Complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) ... " (emphasis added).

Although the statute fails to define "political subdivision," it has been held that a municipality is considered to be a "political subdivision" for purposes of Section 1981a. See Pandya v. City of Chicago, No. 91-C-5700, 1992 WL 198940 at \*4 (N.D. Ill. Aug. 12, 1992). Thus, by mandate of the statute, any claim for punitive damages against the City of Miami would be barred. Accordingly, Plaintiff's claims for punitive damages are dismissed.

Defendant further asks the Court to assess costs to Plaintiff. However, the Court, in its discretion, declines to award costs at this time.

For the reasons set forth above, Defendant City of Miami, Oklahoma's Motion to Dismiss Plaintiff's state law tort cause of action and claim for punitive damages is GRANTED.

IT IS SO ORDERED THIS 22<sup>nd</sup> DAY OF March, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

5096-010

FILED  
MAR 23 1994

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

ANTHONY C. BILLINGS, an )  
Individual, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DECO GALLERY, LTD., a )  
District of Columbia Business )  
Corporation, )  
 )  
Defendant. )

No. 94-C 50B

**FILED**

MAR 22 1994

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

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Plaintiff, Anthony C. Billings, dismisses without prejudice  
his cause of action against Defendant, Deco Gallery, Ltd.

DATED this 22 day of MARCH, 1994.

BARROW GADDIS GRIFFITH & GRIMM

By



Robert B. Sartin #12848  
610 South Main, Suite 300  
Tulsa, OK 74119-1248  
(918) 584-1600

ATTORNEYS FOR PLAINTIFF,  
ANTHONY C. BILLINGS



attacked the validity of one of the prior convictions in his direct appeal on staleness grounds, none of the prior convictions used for enhancement have been attacked on the grounds raised in the present application. Respondent further argues that the "in custody" requirement does not excuse Petitioner from the requirement of exhausting his state remedies.

Petitioner contends that he should not be required to exhaust his state remedies because such would be futile and a waste of judicial resources as the Oklahoma Court of Criminal Appeals has recently rejected the same issue of law in Day v. State, No. PC-92-21 (Okla. Crim. App. Apr. 28, 1992) (unpublished)<sup>1</sup>. Petitioner also contends that Oklahoma does not provide an adequate judicial remedy to challenge his prior convictions in that the Oklahoma Court of Criminal Appeals has recently held in Day (citing Parker v. State, 556 P.2d 1298 (Okla. Crim. App. 1976)) that "even though an appellant is in custody under Gamble, the proper and most efficient method of attacking a former conviction is in the court imposing the judgment and sentence for that former conviction."

#### DISCUSSION

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that

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<sup>1</sup>Attached to petitioner's response, docket #8.

specific claim to the state highest Court. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not exhausted his state judicial remedies in the states of convictions or brought himself within one of the exceptions to the exhaustion rule. See Hall v. Spears, No. 92-6164, slip op. at 2 (10th Cir. Aug. 4, 1992) (unpublished opinion; attached to this order) (holding that petitioner who attacked an Oklahoma conviction on the ground that it was enhanced by an invalid Iowa conviction, had to exhaust his state remedies by first challenging his Iowa conviction in the Iowa courts); see also 28 U.S.C. § 2254(b). Although the Petitioner is indeed "in custody" under Gamble, the "in custody" status does not excuse him from the requirement of exhausting his state judicial remedies in the states which imposed the convictions he now challenges. See Hall, slip op. at 2. In Gamble, the Tenth Circuit merely recognized that a federal court has jurisdiction when the constitutionality of an expired conviction used for enhancement purposes has been attacked. Gamble, 898 F.2d 118-19; accord Hardiman v. Reynolds, 971 F.2d 500, 502 n.3 (10th Cir. 1992).

However, neither Gamble nor Hardiman created an exception to the exhaustion doctrine.

Petitioner's contention that he should not be required to exhaust his state remedies as the Oklahoma Court of Criminal Appeals has rejected the same issue of law in Day lacks any merit. Notwithstanding the fact that Day is an unpublished opinion, Petitioner's case is factually and procedurally distinct from Day. See Goodwin v. State of Oklahoma, 923 F.2d 156, 157-58 (10th Cir. 1991) (recognizing that exhaustion of state remedies is futile where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition). The Oklahoma Court of Criminal Appeals in Day denied the appellant's claim regarding the allegedly invalid former convictions as it was his third application for post-conviction relief and the appellant had "failed to provide [the] Court with sufficient reasons concerning why these grounds for relief were not asserted or were insufficiently raised in prior proceedings." In the instant case, the Petitioner has not presented his claim to the Oklahoma Court at all.

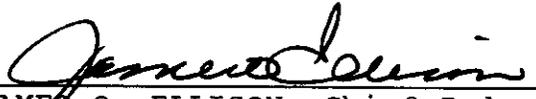
Likewise, Petitioner's reliance on the statement in Day--that "even though appellant was in custody under Gamble, the proper and most efficient method of attacking a former conviction is in the court imposing the judgment and sentence for that former conviction"--does not cause an absence of available State corrective process. The Oklahoma Court of Criminal Appeals made the above statement in dicta without making any reference to the

propriety of state habeas corpus relief in such a situation, or how foreign prior convictions are to be treated.

Thus, Petitioner must exhaust his state remedies by first challenging his prior convictions in the states of conviction: Kansas, Oklahoma, and Colorado. The Oklahoma courts and the Federal Courts will then become available for Petitioner to pursue his remedy. See Hall, slip op. at 2.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Respondent's motion to dismiss [docket #4] is **granted**, and the petition for a writ of habeas corpus is **dismissed** for failure to exhaust state judicial remedies.

IT IS SO ORDERED this 18<sup>th</sup> day of March, 1994.

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

## Citation

972 F.2d 356 (Table)  
 UNPUBLISHED DISPOSITION  
 (CITE AS: 972 F.2D 356, 1992 WL 186285 (10TH CIR.(OKL.)))

FOUND DOCUMENT

Database  
CTAMode  
Page

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

David W. HALL, Petitioner-Appellant,  
 v.

Denise SPEARS, Respondent-Appellee.  
 No. 92-6164.

United States Court of Appeals, Tenth Circuit.  
 Aug. 4, 1992.

W.D.Okl., No. 91-CV-971.  
 W.D.Okl.  
 AFFIRMED.

Before JOHN P. MOORE, TACHA and BRORBY, Circuit Judges.  
 ORDER AND JUDGMENT [FN\*]

BRORBY, Circuit Judge.

\*\*1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Hall, an Oklahoma State inmate, appeals the dismissal of his pro se petition for habeas relief. We grant permission for Mr. Hall to proceed in forma pauperis and affirm.

Mr. Hall, in June 1990, entered guilty pleas in Oklahoma to several counts of sexual offenses and a firearm charge, all after conviction of a former felony. The prior conviction took place in the State of Iowa, and it was this conviction that resulted in an enhancement of his Oklahoma sentences, which were ten years each to run concurrently.

Mr. Hall, in his pro se petition, claimed his guilty plea to some of the Oklahoma convictions was not knowingly and voluntarily entered as the prior Iowa conviction used to enhance his Oklahoma sentence was invalid. Mr. Hall asserted in a conclusory fashion that the Iowa conviction was coerced, was a product of ineffective assistance of counsel, was a product of the Iowa court's failure to advise him of his rights, and was accomplished without a competency hearing.

Mr. Hall pursued his remedies in the Oklahoma courts, which held: (1) the proper method of attacking a former conviction is in the state imposing the conviction, i.e., Iowa; and (2) Mr. Hall failed to adequately explain his  
 Copr.(C) West 1994. No claim to original govt. works.

(CITE AS: 972 F.2D 356, 1992 WL 186285, \*\*1 (10TH CIR.(OKL.)))  
 failure to directly appeal the Iowa conviction and he was therefore procedurally barred from presenting this claim to the Oklahoma courts.

However, the Oklahoma courts stated Mr. Hall could again come before them and receive relief if he successfully challenged his Iowa conviction in the Iowa courts.

The bottom line is that no state court has addressed the merits of Mr. Hall's claims concerning his Iowa conviction. To make this situation more interesting, the State of Oklahoma failed to raise the issue of exhaustion and instead conceded Mr. Hall had exhausted his state remedies. Mr. Hall alleged he had no Iowa trial court records to support his claim.

The district court dismissed Mr. Hall's petition without prejudice until Mr. Hall properly challenged his Iowa conviction in the Iowa courts. [FN1] The district court reasoned that as Iowa has all of the court records, it is in a better position to hear and weigh any evidence bearing on the validity of the Iowa conviction and is better equipped to apply Iowa law.

In his pro se appeal of this decision, Mr. Hall raises the same six arguments raised in the district court, i.e., the Iowa conviction is constitutionally invalid, and asserts he is attacking the Oklahoma sentence that was enhanced by the invalid Iowa conviction. The State of Oklahoma has elected not to respond. [FN2]

28 U.S.C. s 2254(b) provides that an application for habeas shall not be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State." The question we must answer is which state: the state imposing the enhanced sentence, or the state where the conviction arose which gives rise to the enhanced sentence?

\*\*2 The exhaustion doctrine is designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings. It is therefore improper to upset a state court conviction without any opportunity to the state court to correct an alleged constitutional violation. In the case before us, it would be equally improper for either an Oklahoma court or a federal court to upset an Iowa conviction without first extending to Iowa the opportunity to correct any alleged constitutional violations. We therefore hold that when a conviction is attacked under 28 U.S.C. s 2254, the petitioner attacking the conviction must first exhaust available remedies in the state of conviction or bring himself within one of the exceptions to the exhaustion rule. Mr. Hall has done neither.

Mr. Hall misperceives the "in custody" requirement and argues the federal district court has jurisdiction as he is "in custody" because of the Iowa conviction's use in enhancing his Oklahoma sentence. Mr. Hall cites *Maleng v. Cook*, 490 U.S. 488 (1989); *Gamble v. Parsons*, 898 F.2d 117 (10th Cir.), cert. denied, 111 S.Ct. 212 (1990); and *Lowery v. Young*, 887 F.2d 1309 (7th Cir.1989). All three cases hold a state prisoner is in custody when another state has imposed a conviction used to enhance petitioner's present sentence. Mr. Hall is indeed "in custody"; however, this does not excuse him from the requirement of exhausting his remedies in the state imposing the conviction he now challenges. The "in custody" requirement is basically jurisdictional while the exhaustion requirement is founded upon principles of comity.

Mr. Hall must exhaust his state remedies by first challenging his Iowa conviction in the Iowa courts, then the Oklahoma courts and the federal courts  
 Copr.(C) West 1994. No claim to original govt. works.

(CITE AS: 972 F.2D 356, 1992 WL 186285, \*\*2 (10TH CIR.(OKL.)))

become available for Mr. Hall to pursue his remedy.

The judgment of the district court is AFFIRMED.

FN\* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

FN1. The district court dismissed until Mr. Hall "successfully challenged" the prior conviction in the Iowa courts. We assume the word "successfully" was inadvertently used to mean allowing the Iowa courts an opportunity to review Mr. Hall's claims.

FN2. States undoubtedly save time and money in electing this course of action. In so doing, the state shifts its burden of examining the other side of the coin to this Court. Oklahoma's position before the trial court was that Mr. Hall's petition was an attempt to appeal the prior Iowa conviction and an assertion that the district court lacked jurisdiction. We simply note this Court always appreciates a response by the state.

END OF DOCUMENT

Copr.(C) West 1994. No claim to original govt. works.

ENTERED ON DOCKET

DATE 3/22/94

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

IN RE:

LMS HOLDING COMPANY,  
PETROLEUM MARKETING COMPANY  
AND RETAIL MARKETING COMPANY,

Debtors.

BARRY DILL and DIANA DILL,  
husband and wife,

Plaintiffs,

vs.

THE SOUTHLAND CORPORATION,  
a corporation, CONTEMPORARY  
INDUSTRIES SOUTHERN, INC.,  
an Oklahoma corporation,  
and RETAIL MARKETING COMPANY,  
an Oklahoma corporation,

Defendants.

Administratively Consolidated  
Under Case No. 91-03412-C  
(Chapter 11)

State Court Case No. C-93-1438

District Court  
Case No. 94-C-133-B ✓

**FILED**

MAR 14 1994

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

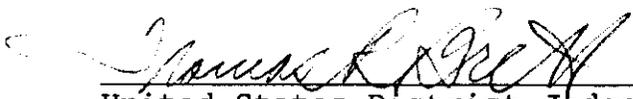
REFERRAL ORDER

This cause comes before the Court upon the Application to Enter Referral Order filed by Defendant, Retail Marketing Company.

The Court being fully advised in the premises and upon consideration of 28 U.S.C. § 157(a),

IT IS HEREBY ORDERED that the instant proceeding is referred to the United States Bankruptcy Court for the Northern District of Oklahoma, for consideration and resolution consistent with the law.

DATED this 14<sup>th</sup> day of ~~February~~ MARCH, 1994.

  
United States District Judge

3

HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.  
Thomas A. Creekmore III, OBA #2011  
Pamela H. Goldberg, OBA #12310  
4100 Bank of Oklahoma Tower  
One Williams Center  
Tulsa, Oklahoma 74172  
(918) 588-2700

ATTORNEYS FOR DEFENDANT, RETAIL MARKETING COMPANY

MAR 22 1994

DATE

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAR 21 1994

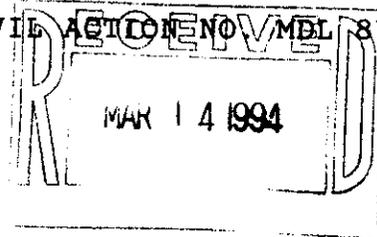
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

IN RE: ASBESTOS PRODUCTS )  
LITIGATION (No. VI) )

THIS DOCUMENT RELATES TO: )

J. B. GOSS and GRACE I. GOSS )  
v. FIBREBOARD CORP., et al )

CIVIL ACTION NO. MDL 875



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

J. B. GOSS and GRACE I. GOSS, )  
v. FIBREBOARD CORP., et al )

93-C-0251B

ORDER AND ENTRY

COMES NOW the Court having considered the Joint Application for Dismissal with Prejudice agreed to by Plaintiffs and Defendant M. H. Detrick Company, it appearing that these parties have fully and finally settled their disputes.

IT IS THEREFORE ORDERED that the above-captioned action be dismissed with prejudice as to Defendant M. H. Detrick Company, each party to pay its own costs.

SO ORDERED this 15<sup>th</sup> day of March, 1994.

United States District Court Judge

Charles R. Weiner

14

ENTERED IN DOCKET

MAR 22 1994

DATE

**FILED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAR 21 1994

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

IN RE: ASBESTOS PRODUCTS )  
LITIGATION (No. VI) )

CIVIL ACTION NO. MDL 875

THIS DOCUMENT RELATES TO: )  
CHARLES W. YORK and PAMELA R. YORK )  
v. FIBREBOARD CORP., et al )

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

CHARLES W. YORK and PAMELA R. YORK )  
v. FIBREBOARD CORP., et al. )

93-C-0252B ✓

ORDER AND ENTRY

COMES NOW the Court having considered the Joint Application for Dismissal without Prejudice agreed to by Plaintiffs and Defendant M. H. Detrick Company.

IT IS THEREFORE ORDERED that the above-captioned action be dismissed without prejudice as to Defendant M. H. Detrick Company, each party to pay its own costs.

SO ORDERED this 15<sup>th</sup> day of March, 1994.



United States District Court Judge

Charles R. Weiner

DATE 3-21-94

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

OILFIELD PIPE AND SUPPLY, INC.,	)
an Oklahoma Corporation,	)
	)
Plaintiff,	)
	)
vs.	)
	)
VICTOR INDUSTRIAL PIPE, INC., a	)
Missouri Corporation; RICHARD A.	)
MOORE and LINDA P. MOORE,	)
	)
Defendants.	)

Case No. 92-C-1006-E ✓

**FILED** )

MAR 18 1994

O R D E R

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

The Court, upon consideration of the evidence presented at trial, the briefs submitted, and arguments of counsel, enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Plaintiff, Oilfield Pipe and Supply (Oilfield) is an Oklahoma Corporation with its principal place of business in Washington County, Oklahoma.
2. The Defendant, Victor Industrial Pipe, Inc. (VIP) was incorporated in the State of Missouri on April 21, 1986, and at all times until it ceased doing business in 1992, maintained its principal place of business in the State of Missouri.
3. The Defendants, Richard A. Moore and Linda P. Moore, were, and still are, residents of the State of Missouri.
4. All parties have stipulated that Jurisdiction and venue are proper in this Court.
5. Defendant VIP did not deny liability to Oilfield for the balance due on open account, and this Court granted summary

judgment in favor of Oilfield against VIP on September 23, 1993.

6. Richard A. Moore and Linda p. Moore were the only officers, directors, and shareholders of VIP from its incorporation until it ceased doing business in 1992. Richard A. Moore was the duly elected President of VIP and Linda P. Moore was the duly elected Secretary and Treasurer of VIP.

7. Richard A. Moore and Linda P. Moore, as the sole officers and stockholders of VIP conducted the affairs of the corporation through informal meetings. On the advice of counsel, no corporate minutes of any meetings of the directors or shareholders of VIP were kept after the initial meeting of incorporation in 1986.

8. Richard A. Moore and Linda P. Moore paid themselves from VIP funds salaries, wages and benefits on a random basis without a verifiable rate. VIP at all relevant times withheld and paid employment taxes for wages paid to Richard A. Moore and Linda P. Moore.

9. Loans were made to the Moores to VIP and from VIP to the Moores without written agreements and the Moores personally borrowed money from a corporate line of credit at the Great Southern Savings Bank.

10. During the initial operation of VIP, the Moores were required by Great Southern Savings Bank to personally guarantee all corporate debts to that bank.

11. At times, the Moores failed to use corporate officer or agent designation on VIP on purchase orders and communications with Oilfield. However, the purchase orders contained the heading "VIP, Inc." and the checks to Oilfield Pipe & Supply were drawn on VIP,

Inc.'s account. Oilfield directed its invoices for sales to "VIP, Inc."

12. The Moores received money from VIP for the use of a personal car. Mr. Moore testified that the car was used 100% for business, although there was no written agreement concerning the use of the car.

13. The Moores conducted all business operations of VIP from a room in their home which was specifically dedicated to the business.

14. VIP provided a 100% health care plan benefit for Richard A. Moore, his spouse and dependents.

15. At all relevant times, Oilfield knew or should have known that VIP was a corporate entity. There is no evidence that either Richard A. Moore or Linda P. Moore made any material misrepresentations to Oilfield.

16. Any findings of fact that are actually conclusions of law should be considered as such.

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action. 28 U.S.C. §1332.

2. The purchases of pipe made by VIP from Oilfield were made by Richard A. Moore as salesman and agent of VIP.

3. From the above stated facts, the Court concludes that the separate corporate existence was not a design or scheme to perpetrate fraud nor was the corporation merely a dummy or a shell. Wallace v. Tulsa Yellow Cab Taxi & Baggage Co., 61 P. 2d 645, 648

(Okla. 1936); Home-Stake Production v. Talon Petroleum, C.A., 907 F.2d 1012, 1017 (10th Cir. 1990).

4. From the above stated facts, the Court concludes that the corporate entity was not used to defeat public convenience, to justify wrong, to perpetrate fraud, or to defend crime. Robertson v. Roy L. Morgan, Production Company, 411 F.2d 1044 (10th Cir. 1969).

5. The Court concludes that VIP is responsible for the balance due Oilfield on open account, and Oilfield is awarded judgment against VIP in the amount of \$58,050.95 plus prejudgment interest beginning 30 days from the date of each invoice to the present in the amount of \$6,608.08 for a total judgment of \$64,659.03. Richard A. Moore and Linda P. Moore are not responsible for any amount due Oilfield and judgment is awarded in favor of Richard A. Moore and Linda P. Moore and against Oilfield.

6. Any conclusions of law that are actually findings of fact should be considered as such.

IT IS SO ORDERED THIS 18<sup>th</sup> DAY OF MARCH, 1994.

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

DATE 3-21-94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CHARLES A. CORLETT; CYNTHIA )  
 M. CORLETT; COUNTY TREASURER, )  
 Washington County, Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Washington County, Oklahoma; )  
 RICH HALLMAN, Tenant; and )  
 BETTY HALLMAN, Tenant, )  
 )  
 Defendants. )

**FILED**  
 MAR 21 1994  
 Richard M. Lewis  
 U.S. District Court  
 Northern District of Oklahoma  
 Oklahoma City, Oklahoma

CIVIL ACTION NO. 92-C-677-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day  
 of March, 1994. The Plaintiff appears by Stephen C.  
 Lewis, United States Attorney for the Northern District of  
 Oklahoma, through Kathleen Bliss Adams, Assistant United States  
 Attorney; and the Defendants, Charles A. Corlett; Cynthia M.  
 Corlett; Rich Hallman, Tenant; Betty Hallman, Tenant; and County  
 Treasurer and Board of County Commissioners, Washington County,  
 Oklahoma, appear not, but make default.

The Court, being fully advised and having examined the  
 court file, finds that the Defendant, Charles A. Corlett,  
 acknowledged receipt of Summons and Complaint on August 3, 1992;  
 the Defendant, Cynthia M. Corlett, acknowledged receipt of  
 Summons and Complaint on August 3, 1992; the Defendant, County  
 Treasurer, Washington County, Oklahoma, acknowledged receipt of  
 Summons and Complaint on August 6, 1992; the Defendant, Board of  
 County Commissioners, Washington County, Oklahoma, acknowledged

receipt of Summons and Complaint on August 3, 1992; the Defendant, Rich Hallman, Tenant, was served with Summons and Second Amended Complaint on June 22, 1993; and Defendant, Betty Hallman, Tenant, was served with Summons and Second Amended Complaint on June 22, 1993.

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

Lot Six (6), Block Eleven (11), Madison Heights Fourth Addition, Washington County.

The Court further finds that on December 19, 1984, the Defendants, Charles A. Corlett and Cynthia M. Corlett, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$68,500.00, payable in monthly installments, with interest thereon at the rate of 12.5 percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Charles A. Corlett and Cynthia M. Corlett, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated December 19, 1984, covering the above-described property. Said mortgage was recorded on December 19, 1984, in Book 827, Page 220, in the records of Washington County, Oklahoma.

The Court further finds that the Defendants, Charles A. Corlett and Cynthia M. Corlett, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Charles A. Corlett and Cynthia M. Corlett, are indebted to the Plaintiff in the principal sum of \$64,560.42, plus interest at the rate of 12.50 percent per annum from October 1, 1991 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$165.00 (\$8.00 for recording the Notice of Lis Pendens and \$157.00 for service of process fees.)

The Court further finds that the Defendants, Charles A. Corlett; Cynthia M. Corlett; Rich Hallman, Tenant; Betty Hallman, Tenant; and County Treasurer and Board of County Commissioners, Washington County, Oklahoma are in default and have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff have and recover judgment against the Defendants, Charles A. Corlett and Cynthia M. Corlett, in the principal sum of \$64,560.42, plus interest at the rate of 12.50 percent per annum from October 1, 1991 until judgment, plus interest thereafter at the current legal rate of 4.22 percent per annum until paid, plus the costs of this action in the amount of \$165.00 (\$8.00 for recording the Notice of Lis Pendens and \$157.00 for service of process fees), plus any additional sums advanced or to be advanced or expended during this foreclosure

action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Charles A. Corlett; Cynthia M. Corlett; Rich Hallman, Tenant; Betty Hallman, Tenant; and County Treasurer and Board of County Commissioners, Washington County, Oklahoma, have no right, title, or interest in the subject real property.

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

**First:**

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

**Second:**

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

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

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under

and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

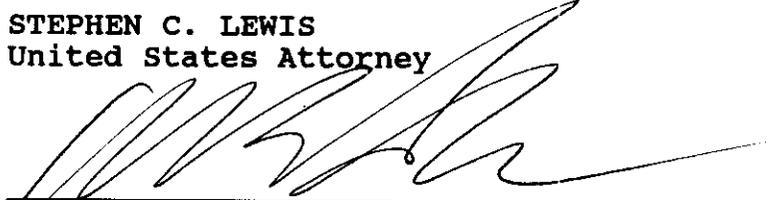
S/ JAMES C. ...

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UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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

Judgment of Foreclosure  
Civil Action No. 92-C-677-E

KBA/esf

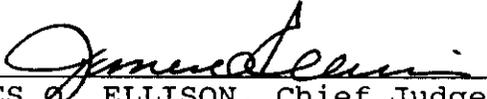


is entitled to relief on the basis that he lost "over 3000 days of good time" credits as he never sought relief in his original or proposed amended complaint on that ground. (Plaintiff's Response, docket #27, at 1.)

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

- (1) Defendants' supplemental motion to dismiss and/or for summary judgment [docket #24] is **granted**;
- (2) Defendants' motion for summary judgment [docket #13] is **denied as moot**;
- (3) This action is **dismissed as moot**.

SO ORDERED THIS 18<sup>th</sup> day of March, 1994.

  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET  
DATE 3-21-94

FILED

MAR 18 1994

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

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

LEONARD FRANKLIN BRANNOCK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 93-C-163-E ✓
	)	
RON CHAMPION, et al.,	)	
	)	
Defendants.	)	

ORDER

At issue before the Court in this prisoner's civil rights action is whether this action is moot due to the rescission of the Oklahoma Department of Corrections' (DOC) grooming code policy.

After carefully reviewing Defendants' status report and Plaintiff's response, the Court concludes that this action should be dismissed as moot because the plaintiff is no longer subject to the condition about which he complains. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985). Plaintiff's argument that the Court should stay this action to ensure that the DOC implements the new personal hygiene code policy in a constitutional manner lacks any merit. The Plaintiff has not alleged a personal injury caused by the new hygiene code policy over which this Court could assert jurisdiction. See Warth v. Seldin, 422 U.S. 490, 498-500 (1975) (to meet constitutional case and controversy requirement for federal court jurisdiction, plaintiff must allege a personal injury caused by defendant that is likely to be redressed by the relief requested).

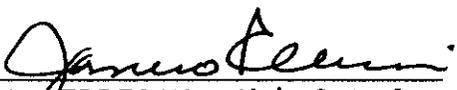
**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) The administrative stay is **lifted**;

(2) Defendants' motion to dismiss or for summary judgment [docket #9] is **denied as moot**.

(3) This action is **dismissed as moot**.

SO ORDERED THIS 18<sup>th</sup> day of March, 1994.

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

DATE 3-21-94

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

ROY DALE CHEATHAM, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 LARRY FIELDS, et al., )  
 )  
 Defendants. )

No. 93-C-161-E

**FILED**

MAR 21 1994

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

ORDER

At issue before the Court in this prisoner's civil rights action is defendants's motion to dismiss this action as moot because the Oklahoma Department of Corrections has rescinded its grooming code policy. The Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule. 7.1.C. In any case, the Court concludes that this action is moot because the Plaintiff is no longer subject to the condition about which he complains. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985).

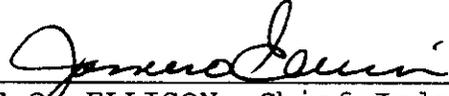
ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) The administrative stay is **lifted**;
- (2) Defendants' motion to dismiss this case as moot [docket #11] is **granted**;
- (3) Defendants' motion to dismiss [docket #4] is **denied** as

moot;

(4) This action is dismissed as moot.

SO ORDERED THIS 18<sup>th</sup> day of March, 1994.



JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

DATE 3-21-94

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

BILLY MELONI,  
Plaintiff,  
vs.  
LARRY FIELDS, et al.,  
Defendants.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

No. 93-C-193-E ✓

F I L E D

MAR 12 1994

Richard M. Lane, Clerk  
U. S. District Court  
Northern District of Oklahoma

ORDER

At issue before the Court in this prisoner's civil rights action is defendants's motion to dismiss this action as moot because the Oklahoma Department of Corrections has rescinded its grooming code policy. The Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule. 7.1.C. In any case, the Court concludes that this action is moot because the Plaintiff is no longer subject to the condition about which he complains. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985).

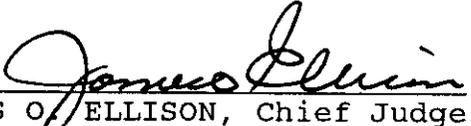
**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) The administrative stay is **lifted**;
- (2) Defendants' motion to dismiss this case as moot [docket #9] is **granted**;
- (3) Defendants' motion to dismiss or for summary judgment

[docket #4] is denied as moot;

(4) This action is dismissed as moot.

SO ORDERED THIS 18<sup>th</sup> day of March, 1994.

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

ENTERED ON DOCKET

DATE 3-21-94

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

SHERRY L. SLY, an individual, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 CIRCLE K CORP., a )  
 corporation, )  
 )  
 Defendant. )

Case No. 93-C-1004-E  
**F I L E D**

Richard G. Ellison, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

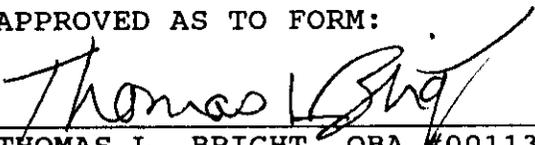
This matter comes on for hearing on Motion to Dismiss of Plaintiff in the above-entitled cause. The Court finds that said cause has been satisfactorily settled by and between the parties hereto and that the consideration therefore has been accepted by Plaintiff, in full settlement satisfaction, release and discharge of her cause of action, claims, demands, suits, debts, dues, sums of money, accounts, reckonings, executions, bills, bonds, specialties, covenants, contracts, controversies, attorneys' fees, claims and demands whatsoever against the Defendant, Circle K Corporation, and the Court, after due consideration, finds that said dismissal should be approved.

IT IS THEREFORE ORDERED that the claims of Plaintiff, be hereby dismissed with prejudice, each to party to bear its own costs.

S/ JAMES G. ELISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

  
THOMAS L. BRIGHT, OBA #001131  
Attorney at Law  
7130 South Lewis, Suite 501  
Tulsa, OK 74136  
(918) 492-0008  
ATTORNEY FOR PLAINTIFF



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H.D. BINNS, JR., OBA #799  
ROBERTA BROWNING FIELDS, OBA #10805  
Rainey, Ross, Rice & Binns  
735 First National Center West  
Oklahoma City, Oklahoma 73102  
(405) 235-1356  
ATTORNEYS FOR DEFENDANT

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