

FILED  
MAY 20 1994

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

FILED

MAY 19 1994

SOUTHWESTERN BELL YELLOW  
PAGES, INC.,

Plaintiff,

v.

GREAT WESTERN DIRECTORIES,  
INC.,

Defendant.

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

Civil Action No. 94-C-448-B

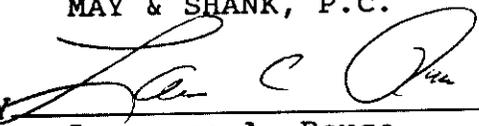
JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Federal Rules of Civil Procedure, Rule 41, the parties hereby stipulate to a dismissal of this action without prejudice. The parties agree that they shall bear their own respective attorneys' fees and costs incurred in connection with this action.

DOERNER, STUART, SAUNDERS,  
DANIEL, ANDERSON & BIOLCHINI

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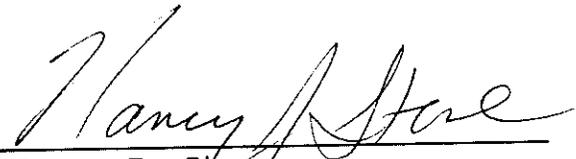
By 

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COUNSEL:

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Attorneys for Defendant  
Great Western, Inc.

**FILED**

MAY 19 1994

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

WILLIAM Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

TOLA ANN FOREMAN,

Plaintiff

v.

PRYOR FOUNDRY, INC., an Oklahoma  
Corporation, and UNITED STEELWORKERS  
OF AMERICA, AFL-CIO, CLC, LOCAL 8511.

Defendants

Case No. 93-C-516B

FILED ON CLERK'S  
MAY 20 1994

**STIPULATION OF DISMISSAL**

Pursuant to FED. R. CIV. P. 41(a)(1), the parties submit to the Court the Plaintiff's Stipulation of Dismissal with prejudice of all of Plaintiff's claims asserted against Defendant Local 8511 of the United Steelworkers of America, AFL-CIO, CLC, in the above-entitled and numbered cause.

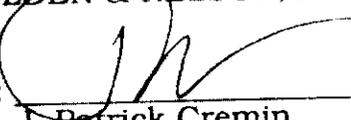
Respectfully submitted,



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ATTORNEYS FOR DEFENDANT PRYOR  
FOUNDRY, INC.

**FILED**

MAY 19 1994

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

BRADLEY K. JONES,  
Plaintiff,

vs.

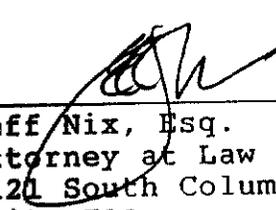
FIRST DATA RESOURCES, INC.  
Defendant.

Case No. 93-C-896B

MAY 20 1994

**JOINT STIPULATION OF DISMISSAL**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the plaintiff, Bradley K. Jones, hereby stipulates with the defendant, First Data Resources, Inc., that this action shall be dismissed with prejudice. Each party is to bear its own costs and attorney fees.

  
\_\_\_\_\_  
Jeff Nix, Esq.  
Attorney at Law  
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ATTORNEY FOR PLAINTIFF,  
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\_\_\_\_\_  
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ATTORNEYS FOR DEFENDANT  
FIRST DATA RESOURCES, INC.



ENTERED ON DOCKET

DATE 5-20-94

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

CONTROLLER SECURITY, INC., )

Plaintiff, )

v. )

HARTFORD FIRE INSURANCE COMPANY, )  
HARTFORD CASUALTY INSURANCE )  
COMPANY, and HARTFORD INSURANCE )  
COMPANY OF THE MIDWEST, )

Defendants.)

F.Ct. 93-C-661-E

D.Ct. CJ-93-2677

**FILED**  
MAY 20 1994  
Richard L. L... Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 19 day of May, 1994, it appearing to the Court that this matter has been compromised and settled, this case is hereby dismissed with prejudice to the refiling of any future action.

**S/ JAMES O. ELLISON**

United States District Judge



IT IS SO ORDERED THIS 18<sup>th</sup> DAY OF MAY, 1994.

  
JAMES O. ELLISON, CHIEF JUDGE  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5-19-94

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

IN RE:	)
	)
THOMAS WILLIAM SLAMANS,	)
	)
Debtor,	)
	)
CCF, INC., successor-in-interest to	)
First Capital Corporation,	)
	)
Appellant,	)
	)
v.	)
	)
FIRST NATIONAL BANK & TRUST	)
COMPANY OF OKMULGEE AND UNITED	)
STATES OF AMERICA,	)
	)
Appellees.	)

93-C-0328-E ✓

**F I L E D**

MAY 19 1994

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

**ORDER**

Now before the Court is an appeal by CCF, Inc. of a decision by the United States Bankruptcy Court for the Northern District of Oklahoma. The Bankruptcy Court awarded Appellee First National Bank \$111,053.41 under Section 509 of the Bankruptcy Code. CCF now challenges that decision, contending the Bankruptcy Court erred, as a matter of law, in awarding First National Bank the money. However, for the reasons stated below, this Court affirms the Bankruptcy Court decision.

**I. Summary of Facts**

Debtor Thomas William Slamans operated gas stations. On December 4, 1990, Slamans gave First Capital Corporation a revolving credit note for \$750,000. Appellant CCF, Inc. ("CCF") is the successor-in-interest to First Capital Corporation.

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On December 20, 1994, Slamans entered into a distribution agreement with Sun Company ("Sun") for the purchase of oil products. Under the agreement, Slamans purchased the oil products from Sun on credit and then sold the products either for cash or by credit card purchase. Credit card sales were first sent to Sun, which would, in turn, reimburse Slamans if he was current on his account. The agreement required Slamans to obtain a letter of credit.

On February 6, 1991, Appellee First National Bank issued a standby letter of credit to Slamans in favor of Sun.<sup>1</sup> The letter provided that FNB agreed to pay Sun up to \$200,000 if Slamans defaulted under the distributor agreement. The letter of credit was secured by a note, mortgage and security agreement covering Slamans' account receivables.

On February 28, 1992, Slamans filed bankruptcy. On March 9, 1992, Sun -- because Slamans had not paid them -- requested \$192,433.15 from FNB pursuant to the letter of credit. On March 11, 1992, FNB paid Sun the money. Also, at that time, FNB demanded the \$111,053.41 in proceeds from credit card sales in Sun's possession. Sun did not turn the money over to FNB; instead it filed an interpleader complaint with the Bankruptcy Court.

On December 16, 1992, the Bankruptcy Court found that FNB was entitled to the \$111,053.41 pursuant to the "plain language" of Section 509 of the Bankruptcy Code. CCF appeals that decision.

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<sup>1</sup> A standby letter of credit is payable by the issuer upon presentation of documents establishing default by the debtor. See, generally, *Philadelphia Gear Corp. v. FDIC*, 751 F.2d 1131, 1135 (10th Cir. 1984). In contrast, a commercial letter of credit is used in sales transactions and is payable by the issuer upon presentation of documents of title. *Id.*

## II. Legal Analysis

The dispute itself is straight-forward: Should FNB have received the \$111,053.41 from Sun pursuant to 11 U.S.C. § 509 of the Bankruptcy Code?<sup>2</sup> Section 509 states: "Except as provided in subsection (b) or (c) of this section, an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of **such creditor** to the extent of such payment."

No precise test is consistently used by courts when interpreting Section 509. The case law, however, indicates the following two-step analysis. First, does FNB -- as an issuer of a letter of credit -- qualify for subrogation under Section 509? In other words, is FNB "an entity that is liable with the debtor?" If FNB does qualify, the second question is whether Section 509 subrogation should be invoked. In this case, both questions are answered affirmatively.

### *A. Does FNB Qualify For Subrogation Under 11 U.S.C. §509?*

The initial issue is whether FNB was "liable with" Slamans on the debt to Sun. Two divergent lines of authority address this issue. The first line, and what appears to be the majority position, is that only a party that is "secondarily liable", such as a guarantor, can be "liable with" the debtor under §509. Issuers of letters of credit, such as FNB, do not fit into the Section 509 "liable with" language because they are primarily liable, according to this reasoning. The distinctions between a guarantor and letters of credit issuers are based, in part, on the legal characteristics of each. One court explains:

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<sup>2</sup> *The facts are not in dispute. Therefore, the question is whether the Bankruptcy Court erred as a matter of law. Such a review is de novo.*

The key distinction between letters of credit and guarantees is that the issuer's obligation under a letter of credit is primary whereas a guarantor's obligation is secondary -- the guarantor is only obligated to if the principal defaults on the debt the principal owes. In contrast, while the issuing bank in the letter of credit situation may be secondarily liable in the temporal sense, since its obligation to pay does not arise until after its customer fails to satisfy some obligation, it is satisfying its own absolute and primary obligation to make payment rather than satisfying an obligation of its customer. Having paid its own debt, as it has contractually undertaken to do, the issuer cannot then step into the shoes of the creditor to seek subrogation, reimbursement or contribution...The only exception would be where the parties reach an agreement. *Tudor Development Group, Inc. v. United States Fidelity & Guaranty, Co.*, 968 F.2d 357, 362 (3rd Cir. 1992).

*Tudor* is a non-bankruptcy case, but several bankruptcy courts have applied the same reasoning. *In the Matter of Agrownautics, Inc.*, 125 B.R. 350 (Bankr. D. Conn. 1991); *In Re Carley Capital Group*, 119 B.R. 646 (W.D. Wisc. 1990) and *In Re East Texas Steel Facilities, Inc.*, 117 B.R. 235 (Bankr. N.D. Tex. 1990). These courts, in effect, conclude that a letter of credit issuer has a separate legal obligation (and remedy) than the debtor. This means they have a primary liability -- not a secondary one. Guarantors, on the other hand, are only secondarily liable and, as a result, can obtain Section 509 subrogation. *In Re Kaiser Steel Corporation*, 89 B.R. 150 (Bankr. D. Colo. 1988).<sup>3</sup>

A second group of cases spurn the foregoing reasoning. *In Re Minnesota Kicks, Inc.*, 48 B.R. 93 (Bankr. D. Minn. 1985) and *In Re Sensor Systems, Inc.*, 79 B.R. 623 (Bankr. E.D. Pa. 1987). They conclude that, for the purposes of Section 509 subrogation, issuers of letters of credit and guarantors should both be eligible for subrogation. For example, the court in *Minnesota Kicks* states: "While a letter of credit may require conformity with

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<sup>3</sup> The courts also rely, in part, on Article 5 of the Uniform Commercial Code. Article 5, in essence, makes clear that a letter of credit is not equivalent to a guarantee. For a explanation of this reasoning, see *Tudor*, supra, at pages 366-368. Also, see Reconciling Standby Letters of Credit and the Principles of Subrogation in Section 509, 7 Bank. Dev. J. 227 (1990).

certain obligations and formalities which are not required of a guarantee [and] where there is no contrary policy reason for treating them dissimilarly for other purposes, precluding the assertion of subrogation rights to issuers of standby letters of credit while allowing guarantors to assert them would be no more than an exercise in honoring form over substance." *Id. at 104*. The court in *In Re Valley Vue Joint Venture*, 123 B.R. 199 (Bankr. E.D. Va. 1991) meanwhile concluded that letter of credit issuers are not primarily liable:

The *Kaiser* [supra] court correctly observed that an issuer's obligation to honor a standby letter of credit is considered a "primary" obligation. However, the *Kaiser* court failed to distinguish between the primary liability of a debtor to its creditor to repay a loan and the primary obligation of the issuer to its beneficiary to honor a letter of credit. When a standby credit supporting a loan is honored, the issuer admittedly is satisfying a debt for which a person other than the issuer is primary liable. This distinction, although not recognized by the...*Kaiser* court is critical. An issuer is not primarily liable on the debt supported by its standby credit. *Id. at 123*.

In the instant case, the Bankruptcy Court declined to follow the *Kaiser, supra*, or decision. Instead, the Bankruptcy Court found *Minnesota Kicks, supra*, more persuasive. Similar to *Minnesota Kicks*, the Bankruptcy Court concluded that guarantors and issuers of letter of credit ought to be treated alike under Section 509. *See, Memorandum Opinion* at page 6 (The provisions of §509 do not draw a distinction between codebtors that are primarily or secondary liable with the debtor).<sup>4</sup> The Bankruptcy Court also relied on what it described as the "plain meaning" of Section 509:

Section 509(a) applies to any entity that is "liable with" the debtor on...a claim of a creditor against the debtor" and who pays the claim. "Liable with" means that the parties are liable to the same creditor at the same time on the same debt. The word "with" has been defined as "sometimes equivalent to the words 'in addition to'." [quoting Black's Law Dictionary]. An issuer of a

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<sup>4</sup> By not drawing a distinction, the Bankruptcy Court did not adopt the *Valley Vue* analysis in toto.

letter of credit is liable to a creditor under the terms of the letter of credit. The debtor is also liable to the creditor under a different agreement. Therefore, an issuer of a letter of credit is clearly liable with, or in addition to, the debtor on a claim. *Memorandum Opinion at page 4.*

The Bankruptcy Court's decision is contra to what appears to be the majority position. But, upon review, the Bankruptcy Court's decision that FNB is eligible for Section 509 subrogation is not in error for two reasons. First, there is a line of authority (albeit the minority position) that supports the Bankruptcy Court's holding.<sup>5</sup> Second, the undersigned rejects a rule that, in effect, states that, absent an agreement by the parties, an issuer of credit can never be eligible for Section 509 subrogation. Such a rule is too mechanical and rigid. *See, Valley Vue*, 123 B.R. at 203 ("Subrogation is an equitable principle to be applied not in a mechanical fashion but rather as necessary to accomplish equitable results."). Therefore, issuers of letters of credit should be eligible for Section 509 subrogation.<sup>6</sup> *See, Tudor dissent*, 968 F.2d at 369 ("The issue is very close, but, on balance, I think the better rule is to retain subrogation on a case-by-case basis and apply it sparingly. When the unexpected happens, as it so often does, it is desirable to leave courts with equitable powers to avoid windfalls and to achieve a result to fair to all parties.")

#### ***B. Did The Bankruptcy Court Err In Awarding FNB the \$111,053.41?***

Since FNB is eligible for subrogation, the next question is whether the circumstances of this case justify subrogation under Section 509. Adopting the analysis of *In Re Kaiser Steel Corporation*, 89 B.R. 150 (Bankr. D. Colo. 1988, the following five-part

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<sup>5</sup> No mandatory precedent guides the Court on this issue.

<sup>6</sup> A noteworthy fact in this analysis is that Sun required Slamans to obtain a letter of credit as a part of the distribution agreement. The Court also finds that FNB, which honored the letter of credit, should prevail under Section 509 as a matter of equity.

provides some guidance in that regard: (1) The codebtor must have made payment to protect its own interests; (2) the codebtor must have not been a volunteer; (3) the payment must satisfy a debt for which the codebtor was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not cause injustice to the rights of others. *In Re Kaiser*, 89 B.R. at 151.

FNB satisfies elements 1, 2 and 4. It made payment to protect its interest. It was not a volunteer and it paid the entire debt. As to element 3, the Court adopts the reasoning set forth in *Valley Vue, supra*, that FNB is not primarily liable.

The only remaining discussion involves element 5. Does the Bankruptcy Court's decision to subrogate cause injustice to CCF? CCF certainly thinks so.<sup>7</sup> But this Court does not. Little question exists that CCF would like to recoup some of Slamans' debt. Yet, the Bankruptcy Court aptly noted that "without the letter of credit there would be no account receivable owing from Sun Company to Debtor and therefore would be no fund available for the other claimants to make a claim against." *Memorandum Opinion at page 6*. Such reasoning is sound. Had FNB not honored the letter of credit, Sun would have kept the \$111,053.41 and CCF would not have a claim to make. As it stands now, FNB is awarded the \$111,053.41 and CCF is in virtually the same position it was had FNB not honored the letter of credit. As a result, no "injustice" has been done to CCF.

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<sup>7</sup> Writes CCF: CCF's predecessor has taken its first priority security interest prior to FNB's issuing the letter of credit. FNB was upon notice of the preexisting, superior lien. FNB then voluntarily took a subordinate security interest in order to secure the reimbursement obligation of the Debtor. FNB now seeks to discard its contractual remedies and turn instead to the doctrine of subrogation in an attempt to prime CCF. CCF advanced \$750,000 on the strength of its secured status and FNB would erode that status after the fact. This is patently unjust. Subrogation simply should not be permitted under these circumstances. *CCF Brief at page 11.*

Furthermore, the specific facts of this case justify subordination. Of particular importance is that Sun required Slamans to obtain a letter of credit as part of the distribution agreement. In addition, FNB honored the letter of credit for \$192,433.15 upon Sun's request and did so after the bankruptcy filing. It seems at odds with the principles of equity to, in effect, punish FNB for honoring the letter of credit. That would send a conflicting message to FNB or any other issuer, which, in turn, could be commercially undesirable. *See, generally, Tudor Development Group*, 968 F.2d at 369 ("It is possible that if no equitable subrogation were permitted, fewer banks would issue such letters, which would be commercially undesirable.")

### III. Conclusion

Slamans obtained a letter of credit, at Sun's request, from FNB. Slamans filed bankruptcy, owing Sun \$192,433.15. Sun drew upon the letter of credit for that amount, which FNB paid. FNB then requested that Sun turn over \$111,053.41, which was owed to Slamans. The Bankruptcy Court subrogated FNB into Slamans' shoes, awarding the \$111,053.41 under Section 509. That ruling was both equitably and legally well-founded, and, as a result, the Bankruptcy Court's decision is AFFIRMED.

SO ORDERED THIS 18<sup>th</sup> day of May, 1994.

  
JAMES O. ELLISON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

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

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

CHANCE M. DELANCEY,  
445-92-2604

Defendant.

CIVIL NUMBER 94-C-487

**FILED**

MAY 19 1994

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

NOTICE OF DISMISSAL

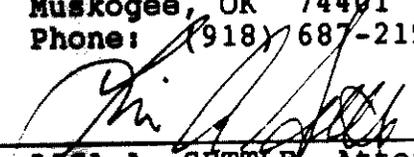
COMES NOW the Plaintiff, United States of America, by and through its attorney, Clifton R. Byrd, District Counsel, Department of Veterans Affairs, Muskogee, Oklahoma, and voluntarily dismisses said action without prejudice under the provisions of Rule 41(a)(1), Federal Rules of Civil Procedure.

Respectfully submitted,

UNITED STATES OF AMERICA

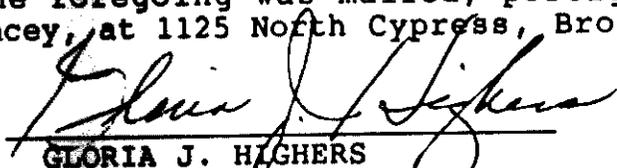
CLIFTON R. BYRD  
District Counsel  
Department of Veterans Affairs  
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Muskogee, OK 74401  
Phone: (918) 687-2191

By:

  
LISA A. SETTLE, Attorney

CERTIFICATE OF MAILING

This is to certify that on the \_\_\_ day of \_\_\_\_\_, 1994, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Chance M. Delancey, at 1125 North Cypress, Broken Arrow, OK 74012.

  
GLORIA J. HIGHERS  
Paralegal Specialist

ENTERED ON DOCKET

DATE 5-19-94

ENTERED

DATE

5/19/94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
vs.

MARY H. DAVIS MANNING;  
DAVID C. DAVIS;  
HILLCREST MEDICAL CENTER;  
T. WESTBY'S SPORTS, INC.;  
C.B. SAVAGE;  
THE STATE OF OKLAHOMA, ex rel.  
OKLAHOMA TAX COMMISSION;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

**FILED**

MAY 19 1994

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

CIVIL ACTION NO. 93-C-644-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18th day  
of May, 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, HILLCREST  
MEDICAL CENTER, appears by K. Jack Holloway; the Defendant, STATE  
OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D.  
Ashley, Assistant General Counsel; the Defendant, T. WESTBY'S  
SPORTS, INC., appears by Steven A. Heath; the Defendant, C.B.  
Savage, appears not, and should be dismissed from this action;  
and the Defendants, MARY H. DAVIS MANNING and DAVID C. DAVIS,  
appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, MARY H. DAVIS MANNING, acknowledged receipt of Summons and Complaint on July 29, 1993; that the Defendant, HILLCREST MEDICAL CENTER, acknowledged receipt of Summons and Complaint on July 16, 1993; that the Defendant, T. WESTBY'S SPORTS, INC., acknowledged receipt of Summons and Complaint on July 20, 1993; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on July 16, 1993; that the Defendant, DAVID C. DAVIS, was served a copy of Summons and Complaint on January 4, 1993; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 20, 1993; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 16, 1993.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, filed his answer on August 5, 1993, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on August 10, 1993; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer, Counter-Claim and Cross-Claim on August 4, 1993; and that the Defendant, HILLCREST MEDICAL CENTER, filed its Answer on July 23, 1993, the Defendant, T. WESTBY'S SPORTS, INC., filed its disclaimer on July 23, 1993, the Defendants, MARY H. DAVIS MANNING and DAVID C. DAVIS, 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 Eight (8), Block Five (5), THIRD  
CRESTVIEW ESTATES, an Addition to the City of  
Tulsa, Tulsa County, State of Oklahoma,  
according to the recorded Plat thereof.

The Court further finds that on March 21, 1985, the Defendants, MARY H. DAVIS MANNING and DAVID C. DAVIS, husband and wife, executed and delivered to Midfirst Mortgage Co., a mortgage note in the amount of \$40,741.00, 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, the Defendants, MARY H. DAVIS MANNING and DAVID C. DAVIS, then husband and wife, executed and delivered to MidFirst Mortgage Co., a mortgage dated March 21, 1985, covering the above-described property. Said mortgage was recorded on March 27, 1985, in Book 4852, Page 329, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1985, MidFirst Mortgage Co. assigned the above-described mortgage note and mortgage to Midland Mortgage Co.. This Assignment of Mortgage was recorded on May 3, 1985, in Book 4860, Page 1000, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1986, Midland Mortgage Co. assigned the above-described mortgage note and mortgage to Trinity Mortgage Co. This Assignment of Mortgage was recorded on March 10, 1986, in Book 4928, Page 1937, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 5, 1988, Trinity Mortgage Co., 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 February 12, 1988, in Book 5080, Page 1077, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 30, 1987, the Defendant, MARY H. DAVIS MANNING, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on August 31, 1988; August 17, 1989; March 19, 1990; September 5, 1990; and December 7, 1990.

The Court further finds that the Defendant, MARY H. DAVIS MANNING, 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, MARY H. DAVIS MANNING, is indebted to the Plaintiff in the principal sum of \$80,672.87, plus interest at the rate of Twelve and One-Half percent per

annum from July 14, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of a Tax Warrant Number ITI8700783600 in the amount of \$639.37, plus accrued and accruing interest, filed on November 12, 1987. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, HILLCREST MEDICAL CENTER, claims an interest in the property which is the subject matter of this action by virtue of a Judgment in Tulsa County District Court case number SC 86-2943, in the amount of \$994.46, plus costs and fees, dated March 13, 1986, and recorded with the Tulsa County Clerk on March 17, 1986, in Book 4930, Page 1445. Execution was issued on such judgment on February 28, 1991, and such writ of execution was recorded with the Tulsa County Clerk on March 5, 1991, in Book 5307, Page 638. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$8.00 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 Court further finds that the Defendant, T. WESTBY'S SPORTS, INC., claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, C.B. Savage, should be dismissed as a defendant to this action.

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 H. DAVIS MANNING, in the principal sum of \$80,672.87, plus interest at the rate of Twelve and One-Half percent per annum from July 14, 1993 until judgment, plus interest thereafter at the current legal rate of 5.02 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION,

have and recover judgment in rem in the amount of \$639.37 plus accrued and accruing interest, for state taxes for the year 1982, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, HILLCREST MEDICAL CENTER, have and recover judgment in the amount of \$994.46 plus costs and fees.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$8.00 for personal property taxes for the year 1991, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and T. WESTBY'S SPORTS, INC., 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, MARY H. DAVIS MANNING, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

**Third:**

In payment of Defendant, STATE OF OKLAHOMA, ex rel.  
OKLAHOMA TAX COMMISSION, in the amount of \$639.37, plus  
interest in state taxes which are currently and owing.

**Fourth:**

In payment of Defendant, HILLCREST MEDICAL CENTER,  
in the amount of \$994.46, plus costs and fees.

**Fifth:**

In payment of Defendant, COUNTY TREASURER,  
Tulsa County, Oklahoma, in the amount of  
\$8.00, 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

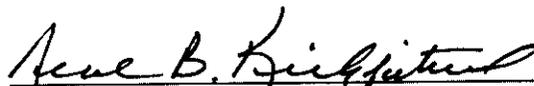
right, title, interest or claim in or to the subject real property or any part thereof.

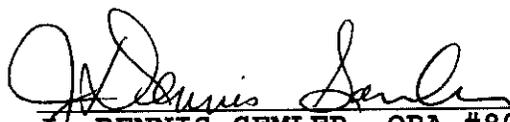
STANLEY R. BNETT

UNITED STATES DISTRICT JUDGE

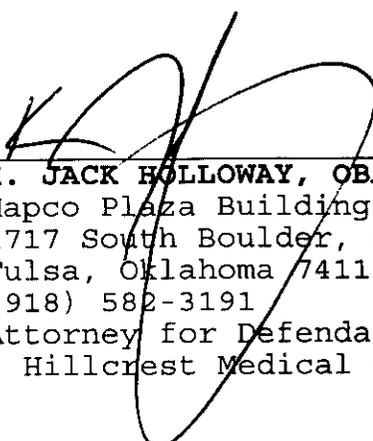
APPROVED:

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,  
Hillcrest Medical Center

Judgment of Foreclosure  
Civil Action No. 93-B-644-B

NBK:flv

ENTERED

DATE

5/19/94

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

SCOTT WOLF and BRENDA WOLF,

Plaintiffs,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, INC., THE PRUDENTIAL SERVICE BUREAU INC., THE PRUDENTIAL LIFE INSURANCE COMPANY, INC., THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, INC., as Claims Administrator for the Employee Benefit Plan known as the Southern Baptist Health Plan, and THE ANNUITY BOARD OF THE SOUTHERN BAPTIST CONVENTION, INC.,

Defendants.

Case No. 92-C-1101-B

FILED

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

JUDGMENT

The Court, having entered summary judgment in favor of Defendants, The Prudential Insurance Company of America, Inc. and The Prudential Service Bureau, Inc. and against Plaintiffs, Scott and Brenda Wolf, by Order of November 5, 1993, and having denied Plaintiffs' Motion for Reconsideration by Order of December 8, 1993, hereby enters this final Judgment in favor of The Prudential Insurance Company of America, Inc. and The Prudential Service Bureau, Inc. and against Plaintiffs.

DATED this 18th day of May, 1994.

S/ THOMAS R. BRETT

THOMAS R. BRETT UNITED STATES DISTRICT JUDGE

Elsie Draper Timothy A. Carney GABLE AND GOTWALS 2000 Bank IV Center Tulsa, Oklahoma 74119-5447 (918) 582-9201 ATTORNEYS FOR DEFENDANT, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, INC. and THE PRUDENTIAL SERVICE BUREAU, INC.

ENTERED

DATE MAY 19 1994

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

**FILED**

MAY 18 1994

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

WORLD HIGH INVESTMENTS, INC. )  
a Panamanian corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JAMES W. McCABE, et al., )  
 )  
Defendants, )

No. 91-C-892-B

**ORDER AND JUDGMENT**

Upon consideration of the Stipulation of Dismissal with Prejudice and Consent to Entry of Final Judgment among all parties who have appeared in this action,

IT IS HEREBY ORDERED AND ADJUDGED, in accordance with Rules 54, 58 and 79 of the Federal Rules of Civil Procedure, that:

1. All claims and causes of action asserted in this action be and hereby are dismissed with prejudice, with each party to bear its own costs and attorneys' fees.
2. There is no just reason for delay in the entry of judgment as agreed upon in the Stipulation of Dismissal with Prejudice and Consent to Entry of Final Judgment, and the Clerk is hereby directed to enter judgment hereon promptly.

DONE AND ORDERED this 18<sup>th</sup> day of May, 1994.



Thomas R. Brett  
United States District Judge

*a/m*



in the demonstration . During the demonstration, Plaintiff mixed two of the customer's prescription drugs (Intal and Ventolin) in the nebulizer medicine cup and then the child's mother administered the breathing treatment to him. Subsequently, the customer (the child's mother) reported to the Defendant that Plaintiff had used non-sterile procedures, in that he permitted the Intal to drip from his fingers into the medicine cup, and that the child had been administered a drug overdose because Plaintiff had instructed the customer to place 2.5 Cc of Ventolin in the syringe, while the treating physician had prescribed .35 cc of Ventolin to be used in each breathing treatment. Defendant investigated the case under the direction of its area manager. As a part of that investigation, the area manager asked Plaintiff to prepare a written statement of his version of the incident. In that statement he declared, inter alia, "It was my understanding that I was to physically show how to mix medications using the medication while they gave themselves a treatment." Pursuant to written company policy, the service representatives were to explain to customers the proper method of mixing medication for use in nebulizers. There is no evidence that Defendant authorized service representatives to mix customers' drugs (the only written evidence of company policy in this regard is a check list service representatives are to reference for demonstrations). During the investigation, Defendant asked all of its service representatives whether they mixed customers' drugs during demonstrations and they all responded in the negative. The Plaintiff reported that he had mixed drugs on several occasions and

"believed" that he learned to do so from a former employee of the company. Following the investigation, the area supervisor concluded that the customer's accusations against the Plaintiff were true and that Plaintiff had violated company policy. Plaintiff was terminated. It is Plaintiff's position that he was instructed to mix drugs not only by a former employee who trained the Plaintiff, but also by the technician because she instructed him to use a syringe with a specific number of cc's of medicine when demonstrating the apparatus on the day of the incident.

It is Plaintiff's theory of the case that he was directed by Defendant to mix drugs in violation of Oklahoma law,<sup>1</sup> and that when he reported that fact during the investigation of the demonstration incident he was terminated for "whistleblowing." Thus, he concludes, he was terminated in violation of Oklahoma's public policy and the Burk exception to termination of at-will employees should apply to his termination and afford him relief in the form of damages. Plaintiff's "whistleblower" theory rests on the following: that the customer reported the incident to her insurer, Pacificare, who questioned the practices of the Defendant in permitting a service representative to perform demonstrations of respiratory equipment, and that his statement to the area manager described above constitutes "whistleblowing" (he also states that he told the manager that he was instructed to mix drugs). The

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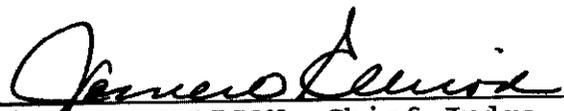
<sup>1</sup>Because the Court reaches its decision on other grounds, it need not consider whether a company directive to mix drugs for customers under these facts, would constitute "wrongdoing" for purposes of a "whistleblower" claim.

Court does not consider the report by Pacificare or the complaint of the customer to be any evidence of "whistleblowing" on the part of the Plaintiff.

Plaintiff's prima facie case does not pass muster. In assessing the merits of a summary judgment motion, the trial court is admonished to determine whether the non-moving party has submitted sufficient evidence so that a jury could reasonably rule in favor of the non-movant's position. Anderson v Liberty Lobby, Inc. 106 S.Ct. 2505, 2510 (1986). In Burk v K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989), The Supreme Court of Oklahoma held that while it is the rule in this jurisdiction that there is no implied covenant of good faith and fair dealing in employment-at-will contexts, an exception to the rule would be made where termination contravene's a "clear mandate of public policy." The Court went on to describe the tort as actionable "where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy." Id. At 29. In the instant case the Plaintiff contends that he was performing an act consistent with a clear and compelling public policy, which is to say he was acting as a " whistleblower". In Hinson v. Cameron, 742 P.2d 549, 553 (Okla. 1987) the Court included " whistleblowing" in the public policy tort and defined it as "exposing some wrongdoing by the employer." And, in White v. American Airlines, Inc., 915 F.2d 1414, 1421 (10th Cir. 1990); the Court ruled that where, as here, there were valid reasons for discharging an employee, the Plaintiff

must show that his "whistleblowing" activity was a "significant" reason for the discharge. Under the evidence adduced for this record there is no evidence that Plaintiff exposed any wrongdoing by the employer. The only pieces of evidence which are conceivably related to that claim are Plaintiff's written statement to the area manager, supra., that it was his "understanding" that he was to mix drugs for customer demonstrations; and the inference he asks the factfinder to draw from the technician's instructions regarding the markings on the syringe (i.e., that the instructions amount to evidence of company wrongdoing). In the Court's view the Plaintiff has failed to meet his burden of showing that a "genuine" factual dispute exists on this pivotal issue. A reasonable jury could not find that any "whistleblowing" activity on Plaintiff's part contributed significantly or made a difference in his employer's decision to terminate him. See, Anderson, supra, at 106 S.Ct. 2510. Therefore, Defendant's motion will be granted and judgment will be entered in favor of the Defendant and against the Plaintiff.

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

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

ENTERED ON DOCKET

DATE 5-19-94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PATRICIA L. PUETT; TULSA )  
 MUNICIPAL EMPLOYEES FEDERAL )  
 CREDIT UNION; CITY OF GLENPOOL, )  
 Oklahoma; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

**FILED**

MAY 18 1994

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

CIVIL ACTION NO. 94-C 167E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day  
 of May, 1994. The Plaintiff appears by Stephen C.  
 Lewis, United States Attorney for the Northern District of  
 Oklahoma, through Neal B. Kirkpatrick, Assistant United States  
 Attorney; the Defendant, **County Treasurer, Tulsa County,**  
**Oklahoma**, appears by J. Dennis Semler, Assistant District  
 Attorney, Tulsa County, Oklahoma; Defendant, **Board of County**  
**Commissioners, Tulsa County, Oklahoma**, appears not, having  
 previously claimed no right, title, or interest in the subject  
 real property; Defendant, **Patricia L. Puett**, appears not, having  
 previously filed her disclaimer; and the Defendants, **Tulsa**  
**Municipal Employees Federal Credit Union and the City of**  
**Glenpool, Oklahoma**, appear not, but make default.

The Court being fully advised and having examined the  
 court file finds that the Defendant, **Tulsa Municipal Employees**  
**Federal Credit Union**, acknowledged receipt of Summons and

Complaint on February 24, 1994; that the Defendant, **City of Glenpool, Oklahoma**, acknowledged receipt of Summons and Complaint on or about March 24, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 3, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on February 25, 1994.

It appears that the Defendant, **Patricia Puett**, filed her disclaimer on April 28, 1994; that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, filed his Answer on March 17, 1994; that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on March 17, 1994; and that the Defendants, **Tulsa Municipal Employees Federal Credit Union and the City of Glenpool, Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**Lot Sixteen (16), Block Five (5), BRENTWOOD, an Addition to the Town of Glenpool, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on July 31, 1980, the Defendant, **Patricia L. Puett**, a single person, executed and delivered to Midland Mortgage Co., her mortgage note in the

amount of \$35,000.00, payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Patricia L. Puett, a single person, executed and delivered to Midland Mortgage Co., a mortgage dated July 31, 1980, covering the above-described property. Said mortgage was recorded on August 8, 1980, in Book 4489, Page 1725, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 20, 1990, Midland Mortgage Co. 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 February 27, 1990, in Book 5238, Page 714, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1990, the Defendant, Patricia L. Puett, 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, Patricia L. Puett, 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, Patricia L. Puett, is indebted

to the Plaintiff in the principal sum of \$47,521.70, plus interest at the rate of 11.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a claim on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$24.00, plus penalties and interest, for the year of 1993. Said claim 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 the Defendants, **Tulsa Municipal Employees Federal Credit Union and the City of Glenpool, Oklahoma**, are in default and have no right, title, or interest in the subject real property.

The Court further finds that the Defendant, **Patricia Puett**, disclaims any 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 an in rem judgment against the Defendant, **Patricia L. Puett**, in the principal sum of \$47,521.70, plus interest at the rate of 11.5 percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.02 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$24.00, plus penalties and interest, for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Board of County Commissioners, Tulsa County, Oklahoma, Patricia Puett, Tulsa Municipal Employees Federal Credit Union, and the City of Glenpool, 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, **Patricia L. Puett**, to satisfy the 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 Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$24.00, plus penalties and interest, for personal property taxes which are presently due and owing on said real property;

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.

**BZ JAMES O. ELISON**

---

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

Judgment of Foreclosure  
Civil Action No. 94-C 167E

NBK:lg

ENTERED ON DOCKET

DATE 5-19-94

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

JAMES R. WADE and TERRY D. WADE )  
husband and wife, )

Plaintiffs, )

v. )

Case No. 92-C-1169-E

WESTERN NATIONAL BANK OF TULSA, )  
a national banking institution, )  
BRUMBAUGH & FULTON COMPANY, an )  
Oklahoma corporation formerly )  
known as "Mager Mortgage Company", )  
GMAC Mortgage Corporation of Iowa, )  
an Iowa corporation formerly known )  
as "Norwest Mortgage, Inc.", )  
Homestead Savings, a federally )  
chartered savings and loan )  
association, and the Resolution )  
Trust Corporation, an agency of )  
the United States Government, )  
and HOMESTEAD FEDERAL SAVINGS )  
ASSOCIATION, a federally chartered )  
savings and loan under a )  
conservatorship of the RTC, )

Defendant. )

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

ORDER

Pursuant to Stipulation of the parties, Plaintiff's claims  
against Defendant are hereby dismissed with prejudice.

DATED this 18 day of May, 1994.

JAMES O. ELLISON  
UNITED STATES DISTRICT OFFICE

DATE 5-19-94

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

JAMES R. WADE and TERRY D. WADE  
husband and wife,

Plaintiffs,

v.

WESTERN NATIONAL BANK OF TULSA,  
a national banking institution,  
BRUMBAUGH & FULTON COMPANY, an  
Oklahoma corporation formerly  
known as "Mager Mortgage Company",  
GMAC Mortgage Corporation of Iowa,  
an Iowa corporation formerly known  
as "Norwest Mortgage, Inc.",  
Homestead Savings, a federally  
chartered savings and loan  
association, and the Resolution  
Trust Corporation, an agency of  
the United States Government,  
and HOMESTEAD FEDERAL SAVINGS  
ASSOCIATION, a federally chartered  
savings and loan under a  
conservatorship of the RTC,

Defendant.

Case No. 92-C-1169-E

MAY 19 1994  
Richard M. Low Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Pursuant to Stipulation of the parties, Plaintiff's claims  
against Defendant are hereby dismissed with prejudice.

DATED this 18 day of May, 1994.

*S/ JAMES O. ELLISON*

JAMES O. ELLISON  
UNITED STATES DISTRICT OFFICE

ENTERED ON DOCKET

DATE 5-19-94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

RALPH J. SHAFFAR; BARBARA J.  
BELLOMY fka BARBARA J. SHAFFAR;  
FORREST "PETE" BELLOMY;  
COMMONWEALTH MORTGAGE COMPANY  
OF AMERICA, L.P. ; CITY OF BIXBY  
OKLAHOMA; COUNTY TREASURER,  
Tulsa County, Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants. )

CIVIL ACTION NO. 94-C-123-E

**FILED**

MAY 18 1994

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day  
of May, 1994. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Neal B. Kirkpatrick, Assistant United States  
Attorney; the Defendant, **County Treasurer, Tulsa County,  
Oklahoma**, appears by J. Dennis Semler, Assistant District  
Attorney, Tulsa County, Oklahoma; that the Defendant, **Board of  
County Commissioners, Tulsa County, Oklahoma**, appears not, having  
previously claimed no right, title, or interest in the subject  
real property; that the Defendant, **Commonwealth Mortgage  
Corporation of America successor in interest to Commonwealth  
Mortgage Company of America, L.P.**, appears not, having previously  
filed its disclaimer; that the Defendant, **City of Bixby, Oklahoma**  
appears not, having previously filed its disclaimer; and the  
Defendants, **Ralph J. Shaffar, Barbara J. Bellomy fka Barbara J.**

Shaffar, and Forrest "Pete" Bellomy, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Ralph J. Shaffar**, acknowledged receipt of Summons and Complaint on February 12, 1994; that the Defendants, **Barbara J. Bellomy fka Barbara J. Shaffar and Forrest "Pete" Bellomy**, were served with Summons and Complaint on March 29, 1994; that the Defendant, **Barbara J. Bellomy fka Barbara J. Shaffar** also acknowledged receipt of Summons and Complaint on or about April 18, 1994; that the Defendant, **City of Bixby, Oklahoma**, acknowledged receipt of Summons and Complaint on February 24, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on February 22, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on February 19, 1994.

It appears that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, filed his Answer on March 10, 1994; that the Defendant **Board of County Commissioners, Tulsa County, Oklahoma**, filed its Answer on March 10, 1994, claiming no right, title or interest in the subject real property; that the Defendant, **Commonwealth Mortgage Corporation of America successor in interest to Commonwealth Mortgage Company of America, L.P.** filed its Disclaimer of Interest on March 9, 1994; that the Defendant, **City of Bixby, Oklahoma** filed its Disclaimer on March 9, 1994; and that the Defendants, **Ralph J. Shaffar, Barbara J. Bellomy fka**

Barbara J. Shaffar and Forrest "Pete" Bellomy, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**Lot Nineteen (19), Block Three (3), SOUTHERN MEMORIAL ACRES, an Addition to the City of Bixby, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on October 16, 1986, the Defendants, Ralph J. Shaffar and Barbara J. Shaffar, executed and delivered to Commonwealth Mortgage Corporation of America their mortgage note in the amount of \$51,900.00, 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, the Defendants, Ralph J. Shaffar and Barbara J. Shaffar, executed and delivered to Commonwealth Mortgage Corporation of America a mortgage dated October 16, 1986, covering the above-described property. Said mortgage was recorded on October 17, 1986, in Book 4976, Page 2816, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 29, 1988, Commonwealth Mortgage Company of America, L.P. acting by and through Commonwealth Mortgage Corporation of America assigned the

above-described mortgage note and mortgage to The Lomas & Nettleton Company. This Assignment of Mortgage was recorded on June 6, 1988, in Book 5104, Page 1737, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 4, 1988, Commonwealth Mortgage Corporation of America assigned the above-described mortgage note and mortgage to Commonwealth Mortgage Company of America, L.P. This Assignment of Mortgage was recorded on June 7, 1988, in Book 5105, Page 368, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 15, 1989, The Lomas & Nettleton Company assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on August 23, 1989, in Book 5202, Page 2012, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Ralph J. Shaffar and Barbara J. Bellomy fka Barbara J. Shaffar, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Ralph J. Shaffar and Barbara J. Bellomy fka Barbara J. Shaffar**, are indebted to the Plaintiff in the principal sum of \$67,529.46, plus interest at the rate of 10 percent per annum from December 1, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a claim on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$42.00 for the year 1993. Said claim 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 the Defendants, **Ralph J. Shaffar, Barbara J. Bellomy fka Barbara J. Shaffar, Forrest "Pete" Bellomy**, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Commonwealth Mortgage Corporation of America successor in interest to Commonwealth Mortgage Company of America, L.P.**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, **City of Bixby, Oklahoma**, disclaims any 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 Defendants, **Ralph J. Shaffar and Barbara J. Bellomy fka Barbara J. Shaffar**, in the principal sum of \$67,529.46, plus interest at the rate of 10 percent per annum from December 1, 1993 until judgment, plus interest thereafter at the current legal rate of 5.02 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$42.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Ralph J. Shaffar, Barbara J. Bellomy fka Barbara J. Shaffar, Forrest "Pete" Bellomy, Commonwealth Mortgage Corporation of America successor in interest to Commonwealth Mortgage Company of America, L.P., the City of Bixby, Oklahoma and the 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, **Ralph J. Shaffar and Barbara J. Bellomy fka Barbara J. Shaffar**, 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, County Treasurer,  
Tulsa County, Oklahoma, in the amount of  
\$42.00, 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

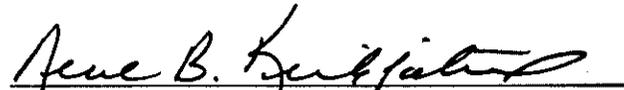
and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

**S/ JAMES O. ELLISON**

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

Judgment of Foreclosure  
Civil Action No. 94-C123E

NBK:lg

5/19/94

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

**FILED**

MAY 18 1994

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

ROBERT R. BURNETT, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 INTERNAL REVENUE SERVICE, and )  
 EDWARD CAVUTO, )  
 )  
 Defendants. )

Case No. 94-C-293-B

ORDER

Now before the Court are Plaintiff's Motion for Temporary Stay and Predeprivation Hearing (Docket #3) and Motion for Immediate Injunction Against Defendant IRS (Docket #5). A hearing on these motions was held April 22, 1994, and the Court now enters the following findings of fact and conclusions of law.

Findings of Fact

1. The Plaintiff, Robert R. Burnett, filed individual income tax returns, Forms 1040, for tax years 1990 and 1991. Tax liabilities were calculated on both returns.
2. No portion of the tax liabilities calculated to be due on the 1990 or 1991 Forms 1040 were paid.
3. The IRS mailed a payment required notice to the Plaintiff, dated July 12, 1993, for taxes, penalty, and interest due for tax year 1991. (Exhibit #1 to Plaintiff's original complaint).
4. The Plaintiff replied to the IRS's request for payment by letter dated August 2, 1993, indicating that he owed the IRS nothing because he was a "Nonresident Alien." (Plaintiff's Exhibit #2).

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5. The Plaintiff was born in the United States (Tulsa, Oklahoma) where he has resided at all times during the relevant period.

6. Plaintiff contends he is a citizen of the United States for all purposes except paying taxes.

7. On August 2, 1993, the IRS mailed to the Plaintiff a Notice of Intent to Levy with respect to taxes, penalty and interest for tax year 1990. (Plaintiff's exhibit #3).

8. On September 27, 1993, the IRS mailed to the Plaintiff a Notice of Intent to Levy for taxes, penalty, and interest due with respect to tax year 1991. (Plaintiff's exhibit #4).

9. By letter dated October 15, 1993, the Plaintiff informed the IRS against that he was not required to pay income taxes because of his "nonresident alien" tax status and that he was considering the Notice of Intent to Levy dated September 27, 1993, to be of no effect because it did not have a valid OMB Control number on the face of the Notice. (Plaintiff's exhibit #5).

10. On December 13, 1993, the IRS mailed another Notice of Intent to Levy to the Plaintiff with respect to taxes, penalty and interest owed for tax year 1990. (Plaintiff's Exhibit #6).

11. By letter dated December 23, 1993, the Plaintiff wrote the IRS and again asserted that he was a nonresident alien and demanded the IRS verify their authority to execute a levy upon his property. (Plaintiff's exhibit #7).

12. On January 15, 1994, the IRS mailed to the Plaintiff a Final Notice of Intention to Levy with respect to tax years 1990

and 1991. (Plaintiff's exhibit #8).

13. On March 1, 1994, and March 13, 1994, the IRS mailed to the Plaintiff Notices of Levy indicating that his property and his rights to property had been levied upon at the Texo Corporation and Community Bank and Trust Company. The Notices of Levy further indicated that the levy pertained to unpaid balances on tax assessments with respect to tax years 1990 and 1991. (Plaintiff's exhibits #13 and #14).

14. On March 28, 1994, the Plaintiff filed a Complaint for Wrongful Levy and a Motion for Temporary Stay and Predeprivation Hearing. On April 22, 1994, the Plaintiff filed an Amended Complaint styled "Complaint for Deprivation of Substantive and Administrative Due Process Rights". Plaintiff invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1343(3) and seeks an order from this Court issuing a "Certificate of Release of Levy" to Plaintiff's bank and to Texo Corporation. The Plaintiff further seeks an order forcing the IRS to return Plaintiff's checking account and any and all monies taken from the Texo corporation. He further seeks compensatory damages from the IRS for violation of his due process rights and deprivation of his money.

15. Any of the foregoing findings of fact which should be considered conclusions of law are hereby incorporated as conclusions of law.

#### Conclusions of Law

1. Any of the following conclusions of law which should more appropriately be considered findings of fact are hereby

incorporated as findings of fact.

2. To the extent that the Plaintiff requests relief in the form of a declaratory judgment or injunctive relief such actions are prohibited by the Anti-Injunction Act, 26 U.S.C. §7421(a), and the tax exception provision of the Declaratory Judgment Act, 28 U.S.C. §2201(a). Section 7421(a) provides that no suit to restrain the assessment or collection of any tax shall be maintained. The Declaratory Judgment Act specifically prohibits declaratory judgments in matters relating to federal taxes. See also, Flora v. United States, 362 U.S. 145, 164, 80 S.Ct. 630, 640, 4 L.Ed. 2d 623 (1960); Fostvedt v. United States, 978 F.2d 1201, 1203 (10th Cir. 1992). The Plaintiff has failed to show that any statutory or common law exception to the Anti-Injunction Act or the tax exception provision of the Declaratory Judgment Act are applicable.

3. Contrary to the Plaintiff's assertions, §702 of the Administrative Procedures Act and other provisions of the Administrative Procedures Act do not override the limitations of the Anti-Injunction Act and the Declaratory Judgment Act. See Fostvedt v. United States, 978 F.2d 1201, 1203-1204 (10th Cir. 1992).

4. Contrary to the assertion of the Plaintiff, 28 U.S.C. §1343(3) does not provide this Court with subject matter jurisdiction over the United States, the IRS, or any of its employees named individually in this case. Section 1343 only vests the district court with jurisdiction when there is a substantive claim for violation of civil rights under 42 U.S.C. §1983 and 1985.

However, these statutes provide a remedy for deprivation of right under color of state law and do not apply when the defendants are acting under color of federal laws. See Mack v. Alexander, 575 F.2d 488, 489 (5th Cir. 1978) and White v. Comm'r of Internal Revenue Service, 537 F.Supp. 679, 683 (D.Colo. 1982).

5. IRS officials are absolutely immune from damages resulting from their decisions to initiate or continue proceedings such as audits and assessments. See Butz v. Economou, 438 U.S. 478, 515-16 (1978); Christensen v. Ward, 916 F.2d 1462, 1475-76 (1990); Stakevitz v. I.R.S., 640 F.2d 205, 206 (9th Cir. 1981); and White v. Comm'r of Internal Revenue Service, 537 F.Supp. 679, 684 (D.Colo. 1982). Acts of which the Plaintiff complains are clearly related to the official duties and responsibilities of the IRS defendants. Decisions to initiate, prosecute or continue proceedings such as audits or assessments are official duties of IRS agents. The authority to collect assessed taxes is specifically delegated to IRS agents. Assessments and levy pursuant to statutory procedures and subject to judicial review do not violate any clearly established right to due process. Christensen v. Ward, 916 F.2d 1462, 1476 (10th Cir. 1990), citing Yalkut v. Gemignani, 873 F.2d 31, 34-35 (2d Cir. 1989).

6. The Plaintiff has not alleged or established any credible or probative fact related to improper IRS procedures utilized in this case to effect the levy.

7. Accordingly, the Plaintiff's Complaint for Deprivation of Substantive and Administrative Due Process Rights is dismissed in

:

its entirety for lack of subject matter jurisdiction and costs are assessed against the Plaintiff.

IT IS SO ORDERED THIS 17<sup>th</sup> DAY OF MAY, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

MAY 19 1994

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 18 1994

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

BOBBY L. ROMINES,

Plaintiff,

vs.

UNITED STATES ex rel. U.S. ARMY  
CORPS OF ENGINEERS &  
DEPARTMENT OF THE ARMY,

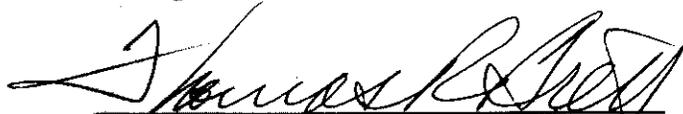
Defendant.

CASE NO. 93-C-786-B

**ORDER**

This matter comes on before the Court upon the Stipulation of all the parties and the Court being fully advised in the premises ORDERS, ADJUDGES AND DECREES that all claims asserted herein by the Plaintiff, Bobby L. Romines, against the United States of America are hereby **DISMISSED WITH PREJUDICE**, the parties to bear their own costs and attorneys' fees.

DATED this 18 day of May, 1994.



UNITED STATES DISTRICT JUDGE

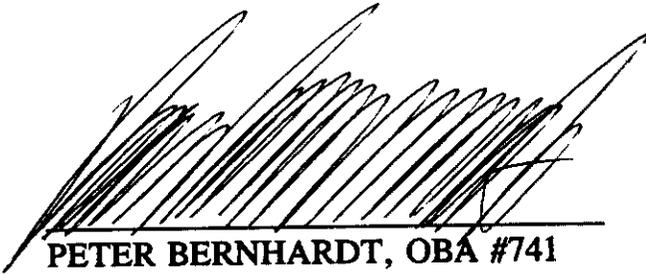
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**ROMINES v. UNITED STATES, 93-C-786-B  
ORDER OF DISMISSAL**

**APPROVED AS TO FORM:**



**JACKSON M. ZANERHAFT, OBA #9988**  
Attorney for Plaintiff  
1717 S. Boulder, Suite 910  
Tulsa, OK 74119  
(918) 582-8393



**PETER BERNHARDT, OBA #741**  
Assistant U.S. Attorney  
333 W. Fourth St., Suite 3460  
Tulsa, OK 74103  
(918) 581-7463

**PB:rc**

ENTERED ON THE CLERK'S

MAY 19 1994

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

**FILED**  
MAY 18 1994

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

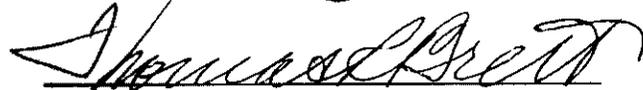
BILL W. HILL, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STANLEY GLANZ, )  
 )  
 Defendant. )

No. 93-C-403-B

**ORDER**

The above captioned case is hereby **dismissed** for lack of prosecution on the Plaintiff's part. The Plaintiff has failed to notify this Court of his **address** changes for more than one year and to respond to the April 29, 1994 Court order.

SO ORDERED THIS 18<sup>th</sup> day of May, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

6

DATE MAY 18 1994

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

SCOTT WOLF and BRENDA WOLF,

Plaintiffs,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, INC., THE PRUDENTIAL SERVICE BUREAU INC., THE PRUDENTIAL LIFE INSURANCE COMPANY, INC., THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, INC., as Claims Administrator for the Employee Benefit Plan known as the Southern Baptist Health Plan, and THE ANNUITY BOARD OF THE SOUTHERN BAPTIST CONVENTION, INC.,

Defendants.

Case No. 92-C-1101-B

**FILED**

MAY 18 1994

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

**JUDGMENT**

The Court, having entered summary judgment in favor of Defendants, The Prudential Insurance Company of America, Inc. and The Prudential Service Bureau, Inc. and against Plaintiffs, Scott and Brenda Wolf, by Order of November 5, 1993, and having denied Plaintiffs' Motion for Reconsideration by Order of December 8, 1993, hereby enters this final Judgment in favor of The Prudential Insurance Company of America, Inc. and The Prudential Service Bureau, Inc. and against Plaintiffs.

DATED this 18<sup>th</sup> day of May, 1994.

S/ THOMAS R. BRETT

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

Elsie Draper  
Timothy A. Carney  
**GABLE AND GOTWALS**  
2000 Bank IV Center  
Tulsa, Oklahoma 74119-5447  
(918) 582-9201  
ATTORNEYS FOR DEFENDANT, THE  
PRUDENTIAL INSURANCE COMPANY OF  
AMERICA, INC. and THE PRUDENTIAL  
SERVICE BUREAU, INC.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

MARY H. DAVIS MANNING;  
DAVID C. DAVIS;  
HILLCREST MEDICAL CENTER;  
T. WESTBY'S SPORTS, INC.;  
C.B. SAVAGE;  
THE STATE OF OKLAHOMA, ex rel.  
OKLAHOMA TAX COMMISSION;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 93-C-644-B

**FILED**

MAY 11 1994

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18th day  
of May, 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, HILLCREST  
MEDICAL CENTER, appears by K. Jack Holloway; the Defendant, STATE  
OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D.  
Ashley, Assistant General Counsel; the Defendant, T. WESTBY'S  
SPORTS, INC., appears by Steven A. Heath; the Defendant, C.B.  
Savage, appears not, and should be dismissed from this action;  
and the Defendants, MARY H. DAVIS MANNING and DAVID C. DAVIS,  
appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, MARY H. DAVIS MANNING, acknowledged receipt of Summons and Complaint on July 29, 1993; that the Defendant, HILLCREST MEDICAL CENTER, acknowledged receipt of Summons and Complaint on July 16, 1993; that the Defendant, T. WESTBY'S SPORTS, INC., acknowledged receipt of Summons and Complaint on July 20, 1993; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on July 16, 1993; that the Defendant, DAVID C. DAVIS, was served a copy of Summons and Complaint on January 4, 1993; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 20, 1993; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 16, 1993.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, filed his answer on August 5, 1993, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on August 10, 1993; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer, Counter-Claim and Cross-Claim on August 4, 1993; and that the Defendant, HILLCREST MEDICAL CENTER, filed its Answer on July 23, 1993, the Defendant, T. WESTBY'S SPORTS, INC., filed its disclaimer on July 23, 1993, the Defendants, MARY H. DAVIS MANNING and DAVID C. DAVIS, 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 Eight (8), Block Five (5), THIRD  
CRESTVIEW ESTATES, an Addition to the City of  
Tulsa, Tulsa County, State of Oklahoma,  
according to the recorded Plat thereof.

The Court further finds that on March 21, 1985, the Defendants, MARY H. DAVIS MANNING and DAVID C. DAVIS, husband and wife, executed and delivered to Midfirst Mortgage Co., a mortgage note in the amount of \$40,741.00, 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, the Defendants, MARY H. DAVIS MANNING and DAVID C. DAVIS, then husband and wife, executed and delivered to MidFirst Mortgage Co., a mortgage dated March 21, 1985, covering the above-described property. Said mortgage was recorded on March 27, 1985, in Book 4852, Page 329, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1985, MidFirst Mortgage Co. assigned the above-described mortgage note and mortgage to Midland Mortgage Co.. This Assignment of Mortgage was recorded on May 3, 1985, in Book 4860, Page 1000, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1986, Midland Mortgage Co. assigned the above-described mortgage note and mortgage to Trinity Mortgage Co. This Assignment of Mortgage was recorded on March 10, 1986, in Book 4928, Page 1937, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 5, 1988, Trinity Mortgage Co., 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 February 12, 1988, in Book 5080, Page 1077, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 30, 1987, the Defendant, MARY H. DAVIS MANNING, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on August 31, 1988; August 17, 1989; March 19, 1990; September 5, 1990; and December 7, 1990.

The Court further finds that the Defendant, MARY H. DAVIS MANNING, 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, MARY H. DAVIS MANNING, is indebted to the Plaintiff in the principal sum of \$80,672.87, plus interest at the rate of Twelve and One-Half percent per

annum from July 14, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of a Tax Warrant Number ITI8700783600 in the amount of \$639.37, plus accrued and accruing interest, filed on November 12, 1987. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, HILLCREST MEDICAL CENTER, claims an interest in the property which is the subject matter of this action by virtue of a Judgment in Tulsa County District Court case number SC 86-2943, in the amount of \$994.46, plus costs and fees, dated March 13, 1986, and recorded with the Tulsa County Clerk on March 17, 1986, in Book 4930, Page 1445. Execution was issued on such judgment on February 28, 1991, and such writ of execution was recorded with the Tulsa County Clerk on March 5, 1991, in Book 5307, Page 638. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$8.00 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 Court further finds that the Defendant, T. WESTBY'S SPORTS, INC., claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, C.B. Savage, should be dismissed as a defendant to this action.

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 H. DAVIS MANNING, in the principal sum of \$80,672.87, plus interest at the rate of Twelve and One-Half percent per annum from July 14, 1993 until judgment, plus interest thereafter at the current legal rate of 5.02 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION,

have and recover judgment in rem in the amount of \$639.37 plus accrued and accruing interest, for state taxes for the year 1982, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, HILLCREST MEDICAL CENTER, have and recover judgment in the amount of \$994.46 plus costs and fees.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$8.00 for personal property taxes for the year 1991, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and T. WESTBY'S SPORTS, INC., 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, MARY H. DAVIS MANNING, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

**Third:**

In payment of Defendant, STATE OF OKLAHOMA, ex rel.  
OKLAHOMA TAX COMMISSION, in the amount of \$639.37, plus  
interest in state taxes which are currently and owing.

**Fourth:**

In payment of Defendant, HILLCREST MEDICAL CENTER,  
in the amount of \$994.46, plus costs and fees.

**Fifth:**

In payment of Defendant, COUNTY TREASURER,  
Tulsa County, Oklahoma, in the amount of  
\$8.00, 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.

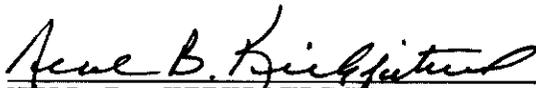
S/ THOMAS R. BRETT

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UNITED STATES DISTRICT JUDGE

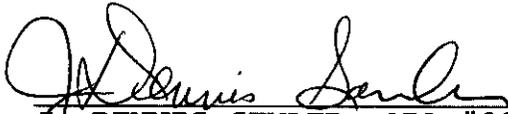
APPROVED:

STEPHEN C. LEWIS  
United States Attorney



---

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



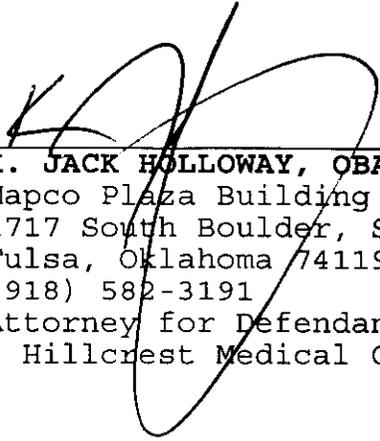
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J. DENNIS SEMLER, OBA #8076  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4841  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma



---

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,  
Hillcrest Medical Center

Judgment of Foreclosure  
Civil Action No. 93-B-644-B

NBK:flv



SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, appearing to read "Phil Pinnell".

**PHIL PINNELL, OBA #7169**  
Assistant United States Attorney

ENTERED ON DOCKET

DATE 5-19-94

FILED

MAY 18 1994

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

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

IN RE: )  
 MID-AMERICAS PROCESS SERVICES, INC., )  
   ) Debtor. )  
 GLEN W. TAYLOR, TRUSTEE, )  
   ) Plaintiff, )  
 vs. )  
 YAFFE IRON AND METAL COMPANY, INC., )  
   ) Defendant, )  
 vs. )  
 GLEN W. TAYLOR, TRUSTEE OF MID- )  
 AMERICA MACHINERY ASSOCIATION, INC., )  
   ) Third-Party Defendant.)

Case No. 91-1254-C  
Chapter 11

Case No. 93-C-882-E ✓  
(Adv. No. 92-406-C)

Case No. 91-1294-C  
Chapter 11

O R D E R

The Court has been advised that the adversary proceeding upon which this action is based has been dismissed with prejudice. Therefore it is not necessary that the action remain upon the calendar of the Court.

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

4

necessary.

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

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

ENTERED ON DOCKET

DATE MAY 18 1994

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JACKY L. WAGNER; BEVERLY J. )  
 WAGNER; NORWEST FINANCIAL )  
 OKLAHOMA, INC.; CITY OF GLENPOOL, )  
 Oklahoma; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

**FILED**  
 MAY 17 1994  
 Richard M. Lawrence, Clerk  
 U. S. DISTRICT COURT  
 NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 191B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day  
 of May, 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; and the Defendants,  
**Jacky L. Wagner, Beverly J. Wagner, Norwest Financial Oklahoma,**  
**Inc., and City of Glenpool, Oklahoma,** appear not, but make  
 default.

The Court being fully advised and having examined the  
 court file finds that the Defendants, **Jacky L. Wagner and**  
**Beverly J. Wagner,** were served with Summons and Complaint on  
 April 11, 1994; that the Defendant, **Norwest Financial Oklahoma,**  
**Inc.,** was served with Summons and Complaint on April 11, 1994;

that the Defendant, **City of Glenpool, Oklahoma**, acknowledged receipt of Summons and Complaint on or about March 24, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 10, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 4, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on March 21, 1994; and that the Defendants, **Jacky L. Wagner, Beverly J. Wagner, Norwest Financial Oklahoma, Inc., and City of Glenpool, Oklahoma**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**Lot Twenty-Six (26), Block Six (6), Brentwood II, an addition to the City of Glenpool, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on July 31, 1986, the Defendants, **JACKY L. WAGNER and BEVERLY J. WAGNER**, husband and wife, executed and delivered to Commonwealth Mortgage Corporation their mortgage note in the amount of \$49,201.00, payable in

monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, JACKY L. WAGNER and BEVERLY J. WAGNER, husband and wife, executed and delivered to Commonwealth Mortgage Company a mortgage dated July 31, 1986, covering the above-described property. Said mortgage was recorded on August 4, 1986, in Book 4960, Page 723, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 5, 1987, Commonwealth Mortgage Corporation of America fka Commonwealth Mortgage Corporation assigned the above-described mortgage note and mortgage to Commonwealth Mortgage Company of America, L.P. This Assignment of Mortgage was recorded on June 19, 1987, in Book 5032, Page 1635, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 26, 1988, Commonwealth Mortgage Company of America, L.P. assigned the above-described mortgage note and mortgage to The Lomas and Nettleton Company. This Assignment of Mortgage was recorded on June 6, 1988, in Book 5104, Page 1624, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 15, 1989, Lomas Mortgage USA, Inc. fka The Lomas and Nettleton Company 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 March 22, 1989, in Book 5173, Page 757, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1990, the Defendants, JACKY L. WAGNER and BEVERLY J. WAGNER, husband and wife, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on March 1, 1991 and March 1, 1992.

The Court further finds that the personal liability of the Defendants, JACKY L. WAGNER and BEVERLY J. WAGNER, was discharged in the United States Bankruptcy Court for the Northern District of Oklahoma in case number 92-4124-W, filed November 25, 1992, discharged March 19, 1993, and closed July 14, 1993.

The Court further finds that the Defendants, JACKY L. WAGNER and BEVERLY J. WAGNER, 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 their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JACKY L. WAGNER and BEVERLY J. WAGNER, are indebted to the Plaintiff in the principal sum of \$76,048.08, plus interest at the rate of 9.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property

which is the subject matter of this action by virtue of personal property taxes in the amount of \$19.00 which became a lien on the property as of June 26, 1992; and has a claim on the property for \$16.00 for the tax year 1992; and has a claim on the property for \$ 16.00 for the tax year 1993. Said lien and claims 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, **Jacky L. Wagner, Beverly J. Wagner, Norwest Financial Oklahoma, Inc., and City of Glenpool, Oklahoma** are in default, and have 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, **Jacky L. Wagner and Beverly J. Wagner**, in the principal sum of \$76,048.08, plus interest at the rate of 9.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.02 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced

or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$51.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **Jacky L. Wagner, Beverly J. Wagner, Norwest Financial Oklahoma, Inc., City of Glenpool, Oklahoma, and the 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 Defendants, **Jacky L. Wagner and Beverly J. Wagner**, 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;

**Third:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$51.00, 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.

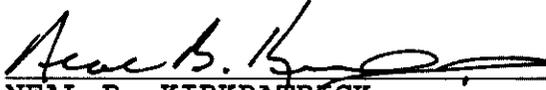
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

**S/ THOMAS R. BRETT**

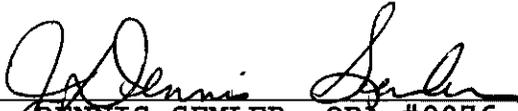
UNITED STATES DISTRICT JUDGE

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

Judgment of Foreclosure  
Civil Action No. 94-C 191B

NBK:lg

MAY 18 1994

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

DAVID LEE ROBINSON; JACQUNETT L.  
ROBINSON; ELLEN HENRY; COUNTY  
TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C 300B

**FILED**

MAY 17 1994

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day  
of May, 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; and the Defendants, **David Lee  
Robinson, Jacqunett L. Robinson, and Ellen Henry,** appear not, but  
make default.

The Court being fully advised and having examined the  
court file finds that the Defendants, **David Lee Robinson and  
Jacqunett L. Robinson,** acknowledged receipt of Summons and  
Complaint on April 11, 1994; that the Defendant, **Ellen Henry,**  
acknowledged receipt of Summons and Complaint on April 2, 1994;  
that Defendant, **County Treasurer, Tulsa County, Oklahoma,**

acknowledged receipt of Summons and Complaint on April 8, 1994; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on March 30, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on April 25, 1994; and that the Defendants, **David Lee Robinson, Jacquenett L. Robinson, and Ellen Henry**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**LOT FIFTY-TWO (52), BLOCK EIGHT (8), NORTHGATE THIRD ADDITION, AN ADDITION IN TULSA COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.**

The Court further finds that on March 5, 1986, the Defendant, Ellen Henry, executed and delivered to MidAmerica Federal Savings and Loan Association her mortgage note in the amount of \$31,700.00, payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Ellen Henry, executed and delivered to MidAmerica Federal Savings and Loan Association a mortgage dated March 5, 1986, covering the above-

described property. Said mortgage was recorded on March 6, 1986, in Book 4928, Page 1015, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 14, 1986, MidAmerica Federal Savings and Loan Association assigned the above-described mortgage note and mortgage to Mortgage Clearing Corporation. This Assignment of Mortgage was recorded on April 23, 1986, in Book 4937, Page 1626, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 2, 1988, Mortgage Clearing Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, his/her successors and assigns. This Assignment of Mortgage was recorded on June 23, 1988, in Book 5109, Page 805, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, David Lee Robinson and Jacquett L. Robinson, currently hold the fee simple title to the property by virtue of a General Warranty Deed Dated May 16, 1986, and recorded on May 19, 1986 in Book 4943, Page 5, in the records of Tulsa County, Oklahoma. The Defendants, David Lee Robinson and Jacquett L. Robinson, are the current assumptors of the subject indebtedness.

The Court further finds that on July 1, 1988, the Defendants, David Lee Robinson and Jacquett L. Robinson, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding

agreements was reached between these same parties on February 1, 1990, May 1, 1991, and April 28, 1992.

The Court further finds that on August 28, 1991, the Defendants, David Lee Robinson and Jacquenett L. Robinson, filed a Chapter 13 Bankruptcy in United States Bankruptcy Court for the Northern District of Oklahoma under Case Number 91-3053C. This Bankruptcy was dismissed by an Order Dismissing the Case, which was filed on March 19, 1993, and dated on March 22, 1994.

The Court further finds that the Defendants, David Lee Robinson and Jacquenett L. Robinson, 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 their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, David Lee Robinson and Jacquenett L. Robinson, are indebted to the Plaintiff in the principal sum of \$51,898.75, plus interest at the rate of 11.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$15.00 which became a lien on the property as of June 26, 1992; and a lien on the property in the amount of \$11.00 which became a lien on the property as of June 25, 1993; and a claim against the property in the amount of \$11.00 for personal property taxes for the year 1993. Said liens

and claim are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **David Lee Robinson, Jacquenett L. Robinson, and Ellen Henry**, are in default, and have 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 Defendants, **David Lee Robinson and Jacquenett L. Robinson**, in the principal sum of \$51,898.75, plus interest at the rate of 11.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.02 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and

recover judgment in the amount of \$37.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, **David Lee Robinson, Jacquett L. Robinson, Ellen Henry, and the 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, **David Lee Robinson and Jacquett L. Robinson**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

**Third:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$37.00, 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.

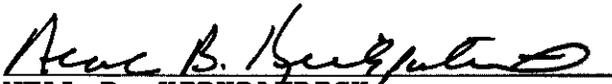
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

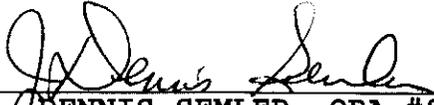
S/ THOMAS R. BRETT,

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

Judgment of Foreclosure  
Civil Action No. 94-C 300B

NBK:lg

ENTERED ON DOCKET

DATE MAY 18 1994

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

**FILED**

MAY 17 1994

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

ROBERT B. REICH, Secretary of )  
Labor, United States Department )  
of Labor, )

Plaintiff, )

vs. )

Case No. 93-C-289-B ✓

PIPELINERS LOCAL UNION NO. 798, )  
UNITED ASSOCIATION OF JOURNEYMAN )  
AND APPRENTICES OF THE PLUMBING )  
AND PIPE FITTING INDUSTRY OF THE )  
UNITED STATES AND CANADA, AFL-CIO, )

Defendants. )

O R D E R

Now before the Court is Defendant Local 798's Motion for Sanctions (Docket #32). Defendant seeks an order imposing sanctions against Plaintiff under Federal Rules of Civil Procedure 37(a)(4) and (b)(2) as a result of Plaintiff's continuing refusal to comply with the discovery order entered by this Court on February 16, 1994. Plaintiff agrees the Defendant's motion should be granted insofar as it seeks the involuntary dismissal of this action but objects to Defendant's request for an award of expenses or monetary sanctions.

Following a review of the issues herein, as well as the record and applicable legal authority, the Court concludes this matter should be and is hereby **DISMISSED** with prejudice pursuant to Fed.R.Civ.P. 37(b). The Court further concludes Defendant's motion should be and is hereby **DENIED** to the extent it seeks an award of costs and attorney fees. Each party is responsible for its own fees, costs and expenses incurred herein.

27

IT IS SO ORDERED THIS 17<sup>th</sup> DAY OF MAY, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



MAY 17 1994

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

**FILED**

MAY 17 1994

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

UNIVERSAL JOINT SPECIALISTS, )  
INC., an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STEVEN L. FRITZ and )  
PRUDENTIAL-BACHE SECURITIES, INC., )  
 )  
Defendants. )

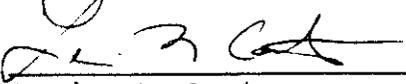
Case No. 91-C-937-B

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

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

  
David H. Sanders  
624 S. Denver, Suite 202  
Tulsa, Oklahoma 74119  
Attorney for Plaintiff,  
Universal Joint Specialists,  
Inc.

DOERNER, STUART, SAUNDERS,  
DANIEL, ANDERSON & BIOLCHINI

By:   
Lewis N. Carter  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

Attorneys for Defendant,  
Prudential-Bache Securities,  
Inc.

CONNER & WINTERS

By: *P. David Newsome*

P. David Newsome, Jr.  
Dierdre O. Dexter  
2400 First National Tower  
Tulsa, Oklahoma 74103  
Attorneys for Defendant, Steven  
L. Fritz

FILED ON DOCKET  
DATE 5/18/94

**FILED**

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

MAY 17 1994

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

THRIFTY RENT-A-CAR SYSTEM, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
RICHARD A. CAILLOUETTE, et al )  
 )  
Defendants. )

Case No. 93-C-473-B

ADMINISTRATIVE CLOSING ORDER

The Defendant Liston 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 days 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 17th day of May, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

49

DATE MAY 18 1994

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

**FILED**

GREGORY S. GOMEZ, an individual )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JOHN DOE, JIM DOE, and JOE DOE, )  
 three unknown Tulsa County Deputy )  
 Sheriffs or jail employees; )  
 SHERIFF STANLEY GLANZ, ex rel TULSA )  
 BOARD OF COUNTY COMMISSIONERS; TULSA )  
 REGIONAL MEDICAL CENTER and DOCTOR )  
 DOE an unknown doctor or medical )  
 personnel, )  
 )  
 Defendants. )

MAY 17 1994

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

Case No. 93-C-1080-B

ORDER

Before the Court for consideration is the Motion to Dismiss of the Defendant, Board of County Commissioners of the County of Tulsa ("Tulsa County"), against Plaintiff, Gregory S. Gomez. Plaintiff brought this action pursuant to Title 42 U.S.C. §§ 1983 and 1988. He also brings pendant state law tort claims.<sup>1</sup> He contends that jailers in the Tulsa County Jail used excessive force upon him in violation of his rights secured by the United States Constitution. He alleges that Sheriff Glanz, as the policy making authority for the Tulsa County Sheriff's office and the aforementioned jailers, failed to properly oversee hiring and training in the jail facility. In addition, he maintains that Sheriff Glanz failed to provide him with adequate medical care and failed to monitor his medical condition.

---

<sup>1</sup> These claims fall generally under the Oklahoma Governmental Tort Claims Act.

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In support of its Motion to Dismiss Tulsa County first asserts that it is misnamed in Plaintiff's Complaint. Plaintiff filed his Complaint against "Sheriff Stanley Glanz, ex rel Tulsa Board of County Commissioners."

Okla. Stat. tit. 19, § 4 provides :

In all suits or proceedings by or against a county, the name in which a county shall sue or be sued shall be, "Board of County Commissioners of the County of \_\_\_\_\_," ...

Tulsa County maintains that it is mandatory that this provision be strictly followed. It, therefore, argues that since it has not been properly named, the case should be dismissed against it. Plaintiff argues that he should be allowed to amend his pleadings to reflect Tulsa County's correct name.

Typically, in order to obtain a valid judgment against Tulsa County it must be named as the Oklahoma statute dictates. However, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure misnomers may be corrected.<sup>2</sup> Graves v. General Ins. Corp., 412 F.2d 583, 584 (10th Cir. 1969). An amendment is proper where the defendant has notice of the suit within the statutory period and will not be "prejudiced by a technical change in the style of the action." Id at 585. This concept is also embodied in Rule 4(h) of

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<sup>2</sup> Rule 15(c) discusses relation back of amendments to pleadings for purposes of tolling applicable statutes of limitation. Though it does not appear that relation back is an issue here, whenever an amendment of a pleading is requested the precepts set forth in Rule 15 are pertinent guides for the Court. Infotronics Corp. v. Varian Ass. Corp., 45 F.R.D. 91 (S.D. Tex. 1968). Oklahoma's Rule concerning relation back of amendments mirrors Rule 15(c) of the Federal Rules of Civil Procedure. Okla. Stat. tit., 12 § 2015 (1984).

the Federal Rules of Civil Procedure which provides:

At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

In the majority of cases in which misnomers have been permitted to be amended under Rule 15(c) "the plaintiff actually sued and served the correct party, the party he intended to sue, but mistakenly used the wrong name of defendant." Graves, at 585. This is precisely the situation presented here. Where this is the case it would be rare that material prejudice would result against a defendant. Tulsa County has not alleged that it was prejudiced by the misnomer. The Court therefore grants Gomez' leave to amend his complaint and proof of service.

#### Oklahoma Governmental Tort Claims Act Claims

Tulsa County next asserts that the Oklahoma Governmental Tort Claims Act provides that Tulsa County is immune from liability for all alleged pendant state tort claims arising out of activity in the Tulsa City-County Jail. Specifically it relies on Okla. Stat. tit. 51, § 155 which states:

The state or political subdivision shall not be liable if a loss or claim results from:

23. Provision, equipping, operation or maintenance of prison, jail or correctional facility, ....

Okla. Stat. tit. 51, § 153 provides, "[t]he state or political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment ...." Okla. Stat. tit. 51, § 152(9) explains, "'[s]cope of employment' means performance by an employee acting in good

faith within the duties of his office or employment ...."

Plaintiff initially pled in his complaint that the jailers who allegedly used excessive force to restrain him were acting with malice and with an absence of good faith. This allegation places the jailers outside the scope of their employment. Houston v. Reich, 932 F.2d 883,890 (10th Cir. 1991); Parker v. City of Midwest City, 850 P.2d 1065, 1067-68 (Okla. 1993); Holman v. Wheeler, 677 P.2d 645, 647 (Okla. 1983). Tulsa County is, therefore, immune from liability for Plaintiff's state tort claims pursuant to §§ 153 and 152(9).

Plaintiff then contends "that the [jailers] acted in good faith in the course of their duties in the furtherance of the business of the employer, thereby deeming the employer, Defendant herein, liable for those actions." (Plaintiff's Response in Opposition to Defendant, Board of County Commissioners of the County of Tulsa, Motion to Dismiss at 12). He argues that the statements against the jailers in his Complaint "are individually against those parties on an alternative theory of bad faith and deliberate, tortious conduct ...."

Arguably it may be possible for an employee to act in good faith in performing duties for an employer and at the same time act in bad faith individually. However, the Court concludes that Tulsa County must still be deemed immune from liability under the Oklahoma Governmental Tort Claims Act on the basis of §155(23). Plaintiff concedes that inmates and detainees may be combative and that the jailers were carrying out their assigned tasks when the

force occurred. (Plaintiff's Response at 13). The purpose and intent of § 155(23) is to protect the state and political subdivisions from tort liability for loss resulting from the functions of the officers and employees performed in the operation of a penal institution. Medina v. State of Oklahoma, 64 O.B.J. 2872, 2874 (Okla. 1993).

Additionally, Tulsa County would not be exposed to liability in tort for the alleged actions of Sheriff Glanz under the Oklahoma Governmental Tort Claims Act because of the "discretion" exception. Okla. Stat. tit. 51 § 155(5) exempts the state or political subdivision from liability if a claim results from "[p]erformance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees ...." Policy-making and planning level actions are discretionary functions of the county and its employees. See Medina at 2874. The § 155(5) exemption from tort liability applies to every governmental entity including jails and prisons. See Id. Plaintiff has specifically alleged in his Complaint that Sheriff Glanz is the final policy-making authority for the jail and the jailers. Gomez is suing Tulsa County for the actions of Sheriff Glanz in his policy-making capacity. Tulsa County is exempt from liability for Sheriff Glanz's alleged tortious conduct pursuant to § 155(5) of the Oklahoma Governmental Tort Claims Act.

#### **Plaintiff's §§ 1983 and 1988 Claims**

Notwithstanding Tulsa County's insulation from liability under the Oklahoma Governmental Tort Claims Act, such act does not

preclude Plaintiff's federal cause of action against Tulsa County.

Immunity as it relates to alleged § 1983 infractions is governed by federal law. Tiemann v. Tul-Center, Inc., 18 F.3rd 851, \_\_\_\_\_ (10th Cir. 1994); "Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law." Id. (citing Howlett v. Rose, 496 U.S. 356, 376 (1990) which quoted Martinez v. California, 444 U.S. 277, 284 n.8 (1980)); See also Owens v. City of Independence, Mo., 445 U.S. 622 (1980). The state Governmental Tort Claims Act and § 1983 afford a "double barreled system." Id. (citing Phillips v Wiseman, 857 P.2d 50, 53 (1993)). "[E]scaping liability under one does not necessarily mean that a party also escapes liability under the other." Id.

Tulsa County argues that the charges contained in Plaintiff's Complaint fail to state a viable § 1983 cause of action against Tulsa County. In order to state a claim under § 1983 Plaintiff must show that Tulsa County, acting under color of state law, deprived him of a right which is secured by the Constitution. Pitts v. Turner and Boisseau Chartered, 850 F.2d 650, 653 (10th Cir. 1988).

Plaintiff's first allegation is that excessive force was used upon him by jailers, acting under color of state law, in violation of his Fourth Amendment right to be free from unreasonable seizures. Plaintiff has failed to adequately set forth specific facts in support of this claim. Conclusory allegations that are not supported by pleaded facts will generally

not survive a motion to dismiss. Revene v. Charles County Comm'r, 882 F.2d 870, 873 (4th Cir. 1989). However, because the Plaintiff has to some extent provided fair notice of the nature of his claim and because of the purported severeness of his alleged injury<sup>3</sup>, the Court will allow the plaintiff to amend his complaint regarding this claim.

Plaintiff's Complaint next alleges that Sheriff Glanz ex rel Tulsa County "failed to properly hire, train, supervise and administer his jail facility ..." (Plaintiff's Complaint at 4.) Plaintiff's Complaint further asserts that Tulsa County through Sheriff Glanz failed to provide adequate medical care. Not only is the Complaint completely devoid of any facts supporting these claims but precedent mandates that allegations of mere negligence may not serve as the basis for § 1983 liability. City of Canton v. Harris, 489 U.S. 378, 388 (1989); Estelle v. Gamble, 429 U.S. 97, 106. Plaintiff's Complaint arguably fails to state a claim on these issues. Notwithstanding, the Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss sets forth some facts which if true could possibly rise to the level of a § 1983 violation. Specifically, the Plaintiff states that he waited three or four days before he was provided with adequate medical care for his broken neck. In light of this the Court will allow the Plaintiff to amend his Complaint.<sup>4</sup>

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<sup>3</sup> Plaintiff claims his neck was broken.

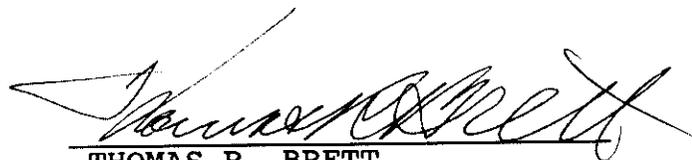
<sup>4</sup> A Complaint may not be amended by a brief in opposition to a motion to dismiss. Thomason v. Nachtrieb, 888 F.2d 1202 (7th Cir. 1989).

### CONCLUSION

Plaintiff's Complaint and proof of service may be amended to reflect Tulsa County's correct name. Plaintiff's pendant state law tort claims against Tulsa County are DISMISSED because Tulsa County is immune from tort liability pursuant to the Oklahoma Governmental Tort Claims Act. Plaintiff has arguably stated a viable § 1983 claim for use of excessive force against him in violation of his rights secured by the Fourth Amendment of the United States Constitution. However, Plaintiff may amend his Complaint to allege a factually specific § 1983 claim pertaining to Tulsa County's alleged failure to properly operate the jail facility and denial of adequate medical care.

Plaintiff has sixty (60) days to comply with this Order. In the event no amended Complaint alleging a factually specific § 1983 claim is filed within sixty days from the date of this Order, the Court will again consider Tulsa County's Motion to Dismiss the federal claim.

IT IS SO ORDERED this 16<sup>th</sup> day of May, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5-18-94

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

CHERYL E. LIMERICK,	)
	)
Plaintiff(s),	)
	)
v.	)
	)
SECRETARY OF HEALTH AND HUMAN	)
SERVICES, Donna Shalala, Secretary.	)
	)
Defendant(s).	)

92-C-0857-E **FILED**

MAY 17 1994

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

ORDER

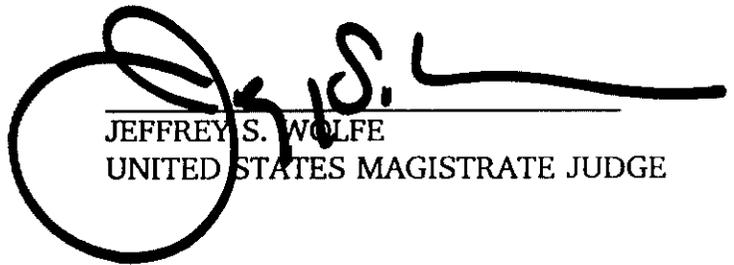
Now before the undersigned is Cheryl E. Limerick's appeal of the Secretary's decision to deny her Social Security benefits. Initially, the United States Magistrate Judge recommended the Secretary's decision be affirmed in a November 17, 1993 Report and Recommendation. However, Ms. Limerick filed an Objection To the Report and Recommendation on November 29, 1993 (docket #15).

Before the Court could rule on Ms. Limerick's objection, the parties consented on January 27, 1994 to proceed before the United States Magistrate Judge pursuant to 28 U.S.C. §636(c)(docket #17). As a result, Ms. Limerick's objection to the Report and Recommendation is still at issue.

Given the circumstances, the undersigned finds as follows. The Secretary's decision to deny Ms. Limerick benefits is **AFFIRMED** for the reasons set forth in the November 17, 1993 Report and Recommendation. In addition, Ms. Limerick's Objection To The Report and Recommendation will be treated as a Motion To Reconsider, which is hereby denied.

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SO ORDERED THIS 17<sup>th</sup> day of May, 1994.

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

ENTERED ON FILE

DATE 5/17/94

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

**FILED**

MAY 16 1994

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

UNITED STATES OF AMERICA, )  
 )  
 )  
 Plaintiff(s), )  
 )  
 v. )  
 )  
 )  
 ROBERT L. HARRIS, et al, )  
 )  
 )  
 Defendant(s). )

93-C-1149-B ✓

**ORDER**

Defendants' Motion to Dismiss Appeal is hereby granted as the matter has been settled between the parties.

SO ORDERED THIS 16<sup>th</sup> day of May, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

3

ENTERED IN COURT

5/17/94

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

**FILED**

MAY 16 1994

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

CLESTER BILLS, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Respondent. )

No. 94-C-479-B

ORDER

Petitioner has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He demands a copy of his trial transcript because his trial counsel withdrew as counsel of record in his direct criminal appeal two weeks ago.

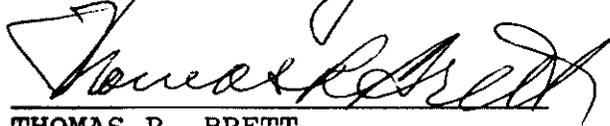
At the outset the Court notes that Petitioner has neither paid the \$5.00 filing fee or submitted a motion for leave to proceed in forma pauperis. Accordingly, the Court should dismiss this case for failure to pay the proper filing fee. See Local Rule 5.1.F. In any case, the Court concludes that Petitioner would not be entitled to federal habeas relief or a copy of his trial transcript. Although Petitioner's trial Counsel, Charles Whitman, filed a motion to withdraw as counsel of record on appeal, the Tenth Circuit denied that application on March 10, 1994, and appointed Mr. Whitman as counsel of record for the Petitioner before that Court.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's

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application for a writ of habeas corpus be **denied**.

SO ORDERED THIS 16 day of May, 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

SECRET  
5/17/94

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

**FILED**

MAY 16 1994

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

JONATHAN R. FREEMAN, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 TULSA POLICE DEPARTMENT, )  
 et al., )  
 )  
 Respondent. )

No. 94-C-295-B ✓

**ORDER**

After carefully reviewing Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and Petitioner's statement in response to the April 5, 1994 order, the Court concludes that Petitioner is actually seeking to sue the Tulsa Police Department and the officers which arrested him for assault and battery, for excessive force, and for making materially false statements. Therefore, the Court will dismiss this habeas corpus action and permit the Petitioner to submit a civil rights complaint pursuant to 42 U.S.C. § 1983. The Clerk will set up Petitioner's civil rights action as a separate action upon receipt of the requisite documents.

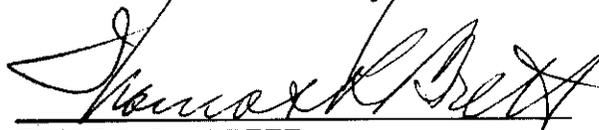
**ACCORDINGLY, IT IS HEREBY ORDERED:**

- (1) That Petitioner's application for a writ of habeas corpus be **dismissed without prejudice**; and
- (2) That the Clerk shall **mail** to the Petitioner the following documents: information and instructions for filing a civil rights complaint pursuant to 42 U.S.C. § 1983, (2) civil rights complaint forms, (3) a blank motion for

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leave to proceed in forma pauperis, and (4) summons and  
U.S.M. 285 forms for two or three defendants.

SO ORDERED THIS 16 day of May, 1994.

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

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

5/17/94  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 16 1994

KENWOOD AVIATION  
SERVICES, INC.,

Plaintiff,

vs.

BIZJET INTERNATIONAL  
SALES AND SUPPORT, INC.,

Defendant.

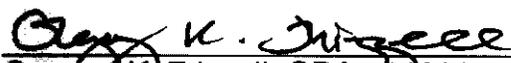
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. C-93-554-B

**STIPULATION OF DISMISSAL**

**COME NOW** Plaintiff Kenwood Aviation Services, Inc., by and through its attorney of record, Gregory K. Frizzell, and Defendant BizJet International Sales and Support, Inc., by and through its attorney of record, Thomas M. Ladner of Norman & Wohlgemuth, and, pursuant to Fed.R.Civ.P. 41(a)(1)(ii), stipulate to the dismissal of the above-captioned action, and all claims for relief asserted therein, including all claims and counterclaims, with prejudice to their refileing.

Respectfully submitted,

  
Gregory K. Frizzell, OBA # 11089  
Two Main Plaza  
610 South Main Street, Suite 302  
Tulsa, Oklahoma 74119  
(918) 584-5402  
ATTORNEY FOR PLAINTIFF KENWOOD  
AVIATION SERVICES, INC.

  
Thomas M. Ladner, OBA # 5161  
Norman & Wohlgemuth  
2900 Mid-Continent Tower  
Tulsa, Oklahoma 74103  
(918) 583-7571  
ATTORNEY FOR DEFENDANT BIZJET  
INTERNATIONAL SALES AND SUPPORT

ENTERED ON

DATE 5/17/94

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ARTHUR R. BEISWENGER )  
 aka Arthur Rex Beiswenger; )  
 RETA L. BEISWENGER )  
 aka Reta Lynn Beiswenger; )  
 TERRY GARTSIDE INVESTMENTS, INC.; )  
 CITY OF SAND SPRINGS; )  
 COUNTY TREASURER, Tulsa County, )  
 Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

**FILED**  
 MAY 16 1994  
 Richard M. Lawrence, Clerk  
 U. S. DISTRICT COURT  
 NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C-8-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16 day  
 of May, 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 SAND  
 SPRINGS, Oklahoma, appears not having previously filed its  
 Disclaimer of Interest through Ronald D. Cates, City Attorney,  
 Sand Springs, Oklahoma; and the Defendants, ARTHUR R. BEISWENGER  
 aka Arthur Rex Beiswenger, RETA L. BEISWENGER aka Reta Lynn  
 Beiswenger, appear not, but make default.

The Court being fully advised and having examined the  
 court file finds that the Defendant, ARTHUR R. BEISWENGER aka

Arthur Rex Beiswenger, signed a waiver of service of Summons on January 19, 1994; that the Defendant, RETA L. BEISWENGER aka Reta Lynn Beiswenger, signed a waiver of service of Summons on January 20, 1994; that the Defendant, TERRY GARTSIDE INVESTMENTS, INC., was served by Marshal on March 31, 1994; that the Defendant, CITY OF SAND SPRINGS, Oklahoma, acknowledged receipt of Summons and Complaint on January 12, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 18, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 6, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on January 25, 1994; that the Defendant, CITY OF SAND SPRINGS, Oklahoma, filed its Disclaimer of Interest on February 3, 1994; and that the Defendants, ARTHUR R. BEISWENGER aka Arthur Rex Beiswenger, RETA L. BEISWENGER aka Reta Lynn Beiswenger, TERRY GARTSIDE INVESTMENTS, INC., have failed to answer and default has therefore been entered by the Clerk of this Court.

The Court further finds that on October 27, 1992, ARTHUR REX BEISWENGER and RETA LYNN BEISWENGER filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-03714-C. On February 24, 1993, a Discharge of Debtor was entered releasing the debtors from all dischargeable debts. Subsequently, on June 25, 1993, Case No. 92-03714-C, United

States Bankruptcy Court for the Northern District of Oklahoma, was closed.

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-FIVE (25), BLOCK ONE (1), PRATTWOOD ESTATES 2ND, AN ADDITION TO THE CITY OF SAND SPRINGS, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that the ARTHUR R. BEISWENGER aka ARTHUR REX BEISWENGER named herein is one and the same person as the Arthur "B." Beiswenger named as a grantee in the general warranty deed dated August 23, 1988 and recorded with the Tulsa County Clerk on September 6, 1988 in Book 5126, Page 867. Such defendant is also sometimes known as Mike Beiswenger.

The Court further finds that on August 31, 1988, the Defendants, ARTHUR REX BEISWENGER and RETA LYNN BEISWENGER, executed and delivered to First Security Mortgage Company, their mortgage note in the amount of \$62,840.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, ARTHUR R. BEISWENGER and RETA L. BEISWENGER, executed and delivered to First Security Mortgage Company, a mortgage dated August 31, 1988, covering the above-described property. Said mortgage was

recorded on September 6, 1988, in Book 5126, Page 868, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 14, 1988, First Security Mortgage Company assigned the above-described mortgage note and mortgage to Government National Mortgage Association. This Assignment of Mortgage was recorded on September 11, 1989, in Book 5206, Page 1672, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 8, 1991, Government National Mortgage Association 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 December 26, 1991, in Book 5370, Page 0444, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 14, 1992, Government National Mortgage Association executed a corrected assignment to the Secretary of Housing and Urban Development of Washington, D.C. This corrected assignment was recorded on May 14, 1992, in Book 5404, Page 2462, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1992, the Defendants, ARTHUR R. BEISWENGER aka Arthur Rex Beiswenger and RETA L. BEISWENGER aka Reta Lynn Beiswenger, 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, ARTHUR R. BEISWENGER aka Arthur Rex Beiswenger and RETA L. BEISWENGER aka Reta Lynn Beiswenger, 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, ARTHUR R. BEISWENGER aka Arthur Rex Beiswenger and RETA L. BEISWENGER aka Reta Lynn Beiswenger, are indebted to the Plaintiff in the principal sum of \$84,686.82, plus interest at the rate of Ten and One-Half (10.5%) percent per annum from December 8, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

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

The Court further finds that the Defendant, CITY OF SAND SPRINGS, Oklahoma, 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 thereof.

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, ARTHUR R. BEISWENGER aka Arthur Rex Beiswenger and RETA L. BEISWENGER aka Reta L. Beiswenger, in the principal sum of \$84,686.82, plus interest at the rate of Ten and One-Half (10.5%) percent per annum from December 8, 1993, until judgment, plus interest thereafter at the current legal rate of 5.02 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, 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** the defendant, CITY OF SAND SPRINGS, Oklahoma, 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 thereof.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, ARTHUR R. BEISWENGER aka Arthur Rex Beiswenger and RETA L. BEISWENGER aka Reta Lynn Beiswenger, 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;

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.

**BY THOMAS R. BRETT**

UNITED STATES DISTRICT JUDGE

APPROVED:

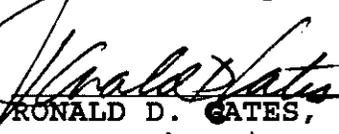
STEPHEN C. LEWIS  
United States Attorney



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Attorney for Defendant,  
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Judgment of Foreclosure  
Civil Action No. 94-C-8-B

NBK:flv

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

MAY 17 1994

IN RE: )  
 )  
ASBESTOS LITIGATION, )  
 )  
DEBORIS I. PARTAIN, individually, )  
and as Surviving Spouse and Next )  
of Kin of GRADY CARL PARTAIN, )  
Deceased, )  
Plaintiff(s), )  
vs. )  
 )  
FIBREBOARD CORP., et al., )  
 )  
Defendants. )

M-1417  
ASB(I)- 6408

No. 89-C-844-C

**F I L E D**

**DISMISSAL WITHOUT PREJUDICE**  
**AS TO DEFENDANTS GAF CORPORATION,**  
**ARMSTRONG CORK COMPANY AND**  
**FLEXITALLIC GASKET COMPANY, INC.**

MAY 16 1994

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

COMES NOW the Plaintiff, and hereby dismisses the above cause without prejudice  
as to Defendants, GAF Corporation, Armstrong Cork Company and Flexitallic Gasket  
Company, Inc.

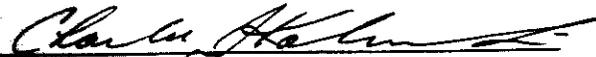
Respectfully submitted,

UNGERMAN & IOLA

*Randall L. Iola*

Randall L. Iola, OBA #13,085  
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**LIAISON COUNSEL FOR DEFENDANTS**

**CERTIFICATE OF MAILING**

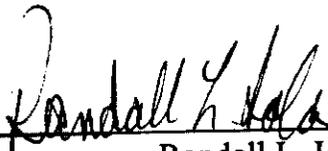
I hereby certify that on this 16<sup>th</sup> day of April, 1994, a true and correct copy of the within and foregoing Dismissal Without Prejudice was mailed, with proper first-class postage thereon fully prepaid, to the following:

**Scott M. Rhodes, Esquire**  
**Pierce, Couch, Hendrickson,**  
**Baysinger & Green**  
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**P. O. Box 26350**  
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ATTORNEYS FOR DEFENDANTS GAF CORPORATION,  
ARMSTRONG WORLD INDUSTRIES, and  
FLEXITALLIC GASKET COMPANY, INC.

  
\_\_\_\_\_  
Randall L. Iola

DATE 5-17-94

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

THE O'BANNON BANKING COMPANY,

Plaintiff,

v.

ZINKLAHOMA, INC., formerly  
JOHN ZINK COMPANY, and  
THE FIRST NATIONAL BANK IN  
DOLTON,

Defendants,

v.

RMP CONSULTING GROUP, INC.,

Third-Party Defendant,  
and Third-Party Plaintiff,

v.

RMP SERVICE GROUP, INC., and  
KOCH ENGINEERING COMPANY, INC.,

Third-Party Defendants.

**FILED**

MAY 16 1994

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

Case No. 90-C-987-E

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, The O'Bannon Banking Company, the Defendant, Zinklahoma, Inc., formerly John Zink Company, and Third Party Defendant, Koch Engineering Company, Inc., by and through their undersigned counsel of record, and pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, stipulate to a dismissal with prejudice of all claims between the parties in the above captioned action. Each party will bear their own costs and attorney fees.

DATED April 29, 1994.

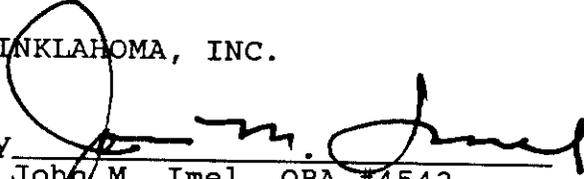
THE O'BANNON BANKING COMPANY

By 

Stuart B. Campbell, OBA #11246  
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GABERINO & DUNN  
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Paul G. White, Esq.  
NEALE, NEWMAN, BRADSHAW &  
FREEMAN  
P. O. Box 10327  
Springfield, MO 65808  
(417) 882-9090

ZINKLAHOMA, INC.

By 

John M. Imel, OBA #4542  
Steven A Stecher, OBA #8574  
MOYERS, MARTIN, SANTEE,  
IMEL & TETRICK  
320 South Boston, Suite 920  
Tulsa, Oklahoma 74103-3722  
(918) 582-5281

KOCH ENGINEERING COMPANY, INC.

By 

Thomas A. Loftus III  
4111 East 37th Street North  
P. O. Box 2256  
Wichita, KS 67201

Larry D. Leonard  
ZARBANO, LEONARD, SCOTT & FEHRLE  
Boston Place Building  
1516 South Boston  
Tulsa, OK 74119-4019  
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District Court of Tulsa County, and that he proceed to the Court of Criminal Appeals based on the District Court's decision.

On June 24, 1993, because neither the Petitioner nor the Respondent had submitted any evidence regarding the reason no appeal had been filed on behalf of the Petitioner, the Court stayed Petitioner's action in the interests of comity to permit the Petitioner to file a request for an appeal out of time with the District Court of Tulsa County. Although Petitioner immediately moved for an appeal out of time with the Tulsa County District Court, he failed to appeal the August 17, 1993 decision denying him an out-of-time appeal.

The Respondent has now moved to dismiss Petitioner's application for failure to exhaust state remedies. He argues that Petitioner was "given more than adequate time and forewarning of how to exhaust his state remedies," but failed to do so. Petitioner objects to Respondent's motion, arguing that neither this Court nor the Tulsa County District Court directed him to file an appeal with the Oklahoma Court of Criminal Appeals and thus, that this Court should exonerate him from having to return to state court to exhaust his state remedies. Petitioner also states that he recently filed an appeal with the Court of Criminal Appeals, PC-94-0329, but that on April 11, 1994, that Court declined jurisdiction and suggested that Petitioner return to the District Court of Tulsa County to seek an out-of-time appeal.

## II. DISCUSSION

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991).

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not exhausted his state remedies. Petitioner failed to file a timely appeal with the Oklahoma Court of Criminal Appeals from the district court's denial of his motion for an out-of-time appeal. Petitioner's contention--that he should be excused from exhausting his state remedies because neither this Court nor the Tulsa County District Court notified him that he should appeal--is totally meritless. Nor does Petitioner's recent attempt to appeal the August 16, 1993 denial of his motion to file an out-of-time appeal satisfy the exhaustion requirement.

Accordingly, the Court concludes that Respondent's motion to dismiss Petitioner's application for failure to exhaust state

remedies should be granted. The Court notes, however, that if the State courts do not grant Petitioner the relief he seeks (after he has renewed his motion for an appeal out of time and has appealed any denial to the Court of Criminal Appeals), that he will be free to refile his petition in this Court. See White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988).

**ACCORDINGLY, IT IS HEREBY ORDERED** that Respondent's motion to dismiss for failure to exhaust [docket #19] be granted and that this petition for a writ of habeas corpus be dismissed without prejudice to it being refiled if the Petitioner is not granted the relief he seeks in the State courts.

SO ORDERED THIS 13 day of May, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON FILE

DATE MAY 16 1994

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

SINGER BROADCASTING CORP., INC., )  
and THE HERMAN A. SINGER INTER )  
VIVOS REVOCABLE TRUST, )

Plaintiffs, )

v. )

CITY OF JENKS, OKLAHOMA, a )  
Municipal Corporation, MIKE )  
TINKER, VIC VREELAND, RUBY )  
McGONIGAL, GARY MEDLIN, PAUL EADS, )  
JACK MCKINZIE, and MARTHA RONGEY, )

Defendants. )

93-C-581-B ✓ ✓

**FILED**

MAY 13 1994

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

ORDER

This order pertains to Defendants', City of Jenks, Oklahoma, Mike Tinker, Vic Vreeland, Paul Eads, and Martha Rongey, Motion for Summary Judgment (Docket #15)<sup>1</sup>, Defendants', Gary Medlin, Jack McKinzie, and Ruby McGonigal, Motion for Summary Judgment (Docket #16), Plaintiffs' Response to the Motion for Summary Judgment of Defendants, City of Jenks, Oklahoma, Mike Tinker, Vic Vreeland, Paul Eads, and Martha Rongey (Docket #22), Plaintiffs' Response to the Motion for Summary Judgment of Defendants, Gary Medlin, Jack Mckinzie, and Ruby McGonigal (Docket #23), the Reply of the Defendants, Gary Medlin, Jack Mckinzie and Ruby McGonigal, to Plaintiffs' Response to Motion for Summary Judgment (Docket #27) and the Reply of Defendants, City of Jenks, Oklahoma, Mike Tinker, Vic Vreeland, Paul Eads, and Martha Rongey, to Plaintiffs'

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

17

Response to Motion for Summary Judgment (Docket #31).

Plaintiffs have brought this suit alleging deprivation of constitutional rights protected by 42 U.S.C. § 1983. They allege that they were prevented from building a radio transmission tower by the members of the City Council of Jenks, Oklahoma, when Ordinance 792 was passed requiring a specific use permit to build a radio transmission tower and their request for a permit was denied. They claim these actions in effect took their property for a public purpose without due process of law and just compensation and constituted an arbitrary and unreasonable exercise of the city's police power bearing no substantial relation to the public health, safety, and welfare in violation of the Fifth Amendment of the United States Constitution and their rights under the Civil Rights Act, 42 U.S.C. § 1983. They also claim that the ordinance restricting the erection of a radio transmission tower is an improper regulation of interstate commerce and that the statute as written is unconstitutionally vague.

In Defendants', City of Jenks, Oklahoma, Mike Tinker, Vic Vreeland, Paul Eads, and Martha Rongey, Motion for Summary Judgment (Docket #15), Defendants seek summary judgment, alleging that the federal courts cannot review local zoning ordinances by means of claims under 42 U.S.C. § 1983, that the ordinance was not clearly arbitrary or unreasonable and was clearly related to the exercise of the police power to protect the public health and welfare, that Plaintiffs had no interest in the property involved at the time the ordinance was passed, that they have not exhausted state remedies available to pursue their claims, that Defendants are immune from liability under the Oklahoma Tort Claims Act, that the ordinance is not unconstitutionally vague, that statutory requirements

of due process were complied with when the ordinance was enacted, that Plaintiffs have not been deprived of all reasonable use of their land, that Defendants are entitled to qualified or good faith immunity, and that the ordinance was not an improper regulation of interstate commerce.

"[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] 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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). 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 nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to

establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). 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 Hosp. of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

Defendants argue that Plaintiffs had no property interest in the land at issue at the time Ordinance 792 was passed, so do not have standing to bring this lawsuit. Defendants state that on June 30, 1992 the property was sold to Inca Oil Company, on November 24, 1992 John Singer was issued a construction permit by the FCC, on December 29, 1992 the hearing on the ordinance occurred, on January 19, 1993 Inca Oil Company sold the property to The Herman Singer Inter Vivos Revocable Trust, on February 1, 1993 Ordinance 792 was passed, on February 23, 1993 Singer Broadcasting Group applied for a special use permit, and on April 15, 1993 the hearing to consider the permit was held and the Planning Commission denied the request.

However, Plaintiffs have shown that John Singer owns a ten percent (10%) interest and Herman Singer owns a ninety percent (90%) interest in Inca Oil Corporation (see pg. 56 of Exhibit A to Plaintiffs' Brief in Response, #22). John Singer and his brother and sister are beneficiaries of the Trust (see pg. 66 of Exhibit A to Defendants' Motion for Summary Judgment, #15). The Warranty Deed dated December 31, 1992 conveys the property at issue from Singer Broadcasting Group, Inc. to the Trust (see Exhibit D to Defendants' Motion for Summary Judgment, #15). Singer Broadcasting Group, Inc. is entirely owned by John Singer (see pg. 72 of Exhibit A to Plaintiffs' Brief in Response, #22).

Under the ruling in Warth v. Seldin, 422 U.S. 490, 498-499 (1975), the essence of the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify the court's action on his behalf. The Singer group and its related entities, including Singer Broadcasting Group, Inc. and The Herman A. Singer Inter Vivos Revocable Trust, have stakes in the controversy and clearly have sufficient standing to bring this lawsuit. Singer Broadcasting Group, Inc. and The Herman A. Singer Inter Vivos Revocable Trust either owned the property or were the entities that would be the beneficiary of the right to operate the tower at the time the Ordinance was passed. Defendants' Motion for Summary Judgment as to this issue is denied.

Plaintiffs must show deprivation by the state of their protected interest in property to sustain their claims that they have been deprived of property without due process of law and just compensation. The property interest asserted is a right under state law to construct a radio transmission tower. Attacks against zoning ordinances have only rarely been sustained. Belle Terre v. Boraas, 416 U.S. 1 (1974); Moore v. East Cleveland, 431 U.S. 494 (1977); Nectow v. Cambridge, 277 U.S. 183 (1928); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The Supreme Court in these cases held that an ordinance was not to be declared unconstitutional unless clearly arbitrary and unreasonable and having no substantial relation to the public health, safety, morals, or general welfare.

The Supreme Court has also treated the denial of a variance in a specific zoning case as a legislative act which will not be reviewed by the courts unless there is proof that it is arbitrary and unreasonable. Village of Arlington Heights v. Metropolitan Housing Devel.

Corp., 429 U.S. 252 (1977). The Court in Arlington Heights recognized that judicial inquiries into legislative or executive motivation were a substantial intrusion into the workings of other branches of government, so placing a decisionmaker on the stand should usually be avoided. Id. at 268 n. 18. Thus "federal judicial interference with a state zoning board's quasi-legislative decisions, like invalidation of legislation for irrationality or arbitrariness, is proper only if the governmental body could have had no legitimate reason for its decision." Shelton v. College Station, 780 F.2d 475, 483 (5th Cir.), cert. denied, 477 U.S. 905 (1986). "It is one thing for federal courts to insist upon procedural rights such as fair notice and quite another to measure the relative probative force and substantive content of the resulting zoning decision." Id. at 482. A governmental body conducting a zoning hearing is required by the due process clause to give notice and certain participatory rights to affected property owners.

The Supreme Court has held that cities may enact land-use restrictions to enhance the quality of life by preserving the character and desirable aesthetic features of a city. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 129 (1978). It is not uncommon for cities to enact specific use ordinances restricting the use of property. Id.; Lucas v. South Carolina Coastal Council, \_\_\_\_\_ U.S. \_\_\_\_\_, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); Williamson County Regional Planning Com. v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). A property owner has no vested right to use his property for a particular purpose freed from public control under the police power. Botchlett v. Bethany, 416 P.2d 613, 616 (Okla. 1966).

Defendants' Motion for Summary Judgment as to the issue of whether Ordinance 792 and the decision to deny Plaintiffs a permit under that ordinance were clearly unreasonable, arbitrary, and unrelated to the exercise of the police power to protect the public health and welfare is granted. The Defendants have related that their decisions were based on hearing testimony concerning fears of a failed and falling radio tower, adverse impacts upon development of the surrounding area, devaluation of surrounding property, and danger of electromagnetic fields. Based on the record before the court, it is clear that Defendants can articulate a rational basis for these decisions. There being no genuine issue of material fact regarding the existence of public concerns to which the police power was properly addressed, summary judgment is appropriate.<sup>2</sup> Factual questions remain only with respect to whether there was a procedural irregularity which invalidated the ordinance, and whether the actions in passing and enforcing the ordinance constituted a taking that must be compensated.

Defendants' exhibits to their Reply to Plaintiffs' Response to Motion for Summary Judgment (Docket #31) show that they complied with Okla. Stat. tit. 11, § 43-104 - § 43-106 in giving notice of the public hearing before the Planning Commission held on December 29, 1992 to consider an amendment to the Jenks Zoning Code reclassifying certain land uses as "Specific Uses" that were prohibited without permit.<sup>3</sup> The notice for

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<sup>2</sup> The court need not address whether the "public concerns" withstand strict scientific scrutiny or market analysis. This court is an improper forum in which to measure the "relative probative force and substantive content" of zoning decisions. Shelton, 780 F.2d at 482.

<sup>3</sup> The notice for this hearing did not specify that radio towers would be considered. It provided: "Notice is hereby given that a public hearing will be held before the Jenks Planning Commission in the City Council Chambers of the Jenks City Hall, 211 North Elm Street, Jenks, Oklahoma, at 7:30 p.m. on the 19th day of December, 1992, on a proposed amendment to the Jenks Zoning Code reclassifying certain land uses as Specific Uses by the deletion of these certain land uses from general zoning district classifications and the addition of these certain land uses to the specific use permit classification."

the April 15, 1993 hearing before the Planning Commission to consider Plaintiffs' application for a specific use permit to construct such a tower also complied with these applicable legal requirements. However, Defendants have not presented documentary evidence that they complied with the notice requirements of Oklahoma's Open Meeting Act, Okla. Stat. tit. 25, § 301, et seq., before the February 1, 1993 City Council meeting where Ordinance 792 reclassifying the land uses, as approved by the Jenks Planning Commission at the December 29, 1992 meeting, was adopted. Defendants claim such notice was given in their Reply to Plaintiffs' Response to Motion for Summary Judgment (Docket #31) at page 8 and Robert D. Richards also states this in paragraph #11 of his sworn affidavit (Exhibit #1 to Defendants' Reply to Plaintiffs' Response to Motion for Summary Judgment). However, Exhibit F to Plaintiffs' Brief in Response to Motion for Summary Judgment (Docket #22) is a letter from Defendants' counsel stating that proof of notice for the February 1, 1993 meeting cannot be located. Thus, there is a factual dispute as to whether proper notice was given.

The Motion for Summary Judgment of Defendants Gary Medlin, Jack McKinzie, and Ruby McGonigal (#16) and the Motion for Summary Judgment of The City of Jenks, Mike Tinker, Vic Vreeland, Paul Eads, and Martha Rongey (#15) as to Plaintiffs' § 1983 claim that their property was taken in violation of their constitutional rights are denied. Zoning is a legislative function which is due the presumptive validity of any municipal ordinance. Mid-Continent Life Ins. Co. v. Oklahoma City, 701 P.2d 412, 413 (Okla. 1985). Under the grant of immunity statutorily conferred in Oklahoma's Political Subdivision Tort Claims Act, Okla. Stat. tit. 51 § 155(1), neither a political subdivision, nor its officials, may be subject

to liability for any acts or omissions in performing a legislative function. However, claims by which an interest holder seeks compensation for "taking" of property under the federal or state constitutions fall under a rubric **distinct** from all others, since fundamental federal and state law protects these claims from legislative abridgment. McCracken v. Lawton, 648 P.2d 18, 20 (Okla. 1982). The Supreme Court has consistently held that "some form of hearing is required before an individual is finally deprived of a property interest." Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

There is a genuine issue of material fact as to whether notice was given of the February 1, 1993 City Council meeting where Ordinance 792 was passed. If proper notice was given and Ordinance 792 is an effective law, there is an issue of material fact as to whether the denial of Plaintiffs' application for a specific use permit to construct a tower constituted a "taking" for which Plaintiffs must be compensated.<sup>4</sup> The City Counselors' actions in considering the application were functionally in the nature of executive review, outside the Council members' range of legislative duties. "When local zoning officials do more than adopt prospective, legislative type rules and take the next step into the area of enforcement," they no longer have legislative immunity. Scott v. Greenville County, 716 F.2d 1409, 1423 (4th Cir. 1983). In such a situation, where counselors act outside the legislative role, they are only entitled to consideration of a defense of qualified immunity.

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<sup>4</sup> The Supreme Court in Lucas, 112 S.Ct. at 2893, described two categories of regulatory action as compensable without case specific inquiry into the public interest advanced to support the restraint. The first includes regulations that compel a property owner to suffer a physical invasion of his property, and the second is where the regulation denies all economically beneficial or productive use of land. Importantly, the Court said "we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." Id. at 2895, n.8 (citing Penn Central, 438 U.S. at 124). In the case at bar, Plaintiffs claim the property at issue was only purchased to construct a radio transmission tower and that the purchase was only made after the Plaintiffs were advised that such construction was permitted in the agricultural district in which it was located (see pgs. 3-4 of Plaintiffs' Brief in Response, #22).

The court cannot rule on Defendants' claim of qualified immunity at this time. Qualified immunity is an affirmative defense that protects government officials from personal liability unless their actions violate clearly established law of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Defendants are entitled to qualified immunity unless they knew or should have known that the Ordinance they were enforcing was invalid due to failure to comply with the Oklahoma Open Meeting Act, Okla. Stat. tit. 25 § 301. As the validity of the Ordinance remains in question, so does the issue of qualified immunity.

Defendants' Motion for Summary Judgment is denied as to Defendants' claim that Plaintiffs did not exhaust their state remedies under the Oklahoma Constitution, Article II, § 24, and Okla. Stat. tit. 66 § 57. Defendants admit that Plaintiffs need not exhaust their state provided remedies in relation to their claims under 42 U.S.C. § 1983 (see pg. 24 of Defendants' Motion for Summary Judgment, #15).

Defendants' Motion for Summary Judgment is denied as to Plaintiffs' claim that the Ordinance is void for vagueness. The Supreme Court held in Grayned v. Rockford, 408 U.S. 104, 108 (1972), that a law is void for vagueness if its prohibitions are not clearly defined. However, the Grayned Court noted that "we can never expect mathematical certainty" from language, and a statute marked by "flexibility and reasonable breath, rather than meticulous specificity" which makes it clear what behavior is prohibited is not unconstitutionally vague. Id. at 111 (citing Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (8th Cir. 1969)). Ordinance 792 has been presented to the court without those portions of the Jenks City Code to which it refers and which are related (Exhibit I

to Plaintiffs' Brief in Response, #22). It is impossible for this court to determine the issue of vagueness without reviewing the full Code, especially Ordinance Number 209, which is being amended.

Defendants' Motion for Summary Judgment is granted as to Plaintiffs' claim that the Ordinance constitutes an improper regulation of interstate commerce. In Guschke v. Oklahoma City, 763 F.2d 379, 384-85 (10th Cir. 1985), the court noted that, even in the absence of explicit legislation, the Commerce Clause of the Federal Constitution creates an implied limitation on states' authority to enact laws which restrict interstate commerce (citing Arkansas Electric Cooperative Corp. v. Arkansas Public Service Com., 461 U.S. 375, 389-393 (1983)).

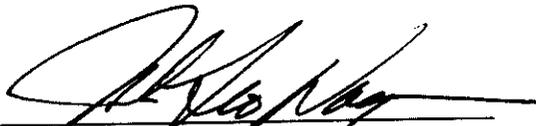
States are not, however, prohibited from regulating matters of legitimate local concern, such as zoning, even though such regulation may affect interstate commerce. When the facts are viewed in the light most favorable to the plaintiff, the defendant's zoning restraint on the height of radio towers has only incidental impact on interstate commerce. Conversely, the state's interest in zoning is great. The height restrictions are not, in either purpose or effect, a protectionist measure. Accordingly, we find that federal interest in the free flow of interstate commerce does not preclude the city's zoning height limitations as applied to amateur radio towers.

Guschke, 763 F.2d at 384-85 (citations omitted). The requirement of a permit to build a transmission tower does not, in either purpose or effect, restrict interstate commerce. Such a requirement has only incidental impact on interstate commerce. The city's interest in zoning is great. There is no merit to Plaintiffs' claim that Ordinance 792 improperly regulates interstate commerce.

In Defendants', Gary Medlin, Jack McKinzie, and Ruby McGonigal, Motion for Summary Judgment (Docket #16), Defendants claim that they were not present at the City Counsel meeting on May 12, 1993 when Ordinance 792 was passed, so they are absolved of all liability stemming from the events discussed above. Ordinance 792 was actually passed on February 1, 1993. On May 17, 1993, the City Council met and rendered a decision denying Plaintiffs a specific use permit. Defendants', Gary Medlin, Jack McKinzie, and Ruby McGonigal, Motion for Summary Judgment (Docket #16) is denied. These Defendants were involved in the meetings most pertinent to Plaintiffs' claims, as already analyzed, and cannot escape any liability which may be found when this case is tried merely because they were not present at the May meeting.

In summary, Defendants', City of Jenks, Oklahoma, Mike Tinker, Vic Vreeland, Paul Eads, and Martha Rongey, Motion for Summary Judgment (Docket #15) is denied as to the issue of Plaintiffs' standing to bring this lawsuit; granted as to the issue of whether the ordinance was clearly unreasonable, arbitrary, and unrelated to the exercise of the police power to protect the public health and welfare; denied as to Plaintiffs' § 1983 claim that their property was taken in violation of their constitutional rights; denied as to Defendants' claim that Plaintiffs did not exhaust their state remedies under the Oklahoma Constitution, Article Two, Section 24 and Okla. Stat. tit. 66 § 57; denied as to Plaintiffs' claim that the Ordinance is void for vagueness; and granted as to Plaintiffs' claim that the Ordinance constitutes an improper regulation of interstate commerce. The Motion for Summary Judgment of Defendants Gary Medlin, Jack McKinzie, and Ruby McGonigal (#16) is denied in full.

Dated this 13<sup>th</sup> day of May, 1994.

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

S:\SINGER.ORD

ENTERED ON DOCKET  
MAY 16 1994

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

AUXIER SCOTT SUPPLY CO., )  
Plaintiff, )  
and )  
THE LEVINSON STEEL COMPANY, )  
Additional Party Plaintiff, )  
vs. )  
STRUCTURAL ACCESSORIES, INC., )  
Defendant. )

**FILED**

MAY 12 1994

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

CASE NO. 94-C-483-E

ORDER OF REMAND

NOW on this 12th day of May, 1994, the captioned cause comes on for hearing on the Motion to Remand and for Sanctions filed by attorneys for Plaintiffs and pursuant to Plaintiffs' Application for Emergency Hearing. Plaintiffs appear by their attorneys Kivell, Rayment & Francis by Brian J. Rayment. Defendant appears by its attorneys Patton, Brown by Frank R. Patton, Jr.

The Court after considering argument of counsel finds:

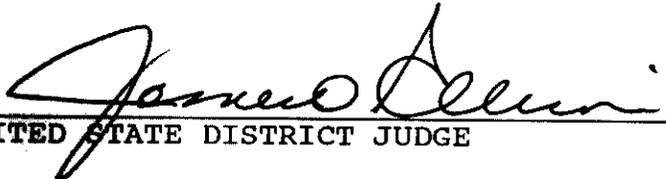
1. That the Plaintiffs' Application for Order to Judgment Debtor to Appear and Disclose Property and Order issued pursuant thereto, filed in the District Court in and for Tulsa County, State of Oklahoma, Case No. CJ 92-01217, is a continuation of the case commenced in March, 1992 and is not a separate action subject to removal.

2. Defendant did not file its Notice of Removal within thirty (30) days or one (1) year from the date the State Court action was commenced in contravention of 28 U.S.C. §1446.

3. That the Notice of Removal was not asserted by Defendant's counsel in contravention of Rule 11.

IT IS THEREFORE ORDERED that the Motion to Remand is granted and this action is hereby remanded to the State Court for further proceedings.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Sanctions is denied.

  
UNITED STATE DISTRICT JUDGE

  
BRIAN J. RAYMENT, OBA #7441

  
FRANK R. PATTON, JR., OBA #6961

ENTERED ON DOCKET

DATE 5-15-94

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

**PATRICIA COATS,** )  
 )  
 **Plaintiff,** )  
 )  
 **vs.** )  
 )  
 **UNITED STATES OF AMERICA,** )  
 )  
 **Defendant.** )

**Case No. 93-C-666-E**

**FILED**

MAY 13 1994

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

**ORDER**

The Court, after reviewing the Motion to Dismiss of Plaintiff, orders the above styled action dismissed.

*S/* JAMES O. ELLISON

---

**James O. Ellison**  
United States District Judge



ENTERED ON DOCKET

DATE 5-15-94

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

IGNACIO NAVARRO,  
Petitioner,

vs.

STANLEY GLANZ, et al.,  
Respondent.

No. 94-C-351-E ✓

**FILED**

MAY 13 1994

**ORDER**

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

On April 20, 1994, the Court ordered petitioner to re-submit his petition for a writ of habeas corpus and his in forma pauperis declaration on the court-authorized forms within fifteen days from the date of entry of that order. Petitioner has failed to do so. **ACCORDINGLY, IT IS HEREBY ORDERED** that Petitioner's application for a writ of habeas corpus be **dismissed without prejudice** for failure to comply with the April 20, 1994 order.

SO ORDERED THIS 13<sup>th</sup> day of May, 1994.

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

ENTERED ON DOCKET

DATE 5-15-94

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

**FILED**

MAY 13 1994

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

UNIVERSAL JOINT SPECIALISTS, )  
INC., an Oklahoma corporation, )

Plaintiff, )

vs. )

Case No. 91-C-936-E

PAINWEBBER, INC.; ROTAN MOSLE, )  
INC., a division of PaineWebber; )  
and STEVEN L. FRITZ, )

Defendants. )

**FILED**

MAY 13 1994

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

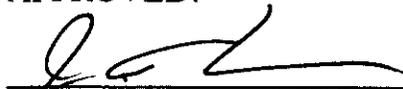
**ORDER OF DISMISSAL WITH PREJUDICE**

This cause came on for hearing on this 13 day of <sup>May</sup> ~~March~~, 1994, upon the Application of the Plaintiff, Universal Joint Specialists, Inc., an Oklahoma Corporation, for Dismissal With Prejudice. The Court, after being advised in the premises, finds that said Application should be approved since the Plaintiff has compromised and settled all of its claims and causes of action heretofore asserted against the Defendants herein and that all claims heretofore asserted are now moot and this cause should be dismissed with prejudice.

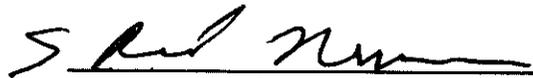
BE IT, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the claims and causes of action of the Plaintiff be and the same are hereby and by these presents dismissed with prejudice and the Defendants are hereby and by these presents dismissed without further liability. JAMES O. ELLISON

United States District Judge

APPROVED:

  
\_\_\_\_\_  
Attorney for Plaintiff

*Claire V Egan #554*  
\_\_\_\_\_  
Attorney for Defendant, PaineWebber,  
Inc. and Rotan Mosle, Inc., a  
division of PaineWebber

  
\_\_\_\_\_  
Attorney for Steven L. Fritz

DATE 5-15-94

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

**FILED**  
MAY 13 1994

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

UNIVERSAL JOINT SPECIALISTS, )  
INC., an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PAINWEBBER, INC.; ROTAN MOSLE, )  
INC., a division of PaineWebber; )  
and STEVEN L. FRITZ, )  
 )  
Defendants. )

Case No. 91-C-936-E ✓

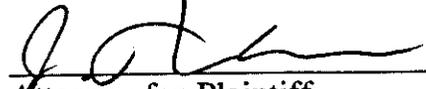
**ORDER OF DISMISSAL WITH PREJUDICE**

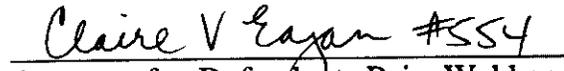
This cause came on for hearing on this 13 day of March, 1994, upon the Application of the Plaintiff, Universal Joint Specialists, Inc., an Oklahoma Corporation, for Dismissal With Prejudice. The Court, after being advised in the premises, finds that said Application should be approved since the Plaintiff has compromised and settled all of its claims and causes of action heretofore asserted against the Defendants herein and that all claims heretofore asserted are now moot and this cause should be dismissed with prejudice.

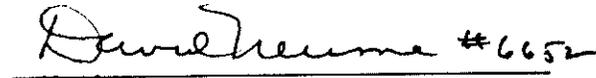
BE IT, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the claims and causes of action of the Plaintiff be and the same are hereby and by these presents dismissed with prejudice and the Defendants are hereby and by these presents dismissed without further liability.

  
United States District Judge

APPROVED:

  
\_\_\_\_\_  
Attorney for Plaintiff

  
\_\_\_\_\_  
Attorney for Defendant, PaineWebber,  
Inc. and Rotan Mosle, Inc., a  
division of PaineWebber

  
\_\_\_\_\_  
Attorney for Steven L. Fritz

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

ENTERED ON DOCKET  
DATE MAY 13 1994

IN RE:

JOHN H WILLIAMS, JR., AND  
CAROL S. WILLIAMS,

Debtors.

(Bankruptcy Case No.  
86-475-W, Chapter 11)

VILLAGE SOUTH NATIONAL BANK,

Plaintiff,

vs.

JOHN H. WILLIAMS, JR.,

Defendant.

No. 88-C-1640-E  
(Bankruptcy Adversary  
No. 87-0076-W)

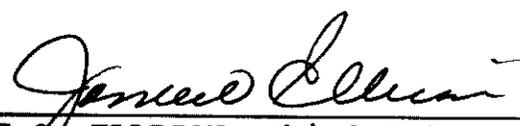
FILED  
MAY 12 1994  
W. Lawrence, Clerk  
DISTRICT COURT  
DISTRICT OF OKLAHOMA

**ADMINISTRATIVE CLOSING ORDER**

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

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

ORDERED this 11<sup>th</sup> day of May, 1994.

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

DATE 5/13/94

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

**FILED**

MAY 12 1994

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STEVEN J. DEVRIES, )  
 )  
 Defendant. )

No. 91-CR-033-B  
(94-C-29-B)

**ORDER**

Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is now before the Court for ruling. The Government has filed its response. For the reasons stated below, Defendant's motion should be denied.

In this section 2255 motion, Defendant seeks credit toward his sentence for the time he was released on bond pending appeal. He argues that he has already served his in-custody time because he was required to post a five-hundred-dollar bond and was restricted to travel in the Northern District of Oklahoma for three years while his appeal was pending before the Tenth Circuit Court of Appeals. The Government argues that the Defendant should have exhausted his administrative remedies with the Attorney General before seeking judicial review. The Court agrees.

Under 18 U.S.C. § 3585(b), a defendant is entitled to credit toward the service of a term of imprisonment where, before the sentence commences, he has spent time in official detention (1) "as a result of the offense for which the sentence was imposed"; or (2) "as a result of any other charge for which the defendant was

arrested after the commission of the offense for which the sentence was imposed"--as long as that time has not been credited against another sentence.

Section 3585 superseded 18 U.S.C. § 3568, which required the Attorney General to give jail credit to any person entitled to receive such credit under the statute. The superseded statute required a prisoner to exhaust administrative remedies with the Bureau of Prisons before seeking judicial relief. See, e.g., Ramsey v. Brennan, 878 F.2d 995, 996 (7th Cir. 1989). Although the new provision makes no reference to the Attorney General, several jurisdictions have nonetheless read the exhaustion requirement into the new statute. See United States v. Brumbaugh, 909 F.2d 289, 290 (7th Cir. 1990) ("the change in language does not signal that Congress intended to relieve the Attorney General of the responsibility for making this calculation"); United States v. Lucas, 898 F.2d 1554, 1556 (11th Cir. 1990).<sup>1</sup> The Tenth Circuit has held similarly that a prisoner must exhaust his administrative remedies under section 3585, although the Circuit did not address the statutory changes. United States v. Woods, 888 F.2d 653, 654 (10th Cir. 1989), cert denied, 494 U.S. 1006 (1990).

Therefore, this Court concludes that the Defendant in this case "must . . . exhaust his administrative remedies with the

---

<sup>1</sup>But see United States v. Zackular, 945 F.2d 423, 424 (1st Cir. 1991) (holding that "the omission of a reference to the Attorney General in section 3585 should be interpreted as reflecting Congress' intention to withdraw its exclusive delegation to the Attorney General and, instead, to vest power to credit sentences in the district court"); United States v. Chalker, 915 F.2d 1254, 1257 (9th Cir. 1990) (same).

Attorney General before seeking judicial review.'" See United States v. Lord, 907 F.2d 1028, 1031 (10th Cir. 1990) (quoting Woods, 888 F.2d at 654-55) (citations omitted)). Because the Defendant has failed to allege or establish that he has exhausted his administrative remedies, this Court is precluded from considering the merits of this claim. See Lord, 907 F.2d at 1031.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion for leave to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 be denied.

SO ORDERED THIS 12<sup>th</sup> day of May, 1994.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

United States District Court )  
Northern District of California ) SS  
I hereby certify that this document  
is a true copy of the original on file  
in this Court.  
Richard M. Lawrence, Clerk  
By B.M. Callough  
Deputy

ENTERED ON DOCKET  
MAY 13 1994

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

IN RE: )  
 )  
JOHN H WILLIAMS, JR., AND )  
CAROL S. WILLIAMS, )  
 )  
Debtors. )  
\_\_\_\_\_)  
TULSA NATIONAL BANK, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JOHN H. WILLIAMS, JR., )  
 )  
Defendant. )

(Bankruptcy Case No.  
86-475-W, Chapter 11)

**FILED**  
MAY 12 1994  
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

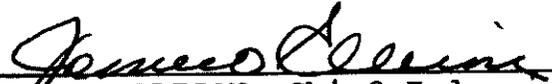
No. 88-C-1637-E  
(Bankruptcy Adversely Affected)  
No. 86-0674-W)

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 12<sup>th</sup> day of May, 1994.

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

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

ENTERED ON DOCKET  
DATE MAY 13 1994

IN RE:

JOHN H WILLIAMS, JR., AND  
CAROL S. WILLIAMS,  
  
Debtors.

(Bankruptcy Case No.  
86-475-W, Chapter 11)

VALLEY NATIONAL BANK,  
  
Plaintiff,

vs.

JOHN H. WILLIAMS, JR.,  
  
Defendant.

No. 88-C-1639-E  
(Bankruptcy Adversary  
No. 87-0119-W)

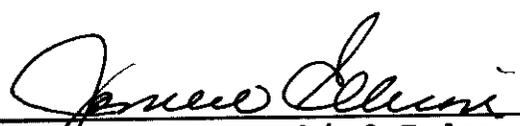
**FILED**  
MAY 12 1994  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ADMINISTRATIVE CLOSING ORDER**

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

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

ORDERED this 11<sup>th</sup> day of May, 1994.

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

2

ENTERED ON DOCKET

DATE 5/13/94

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

**FILED**

MAY 12 1994

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

UNIVERSAL JOINT SPECIALISTS, )  
INC. PROFIT SHARING PLAN, )

Plaintiff, )

vs. )

Case No. 91-C-935 B

ROTAN MOSLE, INC., a division )  
of PaineWebber; PAINWEBBER, INC.; )  
and STEVEN L. FRITZ, )

Defendants. )

**ORDER OF DISMISSAL WITH PREJUDICE**

This cause came on for hearing on this 12<sup>th</sup> day of May, 1994, upon the Application of the Plaintiff, Universal Joint Specialists, Inc. Profit sharing Plan, for Dismissal With Prejudice. The Court, after being advised in the premises, finds that said Application should be approved since the Plaintiff has compromised and settled all of its claims and causes of action heretofore asserted against the Defendants herein and that all claims heretofore asserted are now moot and this cause should be dismissed with prejudice.

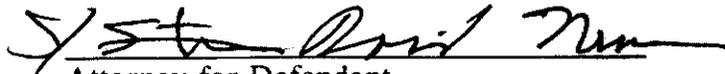
BE IT, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the claims and causes of action of the Plaintiff be and the same are hereby and by these presents dismissed with prejudice and the Defendants are hereby and by these presents dismissed without further liability.

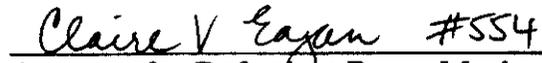
S/ THOMAS R. BRETT

United States District Judge

APPROVED:

  
Attorney for Plaintiff

  
Attorney for Defendant,  
Steven L. Fritz

  
Attorney for Defendant Rotan Mosle,  
Inc., a division of PaineWebber; and  
PaineWebber, Inc.

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

**FILED**

MAY 11 1994

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

AMERICAN TELEPHONE AND )  
TELEGRAPH COMPANY, )

Plaintiff, )

vs. )

Case No. 93-C-918-E

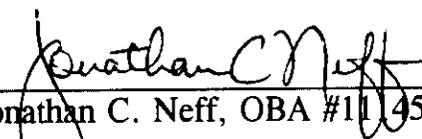
SIERRA CORPORATION OF FORT )  
SMITH, INC., )

Defendant. )

RECEIVED ON DOCKET  
MAY 12 1994

**NOTICE OF DISMISSAL WITHOUT PREJUDICE**

Plaintiff, American Telephone & Telegraph Company, hereby dismisses without prejudice its complaint against Defendant, Sierra Corporation of Fort Smith, Inc.

  
Jonathan C. Neff, OBA #11145  
- Of the Firm -

CROWE & DUNLEVY  
A Professional Corporation  
Suite 500  
321 South Boston  
Tulsa, Oklahoma 74103-3313  
(918) 592-9800  
ATTORNEYS FOR PLAINTIFF,  
AMERICAN TELEPHONE &  
TELEGRAPH COMPANY



MAY 12

05550001/kam

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

**FILED**

LOWELL W. PRATT and VANESSA PRATT,  
husband and WIFE, and NATIONAL UNION FIRE  
INSURANCE COMPANY

Plaintiffs,

v.

GOULD & EBERHARDT GEAR MACHINERY  
CORPORATION D/B/A GOULD & EBERHARDT GEAR  
MACHINERY COMPANY and GOULD & EBERHARDT  
FABRICATING COMPANY

Defendants.

)  
)  
) MAY 11 1994  
) Richard M. Lawrence, Clerk  
) U. S. DISTRICT COURT  
) NORTHERN DISTRICT OF OKLAHOMA

No: 93-C-548-B

**ORDER DISMISSING WITH PREJUDICE**  
**CLAIMS OF LOWELL W. PRATT AND**  
**VANESSA PRATT, HUSBAND AND WIFE, AND**  
**NATIONAL UNION FIRE INSURANCE COMPANY**

The Court, having before it the application of, Lowell W. Pratt and Vanessa Pratt, husband and wife, and National Union Fire Insurance Company, for an Order of Dismissal with prejudice of all their claims against Defendants, Gould & Eberhardt Gear Machinery Corporation D/B/A Gould & Eberhardt Gear Machinery Company and Gould & Eberhardt Fabricating Company, and being duly advised in the premises, finds that the application should be granted.

Gould & Eberhardt Gear Machinery Corporation D/B/A Gould & Eberhardt Gear Machinery Company and Gould & Eberhardt Fabricating Company, are hereby dismissed from this litigation with prejudice.

S/ THOMAS R. BRETT

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

DATE MAY 11 1994

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

**FILED**

MAY 10 1994

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

BOBBY EUGENE LUCKY,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 94-C-2-B ✓

**ORDER**

Before the Court is Defendants' motion to dismiss or for summary judgment filed on March 24, 1994. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1(C).

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

- (1) Defendants' motion to dismiss or for summary judgment [docket #4] is **granted** and the above captioned case is **dismissed without prejudice** at this time.

SO ORDERED THIS 10<sup>th</sup> day of May, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

6



ENTERED ON DOCKET

MAY 11 1994

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

FEDERAL DEPOSIT INSURANCE CORPORATION, )  
in its corporate capacity, and as successor in )  
interest to Continental Illinois National Bank, )

Plaintiff, )

vs. )

ANR PIPELINE COMPANY, a Delaware )  
corporation, formerly known as Michigan )  
Wisconsin Pipe Line Company, )

Defendant. )

Case No. 93-C-822-B

**FILED**

MAY 10 1994

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

**ORDER**

NOW ON this 10<sup>th</sup> day of May, 1994, pursuant to the Stipulation of Dismissal with Prejudice filed by the parties, it is hereby ORDERED, ADJUDGED and DECREED that all claims and causes of action filed in this case are hereby dismissed with prejudice, with each party to bear its own costs and attorneys' fees.

SIGNED this 10<sup>th</sup> day of May, 1994.

**S/ THOMAS R. BIETT**

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
MAY 11 1994

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

**F I L E D**

MAY 10 1994

IN RE: )  
)  
CARLA LOUISE DEAN, )  
)  
Debtor. )  
)  
CARLA LOUISE DEAN, )  
)  
Plaintiff/Appellant, )  
)  
v. )  
)  
SCOTT P. KIRLEY, TRUSTEE, )  
)  
Defendant/Appellee. )

Bky. No. 86-03360-W  
Richard M. Lawton, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 93-C-995-E

ORDER

This order pertains to Appellee, Scott P. Kirley, Trustee's Motion to Dismiss Appeal (Docket #3)<sup>1</sup>. On November 1, 1993, United States Bankruptcy Judge Mickey D. Wilson entered an Order Denying Motion to Remove Exempt Property. The basis of Judge Wilson's decision was that the Debtor had never amended her bankruptcy schedules to include her claim as an asset of the bankruptcy estate, nor had she amended her schedules to claim the asset exempt. On January 19, 1994, the Debtor filed an amendment to her bankruptcy schedules whereby she claimed the asset exempt. Thus, this appeal is now moot because the Debtor is remedying the problems pointed out by the Bankruptcy Judge.

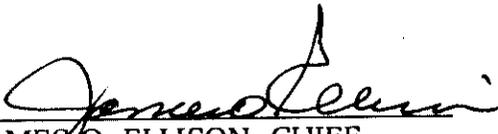
Further, there being no response to the motion and more than fifteen (15) days having passed since the filing of such motion, the court, pursuant to Local Rule 7.1C of the

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

Northern District of Oklahoma, is authorized, in its discretion, to deem the matter confessed and enter the relief requested.

Appellee, Scott P. Kirley, Trustee's Motion to Dismiss Appeal is granted.

Dated this 10<sup>th</sup> day of May, 1994.

  
JAMES O. ELLISON, CHIEF  
UNITED STATES DISTRICT JUDGE

s:dean.ord

ENTERED ON DOCKET

MAY 11 1994

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

**FILED**

MAY 10 1994

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

DONNIE LEWAYNE FOX,  
Plaintiff,

vs.

STANLEY GLANZ, et al.,  
Defendants.

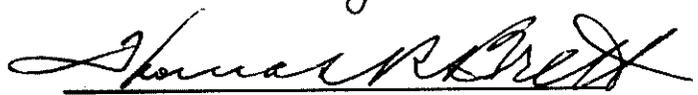
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No. 93-C-1150-B

**JUDGMENT**

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of Defendant Glanz and against the Plaintiff, Donnie L. Fox. Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees.

SO ORDERED THIS 10 day of May, 1994.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

12

ENTERED ON DOCKET  
MAY 11 1994  
DATE

**FILED**

MAY 10 1994

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

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

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Undetermined quantities of )  
articles of drug, gas and )  
liquid oxygen for medical use )  
in high pressure cylinders and )  
cryogenic home units, et al., )  
 )  
Defendants. )

CIVIL NO. 93-C-840-B

CONSENT DECREE OF  
CONDEMNATION AND  
INJUNCTION

Plaintiff, United States of America, by this District's United States Attorney, Stephen C. Lewis, and Assistant United States Attorney, Catherine Depew Hart, filed a complaint for forfeiture on September 16, 1993, against defendant articles of drug. The complaint alleges that the articles are drugs adulterated while held for sale after shipment in interstate commerce, within the meaning of the Federal Food, Drug, and Cosmetic Act (the "Act"), 21 U.S.C. § 351(a)(2)(B), in that the methods used in, and the facilities and controls used for, their manufacture, processing, packing, and storing do not conform to and are not operated and administered in conformity with current good manufacturing practice (CGMP) regulations to assure that such articles meet the safety requirements of the Act and have the identity and strength, and meet the quality and purity characteristics they purport to possess. The complaint further alleges that the articles of drug are misbranded within the meaning of the Act, 21 U.S.C. § 352(b)(1), in that the labeling for the liquid nitrogen fails to bear the name and place of

business of the packer, and a statement of the quantity of contents. In addition, the complaint alleges that the articles of drug are misbranded within the meaning of the Act, 21 U.S.C. § 352(f)(1), in that their labeling fails to bear adequate directions for their intended use.

Pursuant to a warrant of arrest issued by this Court, the United States Marshal for this District seized the articles of drug on September 17, 1993. Thereafter, notice of the complaint and seizure was duly published in accordance with the applicable rules of this Court. On or about October 1, 1993, American Respiratory, Inc., located at 3220 East 21st Street, Tulsa, Oklahoma 74114, by its President David P. Daniel, intervened and filed claim to all the seized articles. American Respiratory, Inc., a corporation incorporated under the laws of Oklahoma, its President David P. Daniel, its Vice-President Christopher Daniel, and its Operations Manager Timothy Briscoe, individuals (collectively referred to as "claimant ARI"), all do business within the jurisdiction of this Court.

On or about October 14, 1993, Big Three Industries, Inc., a Delaware corporation, filed claim to twelve of the seized articles of drug. See attached Claim of Ownership, Exhibit A. Claimant ARI hereby amends its claim to the seized articles of drug and relinquishes all claim to the articles identified by Big Three Industries, Inc.

Claimant ARI affirms that it is the sole owner of the remaining articles of drug seized and not claimed by Big Three

Industries, Inc. Further, claimant ARI agrees to hold plaintiff (including its employees and attorneys) harmless should any party or parties hereafter intervene in this action, and claimant agrees to defend any part of the articles subject to this Decree.

Claimant ARI's business operation includes the manufacture, labeling, storing, and distribution of medical gases and liquid nitrogen in high pressure cylinders, cryogenic units, and dewar cylinders. Claimant ARI conducts its operation at its facility, located at 3220 East 21st Street, Tulsa, Oklahoma, as well as at various customer and supplier locations within the jurisdiction of this Court. The seized cylinders were shipped in interstate commerce to claimant ARI before claimant manufactured, labeled, stored, and distributed the articles of drug.

For purposes of this action only, claimant ARI agrees not to dispute the allegations in the complaint. Claimant ARI further waives the filing of an amended complaint seeking injunctive relief and consents to the entry of a decree of condemnation and permanent injunction without need for further proceedings before this Court.

Upon motion of the United States of America and Claimant ARI, and with the Court being fully advised of the basis thereof, it is hereby

**ORDERED, ADJUDGED, AND DECREED** as follows:

1. This Court has jurisdiction over the subject matter and over all parties to this action.

2. The seized articles are drugs within the meaning of the Act, 21 U.S.C. § 321(g), in that oxygen for medical use is recognized by the official United States Pharmacopeia (USP) and nitrogen for medical use is recognized by the official National Formulary (NF), 21 U.S.C. § 321(g)(1)(A), and storage cylinders for such articles of drug are necessary components of those drugs, 21 U.S.C. § 321(g)(1)(D).

3. The seized articles of drug claimed by claimant ARI are adulterated while held for sale after shipment in interstate commerce, within the meaning of 21 U.S.C. § 351(a)(2)(B), and are misbranded within the meaning of 21 U.S.C. §§ 352(b)(1) and 352(f)(1), as alleged in the complaint. The seized articles of drug are held in violation of the Act, 21 U.S.C. § 331(k).

4. The seized articles of drug claimed by claimant ARI are hereby condemned and forfeited to the United States of America pursuant to 21 U.S.C. § 334(a).

5. Pursuant to 21 U.S.C. § 334(e), the United States of America shall recover from claimant court costs and fees, storage costs, if any, and other proper expenses.

6. The term "manufacture" herein means the transfer, filling, transfilling, packing, or repacking of any medical gas, whether in a liquid or gaseous state, from one container to another, or any other manipulation of the medical gas.

7. The term "distribution" herein means the offer to sell, holding for sale, sale, lease, or transfer of any medical gas, whether in a liquid or gaseous state, to or for any person, including any corporation or business entity. The term "distribution" does not mean, or include, the manufacture or labeling of medical gases or liquid nitrogen.

8. Claimant ARI, its president David P. Daniel, and each and all of their officers, agents, servants, representatives, employees, successors, assigns, attorneys, and any and all persons in active concert or participation with them, or any of them (including individuals, directors, corporations, subsidiaries, affiliates, and partnerships), are hereby restrained and enjoined under 21 U.S.C. § 332(a) from doing or causing: (1) the manufacture, labeling, or holding at any location of articles of drug, medical gas, liquid nitrogen, and their containers, as defined by 21 U.S.C. § 321(g), held for sale after one or more of their components have been shipped in interstate commerce; and (2) directly or indirectly, the introduction or delivery for introduction into interstate commerce of articles of drug, medical gas, liquid nitrogen, and their containers, as defined by 21 U.S.C. § 321(g), unless and until:

(a) The methods used in, and the facilities and controls used for, manufacturing, labeling, and holding articles of drug are established, operated, and administered in conformity with CGMP regulations pursuant to 21 C.F.R. Parts 210 and 211;

(b) Claimant selects one or more persons who, by reason of training and experience, pursuant to 21 C.F.R. § 211.34, are qualified to make inspections of medical gas manufacturing facilities to determine whether the methods, facilities, controls, and training program are designed, operated, and administered in conformity with CGMP regulations, as set forth at 21 C.F.R. Parts 210 and 211, and such person or persons inspect such facilities and manner of operating, and certify in writing to the United States Food and Drug Administration ("FDA") that, in the opinion of such person(s), claimant is operating in conformity with CGMP regulations;

(c) Claimant reports to FDA in writing the actions it has taken to ensure conformity with CGMP regulations;

(d) All articles of drug bear labels that comply with 21 U.S.C. § 352;

(e) FDA inspects, pursuant to paragraph 20 herein, claimant's facilities for purposes of evaluating compliance with CGMP regulations and labeling requirements under the Act;

(f) All costs for which claimant is responsible pursuant to this Decree are paid in full; and

(g) FDA states in writing that claimant appears to be in compliance with CGMP regulations, 21 C.F.R. Parts 210 and 211, and statutory labeling requirements pursuant to 21 U.S.C. § 352, and authorizes resumption of the manufacturing, labeling, and holding of articles of drug, medical gas and liquid nitrogen.

9. With respect to liquid oxygen only, claimant may, prior to receiving notice with respect to all of its drug products as set forth in paragraph 8(g) above, resume manufacture, labeling, and holding of liquid oxygen, if and only if all of the following conditions are satisfied:

(a) The methods used in, and the facilities and controls used for, manufacturing, labeling, and holding liquid oxygen are established, operated, and administered in conformity with CGMP regulations pursuant to 21 C.F.R. Parts 210 and 211;

(b) Claimant's employees, who are engaged in the manufacture, labeling, and holding of liquid oxygen, receive training in the procedures for testing, verifying the testing, and documentation of the identity and strength of bulk liquid oxygen from a qualified person or persons who, by reason of training and experience, are knowledgeable in current good manufacturing practice for liquid oxygen, pursuant to 21 C.F.R. § 211.25(a). The qualified person who provides such training shall be a consultant, pursuant to 21 C.F.R. § 211.34, or another qualified person who is not an employee of the claimant;

(c) Claimant provides to FDA written certification of such training, which shall be signed by the person or persons providing the training and shall include the following information: (1) the name and title or position of the person or persons who received the training; (2) the name, title, and qualifications of the person or persons providing the training;

(3) the place, date, and length of time of the training; and (4) a summary of the subject area(s) covered by the training;

(d) Claimant selects one or more persons who, by reason of training and experience, pursuant to 21 C.F.R. § 211.34, are qualified to make inspections of medical liquid oxygen operations to determine whether the methods, facilities, controls, and training program are established, operated, and administered in conformity with CGMP regulations, as set forth at 21 C.F.R. Parts 210 and 211, and such person or persons inspect such facilities and manner of operating, and certify in writing to FDA that, in the opinion of such person(s), claimant is operating in conformity with CGMP regulations;

(e) Claimant reports to FDA in writing the actions it has taken to ensure conformity with CGMP regulations;

(f) FDA inspects, pursuant to paragraph 20 herein, claimant's facilities for purposes of evaluating compliance with CGMP regulations under the Act, as pertinent to liquid oxygen. FDA shall commence such inspection within ten (10) business days of receiving any certification submitted pursuant to paragraph 9(c); and

(g) FDA states in writing that claimant appears to be in compliance with CGMP regulations, 21 C.F.R. Parts 210 and 211, statutory labeling requirements pursuant to 21 U.S.C. § 352, and authorizes resumption of the manufacturing, labeling, and holding of liquid oxygen.

10. After claimant receives written authorization from FDA pursuant to paragraphs 8(g) or 9(g) above to resume operations, claimant shall be restrained and enjoined from manufacturing, labeling, and holding any article of drug, medical gas and liquid nitrogen, in any manner that is inconsistent with CGMP regulations, statutory labeling requirements, and the provisions set forth herein.

11. Claimant shall immediately cease and discontinue manufacturing, labeling, holding, and distributing any article of drug, medical gas and liquid nitrogen, if FDA determines, after inspection or laboratory analysis of samples, and notifies claimant in writing, that claimant is not in compliance with CGMP regulations, 21 C.F.R. Parts 210 and 211, labeling requirements under the Act, 21 U.S.C. § 352, or this Decree.

12. Any cessation of operation as described in paragraph 11 above shall continue until FDA notifies claimant in writing that claimant appears to be in compliance with the Act and the provisions set forth herein.

13. Within 45 days after the date of entry of this Decree, claimant ARI shall destroy, under FDA supervision, all condemned articles of drug, including cylinders, unless and until (a) the cylinders have been brought into compliance with the Act in the manner described in paragraph 17 below, and (b) claimant receives a written notice from FDA that the cylinders appear to be in compliance with the Act. All costs of the destruction shall be borne by the claimant. Claimant shall be responsible for

ensuring that the destruction is carried out in compliance with all federal and local laws.

14. The United States Marshal for this District shall release the condemned articles from the Marshal's custody to the custody of claimant ARI for the sole purpose of attempting to bring the cylinders into compliance with the Act if claimant, within 30 days after entry of this Decree: (a) pays in full court costs and fees, and storage and other proper expenses of this proceeding, and (b) executes and posts a good and sufficient penal bond with the Clerk of this Court in the amount of ten thousand dollars (\$10,000.00) payable to the United States of America and conditioned upon claimant abiding by and performing all the terms and conditions of this Decree and of such further decrees and orders as may be entered in this proceeding.

15. After filing the bond with the Clerk of the Court, claimant shall give written notice to the Director of the FDA Dallas District Office, that claimant, at its own expense, is prepared to attempt to bring the articles of drug into compliance with the Act under the supervision of a duly authorized representative of FDA.

16. Claimant shall not commence attempting to bring the condemned cylinders into compliance with the Act until claimant (a) submits a written statement to FDA detailing the proposed plan to bring the articles into compliance, and (b) receives written approval from FDA. The submission of such a proposal will stay the time requirement for destruction of the articles

set forth in paragraph 13 above. Within fifteen days after receiving FDA approval for such a proposal and under the supervision of a FDA representative, claimant shall complete the process of bringing the cylinders into compliance with the Act. If FDA rejects in writing a proposal, the time period within which destruction of the articles is to occur under paragraph 13 above shall resume.

17. Claimant shall at no time, and under no circumstances whatsoever, distribute, or otherwise dispose of any part of the condemned cylinders, unless and until (a) the conditions of paragraphs 14 through 16 have been met, and (b) the following conditions have been satisfied:

(a) the cylinders are emptied under the supervision of, and in accordance with methods approved in writing by, FDA;

(b) all cylinders undergo testing, as FDA deems necessary, and under the supervision of and in accordance with methods approved in writing by FDA, to assure that the cylinders conform to all applicable state and federal regulations. All high pressure cylinders must undergo hydrostatic testing in addition to any other testing FDA deems necessary. Written reports of all such testing shall be submitted to FDA. Costs of any testing shall be borne by claimant, including costs of FDA supervision pursuant to the rates set forth in paragraph 23;

(c) a FDA representative has had free access to all the cylinders in order to take any samples or make any tests or examinations that FDA deems necessary; and

(d) a FDA representative has released in writing such cylinders for distribution or other disposition.

18. Claimant shall abide by the decisions of FDA, whose decisions shall be final. If claimant breaches any conditions stated in this Decree, or in any subsequent decree or order entered in this proceeding, claimant shall return the articles immediately to the United States Marshal for this District at claimant's expense, or shall dispose of them pursuant to an Order of this Court.

19. Claimant shall not distribute or dispose of the articles, or any part of them, in any manner that is contrary to the provisions of this Decree, the Act, or the laws of any state or territory (as defined in the Act), in which they are distributed or disposed.

20. Duly authorized FDA representatives are authorized to make one or more inspections, as FDA deems necessary, to inspect claimant's facilities, to take photographs, and to examine and copy all records relating to the receipt, manufacture, labeling, holding, and distribution of drug products to assure continuing compliance with the terms of this Decree. Such inspections shall be authorized upon presentation of a copy of this Decree and appropriate credentials. The inspection authority granted by

this Decree is apart from, and in addition to, the authority to make inspections under the Act, 21 U.S.C. § 374.

21. Claimant ARI shall provide a copy of this Decree, by personal service or registered mail, return receipt requested, within ten (10) calendar days of its entry, to each of its officers, agents, servants, medical gas suppliers, representatives, employees, successors, assigns, attorneys, and any and all persons in active concert or participation with any or all of them (including individuals, directors, corporations, subsidiaries, affiliates, and partnerships). Claimant ARI shall provide the FDA Dallas District Director with an affidavit of compliance with this paragraph within twenty (20) days after the date of the entry of this Decree stating the fact and manner of compliance and identifying the name and title or position of each person so notified.

22. Claimant ARI shall notify the Director of the FDA Dallas District Office in writing at least fifteen (15) calendar days before any change in ownership or character of claimant business, including but not limited to: dissolution, assignment, or sale, which change results in the emergence of a successor corporation, creation or dissolution of subsidiaries, or any other change in the corporate structure of American Respiratory, Inc., or the sale or assignment of any business asset, such as buildings, equipment, inventory, or customer list that may affect compliance with this Decree. Claimant ARI shall provide a copy of this Decree to any prospective successor or assign prior to

any sale or change in business. As noted in paragraph 8 above, this Decree shall apply to all of claimant's successors and assigns.

23. Claimant shall compensate the United States of America for costs as follows: \$49.00 per hour and any fraction thereof per representative for supervision and/or inspectional work; \$59.00 per hour and any fraction thereof per representative for laboratory and analytical work; \$0.25 per mile for travel expenses; \$83.00 per day for subsistence expenses, where necessary; and any other necessary expenses incurred in connection with the supervisory responsibilities of FDA.

24. If claimant ARI, or David P. Daniel, Christopher Daniel, or Timothy Briscoe, individually, violate this Decree and are found in civil or criminal contempt thereof, claimant ARI shall, in addition to other remedies, reimburse plaintiff for attorney fees, investigational expenses, administrative and court costs, and any other costs or fees related to such enforcement proceedings.

25. Claimant ARI shall bear its own costs, including attorney fees, for compliance with this Decree in addition to any costs expressly provided herein.

26. All correspondence to FDA shall be addressed to: Director, Dallas District Office, Food and Drug Administration, Department of Health and Human Services, 3310 Live Oak Street, Dallas, Texas 75204.

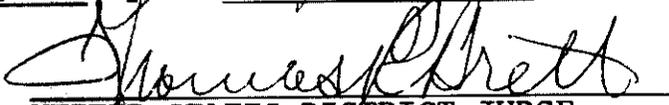
27. If claimant ARI maintains a state of continuous compliance with the terms of this decree for a period of two years from the date FDA notifies claimant ARI in writing that they are in compliance as specified in paragraphs 8 and 9, claimant ARI may move to vacate this order and the government will not oppose.

28. This Court retains jurisdiction to issue further decrees and orders as may be necessary to the proper disposition of this proceeding, and should claimant fail to abide by and perform all of the terms and conditions of this Decree, or of such further orders and decrees as may be entered in this proceeding, or of the bond, then, on motion of plaintiff, the bond shall be forfeited and judgment entered in favor of plaintiff. FDA decisions under this Decree shall be reviewed, if necessary, under the arbitrary and capricious standard set forth in 5 U.S.C. § 706(2)(A).

29. This Decree represents the entirety of the agreement

between plaintiff and claimant ARI, David P. Daniel, Christopher Daniel, and Timothy Briscoe.

SO ORDERED: DATED this 10<sup>th</sup> day of May 1994.

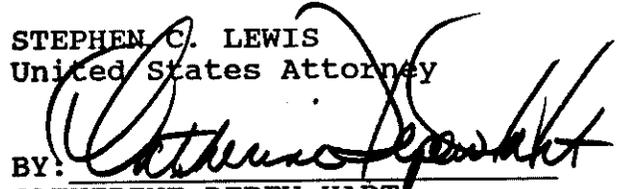
  
UNITED STATES DISTRICT JUDGE

We hereby consent to the entry of the foregoing Decree.

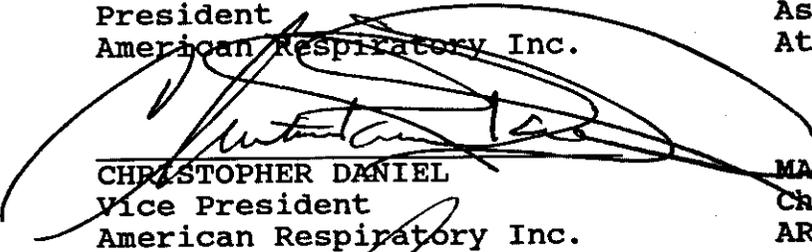


DAVID P. DANIEL  
President  
American Respiratory Inc.

STEPHEN C. LEWIS  
United States Attorney

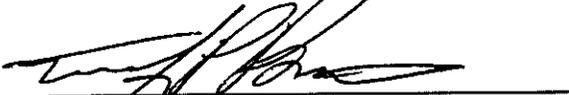


BY: CATHERINE DEPEW HART  
Assistant United States  
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CHRISTOPHER DANIEL  
Vice President  
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MARGARET JANE PORTER  
Chief Counsel  
ARETA L. KUPCHYK  
Assistant Chief Counsel for  
Enforcement  
Food and Drug Administration



TIMOTHY BRISCOE  
Operations Manager  
American Respiratory Inc.

  
JOSEPH FARRIS, Esquire  
Attorney for American  
Respiratory, Inc.

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

IN RE: )  
)  
JAMES W. BRADY, )  
a/k/a JAMES WATSON BRADY, )  
)  
Debtor. )  
)  
PATRICIA ANN HOUSEMAN, et al., )  
)  
Plaintiffs/Appellants, )  
)  
v. )  
)  
JAMES WATSON BRADY, )  
)  
Defendant/Appellee. )

Bky. No. 92-04312-C

RECORDED ON DOCKET  
MAY 11 1994

Adversary No. 93-0179-C

Case No. 93-C-109

**FILED**  
MAY 10 1994  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This order pertains to Appellants' Motion to Dismiss Appeal of Interlocutory Order (Docket #8)<sup>1</sup>. There being a statement that counsel for appellee does not object to the dismissal without prejudice of this appeal, the motion is granted.

Appellants' Motion to Dismiss Appeal of Interlocutory Order is granted and this appeal is dismissed without prejudice.

Dated this 10<sup>th</sup> day of May, 1994.

  
JAMES O. ELLISON, CHIEF  
UNITED STATES DISTRICT JUDGE

s:brady.ord

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

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**F I L E D**

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

MAY 11 1994

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

HOWARD WOLFE,

Plaintiff,

vs.

AMERICAN AIRLINES, INC.

Defendant.

Case No. 93-C-526-E

ENTERED ON DOCKET  
MAY 11 1994  
DATE

O R D E R

Now before the Court is the Motion to Dismiss<sup>1</sup> (Docket #6) of Defendant American Airlines, Inc. (American) and the Motion for Partial Summary Judgment (Docket #14) of the Plaintiff Howard Wolfe (Mr. Wolfe).

Mr. Wolfe is an employee of American Airlines who participated in American's "IDEAAS IN ACTION" program which awards employees for making suggestions that are adopted by the company. On January 11, 1989, Mr. Wolfe, who had previously been successful in submitting 3 ideas to the award program, submitted a suggestion to make a weld repair on certain jet engine parts. Plaintiff's suggestion was rejected on June 7, 1989, because it was believed that the proposed repair procedure was included in an existing Engineering Specification. Plaintiff requested that the suggestion be re-opened, and on June 21, 1989, Engineering made the decision to revise the existing Engineering Specification to specifically cover

<sup>1</sup> The Court notes that Defendant's Motion to Dismiss relies on materials outside the Pleadings, and that the Plaintiff therefore was granted leave to respond after certain discovery had been completed. Both parties agree that the Motion is, and should be treated as, a motion for summary judgment.

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the weld method urged by Plaintiff. At the same time, an analyst, Mr. Mordecai, found that the idea had a "suggested annual savings" of \$65,000.00 and a cost avoidance savings of \$963,060.00.

On October 17, 1989, Supervisor R.D. Easley informed Mr. Wolfe that his suggestion was only being allowed a "trigger"<sup>2</sup> action award, and that the cost savings were not tangible or quantifiable<sup>3</sup>. Mr. Wolfe appealed the decision, and on January 31, 1990, was informed that the idea should be closed as a "non-approval." Mr. Wolfe then complained to Mr. Crandall, President of American, who forwarded the complaint to Robert Baker, Executive Vice President of Operations. Mr Baker informed Mr. Wolfe, by letter of May 16, 1990, that he could "find no reason to overturn either the IdeAAs group or the Appeals Board decision." Mr Wolfe's Attorney then contacted Mr. Crandall on June 20, 1990, and his award of 15,000 credits was upheld.

Mr. Wolfe moves for summary judgment on the contract claim, arguing that the guidelines constitute a binding contract between

---

<sup>2</sup> With respect to trigger awards, the regulations provide that "[s]ome suggestions may cause AMR to take action not specifically recommended in the suggestion, and/or add impetus to the action on an item management already has under review, or which brings about a solution that is better than management was planning to use. In this case, the idea will be classified as a non-quantifiable suggestion for purposes of award."

<sup>3</sup> Under the regulations (145-14) governing the suggestion program, suggestions are classified into two types: 1) quantifiable, a suggestion whose monetary value can be calculated, and 2) non-quantifiable, a suggestion whose monetary value cannot be calculated. Under 145-14, employees are to be paid a minimum of 30,000 award credits and a maximum of 7,500,000 award credits for adopted quantifiable suggestions and a flat 15,000 award credits for adopted non-quantifiable suggestions.

employee and employer and that American breached the contract by failing to pay for his suggestion as a quantifiable suggestion. He also claims that his suggestion and the templates he made to use his suggestion are intellectual property that American has converted by failing to pay him as he is entitled. American moves to dismiss his Complaint, arguing that the breach of contract claim is barred by the contractual provision that decisions of the company are final and that the conversion claim is barred by the statute of limitations and the fact that the suggestion is actually the property of American.

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, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S.

Breach of Contract

Mr. Wolfe claims that American breached its contract by failing to pay the awards that Mr. Mordecai, the analyst, determined he was entitled to. American argues that, assuming that the documents supporting the awards program constitute a contract, Mr. Mordecai can not approve a suggestion and that, under the regulations, American's determination is final.

Mr. Wolfe asserts that Mr. Mordecai's determinations constitute approval of his suggestion and that American is bound by his quantifications. In support of his claim, Mr. Wolfe submits his own affidavit that "[w]hen I submitted suggestion Idea No. 14321, it was approved, and I was told that I would have my money for the suggestion within seven to ten days." Mr. Wolfe does not state in his affidavit that he was told that the suggestion was approved as quantifiable or that he was told that he would receive an award based on the suggestion being quantifiable. He argues that "one who accepts the benefits of a contract must assume the detriments," Dagnott v. ASG Industries, Inc., 558 P.2d 379, 384 (Okla. 1976), and that American accepted the benefits of the transaction by using his idea.

American argues that the analyst does not approve the suggestion, but rather acts as advocate for the employee. Mordecai states in his affidavit that the analyst acts as advocate for the employee during the evaluation process. Moreover, the analyst has

the job of evaluating and seeking approval for the implementation of a suggestion. Thus, American argues, the suggestion was never approved as quantifiable, and under the regulations, the determination of American is final.

Mr. Wolfe argues that American cannot rely on an isolated provision of the contract (that its determinations are final) and ignore its obligation to pay him for his quantifiable suggestion. He relies on Okla.Stat.tit. 15, §75 which provides:

A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known to the person accepting.

However, the obligation arising from the "contract" was to pay certain awards for "quantifiable" suggestions and certain awards for "non-quantifiable" or "trigger" suggestions. Moreover, under the contract, American's decision as to the classification of the award is final. American determined that the suggestion was a "trigger" suggestion and paid Plaintiff accordingly. Plaintiff's Motion for Partial Summary Judgment is Denied and Defendant's Motion to Dismiss as to the contract claim is granted.

#### Conversion of Intellectual Property

Plaintiff also claims that American converted his intellectual property by using his suggestion and certain templates he created at work to enhance his suggestion. However, the terms of the suggestion plan and the employment agreement both make it clear

that any inventions or improvements become the property of American. The Employment agreement provides:

All right, title and interest, including, without limitation, all copyrights and patents, in and to any material produced or inventions developed by me which affect or relate to the Company's business or affect or relate to the air transportation industry shall vest in the Company and I shall have no personal right, title or interest whatsoever therein.

Mr. Wolfe signed this agreement on August 14, 1973. The regulations on the suggestion program provide: "All suggestions submitted become the sole and exclusive property of AMR Corporation." The suggestion form signed by Mr. Wolfe provides:

This suggestion is submitted for consideration under the terms and rules of the AMR Suggestion Program as shown on the reverse side of this form and AA Regulations 145-14. I (we) understand the terms and rules and agree that AMR Corporation has the absolute and exclusive right to the suggestion.

Accordingly, the Court finds that the "property" in question is owned by the Defendant, and that Defendant's Motion to dismiss the conversion claim should be granted.

In summary, the Court finds that Defendant's Motion to Dismiss (Docket #6) should be granted, and that Plaintiff's Motion for Partial Summary Judgment (Docket #14) should be denied.

IT IS SO ORDERED THIS 9<sup>th</sup> DAY OF MAY, 1994.

  
JAMES O. ELLISON, CHIEF JUDGE  
UNITED STATES DISTRICT JUDGE



