

ENTERED ON DOCKET

DATE 4-29-94

IN THE UNITED STATES DISTRICT COURT **F I L E D**  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APR 29 1994

NOLAN HORTON, JR.,

Plaintiff,

vs.

GUY CLARK,  
FRANK CHILDERS,  
HELEN McINTOSH and  
EMILY STRATTON,

Defendants.

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

No. 93-C-0112-E

**ORDER**

On the 22nd day of April, 1994, the above entitled cause comes on for hearing before the undersigned Judge on Plaintiff's Motion for Injunction and Defendant's Motion to Dismiss. The Plaintiff appears in person, pro se, and the Defendants appear by their Counsel, Guy Clark, Esq.

The Court having reviewed and given due consideration to the pleadings, filings, briefs and oral arguments of the Parties, finds that there is no basis for exercise of the Court's jurisdiction in that it has been clearly demonstrated no diversity of citizenship exists between the Parties, the Plaintiff seeks to enjoin the proceedings in a State Court action for which this Court does not have jurisdiction, there is no other justiciable federal issue, and the Court has previously considered a similar petition, dismissed it and the Tenth Circuit Court of Appeals has affirmed such dismissal.

IT IS THEREFORE ORDERED that Plaintiff's complaint is dismissed with prejudice and judgment is entered for the Defendants.

S/ JAMES O. ELLISON

JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE

4-29-94

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

**F I L E D**

APR 29 1994

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

|                                    |   |
|------------------------------------|---|
| RONALD E. WESTMORELAND,            | ) |
|                                    | ) |
| Plaintiff(s),                      | ) |
|                                    | ) |
| v.                                 | ) |
|                                    | ) |
| TULSA COUNTY SHERIFF'S DEPARTMENT, | ) |
|                                    | ) |
| Defendant(s).                      | ) |

94-C-0205-E ✓

**ORDER**

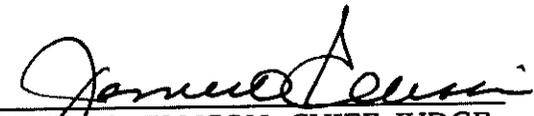
The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed April 8, 1994 in which the Magistrate Judge recommended that the case be dismissed without prejudice.

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

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

It is, therefore, Ordered that the case is dismissed without prejudice.

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

  
 JAMES O. ELLISON, CHIEF JUDGE  
 UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 4-29-94

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

**F I L E D**

APR 29 1994

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

THE HOME-STAKE OIL & GAS )  
COMPANY and THE HOME-STAKE )  
ROYALTY CORPORATION; in the )  
name of and on behalf of TRI )  
TEXAS, INC., )

Plaintiffs, )

vs. )

Case No. 92-C-519-E ✓

CHARLES S. CHRISTOPHER and )  
TRI TEXAS, INC., )

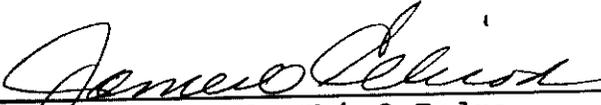
Defendants. )

**ADMINISTRATIVE CLOSING ORDER**

The Court has been advised by counsel that this action is settled, or is in the process of being settled. Therefore it is unnecessary for the action to remain on the calendar of the Court.

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

ORDERED this 29<sup>th</sup> day of April, 1994.

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

DATE 4-29-94

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

**FILED**

APR 29 1994

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

ROBERT DEWAYNE LAMPKIN, )

Plaintiff, )

vs. )

Case No. 93-C-200-E ✓

McDONNELL DOUGLAS-TULSA, )

a division of McDonnell Douglas )

Corporation, et al., )

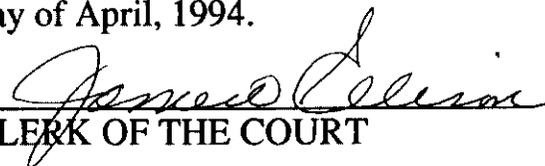
Defendants. )

**JUDGMENT**

This cause came on for trial before the Court and a jury beginning on March 30, 1994, and ending on April 6, 1994; and the issues having been duly tried and the Court having directed the jury to find a general verdict and also to answer a written interrogatory, and the jury having done so, with the Court having reserved the issue of judgment as to Defendants International Union and Local 1093,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff, Robert Dewayne Lampkin, recover of Defendant McDonnell Douglas-Tulsa, a division of McDonnell Douglas Corporation, the sum of \$16,500, with interest thereon at the rate of 5.02% as provided by law, and his costs of action.

Dated at Tulsa, Oklahoma, this 29<sup>th</sup> day of April, 1994.

  
CLERK OF THE COURT



ENTERED ON DOCKET

DATE 4-29-94

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

**FILED**

APR 29 1994

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

RAMONA LITTLE EAGLE OSBORNE, )  
et al., )

Plaintiffs, )

vs. )

No. 92-C-1119-E

BRUCE BABBIT, Secretary of )  
the Interior, United States )  
Department of Interior, )  
et al., )

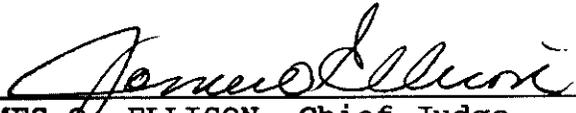
Defendants. )

**JUDGMENT**

Judgment is entered in favor of the Defendants and against the Plaintiffs for the reasons set forth in the separate Order of the Court.

Each party shall bear its own costs and expenses.

DATED this 15th day of April, 1994.



JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 4-29-94

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

RMP CONSULTING GROUP, INC., )  
a Missouri corporation, )

Plaintiff, )

v. )

KOCH ENGINEERING COMPANY, )  
INC., a Kansas corporation, )

Defendant. )

APR 29 1994

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

Case No. 94-C-177E

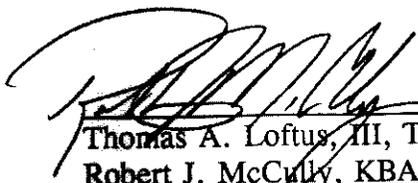
**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

COME NOW the Plaintiff, RMP CONSULTING GROUP, INC., a Missouri corporation, and the Defendant, KOCH ENGINEERING COMPANY, INC., a Kansas corporation, pursuant to Rule 41 of the Federal Rules of Civil Procedure, and jointly stipulate to the dismissal of this action with prejudice to the refiling thereof, with each party to bear their own attorney fees and costs.

Respectfully submitted,

  
\_\_\_\_\_  
Jim D. Loftis, OBA No. 18997  
James L. Menzer, OBA No. 12406  
LOFTIS & MENZER, an Association  
of Professional Corporations  
301 East Eufaula  
Norman, Oklahoma 73069  
(405) 366-1400

ATTORNEYS FOR PLAINTIFF



Thomas A. Loftus, III, TBA No. 12492550  
Robert J. McCully, KBA No. 12433  
KOCH INDUSTRIES, INC.  
P.O. Box 2256  
4111 East 37th Street North  
Wichita, Kansas 67201  
(316) 832-8264

- and -

Larry D. Leonard, OBA No. 5380  
ZARBANO, LEONARD, SCOTT & FEHRLE  
5051 South Lewis, Suite 200  
Tulsa, Oklahoma 74105-6061  
(918) 742-2383

ATTORNEYS FOR DEFENDANT

**FILED**

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

APR 28 1994

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

DARREN WIGGS, an individual, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DURR MEDICAL CORPORATION, an )  
 Alabama Corporation, )  
 )  
 Defendant. )

Case No. 94-C-4-B

RECEIVED BY CLERK  
APR 29 1994

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby dismiss with prejudice the above case of action.

BUFOGLE & ASSOCIATES

By   
Richard H. Reno  
3105 E. Skelly Drive, Suite 600  
Tulsa, Oklahoma 74105

Attorneys for Plaintiff, Darren Wiggs

DOERNER, STUART, SAUNDERS,  
DANIEL, ANDERSON & BIOLCHINI

By:   
Elise Dunitz Brennan  
OBA No. 10276  
Michael C. Redman  
OBA No. 13340  
320 S. Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

Attorneys for Defendant, Durr Medical Corporation

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

D.C.A. GRANTOR TRUST, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PROTECTION MUTUAL INSURANCE )  
 COMPANY, INDUSTRIAL RISK )  
 INSURERS, PHILIP MORRIS )  
 MANAGEMENT CORP. and PHILIP )  
 MORRIS INCORPORATED, and OSCAR )  
 MAYER FOODS CORPORATION, )  
 )  
 Defendants. )

FILED ON DOCKET  
APR 29 1994

Case No. 93-C-594-B

**FILED**

APR 28 1994

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

J U D G M E N T

Pursuant to the Court's Order entered herein this date, granting Defendants' Protection Mutual Insurance Company and Industrial Risk Insurers Motion for Summary Judgment against the Plaintiff Allan Applestein d/b/a D.C.A. Grantor Trust and granting Defendants' Philip Morris Management Corporation, Philip Morris Incorporated, and Oscar Mayer Foods Corporation Motion for Summary Judgment against the Plaintiff Allan Applestein d/b/a D.C.A. Grantor Trust, judgment is entered in favor of Defendants Protection Mutual Insurance Company and Industrial Risk Insurers and against the Plaintiff Allan Applestein d/b/a D.C.A. Grantor Trust and judgment is entered in favor of Defendants Philip Morris Management Corporation, Philip Morris Incorporated, and Oscar Mayer Foods Corporation and against the Plaintiff Allan Applestein d/b/a D.C.A. Grantor Trust.

Costs are assessed against the Plaintiff if timely applied for

55

pursuant to Local Rule 54.1. Each party is to bear its own attorneys fees.

DATED THIS 28<sup>th</sup> DAY OF April, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

D.C.A. GRANTOR TRUST, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PROTECTION MUTUAL INSURANCE )  
 COMPANY, INDUSTRIAL RISK )  
 INSURERS, PHILIP MORRIS )  
 MANAGEMENT CORP. and PHILIP )  
 MORRIS INCORPORATED, and OSCAR )  
 MAYER FOODS CORPORATION, )  
 )  
 Defendants. )

FILED ON DOCKET  
APR 29 1994

Case No. 93-C-594-B

**FILED**

APR 28 1994

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

ORDER

Now before the Court for its consideration are the Motions for Summary Judgment, or in the alternative, Motions for Partial Summary Judgment, pursuant to F.R.Civ.P. 56, filed by Defendants Protection Mutual Insurance Company and Industrial Risk Insurers (The Insurers) (Docket #42) and by Defendants Philip Morris Management Corp., Philip Morris Incorporated, and Oscar Mayer Foods Corporation (Oscar Mayer Group) (Docket #41) against D.C.A. Grantor Trust.

The following facts are undisputed:

1. On December 23, 1986, Plaintiff D.C.A. Grantor Trust (D.C.A.) and Oscar Mayer Foods Corporation (Oscar Mayer) entered into a business lease involving a food processing facility owned by D.C.A.

2. Oscar Mayer leased the facility from January, 1987, until the lease's termination on December 31, 1991. Oscar Mayer had

54

vacated the premises in the early part of 1991.

3. The lease obligated Oscar Mayer to insure the facility during the lease term, and Oscar Mayer agreed to furnish D.C.A. with evidence of insurance.

4. During the lease term and up until October 1, 1991, Defendant Philip Morris had purchased and maintained a policy from Defendant Protection Mutual Insurance Company (Protection Mutual) for the plant leased by Oscar Mayer, a wholly owned subsidiary of Philip Morris.

5. In October 1991, Defendant Philip Morris purchased another policy in which Protection Mutual and Industrial Risk Insurers (I.R.I.) each provided 50% of the insurance coverage on the leased premises. This was a group policy that covered other Philip Morris properties as well.

6. On or about February 18, 1993, D.C.A. alleges that a burglary took place at the premises previously leased by Oscar Mayer, which D.C.A. claims resulted in damages in the amount of \$69,829.25, of which \$39,452.05 is claimed to be damages for business interruption.

7. At the time of the alleged burglary, the premises were vacant, and had been vacant for at least fourteen months.

8. D.C.A. made a claim against Protection Mutual for the loss, but the claim was denied.

9. D.C.A. did not make a demand to I.R.I. for payment before filing this lawsuit.

In its Amended Complaint D.C.A. seeks reformation of the

insurance policy so that it does not include a \$2,000,000 deductible that is contained in the policy but is not shown in the Certificate of Insurance issued to D.C.A. by the Insurers. If the policy cannot be reformed, D.C.A. seeks to impose liability on Philip Morris and Oscar Mayer for failure to provide insurance coverage as required by the lease agreement.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

"[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary

judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

" . . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

In their Motion for Summary Judgment, or in the alternative, Motion for Partial Summary Judgment, the Insurers argue that D.C.A. is not entitled to reformation of the insurance policies because it is not a party to the contract, and therefore, does not have standing to bring a suit to reform the policies. These Defendants also argue that there was a legitimate basis for denying the claim. Protection Mutual claims that there is no evidence to support a claim of bad faith against Protection Mutual because the claim was denied on the grounds that it did not exceed the policy deductible.<sup>1</sup>

D.C.A. is seeking reformation of the insurance policy to

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<sup>1</sup>D.C.A. claims in its complaint that it is a business trust. This claim prompted the Defendants to argue that D.C.A. does not have standing to bring suit in Oklahoma because it has not registered in this State as a business trust. Plaintiff now claims the real party in interest is Allan Applestein who uses "D.C.A. Grantor Trust" as a trade name. In view of the Court's ultimate decision herein, the issue of standing is moot.

conform with the Certificate of Insurance No. 45 issued to D.C.A. on October 1, 1991 by Marsh & McLennan, Inc. The Certificate of Insurance issued to D.C.A. did not contain a deductible amount within it. D.C.A. claims that Oscar Mayer was to obtain a policy on the leased premises that was not subject to a deductible. Therefore, D.C.A. argues that the policy should be reformed to reflect no deductible in accordance with the Certificate of Insurance.

This argument is unpersuasive because the Certificate of Insurance clearly states on its face that it is "given as a matter of information only, and neither affirmatively amends, extends or alters the coverage afforded by the policy(ies) designated above, and confers no rights on the certificate holder." D.C.A.'s reliance on the Certificate of Insurance for a complete statement of its rights is unjustified. Plaintiff's reliance on this instrument is misplaced because it clearly states that the Certificate is for information only and that it conferred no rights on D.C.A.

D.C.A.'s argument that the policy should be reformed to conform to what it thought to be the scope of coverage required under the lease is unpersuasive. The insurance companies had nothing to do with the lease or the negotiation of the lease. The insurance companies only involvement was the issuing of the policies purchased by Philip Morris. The insurance companies issued the policy on terms agreed upon by Philip Morris and the insurance companies. The insurance companies knew nothing of the

terms of the lease between Oscar Mayer and D.C.A. and never conducted any negotiations with D.C.A. about insurance coverage. The insurance companies issued policies in accordance with the desires of the purchaser, Philip Morris. These Defendants are not required to conform their policies to the wishes of D.C.A. who was not the purchaser of the policy.

Furthermore, even if D.C.A. or Applestein could show that it was a party to the insurance policy, the policy cannot be reformed without showing that a prior agreement existed in which the parties agreed that the policy would have no deductible. Under Oklahoma law, a party seeking reformation of an insurance policy "must show by proof that is clear, unequivocal and decisive, and more than a mere preponderance, that a prior agreement existed and that the contract does not reflect that agreement because of fraud or mistake." Evans v. Hartford Life Ins. Co., 704 F.2d 1177, 1179-80 (10th Cir. 1983).

D.C.A. has failed to show that any agreement as to a deductible existed prior to the issuance of the insurance policies. There has been no evidence offered that there was either an oral or written agreement between D.C.A. and the insurance companies concerning the amount of deductible to be contained in the policy. Moreover, there has been no evidence brought forward that shows that there was an agreement between D.C.A. and the Oscar Mayer Group that required that the purchased policy contain no deductible. Although the lease does state the amount of insurance to be secured on the premises, it is silent on the question of

whether such policy should contain a deductible. D.C.A. has brought forth no evidence of any agreement on the issue of a deductible. In as much as there has been no evidence of a prior agreement, oral or written, on the issue of a deductible, D.C.A. is not entitled to reformation of the policy because it has not shown by "clear, unequivocal, and decisive" proof that a prior agreement existed.

Likewise, D.C.A.'s claim that Protection Mutual acted in bad faith by denying the claim cannot stand. D.C.A. claims that Protection Mutual acted in bad faith when it denied its claim. Protection Mutual asserts that it denied the claim because it did not exceed the policy deductible, i.e. \$2,000,000. The claim<sup>2</sup> made by D.C.A. to recover its damages as a result of the alleged burglary did not meet that deductible.

Under Oklahoma law, "an insurer has an implied duty to deal fairly and act in good faith with its insured." Christian v. American Home Assur. Co., 577 P.2d 899, 904 (Okla. 1978). However, "tort liability may be imposed only where there is a clear showing that the insurer unreasonably, and in bad faith, withholds payment of the claim of its insured." Id. at 905. Furthermore, a bad faith claim will not "lie where there is a legitimate dispute." Ballinger v. Security Connecticut Life Insurance Co., 862 P.2d 68, 70 (Okla. 1993).

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<sup>2</sup> The claim was for the amount of \$67,400, of which approximately one-half was for the actual vandalism and the remainder for "business interruption". The Court concludes Plaintiff would have a heavy burden indeed to establish a claim for "business interruption" of an empty, unleased building.

Protection Mutual had a legitimate basis for denying the claim made by D.C.A.; the loss did not meet the deductible as stated in the policy. It is patently not unreasonable for an insurance company to deny a claim that does not exceed the deductible amount of the policy. An insurance company is not exposed to claims for bad faith when they have a legitimate basis for denying a claim under the policy terms. Therefore, the Court concludes the denial of the claim based on not meeting the deductible is not unreasonable and not in bad faith.

Defendants Protection Mutual and I.R.I. and Defendants Philip Morris Management Corp., Philip Morris Inc., and Oscar Mayer contend that D.C.A. lacks standing to bring a suit in the Courts of Oklahoma because it is a business trust and has neither qualified to do business in the state, nor has it paid any franchise tax in the state. D.C.A. contends in its opposition brief to Defendants Protection Mutual and I.R.I. Motion for Summary Judgment that D.C.A. Grantor Trust is not a business trust but a trade name set up for Allan H. Applestein to do business after he was subject to extortion claims. However, in the Plaintiff's amended complaint and second amended complaint, the Plaintiff characterizes itself as "a Business Trust with Allan H. Applestein being the Trustee and being the sole beneficiary."

If D.C.A. is a business trust, it arguably has not lost its right to seek relief in Oklahoma solely by virtue of not paying its franchise tax. Business trusts are subject to the Franchise Tax Code in Oklahoma. 68 O.S. sec. 1201. Furthermore, as the

Defendants point out Section 1212 of Title 68 provides for penalties for failure to obtain a license or failure to pay franchise taxes. 68 O.S. sec. 1212(b) provides that any person:

who attempts or purports to exercise any rights, privileges or powers of any such domestic corporation, or who does or attempts to do any business in the state in behalf of any such foreign corporation, association or organization, without having first obtained a license therefor, as provided herein, or after any such license so obtained shall have been canceled, forfeited, or expired, shall be guilty of a misdemeanor.

Section 1212(c) goes on to provide that "[a] corporation, association or organization whose right to do business shall be thus forfeited shall be denied the right to sue or defend in any court of this state..." Defendants contend that D.C.A. does not have standing to sue in Oklahoma because it admittedly has not registered or paid franchise tax in Oklahoma. However, in State Ex Rel. Dep't of Highways v. Martin, 572 P.2d 611, 614 (Okla. App. 1977), the Court of Appeals of Oklahoma stated that "the forfeiture of corporate rights under 1212(a)<sup>3</sup> is not automatic but requires an affirmative act of the Tax Commission." In this case, there has been no evidence that affirmative action by the Tax Commission has been taken. Therefore, it has not been shown that the Plaintiff should be denied the right to sue in Oklahoma Courts. However, as stated earlier, this issue is unnecessary to decide in view of the Court's conclusions herein.

In their Motion for Summary Judgment, the Oscar Mayer Group

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<sup>3</sup>The clause that provides for the denial of "the right to sue or defend in any court of this state" is now found in Section 1212(C).

contends that D.C.A. is unable to establish breach of contract on the part of Philip Morris and Oscar Mayer. It is undisputed that these defendants had no obligation to insure the leased premises beyond the term of the lease, which ended on December 31, 1991. However, D.C.A. argues that Oscar Mayer had a contractual duty to have the leased premises 100% insured while the lease was in effect. D.C.A. asks that if the insurance policies cannot be reformed, and a \$2,000,000 deductible is found to apply to the policies, that Oscar Mayer and Philip Morris be subject to a claim for breach of contract because they only provided 50% insurance coverage during the lease term when D.C.A. contends they were required to provide 100% coverage.

In order to establish a breach of contract claim, the plaintiff must show that there was an actual contract between the parties, that the challenged party did not perform by the terms of the contract, and that damages resulted from the failure to perform. In this case, it is clear that Oscar Mayer and D.C.A. entered into a lease agreement. It is also admitted that Oscar Mayer was to provide insurance on the premises during the lease period. However, the lease is silent on the issue of whether the policy provided by Oscar Mayer could contain a deductible. D.C.A. contends that Oscar Mayer has breached the contract because it failed to provide insurance coverage for the first two million dollars of loss on the policy. The lease provided for the amount of coverage to be obtained, but did not require the policy to contain no deductible. These Defendants cannot be held liable for

breach of the agreement because no such agreement has been shown to exist. The lease does not demand that the insurance coverage contain no deductible, and D.C.A. has not shown that any such agreement was formed outside of the lease. Therefore, no breach can be found when there is no showing that the agreement to provide 100% coverage with no deductible was in place.

Furthermore, D.C.A. has not been able to show that these Defendants are not entitled to Summary Judgment on its claim of fraud. In Oklahoma the elements of actionable fraud are:

the defendant made a material misrepresentation that was false, that he knew when he made the representation that it was false, or that it was made recklessly without any knowledge of its truth and made as a positive assertion, and that he made it with the intention that it should be acted on by the plaintiff, and the plaintiff acted in reliance upon it and thereby suffered injury.

D & H Co., Inc. v. Shultz, 579 P.2d 821, 824 (Okla. 1978).

Fraud is never to be presumed, and the proof required to establish fraud, clear and convincing evidence, is more stringent than the traditional preponderance of the evidence. Tice v. Tice, 672 P.2d 1168, 1171 (Okla. 1983). Furthermore, each element must be proven, and the "absence of any one is fatal to recovery." Steiger v. Commerce Acceptance of Oklahoma City, Inc., 455 P.2d 81, 86 (Okla. 1969)

D.C.A. has not shown that any misrepresentations as to the insurance coverage were made by Oscar Mayer or Philip Morris. Plaintiff has not shown that they made false statements, or that Oscar Mayer or Philip Morris represented that the policy obtained for the leased premises would not contain a deductible.

Furthermore, if D.C.A.'s claim of fraud has its basis in the furnishing of the Certificate of Insurance to D.C.A. which stated the insurance would be effective until October, 1994, it still cannot establish an essential element of fraud. D.C.A. has made no showing that these Defendants had the Certificate issued with the intention that D.C.A. rely on its recitation of coverage until October, 1994. It has not been shown that these defendants intended that D.C.A. rely on the Certificate and then not purchase insurance on the premises after the lease term on the basis of the facts within the Certificate. Therefore, the Plaintiff has not shown by clear and convincing evidence that Oscar Mayer or Philip Morris committed a fraud because they have not shown that these Defendants made a misrepresentation about insurance coverage that was false, or that they intended for D.C.A. to rely on the Certificate of Insurance.

#### CONCLUSION

This Court concludes that Plaintiff has failed to establish that genuine issues of material fact remain. Because no material issues of fact remain, and the issues of law have been resolved in favor of the Defendants, Defendants are entitled to judgment as a matter of law. The Court concludes that the Defendants Protection Mutual Insurance Company and Industrial Risk Insurers Motion for Summary Judgment should be and the same is hereby GRANTED. Defendants Philip Morris Management Corporation, Philip Morris Incorporated, and Oscar Mayer Foods Corporation Motion for Summary Judgment should be and the same is hereby GRANTED.

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

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

THOMAS R. BRET  
UNITED STATES DISTRICT JUDGE

**FILED**

APR 28 1994 *RL*

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

PENNWELL PRINTING COMPANY, INC. )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TULSA TYPOGRAPHICAL UNION )  
 NUMBER 403, )  
 )  
 Defendant. )

Case No. 92-C-1139-B ✓

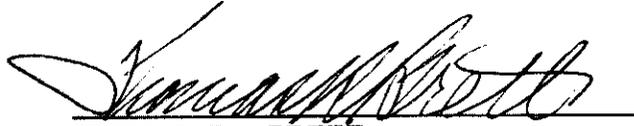
FILED ON DOCKET  
DATE APR 28 1994

ADMINISTRATIVE CLOSING ORDER

The Parties having been ordered to arbitration and these proceedings have been stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the Parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within sixty (60) days of a final adjudication of the arbitration proceedings, the Parties have not by an appropriate motion to reopen for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 28th day of April 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

23

ENTERED ON DOCKET

DATE 4-28-94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE UNKNOWN HEIRS, EXECUTORS, )  
 ADMINISTRATORS, DEVISEES, )  
 TRUSTEES, SUCCESSORS AND )  
 ASSIGNS OF FLORENE HARDIN, )  
 DECEASED; LINDA K. HILL; BILLY )  
 J. JAMES; PATTY DOBSON; DEL )  
 HARDIN; FIDELITY FINANCIAL )  
 SERVICES; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; BOARD )  
 OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma; STATE )  
 OF OKLAHOMA ex rel. OKLAHOMA )  
 TAX COMMISSION, )  
 )  
 Defendants. )

**FILED**

APR 28 1994

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

CIVIL ACTION NO. 93-C-1020-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day  
of April, 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 Defendants, County Treasurer, Tulsa County,  
Oklahoma, and Board of County Commissioners, Tulsa County,  
Oklahoma, appear by J. Dennis Semler, Assistant District  
Attorney, Tulsa County, Oklahoma; that the Defendant, State of  
Oklahoma ex rel. Oklahoma Tax Commission, appears not, having  
previously filed its Disclaimers; and the Defendants, The Unknown  
Heirs, Executors, Administrators, Devisees, Trustees, Successors  
and Assigns of Florene Hardin, Deceased; Linda K. Hill; Billy J.  
James; Patty Dobson; Del Hardin; and Fidelity Financial Services,  
appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Billy J. James**, acknowledged receipt of Summons and Complaint on December 2, 1993; that the Defendant, **Fidelity Financial Services**, acknowledged receipt of Summons and Complaint on November 16, 1993; that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on November 22, 1993; that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on November 17, 1993; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint on November 16, 1993.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin, Deceased; Linda K. Hill; Patty Dobson; and Del Hardin**, 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 January 27, 1994, and continuing through March 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 Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin, Deceased; Linda K. Hill; Patty Dobson; and Del Hardin**, 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 Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin, Deceased; Linda K. Hill; Patty Dobson; and Del Hardin.** 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, 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.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answers on December 13, 1993; that

the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Disclaimers on December 13, 1993 and January 14, 1994; and that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin, Deceased; Linda K. Hill; Billy J. James; Patty Dobson; Del Hardin; and Fidelity Financial Services**, 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 upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Fifteen (15), Block Twenty (20), in Northridge, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that this a suit brought for the further purpose of judicially determining the death of Florene Hardin, and judicially determining the heirs of Florene Hardin.

The Court further finds that Floyd Franklin Hardin and Florene Hardin became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated July 22, 1969, from Donald E. Johnson as Administrator of Veterans Affairs, to Floyd Franklin Hardin and Florene Hardin, 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 July 24, 1969, in Book 3897, Page 167, in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that Floyd Franklin Hardin died on September 25, 1979. Upon the death of Floyd Franklin Hardin, the subject property vested in his surviving joint tenant, Florene Hardin, by operation of law. An Affidavit of Surviving Joint Tenant was recorded on December 6, 1983 in Book 4749, Page 1912, in the records of Tulsa County, Oklahoma.

The Court further finds that Florene Hardin died on May 23, 1992, while seized and possessed of the real property being foreclosed. Upon the death of Florene Hardin, the subject property vested in her heirs and assigns, by operation of law. Certificate of Death No. 11962 issued by the Oklahoma State Department of Health certifies Florene Hardin's death.

The Court further finds that on July 23, 1969, Floyd Franklin Hardin and Florene Hardin, now deceased, who were then husband and wife, executed and delivered to the United States of America, on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$10,250.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Floyd Franklin Hardin and Florene Hardin, now deceased, who were then husband and wife, executed and delivered to the United States of America, on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated July 23, 1969, covering the

above-described property. This mortgage was recorded on July 24, 1969, in Book 3897, Page 174, in the records of Tulsa County, Oklahoma.

The Court further finds that Florene Hardin, now deceased, 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 Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$2,267.04, plus interest at the rate of 7.5 percent per annum from June 1, 1992, until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$311.40 for publication fees.

The Court further finds that Plaintiff, United States of America, is entitled to a judicial determination of the death of Florene Hardin, and to a judicial determination of the heirs of Florene Hardin.

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 \$238.00, plus penalties and interest, for the year 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 liens on the property which is the subject matter of this action by virtue of personal

property taxes in the amount of \$77.00 which became liens on the property as of 1987 (\$4.00), 1988 (\$3.00), 1989 (\$2.00), 1991 (\$34.00), 1992 (\$17.00), and 1993 (\$17.00). Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **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, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin, Deceased; Linda K. Hill; Billy J. James; Patty Dobson; Del Hardin; and Fidelity Financial Services**, are in default and therefore have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the death of Florene Hardin be and the same hereby is judicially determined to have occurred on May 23, 1992 in the City of Tulsa, Tulsa County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the only known heirs of Florene Hardin, Deceased, are Linda K. Hill, Billy J. James, Patty Dobson, and Del Hardin, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Florene Hardin, Deceased, have been discovered and it is hereby judicially determined that Linda K.

Hill, Billy J. James, Patty Dobson, and Del Hardin are the only known heirs of Florene Hardin, Deceased, and that Florene Hardin, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on March 11, 1994 regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, have and recover judgment in rem in the principal sum of \$2,267.04, plus interest at the rate of 7.5 percent per annum from June 1, 1992, until judgment, plus interest thereafter at the current legal rate of 4.51 percent per annum until fully paid, plus the costs of this action in the amount of \$311.40 for 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, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$238.00, 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 \$77.00, plus penalties and interest, for personal property taxes for the years 1987 (\$4.00),

1988 (\$3.00), 1989 (\$2.00), 1991 (\$34.00), 1992 (\$17.00), and 1993 (\$17.00), plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin, Deceased; Linda K. Hill; Billy J. James; Patty Dobson; Del Hardin; Fidelity Financial Services; Board of County Commissioners, Tulsa County, Oklahoma; and State of Oklahoma ex rel. Oklahoma Tax Commission,** have no right, title, or interest in the subject real property.

**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 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 the judgment rendered herein in favor of Defendant, County Treasurer, Tulsa County, Oklahoma;

**Third:**

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

**Fourth:**

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

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

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

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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



J. DENNIS SEMLER, OBA #8076  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, OK 74103  
(918) 596-4841

Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 93-C-1020-E

KBA:css

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

FRANK J. PRIBOY and LAURA PRIBOY, )  
husband and wife, )  
 )  
Plaintiffs, )  
 )  
and )  
 )  
NATIONAL UNION FIRE INSURANCE )  
COMPANY, )  
 )  
Additional Party Plaintiff )  
 )  
vs. )  
 )  
THE VILLAGE LIMITED PARTNERSHIP, )  
an Oklahoma limited partnership; )  
GORMAN, INC.; and ANTHONY )  
HUTCHINSON d/b/a HUTCHINSON )  
PAINTING, )  
 )  
Defendants. )

ENTERED ON DOCKET  
APR 28 1994

Case No. 92-C-1073-B

**FILED**

APR 26 1994

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

**AMENDED JUDGMENT**

In keeping with the verdict of the jury returned April 4, 1994, and the various settlement agreements announced in open court April 22, 1994, judgment is hereby entered in favor of the Plaintiff Frank Priboy in the sum of \$105,000.00 and in favor of the Plaintiff Laura Priboy in the sum of \$15,000.00 against Defendants The Village Limited Partnership and Anthony Hutchinson d/b/a Hutchinson Painting.

Pursuant to agreement, the judgments bear pre-judgment interest at the rate of 6.99% per annum.

Post-judgment interest at the rate of 3.74% per annum is not in issue because monies sufficient to satisfy the judgment were delivered to the Plaintiffs.

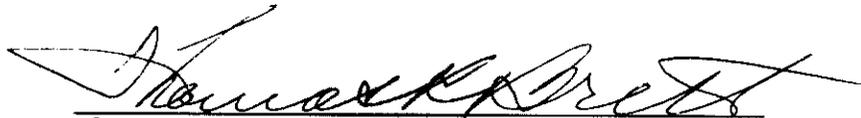
The issue of costs is also not in issue because the parties have resolved the issue through settlement.

The issue of the subrogation interest of Additional Party Plaintiff National Union Fire Insurance Company was also announced settled. National Union had paid \$72,817.00 and advanced costs of \$3,750.00. Pursuant to a compromised settlement, National Union Fire Insurance Company is granted a subrogation claim against the total judgment of \$36,500.00 plus costs of \$3,750.00.

The Defendant Gorman, Inc., was granted judgment at the conclusion of the evidence. Gorman, Inc., had applied for costs but has withdrawn its Application pursuant to agreement with the Plaintiffs.

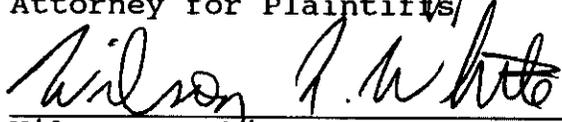
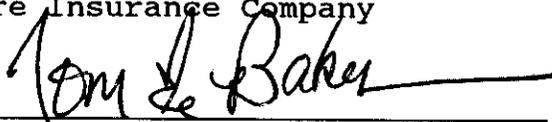
All parties herein shall pay their own respective attorney's fees.

JUDGMENT IS THEREFORE ENTERED IN ACCORDANCE WITH THE PREVIOUS RULINGS SET FORTH WITHIN THIS DOCUMENT.



Thomas R. Brett  
United States District Judge

APPROVED:

  
Richard A. Pizzo  
Attorney for Plaintiffs  
Wilson T. White  
Attorney for National Union  
Fire Insurance Company  
Thomas E. Baker  
Attorney for The Village  
Limited Partnership

**FILED**

IN THE UNITED STATES DISTRICT COURT FOR THE **APR 26 1994**

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

ASSOCIATES LEASING, INC. )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
GUEST TRUCKING COMPANY, INC, )  
M. PAUL GUEST and JAQUITA GUEST, )  
 )  
Defendants. )

ENTERED ON DOCKET  
APR 28 1994

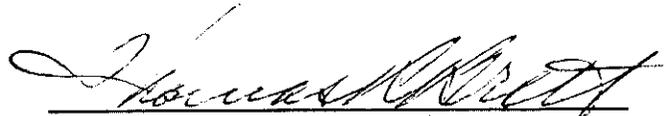
Case No. 90-C-991-B

**ADMINISTRATIVE CLOSING ORDER**

The Defendants having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 60 of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 26th day of April, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**FILED**

IN THE UNITED STATES DISTRICT COURT FOR THE APR 26 1994

NORTHERN DISTRICT OF OKLAHOMA

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

KEVIN PARK,

Plaintiff,

vs.

MONTE MORRIS FRIESNER,

Defendant.

Case No. 91-C-198-B ✓

ENTERED ON DOCKET

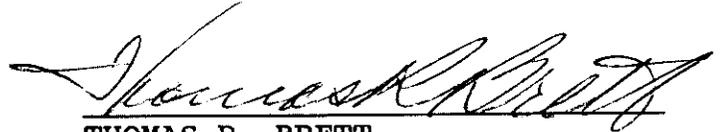
DATE APR 28 1994

**ADMINISTRATIVE CLOSING ORDER**

The Defendant having filed its petition in bankruptcy in Canada and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 60 of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 26th day of April, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

89

**FILED**

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

APR 26 1994

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

GPS TECHNOLOGIES, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 J. WILLIAMS BOOK CO., et al, )  
 )  
 Defendants. )

Case No. 93-C-498-B

ENTERED ON DOCKET  
DATE APR 28 1994

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

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

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

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

IT IS SO ORDERED this 26th day of April, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE APR 28 1994

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

**F I L E D**

APR 26 1994

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

|                                 |   |
|---------------------------------|---|
| STATESIDE TRAVEL, INC.,         | ) |
| JERRY HAMEL, and EARLE COHN,    | ) |
|                                 | ) |
| Plaintiffs,                     | ) |
|                                 | ) |
| v.                              | ) |
|                                 | ) |
| COMMERCIAL LANDMARK CORPORATION | ) |
| and COMMERCIAL BANK & TRUST     | ) |
| COMPANY OF TULSA,               | ) |
|                                 | ) |
| Defendants.                     | ) |

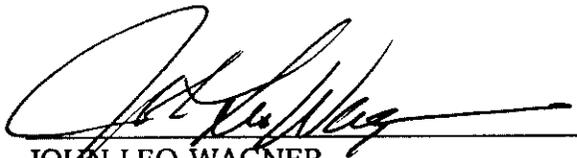
92-C-635-Wagner ✓

**JUDGMENT**

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

Judgment is entered in favor of **Plaintiffs**, Stateside Travel, Inc., Jerry Hamel, and Earle Cohn, and against the **Defendants**, Commercial Landmark Corporation and Commercial Bank & Trust Company of Tulsa, in the amount of \$60,000.00.

Dated this 25<sup>th</sup> day of April, 1994.

  
 \_\_\_\_\_  
 JOHN LEO WAGNER  
 UNITED STATES MAGISTRATE JUDGE

4-15

ENTERED ON DOCKET  
DATE APR 28 1994

IN THE UNITED STATES DISTRICT COURT FOR THE **F I L E L**  
NORTHERN DISTRICT OF OKLAHOMA

APR 20 1994

**Willie B. Hoskins,**  
SSN: 442-54-0222,  
Plaintiff,  
  
v.  
  
**Donna E. Shalala,**  
Secretary of Health and  
Human Services,  
  
Defendant.

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

Civ. No. 87-C-345-B  
(Tenth Circuit No.  
88-2312)

**ORDER**

The Court, having considered Petitioner's Application and Motion for Final Order for Attorney Fees Under 28 U.S.C. Section 2412, the Equal Access to Justice Act (EAJA), and having reviewed the arguments and representations of counsel, finds:

- 1) Petitioner requests attorney fees pursuant to 28 U.S.C. Section 2412, based upon a successful challenge of Defendant's decision denying Plaintiff's Social Security Disability benefits (SSD). The parties have stipulated that \$100.00 per hour for 103.00 hours and \$10,300.00 is a fair and reasonable amount under 28 U.S.C. Section 2412.
- 2) The Court finds that the Defendant's position was not substantially justified, nor reasonable as to the facts of the case in originally denying the benefits, and that an award under the EAJA is justified, and Defendant agrees with said fee and the Court hereby sustains Petitioner's Motion for attorney fees.
- 3) No attorney fee award has yet been made by the

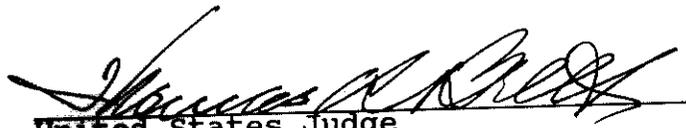
Defendant to Plaintiff's representative in the administrative proceedings before the Social Security Administration. Petitioner shall advise the Social Security Administration of this award and any request for fees related to the administrative proceedings, if any.

4) If an award of fees for work performed in this court is sought and awarded under 42 U.S.C. Section 406, Petitioner shall return to the Plaintiff the lesser of the Section 406 award or the amount awarded by this Order, pursuant to Weakley vs Bowen, 803 F.2d 575 (10th Cir., 1986).

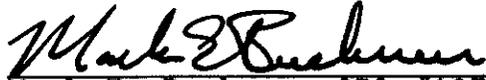
5) That counsel, Mark E. Buchner, for Plaintiff has expended 103.00 hours in pursuit of the Plaintiff's claim in the United States District Court for the Northern District of Oklahoma and that \$100.00 per hour is a fair and reasonable hourly fee, and that a fee of \$10,300.00 shall be awarded to Mark E. Buchner, Attorney at Law.

**IT IS THEREFORE SO ORDERED.**

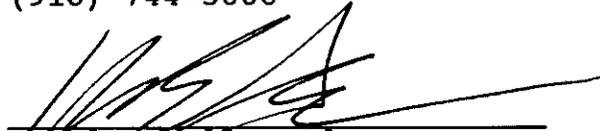
DATED this 19 day of Apr., 1994.

  
United States Judge

**APPROVED:**



Mark E. Buchner  
Mark E. Buchner, OBA #1279  
Petitioner and Attorney for Plaintiff  
3726 South Peoria  
Suite 26  
Tulsa, Oklahoma 74105  
(918) 744-5006



Kathleen Bliss-Adams  
Assistant U.S. Attorney  
Northern District of Oklahoma  
3600 U.S. Courthouse  
Tulsa, Oklahoma 74103

**FILED**

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

APR 26 1994

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

BILLY FRANKLIN WILLIAMS,  
Plaintiff,  
vs.  
EAGLE-PICHER INDUSTRIES, INC.,  
Defendant.

Case No. 88-C-716-B ✓

ADMINISTRATIVE CLOSING ORDER

ORDERED ON DOCKET  
DATE APR 28 1994

The Defendant having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 60 of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 26th day of April, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

233

ENTERED ON DOCKET

DATE 4-28-94

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

DONA OLDS,

Plaintiff,

v.

DICKINSON OF TULSA, INC.,  
a Delaware corporation, d/b/a  
CAREER POINT BUSINESS SCHOOL  
INC.; and EDU DYNE SYSTEMS,  
INC., a Texas corporation,

Defendants.

Case No. 93-C-461E

**FILED**

APR 28 1994

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

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 28 day of  
April, 1994, upon the parties' Joint Stipulation of  
Dismissal With Prejudice, and for good cause shown, it is hereby,

ORDERED, ADJUDGED AND DECREED that Plaintiff's cause of  
action against Defendants is hereby dismissed with prejudice with  
each party to bear its own costs and attorneys' fees.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 4-28-94

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

**FILED**  
APR 2 1994  
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ROBERT G. TILTON, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
GARY L. RICHARDSON, et al., )  
 )  
Defendants. )

No. 92-C-424-E ✓

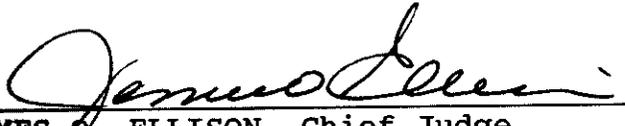
**ORDER**

The Court has received notice that the Plaintiff's Petition for Writ of Certiorari has been denied.

The Stay is, therefore, lifted in the above-captioned matter. Pursuant to 28 U.S.C. §1365 the Court declines to exercise supplemental jurisdiction over Plaintiff's state claims.

Therefore the case is hereby dismissed.

ORDERED this 28<sup>th</sup> day of April, 1994.

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

ENTERED ON DOCKET

DATE 4-28-94

IN THE UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF OKLAHOMA **F I L E D**

APR 28 1994

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

VENTURE TECHNICAL SALES & SERVICE, INC.,

PLAINTIFF,

v.

Case No. 93-C-695-E ✓

AMSPEC, INC.,

DEFENDANT.

O R D E R

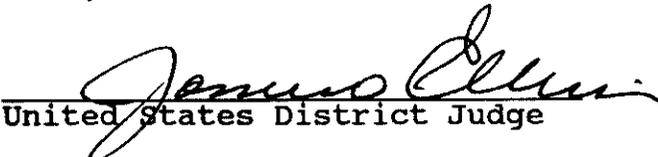
Rule 41(b) of the Federal Rules of Civil Procedure provides as follows:

*(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 MARCH 24, 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 28<sup>th</sup> day of April, 19 94

  
United States District Judge



The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." *Id.* § 423(d)(1)(A). An individual

"shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

*Id.* § 423(d)(2)(A).

Under the Social Security Act the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987). The Secretary meets this burden if the decision is supported by substantial evidence. *See*, Campbell v. Bowen, 822 F.2d 1518, 1521

(10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

"is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.'"

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985) (quoting Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985)). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. See Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d at 243, proceed as follows:

- (1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).
- (2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
- (3) A person whose impairment meets or equals one

of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

- (4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
- (5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary find that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920.

Plaintiff has filed three applications for disability benefits. Plaintiff's first claim was denied April 5, 1988. The second application was denied on October 3, 1989. Ryle filed his third application on October 18, 1990, alleging he could not work due to emphysema, chronic bronchitis and hernia problems. That application was denied initially and again on reconsideration. After a December 12, 1991, hearing,<sup>2</sup> the ALJ denied benefits. Plaintiff is now challenging the Secretary's denial of his third application and raises four objections to the ALJ's decision.

#### I. *Res Judicata*

In denying the benefits, the ALJ concluded Plaintiff had

---

<sup>2</sup> At the hearing, Plaintiff asserted, apparently for the first time, that he has suffered from anxiety since 1986.

failed to show good cause for reopening the earlier claims.

In absence of good cause for reopening ... the ALJ finds that the decision of April 5, 1988 and the determination of October 3, 1989 are res judicata with respect to the claimant's current application, for the period from September 8, 1986 through October 3, 1989, the date of the last determination. The undersigned will now consider the period of time from October 4, 1989, through December 31, 1989, the date the claimant last met the disability insured status requirement. While the determination of October 3, 1989, and the decision of April 5, 1988, will not be reopened, all the medical evidence in the file is carefully considered [in] reaching this decision. *Record at 14.*

Plaintiff contends that the ALJ erred in applying the doctrine of *res judicata* to Plaintiff's claim that he was disabled prior to October 3, 1989. Plaintiff argues it is only proper to apply *res judicata* when the new claim encompasses the same facts and issues as the earlier claim. Plaintiff alleges his current claim includes evidence he was suffering from anxiety from as early as 1986 and this evidence and issue has not been previously raised or addressed.

This Court does not have jurisdiction to review the Secretary's refusal to reopen a claim for disability benefits or determination such claim is *res judicata* absent a colorable constitutional claim. Nelson v. Secretary, 927 F.2d 1109, 1111 (10th Cir. 1990) and Brown v. Sullivan, 912 F.2d 1194, 1196 (10th Cir. 1990). The Court concludes Plaintiff's current claim that he was disabled prior to October 3, 1989, is the same claim previously denied by the Secretary. As Plaintiff has failed to assert a

colorable constitutional claim, this Court lacks jurisdiction to review the Secretary's refusal to reopen and application of *res judicata*.

## II. The Treating Physician

Plaintiff also contends the ALJ failed to give the proper credence to the opinions of Plaintiff's treating physicians, Drs. Mark S. Galfo and Faith Holmes. In a letter dated May 10, 1989, Dr. Galfo stated that "Ryle has a long history of Chronic Obstructive Pulmonary Disease which limits his ability to work. He becomes short of breath with mild exertion." Record at 249. In a November 6, 1990 letter, Holmes states that Ryle has a history of obstructive pulmonary disease that makes him "short of breath with mild exertion." *Id.* at 251. Neither doctor stated that Plaintiff was disabled or would be unable to return to his past relevant work and perform the type of activity required of a security guard.

The Tenth Circuit gives substantial credence to the opinions of treating physicians on the subject of medical disability. A treating physician's opinion is binding on the fact finder unless it is contradicted by "substantial evidence," and the opinion is entitled to extra weight due to the physician's greater familiarity with the claimant's medical situation. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frei v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). Those conclusions can only be disregarded if specific, legitimate reasons are given by the ALJ.

Although he did not specifically mention the findings of the two treating physicians, the Court concludes the ALJ did not

disregard their findings. After hearing all the evidence, the ALJ determined Plaintiff had "mild chronic obstructive pulmonary disease" and concluded that this condition was not severe enough to prevent him from working as a security guard. This conclusion is not inconsistent with the opinions of the treating physicians and thus the Plaintiff's argument is not well taken.

### III. Anxiety

Plaintiff next contends the ALJ did not properly evaluate his claim of anxiety. The ALJ addressed Plaintiff's claim of mental impairment as follows:

While the medical evidence reflects claimant to have been prescribed Valium and Vistoril, this appears to have been prescribed at a time when claimant chose to have abstained from abuse of alcohol. On January 6, 1987, he admitted to his physician he was frightened. Claimant was then prescribed Hydroxyzine for "anxiety." The term "anxiety" has been used since that date; however, there is no indication in the record of recommendation to claimant that he seek psychiatric or psychological help. Nor is there evidence in the record that claimant, on his own, has sought any help for a mental impairment. Further, the record offers no evidence of other signs or symptoms to substantiate a medically-determinable mental impairment; thus, the Administrative Law Judge finds and hold that based on this record, claimant does not have a medically-determinable mental impairment.

The ALJ also completed a Psychiatric Review Technique Form and found that Plaintiff's alleged "anxiety" did not meet a listed mental impairment. The Court agrees with and adopts the Report and Recommendation of the Magistrate affirming the ALJ and concluding that the evidence does not support a finding a disability because

of "anxiety".

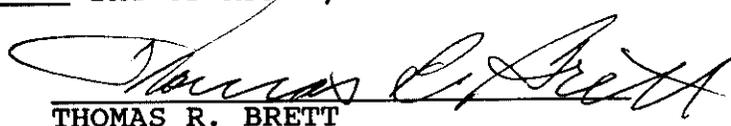
IV. Substantial Evidence

Finally, Plaintiff argues there is not substantial evidence in the record to support the ALJ's finding that the Plaintiff could perform his past relevant work as a security guard.

Under the Social Security Act the claimant bears the burden of proving a disability which prevents him from engaging in his prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988). The Court agrees with and adopts the Magistrate's finding that Plaintiff has failed to satisfy the burden of proving he is suffering from a disability which prevents him from engaging in his prior work activity.

The Court has reviewed the record before the Administrative Law Judge and concludes that it contains substantial evidence upon which the Administrative Law Judge's decision was based. The Court agrees with the Magistrate Judge's Report and Recommendation and the same is hereby adopted and ratified. The Court concludes that the Secretary's decision should be and the same is hereby AFFIRMED.

IT IS SO ORDERED THIS 25<sup>TH</sup> DAY OF APRIL, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JAN 5 1994

Richard M. Lawrence  
U.S. DISTRICT COURT

STEVEN A. CURLEE, JAMES R.  
FLAHERTY, G. SHELL BOUDREAUX and  
DENNIS G. STRAUCH,

Plaintiffs,

v.

Case No. 93-C-291-B ✓

GEODYNE RESOURCES, INC.,  
MICHAEL W. TOMASSO, DAVID J.  
GALLITANO, and PAINWEBBER  
INCORPORATED,

Defendants.

JOINT STIPULATION OF DISMISSAL  
WITH PREJUDICE

The Plaintiffs STEVEN A. CURLEE, JAMES R. FLAHERTY, G. SHELL BOUDREAUX and DENNIS G. STRAUCH and the Defendants GEODYNE RESOURCES, INC., MICHAEL W. TOMASSO, DAVID J. GALLITANO, and PAINWEBBER INCORPORATED, by and through their respective counsel, jointly inform the Court that they have reached a mutually satisfactory private settlement regarding plaintiffs' claims, and stipulate pursuant to Fed.R.Civ.P. 41(a)(i)(ii) that Plaintiffs'

*Case was admin  
closed 4-26-94  
per HO. pw*

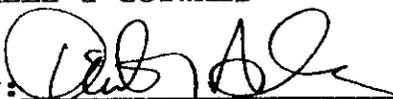
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claims are dismissed with prejudice, the parties to bear their own respective costs and attorney fees.

Respectfully submitted,

GABLE & GOTWALS

By: 

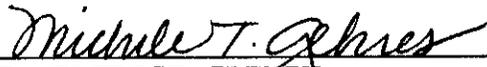
JAMES M. STURDIVANT  
TIMOTHY A. CARNEY  
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-and-

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

By: 

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MICHELE T. GENRES  
4100 Bank of Oklahoma Tower  
Tulsa, Oklahoma 74172-0141

ATTORNEYS FOR DEFENDANTS

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

**FILED**

APR 26 1994

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

KIOWA OIL & GAS, LTD., and  
GOLDEN ARROW ENERGY PARTNERS,  
LTD.,

Plaintiffs,

vs.

No. 89-C-634-B

JACK W. KELLEY and OKLAHOMA  
PETROLEUM MANAGEMENT  
CORPORATION,

Defendants.

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a)(1), of the Federal Rules of Civil Procedure, this action is voluntarily dismissed with prejudice by the parties hereto. Each party is to bear their respective costs. All parties who have appeared in the action hereby sign this dismissal.

FELDMAN, HALL, FRANDEN,  
WOODARD & FARRIS

BREWSTER, SHALLCROSS &  
DEANGELIS

By Joseph R. Farris  
Joseph R. Farris, OBA #2835  
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918/583-7129

By Jennifer L. DeAngelis  
Clark O. Brewster  
Jennifer L. DeAngelis  
20 East 5th, 15th Floor  
Tulsa, OK 74103  
918/584-1500

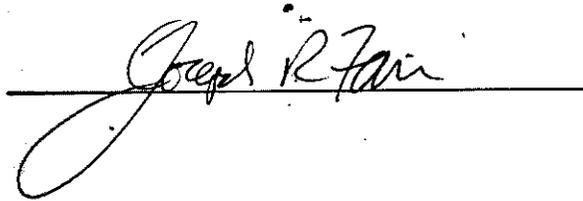
ATTORNEYS FOR OPMC  
and JACK KELLEY, Defendants

ATTORNEYS FOR THE PLAINTIFFS

**CERTIFICATE OF MAILING**

This is to certify that on this 26 day of April, 1994, a true and correct copy of the foregoing instrument was deposited in the U. S. Mail, postage prepaid, addressed to:

Clark O. Brewster  
Jennifer L. DeAngelis  
• Brewster & Shallcross  
20 East 5th, 15th Floor  
Tulsa, OK 74103

A handwritten signature in cursive script, reading "Joseph R. Fair", is written over a horizontal line.

DATE APR 26 1994

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

HOWARD HILL and BONNIE HILL, )  
husband and wife, )  
 )  
Plaintiffs, )

vs. )

STEVEN R. BAILEY, an individual, )  
BILLY M. HOLLINGSWORTH, an )  
individual, SANTISI TRUCKING COMPANY, )  
a foreign corporation, PIEDMONT OF )  
MICHIGAN, INC., a foreign corporation, )  
RANGER INSURANCE COMPANY, a foreign )  
insurance company, and AMERISURE )  
INSURANCE COMPANY, a foreign )  
insurance company, )  
 )  
Defendants, )

and )

BILLY HOLLINGSWORTH, SR., BILLY )  
HOLLINGSWORTH, JR., ROSE M. )  
HOLLINGSWORTH, GINA M. )  
HOLLINGSWORTH, and GINA M. )  
HOLLINGSWORTH, as Natural Mother )  
and Next Friend of JOSHUA DAVID )  
HOLLINGSWORTH, a Minor, )  
 )  
Plaintiffs, )

vs. )

STEVEN R. BAILEY, and DONALD SANTISI )  
TRUCKING COMPANY, )  
 )  
Defendants. )

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

Consolidated Case No. /  
92-C-975-C

**ORDER**

Plaintiffs, Howard Ted Hill, Bonnie Mae Hill, Billy Monroe Hollingsworth, Sr.,

78

Rose Marie Hollingsworth, Billy Monroe Hollingsworth, Jr. and Gina Maxine Hollingsworth, individually and as natural parents and next friends of Joshua David Hollingsworth, a minor, and Defendants, Steven R. Bailey, Donald Santisi Trucking Company and Ranger Insurance Company, have filed a Joint Motion for Dismissal With Prejudice of all claims in the above-captioned action. There was also a hearing on March 23, 1994, before Magistrate Judge Wagner, where the Court approved the settlement of the claims of Joshua David Hollingsworth, a minor. Being advised in the premises, the Court finds that the Joint Motion for Dismissal With Prejudice of all claims in the above-captioned action should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-captioned action is dismissed with prejudice. Each party shall bear his or her own costs.

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

  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE APR 26 1994

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

IN RE: )  
 )  
 Debtor. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 LAURA M. PARMELE, )  
 )  
 Appellee. )

FILED

APR 25 1994

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

93-C-0652-B

ORDER

Now before the Court is the United States' appeal of a Bankruptcy Court decision. The Bankruptcy Court found that a secured claim by the Internal Revenue Service should be reduced by some \$8,000. The United States challenges that decision, arguing that the Bankruptcy Court erred as a matter of law. For the reasons discussed below, the decision by the Bankruptcy Court is reversed.

I. Summary of Facts/Procedural History

Prior to November of 1992, Appellee Laura M. Parmele owed the Internal Revenue Service ("IRS") \$34,624.57 because she did not pay taxes for 1984, 1986, 1987 and 1988. On November 6, 1992, Parmele filed Chapter 13 Bankruptcy. About a month later, Appellant United States filed a Proof of Claim for the \$34,624.57 owed by Parmele to the IRS ("IRS Claim").<sup>1</sup>

<sup>1</sup> The claim noted that the United States had filed Notices of Federal Tax Lien in Tulsa County on October 18, 1991 and November 27, 1991.

15

On December 16, 1992, Parmele filed an Objection To The Claim of the Internal Revenue Service. The objection asserted that the "value of any property to which the lien of the Internal Revenue Service attaches is substantially less than the amounts owed." The United States refuted Parmele's objection, stating that she had \$15,357 in estate properties and additional assets as a part of a settlement agreement.<sup>2</sup>

On July 13, 1993, the Bankruptcy Court entered an Order Determining Amount of Allowable Secured Claim. The Bankruptcy Court reduced the IRS secured claim by \$8,386 to \$24,342. In making the reduction, the Bankruptcy Court exempted \$3,226 of Parmele's property under 28 U.S.C. §6334. Another \$5,160 was exempted from the claim so that Parmele would be able to pay her 1993 estimated federal and state taxes.<sup>3</sup> Following the ruling, the United States filed the instant appeal.

## II. Legal Analysis

Appellant United States raises two issues. First, did the Bankruptcy Court err as a matter of law in reducing the United States' secured claim pursuant to 26 U.S.C. § 6334? Second, did the Bankruptcy Court err by reducing the claim by the amount owed by Parmele for 1993 taxes? Each issue is discussed below.

### *A. Reduction of IRS Claim Pursuant To 26 U.S.C. § 6334*

The Bankruptcy Court used §6334 as a vehicle to reduce the IRS claim by \$3,226.<sup>4</sup>

---

<sup>2</sup> Parmele obtained a deficiency judgment against Feng Shiang Shu and Chin Jung Shu on August 8, 1989. On April 5, 1993, Parmele filed a Motion To Approve Settlement Of Deficiency Judgment. On May 5, 1993 -- without objection by the United States -- the Bankruptcy Court approved the \$20,000 settlement. Of the \$20,000, \$300 was spent on attorney fees and \$19,700 was transferred to Parmele's trustee.

<sup>3</sup> The tax liability was a result of the proceeds from the \$20,000 settlement plus approximately \$13,000.00 earned by Parmele in her employment.

<sup>4</sup> Section 6334 states that certain property shall be exempt from levy, including personal effects, wearing apparel, etc.

Wrote the Court in its June 21, 1993 Order:

**The Internal Revenue Code, 28 U.S.C. §6334, sets out certain property which is exempt from levy even though the lien of United States does attach to the property. In establishing the value of the claim of United States for payment under the Debtor's Chapter 13 Plan, the allowed secured claim of the United States shall be reduced by \$3,226 which amount the parties have stipulated is the value of the exempt property which cannot be levied by United States, but the lien shall continue to attach to such property.**

The United States contends that the Bankruptcy Court improperly used §6334 to reduce the claim. It argues that §6334 is a statute exempting property from a levy -- not a statute allowing a bankruptcy court to reduce the value of an IRS tax lien.

A Ninth Circuit case is persuasive on this issue. In *United States v. Barbier*, 896 F.2d 377 (9th Cir. 1990), the IRS assessed federal income taxes against the Barbiers. Similar to the instant case, the Barbiers argued that 26 U.S.C. §6334, which exempts from an administrative levy household effects and a limited amount of other property, also prohibits the attachment of a federal tax lien on the exempted property. The Bankruptcy Court and District Court agreed, holding that a federal tax lien could not attach to property exempt from an administrative levy.

On appeal, however, the appellate court reversed. It first discussed 26 U.S.C. §6321, which states: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount...shall be a lien in favor of the United States upon all property and rights to property, belonging to such person." It found that §6334 addressed the issue of a levy -- not a lien.<sup>5</sup> The Court then concluded:

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<sup>5</sup> *The difference between a levy and a lien also suggests why a lien should still attach to property exempt from a levy. A levy forces debtors to relinquish their property. It operates as a seizure by the IRS to collect delinquent income taxes...The IRS's levying power is limited because a levy is an immediate seizure not requiring judicial intervention. A levy connotes compulsion or a forcible means of extracting taxes from a*

Holding that a lien does not extend to property exempt from levy under section 6334 would be inconsistent both with Supreme Court precedent and the statutory purpose of ensuring the government is able to secure collection of tax revenues. *Id.* at 379.

While the facts differ somewhat in the instant case, the issue -- similar to the one in *Barbier* -- is whether §6334 can be used to reduce the amount of an IRS tax lien. The holding in *Barbier* persuades the court that §6334 cannot be used for that purpose. The statute clearly applies to an IRS levy, not an IRS lien. Therefore, the court finds that the Bankruptcy Court erred on this issue. Consequently, the lien should not have been reduced by \$3,226.

***B. Reduction of Claim by the Amount of Parmele's 1993 Taxes***

In its July 13, 1993 Order, the Bankruptcy Court reduced the amount of the IRS claim by \$5,160 -- the estimated amount of 1993 taxes owed by Parmele to the IRS and to the State of Oklahoma. Although the Bankruptcy Court did not discuss its reasoning in the opinion, an excerpt from the June 22, 1993 hearing shed some light on the court's decision:

**JUDGE:** It seems to me as to this problem on the allowance of taxes that I think it's unfair for Ms. Parmele to be charged with an additional sum of \$5,160. And, accordingly in the calculations, I will allow the withholding of said \$5,160. Then I will direct that the Trustee pay said \$5,160 to the taxing entities, the federal taxes and the Oklahoma taxes in their proportionate amount as an estimated tax for the 1993 taxes...

**UNITED STATES ATTORNEY:** I would like to, just for the record, would the Court please direct counsel as to what provision under the Code he is relying upon to make that allocation?

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*recalcitrant taxpayer. A taxpayer subject to an IRS levy is provided certain protection such as notice and an opportunity to pay the taxes due before the seizure. A lien, however, is merely a security interest and does not involve the immediate seizure of property. A lien enables the taxpayer to maintain possession of the property while allowing the government to preserve its claim should the status of the property later change. If, for instance, the debtor later sells his exempt personal property for cash, the IRS would be entitled to obtain such proceeds. Barbier, 896 F.2d at 379.*

JUDGE: Well, in all fairness -- and I really don't know whether or not that property of the estate -- as far as I'm concerned, that property of the estate is encumbered with legal obligations. That it seems to me, in addition, that it would be completely unfair and to defeat the purposes of 13 to burden and laden the debtor with an additional \$5,000, which in this budget she'd never be able to pay. That that, in addition, is a proper deduction as to a determination of disposable income. And then if I have any other problem, I'll just throw in 105 (11 U.S.C. §105). *Transcript of Proceedings, pp. 7-8 (docket #59).*

The United States argues that the Bankruptcy Court does not have the authority to use estate property to pay for "post-petition estimated taxes of the Debtor." *Appellant Brief, page 8 (docket #7)*. The IRS contends that estate property must be used to pay the claim, citing 11 U.S.C. §541.<sup>6</sup>

The issue here is, in essence, whether the Bankruptcy Court can use 11 U.S.C. § 105 to take proceeds from the estate property and pay the debtor's post-petition taxes. No case law has been found (or cited by Parmele) that allows using Section 105 in that way. As a result, the Court finds that the Bankruptcy Court erred.

Section 105 allows bankruptcy courts to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Act. This directive is "consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *United States v. Energy Resources Co.*, 110 S.Ct. 2139, 2142 (1990). But such power is not limitless. For example, the Bankruptcy Court does not have the authority to contravene specific

---

<sup>6</sup> Parmele, obviously, disagrees with the United States. *She writes: "In the case before the Court, we have an actual disposition of an asset (i.e. the deficiency judgment). The costs associated with the disposition are not hypothetical, but fixed. The trial court properly allowed for the costs and expenses associated with converting a worthless piece of paper to cash, which in fact benefitted the Creditor United States. If the trial court had not provided for payment of taxes from the settlement it would have caused the Appellee to fail in her attempt to reorganize as all her disposable income was being submitted for funding of her plan in accordance with 11 U.S.C. 1322(a)(1)." Appellee's Brief, page 7 (docket #11).*

provisions of the Bankruptcy Code. *Re Pirsig Farms*, 46 B.R. 237 (D. Minn. 1985). In addition, the Bankruptcy Court can not simply justify its decisions by invoking Section 105. *See, In Re Lapiana*, 909 F.2d 221, 223 (7th Cir. 1990)("It is true of course that bankruptcy, despite its equity pedigree, is a procedure for enforcing pre-bankruptcy entitlement under specified terms and conditions rather than a flight of redistributive fancy or a grant of free-wheeling discretion such as the medieval chancellors enjoyed.") See, also, *United States v. Pepperman*, 976 F.2d 123, 131 (3rd Cir. 1992)("Section 105 does not give the court the power to create substantive rights that otherwise would be unavailable under the Code...The fact that a bankruptcy proceeding is equitable does not give the judge a free-floating to redistribute rights in accordance with his or her personal views of justice and fairness, however, enlightened those views may be.")

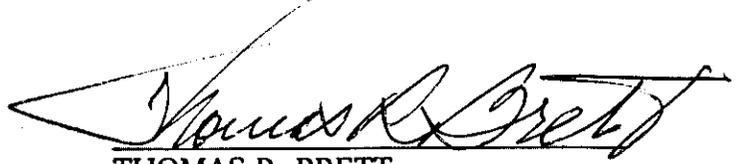
In the instant case, this Court's decision is guided, in part, by 26 U.S.C. § 6321, which states: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount...shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." That language strongly suggests that Congress wanted to assure the collection of taxes. A second reason for the decision is the absence of any statutory or case authority supporting the Bankruptcy Court's decision. Finally, as a general rule, Section 105 does not allow a court to take estate proceeds and apply them to post-petition or "current" estimated taxes.<sup>7</sup> In addition, nothing in the record suggests exigent circumstances on the part of the debtor. Consequently, the decision of the Bankruptcy Court is reversed and remanded in

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<sup>7</sup> The court finds that the settlement proceeds were a part of the estate's property. See 11 U.S.C. § 541(a)(6).

accordance with this opinion.

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

A handwritten signature in cursive script, appearing to read "Thomas R. Brett". The signature is written in black ink and is positioned above the printed name and title.

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RANDALL A. DEVIN; )  
 KAY D. DEVIN; )  
 DELAINA S. DEVIN; )  
 SEARS, ROEBUCK AND COMPANY, )  
 a New York Corporation; )  
 SERVICE COLLECTION ASSOCIATION, )  
 INC., a corporation; )  
 COUNTY TREASURER, Tulsa County, )  
 Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE APR 26 1994

**FILED**

APR 25 1994

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

CIVIL ACTION NO. 93-C-597-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this \_\_\_\_\_ day  
of \_\_\_\_\_, 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, Tulsa County,  
Oklahoma, and Board of County Commissioners, Tulsa County,  
Oklahoma**, appear by J. Dennis Semler, Assistant District  
Attorney, Tulsa County, Oklahoma; the Defendant, **Service  
Collection Association, Inc., a corporation**, appears by its  
attorney K. Jack Holloway; the Defendant, **Delaina S. Devin**,  
appears not, having previously filed her Disclaimer; and the  
Defendants, **Randall A. Devin, Kay D. Devin, and Sears, Roebuck  
and Company, a New York Corporation**, appear not, but make  
default.

NOTE: THIS CASE IS TO BE MAILED  
BY MOVANT TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

The Court being fully advised and having examined the court file finds that Defendant, **Randall A. Devin**, acknowledged receipt of Summons and Amended Complaint on August 4, 1993; that Defendant, **Kay D. Devin**, acknowledged receipt of Summons and Amended Complaint on August 4, 1993; that Defendant, **Delaina S. Devin**, acknowledged receipt of Summons and Complaint on July 7, 1993; that Defendant, **Sears, Roebuck and Company, a New York Corporation**, was served with Summons and Complaint on July 1, 1993 by certified mail, return receipt requested, through its service agent Corporation Company; that Defendant, **Service Collection Association, Inc., a corporation**, acknowledged receipt of Summons and Complaint on July 2, 1993; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on July 1, 1993; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on July 1, 1993.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on July 14, 1993; that the Defendant, **Delaina S. Devin**, filed her Disclaimer on July 14, 1993; that the Defendant, **Service Collection Association, Inc., a corporation**, filed its Answer on July 23, 1993; and that the Defendants, **Randall A. Devin**, **Kay D. Devin**, and **Sears, Roebuck and Company, a New York Corporation**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Randall A. Devin named as a defendant herein is one and the same person as, and is sometimes known as, Randall Alan Devin; and the Delaina S. Devin named as a defendant herein is one and the same person as, and is sometimes known as Delaina Sue Devin.

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 Five (5), Block Five (5), MARY ELLEN ADDITION to Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on May 30, 1985, Randall A. Devin and Delaina S. Devin, then husband and wife, executed and delivered to Turner Corporation of Oklahoma, Inc., their mortgage note in the amount of \$37,004.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Randall A. Devin and Delaina S. Devin executed and delivered to Turner Corporation of Oklahoma, Inc., a mortgage dated May 30, 1985, covering the above-described property. This mortgage was recorded on June 3, 1985, in Book 4866, Page 2237, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 21, 1989, Turner Corporation of Oklahoma, Inc. assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development, its successors and assigns. This Assignment of Mortgage was recorded on March 21, 1989, in Book 5173, Page 326, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1989, Randall A. Devin and Delaina S. Devin 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 due to such defendants' default in paying the installments.

The Court further finds that on November 6, 1990, the personal liability of Randall Alan Devin aka Randall A. Devin and Delaina Sue Devin aka Delaina S. Devin on the debt represented by the subject note and mortgage was discharged in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 90-1934-C, a Chapter 7 Bankruptcy.

The Court further finds that a decree of divorce was granted in Case No. FD91-3523 in the District Court of Tulsa County to Delaina Sue Devin and Randall Alan Devin on July 3, 1991; however, such decree is silent as to disposition of the subject real property.

The Court further finds that the Defendants, Randall A. Devin and Delaina S. Devin, 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 their failure to make

the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Randall A. Devin and Delaina S. Devin**, are indebted to the Plaintiff in the principal sum of \$59,751.76, plus interest at the rate of 12.5 percent per annum from June 28, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 for recording Notice of Lis Pendens.

The Court further finds that the Defendant, **Delaina S. Devin**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, **Kay D. Devin and Sears, Roebuck and Company**, a New York Corporation, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Service Collection Association, Inc.**, a corporation, has a lien on the property which is the subject matter of this action by virtue of a judgment dated November 8, 1989, and recorded on November 15, 1989, in Book 5219, Page 2555, in the records of Tulsa County, Oklahoma, in the amount of \$14,202.54, plus interest and attorney's fee of \$2,840.00, plus costs.

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 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 in rem against the Defendants, **Randall A. Devin and Delaina S. Devin**, in the principal sum of \$59,751.76, plus interest at the rate of 12.5 percent per annum from June 28, 1993 until judgment, plus interest thereafter at the current legal rate of 4.51 percent per annum until paid, plus the costs of this action in the amount of \$8.00 for recording Notice of Lis Pendens, 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, **Service Collection Association, Inc.**, a corporation, have and recover judgment in the amount of \$14,202.54, plus interest and attorney's fee of \$2,840.00, plus costs, by virtue of a judgment dated November 8, 1989, and recorded on November 15, 1989, in Book 5219, Page 2555, in the records of Tulsa County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **Kay D. Devin; Delaina S. Devin; Sears, Roebuck and**

Company, a New York Corporation; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Randall A. Devin and Delaina S. Devin, to satisfy the in rem 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 the judgment rendered herein in favor of the Plaintiff;

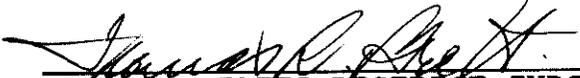
**Third:**

In payment of the judgment rendered herein in favor of the Defendant, Service Collection Association, Inc., a corporation.

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.

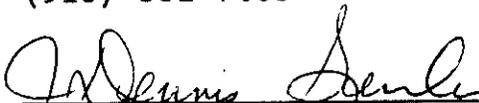
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

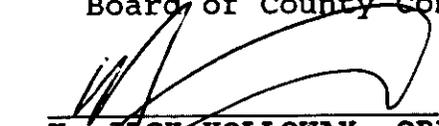
  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

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

  
J. DENNIS SEMLER, OBA #8076  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4841  
Attorney for Defendants, County Treasurer and  
Board of County Commissioners, Tulsa County, Oklahoma

  
K. JACK HOLLOWAY, OBA #11352  
Mapco Plaza Building  
1717 South Boulder, Suite 200  
Tulsa, Oklahoma 74119  
(918) 582-3191  
Attorney for Defendant,  
Service Collection Association, Inc., a corporation

Judgment of Foreclosure  
Civil Action No. 93-C-597-B  
NBK:css

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE APR 26 1994

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 )  
 )  
 vs. )  
 )  
 ) CHRIS L. COONCE; )  
 ) TRUDY K. COONCE KENDALL; )  
 ) LIZABETH A. COONCE; )  
 ) SERVICE COLLECTION ASSOCIATION, )  
 ) INC., a corporation; )  
 ) STATE OF OKLAHOMA ex rel. )  
 ) Oklahoma Tax Commission; )  
 ) COUNTY TREASURER, Tulsa County, )  
 ) Oklahoma; )  
 ) BOARD OF COUNTY COMMISSIONERS, )  
 ) Tulsa County, Oklahoma, )  
 )  
 ) Defendants. )

**FILED**

APR 25 1994

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

CIVIL ACTION NO. 93-C-642-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this \_\_\_\_\_ day of \_\_\_\_\_, 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, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, SERVICE COLLECTION ASSOCIATION, INC., appears by K. Jack Holloway; the Defendant, CHRIS L. COONCE, appears not, but makes default; the Defendant, LIZABETH A. COONCE, appears not, but makes default; and the Defendant, TRUDY K. COONCE KENDALL, appears not, but makes default.

NOTE: THIS ORDER IS TO BE MAILED  
BY MOVANT TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

The Court being fully advised and having examined the court file finds that the Defendant, CHRIS L. COONCE, acknowledged receipt of Summons and Complaint on August 2, 1993; that the Defendant, LIZABETH A. COONCE, acknowledged receipt of Summons and Complaint on August 2, 1993; that the Defendant, TRUDY K. COONCE KENDALL, acknowledged receipt of Summons and Complaint on July 26, 1993; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., acknowledged receipt of Summons and Complaint on July 16, 1993; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on July 15, 1993; that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 19, 1993; and that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 15, 1993.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on August 5, 1993; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer, Counterclaim and Cross-Claim on August 4, 1993; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its answer on July 7, 1993; and that the Defendants, CHRIS L. COONCE, LIZABETH A. COONCE, and TRUDY K. COONCE KENDALL, 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 Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seven (7), Block Five (5), of BLOCKS 1, 2, 3, 4, 5, 6, 7, 8 & 9, LOUISVILLE HEIGHTS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Defendant, CHRIS L. COONCE, is one and the same person as CHRISTOPHER LEE COONCE. The Defendant, LIZABETH A. COONCE, is one and the same person as LIZABETH HOWELL and as LIZABETH STREETER.

The Court further finds that on January 26, 1987, the Defendants, CHRIS L. COONCE and TRUDY COONCE, then husband and wife, executed and delivered to Mercury Mortgage Co., Inc., a mortgage note in the amount of \$28,300.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, CHRIS L. COONCE and TRUDY COONCE, then husband and wife, executed and delivered to Mercury Mortgage Co., a mortgage dated January 26, 1987, covering the above-described property. Said mortgage was recorded on January 28, 1987, in Book 4998, Page 566, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 30, 1991, Mercury Mortgage Co., Inc. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of

Mortgage was recorded on July 30, 1991, in Book 5338, Page 1383, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1991, the Defendants, CHRIS L. COONCE and LIZABETH A. COONCE, 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, CHRIS L. COONCE and LIZABETH A. COONCE, 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 their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, CHRIS L. COONCE and LIZABETH A. COONCE, are indebted to the Plaintiff in the principal sum of \$33,762.21, plus interest at the rate of Nine (9%) percent per annum from July 13, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$258.00 (\$250.00 abstracting fees, \$8.00 fee for recording Notice of Lis Pendens).

The Defendant, SERVICE COLLECTION ASSOCIATION, INC., claims an interest in the property by virtue of a judgment dated December 26, 1991 and filed December 27, 1991, in the amount of \$2,120.45, plus penalties and interest, such lien is inferior to the lien of the Plaintiff.

The Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property by virtue of a Tax Warrant

Number ITI92018272-00 dated October 13, 1992, and filed October 28, 1992, in the amount of \$507.59, plus penalties and interest, such lien is inferior to the lien of the Plaintiff.

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 personal property taxes in the amount of \$31.00 which became a lien on the property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Defendant, TRUDY K. COONCE KENDALL, has no right, title or interest in or to the subject property.

On February 24, 1993, the personal liability of the Defendants, CHRIS L. COONCE, and LIZABETH A. COONCE, on the debt represented by the subject note and mortgage was discharged in United States Bankruptcy Court for the Northern District of Oklahoma, Case Number 92-B-3700C, a Chapter 7 Bankruptcy.

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

IN REM judgment against the Defendants, CHRIS L. COONCE and LIZABETH A. COONCE, in the principal sum of \$33,762.21, plus interest at the rate of Nine (9%) percent per annum from July 13, 1993 until judgment, plus interest thereafter at the current legal rate of 4.51 percent per annum until paid, plus the costs of this action in the amount of \$258.00, 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 Defendant, TRUDY K. COONCE KENDALL, has no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment in the amount of \$507.59, plus penalties and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., have and recover judgment in the amount of \$2,120.45, plus penalties and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$31.00, plus penalties and interest, for personal property taxes for the years 1991 and 1992, plus the costs of this action.

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, CHRIS L. COONCE and LIZABETH A. COONCE, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

**Third:**

In payment of Defendant, SERVICE COLLECTION ASSOCIATION, INC., in the amount of \$2,120.45, plus penalties and interest.

**Fourth:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$31.00, personal property taxes which are currently due and owing.

**Fifth:**

In payment of Defendant, STATE OF OKLAHOMA,  
ex rel. OKLAHOMA TAX COMMISSION, in the  
amount of \$507.59, plus penalties and  
interest.

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.

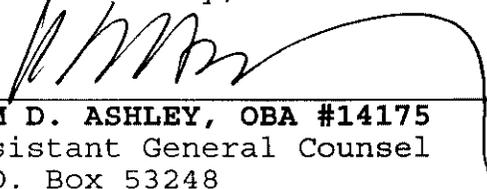
**S/ THOMAS R. BRETT**  
UNITED STATES DISTRICT JUDGE

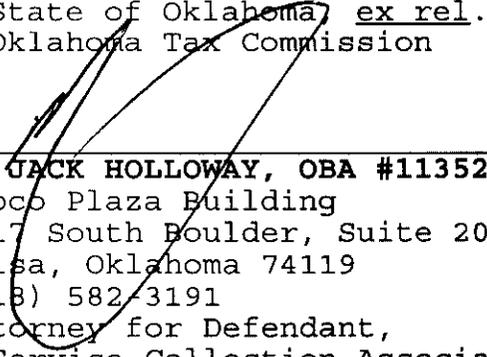
APPROVED:

STEPHEN C. LEWIS  
United States Attorney

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

  
J. DENNIS SEMLER, OBA #8076  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4841  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

  
KIM D. ASHLEY, OBA #14175  
Assistant General Counsel  
P.O. Box 53248  
Oklahoma City, Oklahoma 73152-3248  
(405) 521-3141  
Attorney for Defendant,  
State of Oklahoma, ex rel.  
Oklahoma Tax Commission

  
K. JACK HOLLOWAY, OBA #11352  
Mapco Plaza Building  
1717 South Boulder, Suite 200  
Tulsa, Oklahoma 74119  
(918) 582-3191  
Attorney for Defendant,  
Service Collection Association, Inc.,

Judgment of Foreclosure  
Civil Action No. 93-C-642-B

NBK:flv

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
GENEVA JANE CANTERO EFIRD;  
TOM EFIRD;  
JOHN CANTERO;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,  
Defendants.

ENTERED ON DOCKET  
DATE APR 25 1994

**FILED**

APR 25 1994

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

CIVIL ACTION NO. 93-C-454-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this \_\_\_\_ day of \_\_\_\_\_, 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, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma,** appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendants, **Geneva Jane Cantero Efird and Tom Efird,** appear not, having previously filed their Disclaimers; the Defendant, **John Cantero,** appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, **Geneva Jane Cantero Efird,** acknowledged receipt of Summons and Complaint on May 25, 1993; that the Defendant, **Tom Efird,** acknowledged receipt of Summons and Complaint on May 25, 1993; that the Defendant, **John Cantero,**

NOTE: THIS ORDER IS TO BE MAILED  
BY MOVANT TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

acknowledged receipt of Summons and Complaint on May 19, 1993; that Defendant, **County Treasurer, Tulsa County, Oklahoma,** acknowledged receipt of Summons and Complaint on May 18, 1993; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma,** acknowledged receipt of Summons and Complaint on May 17, 1993.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answers on June 7, 1993; that the Defendant, **Geneva Jane Cantero Efird,** filed her Disclaimer on May 28, 1993; that the Defendant, **Tom Efird,** filed his Disclaimer on May 28, 1993; and that the Defendant, **John Cantero,** mailed to Plaintiff a handwritten letter stating that the property did not belong to him, but has otherwise failed to file an answer with the Court and his 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 Twenty-seven (27), Block Nine (9), ROLLING HILLS THIRD ADDITION, an Addition in Tulsa County, Oklahoma, according to the recorded plat thereof.**

The Court further finds that on August 6, 1979, Willis Dean Cantero and Geneva Jane Cantero executed and delivered to Modern American Mortgage Corporation, their mortgage note in the

amount of \$34,050.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Willis Dean Cantero and Geneva Jane Cantero, then husband and wife, executed and delivered to Modern American Mortgage Corporation, a mortgage dated August 6, 1979, covering the above-described property. Said mortgage was recorded on August 7, 1979, in Book 4418, Page 1071, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 30, 1980, Modern American Mortgage Corporation assigned the above-described mortgage note and mortgage to Union National Bank of Little Rock. This Assignment of Mortgage was recorded on November 12, 1980, in Book 4509, Page 1351, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1989, Union National Bank of Arkansas, Little Rock, Arkansas, formerly known as Union National Bank of Little Rock assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development, his successors and assigns. This Assignment of Mortgage was recorded on February 13, 1989, in Book 5166, Page 1239, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1989, Geneva Jane Cantero (Efird), then a single person, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose due to such defendant's default in paying the installments. Superseding

agreements were reached between these same parties on May 1, 1990 and June 1, 1991.

The Court further finds that on July 2, 1984, Willis Dean Cantero and Geneva Jane Cantero, then husband and wife, entered into a contract for exterior repairs to the property and executed and delivered a mortgage in the amount of \$4,200.00 to cover payment therefore. This mortgage is now held by the Plaintiff pursuant to an assignment dated February 2, 1993, and recorded on February 10, 1993, in Book 5476, Page 643, in the records of Tulsa County, Oklahoma, and upon foreclosure of the subject first mortgage should be declared a valid lien subordinate to the Plaintiff's first mortgage described above.

The Court further finds that the Defendant, Geneva Jane Cantero Efird, is one and the same person and sometimes known as Jane Cantero, Geneva Jane Cantero, Geneva Efird, and Jane Efird.

The Court further finds that the Defendant, Geneva Jane Cantero Efird, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Geneva Jane Cantero Efird, is indebted to the Plaintiff in the principal sum of \$45,482.60, plus interest at the rate of 10 percent per annum from May 13, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 for recording Notice of Lis Pendens.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$36.00 which became liens on the property as of 1986 (\$1.00); 1987 (\$5.00); 1988 (\$5.00); 1989 (\$4.00); 1991 (\$21.00). Said liens are inferior to the interest of the Plaintiff, **United States of America**.

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

The Court further finds that the Defendants, **Geneva Jane Cantero Efird and Tom Efird**, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendant, **John Cantero**, is in default and therefore has no right, title, or interest in the subject real property.

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 in rem judgment against the Defendant, **Geneva Jane Cantero Efird**, in the principal sum of \$45,482.60, plus interest at the rate of 10 percent per annum from May 13, 1993 until judgment, plus

interest thereafter at the current legal rate of 4.51 percent per annum until paid, plus the costs of this action in the amount of \$8.00 for recording Notice of Lis Pendens, 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 Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover in rem judgment for the remaining amount owing on a mortgage now held by the Plaintiff pursuant to an assignment dated February 2, 1993, and recorded on February 10, 1993, in Book 5476, Page 643, in the records of Tulsa County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$36.00 for personal property taxes for the years 1986 (\$1.00); 1987 (\$5.00); 1988 (\$5.00); 1989 (\$4.00); 1991 (\$21.00), plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Geneva Jane Cantero Efird; Tom Efird; John Cantero; and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, Geneva Jane Cantero Efird, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the

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

**First:**

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

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff in the principal sum of \$45,482.60, plus interest at the rate of 10 percent per annum from May 13, 1993 until judgment, plus interest thereafter at the legal rate until fully paid;

**Third:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$36.00, personal property taxes which are currently due and owing;

**Fourth:**

In payment of the judgment rendered herein in favor of the Plaintiff for the remaining amount owing on a mortgage now held by the Plaintiff pursuant to an assignment dated February 2, 1993, and recorded on February 10, 1993, in Book 5476, Page 643, in the records of Tulsa County, Oklahoma.

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.

S/ THOMAS R. BRETT

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UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

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

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J. DENNIS SEMLER, OBA #8076  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4841  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 93-C-454-B

NBK:css

ENTERED ON DOCKET

DATE 4-25-94

**FILED**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA APR 25 1994

RUSSELL BAUER and TERRILL  
LANDRUM,

Plaintiffs,

vs.

BALBOA INSURANCE COMPANY,

Defendant.

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

No. 93 C 924 E

ORDER FOR DISMISSAL WITH PREJUDICE

The Joint Motion for Dismissal of the Plaintiffs and the Defendant, and each of them, having come on before this Court on the 22 day of April, 19 94, requesting this Court to dismiss the above styled and numbered cause with prejudice for the reason that the parties have settled each and all claims asserted herein;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause be and hereby is dismissed with prejudice.

S/ JAMES O. ELLISON

\_\_\_\_\_  
U. S. DISTRICT JUDGE



trial court advised Petitioner of her right to a direct appeal, Petitioner did not seek to withdraw her guilty pleas or otherwise attempt to appeal her conviction within the applicable time periods.

In September 1990, Petitioner filed an application for post-conviction relief in the District Court of Tulsa County, alleging that her former convictions were improperly used to enhance her sentence; one of the former convictions used to enhance her sentence was not her conviction; and the district court lacked jurisdiction to rule on one of her prior convictions. The district court denied relief on March 27, 1991, on the basis that Petitioner had not sought a direct appeal. On June 17, 1991, the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief, finding that Petitioner was advised of her right to appeal but that she took no steps to attempt to perfect a timely direct appeal and that she had offered no reason for her failure to appeal.

In January 1992, Petitioner filed a second application for post-conviction relief and requested for an appeal out of time. In addition to raising the same grounds for relief, Petitioner argued that her trial counsel was ineffective because he failed to challenge the constitutionality of her prior convictions; that she was denied due process because the district court delayed in ruling on her case and because her counsel misinformed her that she had no appealable grounds. On April 30, 1992, the district court denied Petitioner's application on the basis that the issues were either

res judicata or were waived. As to ineffective assistance, the court concluded that Petitioner's trial counsel was not ineffective. On September 22, 1992, The Court of Criminal Appeals affirmed, finding that Petitioner's reasons for failing to appeal were invalid and that Petitioner failed to show that she was entitled to relief.

In January 1993, the Petitioner filed the present application for a writ of habeas corpus, restating the same grounds she had alleged in her second application for post-conviction relief. In her brief, Petitioner argued that she could show sufficient cause to excuse her procedural default because her counsel misled her to believe that she had no appealable grounds.

Respondent objected to Petitioner's application, arguing that the Petitioner had procedurally defaulted her claims; that the Oklahoma Court of Criminal Appeals rested its decision on an adequate and independent state procedural bar; and that Petitioner failed to show cause and prejudice, or a fundamental miscarriage of justice to excuse her procedural default. The Petitioner has not submitted a reply.

## II. DISCUSSION

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged

violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991).

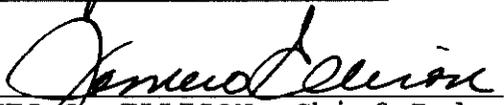
Petitioner does not dispute that the decision of the Oklahoma Court of Criminal Appeals rested upon a state procedural bar. She argues, however, that her counsel's failure to file a direct appeal, although he found it futile, constitutes sufficient cause to excuse her default. While ineffective assistance of counsel may provide sufficient cause to excuse a procedural default, the mere failure to appeal an appealable judgment is not per se ineffective. Belford v. United States, 975 F.2d 310, 315 (7th Cir. 1992). Additionally, an attorney does not have a duty in every case to advise a defendant of his limited right to appeal a guilty plea.

Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989). To prove ineffective assistance of counsel, however, Petitioner must demonstrate that her counsel's performance fell below an objective standard of reasonableness, and that if counsel had filed an appeal that Petitioner would have had a reasonable probability of obtaining relief. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1992); Strickland v. Washington, 466 U.S. 668, 694 (1984). Because the Petitioner has not shown how she was prejudiced, the Court concludes that she has failed to satisfy the Strickland test and consequently failed to meet the cause and prejudice standard.

**ACCORDINGLY, IT IS HEREBY ORDERED:**

- (1) That the Attorney General for the State of Oklahoma be **dismissed** as a party in this case; and
- (2) That this petition for a writ of habeas corpus be **denied** as procedurally barred.

IT IS SO ORDERED this 22<sup>nd</sup> day of April, 1994.

  
JAMES O. ELLISON, Chief Judge  
UNITED STATES DISTRICT COURT



ENTERED ON DOCKET  
DATE APR 25 1994  
**FILED**

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

APR 22 1994 *ml*

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

JOHNNY LEE WASHINGTON, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RON CHAMPION, )  
 )  
 Respondent. )

No. 92-C-834-B

**ORDER**

At issue before the Court for consideration are Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Respondent's response and a supplemental response, and Petitioner's reply and supplemental reply. The Court determines that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992). The Court also determines that the Attorney General is not a proper party in this case because the Petitioner is presently in custody pursuant to the state judgment in question.<sup>1</sup> See Rule 2(a) and (b) of the Rules Governing Section 2254 Cases.

**I. BACKGROUND**

In April 1986, a Washington County jury found Petitioner

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<sup>1</sup>Although the Petitioner is no longer incarcerated for the conviction under attack [docket #11 and docket #21 at 2], this Court has previously construed this petition to assert a challenge to Petitioner's present sentence to the extent that it has been enhanced by this allegedly invalid prior conviction [docket #13]. See Gamble v. Parsons, 898 F.2d 117, 118 (10th Cir. 1990).

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guilty of the charge of unlawful distribution of a controlled substance, after former conviction of two or more felonies. The trial court sentenced Petitioner to ten-year imprisonment. Although the Petitioner expressed a desire to proceed pro se on appeal, the trial court appointed the Appellate Public Defender and stated "I'm protecting your rights by making sure that you have proper counsel appointed for you. If you then choose of your own desire to discharge him, that's up to you. I would not think it would be in your best interest, but that's up to you." (Docket #20, State Record Vol. I, Sentencing hearing tr. at 4-9.)

On July 29, 1987, following the filing of a petition in error, the Public Defender assigned to the Petitioner filed a motion to withdraw in the Court of Criminal Appeals on the basis of a conflict of interest. She argued that Petitioner had notified her by written affidavit attached to the motion that he desired to proceed pro se, and that he had filed a bar complaint against her and a federal lawsuit against the agency on the basis that his appeal was not timely prosecuted.<sup>2</sup> (Docket #20, State Court Record Vol. I.) On August 5, 1987, Petitioner filed a pro se motion requesting the "withdraw[al] [of the] Oklahoma Appellate Public Defender and [for] permission to proceed Pro Se in Forma Pauperis." Petitioner asserted that "the lack of staff" at the Public Defender's Office would lead "to ineffective assistance, frivolous documents, needless to say a lengthy delay." (Id.)

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<sup>2</sup>This Court later consolidated Petitioner's case, alleging delay in the prosecution of his direct appeal, No. 92-C-79-E, with Harris v. Champion, 90-C-448-E.

On August 10, 1987, without holding a hearing or otherwise making any inquiry, the Court of Criminal Appeals granted Petitioner's request to proceed pro se, permitted the Public Defender to withdraw, and gave Petitioner an additional ninety days to file his appellate brief. In February 1988, Petitioner moved for fundamental error review because he was under house arrest and had no access to legal materials to prepare a brief.<sup>3</sup> (Id.) On March 15, 1988, the Court of Criminal Appeals granted Petitioner's motion for fundamental error review and summarily affirmed the conviction. The Court found "no fundamental error; appellant appears to have had a fair trial and the proof of his guilt was strong, and the sentence was the minimum allowed for an after former conviction of a prior felony." (Id.)

Next Petitioner sought post-conviction relief in the District Court of Washington County. He alleged (1) that the trial court wrongfully withheld exculpatory impeachment evidence from him at trial; (2) that the trial court abused its discretion when it denied his motion to disqualify trial counsel and have new counsel appointed; and (3) that his trial counsel provided ineffective assistance at trial. The District Court denied relief, holding that "the issues raised by the petitioner have been or could have been raised on direct appeal" and that Petitioner's ineffective-assistance-of-counsel claim lacked any merit. (Docket #24.)

On appeal from the denial of post-conviction relief,

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<sup>3</sup>Rule 3.6 of the Court of Criminal Appeals provides in part that "[w]hen the briefs are not filed, or when an appearance is not made, the cause will be submitted for fundamental error only."

Petitioner raised the same three grounds for relief and argued for the first time in his "statement of facts" that he was denied his right to counsel on direct appeal when the Court of Criminal Appeals failed to inquire if he was competent to proceed pro se.<sup>4</sup> (Docket #20, "Petition in Error and Pro Se Brief in support of Appeal from Denial of Post-conviction relief" at 10.) The Oklahoma Court of Criminal Appeals affirmed the denial of Petitioner's application and found that "all issues previously ruled upon by this Court are res judicata, and all issues not raised in the direct appeal, which could have been raised, are waived." The Court did not address Petitioner's allegation regarding his right to counsel on direct appeal. (Docket #20, "Order affirming denial of application for post-conviction relief.")

In September 1992, Petitioner filed the present request for a writ of habeas corpus. He reasserted his claims regarding the ineffective assistance of trial counsel and the withholding of the exculpatory impeachment evidence, and argued he was denied his Sixth Amendment right to counsel on direct appeal. In particular, Petitioner alleged that he did not have a chance to "waive [his] right to appellate counsel with eyes open" because the Court of Criminal Appeals failed to ensure that he understood "the dangers, and hazards of self representation." [Docket #1.]

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<sup>4</sup>Petitioner stated that he "question[ed] the Criminal Court of Appeals granting him permission to proceed pro se on his direct appeal, even though the petitioner requested permission, as a constitutional safeguard the appeals court should have given a competency test to determine if the petitioner was capable of handling his own appeal as the U.S. Supreme Court has held in certain instances as a rule."

Respondent argued that Petitioner had procedurally defaulted his first two grounds of relief; that the Oklahoma Court of Criminal Appeals rested its decision on an adequate and independent state procedural bar; and that Petitioner failed to show cause and prejudice, or a fundamental miscarriage of justice to excuse his procedural default. Regarding Petitioner's third ground for relief, Respondent asserted that Petitioner had knowingly and voluntarily waived his right to counsel on direct appeal, and that the federal court should presume correct the state court's findings of fact as to this issue. (Docket #20.)

In his reply, Petitioner restated his arguments in support of his first two claims and asserted that "[h]ad [he] known about the dangers and hazards of self-representation their [sic] no way he would have requested permission from the Appellate Court to proceed Pro Se; [sic] on appeal." He argued that the record did not contain evidence of a knowing and intelligent waiver especially because his request to proceed pro se "was based on Appellate Counsel's extremely heavy case load and understaffing which led to extension of time and questions about effectiveness." (Docket #21 at 8.)

## II. DISCUSSION

### A. Right to Counsel on Direct Appeal

The Court will address first Petitioner's third ground for relief that the Oklahoma Court of Criminal Appeals failed to ensure that he knowingly, intelligently, and voluntarily waived his right

to counsel on direct appeal. The initial inquiry in any habeas proceeding is, however, whether the Petitioner has exhausted his available state court remedies. Rose v. Lundy, 455 U.S. 509 (1982). The exhaustion doctrine, codified in 28 U.S.C. § 2254(b), is based upon notions of federalism and comity, and requires a federal court, before considering the merits of a habeas claim, to determine that the identical claims raised in the habeas petition have either been presented to the highest court of the state in which the judgment of conviction was entered, or that there are no procedures presently available for such presentation. Id.

In the case at hand, the Petitioner did not fairly present to the state courts his claim that he did not knowingly, intelligently, and voluntarily waive his right to appellate counsel. He questioned his ability to proceed pro se for the first time in the factual statement in his appellate brief from the denial of post-conviction relief, but at no time expanded this argument as a separate enumerated ground for relief supported by federal and state case law. See Nadworny v. Fair, 872 F.2d 1093 (1st Cir. 1989); Martin v. Solem, 801 F.2d 324, 330-31 (8th Cir. 1986); Daye v. Attorney General of the State of New York, 696 F.2d 186 (2d Cir. 1982); see also Andrews v. Deland, 943 F.2d 1162, 1182 n.28 (10th Cir. 1991), cert. denied, 112 S. Ct. 1213 (1992) (claim was fairly presented to the state courts when it was clearly raised as a distinct issue in the brief to the Utah Supreme Court). In any case, the Respondent has failed to state in his supplemental response whether the Petitioner has exhausted his state remedies as

to this ground for relief. See Granberry v. Greer, 481 U.S. 129, 134 (1987) (the respondent has the duty to inform the district court whether the petitioner has exhausted all available state remedies); Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (the state may waive the exhaustion defense by failing to raise it in federal district court).

When the Respondent fails to assert the exhaustion defense, as in this case, this Court may "consider it waived if the interests of comity, federalism, and justice would be served." Hannon v. Maschner, 981 F.2d 1142, 1146 (10th Cir. 1992) (quoted case omitted); see also Plunket v. Johnson, 828 F.2d 954, 956 (2d Cir. 1987) (interpreting the Supreme Court reasoning in Granberry to conclude that "district courts also must exercise their discretion to determine what effect to give to a state's waiver of the exhaustion defense, and must not adopt a per se rule that in the case of nonexhaustion the petition must be dismissed). Because the Court concludes, as pointed out more fully below, that the Petitioner was denied his due process rights under Douglas v. California, 372 U.S. 353 (1963), the Court finds that the interests of justice would be served in this case by considering the exhaustion defense waived and by reaching the merits of Petitioner's third ground for relief without incurring unnecessary delay. See Granberry, 481 U.S. at 135 (it may be appropriate for appellate court to find state waived nonexhaustion defense in order to avoid unnecessary delay in granting relief that is plainly warranted); Hannon, 981 F.2d at 1146 (holding that interests of

justice would be served by reaching the merits of the petition and granting immediate relief where the district court had concluded that petitioner's constitutional rights were violated and his repeated attempts to seek review of his claims were thwarted).

1. Case Law

In Douglas v. California, 372 U.S. 353, 355 (1963), the Supreme Court held that the Fourteenth Amendment guarantees a criminal defendant the right to effective assistance of counsel in his first appeal as of right. In Oklahoma, the right to counsel on direct appeal is guaranteed to a criminal defendant who has been convicted of a felony, by article 2, section 20 of the Oklahoma Constitution. Although the Court in Douglas was not precise on whether the right to counsel was based on due process or equal protection, that issue was clarified in Evitts v. Lucey, 469 U.S. 387 (1985), where the Court determined that the right to counsel on an appeal as of right is a matter of due process. Id. at 402-405. See also Penson v. Ohio, 488 U.S. 75, 85 (1988) ("The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to the appellate stage.")

In the alternative, a criminal defendant has a Constitutional right under the Sixth Amendment to proceed pro se. Faretta v. California, 422 U.S. 806, 832 (1975); Stevenson v. State, 702 P.2d 371, 374 (Okla. Crim. App. 1985). It is well established in Oklahoma and in the Tenth Circuit, however, that in order to invoke the Sixth Amendment right to self-representation, the request must

be: (1) knowing and intelligent, and (2) unequivocal. See United States v. Padilla, 819 F.2d 952, 956 (10th Cir. 1987); Nave v. State, 808 P.2d 991, 994 (Okla. Crim. App. 1991) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)). A court must not only determine whether the defendant has made an unequivocal demand to represent himself, but also "whether the defendant has the capacity to decide intelligently and to understand what he is doing, i.e., whether he can make a valid waiver of his right to counsel." Coleman v. State, 617 P.2d 243, 246 (Okla. Crim. App. 1980).

In recognition of the thin line that a court must traverse in evaluating demands to proceed *pro se*, and the knowledge that shrewd litigants can exploit this difficult constitutional area by making ambiguous self-representation claims to inject error into the record, state and federal courts further require "that the trial court advise[] the defendant of the dangers and disadvantages of self-representation." Nave, 808 P.2d at 994 (cited cases omitted); see also Padilla, 819 F.2d at 956-57. "The trial judge must clearly explain to the defendant the inherent disadvantages in such a waiver, including a lack of knowledge and skill as to rules of evidence, procedure and criminal law. The record must establish that 'he knows what he is doing and his choice is made with eyes open.'" Coleman, 617 P.2d at 246; see also Nave, 808 P.2d at 994 (cited case omitted). "A record of the knowing and voluntary waiver is mandatory, and absent a sufficient record, waiver will not be found." Nave, 808 P.2d at 994.

The same standard applies to a request to proceed *pro se* which

a criminal defendant submits for the first time to the Oklahoma Court of Criminal Appeals. See Hendricks v. Zenon, 993 F.2d 664, 670 (9th Cir. 1993) (holding that petitioner was entitled to habeas relief because the Oregon Court of Appeals did not apprise petitioner of the dangers and disadvantages of self-representation during direct appeal from state conviction); Smith v. Dahm, 779 F. Supp. 1045 (D.Neb. 1991) (holding that petitioner was deprived of fundamental right to counsel during his one and only direct appeal from state court conviction warranting habeas relief); see also Baker v. Kaiser, 929 F.2d 1495, 1500 (10th Cir. 1991) (holding that defendant had a constitutional right to counsel during the ten-day period for filing a notice of appeal).

2. Case in Question

After carefully reviewing the record in this case, the Court concludes that the Petitioner did not knowingly and intelligently waive his right to counsel and elected to proceed pro se on appeal. While it is undisputed that the Petitioner voluntarily and unequivocally requested the withdrawal of his appointed counsel, there is no indication in the record that the Court of Criminal Appeals conducted a hearing or otherwise attempted to determine whether the Petitioner appreciated the dangers and disadvantages of self-representation. See Cross v. United States, 893 F.2d 1287, 1291 (11th Cir.), cert. denied, 498 U.S. 849 (1990) (noting that if the evidence in the record were only petitioner's statement that he "want[ed] to be allowed to represent myself through the whole

trial," the court would be compelled to find reversible error). Nor does Petitioner's motion aver that he was aware of his constitutional right to appointed counsel on appeal and its advantages, but that nonetheless he wished to waive the services of an attorney. Cf. People v. Jewell, 151 A.D.2d 607, 542 N.Y.S.2d 695 (N.Y.A.D. 1989) (although appellate court had not conducted in-person oral inquiry before granting defendant's application to proceed pro se on direct appeal, defendant's comprehension of his constitutional rights was clear from his own written words which unequivocally asserted his knowledgeable waiver of counsel). Rather the motion indicates that Petitioner was faced with nothing but a "hobson's choice," or no real choice at all.<sup>5</sup> He either accepted the inordinate delay associated with the representation by the Appellate Public Defender or he proceeded pro se.

As evidence of a knowing and intelligent waiver, the Respondent only points to the fact that Petitioner filed a bar complaint against the Public Defender and voluntarily asked that she be removed from his case. That evidence, however, does not exonerate the Court of Criminal Appeals from its duty to warn Petitioner about the dangers of self-representation. Absent a discussion regarding the hazards of self-representation, this Court can only look to "the particular facts and circumstances surrounding that case, including the background, experience and

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<sup>5</sup>Webster's Third new International Dictionary 1076 (1981) ("an apparent freedom to take or reject something offered when in actual fact no such freedom exists; the forced acceptance of something whether one likes it or not").

conduct of the accused' to determine whether the waiver was knowing and intelligent despite the absence of a specific inquiry on the record." Hendricks, 993 F.2d at 670. In the case at hand, however, the record does not reveal that Petitioner had any particular experience in legal matters. See id. Petitioner's motion for fundamental error review shows otherwise. Additionally, the State has not presented any particular circumstances that Petitioner's background, prior experience, or conduct demonstrate he made a knowing and intelligent waiver of his right to counsel on direct appeal.

Accordingly, the Court concludes that the failure of the Oklahoma Court of Criminal Appeals to ensure that Petitioner knowingly and intelligently sought the relinquishment of appointed counsel, resulted in the denial of due process under Douglas v. California, 372 U.S. 353 (1963). The Court, therefore, will grant Petitioner's application for a writ of habeas corpus unless within sixty (60) days after this order becomes final, including any appeal from it, the State of Oklahoma and the Oklahoma Court of Criminal Appeals grant the Petitioner a new direct appeal with the benefit of appointed counsel unless he knowingly and intelligently elects, as required by law, to proceed pro se. See Baker, 929 F.2d at 1500 (holding that defendant who was denied the right to counsel during the ten-day period for filing a notice of appeal was entitled to habeas corpus relief unless the Oklahoma state courts would provide him with an out of time appeal within a reasonable time); see also Hendricks, 993 F.2d at 670 (reversing and remanding

for the district court to issue a writ of habeas corpus and determine the reasonable time in which the State of Oregon should grant petitioner a new appeal with the benefit of appointed counsel unless he knowingly and intelligently elects to proceed pro se).

**B. Ineffective Assistance of Trial Counsel and Wrongful Withholding of Exculpatory Evidence**

The Court declines to address whether Petitioner procedurally defaulted his first two grounds for relief now that the Petitioner may have an opportunity to raise them on direct appeal.

**III. CONCLUSION**

**ACCORDINGLY, IT IS HEREBY ORDERED:**

- (1) That the Attorney General for the State of Oklahoma be dismissed as a party in this case;
- (2) That this petition for a writ of habeas corpus be granted unless within sixty (60) days after this order becomes final, including any appeal from it, the State of Oklahoma and the Oklahoma Court of Criminal Appeals grant the Petitioner a new direct appeal with the benefit of appointed counsel unless he knowingly and intelligently elects, as required by law, to proceed pro se; and
- (3) That the Respondent shall notify the Court if the State of Oklahoma and the Oklahoma Court of Criminal Appeals

grant the Petitioner a new direct appeal.

SO ORDERED THIS 22<sup>nd</sup> day of Apr., 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



claim in the State courts and thus he is not entitled to review in this habeas corpus case. Petitioner replies that the State court denied him a fair trial and that his fourth amendment claim is meritorious.

## II. DISCUSSION

The Court need not belabor its discussion of Petitioner's application for a writ of habeas corpus because the State court granted Petitioner a full and fair opportunity to litigate his fourth amendment claim. In Stone v. Powell, 428 U.S. 465, 494 (1976), the Supreme Court stated that where the state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial. The Tenth Circuit has reiterated that a federal habeas corpus court need not address a fourth amendment question as long as the state court has given petitioner a full and fair opportunity for a hearing on the issue. Miranda v. Cooper, 967 F.2d 392, 400-01 (10th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 113 S. Ct. 347 (1992).

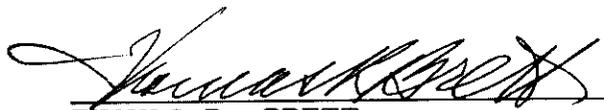
In this case, Petitioner received not one but several opportunities to fully, fairly, and adequately discuss the admissibility of the evidence in question in the State court. Petitioner first filed a motion to quash and suppress on December 15, 1988, for which arguments were heard and overruled by the magistrate at the December 20, 1988 preliminary hearing. After

Petitioner filed another Motion to Quash on January 4, 1989, his arguments were again heard and overruled at the February 1, 1989 arraignment. Petitioner also filed a Motion to Quash and Suppress on May 24, 1989, the day of the non-jury trial, and objected when the evidence was admitted. [Docket #6, ex. D-H.] Lastly, Petitioner raised this issue in his direct criminal appeal where the Oklahoma Court of Criminal Appeals held that Petitioner's warrantless arrest did not violate the Fourth Amendment. [Docket #6, ex. A-C.]

Therefore, the Court concludes that Petitioner's application for a writ of habeas corpus must be denied on the ground that Petitioner has had a full and fair opportunity to litigate his fourth amendment claim in the State court.

**ACCORDINGLY, IT IS HEREBY ORDERED:**

- (1) That the Attorney General for the State of Oklahoma be **dismissed** as a party in this case; and
  - (2) That this petition for a writ of habeas corpus be **denied**;
- IT IS SO ORDERED this 25 day of Apr., 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

SEARCHED ON EDOKEY  
APR 25 1994

GURKEE'S INTERNATIONAL, INC., )  
an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
THE SUN GROUP, INC., a )  
Florida corporation; ROBERT L. )  
BENSE, an individual, and JOSEPH )  
W. SCOTT, an individual, )  
 )  
Defendants. )

Case No. 93-C-1054-B

FILED

APR 22 1994

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

ORDER GRANTING JUDGMENT AND ADOPTING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now on this 15 day of April, 1994, there comes on for consideration the Magistrate's Report of Proposed Findings of Fact and Recommended Conclusions of Law concerning plaintiff's Motion to Impose Sanctions, filed February 17, 1994, and the affidavits in support thereof. The Court, having reviewed the proposed findings and recommendations of the United States Magistrate in the matter, finds that the proposed findings of fact set forth in the Magistrate's Report of Proposed Findings of Fact and Recommended Conclusions of Law, filed March \_\_, 1994 herein, should be adopted by the Court, together with the recommended conclusions of law thereupon.

IT IS THEREFORE ORDERED that judgment shall be entered in favor of plaintiff Gurkee's International, Inc. and against the defendants herein as follows:

1. On plaintiff's first cause of action against defendants The Sun Group, Inc. and Robert L. Bense, and in favor of plaintiff Gurkee's, a judgment declaring that:
  - (a) the refusal of defendants Sun and Bense to furnish guaranties of the October, 1993 line of credit loan to Gurkee's from Stillwater National Bank was a breach by defendants Sun and Bense of the Employment Agreement;

3

(b) the demands and claims of defendants Sun and Bense for compensation and distributions in excess of the amounts provided under the terms of the Employment Agreement and in preference to third party creditors of Gurkee's, was a breach of the Employment Agreement;

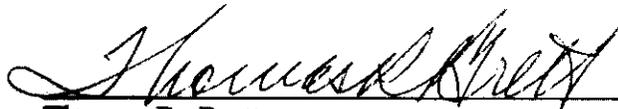
(c) the level of sales necessary to constitute "successful sales" under the Employment Agreement was not met by defendants Sun and Bense;

(d) defendants Sun and Bense failed to meet the terms of their engagement under the Employment Agreement with Gurkee's; and

(e) the stock ownership of defendants Sun and Bense in Gurkee's is cancelled and the stock is returned to Gurkee's under the Employment Agreement.

2. A judgment against defendants The Sun Group, Inc. and Robert L. Bense and in favor of plaintiff Gurkee's in the amount of \$22,962.87 for salary overdraws paid by plaintiff to defendants under the Employment Agreement, plus interest thereon at the Prime Rate published in the Wall Street Journal, until paid;
3. Judgment on plaintiff's second and third causes of action for the withholding trademarked sandal inventory, diversion of sales of trademarked inventory, and conversion of trade show booth and its contents, a judgment against defendants The Sun Group, Inc. and Robert L. Bense for \$75,326.78, trebled, for a total award of \$225,980.34 in favor of plaintiff Gurkee's, plus interest accruing on the judgment at the statutory rate, until paid;
4. Judgment on plaintiff's fourth and fifth causes of action for the withholding trademarked sandal inventory and conversion of inventory, a judgment against defendant Joseph W. Scott in the amount of \$66,264.00, trebled, for a total award of \$198,792.00 in favor of Gurkee's, plus interest accruing on the judgment at the statutory rate, until paid;
5. An order that the Court's Preliminary Injunction entered December 27, 1993, against defendants Sun and Bense be and is hereby converted into a permanent injunction against defendants Sun and Bense and in favor of plaintiff Gurkee's;
6. A judgment awarding against defendants Sun, Bense and Scott all of Gurkee's reasonable attorney's fees and actual, necessary costs and expenses in this litigation;
7. A judgment denying all relief requested by the defendants upon their counterclaims against the plaintiff herein.

AND IT IS SO ORDERED this 15 day of April, 1994.

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

**Thomas R. Brett**

**UNITED STATES DISTRICT JUDGE**

ENTERED ON DOCKET

DATE 4-25-94

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

EDWARD L. BRUCE )  
Plaintiff-Petitioner, )  
vs. )  
DONNA E. SHALALA, SECRETARY )  
OF HEALTH & HUMAN SERVICES. )  
Defendant-Respondent. )

No. 91-C-990-E  
**FILED**

APR 27 1994

Richard M. Law Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**JUDGMENT**

Pursuant to the Order of the Court dated April 12, 1994, relating to the Court's Order entered March 18, 1993, this Judgment has been prepared and agreed to by the parties.

IT IS THEREFORE ORDERED, that Plaintiff's motion seeking review is hereby granted to the extent that this Court has reversed the order of the administrative law judge, and judgment is rendered for Plaintiff.

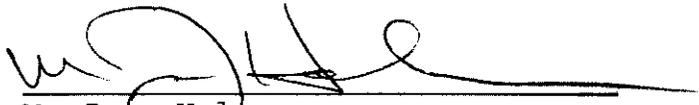
IT IS FURTHER ORDERED that the Defendant's motion for remand is hereby granted and this action is remanded for further proceedings consistent herewith.

This 21 day of April, 1994.

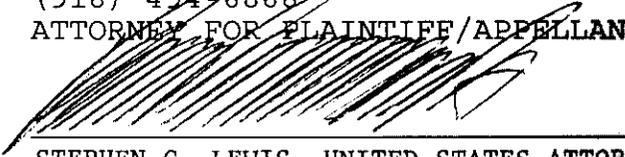
S/ JAMES O. ELISON

\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:



M. Jean Holmes  
WINTERS, KING & ASSOCIATES  
2448 E. 81ST STREET, STE. 5900  
Tulsa, OK 74137-4259  
(918) 494-6868  
ATTORNEY FOR PLAINTIFF/APPELLANT



STEPHEN C. LEWIS, UNITED STATES ATTORNEY  
Peter Bernhardt *UBA vs 744*  
Assistant U.S. Attorney  
3600 U.S. Courthouse  
Tulsa, OK 74103  
ATTORNEY FOR DEFENDANT/APPELLEE

ENTERED ON DOCKET

DATE 4-22-94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Lavell D. Thompson; Donna C. )  
 Thompson; L.C. Thompson; )  
 Loretta F. Thompson; COUNTY )  
 TREASURER, Tulsa County, Oklahoma )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

**FILED**

APR 21 1994

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

CIVIL ACTION NO. 94-C 129E

**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 20 day of April, 1994.

S/ JAMES O. ELISON

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

ENTERED ON DOCKET

DATE 4-22-94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
vs.

MARY JO ALLRED;  
CITY OF BROKEN ARROW;  
STATE OF OKLAHOMA ex rel.  
Oklahoma Tax Commission;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

**FILED**

APR 21 1994

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

CIVIL ACTION NO. 93-C-456-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day  
of April, 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**, Tulsa County,  
Oklahoma, and **Board of County Commissioners**, Tulsa County,  
Oklahoma, appear by J. Dennis Semler, Assistant District  
Attorney, Tulsa County, Oklahoma; the Defendant, **City of Broken  
Arrow**, appears by its attorney Michael R. Vanderburg; the  
Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**,  
appears by its attorney Kim D. Ashley; and the Defendant, **Mary Jo  
Allred**, appears not, but makes default.

The Court being fully advised and having examined the  
court file finds that the Defendant, **Mary Jo Allred**, was served  
with Summons and Complaint on July 1, 1993; that the Defendant,  
**City of Broken Arrow**, acknowledged receipt of Summons and

Complaint on May 27, 1993; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint on May 17, 1993; that Defendant, **County Treasurer**, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on May 18, 1993; and that Defendant, **Board of County Commissioners**, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on May 17, 1993.

It appears that the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, filed their **Answers** on June 7, 1993; that the Defendant, **City of Broken Arrow**, filed its Answer on or about June 18, 1993; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Answer, Counterclaim and Cross-claim on or about June 3, 1993; and that the Defendant, **Mary Jo Allred**, has failed to answer and her 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 Two (2), Block Six (6), VALLEY RIDGE, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on October 15, 1986, Mark Milberger and Deborah L. Milberger, husband and wife, executed and delivered to FirstTier Mortgage Co., a mortgage note in the

amount of \$58,650.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Mark Milberger and Deborah L. Milberger, husband and wife, executed and delivered to FirstTier Mortgage Co., a mortgage dated October 15, 1986, covering the above-described property. Said mortgage was recorded on October 22, 1986, in Book 4977, Page 2005, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 30, 1987, FirstTier Mortgage Co. assigned the above-described mortgage note and mortgage to Leader Federal Savings and Loan Association. This Assignment of Mortgage was recorded on January 8, 1988, in Book 5073, Page 2588, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 25, 1992, Leader Federal Bank for Savings fka Leader Federal Savings and Loan Association assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on March 2, 1992, in Book 5384, Page 1657, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 13, 1990, Mark Milberger and Deborah L. Milberger, husband and wife, granted a General Warranty Deed to the Defendant, Mary Jo Allred. This deed was recorded on July 13, 1990 in Book 5264, Page 1626, in the records of Tulsa County, Oklahoma. The Defendant, Mary Jo Allred, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on March 1, 1992, the Defendant, Mary Jo Allred, 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 Defendant, Mary Jo Allred, 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 her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Mary Jo Allred, is indebted to the Plaintiff in the principal sum of \$72,249.40, plus interest at the rate of 10 percent per annum from May 12, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$198.00 (\$190.00 fee for abstracting; \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, **City of Broken Arrow**, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat of Valley Ridge Addition.

The Court further finds that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, has a lien on the subject real property by virtue of tax warrant number ITI9100134700 dated January 31, 1991 and filed February 6, 1991,

in the amount of \$143.81, plus penalties and interest, but such lien is inferior to the lien of the Plaintiff.

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 personal property taxes in the amount of \$58.00 which became a lien on the property as of June 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

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 Defendant, **Mary Jo Allred**, in the principal sum of \$72,249.40, plus interest at the rate of 10 percent per annum from May 12, 1993 until judgment, plus interest thereafter at the current legal rate of 4.51 percent per annum until paid, plus the costs of this action in the amount of \$198.00 (\$190.00 fee for abstracting; \$8.00 fee for recording Notice of Lis Pendens), 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, **City of Broken Arrow**, has no right, title or interest in the subject real property, **except** insofar as it is the lawful holder of certain easements **as shown** on the duly recorded plat of Valley Ridge Addition.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, have and recover judgment in the amount of \$143.81, plus penalties and interest, by virtue of tax warrant number ITI9100134700 dated January 31, 1991 and filed February 6, 1991.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$58.00, plus penalties and interest, for personal property taxes for the year 1991, plus the costs of this action.

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

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, **Mary Jo Allred**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States **Marshal** for the Northern District of Oklahoma, commanding him to **advertise** and sell according to Plaintiff's election with or without appraisement the real

property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

**Third:**

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, in the amount of \$143.81, plus penalties and interest.

**Fourth:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$58.00, 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 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.

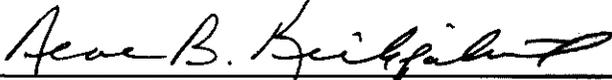
S/ JAMES O. ELLISON

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UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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



**J. DENNIS SEMLER, OBA #8076**  
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Attorney for Defendants,  
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Board of County Commissioners,  
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Attorney for Defendant,  
City of Broken Arrow



**KIM D. ASHLEY, OBA #14175**  
Assistant General Counsel  
P.O. Box 53248  
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(405) 521-3141  
Attorney for Defendant,  
State of Oklahoma ex rel.  
Oklahoma Tax Commission

Judgment of Foreclosure  
Civil Action No. 93-C-456-E

NBK:css

RECEIVED ON DOCKET  
APR 22 1994

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

**FILED**

APR 21 1994

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

WILLIAM F. HARVELL, )  
)  
Plaintiff, )  
)  
v. )  
)  
DEPARTMENT OF HEALTH AND HUMAN )  
SERVICES, Donna Shalala, Secretary, )  
)  
Defendant. )

92-C-1168-Wolfe

ORDER

The Secretary of Health and Human Services denied Social Security disability benefits to Plaintiff William Harvell. Harvell now appeals that decision. For the reasons discussed below, the case is remanded.

I. Standard of Review

In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g).<sup>1</sup> The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

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<sup>1</sup> Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

16

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

## II. Procedural History/Summary of Evidence

On April 19, 1991, Plaintiff applied for Social Security Disability benefits due to pain in his back.<sup>3</sup> Plaintiff was born on January 7, 1939 and has a 10th grade education. He has worked as a laborer for a city water and street department.

The evidence in the record can be summarized as follows.<sup>4</sup> Plaintiff has not engaged in substantial gainful activity since June of 1990. He quit working because of pain in his back and legs. At the time of the hearing he was 5'8" tall and weighed 212 pounds. Prior to quitting, he had worked for 20 years for the city. In his December 5, 1991 testimony before the Administrative Law Judge ("ALJ"), Plaintiff, who was not represented by counsel, said he could not walk very far. He testified that his daily activities included going to the coffee shop and occasional hunting and fishing. He also testified that walking causes pain.

---

<sup>2</sup> When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

<sup>3</sup> It was Plaintiff's second application for benefits. He first applied on July 16, 1990 and was denied. He did not appeal that decision.

<sup>4</sup> The summary provided by the ALJ (Record, pages 14-28) and the Brief In Support of Defendant's Administrative Decision (docket #14) also provide a fair representation of the evidence in the record.

A vocational expert also testified at the hearing. She said that Plaintiff could not return to his past work, but he could work in light truck driving jobs and/or in light unskilled assembly jobs.

The medical evidence included the following. On April 3, 1990, Plaintiff underwent a ventral herniorrhaphy. On June 18, 1990, Dr. William K. Smith, M.D. wrote that his examination "shows herniation of disc material at L5-S1 that occurs in the midline...On a scale of 1-4 this would be a 2-3...There is also herniation of disc material at L4-L5." *Record at 185.*

Dr. S.H. Shaddock, M.D., examined Plaintiff on July 17, 1990 and concluded that he had "lumbar intervertebral disc disease, L4-5 and L5-S1 and lumbar myofascial strain."

Dr. Michael Farrar, D.O., examined Plaintiff on November 21, 1990 and wrote:

**I am of the opinion he sustained injury to his lumbar spine in work related trauma that occurred on or about February 16, 1990...The injuries were to his lumbar spine with aggravated diskogenic disease...It is my opinion that only vocational rehabilitation and aptitude testing will he be able to return to the work force in some acceptable position. Without same, he will unfortunately become permanently and totally disabled from an economic basis." *Record at 188-192.***

On August 23, 1991, Dr. Glenn Cosby examined Plaintiff. He diagnosed Plaintiff with "lumbar disk disease with sciatic nerve root involvement"; "chronic bronchitis from a 90-pack [a] year history of cigarette smoking"; hypertension and "abdominal obesity, severe." Dr. Cosby also noted that Plaintiff had trouble walking and getting on-and-off the examination table. *Id at 194.*<sup>5</sup>

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<sup>5</sup> Dr. Cosby wrote: He[Plaintiff] walks with safety but somewhat slowly in the hallway; on dressing and undressing, getting on-and-off the examining table were noted to be done very slowly and with rather obvious pain in the low back." *Id.* at 194-195.

After examining the evidence, the ALJ found that Plaintiff was unable to perform his past relevant work. He also concluded that Plaintiff had the residual functional capacity to perform the full range of **medium** work and, as a result, that Plaintiff was not eligible for disability benefits. *Id.* at 27.<sup>6</sup>

### III. Legal Analysis

Three issues are raised by Plaintiff. First, did the ALJ fail in his duty to develop the record? Second, did the ALJ err in applying the Grid Regulations ("grids")? Third, was the ALJ's hypothetical question to the vocational expert improper?

The first issue is whether the ALJ properly developed the record, given the fact that Plaintiff was not assisted by counsel. The ALJ clearly has a basic obligation to develop a full and fair record. *Smith v. Secretary*, 587 F.2d 857, 860 (7th Cir. 1978). This duty of inquiry takes on special urgency when the claimant has little education and is unrepresented by counsel. *Dixon v. Heckler*, 811 F.2d 506, 508 (10th Cir. 1987).<sup>7</sup> The case can be remanded for a gathering of additional evidence if the ALJ fails in this duty. *Thompson v. Sullivan*, 933 F.2d 581, 586 (7th Cir. 1991).

In *Musgrave v. Sullivan*, 966 F.2d 1371, 1374, the court stated that a claimant's *pro se* status does not, in and of itself, **mandate** a reversal. What does mandate a reversal, however, was not specifically addressed. Instead, the court suggested that such a determination must be done on a **case-by-case** basis and offered the following analysis:

---

<sup>6</sup> The ALJ also found that Plaintiff "grossly exaggerates his multiple subjective complaints." *Id.* at 27.

<sup>7</sup> Also, see, *Kane v. Heckler*, 731 F.2d 1216, 1219 (5th Cir. 1984)(ALJ's obligation rises to special duty for unrepresented claimant unfamiliar with hearing process.)

The length, or brevity, of a **benefits hearing** is not dispositive of whether or not the ALJ met the heightened **obligation** to fully develop the record in a case where the claimant is **unrepresented**. We conclude that the more important inquiry is whether the **ALJ** asked sufficient questions to ascertain (1) the nature of a claimant's **alleged impairments**, (2) what on-going treatment and medication the **claimant** is receiving, and (3) the impact of the alleged impairment on a claimant's **daily** routine and activities. *Id. at 1374-75.*

In addition to the three questions in *Musgrave*, the case law also suggests that a fourth prong of analysis be used: the **ability** of the claimant to understand the hearing procedure. For example, in *Dixon v. Heckler*, 811 F.2d 506, 510 (10th Cir. 1987), the claimant, who had a sixth-grade education, was deemed illiterate. The *Dixon* court concluded that the ALJ failed in his **duty** to develop the record, in part, because the "the duty of inquiry takes on special urgency **when** the claimant has little education." *Id. at 510.* In *Musgrave*, however, the court found that the ALJ properly developed the record. Part of the finding rested on the fact that **claimant** was "educated [high school education] and articulate" and "understood and **effectively** responded to the ALJ's questions." *Id. at 1375.*

In the instant case, the hearing lasted but 20 minutes. While the brevity of the hearing is not dispositive, it is a **factor** for this Court to consider. During this short hearing, the ALJ asked Plaintiff **some** questions about his alleged impairments, on-going treatment and medication and the **impact** of the alleged impairment on Plaintiff's daily activities, but did not engage in an **extensive** inquiry. Upon review, however, the questions actually asked by the ALJ did **not** properly develop the record, given the circumstances in this case.

Plaintiff's alleged impairment is **back** pain. The ALJ asked only a few questions about that pain and solicited little, **if any**, meaningful responses about the degree of

Plaintiff's pain. In addition, the ALJ should have inquired more extensively as to Plaintiff's daily activities and the impact of his alleged impairment on those activities. The record also suggests (and claimant argues) that questions remain as to whether Plaintiff can do medium work. This issue needs further development.<sup>8</sup>

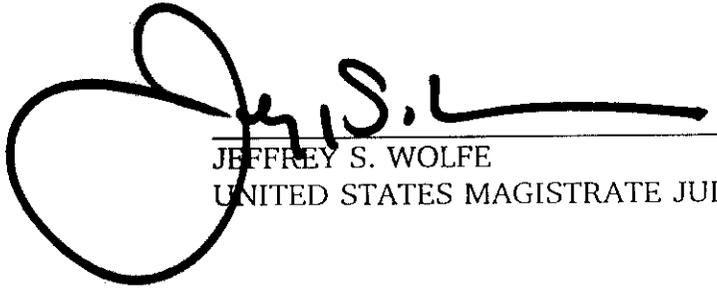
Furthermore, a serious question about the Plaintiff's level of understanding also requires remand.<sup>9</sup> The Plaintiff is in neither of the categories discussed in *Dixon* or *Musgrave*: he is neither illiterate nor does he appear to be "educated" and "articulate". Instead, he is somewhere in-between -- a former truck driver/laborer who has a 10th grade education. That, in itself, does not mandate a remand. However, at the hearing, Plaintiff's testimony was not responsive to the questions of the ALJ, strongly suggestive of the fact that he did not understand the process. Nearly every answer was brief, many only one or two words. At no time did he offer a narrative or a detailed explanation or otherwise advance his disability arguments. Obviously, this Court cannot know the reasons for such superficial responses, but the record suggests that he was unable to effectively understand and participate in any meaningful fashion at the hearing. That finding, coupled with the inadequacy of the ALJ's questions, means the case should be REMANDED for a supplemental hearing, wherein the ALJ should fully and fairly develop the record, consistent with this opinion.

---

<sup>8</sup>Determining whether the ALJ asked "sufficient" questions requires the undersigned, in effect, to play the role of Monday morning quarterback. Such a chore can be difficult. For example, in this case, the medical evidence supports the ALJ's decision of no disability. However, further inquiry by the ALJ (and counsel's representation of Plaintiff) may provide Plaintiff more of a meaningful opportunity to argue his claims.

<sup>9</sup> This may, in part, be obviated by the fact that Plaintiff is not represented.

SO ORDERED THIS 21<sup>st</sup> day of April, 1994.

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

ENTERED ON DOCKET

DATE 4-22-94

**FILED**

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APR 22 1994

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

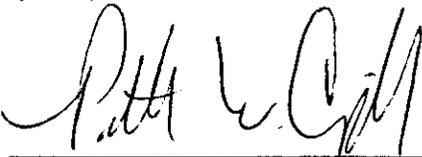
|              |   |                  |
|--------------|---|------------------|
| JOSE NEVAREZ | ) |                  |
|              | ) |                  |
| Plaintiff,   | ) |                  |
|              | ) |                  |
| vs.          | ) | Civil Action No. |
|              | ) | 93-C-579-E       |
| ONEOK, INC.  | ) |                  |
|              | ) |                  |
| Defendant.   | ) |                  |

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff, Jose Nevarez, pursuant to Federal Rule of Civil Procedure 41(a)(1), hereby dismisses with prejudice his complaint against Defendant, ONEOK, Inc.

Respectfully submitted,

  
 Richard J. Borg OBA #10621  
 Attorney for Plaintiff  
 5314 S. Yale, Suite 206  
 Tulsa, Oklahoma 74135  
 (918) 488-8800

  
 Larry D. Henry, OBA #4105  
 Vivian C. Hale, OBA #14241  
 Patrick W. Cipolla, OBA #15203  
 Huffman Arrington, Kihle,  
 Gaberino & Dunn  
 Attorneys for Defendant  
 1000 ONEOK Plaza  
 100 West Fifth Street  
 Tulsa, OK 74103-4219  
 (918) 585-8141

ENTERED ON DOCKET

DATE 4-22-94

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

ANGEL BRUNER,

Plaintiff,

vs.

LAURA BORDERS,  
and JAMES ASHE,

Defendants.

Case No. 92-C-739-E

**F I L E D**

APR 22 1994

FILED  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA  
Clerk

**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 21 day of April, 1994.

S/ JAMES O. ELLISON

United States District Judge

ENTERED ON DOCKET

DATE 4-22-94

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

**FILED**

APR 21 1994

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

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

92-C-1131-E

ORDER

This case is **REMANDED**. Plaintiff Kristopher M. Bryant appeals the Secretary's decision to terminate his benefits. The **issue** is whether the Secretary properly applied 20 C.F.R. §416.1165. For the reasons **discussed** below, the Court is unable to determine whether the Secretary properly **interpreted** its own regulation.

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

The child's parents then had a **baby girl** on July 27, 1991. Pursuant to 20 C.F.R. §416.1165, the Secretary decided (and the ALJ agreed) that the child no longer was entitled to benefits. Apologetically, the ALJ wrote:

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

Plaintiff appealed the decision to this Court. This Court's initial review, however, indicated that more information was needed from the Secretary to conduct a meaningful review. *See Order, February 24, 1994 (docket #17)*. Despite a request from the Court to supplement the record, no further information was provided by the Secretary. A subsequent telephone hearing with counsel for both parties also proved to be fruitless. Then, on April 19, 1994 -- upon the request of this Court -- counsel for the Secretary filed a Certification, which read, in part: "the record is complete and the information on which the ALJ based his calculations is found at pages 31-33 of the record and further explained at pages 1, 2 and 7 of the Defendant's Brief."

However, the Court still is unable to determine the accuracy of the Secretary's calculation based on the record. The computer printout that appears on pages 31-33 of the Record is of little help. While it may be a standardized form used by Social Security officials, it is but a cryptic document to this Court. The Secretary states that her brief clarifies the matter, but it does not.<sup>1</sup> In addition, counsel for the Secretary has made little effort to clarify the matter.<sup>2</sup> Therefore, the case is remanded. Further analysis follows.

---

<sup>1</sup> The calculation of the ALJ has not been found in the Record. It is unclear whether he did indeed check the calculation or simply adopted the Secretary's findings. The ALJ, similar to this Court, has an affirmative duty to develop the record. The Fifth Circuit writes: "The Social Security Administration conducts literally thousands of benefit hearings each year. Indeed, the disability program has been called "the Mount Everest of bureaucratic structures." (emphasis added). About 1,250,000 claims are made annually. ALJ's conduct 150,000 hearings. Over 625 ALJs and 5,600 state agent personnel are involved in deciding the claims. The disability decisional system alone is comparable in size to the entire federal court system. The system must run efficiently and expeditiously. But...because the results of these hearing gravely affect the claimants, the hearing must be conducted in such a manner as to assure their objective; the determination of a matter of moment on the basis of a record accurately developed. The function of the ALJ is not merely to sit and listen, nor is he appointed to process cases on an administrative assembly line." *Kane v. Heckler*, 731 F.2d 1216 (5th Cir. 1984).

<sup>2</sup> The most efficient way to handle this issue was for counsel for the Secretary to clarify and/or explain how the calculations were computed. That was not done. Instead, counsel for the Secretary indicated the only way the issue could be addressed was through a remand. Needless to say, a remand -- which, in all likelihood, will take many months -- does not appear to be the most efficient and logical way of handling the dispute from either party's perspective. However, it appears to be this Court's only option.

The central issue raised by Plaintiff is whether the regulation in question is "valid and properly applied." *Plaintiff's Brief, page 3 (docket #6)*. Plaintiff contends that the Secretary could have calculated §416.1165 two different ways -- one of which would not terminate Plaintiff's benefits. Writes the Plaintiff:

**The Secretary's decision was in error as a matter of law, in spite of the overwhelming evidence that the application of the regulation as recommended by the POMS was wrong, inequitable, outrageous, ridiculous and absurd, he would not change the calculation to a more reasonable method. *Plaintiff's Brief at 9.***

Obviously, to fairly consider Plaintiff's argument, the Court must determine how (and why) the Secretary calculated §416.1165 the way it did. This Court has an affirmative duty in reviewing administrative action to engage in substantial inquiry of the relevant facts as developed in the record and then, to define, specifically, those facts which it deems supportive of the agency's decision. *Dixon v. Heckler*, 811 F.2d 506, 510 (10th Cir. 1987), quoting *Hill v. Morton*, 525 F.2d 327, 328 (10th Cir. 1975). *Also, see Veal v. Bowen*, 833 F.2d 693, 696 (7th Cir. 1987) ("We must not simply rubber stamp his [the ALJ's] decision in the absence of a critical review of the evidence.").

At least one other court acknowledges having trouble in reviewing a calculation of §416.1165. That court reversed the Secretary's decision. *See, Parker v. Secretary*, No. 82-0147-F (*slip. op. D. Mass. February 7, 1984*) ("I must admit I would not have arrived at this conclusion without the Secretary's guidance. Nothing in the language of this regulation...would indicate this result.") As noted, the Secretary declined to supplement the record in this case.

Therefore, for the reasons stated, the case is REMANDED. On remand, the ALJ shall document the following:

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

SO ORDERED THIS 21<sup>st</sup> day of April, 1994.

  
JEFFREY S. WOLFE  
UNITED STATES MAGISTRATE JUDGE

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

~~FILED~~

APR 21 1994

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

CHROMALLOY GAS TURBINE CORPORATION )  
d/b/a AERO TECHNICAL SERVICES, )  
d/b/a CHROMALLOY COMPRESSOR )  
TECHNOLOGIES, d/b/a AERO TECHNICAL )  
SERVICES GROUP, and d/b/a AERO )  
COMPONENT TECHNOLOGIES GROUP )

ENTERED ON DOCKET  
DATE APR 22 1994

~~FILED~~

Case No. 94C-394-B

Plaintiff,

APR 21 1994

vs.

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

T K INTERNATIONAL, INC.

Defendant.

PLAINTIFF'S NOTICE OF DISMISSAL WITHOUT PREJUDICE

The Plaintiff, CHROMALLOY GAS TURBINE CORPORATION, by and through its undersigned trial counsel, and pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, hereby gives notice of its dismissal without prejudice of all claims and causes of action alleged in the Complaint filed in the above-styled and numbered action.

DATED this \_\_\_\_\_ day of April, 1994.

*Patrick O. Waddel*

Patrick O. Waddel, OBA #9254  
James M. Sturdivant, OBA #8723  
GABLE & GOTWALS  
2000 Bank IV Center  
Tulsa, Oklahoma 74119  
(918) 582-9201

and

Thomas T. Steele  
Florida Bar No. 158613  
Richard G. Salazar  
Florida Bar No. 899615  
FOWLER, WHITE, GILLEN, BOGGS,  
VILLAREAL AND BANKER, P.A.  
P. O. Box 1438  
Tampa, FL 33601-1438  
(813) 225-1125  
(813) 229-8313

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Plaintiff's Notice has been furnished by hand delivery to:

Tom Q. Ferguson  
Doerner, Stuart, Saunders,  
Daniel & Anderson  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103

and by United States Mail to:

Robert L. Congeyer  
Beggs & Lane  
Seventh Floor Blount Bldg.  
Three West Garden Street  
P. O. Box 12950  
Pensacola, Florida 32576-2950

this \_\_\_\_\_ day of April, 1994.

  
\_\_\_\_\_

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

ENTERED ON DOCKET  
DATE APR 22 1994

**FILED**

APR 21 1994

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

JARRELL PELL,

PLAINTIFF,

vs.

TEREX CORPORATION, A DELAWARE  
CORPORATION, AND UNIT RIG, A  
DIVISION OF TEREX CORPORATION,

DEFENDANT.

Case No. 93-C-353-B

J U D G M E N T

In accordance with the jury verdict rendered this date, Judgment is hereby entered in favor of Defendant Terex Corporation, a Delaware Corporation, and Unit Rig, a Division of Terex Corporation, and against the Plaintiff Jarrell Pell on all claims. Costs are assessed against Plaintiff if timely applied for under Local Rule 54.1 and each party is to pay their own attorneys fees.

DATED this 21<sup>ST</sup> day of April, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE APR 20 1994

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

**F I L E D**

APR 20 1994

|                  |   |
|------------------|---|
| ROY DALE SPARKS, | ) |
|                  | ) |
| Petitioner,      | ) |
|                  | ) |
| vs.              | ) |
|                  | ) |
| RON CHAMPION,    | ) |
|                  | ) |
| Respondent.      | ) |

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

No. 93-C-1062-B ✓

**ORDER**

IT IS ORDERED that Petitioner's motion to dismiss this habeas corpus action ("for a voluntary dismissal") [docket #15] be granted, and that this action be dismissed without prejudice.

SO ORDERED THIS 20 day of April, 1994.

  
 THOMAS R. BRETT  
 UNITED STATES DISTRICT JUDGE

*Clan*

ENTERED ON DOCKET  
APR 21 1994

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

FILED

APR 20 1994

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

|                               |   |                |
|-------------------------------|---|----------------|
| JESSE WATSON,                 | ) |                |
|                               | ) |                |
| Plaintiff,                    | ) |                |
|                               | ) |                |
| vs.                           | ) | No. 93-C-831-B |
|                               | ) |                |
| TULSA POLICE DEPARTMENT, sued | ) |                |
| as John Doe Officer,          | ) |                |
|                               | ) |                |
| Defendant.                    | ) |                |

ORDER

Before the Court is Plaintiff's motion to stay proceeding or in the alternative to dismiss this case without prejudice [docket #20]. The Plaintiff states that the Court's order of March 31, 1994, "has thoroughly confused" him, that he has been denied access to a law library to prepare a response to Defendant's motion to dismiss, and that he is entitled to stay this action because his incarceration amounts to a legal disability, or in the alternative, that he is entitled to dismiss this action without prejudice.

At the outset the Court will try to clarify for the Plaintiff the status of his case. On March 7, 1994, the Court dismissed this action without prejudice because the Plaintiff had failed to respond to Defendant's motion to dismiss within the time prescribed by Local Rule 7.1.C. On March 23, 1994, Plaintiff filed numerous motions including a motion for reconsideration and a motion for summary judgment and leave to amend the complaint. Plaintiff, however, did not submit a response to Defendant's motion to dismiss. Consequently, on March 31, 1994, the Court granted Plaintiff's motion for reconsideration and stated that it would

reopen Plaintiff's case if Plaintiff would file a response to Defendants' motion to dismiss. Because the Plaintiff has yet to submit a response to Defendants' motion to dismiss, Plaintiff's case remains dismissed without prejudice as of the date of this order.

In his present motion, the Plaintiff argues that Defendant's motion to dismiss is moot because the Court has granted his motion for leave to amend. The Plaintiff is mistaken. On March 31, 1994, the Court granted Plaintiff's motion requesting service of amended complaint [docket #7], but did not grant Plaintiff leave to amend his complaint [docket #15].

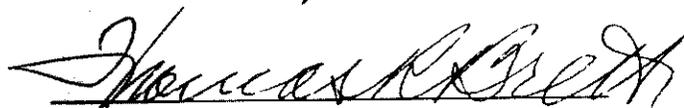
In his present motion, Plaintiff also requests to stay this action or alternatively to dismiss it without prejudice. This requests does not make any sense because this case has been dismissed without prejudice for more than one month. The Court will, thus, construe Plaintiff's motion to state that he is no longer seeking to reopen this case by filing a response.

**ACCORDINGLY, IT IS HEREBY ORDERED:**

- (1) That Plaintiff's motion for a stay or in the alternative to dismiss this action without prejudice [docket #20] be denied as moot because the Court dismissed this action without prejudice on March 7, 1994;
- (2) That the Clerk shall note on the docket sheet that Plaintiff no longer seeks to reopen this case by filing a response; and
- (3) That Plaintiff's motion for relief from judgment [docket

#13-2], and for summary judgment and to amend complaint  
[docket #15] be ~~denied~~ <sup>me</sup> as moot

SO ORDERED THIS 20 day of April, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



reason for delay in the entry of a final judgment on plaintiffs' claims against defendants;

IT IS HEREBY ORDERED that defendant Lawhorn and his partners, employees, agents, representatives, affiliates, successors in interest and all persons in active concert or participation with them are permanently enjoined from the date of this Order from intercepting, recording and/or exhibiting in any manner any Top Rank and TVKO television programming without license or first obtaining Top Rank's written consent to do so from the offices of Top Rank's and TVKO's General Counsel; and

IT IS FURTHER ORDERED that if defendant Lawhorn fails to comply with the foregoing paragraph, defendant Lawhorn shall pay to plaintiffs liquidated damages in the amount of \$25,000 for each such unauthorized showing of a Top Rank or TVKO television program; and

IT IS FURTHER ORDERED that defendant Lawhorn shall pay to plaintiffs the sum of Five Thousand Dollars (\$5,000) in accordance with the terms of the Settlement Agreement; and

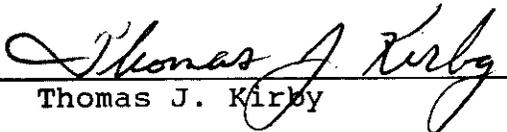
IT IS FURTHER ORDERED that the Court shall retain jurisdiction of this Action until such time as the settlement payment contained in this Consent Judgment and the Settlement

Agreement has been satisfied and for the purpose of enforcing all of the provisions of the same.

Dated: February 28, 1994

APPROVED, ACCEPTED AND AGREED TO:

HUFFMAN, ARRINGTON, KIHLE,  
GABERINO & DUNN  
Attorneys for Plaintiffs  
1000 Oneok Plaza  
100 West Fifth Street  
Tulsa, Oklahoma 74103

By:   
Thomas J. Kirby

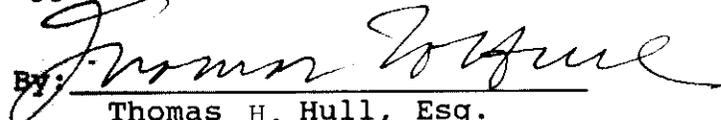
LERNER, DAVID, LITTENBERG,  
KRUMHOLZ & MENTLIK  
Attorneys for Plaintiffs  
600 South Avenue West  
Westfield, New Jersey 07090

By:   
W. Drew Kastner  
Of Counsel to the Firm

MAGGIE'S BAR

By:   
Name: Randall W. Lawhorn  
Title: Former Owner

Approved As To Form:

By:   
Thomas H. Hull, Esq.  
Attorney for Defendant

SO ORDERED THIS 20 DAY  
OF April, 1994

JAMES O. HULL

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 4-21-94

**FILED**

APR 21 1994

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

BERNARDINE THEIS, Administrator  
of the Estate of PATRICK THEIS,  
Deceased,

Plaintiff,

v.

GARRETT ENGINE DIVISION OF  
ALLIED-SIGNAL, INC., a Delaware  
corporation; WOODWARD GOVERNOR  
COMPANY, a Delaware corporation;  
and MITSUBISHI HEAVY INDUSTRIES,  
LTD., a Japanese corporation,

Defendants.

NO. 93-C-0145E

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED by and between the parties in  
this action through their designated counsel that the above-  
captioned action be and hereby is dismissed with prejudice

pursuant to Federal Rule of Civil Procedure 41(a)(1). Each party to bear its own costs.

DATED: March 3, 1994.

**KENNETH C. MILLER, LTD.**

By Kenneth C. Miller  
Kenneth C. Miller

Attorneys for Plaintiff  
Bernardine G. Theis, Administrator  
of the Estate of Patrick A. Theis,  
Deceased

DATED: ~~March~~ April 20, 1994.

**DAVID C. JOHNSTON, JR., P.C.**

By David C. Johnston, Jr.  
David C. Johnston, Jr.

Attorneys for Defendant  
AlliedSignal Inc.

ENTERED ON DOCKET

DATE 4-21-94

**FILED**

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

APR 19 1994

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

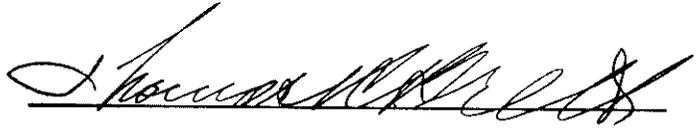
THOMAS R. SLIGAR, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BILL JORDAN, and TOM L. TEEL, )  
 )  
 Defendants. )

CASE NO. 92-C-652-B ✓

J U D G M E N T

In accordance with the jury verdict rendered this date, Judgment is hereby entered in favor of Defendants Bill Jordan and Tom L. Teel and against the Plaintiff Thomas R. Sligar on all claims. Costs are assessed against Plaintiff if timely applied for under Local Rule 54.1 and each party is to pay their own attorneys fees.

DATED this 19<sup>th</sup> day of April, 1994.



THOMAS R. BRET  
UNITED STATES DISTRICT JUDGE