

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

FEB 16 1996

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

MELODY BAKER,

Plaintiff,

vs.

ASSOCIATION FOR DIRECT CARE  
TRAINERS, INC.,  
an Oklahoma corporation

Defendant.

No. 95-C-1051B

ENTERED ON DOCKET

FEB 20 1996

DATE

ORDER OF DISMISSAL WITH PREJUDICE  
AND  
ORDER OF CONFIDENTIALITY

NOW ON this 16th day of February, 1996, the above styled and numbered matter comes on before this Court pursuant to the Joint Stipulation for Order of Dismissal filed herein by the parties hereto. Upon consideration of such Joint Stipulation for Dismissal the Court finds that the above styled and numbered matter should be dismissed with prejudice to the refileing of same. Further, the Court, based upon such Joint Stipulation of Dismissal finds that effective the date of the entry of this Order, an Order of Confidentiality should be entered whereby both parties to this proceeding are to keep the terms of resolution confidential, and when referring to the resolution of this proceeding shall state only "The matter has been dismissed with prejudice by mutual agreement".

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the foregoing findings be and same hereby are made Orders of this Court as if fully set forth hereinafter.

*[Faint signature]*

---

The Honorable John Leo Wagner  
United States District Judge

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

SUNSET COUNTRY CLUB, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 NEW ENGLAND MUTUAL LIFE )  
 INSURANCE COMPANY, )  
 )  
 Defendant. )

FEB 21 1996

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

Case No. 95-C-950 BU

*EOD 2/20/96*

**ORDER GRANTING JOINT STIPULATION AND APPLICATION  
FOR AN ORDER OF DISMISSAL WITH PREJUDICE**

Upon consideration of the parties' Joint Stipulation and Application for an Order of Dismissal With Prejudice of any and all claims that have been asserted or which might have been asserted in this action, and good cause having been shown, it is this 20<sup>th</sup> day of February, 1996,

**ORDERED** that the parties' Joint Stipulation and Application for an Order of Dismissal with Prejudice be and it is hereby GRANTED; and it is further

**ORDERED** that the above-captioned action be and it is hereby **DISMISSED WITH PREJUDICE**, each party to pay their own costs and attorneys' fees.

*15 Michael Burrage*  
MICHAEL BURRAGE,  
United States District Judge

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

**FILED**

FEB 16 1996

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

Case No. 94-C-531-H ✓

ENTERED ON DOCKET

DATE 2-20-96

ABED DAMAJ,

Plaintiff,

v.

FARMERS INSURANCE COMPANY,  
INC., d/b/a FARMERS INSURANCE  
GROUP OF COMPANIES,

Defendant.

**ORDER**

This matter comes before the Court on a Motion for Summary Judgment by Defendant Farmers Insurance Company, Inc. ("Farmers"). Plaintiff has asserted claims against Farmers for breach of contract and bad faith. Plaintiff has demanded compensatory and punitive damages. In the instant motion, Farmers moves for summary judgment on Plaintiff's bad faith claim and moves to strike Plaintiff's claim for punitive damages.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)

52

("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he 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. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

To prevail on a bad faith claim, there must be a "clear showing" that the insurer acted unreasonably and in bad faith. Oulds v. Principal Mut. Life Ins. Co., 6 F.3d 1431, 1436 (10th Cir. 1993). Further, acting on the basis of a legitimate dispute over coverage or the amount of the claim does not implicate the tort of bad faith. Id. Here, Plaintiff has presented no evidence demonstrating that Farmers acted unreasonably in attempting to settle Plaintiff's claim for \$10,000, rather than the \$12,000 requested by Plaintiff, and there are no facts material to the

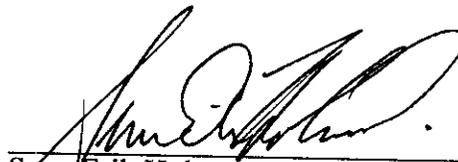
determination of the bad faith claim which are in dispute. For those reasons, the Court grants summary judgment to Farmers on Plaintiff's bad faith claim.

The second portion of Farmers' motion is a request to strike Plaintiff's punitive damages demand. To recover punitive damages, "the proof must show some elements of fraud, malice, or oppression. The act which constitutes the cause of action must be actuated by or accompanied with some evil intent, or must be the result of such gross negligence - such disregard of another's rights - as is deemed equivalent to such intent." McLaughlin v. National Benefit Life Ins. Co., 772 P.2d 383, 387 (Okl. 1988). Here, Plaintiff has demonstrated neither "evil intent" nor "gross negligence". For that reason, Defendant's motion to strike Plaintiff's punitive damages claim is granted.

In conclusion, the Court grants Defendant's Motion for Summary Judgment (Docket # 35).

IT IS SO ORDERED.

This 15<sup>TH</sup> day of February, 1996.

  
Sven Erik Holmes  
United States District Judge

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

HAROLD C. STUART, an )  
individual, and STUART, )  
BIOLCHINI, TURNER & GIVRAY, an )  
Oklahoma partnership, )  
Plaintiffs, )  
vs. )  
DOERNER, STUART, SAUNDERS, )  
DANIEL & ANDERSON, an Oklahoma )  
partnership, )  
Defendant. )

FILED

FEB 16 1996

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

Case No. 94-C-1156-K

ENTERED ON DOCKET

FEB 20 1996

JUDGMENT BY CONSENT

The Plaintiffs Harold C. Stuart and Stuart, Biolchini, Turner & Givray having filed their Complaint herein on December 15, 1994, and Defendant Doerner, Stuart, Saunders, Daniel & Anderson, now known as Doerner, Saunders, Daniel & Anderson, having filed its Counterclaims against Stuart, Biolchini, Turner & Givray, have agreed upon a basis for settlement of this action including the entry of a Final Judgment pursuant to a Stipulation dated February 13, 1996, the original of which has been filed with this Court. The Stipulation was made solely for the purpose of settlement and without admission as to any of the allegations of the Complaint or Counterclaims, or as to any matters arising out of the Complaint or Counterclaims, and it appearing that there has been no trial of the matters alleged in the Complaint or Counterclaim, and that there has been no finding of fact or conclusion of law or adjudication made with respect to any matter alleged in, or arising out of, the Complaint or Counterclaims, and it appearing further

62

that no notice of hearing upon the entry of said Final Judgment need be given as provided in the Stipulation;

Now, Therefore, upon the Stipulation of Settlement between Plaintiffs Harold C. Stuart and Stuart, Biolchini, Turner & Givray and Defendant Doerner, Stuart, Saunders, Daniel & Anderson, now known as Doerner, Saunders, Daniel & Anderson, dated February 13, 1996, it is therefore

ORDERED, ADJUDGED, AND DECREED that:

- a. Doerner, Saunders, Daniel & Anderson, its partners and successors, shall not use "Stuart" in its firm name, and shall not use or list "C.B. Stuart", "Harold C. Stuart", or any derivative thereof, on firm or personal letterhead or stationery, or Martindale-Hubbell, yellow pages, or any legal directory, listing, or announcements.
- b. Stuart, Biolchini, Turner & Givray, its partners and successors, shall not use "Doerner" in its firm name, and shall not use or list "E.J. Doerner" or any derivative thereof, on firm or personal letterhead or stationery, or Martindale-Hubbell, yellow pages, or any legal directory, listing, or announcements.
- c. Doerner, Stuart, Saunders, Daniel & Anderson, now known as Doerner, Saunders, Daniel & Anderson, is the successor law firm to Doerner, Stuart, Saunders, Daniel, Anderson & Biolchini and all of its predecessors in interest.

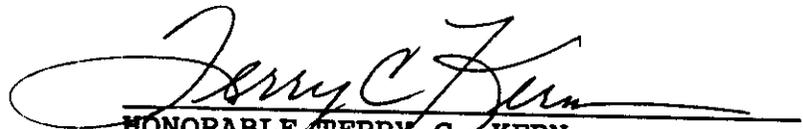
- d. Stuart, Biolchini, Turner & Givray, and its successors, shall not hold itself out as the successor law firm to Doerner, Stuart, Saunders, Daniel, Anderson & Biolchini, or any of its predecessors in interest. However, Stuart, Biolchini, Turner & Givray shall be entitled to claim that the law firm of Stuart, Biolchini, Turner & Givray can trace its origins in the practice of law to C.B. Stuart, who founded his law firm prior to statehood.
- e. Except as provided in sub-paragraphs 2.a, 2.b, 2.c, and 2.d herein, all claims in Counts One through Five of Plaintiffs' Complaint, Amended Complaint, or proposed Amendments To Complaint, and all claims in Counts One and Two of Defendant's Counterclaims, including all forms of legal or equitable relief that were or could have been claimed by or awarded to any party as a remedy therefore, are dismissed with prejudice.
- f. Each party is to pay that party's respective costs and attorneys fees.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that neither this Final Judgment, nor the Stipulation of Settlement, nor anything contained herein or therein, shall constitute evidence or an admission or adjudication with respect to any allegation of the Complaint, Amended Complaint, proposed Amendments To Complaint or Counterclaims or any fact or conclusion of law with respect to any

matter alleged in or arising out of the Complaint, Amended Complaint, proposed Amendments To Complaint or Counterclaims or of any wrongdoing or misconduct or liability on the part of any party.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction to enforce the terms of this Judgment By Consent.

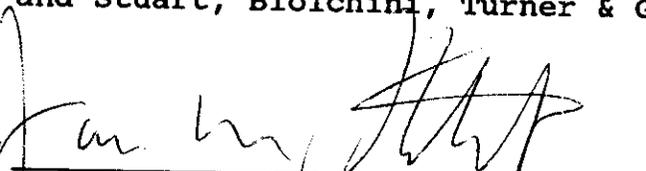
Dated this 15 day of February, 1996.

  
HONORABLE TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

  
James L. Kincaid  
Crowe & Dunlevy  
321 South Boston, Suite 500  
Tulsa, Oklahoma 74103

Attorney for Plaintiffs Harold C. Stuart  
and Stuart, Biolchini, Turner & Givray

  
James M. Sturdivant  
Gable & Gotwals, Inc.  
2000 Bank IV Center  
15 West Sixth Street  
Tulsa, Oklahoma 74119

Attorney for Defendant and Counterclaimant  
Doerner, Saunders, Daniel & Anderson

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )

vs. )

JEWEL G. ESKRIDGE a/k/a JEWEL )  
G. ESKRIDGE TREMBLE; WILLIAM )  
T. LAWRENCE, JR; SHARON )  
TAYLOR, Tenant; STATE OF )  
OKLAHOMA ex rel. OKLAHOMA )  
EMPLOYMENT SECURITY )  
COMMISSION; COUNTY TREASURER, )  
Tulsa County, Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma; )  
SANDRA L. JOHNSON aka )  
SANDRA JOHNSON; MCKINLEY )  
JOHNSON; and STATE OF OKLAHOMA )  
ex rel. OKLAHOMA TAX )  
COMMISSION, et al. )

Defendants. )

CIVIL ACTION NO. 94-C-685-K

ENTERED ON DOCKET

DATE FEB 20 1996

FILED

FEB 16 1996

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

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day  
of February, 1996. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Phil Pinnell, Assistant United States Attorney;  
the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission,  
appears by Kim D. Ashley, Assistant General Counsel; the  
Defendants, County Treasurer, Tulsa County, Oklahoma, and Board  
of County Commissioners, Tulsa County, Oklahoma, appear not,  
having previously claimed no right, title or interest in the  
subject property; the Defendant, State of Oklahoma ex rel.  
Oklahoma Employment Security Commission, appears not, having  
previously filed an Answer and Disclaimer; the Defendant, Sharon  
Taylor, Tenant, appears not and is no longer a tenant on the

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

subject property and should be dismissed from this action; and the Defendants, Jewel G. Eskridge aka Jewel G. Eskridge Tremble, William T. Lawrence, Jr., Sandra L. Johnson aka Sandra Johnson aka Saundra Johnson, and McKinley Johnson, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Sandra L. Johnson aka Sandra Johnson aka Saundra Johnson was served with Summons and Amended Complaint on October 11, 1994, as shown on the U.S. Marshal's service; the Defendant, McKinley Johnson, was served with Summons and Amended Complaint on October 11, 1994, as shown on the U.S. Marshal's service.

The Court further finds that the Defendants, Jewel G. Eskridge aka Jewel G. Eskridge Tremble and William T. Lawrence, Jr., were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning May 31, 1995, and continuing to July 5, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Jewel G. Eskridge aka Jewel G. Eskridge Tremble and William T. Lawrence, Jr., and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern

Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Jewel G. Eskridge aka Jewel G. Eskridge Tremble and William T. Lawrence, Jr.. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on August 3, 1994, claiming no right, title or interest in the subject property; that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on August 3, 1994, claiming no right, title or interest in the subject property; that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, filed

its Answer and Disclaimer on September 28, 1994; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on September 26, 1994; and that the Defendants, Jewel G. Eskridge aka Jewel G. Eskridge Tremble, William T. Lawrence, Jr., Sandra L. Johnson aka Sandra Johnson aka Saundra Johnson, and McKinley Johnson, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on January 26, 1993, William T. Lawrence, Jr. filed his voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-00216-C; and the case was dismissed on February 10, 1994.

The Court further finds that the Defendant, Sandra L. Johnson is also known as Sandra Johnson and is also known as Saundra Johnson.

The Court further finds that the Defendant, Sharon Taylor, Tenant, has not been served and no longer lives on the subject property and should be dismissed as a defendant herein.

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

Lot Two (2), in Block One (1) NORTHGATE 3RD ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat thereof.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Jack Eskridge, Jr. and the judicial termination of the joint tenancy of Jack Eskridge, Jr. and Jewel G. Eskridge.

The Court further finds that Jack Eskridge, Jr., now deceased, and Jewel G. Eskridge became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated November 5, 1973 from Donald E. Johnson, as Administrator of Veterans Affairs, to Jack Eskridge, Jr. and Jewel G. Eskridge, husband and wife, as joint tenants and not as tenants in common, with full right of survivorship, the whole estate to vest in the survivor in the event of the death of either, which Warranty Deed was filed of record on November 8, 1973, in Book 4095, Page 595 in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that Jack Eskridge, Jr. died on May 9, 1983, while seized and possessed of the subject real property, as is evidenced by Certificate of Death No. 11645, issued by the State Department of Health, State of Oklahoma, and that the subject property vested in his surviving joint tenant, Jewel G. Eskridge, by operation of law.

The Court further finds that on November 6, 1973, Jack Eskridge, Jr. now deceased, and Jewel G. Eskridge, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of

\$11,000.00, payable in monthly installments, with interest thereon at the rate of six percent (6%) per annum.

The Court further finds that as security for the payment of the above-described note, Jack Eskridge, Jr. now deceased, and Jewel G. Eskridge, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated November 6, 1973, covering the above-described property. Said mortgage was recorded on November 8, 1973, in Book 4095, Page 612, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Jewel G. Eskridge aka Jewel G. Eskridge Tremble, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Jewel G. Eskridge aka Jewel G. Eskridge Tremble, is indebted to the Plaintiff in the principal sum of \$6,119.26, plus interest at the rate of 6 percent per annum from July 1, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$411.58 (\$123.00 fees for service of Summons and Complaint, \$288.58 publication fees).

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

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission,

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

The Court further finds that the Defendants, Jewel G. Eskridge aka Jewel G. Eskridge Tremble, William T. Lawrence, Jr., Sandra L. Johnson aka Sandra Johnson aka Saundra Johnson, and McKinley Johnson, are in default and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action by virtue of Tax Warrant No. ITI0001624000 against Sandra L. Johnson filed September 15, 1983 in the amount of \$117.28 plus penalties and interest. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the United States, Department of Justice, has a lien upon the property by virtue of a Notice of Lien For Fine Imposed Pursuant To the Sentencing Reform Act of 1984, Serial Number 062, Case No. 89-CR-054-B against William Lawrence, Jr., dated June 15, 1992, and recorded on June 17, 1992 in Book 5413 at Page 1351 in the records of Tulsa County, Oklahoma, in the amount of \$6,000.00 fines and \$150.00 special assessments plus interest and penalties. The amount on this lien will be paid out of the proceeds of the sale if the property should yield an amount in excess of the debt to the Secretary of Veterans Affairs, according to its priority as provided by 18 U.S.C. § 3613.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Jack Eskridge, Jr. be and the same hereby is judicially determined to have occurred on May 9, 1983 in the City of Tulsa, Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of Jack Eskridge, Jr. and Jewel G. Eskridge in the above described real property be and the same hereby is judicially terminated.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendant, Jewel G. Eskridge aka Jewel G. Eskridge Tremble, in the principal sum of \$6,119.26, plus interest at the rate of 6 percent per annum from July 1, 1993 until judgment, plus interest thereafter at the current legal rate of 4.89 percent per annum until paid, plus the costs of this action in the amount of \$411.58 (\$123 fees for service of Summons and Complaint, \$288.58 publication fees), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment in rem in the amount of \$117.28, plus penalties and interest, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners,

Tulsa County, Oklahoma, claims no right, title, or interest in the subject real property.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Sharon Taylor, Tenant, has no right, title, or interest in the subject real property and is hereby dismissed as a Defendant herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Sandra L. Johnson is also known as Sandra Johnson and is also known as Saundra Johnson.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Jewel G. Eskridge aka Jewel G. Eskridge Tremble, William T. Lawrence, Jr., Sandra L. Johnson aka Sandra Johnson aka Saundra Johnson, and McKinley Johnson are in default and have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Jewel G. Eskridge aka Jewel G. Eskridge Tremble, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisal, the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

In payment of 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 \$117.28 plus penalties and interest.

**Fourth:**

In payment of United States, Department of Justice in the amount of \$6,000.00 fines and \$150.00 special assessments plus interest and penalties.

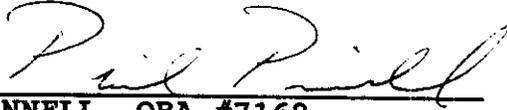
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

s/ TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



PHIL PINNELL, OBA #7169  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463



KIM D. ASHLEY, OBA#14175  
Assistant General Counsel  
State of Oklahoma ex rel.  
Oklahoma Tax Commission

Judgment of Foreclosure  
USA v. Jewel G. Eskridge aka  
Jewel G. Eskridge Tremble, et al.  
Civil Action No. 94-C-685-K

PP/esf

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

RADHA R. M. NARUMANCHI; and  
RADHA B. D. NARUMANCHI,

Plaintiffs,

v.

KINARK CORPORATION, a Delaware corporation;  
PAUL CHASTAIN, individually; JOHN Q. HAMMONS,  
individually; JAMES M. REED, individually; HALL,  
ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, an  
Oklahoma professional corporation,

Defendants.

ORDER

Pursuant to Fed. R. Civ. P. 16 and Local Rule 16.1, the undersigned held a Case Management Conference on February 15, 1996. Radha Ramana Murty Narumanchi appeared by telephone. Radha B.D. Narumanchi was excused from attending the Conference. James Reed, with the law firm Hall, Estill, Hardwick, Gable & Nelson ("Hall Estill"), appeared on behalf of Defendants, Kinark Corporation, Paul Chastain and John Q. Hammons. Mark Petrich, also with Hall Estill, appeared on behalf of Defendants, Hall Estill and James Reed.

The Court has thoroughly reviewed the parties' briefs on all pending motions and has heard oral argument on all pending motions at the Case Management Conference. This Order memorializes the Court's findings at the Case Management Conference and disposes of certain pending motions. The Court finds and orders as follows:

ENTERED ON DOCKET

DATE FEB 20 1996

No. 95-C-220-K

**FILED**

FEB 16 1996

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

82

1. Pursuant to 28 U.S.C. § 636(c), the parties have consented to the jurisdiction of the undersigned magistrate judge. A Trial Consent Form has been executed by counsel for Defendants and a copy has been sent to Radha R.M. Narumanchi for execution by himself and Radha B.D. Narumanchi.
2. The attached Scheduling Order is adopted by reference herein and it shall govern the further conduct of this case. The Scheduling Order supersedes any conflicting dates proposed in the parties' Case Management Plan.
3. Plaintiffs' motions to consolidate this case with case number 95-C-1131-K [Doc. Nos. 55 and 56] are denied without prejudice to their being refiled once the motion to remand in case number 95-C-1131-K has been ruled on. Defendants' motion for leave not to respond to Plaintiffs' motion to consolidate [Doc. No. 58] is, therefore, moot.
4. Plaintiffs' motion for sanctions against James Reed and Mark Petrich [Doc. No. 60] is denied.
5. Plaintiffs' motions for default judgment [Doc. Nos. 65 and 66] are denied.
6. Defendants' motion for leave to file answers to the First Amended Complaint [Doc. No. 67] is granted. Defendants shall file their answers by February 23, 1996.

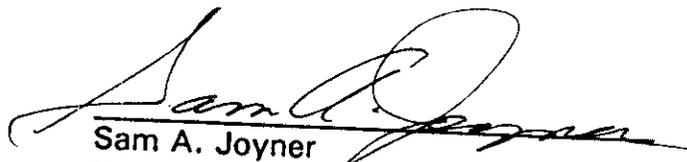
7. Defendants' motion to lift Magistrate Judge Wolfe's oral stay order [Doc. No. 68] is granted. Any previous stay in this case is hereby lifted. Discovery in this case shall proceed in accordance with this Court's local rules, the Federal Rules of Civil Procedure, and this Order. Anything in the parties' Case Management Plan to the contrary is superseded by the referenced rules and order.
8. Plaintiffs' motion to strike Defendants' amendment to Defendants' response to Plaintiffs' motion for default judgment [Doc. No. 80] is denied.

The only remaining items on the Court's docket are as follows:

1. Plaintiffs' motion for leave to file out of time a motion to reconsider Judge Terry Kern's December 19, 1995 Order [Doc. No. 69]. This motion will be handled by Judge Kern.
2. Plaintiffs' objection to the undersigned's October 25, 1995 Order regarding disqualification of Hall Estill and various attorneys. This will also be handled by Judge Kern.

IT IS SO ORDERED.

Dated this 16th day of February 1996.

  
Sam A. Joyner  
United States Magistrate

XIV. Scheduling Order (completed by the court at the case management conference)

A. Pretrial Schedule

1. 6/28/96 DISCOVERY CUTOFF (Interrogatories and Rule 34 requests must be made 30 days in advance of this date, and written discovery responses must be finally supplemented 10 days in advance of this date.)
- 1a. 8 NUMBER OF FACT WITNESS DEPOSITIONS PERMITTED
- 1b. 2 NUMBER OF EXPERT WITNESS DEPOSITIONS PERMITTED
2. 3/17/96 MOTIONS FOR JOINDER OF ADDITIONAL PARTIES AND/OR AMENDMENT TO THE PLEADINGS FILED
3. 7/5/96 DISPOSITIVE MOTIONS AND MOTIONS IN LIMINE CUTOFF (Attorney meeting to resolve evidentiary issues required before filing in limine motions.)
- 3a. 7/22/96 RESPONSES FILED
- 3b. 8/11/96 REPLIES FILED
4. 6/7/96 EXCHANGE OF WITNESS LISTS (Filed of record)
5. 6/7/96 EXPERT WITNESS EXCHANGE (Filed of record)
- 5a. 6/7/96 PLAINTIFF'S EXPERT NARRATIVES/REPORTS DUE
- 5b. 6/7/96 DEFENDANT'S EXPERT NARRATIVES/REPORTS DUE
6. 8/17/96 EXCHANGE OF PREMARKED EXHIBITS
7. \_\_\_\_\_ SETTLEMENT REPORT (Filed - include date of meeting, persons present, and prospects for settlement.)
8. 1st or 2nd week of July REQUEST FOR SETTLEMENT CONFERENCE (Indicate month and year desired.) **NOTE: Settlement conferences are set separately and a continuation of any date herein will not continue a settlement conference. A separate application is required to continue a settlement conference.**
9. Yes ALL PARTIES CONSENT TO ADJUNCT SETTLEMENT JUDGE?
10. 7/5/96 DEPOS/VIDEOTAPE/INTERROG DESIGNATIONS (Exchanged between counsel.)
- 10a. 7/22/96 COUNTER-DESIGNATIONS (Exchanged between counsel.)
- 10b. 8/11/96 TRANSCRIPTS ANNOTATED WITH OBJECTIONS & OPTIONAL BRIEFS ON UNUSUAL OBJECTIONS FILED (Attorney meeting to resolve objections required before filing.)
11. 9/10/96 PRETRIAL CONFERENCE AT 2:30 o'clock p.m.
12. 9/3/96 AGREED PRETRIAL ORDER
13. 10/11/96 JOINT STATEMENT OF THE CASE
14. 10/11/96 REQUESTED JURY INSTRUCTIONS AND VOIR DIRE
15. 10/11/96 PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW
16. 10/11/96 TRIAL BRIEFS

B. Trial Setting

1. 10/21/96 TRIAL DATE (  ) JURY ( ) NON-JURY at 9:30 a.m

*W*  
*2/8/95*

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

ENTERED ON CLERK'S  
FEB 20 1996

IN RE: )  
WARLICK INVESTMENTS, LTD., )  
Debtor, )  
WARLICK INVESTMENTS, LTD., )  
Plaintiff, )  
vs. )  
COMMONWEALTH CHARTERIC )  
TRUST CO., LTD., )  
Defendant, )  
and WILLIAM MICHAEL FURMAN, )  
Filing as Cross Defendant. )

Case No. 87-01138-W  
Chapter 11

Case No. 95-C-725-BU

**FILED**  
FEB 16 1996

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

**ORDER**

On January 5, 1996, this Court entered an Order denying the motion of Appellant, William Michael Furman, to proceed in forma pauperis and directing Appellant to file with the Court, on or before January 22, 1996, proof of payment of the requisite filing fee of \$105.00 to the Bankruptcy Court. The Court stated that if Appellant failed to file the proof of payment within the time prescribed, this appeal shall be dismissed without prejudice. Thereafter, on January 10, 1996, the Court entered an Order stating that Appellant shall have until January 31, 1996 to assist the Clerk of the Bankruptcy Court to assemble the record and have it transmitted to the Court. This was the second extension of time granted to Appellant to assist the Clerk in assembling the record. The Court has reviewed the record in this matter and it

appears that Appellant has not complied with the Court's Orders. Because Appellant has failed to file the proof of payment of the requisite filing fee and has failed to assist the Clerk of the Bankruptcy Court to assemble the record, the Court hereby DISMISSES WITHOUT PREJUDICE the above-captioned appeal.

ENTERED this 16<sup>th</sup> day of February, 1996.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

KAREN NELSON, an individual, and )  
KAREN NELSON IRREVOCABLE TRUST, by )  
Trustees, BEVERLY VOGEL and MIKE )  
WILLIAMSON, )

FEB 16 1996

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

Plaintiff, )

vs. )

Case No. 95-C-904-E

MASSACHUSETTS MUTUAL LIFE )  
INSURANCE COMPANY, a foreign )  
corporation, and JOHN YOUNT, )  
an individual, )

ENTERED ON DOCKET  
DATE FEB 20 1996

Defendants. )

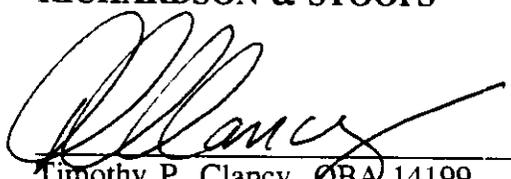
**STIPULATION OF DISMISSAL WITHOUT PREJUDICE**

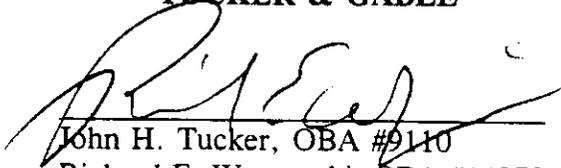
Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, it is hereby stipulated and agreed between the parties, Karen Nelson, an individual, and Karen Nelson Irrevocable Trust, by Trustees, Beverly Vogel and Mike Williamson, Plaintiffs, and Massachusetts Mutual Life Insurance Company, a foreign corporation, and John Yount, an individual, Defendants, by and through their respective attorneys, Richardson & Stoops and Rhodes, Hieronymus, Jones, Tucker & Gable, that Defendant, John Yount, be dismissed without prejudice. All parties hereto to be responsible for their own attorney's fees and costs associated herewith.

DATED this 15 day of February, 1996.

**RICHARDSON & STOOPS**

**RHODES, HIERONYMUS, JONES,  
TUCKER & GABLE**

By   
Timothy P. Clancy, OBA 14199  
6846 S. Canton, Suite 200  
Tulsa, OK 74136  
(918) 492-7674

By   
John H. Tucker, OBA #9110  
Richard E. Warzynski, OBA #14079  
100 W. 5th St, Suite 400  
Tulsa, OK 74103  
(918) 582-1173

ATTORNEY FOR PLAINTIFF

ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

FEB 16 1996

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

CARLTON ENTERPRISES, INC., )  
d/b/a DON CARLTON HONDA, )  
and DON CARLTON GMC TRUCK, )  
INC., d/b/a CAR CITY, )

Plaintiffs, )

-v- )

DEALER COVER, INC., SPECIAL )  
RISK MARKETING, INC., et al. )

Defendants. )

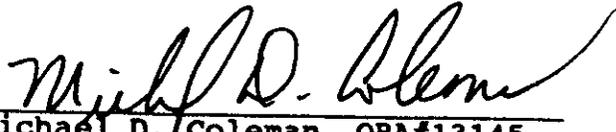
Case No. 95-CV-1055BU

*Feb 16 1996*

**STIPULATION FOR PARTIAL  
DISMISSAL WITH PREJUDICE  
AS TO CERTAIN DEFENDANTS ONLY**

The plaintiff, Carlton Enterprises, Inc., and only the defendants, Global Special Risks, Inc., Underwriters at Lloyd's, London, Indemnity Marine Assurance Company Limited, Commercial Union Assurance Company, PLC, The Yorkshire Insurance Company, LTD., Phoenix Assurance PLC, Sphere Drake Insurance PLC, Dai-Tokyo Insurance Company (U.K.) LTD., Per Sphere Drake Insurance PLC 'NO. 2' A/C, Ocean Marine Insurance Company LTD., Cornhill Insurance PLC, Allianz International Insurance Company LTD., Per Cornhill J A/C, Northern Assurance Company LTD. 'NO. 6' A/C, Norwich Union Fire Insurance Society LTD. NO. 1 'M', A/C Per Maritime Insurance Company LTD., and Colonia Insurance Company (UK) LTD., acknowledging a compromise settlement of all claims as to these defendants having been concluded, hereby stipulate that the above-styled action be dismissed with prejudice as to the foregoing

defendants, plaintiff specifically reserving rights against all other defendants and all other parties who are or may be liable.



Michael D. Coleman, OBA#13145  
Kerr, Irvine, Rhodes & Ables  
201 Robert S. Kerr Avenue  
Suite 600  
Oklahoma City, OK 73102  
(405) 272-9221



David H. Cole, OBA#01776  
One North Hudson, Suite 200  
Oklahoma City, OK 73102  
(405) 272-0322

**FRIDAY**

**FEBRUARY 16, 1996**

**BEFORE**

**HONORABLE JAMES O. ELLISON, SENIOR JUDGE**

10:00 A.M.

MEETING

1:30 P.M.

STATUS CONFERENCE

85-C-437

HOMEWARD BOUND, ET AL

V. HISSOM MEMORIAL, ET AL

Attorneys:

Louis Bullock ✓

Patricia Bullock

William Sagona, Gdn Ad Litem

Attorneys:

Mark Jones ✓



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

**FILED**

FEB 15 1996

*Ja*

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

Case No. 93-C-0036-H ✓

ENTERED ON DOCKET

*2-16-96*

RHOADES OIL COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

This matter comes before the Court on a Motion for Summary Judgment by Plaintiff Rhoades Oil Company, Inc. ("Rhoades Oil") and a Cross-Motion for Summary Judgment by Defendant United States. For the reasons expressed herein, the Court grants Plaintiff's Motion for Summary Judgment and denies Defendant's Cross-Motion.

Plaintiff commenced this civil tax action suit pursuant to 26 U.S.C. § 7422 to recover alleged overpayments made to the United States in connection with personal holding company taxes and interest thereon assessed against Plaintiff for taxable years 1988, 1989, and 1990, in the total amount of \$503,689.00. The assessment stemmed from the determination by the Internal Revenue Service (the "Service") that Plaintiff is a "personal holding company" within the meaning of the Internal Revenue Code (the "Code") §§ 541-543, and therefore subject to the personal holding company tax.

I.

The basic facts of this case are set forth in the Stipulation of Facts filed with the Court on November 9, 1993 and supplemented on May 31, 1994.

Rhoades Oil was founded in 1945 by Sam J. Rhoades, Sr. for the purpose of exploring and producing oil and gas. Since its inception, Rhoades Oil has been an oil and gas company, and its only activities have been the exploration and production of oil and gas reserves. These activities include purchasing oil and gas leases, drilling wells, and acting as the operator for producing wells.

Rhoades Oil is a closely-held Delaware corporation with its principal place of business in Tulsa, Oklahoma. The stock of the company is owned as follows:

	<u>Pre-9/89</u>		<u>Post-9/89</u>	
Common Stock (No Par)				
Sam J. Rhoades	50%	305.0	66.7%	305.0
Nona M. Rhoades	25%	147.5	33.3%	146.5
Sam J. Rhoades, Jr.	25%	<u>147.5</u>	0.0%	<u>0.0</u>
Total Shares (Common) Outstanding		600.0		452.5
Preferred Stock (Par \$100)				
Sam J. Rhoades, Trust	50%	100.0	66.7%	100.0
Nona M. Rhoades, Trust	25%	50.0	33.3%	50.0
Sam J. Rhoades, Trust	25%	<u>50.0</u>	0.0%	<u>0.0</u>
Total Shares (Preferred) Outstanding		200.0		150.00

Rhoades Oil redeemed the shares of Sam J. Rhoades following his death in 1989. During the last half of each of the taxable years at issue more than 50 percent of the outstanding stock of Rhoades Oil was owned by no more than 5 individuals.

The income of Rhoades Oil from its oil and gas business is derived from working interests, overrides, and royalty interests. A working interest is ownership of an oil and gas lease. The owner receives the gross receipts from the sale of oil and gas, less royalty payments and severance taxes, and bears the drilling and operating expenses of the well. The overrides of Rhoades Oil were created when the company owned a working interest in certain wells, but converted the working interest into an override. The overrides do not bear any expenses of drilling or operations. A royalty interest also bears no drilling or operating expenses. In 1988 through 1990, Rhoades Oil received the following revenues from working interests, overrides, and royalty interests:

	<u>1988</u>	<u>1989</u>	<u>1990</u>
Working Interests	\$1,162,000	\$1,211,000	\$1,316,000
Overrides and Royalties	\$ 56,000	\$ 46,000	\$ 56,000

As of January 1, 1988, January 1, 1989, and January 1, 1990, Rhoades Oil had retained earnings of \$17,710,020, \$18,977,833, and \$14,273,523, respectively. The investment income of Rhoades Oil is derived from the investment of the company's retained earnings, mostly in Treasury Bills and publicly-traded stocks.

The original Forms 1120 - U.S. Corporation Income Tax Returns filed by Rhoades Oil for taxable years 1988, 1989, and 1990 did not reflect a liability for any personal holding company tax.

On or about July 31, 1991, Rhoades Oil received a letter from the Service notifying Rhoades Oil of proposed federal income tax deficiencies under Section 541 et seq. of the Code, the personal holding company tax provisions. This Notice of Deficiency proposed deficiencies as follows:

<u>Taxable Year</u>	<u>Additional Tax</u>
1988	\$101,053.00
1989	\$163,188.00
1990	\$144,392.00

On April 16, 1992, Plaintiff executed IRS Form 870, Waiver of Restrictions on Assessment and Collection of Tax and Acceptance of Overassessment, and on May 24, 1992, made advance payments of the deficiencies in the following amounts:

<u>Year</u>	<u>Tax</u>	<u>Interest</u>
1988	\$101,053.00	\$ 39,895.85
1989	\$163,188.00	\$ 39,701.06
1990	\$144,392.00	\$ 15,459.48
	Total	\$503,689.39

These deficiencies were subsequently assessed on July 6, 1992.

On or about May 22, 1992, Rhoades Oil filed three separate Forms 1120X - Amended U.S. Corporation Income Tax Returns for taxable years 1988, 1989, and 1990, which served as its claims

for refund.<sup>1</sup> In these Amended Returns, Rhoades Oil sought a refund of all personal holding company tax paid for taxable years 1988, 1989, and 1990, plus interest. The Service neither approved nor denied these claims within the six-month period following the filing of these claims.

In calculating its personal holding company income for taxable years 1988, 1989, and 1990, Rhoades Oil did not deduct "lifting costs"<sup>2</sup> from gross income when determining its adjusted ordinary gross income from working interests under Section 542(a)(1). Using this method, Rhoades Oil's personal holding company income did not exceed 60 percent of its adjusted ordinary gross income and, accordingly, it was not treated as a personal holding company under Section 542.

On its tax returns, Rhoades Oil treated Lease Operating Expenses (lifting costs) as part of its "Cost of Goods Sold." For non-tax accounting purposes, Rhoades Oil treated Lease Operating Expenses as part of its "Cost of Operations" which is subtracted from Gross Receipts in arriving at Gross Profits.

On audit, the Service followed Revenue Ruling 60-344, 1960-2 C.B. 186, and deducted lifting costs from gross sales of oil and gas to calculate "gross income" for purposes of the personal holding company test. Using this calculation of "gross income," the Service determined that Rhoades Oil was a personal holding company under Section 542 and was therefore subject to the tax on undistributed personal holding company income under Section 541.

---

<sup>1</sup> Pursuant to the Joint Stipulation of Facts, the United States does not admit any facts set forth in the 1988, 1989, and 1990 Forms 1120X, except as expressly stated.

<sup>2</sup> The term "lifting costs" when used in the oil and gas industry is usually considered to be synonymous with "operating costs," and consists of those deductible costs incurred in the production of oil and gas after the completion of drilling and before its removal from the property for sale or transportation, e.g. labor, superintendence, supplies, repairs, and assets having a life not in excess of one year, maintenance, and applicable overhead costs. See Rev. Rul. 60-344, 1960-2 C.B. 186.

## II.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he 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. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

### III.

The language of the statute and the legislative history of the personal holding company tax provisions make clear that any corporation that falls within the technical provisions of the statute will be deemed a "personal holding company." H.R. Rep. No. 704, 73d Cong., 2d Sess. 11-12 (1934).<sup>3</sup> "The provision is designed so that there is no necessity to prove a purpose to avoid surtaxes [on wealthy individuals], and it has been considerably strengthened and improved by the Revenue Act of 1937." H.R. Rep. No. 1860, 75th Cong., 3d Sess. 3 (1938). See American Package Corp. v. Commissioner, 125 F.2d 413, 416-17 (4th Cir. 1942) (noting that, unlike the accumulated earnings tax, the personal holding company tax must be applied regardless of whether there is a legitimate business purpose); Investors Ins. Agency v. Commissioner, 72 T.C. 1027, 1032-33 (1979), aff'd, 677 F.2d 1328 (9th Cir. 1982) (applying personal holding company tax despite being a trap for the unwary); Montgomery Coca-Cola Bottling Co. v. United States, 615 F.2d 1318, 1323 (Cl. Ct. 1980) (tax is "automatic upon qualification under the objective criteria of sections 541 et seq., and . . . does not turn on a tax avoidance motive").

---

<sup>3</sup> As Defendant stated in its brief, the goal of Congress in enacting the personal holding company tax was to prevent the use of "incorporated pocketbooks" by high-bracket individual taxpayers to shield their investment income from tax at the steeply graduated individual tax rates while retaining control over the underlying portfolio securities through their control of the personal holding company. To accomplish this goal, Congress established a set of mechanical tests for determining whether a company was a personal holding company. Def.'s Resp. Br. at 8.

A "personal holding company" is defined in Section 542(a) of the Code as follows:

- (a) GENERAL RULE.- For purposes of this subtitle, the term "personal holding company" means any corporation \* \* \* if --
  - (1) ADJUSTED ORDINARY GROSS INCOME REQUIREMENTS. At least 60 percent of its adjusted ordinary gross income (as defined in section 543(b)(2)) for the taxable year is personal holding company income (as defined in section 543(a), and
  - (2) STOCK OWNERSHIP REQUIREMENT. At any time during the last half of the taxable year more than 50 percent in value of its outstanding stock is owned, directly or indirectly, by or for not more than 5 individuals. \* \* \*

The parties have stipulated that during the last half of each taxable year at issue, more than 50 percent of the outstanding stock of Rhoades Oil was owned by no more than 5 individuals. Plaintiff therefore has satisfied the stock ownership test set forth in Section 542(a)(2).

If a corporation meets the stock ownership test of Section 542(a)(2), under the terms of Section 542(a)(1) it will be subject to the 28 percent tax on its undistributed personal holding company income if its personal holding company income comprises 60 percent or more of its "adjusted ordinary gross income," as that term is defined in Section 543(b). Because the amount of Rhoades Oil's personal holding company income is not in dispute, the sole issue is the proper method for determining its "adjusted ordinary gross income".

The term "ordinary gross income" is defined in Section 543(b)(1) as:

- (b) DEFINITIONS - For purposes of this part -
  - (1) ORDINARY GROSS INCOME. - The term "ordinary gross income" means the gross income determined by excluding -
    - (A) all gains from the sale or other disposition of capital assets,
    - (B) all gains (other than those referred to in subparagraph (A)) from the sale or other disposition of property described in section 1231(b), and
    - (C) in the case of a foreign corporation . . .

The term "adjusted ordinary gross income" is defined in Section 543(b)(2) as:

(2) ADJUSTED ORDINARY GROSS INCOME. The term "adjusted ordinary gross income" means the ordinary gross income adjusted as follows:

\* \* \*

(B) MINERAL ROYALTIES, ETC - From the gross income from mineral, oil, and gas royalties described in paragraph (4), and from the gross income from working interests in an oil or gas well, subtract the amount allowable as deductions for -

- (i) exhaustion, wear and tear, obsolescence, amortization, and depletion,
- (ii) property and severance taxes,
- (iii) interest, and
- (iv) rent,

to the extent allocable, under regulations prescribed by the Secretary, to such gross income from royalties or such gross income from working interests in oil or gas wells. The amount subtracted under this subparagraph with respect to royalties shall not exceed the gross income from such royalties, and the amount subtracted under this subparagraph with respect to working interests shall not exceed gross income from such working interests.

As Defendant stated in its brief, the determination of "adjusted ordinary gross income" may be illustrated as follows:

less: Gross Income  
Items described in Section 543(b)(1)(A)-(C)  
equals: Ordinary Gross Income

and

less: Ordinary Gross Income  
Items described in Section 543(b)(2)(B)(I)-(iv)  
equals: Adjusted Ordinary Gross Income

The parties do not dispute the amounts of the adjustments to be made under Section 543(b)(1)(A)-(C) to reduce "gross income" to "ordinary gross income", or under Section 543(b)(2)(B)(i)-(iv) to arrive at "adjusted ordinary gross income." The parties disagree, however, as to the proper definition of "gross income" under Section 543(b)(1), the starting point of the calculation. The question for the Court, therefore, is what constitutes "gross income" for purposes

of Section 543(b)(1) and the applicable regulations in effect and pertinent to the taxable years at issue.

#### IV.

Defendant claims that under Section 543 and the applicable regulations “gross income” means gross sales (or receipts or revenues) reduced by “lifting costs.” In support of this view, Defendant relies almost exclusively on Revenue Ruling 60-344, 1960-2 C.B. 186 and Laguna Royalty Co. v. Commissioner, 406 F.2d 703 (5th Cir. 1969), affg, 27 T.C.M. (CCH) 164 (1968). Based on these authorities, and using this method of calculating “gross income,” Defendant argues that Rhoades Oil should be classified as a personal holding company for the taxable years in question. The Court, however, believes that Defendant’s reliance upon these authorities is misplaced.

In Revenue Ruling 60-344, the taxpayer sought advice as to whether “lifting costs” constitute a part of production costs in the determination of “gross income” from oil production under the provisions of Section 61(a) of the Code relating to the definition of gross income, and Section 542(a) of the Code relating to the definition of a personal holding company.

At the time of Revenue Ruling 60-344, Section 61(a) provided that “gross income means all income from whatever source derived, including (but not limited to) . . . (2) Gross income derived from business . . . .” These provisions remained in effect through taxable years 1988, 1989, and 1990. By contrast, however, Section 542 and Section 543, which were subsequently amended in 1964, were materially different prior to the taxable years at issue here, stating in applicable part:

Section 542 [1954 Code]. (a) GENERAL RULE. - For purposes of this subtitle, the term “personal holding company” means any corporation . . . if -

(1) GROSS INCOME REQUIREMENT. - At least 80 percent of its gross income for the taxable year is personal holding company income as defined in section 543 . . .

Section 543 [1954 Code]. (a) GENERAL RULE. - For purposes of this subtitle, the term "personal holding company income" means the portion of the gross income which consists of:

- (1) DIVIDENDS \* \* \*
- (2) STOCK AND SECURITIES TRANSACTIONS \* \* \*
- (3) COMMODITIES TRANSACTIONS \* \* \*
- (4) ESTATES AND TRUSTS \* \* \*
- (5) PERSONAL SERVICE CONTRACTS \* \* \*
- (6) USE OF CORPORATION PROPERTY BY SHAREHOLDERS \* \* \*
- (7) RENTS \* \* \*
- (8) MINERAL, OIL AND GAS ROYALTIES \* \* \*

Therefore, the question presented to the Service in Revenue Ruling 60-344 was the meaning of the term "gross income" as used in these pre-1964 provisions of the Code.

Moreover, without reasoning or justification, Revenue Ruling 60-344 declared that Treas. Reg. § 1.61-3,<sup>4</sup> which by its terms pertains to "a manufacturing, merchandising, or mining business",

---

<sup>4</sup> Treas. Reg. § 1.61-3(a) provides in applicable part:

(a) *In general.* In a manufacturing, merchandising, or mining business, "gross income" means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. Gross income is determined without subtraction of depletion allowances based on a percentage of income to the extent that it exceeds cost depletion which may be required to be included in the amount of inventoriable costs as provided in Section 1.471-11 and without subtraction of selling expenses, losses or other items not ordinarily used in computing costs of goods sold or amounts which are a type for which a deduction would be disallowed under Section 162(c), (f), or (g) in the case of a business expense. The costs of goods sold should be determined in accordance with the method of accounting consistently used by the taxpayer.

applied equally to an oil and gas business for purposes of Section 542, and proceeded to analyze the treatment of “lifting costs” under this provision of the regulations.<sup>5</sup>

Revenue Ruling 60-344 concluded that:

... in the case of oil and gas producing properties, "lifting costs" constitute a portion of the cost of producing oil and gas and must be subtracted from gross sales in computing gross income for the purpose of determining whether personal holding company income, as defined in section 543 of the Code, is at least 80 percent of the corporation's gross income for a taxable year.

In Laguna Royalty Co., the Fifth Circuit adopted without discussion the findings and conclusions of the Tax Court memorandum opinion. 406 F.2d 703. In turn, the memorandum opinion, without informative analysis, adopted Revenue Ruling 60-344 and determined that the issue should be decided under I.R.C. § 61(a)(2) and Treas. Reg. § 1.61-3.<sup>6</sup> The Tax Court concluded:

---

<sup>5</sup> Revenue Ruling 60-344 expressly relied upon Treas. Reg. § 1.61-3 stating:

Section 61(a) of the Code provides, in part, that gross income includes gross income derived from business. Section 1.61-3 of the regulations defines gross income in the case of manufacturing, merchandising, or mining business as total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. In determining gross income, a subtraction should not be made for depletion allowances based on a percentage of income, selling expenses, losses, or other items not ordinarily used in computing cost of goods sold. However, a taxpayer may elect to subtract for depreciation or depletion based on cost incurred in connection with the production of goods or materials in determining gross income. See Rev. Rul. 141, C.B. 1953-2, 101.

<sup>6</sup> The Court observes that in Laguna Royalty Co., as here, the taxpayer argued that the treatment of “lifting costs” should be determined by applying the definition of “gross income” contained in Section 613 of the Code. 406 F.2d 703 (5th Cir. 1969), aff'g 27 T.C.M. (CCH) 164 (1968). The Tax Court properly rejected the taxpayer’s argument and analyzed that case under Section 61, stating in part, “[t]he term ‘gross income from the property’, as used in Section 613 for the purposes of measuring the depletion or exhaustion of the natural resource, is not the same as ‘gross income’ as used in Section 542(a)(1) for the purpose of determining personal holding company tax liability.” Id. Similarly, in the instant case, this Court finds that Section 61, and not Section 613, controls the definition of “gross income,” and thus Rhoades Oil’s argument to the contrary is without merit. Accord Treas. Reg. § 1.542-2. As discussed more fully below, the Court departs from Laguna Royalty Co. by concluding that Treas. Reg. § 1.61-3, which refers to “mining,” does not also apply to “oil and gas” under the statute as it existed following the 1964 amendments.

We agree with respondent that, in the instant case, the term "gross income" means the gross sales in the amount for which the oil and gas was sold in the immediate vicinity of the wells, less "lifting costs." This position, as set forth in Rev. Rul. 60-344, 1960-2 C.B. 186 is that:

[i]n the case of oil and gas producing properties, "lifting costs" constitute a portion of the cost of producing the oil and gas and must be subtracted from gross sales in computing gross income for the purpose of determining whether personal holding company income, as defined in section 543 of the Internal Revenue Code of 1954, is at least 80 percent of the corporation's total gross income for a taxable year.

In our opinion this is a correct statement of the rule applicable herein.

With respect to Treas. Reg. § 1.61-3, the Tax Court stated:

Section 61 provides, in pertinent part, that gross income includes "gross income derived from business," and section 1.61-3 of the Regulations defines gross income in the case of a manufacturing, merchandising or mining business as total sales, less cost of goods sold.

#### V.

The authorities cited by Defendant all rely upon Treas. Reg. § 1.61-3 in deciding that "lifting costs" must be subtracted from gross receipts to determine "gross income" under Section 543(b)(1). These decisions apparently are based on the view that the oil and gas business is included in the phrase "manufacturing, merchandising, or mining business" contained in the regulation.

Whether these authorities, which construed the term "gross income" for purposes of Section 542(a)(1) of the pre-1964 statute, were correctly decided, need not be determined here. Indeed, nothing in the pre-1964 statute is presently before this Court. What is before the Court is the law in effect and applicable to taxable years 1988, 1989, and 1990. The Court finds that Revenue Ruling 60-344 and the case law cited by Defendant in its brief all pertain to the pre-1964 statute and thus are not binding in deciding the instant case. Accordingly, the Court must look to the plain language of the Code and the regulations in effect during the taxable years at issue.

Two of the relevant provisions of the Code provide as follows:

SECTION 541. IMPOSITION OF PERSONAL HOLDING COMPANY TAX. In addition to other taxes imposed by this chapter, there is hereby imposed for each taxable year on the undistributed personal holding company income (as defined in section 545) of every personal holding company (as defined in section 542) a personal holding company tax equal to 39.6 percent of the undistributed personal holding company income.

SECTION 542. DEFINITION OF PERSONAL HOLDING COMPANY. (a) GENERAL RULE - For purposes of this subtitle, the term "personal holding company" means any corporation (other than a corporation described in subsection (c)) if --

(1) ADJUSTED ORDINARY GROSS INCOME REQUIREMENT. - At least 60 percent of its adjusted ordinary gross income (as defined in section 543(b)(2)) for the taxable year is personal holding company income (as defined in section 543(a)) . . . .

Revenue Ruling 60-344 construed the term "gross income" as set forth in Section 542 as it existed prior to 1964. Clearly, however, following the 1964 amendments, Section 542 no longer contained the term "gross income." Rather, the section used the term "adjusted ordinary gross income" instead of "gross income" and expressly stated that the term is defined in Section 543(b)(2).

The language in Section 543(b) is illuminating for at least two reasons. First, this is a new definition section added by the 1964 amendments to set forth a determination of "adjusted ordinary gross income" step-by-step from "gross income" to "ordinary gross income," I.R.C. § 543(b)(1), and from "ordinary gross income" to "adjusted ordinary gross income," I.R.C. § 543(b)(2). Second, the provision sets forth the proper treatment of oil and gas royalties and working interests in oil and gas wells, and expressly distinguishes such royalties and interests from mineral royalties, which are also specifically addressed. I.R.C. § 543(b)(2)(B).

The question for this Court is the meaning of "gross income" as that term is used in Section 543(a)(1), the starting point of the relevant calculation. Defendant first contends that the Court should defer to Revenue Ruling 60-344, citing Dunn v. United States, 468 F. Supp. 991, 993 (S.D.N.Y. 1979) (holding that revenue rulings have "the power of legal precedents unless unreasonable or inconsistent with the provisions of the Internal Revenue Code.") This revenue

ruling, however, construed the term "gross income" contained in Section 542 prior to the 1964 amendments. As a result of these amendments, Section 542 no longer contains the term "gross income." Instead, "gross income" is used as the starting point of the new definition section in Section 543(b), which definition section sets forth certain adjustments and other calculations including specific subtractions to arrive at the "gross income" both "from mineral, oil and gas royalties" and "from working interests in an oil and gas well." These adjustments and calculations were not in the pre-1964 statute. In light of the material changes in the statute, the Court rejects Defendant's contention that Revenue Ruling 60-344 and case law adopting its rationale control the instant case.

Defendant next contends that, even if Revenue Ruling 60-344 and the cases that follow this ruling are no longer controlling, the reasoning of such authorities should be followed. Under this theory, for the reasons described above, the Court would be required to apply Treas. Reg. § 1.61-3.

As noted above, Treas. Reg. § 1.61-3 applies to "a manufacturing, merchandising or mining business." Defendant, however, has identified no authority whatsoever to support its claim that "oil and gas" is synonymous with "mining". Moreover, anyone familiar with the history of Oklahoma is fully aware of the distinct contributions that the oil industry and the mining industry have each made to the State and, to date, the Court is unaware of any instance in which anyone has confused one industry with the other.

The assertion by Defendant that "oil and gas" constitutes "mining" is even more incredible in the context of the statute itself. As noted above, Section 543(b)(2) expressly distinguishes between "oil," "gas," and "minerals." Thus, the drafters of Section 543(b)(2) were clearly aware of the differences between minerals, oil, and gas. Therefore, the Court assumes that the drafters of Section 543(b)(1) were also aware of this distinction. The Court finds that, for purposes of defining "gross income" as the starting point of the calculation in Section 543(b)(1), the drafters did not intend the term "mining" to encompass "oil and gas".

Although ignoring the plain language of both the statute and Treas. Reg. § 1.61-3, Defendant asserts further that “mining” must include “oil and gas,” because each endeavor involves “the extraction of natural resources from the earth.” In its brief, Defendant states that:

[t]here is nothing to suggest that the activities of Rhoades Oil should be treated differently than any mining activity for purposes of Treas. Reg. § 1.61-3(a) - both involve the extraction of natural resources from the earth. And for purposes of the personal holding company test, there can certainly be no rationale for distinguishing them.

As noted above, however, this statute is technical in nature and must be strictly applied according to its plain language. See Montgomery Coca-Cola Bottling Co., 615 F.2d at 1323. Strict statutory construction forbids substituting the term “oil and gas” for “mining” simply because they both involve the “extraction of natural resources from the earth.” If the Commissioner and the Secretary of the Treasury had intended to apply Treas. Reg. § 1.61-3 to “oil and gas” as well as to “mining”, then this provision of the regulations should have referred to “the extraction of natural resources from the earth.”<sup>7</sup> See e.g. Granquist v. Hackleman, 264 F.2d 9, 16 (9th Cir. 1959) (stating “[a] Treasury Regulation has the force and effect of law only if it is consistent with and reasonably adapted to the enforcement of a revenue statute.”)

In summary, the Court concludes that for purposes of determining “gross income” under Section 542, the controlling authority is Section 61. Section 1.61-3 of the regulations, however, does not apply to “oil and gas,” because it only refers to “mining” and the statute specifically

---

<sup>7</sup> Defendant argues that the fact that Congress “made no changes to the definition of ‘gross income’ in the Revenue Act of 1964 counsels that Congress acquiesced in the IRS’s interpretation of Revenue Ruling 60-344. It is long-established that ‘[a]dministrative’ construction must be deemed to have received legislative approval by the re-enactment of the statutory provision, without material change.” This argument is wholly without merit. As noted herein, the 1964 amendments contained material changes to the statute, including a detailed definitional section that expressly distinguished between minerals and oil and gas. A more reasonable conclusion is that if the Service and the Department of Treasury had intended to continue to treat “oil and gas” in the same fashion as “mining,” then the Commissioner and the Secretary would have amended the regulations to reflect the changes in the statute.

distinguishes between "minerals" and "oil and gas." I.R.C. § 543(b)(2)(B). The authorities cited by Defendant to the contrary are inapposite because this provision of the Code was materially amended in 1964, and the delineation between "minerals" and "oil and gas" was reflected in a new definitional section added by the 1964 amendments. Under general principles, "gross income" refers to "gross income derived from business." I.R.C. § 61(a)(2). Absent an express statement to the contrary in the statute or applicable regulations, "lifting costs" should be treated as operating costs under general principles and therefore should not be subtracted from gross profits to determine "gross income."

Applying these principles to the instant case, Rhoades Oil is not a personal holding company as that term is defined in Sections 541 through 543 of the Code for taxable years 1988, 1989, and 1990. Therefore, summary judgment is hereby granted for the Plaintiff.<sup>8</sup>

IT IS SO ORDERED.

This 14<sup>TH</sup> day of February, 1996.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

---

<sup>8</sup> Treas. Reg. § 1.61-3 provides that the "cost of goods sold should be determined in accordance with the method of accounting consistently used by the taxpayer." Accordingly, Plaintiff argues that the method of accounting consistently used by Rhodes Oil reflects "lifting costs" in the category "Operating Expenses" rather than in the category "Cost of Sales," and that this treatment should be respected under the regulations. Because the Court has determined that, for the reasons discussed herein, this regulation does not apply to "oil and gas," it is unnecessary to reach this issue.

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

**FILED**  
FEB 15 1996

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

GENERAL DYNAMICS CORPORATION,  
a Delaware corporation,

Plaintiff,

vs.

INTERSOURCE, INC., an  
Oklahoma corporation,

Defendant.

Case No. 95-C-286-B

ENTERED ON DOCKET

DATE FEB 16 1996

ORDER

Before the Court is Plaintiff's Motion for Attorney's Fees (Docket #49). Plaintiff seeks \$23,952 in attorney's fees in connection with this case. Defendant has filed no objection, and the time for such objections has passed. Therefore, Plaintiff's Motion is granted.

IT IS SO ORDERED this 15<sup>th</sup> day of February, 1996.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

52

FILED

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

FEB 15 1996

LARRY MILLER,  
  
Plaintiff,  
  
v.  
  
AMERADA HESS CORPORATION,  
  
Defendant.

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

Case No. 94-C-1122K

ENTERED FOR RECORD

DATE FEB 16 1996

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, hereby jointly inform the Court that they have reached a mutually satisfactory private settlement regarding Plaintiff's claims herein, and all of Plaintiff's claims should, therefore, be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 15th day of February, 1996.

Respectfully submitted,

By: Jeff Nix  
Jeff Nix, Esq.  
Leslie C. Rinn, Esq.  
2121 South Columbia  
Suite 710  
Tulsa, Oklahoma 74114-3521

ATTORNEYS FOR PLAINTIFF

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

By: J. Patrick Cremin  
J. Patrick Cremin, OBA #2013  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0594

ATTORNEYS FOR DEFENDANT

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

FILED  
FEB 15 1996

ELLEN L. DRAKE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 AMERADA HESS CORPORATION, )  
 )  
 Defendant. )

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

Case No. 95-C-0009K

ENTERED ON DOCKET  
DATE FEB 16 1996

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, hereby jointly inform the Court that they have reached a mutually satisfactory private settlement regarding Plaintiff's claims herein, and all of Plaintiff's claims should, therefore, be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 15th day of February, 1996.

Respectfully submitted,

By: Leslie C. Rinn  
Jeff Nix, Esq.  
Leslie C. Rinn, Esq.  
2121 South Columbia  
Suite 710  
Tulsa, Oklahoma 74114-3521

ATTORNEYS FOR PLAINTIFF

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

By: J. Patrick Cremin  
J. Patrick Cremin, OBA #2013  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0594

ATTORNEYS FOR DEFENDANT

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

**FILED**

FEB 15 1996

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

Case No. 95-C-325-BU

ENTERED

DATE FEB 16 1996

ROLAND D. FOSTER, )  
)  
)  
Petitioner, )  
)  
v. )  
)  
RON CHAMPION, et al., )  
)  
)  
Respondents. )

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Petitioner's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1), Respondent's Response to Petition for Writ of Habeas Corpus (Docket #6), Petitioner's Traverse to Response to Petition for Writ of Habeas Corpus (Docket #7), and Petitioner's Motion to Expedite Judgement (Docket #8).

Petitioner is incarcerated pursuant to a conviction in the District Court of Tulsa County in Case No. CRF-86-589 for which he received several ten and twenty year sentences to run consecutively. He does not challenge the validity of his conviction, but attacks the awarding and computation of time credits to his sentence by the Department of Corrections.

Respondents claim that petitioner must exhaust his administrative remedies through the Department of Corrections. The Oklahoma Court of Criminal Appeals held in Canady v. Reynolds, 880 P.2d 391, 400 (Okla. Crim. App. 1994), that an inmate does not have a right to a court determination of the status of his earned credits in a situation where he is not entitled to immediate release. However, the court recognized that many things can

9

C

occur between the time credits are earned, when they are taken away, and when release is imminent and that an inmate may file a writ of mandamus to force prison officials to provide him with constitutional procedural due process, including proper notice and a hearing, before revoking credits after they have been previously earned and may file a writ of habeas corpus with the State Court of Criminal Appeals at such time as he or she is entitled to immediate release. Id.

However, the Tenth Circuit Court of Appeals found in Wallace v. Cody, 951 F.2d 1170, 1172 (10th Cir. 1991), that exhaustion of state remedies would be futile because the petitioner was seeking speedier, as opposed to immediate, release. Therefore the court can consider petitioner's claim.

Petitioner filed a Petition for Writ of Habeas Corpus in the District Court of Osage County, Case No. C-93-163, on July 14, 1993. On March 30, 1994, a Response was filed, and on June 24, 1994, the petition was denied because he had not exhausted his administrative remedies and had failed to show that, even if the relief he requested was granted, he would be entitled to immediate release. On July 11, 1994, he filed a "Response to Opinion of Judge Pearman," on September 29, 1994, he filed a "Motion for Summary Disposal," and on February 23, 1995, he filed a "Motion for Default Judgment." The Court of Criminal Appeals construed these pleadings as a petition to the court for a writ of habeas corpus, and denied the petition on March 9, 1995, because he had failed to show that he had exhausted his administrative remedies, show that he was entitled to immediate release, and attach a certified copy of the judgment and sentence to his pleadings.

Petitioner alleges that he was denied equal protection of the law because of the state

court's eleven-month delay in deciding his state habeas petition, relying on Okla. Stat. tit. 12, § 1333 in support of his position.<sup>1</sup> Petitioner does not contend that this statute is unconstitutional. To prevail on his equal protection claim that the statute was applied unequally, intentional discrimination must be shown. Jones v. White, 992 F.2d 1548, 1573 (11th Cir. 1993) (citing Snowden v. Hughes, 321 U.S. 1, 8 (1944)). Error or arbitrary administration does not violate equal protection. Jones, 992 F.2d at 1573. Petitioner cannot show that intentional discrimination occurred in this case.

Petitioner claims that he should receive credit under the good time system which existed prior to November 1, 1988, and also the system that existed after that date, including "earned credits," "level credits," and "good/gain time"; he argues that he should receive credits for the number of days in the month, plus 44 level credits, plus two days credit for 20 working days in the month. (See pg. 7 of petitioner's "Traverse to Response to Petition for Writ of Habeas Corpus," Dkt. #7). There is no merit to his claim.

At the time of petitioner's crime in 1986, the Oklahoma Department of Corrections ("DOC") awarded earned credits as provided by Okla. Stat. tit. 57 §§ 138 and 224. Under § 138, inmates earned two days of credit based upon their participation in Oklahoma State Industries work. Under § 224, inmates assigned to work for a state agency, other than the DOC, or a county or municipal jail earned three credits for each day of service.

On November 1, 1988, § 138 was amended so that the number of credits available each month was based upon assignment to one of four classes, with class level credits

---

<sup>1</sup>Section 1333 provides: "[w]rits of habeas corpus may be granted by any court of record in term time, or by a judge of any such court, either in term or vacation; and upon application the writ shall be granted without delay."

ranging from zero per month (Class 1) to 44 per month (Class 4). On that date, § 224 was also amended and the amount of earned credits available per day of work for the state, county, or municipality was to be given pursuant to § 138.

In Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1990), the Oklahoma Court of Criminal Appeals held that § 138 was an ex post facto law, because requirements were added and monthly earned credits available were reduced, thus lengthening the period that a prisoner must spend in prison. Therefore the court concluded that inmates who were disadvantaged by the amended statutes were entitled to credits under the statutes effective on the date the crime was committed. Every prisoner accrues good time under the new statute, unless it is disadvantageous to them, in which case the old statute applies to those whose crimes were committed during the relevant time period. Notably, the Ekstrand court stated that it had not held in an earlier case, Mahler v. State, 776 P.2d 565 (Okla. Cr. 1989)<sup>2</sup>, that prisoners were entitled to earn credits under both statutes.

This position was reiterated by the court in State ex rel. Maynard v. Page, 798 P.2d 628, 629 (Okla. Crim. App. 1990), when it expressly stated that an inmate was entitled to earn credits under only one system.

The Tenth Circuit in Wallace, 951 F.2d at 1171, recognized that Oklahoma had created a liberty interest in earned credits and that federal habeas corpus was the proper avenue to redress a denial of those credits. The court remanded the case for a resolution of whether earned credits were being calculated in accordance with the standards set forth

---

<sup>2</sup> The court notes that the order in Mahler v. State was withdrawn on procedural grounds on October 10, 1989. See, Mahler v. State, 783 P.2d 973 (Okla. Crim. App. 1989).

in Ekstrand and Page, noting that under Ekstrand prisoners disadvantaged by the amended statutes are entitled to have their credits computed under the statute in effect on the date their crime was committed.

It is clear that petitioner cannot claim credits under the statute as it was before November 1988 and as it was afterward. He is not being denied equal protection of the law, because all prisoners may only receive credits under one statute. He attaches a copy of an order in which the District Court of Atoka County held that he was entitled to credits under both statutes. (Petition, Docket #1, Exhibit #10). The interpretation by the District Court of Atoka County was erroneous.

Respondents have attached Exhibits "K" and "J" to their brief which show that petitioner has been awarded credits pursuant to the version of § 138 which is most advantageous from February, 1993 through June, 1995. His Consolidated Record Card shows that he has received two credits each month for each day served, which has totalled 56 to 62 days per month. This is the amount he would have received under § 138 at the time he was incarcerated, and more than the 44 maximum credits he would receive under the statute as amended. He has not worked outside the prison for other state industries, so § 224 does not apply. (See Exhibit "J"). The Department of Corrections audited his record in August, 1993 to determine whether he was entitled to any additional earned credits under Ekstrand and found he was entitled to two additional credits, which he received in August, 1993.

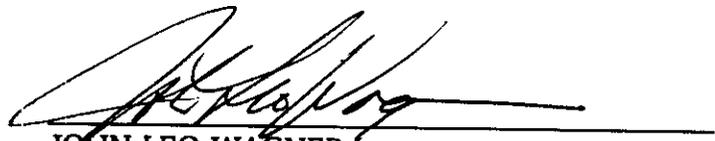
The rule for reviewing the sufficiency of any complaint is that the "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A court may dismiss an action for failure to state a cause of action "only if it is clear that no relief could be granted under any set of facts which could be proved". Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Petitioner has failed to show that he has not received good time credits to which he is entitled. It is clear that he can prove no set of facts which would entitle him to relief. Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1) should be dismissed and Petitioner's Motion to Expedite Judgement (Docket #8) should be denied.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 14<sup>th</sup> day of February, 1996.

  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

T:Foster.rr

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

FEB 14 1996

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

IN RE: )  
WARLICK INVESTMENTS, LTD., )  
Debtor, )  
WARLICK INVESTMENTS, LTD., )  
Plaintiff, )  
vs. )  
COMMONWEALTH CHARTERIC )  
TRUST CO., LTD., )  
Defendant, )  
and WILLIAM MICHAEL FURMAN, )  
Filing as Cross Defendant. )

Case No. 87-01138-W  
Chapter 11

FILED ON DOCKET  
DATE FEB 15 1996

Case No. 95-C-962-BU ✓

**ORDER**

On January 5, 1996, this Court entered an Order denying the motion of Appellant, William Michael Furman, to proceed in forma pauperis and directing Appellant to file with the Court, on or before January 22, 1996, proof of payment of the requisite filing fee of \$105.00 to the Bankruptcy Court. The Court stated that if Appellant failed to file the proof of payment within the time prescribed, this appeal shall be dismissed without prejudice. Thereafter, on January 10, 1996, the Court entered an Order stating that Appellant shall have until January 31, 1996 to assist the Clerk of the Bankruptcy Court to assemble the record and have it transmitted to the Court. This was the second extension of time granted to Appellant to assist the Clerk in assembling the record.

The Court has reviewed the record in this matter and it

appears that Appellant has not complied with the Court's Orders. Because Appellant has failed to file the proof of payment of the requisite filing fee and has failed to assist the Clerk of the Bankruptcy Court to assemble the record, the Court hereby DISMISSES WITHOUT PREJUDICE the above-captioned appeal.

ENTERED this 13<sup>th</sup> day of February, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

57,61

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

FEB 14 1996  
Richard W. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

PATRICIA QUILLIN and RILEY )  
QUILLIN, wife and husband, )  
 )  
Plaintiffs, )  
vs. )  
 )  
AMERICAN HOSPITAL SUPPLY CORP., )  
INC., AMERICAN HEYER-SCHULTE, )  
CORP., BAXTER HEALTHCARE )  
CORPORATION, BAXTER )  
INTERNATIONAL, INC., DOW )  
CORNING WRIGHT CORPORATION, )  
and DOW CHEMICAL COMPANY, )  
all foreign corporations, )  
 )  
Defendants. )

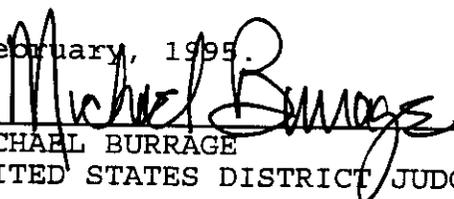
Case No. 94-C-1020-BU

ENTERED ON DOCKET  
DATE FEB 15 1996

ADMINISTRATIVE CLOSING ORDER

Having reviewed Plaintiffs' Response to the Court's January 30, 1996 Directive Regarding the U.S. Supreme Court's Writ of Certiorari in Lohr v. Medtronic, Inc. and Baxter Healthcare Corporation's Supplemental Submission on Motion for Summary Judgment Pursuant to Court's Minute Order Request, the Court hereby orders that the Clerk administratively terminate this action in his records pending a determination by the U.S. Supreme Court of the cross-petitions for writ of certiorari in Lohr v. Medtronic, Inc., 56 F.3d 1335 (11th Cir. 1995), cert. granted, 1996 WL 18431, 64 USLW 3360 (U.S. Jan. 19, 1996) (Nos. 95-754, 95-886). After a determination has been made by the U.S. Supreme Court, the parties shall file the appropriate motion to reopen this matter for final resolution.

Entered this 13<sup>th</sup> day of February, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

66

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

**FILED**

FEB 15 1996

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

ROBERT and BETTY THOMAS, )  
)  
Plaintiffs, )  
)  
v. )  
)  
CUMMINS MATERIAL, INC., an )  
Oklahoma corporation; and, )  
LIBERTY MUTUAL INSURANCE )  
COMPANY, a Massachusetts )  
corporation, )  
)  
Defendants.)

No. 94-C-793K

ENTERED ON DOCKET  
FEB 15 1996  
DATE \_\_\_\_\_

ORDER OF DISMISSAL

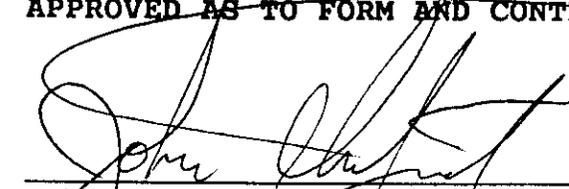
NOW on this 14 day of February, 1995, this matter comes on before the undersigned Judge of the United States District Court for the Northern District of Oklahoma, the Court having received and reviewed the Stipulation of Dismissal executed by attorneys of record for both parties, finds as follows:

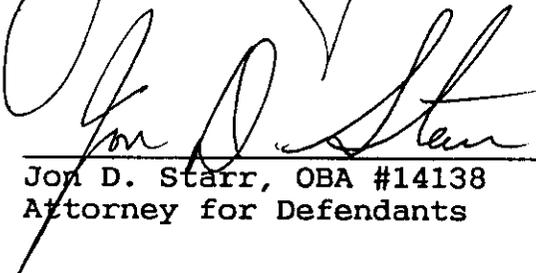
That each of the parties in this matter have entered into a settlement agreement which has been fully satisfied and is binding upon the parties to this action. Pursuant to the terms of said settlement agreement, that this action is now herein dismissed with prejudice, and the Plaintiffs shall be forever barred from pursuing this matter further against the Defendants.

s/ TERRY C. KERN

HONORABLE TERRY C. KERN  
JUDGE OF THE UNITED STATES  
DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

~~APPROVED AS TO FORM AND CONTENT:~~

  
\_\_\_\_\_  
John M. Thetford, OBA #12892  
Attorney for Plaintiffs

  
\_\_\_\_\_  
Jon D. Starr, OBA #14138  
Attorney for Defendants

20\285\STIPDIS.SO\JDS

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TERRY E. ROSS; SHIPHRAH H. ROSS; )  
 STATE OF OKLAHOMA *ex rel* )  
 OKLAHOMA TAX COMMISSION; )  
 BLANCHE BAKER; COUNTY )  
 TREASURER, Tulsa County, Oklahoma; )  
 BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 Defendants. )

ENTERED ON DOCKET  
DATE FEB 15 1996

**FILED**

FEB 15 1996

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

Civil Case No. 95-C 660K

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 14 day of Feb.,  
1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern  
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the  
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY  
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant  
District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA *ex rel*  
OKLAHOMA TAX COMMISSION, appears by Assistant General Counsel Kim D. Ashley;  
and the Defendants, TERRY E. ROSS, SHIPHRAH H. ROSS, and BLANCHE BAKER,  
appear not, but make default.

The Court being fully advised and having examined the court file finds that the  
Defendants, TERRY E. ROSS and SHIPHRAH H. ROSS, are each single, unmarried  
persons since their decree of divorce, case number 91-7300, filed in Tulsa County District  
Court on February 25, 1992.

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

The Court being fully advised and having examined the court file finds that the Defendant, SHIPHRAH H. ROSS, waived service of Summons on August 1, 1995.

The Court further finds that the Defendants, TERRY E. ROSS and BLANCHE BAKER, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning November 8, 1995, and continuing through December 13, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, TERRY E. ROSS and BLANCHE BAKER, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, TERRY E. ROSS and BLANCHE BAKER. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court

accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on June 26, 1995; that the Defendant, STATES OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Answer on July 9, 1995; and that the Defendants, TERRY E. ROSS, SHIPHRAH H. ROSS, and BLANCHE BAKER, 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 Two (2), CHAMBERS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on February 1, 1989, the Defendants, TERRY E. ROSS and SHIPHRAH ROSS, executed and delivered to Inland Mortgage Corporation their mortgage note in the amount of \$36,018.00, payable in monthly installments, with interest thereon at the rate of 8.875% per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, TERRY E. ROSS and SHIPHRAH ROSS, then husband and wife, executed and delivered to Inland Mortgage Corporation a mortgage dated February 1,

1989, covering the above-described property. Said mortgage was recorded on February 3, 1989, in Book 5165, Page 418, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1989, INLAND MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to GOVERNMENT NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on April 26, 1991, in Book 5317, Page 1564, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 12, 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 April 26, 1991, in Book 5317, Page 1565, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1991, the Defendant, TERRY E. ROSS, 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, TERRY E. ROSS, 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 his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, TERRY E. ROSS, is indebted to the Plaintiff in the principal sum of \$53,507.30, plus interest at the rate of 8.875 percent per annum from April 1, 1995 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 \$20.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$20.00 which became a lien as of June 25, 1993; and a lien in the amount of \$28.00 which became a lien as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

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 states taxes in the amount of \$488.07 which became a lien on the property as of January 5, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, TERRY E. ROSS, SHIPHRAH H. ROSS, and BLANCHE BAKER, are in default, and have no right, title or interest in the subject real property.

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

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, TERRY E.

ROSS, in the principal sum of \$53,507.30, plus interest at the rate of 8.875 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 4.89 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 \$68.00, plus costs and interest, for personal property taxes for the years 1991-1993, plus the costs of this action.

**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 \$488.07 for state taxes, plus the costs of this action and interest.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, TERRY E. ROSS, SHIPHRAH H. ROSS, BLANCHE BAKER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, TERRY E. ROSS, 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 appraisalment the real property involved herein and apply the proceeds of the sale as follows:

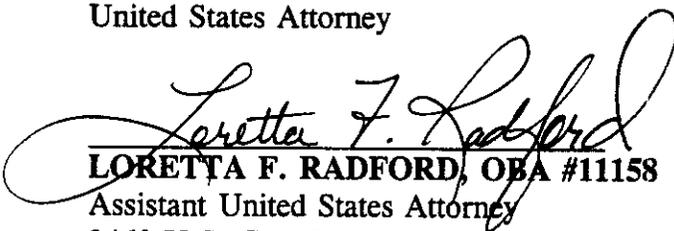
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**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/ TERRY C. KERN**

**UNITED STATES DISTRICT JUDGE**

APPROVED:  
STEPHEN C. LEWIS  
United States Attorney

  
**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
**DICK A. BLAKELEY, OBA #852**  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

**FILED**

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

FEB 14 1996

**MICHAEL ANDREWS,** )  
 )  
**PLAINTIFF,** )  
 )  
**vs.** )  
 )  
**TOWN OF SKIATOOK, OKLAHOMA,** )  
 )  
**DEFENDANT.** )

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

**CASE No. 95-C-0057-M**

**ENTERED ON DOCKET**  
**DATE FEB 15 1996**

**FINDINGS OF FACT/CONCLUSIONS OF LAW**

The parties consented to trial before a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). This Court conducted a non-jury trial on January 22, 1996 and January 31, 1996. Based upon the evidence presented at trial, the argument of counsel and the proposed Findings of Fact and Conclusions of Law and supporting briefs submitted by both parties, the Court hereby issues its FINDINGS OF FACT AND CONCLUSIONS OF LAW.

**FINDINGS OF FACT**

1. Plaintiff, Michael Andrews, is a resident of the town of Skiatook, State of Oklahoma, and was employed by the Town of Skiatook as an Emergency Medical Technician (EMT) from February 28, 1993 to January 6, 1995.
2. Defendant, Town of Skiatook, is a political subdivision of the State of Oklahoma, existing under the laws of the State of Oklahoma, and was engaged in the business of managing, maintaining and operating an emergency ambulance service at all times relevant to this litigation.
3. During his employment as an EMT with the Town of Skiatook, Plaintiff was required to work four regular twelve-hour shifts per week and four twelve-hour on-call shifts per week which immediately followed his regular twelve-hour shift. Every third week Plaintiff was

14

required to work one additional twelve-hour on-call shift. EMTs were permitted to trade their on-call shifts with another EMT and would then be expected to pay back the other EMT by covering an on-call shift for him/her.

4. The Town of Skiatook operated two emergency ambulances. One ambulance was staffed by two EMTs who remained at the ambulance station. The second ambulance was staffed by two "on-call EMTs" who were required to respond to calls in the second ambulance when an emergency call was received while the first ambulance was on another run. A call serviced by the second ambulance staffed by on-call EMTs is called a "second run."

5. While on-call, Plaintiff was required to monitor a pager which could be utilized to summon him for a second run. In addition to summoning the on-call personnel, the pager would advise the on-call personnel when the first ambulance had gone on a run. On-call EMTs could also monitor a police radio, which would advise them when the first ambulance had completed its run and returned to the ambulance station. Thus, the on-call EMTs would be aware when the first ambulance was on a run and there was an increased likelihood they could be summoned to make a second run.

6. While on-call, the EMTs were required to remain clean and appropriately attired, although not required to report in uniform, to refrain from drinking alcohol, and to respond to an on-call page within a reasonable period of time.

7. Conflicting evidence was presented to the Court concerning the required response time for on-call EMTs to begin a second run. Plaintiff presented evidence that the Town of Skiatook required on-call EMTs to respond and be physically moving in the second ambulance within five minutes of receiving a page for a second run. Defendant presented evidence that

there was no official policy that on-call EMTs respond and be rolling on a call within five minutes of receiving the page. Rather, Defendant contended that on-call EMTs were only required to respond and be rolling in a reasonable time.

8. Defendant's Exhibit 12 sets forth Plaintiff's actual response time for the 76 second runs he made during his approximately two years of employment with Defendant. The response time is the number of minutes it took for Plaintiff to respond to the page and be rolling in the ambulance. Plaintiff averaged a response time of 4.84 minutes. Plaintiff took more than five minutes to respond to 28 of the calls, the longest being 13 minutes. Plaintiff's response times ranged from zero (0) minutes, which was explained by his presence at the ambulance station when the call was received, to a high of 13 minutes. Plaintiff was never disciplined for response times in excess of 5 minutes.

Based upon the evidence presented and the credibility determinations made by the Court, the Court finds that there was not an official policy of Defendant requiring on-call EMTs to respond and be rolling on a second run within five minutes of receiving the page. However, the Court finds that there was an established practice of Defendant which required on-call EMTs to respond to a page for a second run promptly and that this practice resulted in a practical requirement that on-call EMTs respond to a page for a second run and be rolling within five to ten minutes of receiving a page.

9. Plaintiff was not compensated for the time spent on-call unless he was called back to make a second run, in which case, Plaintiff was compensated for a minimum of two hours at time and one-half pay. Of the 76 second runs Plaintiff made, none lasted more than two hours.

10. In 1993, the Town of Skiatook ambulance service made a total of 1,071 runs, 115 of which were second runs. Plaintiff made 28 second runs.

11. In 1994, the Town of Skiatook ambulance service made a total of 1,171 runs of which 140 were second runs. Plaintiff made 48 second runs.

12. Plaintiff worked ten months in 1993. At four on-call shifts per week and one extra on-call shift every three weeks, Plaintiff would have worked a total of 173 on-call shifts in 1993. Considering that Plaintiff went on 28 second runs in 1993, the Court calculates that Plaintiff was actually called back to service during 16.18% of his on-call shifts in 1993.

13. Plaintiff worked a full twelve months in 1994. At four on-call shifts per week and one extra on-call shift every three weeks, Plaintiff would have worked a total of 209 on-call shifts. Considering that Plaintiff went on 48 second runs in 1994, the Court calculates that Plaintiff was called back to service during 22.96% of his on-call shifts in 1994.

14. Considering the total number of all second runs for the Skiatook ambulance service in relation to the total number of ambulance calls for the Skiatook ambulance service, based on Defendant's Exhibit 12, the Court concludes that in 1993, second runs were required in 10.7% of the total number of calls, while in 1994, second runs were required in 11.9% of the total number of calls.

### CONCLUSIONS OF LAW

This Court has jurisdiction of this matter pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. and 28 U.S.C. § 1337. Defendant Town of Skiatook is a public agency and employer within the meaning of the Fair Labor Standards Act, is located within the jurisdiction of this Court, and is subject to the provisions of the Fair Labor Standards Act.

The test to determine whether an employee's on-call time constitutes working time is whether the time is spent predominantly for the employer's benefit or for the employee's. *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed 118 (1944). That test requires consideration of the agreement between the parties, the nature and extent of the restrictions, the relationship between the services rendered and the on-call time and all surrounding circumstances, *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed 124 (1944).

The 10th Circuit has consistently adhered to the above principles in addressing the issue of the compensability of on-call time. *See generally Gilligan v. City of Emporia, Kansas*, 986 F.2d 410 (10th Cir. 1993)(no on-call compensation for water and sewer employees required to wear pager, stay sober and report within 30 minutes); *Armitage v. City of Emporia, Kansas*, 982 F.2d 430 (10th Cir. 1992)(no on-call compensation for detectives required to wear pager, stay sober, report within 20 minutes where called less than 2 times per week); *Renfro v. City of Emporia, Kansas*, 948 F.2d 1529 (10th Cir. 1991)(on-call compensation awarded to firefighters required to report within 20 minutes where the number of call-backs could be as high as 13 per shift and averaged 3-5 per shift); *Boehm v. Kansas City Power & Light Company*, 868 F.2d 1182 (10th Cir. 1989)(no on-call compensation for power company linesmen who were required to be reachable by telephone and to accept call-outs 1/3 of the time called); *Norton v. Worthen Van Service, Inc.*, 839 F.2d 653 (10th Cir. 1988)(no on-call compensation for van drivers required to report within 15-20 minutes).

In addition to the authorities set forth above, the Court has also considered the following regulations promulgated by the United States Dept. of Labor concerning the compensability of on-call time:

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purpose is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. 29 C.F.R. § 785.17.

Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. 29 C.F.R. § 553.221(c).

Resolution of the matter involve[s] determining the degree to which the employee could engage in personal activity while subject to being called. 29 C.F.R. § 553.221(b).

Of the five 10th Circuit cases cited above, in four of the cases the court held that time spent on-call is not compensable. The sole 10th Circuit authority finding on-call time compensable is *Renfro, supra*. Plaintiff argues that his case is controlled by the decision in *Renfro*. This Court disagrees.

In *Renfro* the firefighters, although not required to remain on the premises while on-call, were required to report to the station within twenty minutes of being called back, were called back as many as 13 times in one shift, and averaged 3 to 5 callbacks per on-call shift. In *Renfro*, the 10th Circuit affirmed the district court which found:

[T]he frequency with which Emporia firefighters are subject to call-backs readily distinguishes this case from cases which have held that on-call time is non-compensable. In many of those cases, the probability of an employee being called in, and thus, the probability of disruption of the employee's personal activities, was minimal.

*Renfro v. City of Emporia, Kansas*, 729 F.Supp. 747, 752 (D. Kan. 1990). The infrequency of callbacks in this case distinguishes it from *Renfro*.

Instead of being called back to work on average between 3 to 5 times per on-call shift, Plaintiff was only called back 16.18% of the time during his on-call shifts in 1993 and 22.96% of the time for his on-call shifts in 1994. Further, when all on-call second runs are calculated, any EMT on-call for Defendant was required to respond to a second run only 10.7% of the time in 1993, and 11.9% of the time in 1994. This major difference in the number of times Plaintiff was called back as compared to the firefighters in *Renfro* clearly distinguishes the present case from *Renfro* and aligns it squarely with *Gilligan*, *Armitage*, *Boehm* and *Norton*, *supra*.

Plaintiff also relies on an opinion letter of the Wage/Hour Administrator of the Dept. of Labor, No. 1609, wherein the Wage/Hour Administrator opined as follows:

On-call time of ambulance personnel who were required to either remain at an establishment while on call or be ready to respond from their home within three minutes was compensable time. The three minute response requirement was too restrictive for employees to use on-call time effectively for their own purposes.

However, the opinion letter gives no more than this bare-boned factual statement focusing completely upon the 3 minute response time. As noted above, the Court finds that the required response time in this case ranged between 5 and 10 minutes with a low incidence of actually being called for a second run while on-call. These facts render the conclusion reached in the opinion letter relied upon by Plaintiff inapplicable to the instant case.

The situation in this case is closer to *Spires v. Ben Hill County*, 745 F.Supp. 690 (M.D.Ga. 1990) than it is to either *Renfro* or the opinion letter. In *Spires* the court held that EMTs on-call who were required to respond to the station within ten minutes of receiving a call, in uniform or jumpsuit, clean and sober, and who also worked greater than 8 hours per 24 hour

on-call period did not qualify for on-call compensation because the restrictions did not preclude them from effectively using their time for personal pursuits.

While the Court certainly acknowledges that Plaintiff's time on-call somewhat restricted his personal activities; the test is not whether there was some restriction on Plaintiff's personal activities. Rather the test is whether Plaintiff's on-call time was spent predominantly for the benefit of his employer. In *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991), the Court observed:

As noted, we have described "the critical issue" in cases of this kind as being "whether the employee can use the [on-call] time effectively for his or her own purposes". This does not imply that the employee must have substantially the same flexibility or freedom as he would if not on call, else all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject. [citations omitted] *Id.* at 677.

On the facts before this Court, it is clear that Plaintiff's on-call time was predominantly for his personal benefit. While on-call, Plaintiff was free to engage in any activity of his choosing as long as he remained clean, did not drink alcohol and could respond to the ambulance station within five to ten minutes. The five to ten minute requirement gave Plaintiff access to all of the small town of Skiatook. Further, the fact that Plaintiff was notified when the first ambulance had gone on a run enabled Plaintiff to prepare for the possibility of a second run and to structure his activities so his on-call time would be as least restrictive as possible. In this regard it is fair to conclude that Plaintiff felt only slight restrictions on his personal activities while the first ambulance was not out on a call. It was only when the first ambulance was out on a call that Plaintiff had any significant chance of having to respond to a second run call and, based upon actual experience, Plaintiff knew that the percentage of time when a second run call

would be required was small. Thus, Plaintiff was predominantly free to pursue his personal activities during his on-call time.

Additionally, the Court would note that even when Plaintiff had to respond to a second run, the time entailed was uniformly less than two hours. Thus, the times when Plaintiff's personal affairs were disturbed while he was on-call were of low frequency and of short duration. As stated by the Court in *Armitage, supra*, at page 433:

Although the detectives' services are certainly beneficial to the public, to require compensation under these facts would require that all on call employees be paid for standby time. This would be a major change in the law of the FLSA.

Such is the case before this Court and this Court likewise declines to require the major change in the law of the FLSA that compensation of on-call time in this case would entail.

Based upon the above FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Court finds that Plaintiff has failed to prove by a preponderance of the evidence that his on-call time was spent predominantly on behalf of Defendant employer. THE COURT, THEREFORE, FINDS IN FAVOR OF DEFENDANT. Judgment will be entered accordingly.

DATED this 14<sup>th</sup> day of February, 1996.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DAVID C. ALEXANDER aka David )  
 Clinton Alexander aka David Alexander; )  
 JANICE M. ALEXANDER aka Janice )  
 Mary Alexander aka Janice Alexander; )  
 SERVICE COLLECTION )  
 ASSOCIATION, INC.; BEVERLY )  
 EVANS; CITY OF BIXBY, Oklahoma; )  
 COUNTY TREASURER, Tulsa County, )  
 Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. )

**FILED**

FEB 13 1996

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

Civil Case No. 95 C 619B

ENTERED ON DOCKET ✓  
DATE FEB 14 1996

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 13 day of Feb,  
1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern  
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the  
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY  
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District  
Attorney, Tulsa County, Oklahoma; the Defendants, DAVID C. ALEXANDER aka David  
Clinton Alexander aka David Alexander and JANICE M. ALEXANDER aka Janice Mary  
Alexander aka Janice Alexander, appear not having previously filed a Disclaimer; the  
Defendant, SERVICE COLLECTION ASSOCIATION, INC., appears not having previously  
filed a Disclaimer; the Defendant, CITY OF BIXBY, Oklahoma, appears not having

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

previously filed a Disclaimer; and the Defendant, BEVERLY EVANS, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, DAVID C. ALEXANDER aka David Clinton Alexander aka David Alexander, was served a copy of Summons and Complaint on August 15, 1995, by Certified Mail; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., signed a Waiver of Summons on July 10, 1995; that the Defendant, CITY OF BIXBY, Oklahoma, was served a copy of Summons and Complaint on July 7, 1995, by Certified Mail.

The Court further finds that the Defendant, BEVERLY EVANS, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning November 3, 1995, and continuing through December 8, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, BEVERLY EVANS, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, BEVERLY EVANS. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America,

acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 20, 1995; that the Defendants, DAVID C. ALEXANDER aka David Clinton Alexander aka David Alexander and JANICE M. ALEXANDER aka Janice Mary Alexander aka Janice Alexander, filed their Disclaimer on August 22, 1995; the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its Disclaimer on July 14, 1995; the Defendant, CITY OF BIXBY, Oklahoma, filed its Disclaimer on August 3, 1995; and that the Defendant, BEVERLY EVANS, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, DAVID C. ALEXANDER, is one and the same person as David Clinton Alexander and David Alexander, and will hereinafter be referred to as "DAVID C. ALEXANDER." The Defendant, JANICE M. ALEXANDER, is one and the same person as Janice Mary Alexander, and Janice Alexander, and will hereinafter be referred to as "JANICE M. ALEXANDER." The Defendants, DAVID C. ALEXANDER and JANICE M. ALEXANDER, were granted a Divorce on August 6, 1993, in Tulsa County,

District Court, Case No. FD-93-2942. The Defendants, DAVID C. ALEXANDER and JANICE M. ALEXANDER, are both single unmarried persons.

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 Thirty-six (36), Block Three (3), BLUE RIDGE ESTATES, an Addition to the City of Bixby, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on January 18, 1983, Robert E. Jones and Joey M. Jones, executed and delivered to FOSTER MORTGAGE CORPORATION, their mortgage note in the amount of \$55,000.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Robert E. Jones and Joey M. Jones, husband and wife, executed and delivered to FOSTER MORTGAGE CORPORATION, a mortgage dated January 18, 1983, covering the above-described property. Said mortgage was recorded on January 25, 1983, in Book 4664, Page 1343, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 30, 1984, FOSTER MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to TRANSAMERICA MORTGAGE COMPANY. This Assignment of Mortgage was recorded on February 22, 1984, in Book 4768, Page 1877, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 20, 1985, TRANSAMERICA MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to

PACIFIC FIRST FEDERAL SAVINGS BANK, its successors and assigns. This Assignment of Mortgage was recorded on June 26, 1985, in Book 4872, Page 1201, in the records of Tulsa County, Oklahoma. This Assignment of Mortgage was re-recorded on December 22, 1986, in Book 4990, Page 904, in the records of Tulsa County, Oklahoma, to correctly execute by an Assistant Secretary.

The Court further finds that on October 1, 1986, PACIFIC FIRST FEDERAL SAVINGS BANK, assigned the above-described mortgage note and mortgage to SAMCO MORTGAGE CORPORATION. This Assignment was recorded on December 22, 1986, in Book 4990, Page 905, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 29, 1988, SAMCO Mortgage Corporation, assigned the above-described mortgage note and mortgage to CSB MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on April 15, 1988, in Book 5093, Page 1481, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 5, 1989, CSB MORTGAGE CORPORATION, formerly Mercantile Mortgage Corporation of Texas, assigned the above-described mortgage note and mortgage to The Secretary of Housing & Urban Development. This Assignment of Mortgage was recorded on October 10, 1989, in Book 5212, Page 2684, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, DAVID C. ALEXANDER and JANICE M. ALEXANDER, currently hold title to the property by virtue of a General Warranty Deed, dated November 22, 1988, recorded on December 5, 1988, in Book 5143, Page 1638, in the records of Tulsa County, Oklahoma, are the current assumptors of the subject indebtedness.

The Court further finds that on January 1, 1990, the Defendants, DAVID C. ALEXANDER and JANICE M. ALEXANDER, 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 October 1, 1990, June 1, 1991, December 1, 1991, September 1, 1992 and August 1, 1993.

The Court further finds that the Defendants, DAVID C. ALEXANDER and JANICE M. ALEXANDER, 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 C. ALEXANDER and JANICE M. ALEXANDER, are indebted to the Plaintiff in the principal sum of \$92,140.82, plus interest at the rate of 12 percent per annum from April 1, 1995 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 \$39.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, BEVERLY EVANS, is in default, and has no right, title or interest in the subject real property.

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, DAVID C. ALEXANDER, JANICE M. ALEXANDER, SERVICES COLLECTION ASSOCIATION, INC., and CITY OF BIXBY, Oklahoma, Disclaim 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 In Rem against the Defendants, DAVID C. ALEXANDER and JANICE M. ALEXANDER, in the principal sum of \$92,140.82, plus interest at the rate of 12 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of \_\_\_\_\_ 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 \$39.00, plus costs 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, DAVID C. ALEXANDER, JANICE M. ALEXANDER, SERVICE COLLECTION ASSOCIATION, INC., BEVERLY EVANS, and CITY OF BIXBY, 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 C. ALEXANDER and JANICE M. ALEXANDER, to satisfy the money judgment In Rem 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 \$39.00, 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.

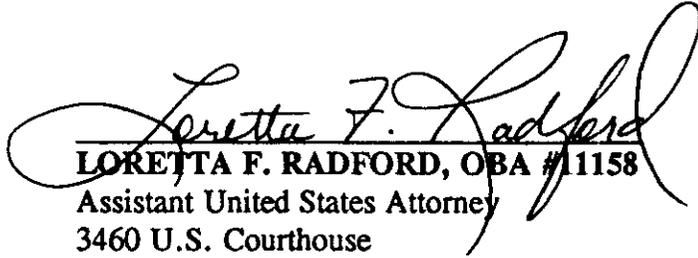
S/ THOMAS R. BRETT

---

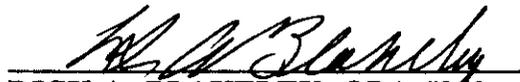
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



**DICK A. BLAKELEY, OBA #852**  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95 C 619B

LFR:flv

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

**FILED**

FEB 13 1996

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

PARADISE DISTRIBUTORS, INC. and )  
PARADISE BEVERAGE, INC., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
EVANSVILLE BREWING COMPANY, INC., )  
 )  
Defendant. )

Case No. 94-C-1178-H

ENTERED ON DOCKET  
DATE 2-14-96

**AGREED ORDER OF  
DISMISSAL WITH PREJUDICE**

The Court, upon due consideration and upon agreement of the parties, finds that Plaintiffs' claims in the above-styled and numbered cause against Defendant herein be dismissed with prejudice with each party to bear their own costs and attorney's fees.

IT IS SO ORDERED.

This 12<sup>th</sup> day of February, 1996.

S/ SVEN ERIK HOLMES

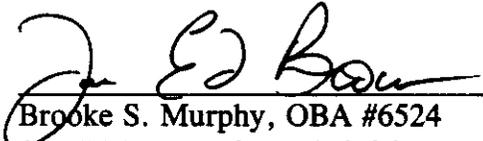
\_\_\_\_\_  
Hon. Sven Erik Holmes  
United States District Judge

AGREED AS TO FORM:



W. Kirk Clausing, OBA #1725  
2021 S. Lewis Ave., Suite 240  
Tulsa, Oklahoma 74104  
(918) 745-0417

ATTORNEYS FOR PLAINTIFFS  
PARADISE DISTRIBUTORS, INC. AND  
PARADISE BEVERAGE, INC.



Brooke S. Murphy, OBA #6524  
Jon Ed Brown, OBA #16186  
Crowe & Dunlevy  
321 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 592-9800

ATTORNEYS FOR DEFENDANT  
EVANSVILLE BREWING COMPANY, INC.



COPY

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

FILED

BURLEY WILSON, JR.

Plaintiff,

vs.

JACK McCOY, BARBARA McCOY  
and the CITY OF SAPULPA

Defendants.

FEB 15 1996

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

Case No. 95-C-647-K

STIPULATION OF DISMISSAL WITH PREJUDICE

ENTERED ON COURT  
DATE FEB 14 1996

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, Jack McCoy, Barbara McCoy and the City of Sapulpa, are hereby dismissed with prejudice.

Burley Wilson, Jr.  
BURLEY WILSON, JR., PLAINTIFF

By: Steven L. Sessinghaus  
STEVEN L. SESSINGHAUS, OBA #8085  
P.O. Box 200  
Tulsa, Oklahoma 74101-0200

ATTORNEY FOR PLAINTIFF

ELLER AND DETRICH  
A Professional Corporation

By: John H. Lieber  
JOHN H. LIEBER, OBA #5421  
2727 East 21st Street  
Suite 200, Midway Building  
Tulsa, Oklahoma 74114  
(918) 747-8900

ATTORNEY FOR DEFENDANTS

RONALD D. WOOD & ASSOCIATES

By: *Ronald D. Wood*

RONALD D. WOOD, OBA #9848  
THOMAS A. LE BLANC, OBA #14768  
2727 E. 21st St., Suite 500  
Tulsa, Oklahoma 74114

ATTORNEYS FOR DEFENDANTS

FILED

FEB 13 1996

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

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

JANE NEER, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 AMERADA HESS CORPORATION, )  
 )  
 Defendant. )

Case No. 95-C-0011K

ENTERED ON DOCKET

DATE FEB 14 1996

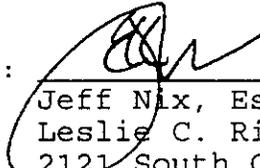
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, hereby jointly inform the Court that they have reached a mutually satisfactory private settlement regarding Plaintiff's claims herein, and all of Plaintiff's claims should, therefore, be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 12 day of February, 1996.

Respectfully submitted,

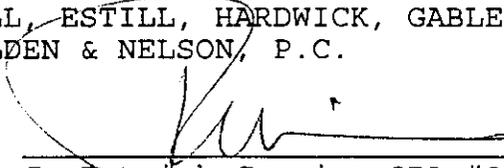
By:

  
\_\_\_\_\_  
Jeff Nix, Esq.  
Leslie C. Rinn, Esq.  
2121 South Columbia  
Suite 710  
Tulsa, Oklahoma 74114-3521

ATTORNEYS FOR PLAINTIFF

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

By:

  
\_\_\_\_\_  
J. Patrick Cremin, OBA #2013  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0594

ATTORNEYS FOR DEFENDANT

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

FILED

FEB 13 1996

Hard M. Lawrence, Court  
U.S. DISTRICT COURT

GARY D. DAWSON,

Plaintiff,

v.

THE CITY OF BARTLESVILLE,  
OKLAHOMA, CHIEF STEVEN BROWN,  
INDIVIDUALLY AND IN HIS  
OFFICIAL CAPACITY, ROBERT  
E. METZINGER, INDIVIDUALLY  
AND IN HIS OFFICIAL CAPACITY,  
AND THE BARTLESVILLE POLICE  
OFFICERS ASSOCIATION, LOCAL  
97, IUPA, AFL-CIO,

Defendants.

Case No. 95-C-23-K

FILED ON DOCKET  
FEB 14 1996  
DATE

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federales of Civil Procedure, the parties hereby stipulate to dismissal with Prejudice of Plaintiff's causes of action in case against Defendant, the City of Bartlesville, Oklahoma.

DATED this 13<sup>th</sup> day of February, 1996.

SOBEL & LANGHOLZ

By:

  
David L. Sobel,  
701 ONEOK Plaza  
Tulsa, OK 74101  
(918) 584-7700

ATTORNEYS FOR F

DOERNER, SAUNDERS, DANIEL & ANDERSON

BY: Kathy R. Neal  
Kathy R. Neal, OBA No. 674  
Rebecca M. Fowler, OBA No. 13682  
320 South Boston Avenue  
Suite 500  
Tulsa, Oklahoma 74103-3725  
(918) 582-1211

ATTORNEYS FOR DEFENDANT, THE CITY OF  
BARTLESVILLE, OKLAHOMA

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
FEB 13 1996  
DATE \_\_\_\_\_

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
ANNA MAE HOGARD aka Ann )  
Mulvehill; QUAD STATES FINANCIAL )  
SERVICES; COUNTY TREASURER, )  
Ottawa County, Oklahoma; BOARD OF )  
COUNTY COMMISSIONERS, Ottawa )  
County, Oklahoma, )  
)  
Defendants. )

**FILED**

FEB 13 1996

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

Civil Case No. 95 C 1175K

**ORDER**

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Defendant, **Quad States Financial Services**, is dismissed from this action.

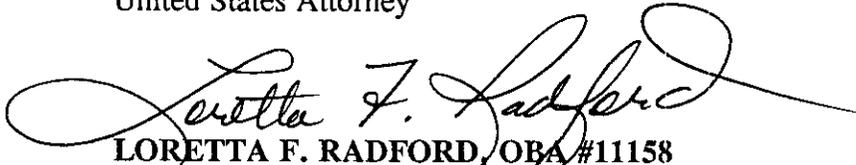
Dated this 13 day of February, 1996.

**s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford". The signature is written in black ink and is positioned above the typed name of the signatory.

**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

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

FISHERCORP, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PRUDENTIAL SECURITIES, )  
 INC., )  
 )  
 Defendant. )

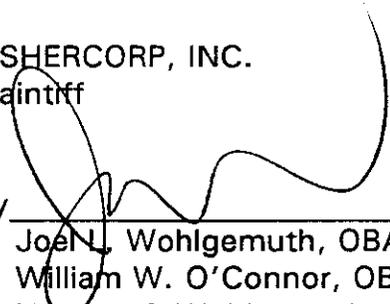
ENTERED ON DOCKET  
DATE 2-13-96

Case No. 94-C-405-H

STIPULATION OF DISMISSAL WITH PREJUDICE

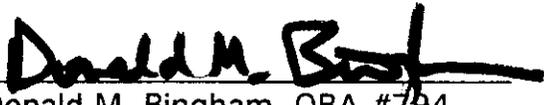
COME NOW the Plaintiff and the Defendant, by and through their respective counsel, and hereby stipulate that this action should be, and hereby is, dismissed with prejudice. Each party shall bear its own attorney fees and costs.

FISHERCORP, INC.  
Plaintiff

By   
Joe N. Wohlgemuth, OBA #9811  
William W. O'Connor, OBA #13200  
Norman & Wohlgemuth  
2900 Mid-Continent Tower  
Tulsa, OK 74103-4023  
(918) 583-7561

Attorneys for Plaintiff

PRUDENTIAL SECURITIES, INC.,  
Defendant

By   
Donald M. Bingham, OBA #794  
Patricia E. Neel, OBA #6601  
Riggs, Abney, Neal, Turpen,  
Orbison & Lewis  
502 West Sixth Street  
Tulsa, OK 74119-1010  
(918) 587-3161

Attorneys for Defendant

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )

vs. )

PATRICIA R. STEDHAM; STATE OF )  
 OKLAHOMA ex rel OKLAHOMA TAX )  
 COMMISSION; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; BOARD OF )  
 COUNTY COMMISSIONERS, Tulsa )  
 County, Oklahoma, )

Defendants. )

**FILED**

**FEB 13 1996**

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

Civil Case No. 95-C 1059E

**ENTERED ON DOCKET**

**DATE FEB 13 1996**

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 12 day of Feb, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, appears by Assistant General Counsel, Kim D. Ashley; and the Defendant, PATRICIA R. STEDHAM, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, PATRICIA R. STEDHAM, is a single, unmarried person.

The Court being fully advised and having examined the court file finds that the Defendant, PATRICIA R. STEDHAM, waived service of Summons on November 3, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on November 1, 1995; that the Defendant, STATE OF OKLAHOMA, filed its Answer on November 13, 1995; and that the Defendant, PATRICIA R. STEDHAM, has failed to answer and her default has therefore been entered by the Clerk of this Court.

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

Lot Five (5), in Block Fourteen (14), in ROBERTS ADDITION, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on August 29, 1986, the Defendant, PATRICIA R. STEDHAM, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION OF AMERICA her mortgage note in the amount of \$39,340.00, 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 Defendant, PATRICIA R. STEDHAM, a single person, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION OF AMERICA a mortgage dated August 29, 1986, covering the above-described property. Said mortgage was recorded on September 2, 1986, in Book 4966, Page 2177, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 12, 1987, 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 August 5, 1987, in Book 5043, Page 1441, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 26, 1988, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., acting by and through Commonwealth Mortgage Corporation of America, its sole partner 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 1502, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1989, LOMAS MORTGAGE USA, INC. formerly the Lomas & Nettleton 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 March 7, 1989, in Book 5170, Page 1071, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 1, 1989, the Defendant, PATRICIA R. STEDHAM, 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. A superseding agreement was reached between these same parties on February 1, 1990, February 1, 1991, and January 1, 1992.

The Court further finds that the Defendant, PATRICIA R. STEDHAM, 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, PATRICIA R. STEDHAM, is indebted to the Plaintiff in the principal sum of \$63,381.27, plus interest at the rate of 9.5 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$136.00, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

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 in the amount of \$68.62, which became a lien as of January 21, 1982. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, PATRICIA R. STEDHAM, is in default, and has no right, title or interest in the subject real property.

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

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, PATRICIA R. STEDHAM, in the principal sum of \$63,381.27, plus interest at the rate of 9.5 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 4.89 percent per annum until paid, plus the costs of this action in the amount, 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 \$136.00, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

**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 \$68.62 for a tax warrant, plus the costs of this action and interest.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, PATRICIA R. STEDHAM and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, PATRICIA R. STEDHAM, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$136.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

**Third:**

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

**Fourth:**

In payment of Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, in the amount of \$68.62, plus accrued and accruing interest, for state <sup>1st</sup> ~~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.

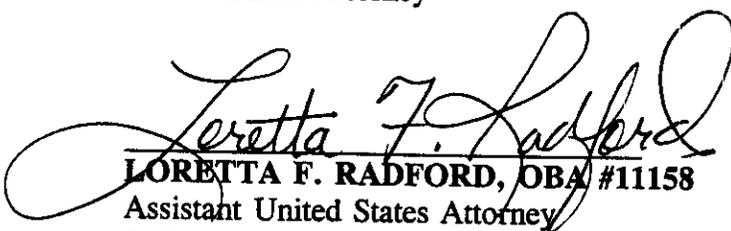
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed 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

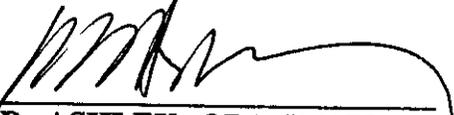
APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
\_\_\_\_\_

**DICK A. BLAKELEY, OBA #852**  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
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

Judgment of Foreclosure  
Civil Action No. 95-C 1059E

LFR/lg

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

F I L E D

FEB 12 1996

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

VINCE BREEDLOVE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MASSACHUSETTS MUTUAL LIFE )  
 INSURANCE COMPANY, )  
 a corporation, )  
 )  
 Defendant. )

Case No. 95-C-550-BU

ENTERED ON DOCKET  
DATE FEB 13 1996

**ORDER GRANTING JOINT STIPULATION AND APPLICATION FOR AN  
ORDER OF DISMISSAL WITH PREJUDICE**

For good cause having been shown, the parties, Plaintiff, Vince Breedlove, and Defendant, Massachusetts Mutual Life Insurance Company, by and through their attorneys of record, having stipulated to the entry by this Court of an order of dismissal with prejudice of any and all claims which have been asserted, or which might have been asserted, as a result of the matters described in the Plaintiff's Petition filed May 25, 1995, in the District Court in and for Tulsa County, State of Oklahoma and removed and filed in this Court by Notice of Removal filed June 16, 1995, it is hereby ordered that the above-captioned action be dismissed with prejudice.

DATED this 12 day of Feb, 1996.

**s/ MICHAEL BURRAGE**

UNITED STATES DISTRICT COURT JUDGE

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

**F I L E**

FEB 12 1996

SAMUEL J. WILDER, Pro Se, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BOARD OF COUNTY COMMISSIONERS )  
OF THE COUNTY OF TULSA, et )  
al., )  
 )  
Defendants. )

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

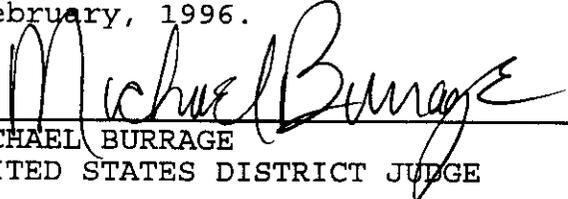
Case No. 96-C-23-BU

ENTERED  
DATE FEB 13 1996

**ORDER**

On January 11, 1996, Plaintiff, Samuel J. Wilder, filed a complaint styled as a "Notice of Appeal," wherein he sought to appeal a decision by Tulsa County Special District Judge Howard Mafford dismissing Plaintiff's petition on March 31, 1995. On January 19, 1996, this Court dismissed Plaintiff's complaint for lack of subject matter jurisdiction. On January 23, 1996, Plaintiff filed another pleading styled as a "Notice of Appeal." This pleading is similar to the January 11, 1996 complaint and is dated January 19, 1996. As the Court has previously dismissed Plaintiff's complaint for lack of subject matter jurisdiction, the Notice of Appeal (Docket Entry #5) is hereby **STRICKEN** from the record and the Court shall give no further consideration to the pleading.

ENTERED this 12<sup>th</sup> day of February, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

FILE

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

FEB 1 8 1996

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

DORIS M. SNOW, )  
 )  
Plaintiff, )  
vs. )  
INTERNAL REVENUE SERVICE, )  
 )  
Defendant. )

Case No. 95-C-573-BU

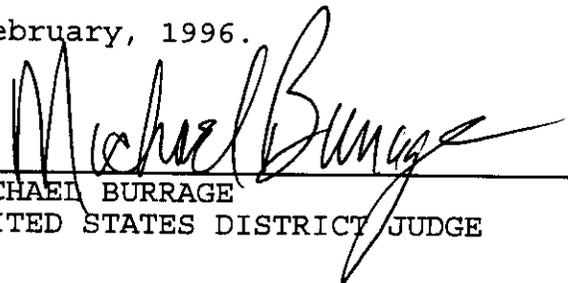
FEB 1-3 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 90 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 12<sup>th</sup> day of February, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**F I L E**  
FEB 18 1996

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

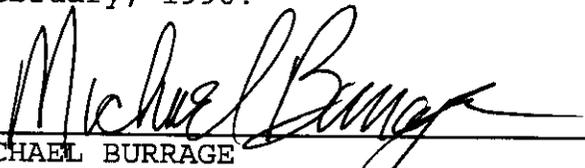
DORIS M. SNOW, )  
 )  
Plaintiff, )  
vs. )  
INTERNAL REVENUE SERVICE, )  
 )  
Defendant. )

Case No. 95-C-573-BU ✓

O R D E R

The Joint Application to Suspend the Scheduling Order and Strike the Trial Setting filed herein on February 7, 1996 is hereby **GRANTED**. The operation of the Scheduling Order entered in this case on October 26, 1995 is suspended, and the trial set for April 15, 1996 is hereby stricken.

Entered this 12 day of February, 1996.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
LEON U. MOODY aka LEON ULYSSES )  
MOODY aka LEON V. MOODY; )  
LYNDA G. MOODY aka LYNDA GENE )  
MOODY aka LYNDA GEAN MOODY; )  
BOATMEN'S BANK successor by merger )  
to SECURITY BANK; MORTGAGE )  
CLEARING CORPORATION; EAGLE )  
RIDGE CONDOMINIUM )  
HOMEOWNERS ASSOCIATION, INC.; )  
JOHN A. JAMES; JOANNA B. JAMES; )  
JEFFREY PAUL USDANSKY; STATE )  
OF OKLAHOMA ex rel OKLAHOMA )  
TAX COMMISSION; COUNTY )  
TREASURER, Tulsa County, Oklahoma; )  
BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )  
 )  
Defendants. )

FILED

FEB 13 1996

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

Civil Case No. 95-C 569B

ENTERED ON DOCKET

DATE FEB 13 1996

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 12 day of Feb,  
1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern  
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the  
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY  
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant  
District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA ex rel  
OKLAHOMA TAX COMMISSION, appears by Assistant General Counsel Kim D. Ashley;  
the Defendants, BOATMEN'S BANK SUCCESSOR BY MERGER TO SECURITY BANK

NOTE: THIS ORDER IS TO BE MAILED  
BY MAIL TO THE COUNSEL AND  
PROSECU...  
UPON...

and MORTGAGE CLEARING CORPORATION, appear not having previously filed their disclaimers; and the Defendants, LEON U. MOODY aka LEON ULYSSES MOODY aka LEON V. MOODY, LYNDA G. MOODY aka LYNDA GENE MOODY aka LYNDA GEAN MOODY, EAGLE RIDGE CONDOMINIUM HOMEOWNER'S ASSOCIATION, INC., JOHN A. JAMES, JOANNA B. JAMES, and JEFFREY PAUL USDANSKY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LEON U. MOODY aka LEON ULYSSES MOODY aka LEON V. MOODY will hereinafter be referred to as ("LEON U. MOODY"); and the Defendant, LYNDA G. MOODY aka LYNDA GENE MOODY aka LYNDA GEAN MOODY will hereinafter be referred to as ("LYNDA G. MOODY"). LEON U. MOODY and LYNDA G. MOODY are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, LEON U. MOODY, acknowledged receipt of Summons and Complaint via certified mail on September 12, 1995; the Defendant, LYNDA G. MOODY, acknowledged receipt of Summons and Complaint via certified mail on September 14, 1995; the Defendant, BOATMEN'S BANK SUCCESSOR BY MERGER TO SECURITY BANK, acknowledged receipt of Summons and Complaint via certified mail on June 22, 1995; the Defendant, MORTGAGE CLEARING CORPORATION, acknowledged receipt of Summons and Complaint via certified mail on June 22, 1995; the Defendant, EAGLE RIDGE CONDOMINIUM HOMEOWNER'S ASSOCIATION, INC., acknowledged receipt of Summons and Complaint via certified mail on October 16, 1995; the defendant, JOHN A. JAMES, waived service of Summons on June 30, 1995; the Defendant, JOANNA B.

JAMES, waived service of Summons on July 17, 1995; and the Defendant, STATE OF OKLAHOMA ex re OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint via certified mail on June 22, 1995.

The Court further finds that the Defendant, JEFFREY PAUL USDANSKY, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning November 3, 1995, and continuing through December 8, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, JEFFREY PAUL USDANSKY, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, JEFFREY PAUL USDANSKY. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or

mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on July 11, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Answer on July 10, 1995; the Defendant, BOATMEN'S BANK SUCCESSOR BY MERGER TO SECURITY BANK, filed its disclaimer on July 19, 1995; the Defendant, MORTGAGE CLEARING CORPORATION, filed its disclaimer on July 11, 1995; and that the Defendants, LEON U. MOODY, LYNDA G. MOODY, EAGLE RIDGE CONDOMINIUM HOMEOWNER'S ASSOCIATION, INC., JOHN A. JAMES, JOANNA B. JAMES, and JEFFREY PAUL USDANSKY, 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:

Building 3032, Unit B and a .0135% Undivided interest in and to the common elements appertaining thereto in EAGLE RIDGE CONDOMINIUMS, PHASE III, according to the DECLARATION CREATING UNIT OWNERSHIP ESTATES FOR EAGLE RIDGE CONDOMINIUMS, dated August 17, 1983, recorded in Book 4718, Page 268-349, Inclusive of the Records of Tulsa County, State of Oklahoma, and by Annexation Notice dated June 2, 1984, Recorded in Book 4800, at Pages 1067-1084, covering the following described real property, to-wit:

All that part of Block Thirteen (13), EASTPARK, an Addition in the City of Tulsa, Tulsa County, Oklahoma, according to the Official recorded Plat thereof, more particularly described as follows: to-wit:

All of Lots One (1) thru Five (5); all of Lot Six (6) Less the South 5.0 feet of the West 15.0 feet; all of Lots Seven (7) thru Eleven (11) Less the West 15.0 feet; all of Lots Twenty-six (26) thru twenty-nine (29); all that part of Lot Thirty-four (34) lying West of lot Thirty (30); all of Lots Thirty (30) thru Thirty-three (33); all that part of Lot Thirty-four (34) lying East of Lot Thirty-three (33); all that part of Lot Thirty-four (34) lying South of Lots Thirty (30) thru Thirty-three (33);

AND

All that part of Block Fifteen (15), EASTPARK, an Addition in the City of Tulsa, Tulsa County, State of Oklahoma, according to the official Recorded Plat thereof, more particularly described as follows: to-wit:

The North 11.95 feet of Lot Seven (7); all of Lots Eight (8) thru Seventeen (17); the Southerly 36.05 feet of Lot Eighteen (18).

The Court further finds that on August 20, 1986, JOHN A. JAMES and JOANNE B. JAMES, executed and delivered to SECURITY BANK their mortgage note in the amount of \$54,700.00, 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, JOHN A. JAMES and JOANNE B. JAMES, executed and delivered to SECURITY BANK a mortgage dated August 20, 1986, covering the above-described property. Said mortgage was recorded on August 27, 1986, in Book 4965, Page 2122, in the records of Tulsa County, Oklahoma and was re-recorded to reflect the correct final payment

date on December 4, 1986 in Book 4986, Page 2061, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 20, 1986, SECURITY BANK assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on September 3, 1986, in Book 4967, Page 280, in the records of Tulsa County, Oklahoma and was re-recorded on December 10, 1986 in Book 4987, Page 2868 in the records of Tulsa County, Oklahoma.

The Court further finds that on June 22, 1989, MORTGAGE CLEARING CORPORATION assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development, its successors and assigns. This Assignment of Mortgage was recorded on June 27, 1989, in Book 5191, Page 476, in the records of Tulsa County Oklahoma and was re-recorded on September 12, 1989 in Book 5206, Page 2221 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, LEON U. MOODY and LYNDA G. MOODY, currently hold record title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on the Warranty Deed dated June 8, 1988 and recorded with the Tulsa County Clerk June 8, 1988 in Book 5105 at Page 2082, the parties names as LYNDA G. and LEON U. MOODY, husband and wife are the same parties as the LYNDA G. MOODY and LEON U. MOODY names as Defendants herein.

The Court further finds that on June 19, 1989, the Defendants, LEON U. MOODY and LYNDA G. MOODY, 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. A superseding agreement was reached between these same parties on June 13, 1990 and May 5, 1991.

The Court further finds that on November 17, 1992, the Defendants, LEON U. MOODY and LYNDA G. MOODY filed their petition for Chapter 7 relief, case number 92-3998, in the United States Bankruptcy Court for the Northern District of Oklahoma. this case was discharged on March 19, 1993 and subsequently closed on July 12, 1993.

The Court further finds that the Defendants, LEON U. MOODY and LYNDA G. MOODY, 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, LEON U. MOODY and LYNDA G. MOODY, are indebted to the Plaintiff in the principal sum of \$74,964.22, plus interest at the rate of 10 percent per annum from April 1, 1995 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 \$37.00 which became a lien on the property as of June 23, 1994; and a lien in the amount of \$37.00 which became a lien as of June 25, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, has a lien on the subject property in the amount of

\$183.95, by virtue of a tax warrant, which became a lien as of December 20, 1993. Said lien is inferior to the interest of the Plaintiff United States of America.

The Court further finds that the Defendants, BOATMEN'S BANK SUCCESSOR BY MERGER TO SECURITY BANK and MORTGAGE CLEARING CORPORATION, disclaim any right, title, or interest in the subject real property.

The Court further finds that the Defendants, LEON U. MOODY, LYNDA G. MOODY, EAGLE RIDGE CONDOMINIUM HOMEOWNER'S ASSOCIATION, INC., JOHN A. JAMES, JOANNA B. JAMES, and JEFFREY PAUL USDANSKY, are in default, and have no right, title or interest in the subject real property.

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

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, LEON U. MOODY and LYNDA G. MOODY, in the principal sum of \$74,964.22, plus interest at the rate of 10 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 4.89 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 \$74.00, plus costs and interest, for personal property taxes for the years 1992 and 1993, plus the costs of this action.

**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 \$183.95 for a tax warrant, plus the costs of this action and interest.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, LEON U. MOODY, LYNDIA G. MOODY, BOATMEN'S BANK SUCCESSOR BY MERGER TOP SECURITY BANK, MORTGAGE CLEARING CORPORATION, EAGLE RIDGE CONDOMINIUM HOMEOWNER'S ASSOCIATION, INC., JOHN A. JAMES, JOANNA B. JAMES, JEFFREY PAUL USDANSKY and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, LEON U. MOODY and LYNDIA G. MOODY, 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 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.

**Fourth:**

In payment of Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, in the amount of \$183.95, plus accrued and accruing interest, for a tax warrant.

**Fifth:**

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.

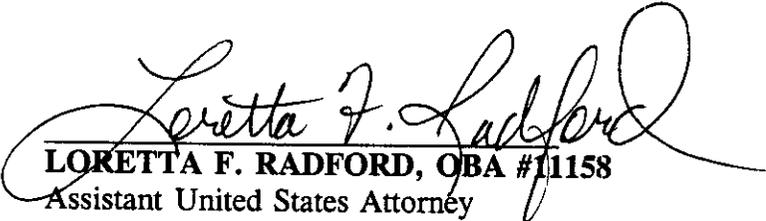
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed 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

  
**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
**DICK A. BLAKELEY, OBA #852**

Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma



---

**KIM D. ASHLEY, OBA #14165**  
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

Judgment of Foreclosure  
Civil Action No. 95-C 569B

LFR/lg



2-13-96

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

AVTECH, INC., an Oklahoma )  
corporation, and )  
DONALD A. MCCANCE, )  
 )  
Plaintiffs, )

v. )

Civil Action No. 94-C-790-H

AMPCO, INC., a New York )  
corporation, and )  
CONSUMER WATCH CORPORATION, a )  
New York corporation, )  
GLAZE, INC., a New Jersey )  
corporation, and SEAGRY )  
INTERNATIONAL (ASIA) LIMITED, )  
a Hong Kong corporation, )  
 )  
Defendants. )

**COPY**

**FILED**

FEB 12 1996

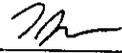
Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

DISMISSAL

Plaintiffs, Avtech, Inc., and Donald A. McCance, hereby  
dismiss their claims for damages, costs and attorneys fees against  
the Defendant Glaze, Inc., with prejudice, and against the  
Defendants AMPCO, Inc., Consumer Watch Corporation and Seagry  
International (Asia) Limited, without prejudice.

DATED: February 12<sup>th</sup>, 1996.

KIVELL, RAYMENT AND FRANCIS  
a Professional Corporation

By   
Brian J. Rayment, OBA #7441  
7666 East 61st St., Ste. 240  
Tulsa, OK 74133  
(918) 254-0626  
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that on this 12<sup>th</sup> day of February, 1996, I mailed a true and correct copy of the above and foregoing document to George P. Ziegler, 18 East 41st Street, New York, NY 10017-6293, Consumer Watch Corporation, John Jhong, 435 Brook Avenue, Unit 29, Deer Park, NY 11729, AMPCO, Inc., 435 Brook Avenue, Unit 29, Deer Park, NY 11729 and Seagry International (Asia) Limited, 7th Floor, Allied Kajima Bldg., 138 Gloucester Road, Walchai, Hong Kong, with sufficient postage thereon.



---

BRIAN J. RAYMENT

ampco.dis

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

OLYMPUS AMERICA INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
JAMES ERNEST TANNEHILL, )  
 )  
Defendant and )  
Third Party Plaintiff, )  
 )  
v. )  
 )  
OLYMPUS AMERICA, INC., and )  
DAN BROWNING, )  
 )  
Third Party Defendants. )

**COPY**

ENTERED ON DOCKET

DATE 2-13-96

Case No. 94-C-375-H

**FILED**

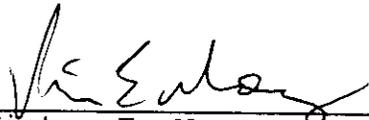
FEB 12 1996

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

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Olympus America Inc., Defendant, James Ernest Tannehill, and Third Party Defendant, Dan Browning, hereby stipulate to the dismissal with prejudice of the claims asserted by Plaintiff in its Complaint and the Defendant James Ernest Tannehill in his counterclaim and third party claim.

BAKER & HOSTER

  
\_\_\_\_\_  
Victor E. Morgan  
800 Kennedy Building  
Tulsa, OK 74103  
(918) 592-5555  
Attorney for Plaintiff and  
Third Party Defendant

KIVELL, RAYMENT AND FRANCIS  
A Professional Corporation

By: \_\_\_\_\_



BRIAN J. RAYMENT, OBA#7441  
Triad Center, Suite 240  
7666 East 61st Street  
Tulsa, Oklahoma 74133  
(918) 254-0626  
Attorneys for Defendant

tanne.dis



**Spouse, if any, of David Russell Golden; Carol Louise Golden aka Carol L. Golden aka Carol Golden; and Spouse, if any, of Carol Louise Golden,** appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **David Russell Golden aka David R. Golden aka Dave R. Golden,** executed a Waiver of Service of Summons on June 5, 1995 which was filed on June 12, 1995; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission,** filed its Entry of Appearance on May 12, 1995.

The Court further finds that the Defendants, **Spouse, if any, of David Russell Golden; Carol Louise Golden aka Carol L. Golden aka Carol Golden; and Spouse, if any, of Carol Louise Golden,** were served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning October 3, 1995, and continuing through November 7, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Spouse, if any, of David Russell Golden; Carol Louise Golden aka Carol L. Golden aka Carol Golden; and Spouse, if any, of Carol Louise Golden,** and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Spouse, if any, of David Russell Golden; Carol Louise Golden aka Carol L.**

**Golden aka Carol Golden; and Spouse, if any, of Carol Louise Golden.** The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma,** filed their Answer on June 12, 1995; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission,** filed its Answer on May 12, 1995; and that the Defendants, **David Russell Golden aka David R. Golden aka Dave R. Golden; Spouse, if any, of David Russell Golden; Carol Louise Golden aka Carol L. Golden aka Carol Golden; and Spouse, if any, of Carol Louise Golden,** 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 Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot 4, in Block 3, of Sunset Acres Subdivision, an Addition to the City of Claremore, Rogers County, Oklahoma, according to the recorded plat thereof.**

The Court further finds that on August 8, 1986, David Russell Golden and Carol Louise Golden executed and delivered to MidFirst Mortgage Co., their mortgage note in the amount of \$46,658.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, David Russell Golden and Carol Louise Golden, husband and wife, executed and delivered to MidFirst Mortgage Co., a real estate mortgage dated August 8, 1986, covering the above-described property, situated in the State of Oklahoma, Rogers County. This mortgage was recorded on August 12, 1986, in Book 738, Page 460, in the records of Rogers County, Oklahoma.

The Court further finds that on September 1, 1986, MidFirst Mortgage Co. executed a Deed of Trust/Security Deed assigning the above-described mortgage note and mortgage to Midland Mortgage Co. This Deed was recorded on January 26, 1987, in Book 750, Page 783, in the records of Rogers County, Oklahoma.

The Court further finds that on March 17, 1992, Midland Mortgage Co. assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development. This Assignment was recorded on March 20, 1992, in Book 876, Page 843, in the records of Rogers County, Oklahoma.

The Court further finds that on February 26, 1992, David R. Golden 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. A superseding agreement was reached between these same parties on July 21, 1992.

The Court further finds that Defendants, **David Russell Golden aka David R. Golden aka Dave R. Golden and Carol Louise Golden aka Carol L. Golden aka Carol Golden**, 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 Russell Golden aka David R. Golden aka Dave R. Golden and Carol Louise Golden aka Carol L. Golden aka Carol Golden**, are indebted to the Plaintiff in the principal sum of \$44,976.59, plus penalty charges in the amount of \$258.04, plus accrued interest in the amount of \$14,253.26 as of January 1, 1995, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$354.65 (\$50.00 fees for evidentiary affidavit, \$296.65 publication fees, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, **County Treasurer, Rogers County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$351.53, plus penalties and interest, for the year 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, has liens on the property which is the subject matter of this

action in the total amount of \$6,240.12, together with interest and penalty according to law by virtue of the following tax warrants.

Tax Warrant No.	Dated	Recorded	County	Amount
STS9100084903	06/14/91	06/17/91	Rogers	\$ 553.34
STS9100084902	06/14/91	06/17/91	Rogers	\$ 553.34
STS9100085803	06/14/91	06/19/91	Rogers	\$ 761.54
STS9200057101	03/09/92	03/11/92	Rogers	\$3,193.64
STS9200057001	03/09/92	03/11/92	Rogers	\$1,731.60
STS9200057002	03/09/92	03/11/92	Rogers	\$1,731.60

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

The Court further finds that the Defendants, **David Russell Golden aka David R. Golden aka Dave R. Golden; Spouse, if any, of David Russell Golden; Carol Louise Golden aka Carol L. Golden aka Carol Golden; and Spouse, if any, of Carol Louise Golden**, are in default and therefore have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the 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, **David Russell Golden aka David R. Golden aka Dave R. Golden and Carol Louise Golden aka Carol L. Golden aka Carol Golden**, in the principal sum of \$44,976.59, plus penalty charges in the amount of \$258.04, plus accrued interest in the amount of \$14,253.26 as of January 1, 1995, plus interest accruing thereafter at the rate of 9.5 percent per annum until

judgment, plus interest thereafter at the current legal rate of 4.89 percent per annum until paid, plus the costs of this action in the amount of \$354.65 (\$50.00 fees for evidentiary affidavit, \$296.65 publication fees, \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer, Rogers County, Oklahoma, have and recover judgment in the amount of \$351.53, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

**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 the total amount of \$6,240.12, together with interest and penalty according to law by virtue of the following tax warrants.

Tax Warrant No.	Dated	Recorded	County	Amount
STS9100084903	06/14/91	06/17/91	Rogers	\$ 553.34
STS9100084902	06/14/91	06/17/91	Rogers	\$ 553.34
STS9100085803	06/14/91	06/19/91	Rogers	\$ 761.54
STS9200057101	03/09/92	03/11/92	Rogers	\$3,193.64
STS9200057001	03/09/92	03/11/92	Rogers	\$1,731.60
STS9200057002	03/09/92	03/11/92	Rogers	\$1,731.60

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, David Russell Golden aka David R. Golden aka Dave R. Golden; Spouse, if

any, of David Russell Golden; Carol Louise Golden aka Carol L. Golden aka Carol Golden; Spouse, if any, of Carol Louise Golden; and Board of County Commissioners, Rogers 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 Russell Golden aka David R. Golden aka Dave R. Golden and Carol Louise Golden aka Carol L. Golden aka Carol Golden**, 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 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 Defendant, County Treasurer, Rogers County, Oklahoma;

**Third:**

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

**Fourth:**

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission.

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

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment

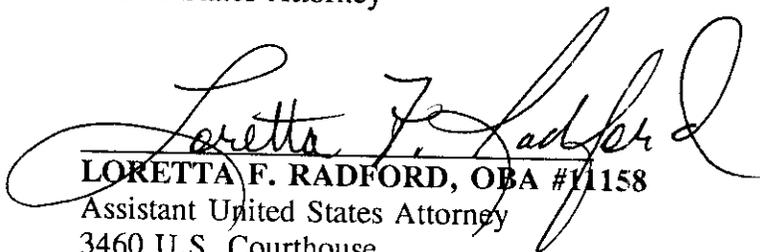
and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

**s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

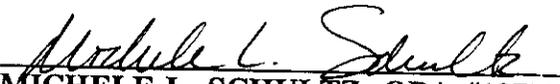
APPROVED:

STEPHEN C. LEWIS  
United States Attorney



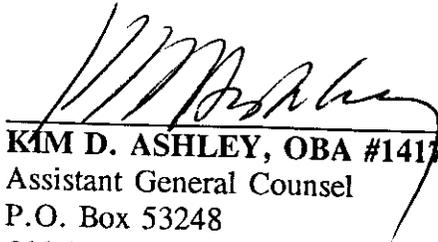
**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

Judgment of Foreclosure  
Case No. 95-C-382-K (Golden)

  
**MICHELE L. SCHULTZ, OBA #13771**

Assistant District Attorney  
219 South Missouri, Room 1-111  
Claremore, Oklahoma 74017  
(918) 341-3164  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Rogers County, Oklahoma

Judgment of Foreclosure  
Case No. 95-C-382-K (Golden)



---

**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

Judgment of Foreclosure  
Case No. 95-C-382-K (Golden)

LFR:css

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

ROBERT and BETTY THOMAS, )  
)  
Plaintiffs, )

v. )

No. 94-C-793K

CUMMINS MATERIAL, INC., an )  
)  
Oklahoma corporation; and, )  
)  
LIBERTY MUTUAL INSURANCE )  
)  
COMPANY, a Massachusetts )  
)  
corporation, )  
)  
Defendants.)

ENTERED ON DOCKET

FEB 13 1996

FILED

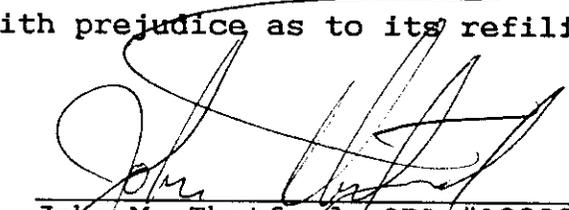
FEB 12 1996

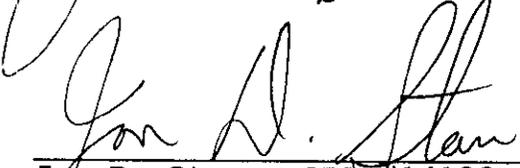
Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

COMES NOW the parties to this action, and pursuant to the terms of a settlement agreement, do herein stipulate that the terms of the settlement agreement have been satisfied and that this matter should be dismissed with prejudice as to its refiling.

WHEREFORE, the parties pray that this Honorable Court enter an Order dismissing this matter with prejudice as to its refiling.

  
\_\_\_\_\_  
John M. Thetford, OBA #12892  
Attorney for Plaintiffs  
Robert and Betty Thomas

  
\_\_\_\_\_  
Jon D. Starr, OBA #14138  
Attorney for Defendants  
Cummins Material, Inc. and  
Liberty Mutual Insurance Company

12

25  
0

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

ENTERED ON DOCKET  
DATE FEB 13 1996

**FILED**

FEB 12 1996

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

Case No. 95-C-416-K

Charles Stephenson and )  
Karen Stephenson, d/b/a/ )  
Kap Investments, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
Afrigue, U.S.A., Inc., )  
a Florida corporation, )  
 )  
Defendant. )

ORDER

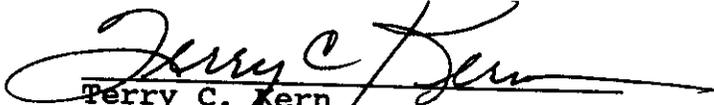
Now before this Court is Plaintiffs' motion for default judgment. On September 12, 1995, the Clerk of this Court entered Defendant's default. Upon Order of this Court, Magistrate Sam Joyner held a hearing to determine the amount of damages to be awarded. Following a hearing, Magistrate Joyner filed a Report and Recommendation on December 6, 1995, containing proposed findings of fact, conclusions of law and a recommendation that default judgment be entered in favor of Plaintiffs and against Defendant on all claims. Both parties were properly served with the Magistrate's Report and Recommendation, and neither filed written objections within the statutory period. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b).

Therefore, this Court hereby adopts the Magistrate's Report and Recommendation in its entirety, and in accordance therewith, ORDERS that default judgment be entered in favor of Plaintiffs and

15

against Defendant on all claims. Judgment shall be in the amount of \$68,000 in damages, plus post-judgment interest at the rate of 4.89%, plus \$199.93 in costs.

ORDERED THIS 12 DAY OF FEBRUARY, 1996.

  
Terry C. Kern  
United States District Judge

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

ENTERED ON DOCKET  
DATE FEB 13 1996

DANNY MEYERS,  
Plaintiff,

vs.

HAYSSEN MANUFACTURING COMPANY  
a/k/a HAYSSEN MFG. CO.,  
a corporation; FLUOR  
CONSTRUCTORS, INC., a corpor-  
ation; FLUOR DANIEL, INC.,  
formerly FLUOR ENGINEERS,  
INC., a corporation.

Defendants.

cv-  
No. 94-342-K

**FILED**

FEB 12 1996

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

ORDER

Before this Court is the motion of Defendant Hayssen Manufacturing Company ("Hayssen") to reconsider this Court's Order of March 25, 1995, denying Hayssen's motion for summary judgment. Defendant Danny Meyers ("Meyers") was injured when working at a machine manufactured by Hayssen and subsequently modified by Meyers' employer, Kimberly-Clark.

Hayssen's first argument is that when Kimberly-Clark modified the machine and thereby defeated a safety feature of the machine, Hayssen was no longer liable under strict products liability for any injuries resulting from the modification. The Oklahoma Supreme Court has held that a manufacturer may not be held liable under strict products liability if an alteration is

responsible for the defect and is the intervening and supervening<sup>1</sup> cause, as opposed to the concurrent cause of the injuries. Messler v. Simmons Gun Specialties, Inc., 687 P.2d 121, 125 (Okla. 1984). For an intervening act to constitute a supervening cause, it must meet a three prong test: it must be (1) independent of the original act, (2) adequate of itself to bring about the result, and (3) one whose occurrence was not reasonably foreseeable. Henry v. Merk and Co., 877 F.2d 1489, 1495 (10th Cir. 1989) (applying Oklahoma law).

This Court holds that summary judgment on this ground is inappropriate because the third prong--i.e., the foreseeability of Kimberly-Clark's modification of the machine--presents a factual issue for a jury.<sup>2</sup> The closest Oklahoma case to the instant case is Stewart v. Scott-Kitz Miller, 626 P.2d 329 (Okla. Ct. App. 1981), in which an Oklahoma appellate court examined whether a modification to an industrial machine that caused plaintiff's injuries was reasonably foreseeable sufficient to defeat a demurrer by the defendant manufacturer. Following a repair of a forklift, workers replaced certain bolts backwards, causing the forklift to malfunction and injure plaintiff. Id. at 330. The court held that the modification causing the injury was reasonably foreseeable because the manufacturer could have forecast the necessity of removal of the bolts during routine maintenance and the possibility that those bolts would be replaced backwards. Id. at 331.

Similarly in the instant case, given the design of the machine and the mechanics of its operational adjustment, there is a factual question as to whether Hayssen could have reasonably forecast that a user of the machine would modify the safety feature in question. The controls for the air jets were inside the safety guards installed by the manufacturer. (Mandeville Aff.); (Jessie

---

<sup>1</sup> As the Tenth Circuit notes, "supervening" is Oklahoman for "superseding." Henry v. Merk and Co., 877 F.2d 1489, 1495 n.10 (10th Cir. 1989).

<sup>2</sup> Since Hayssen's argument fails the third prong, this Court need not consider the other two prongs; all three prongs must be satisfied to sustain a defense on this ground.

Depo. ). Although a worker could turn off the machine, open the safety guards, adjust the air jets, close the safety guards, and restart the machine to see whether the adjustment was satisfactory, this method was apparently rather cumbersome and impractical. The affidavits and depositions presented by Meyers suggest that a more effective method of adjustment was to adjust the air jets while the machine was running, and thereby ensure a satisfactory adjustment without repeatedly stopping and restarting the machine. Therefore, Defendant's first argument fails because Plaintiff has presented evidence sufficient to raise a genuine issue as to whether it was reasonably foreseeable, given the machine's design, that a user would defeat the safety device in order to be able to adjust the air jets on the fly.<sup>3</sup>

Hayssen's second argument is that it should be relieved of liability because its machine was not unreasonably dangerous as a matter of law since Kimberly-Clark was a sophisticated/knowledgeable user. However, Hayssen misstates the law in this state. He argues, "Foreseeability is irrelevant when a third party industrial-manufacturer consciously bypasses built-in safety features." (Mot. Recon. at 7 (citing Robinson v. Reed-Prentice, 49 N.Y.2d 471 (1980).) Yet Oklahoma has not adopted this rule; foreseeability remains a relevant concern whenever a product has been modified from its original state. Moreover, the case upon which Hayssen relies, Duane v. Oklahoma Gas & Electric, 833 P.2d 284 (Okla. 1992), involving only a duty to warn claim, explicitly retains foreseeability as a relevant factor in manufacturers' products liability

---

<sup>3</sup> Defendant's counsel essentially urges this Court to adopt a rule that when a knowledgeable industrial user modifies a machine in order to defeat a built-in safety feature and that modification causes an injury, the modification should be deemed unforeseeable as a matter of law. See Robinson v. Reed-Prentice, 49 N.Y.2d 471, 480 (1980); Rodriguez v. Besser Co., 565 P.2d 1315 (Ariz. App. Ct. 1977). While this position might be sound public policy, it is not the law in Oklahoma.

cases:

A product is not defective when it is safe for normal handling and consumption, and there is no duty to warn where the product is used in an unlikely, unexpected or *unforeseeable* manner. . . . A duty to warn must also be based upon the *foreseeability* that the user would use the product in that way, the type of danger involved, and *foreseeability* of the user's knowledge of the danger.

833 P.2d at 286 (emphasis added). See also Hutchins v. Silicone Specialties, 881 P.2d 64, 67 (Okla. 1993) ("A defendant in a manufacturers' products liability case is not liable for misuse of its product in a manner that is not foreseeable."). Thus even where the victim, or his employer, is a knowledgeable user, the manufacturer's liability depends upon questions of foreseeability of a particular use and foreseeability of knowledge of the user--questions this Court holds present genuine issues of material fact for a jury's determination. Therefore, summary judgment is not appropriate.

The Order of March 25, 1995 denying Hayssen's motion for summary judgment is therefore SUSTAINED.

ORDERED THIS 9 DAY OF FEBRUARY, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

DARIN P. FARBER  
Plaintiff,  
vs.  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,  
Defendant.

No. 94-C-1155-K

**FILED**

FEB 12 1996

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

ENTERED ON DOCKET  
DATE FEB 13 1996  
FEB 13 1996

JUDGMENT

This matter came before the Court for consideration of the Motion by Defendant STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY for Summary Judgment against Plaintiff DARIN F. FARBER.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff.

ORDERED THIS DAY OF 9 FEBRUARY, 1996

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

38



injuries to his lower back. The insurance of the driver who ran the red light was inadequate to compensate Farber for his claimed injuries. In addition, the \$10,000 uninsured/underinsured motorist ("UM") policy on the truck Farber was driving was inadequate to cover his claimed injuries. Farber therefore seeks to "stack" UM benefits from policies on two other vehicles owned by him: a 1990 Chevrolet Camero ("Camero") and a 1982 Ford F-250 Flatbed Truck ("Flatbed"). The named insured on the policy covering the Camero is Lee Roy West, Farber's step-father. The named insureds on the policy covering the Flatbed are Lee Roy West and Janice West, Farber's mother.

## II. Discussion

Farber concedes that he is not an "insured" under the express terms of the UM policies covering the Camero and Flatbed. Farber therefore urges this Court to apply the doctrine of implied waiver or estoppel to include him as an "insured" under the UM policies covering the Camero and Flatbed. See Babcock v. Adkins, 695 P.2d 1340, 1343 (Okla. 1985) (holding that an individual cannot "stack" uninsured motorist coverage under separate policies unless that individual also qualifies as an "insured" under those separate policies). As the basis of his waiver and estoppel argument, Farber contends that Don Wells, the State Farm agent who sold his family its policy, led them to believe that all members of the family would be equally covered in the event of an accident involving any of the ten cars used by the family.

Farber correctly argues that under Oklahoma law, waiver and estoppel are sometimes available to plaintiffs claiming insurance benefits not explicitly provided in the terms of the policy. However, both the Tenth Circuit and Oklahoma Supreme Court have only allowed such theories under limited circumstances. In Security Insurance Co. v. Greer, 437 P.2d 243 (Okla. 1968), the Oklahoma Supreme Court held, "An insurer may by his action or conduct be estopped from denying that his policy affords coverage for a risk which the insured has been led honestly to believe was assumed under the terms of the policy." Id. at 245-46. However, the court intimated in *dicta* that waiver and estoppel were only available in cases involving "accepted risk," that is, risk with a condition subsequent. Id. at 246. In contrast, in cases involving "excepted risk," estoppel cannot be invoked to broaden the scope of coverage of a policy so as to bring within its protection risks that are not included or that are expressly excluded. Id. "The theory underlying this rule appears to be that neither estoppel nor waiver can operate to create a new contract." Id. See also Western Ins. Co. v. Cimarron Pipe Line Const., 748 F.2d 1397, 1400 (10th Cir. 1984) ("The doctrine of implied waiver or estoppel is not available to bring within the coverage of an insurance policy risks that are not covered by its terms or that are expressly excluded therefrom.") (quoting Lester v. Sparks, 583 P.2d 1097, 1100 (Okla. 1978) (quoting *Appelman's Treatise on Insurance Law* §

9090 at 344)).<sup>2</sup>

The question, then, is into which category Farber falls: an excepted risk or an accepted risk "to be defeated by conditions set forth in the policy." Greer, 437 P.2d at 246. Farber argues that he is an accepted risk because his ownership of a vehicle is a condition subsequent under the UM policies. The disputed policies provide underinsured motorist coverage *inter alia* to "any relative [of the named insured] who does not own a car." Farber asserts that State Farm effectively waived this condition subsequent by assuring him and his family that they were all equally covered. Therefore, he asserts, State Farm is now estopped from using this provision to exclude him from UM coverage.

While this is a creative argument, Farber's characterization of car ownership as a condition subsequent defies logic in the instant context. Farber owned the cars at the time the Wests purchased the policies; therefore, his ownership of a vehicle could not be a condition subsequent to the insurance policy. In other words, since the condition that excluded him from UM coverage existed at the time the policies were purchased, Farber must be viewed as an excepted risk: he was *a priori* excluded as an "insured" under the terms of the UM policies covering the Camero

---

<sup>2</sup> Farber cites Braun v. Annesley, 936 F.2d 1105 (10th Cir. 1991) in support of his estoppel argument. Braun is inapposite because it establishes an exception to the rule under circumstances not present in the instant case. "[W]hen an insurer assumes the defenses of an action knowing the grounds which would permit it to deny coverage, it may be estopped from subsequently raising the defense of noncoverage." Id. at 1110. There is no evidence in the instant case that State Farm assumed the defense of Farber in any proceeding.

and Flatbed. Consequently, Farber cannot use waiver or estoppel to "create a new contract" providing UM coverage.

Summary judgment is appropriate in an insurance coverage case where the record demonstrates that a plaintiff's claim of insurance coverage cannot be sustained in light of the language of the policy and the applicable law. See Allstate Ins. Co. v. Brown, 920 F.2d 664 (10th Cir. 1990). As stated above, Farber's claim cannot be sustained by the language of the two remaining policies, and the law does not permit him to alter that language through an estoppel or waiver theory. Since there is no genuine issue as to any material fact, State Farm is entitled to judgment as a matter of law on Farber's claims under the two remaining insurance policies. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed.R.Civ.P. 56.

There remains Farber's bad faith insurer claim against State Farm for denial of coverage under all ten policies. While the Oklahoma Supreme Court has allowed bad faith claims against insurance companies by its insureds, see Christian v. American Home Insurance, 577 P.2d 899 (Okla. 1977), it does not permit third parties to bring such bad faith claims. Allstate Insurance v. Amick, 680 P.2d 362, 364-65 (Okla. 1984). The court explained, "Th[e] single duty of dealing fairly and in good faith with the insured arises from the contractual relationship. In the absence of a contractual or statutory relationship, there is no duty which can be breached." Id. at 364. Farber has no contractual relationship with State Farm with respect to the nine policies

under which he now claims coverage. In other words, Farber is a stranger to these insurance contracts between State Farm and the Wests, and State Farm therefore has no duty of dealing fairly and in good faith toward Farber. Id. at 365.

Finally, although State Farm has paid Farber in full on the policy covering the vehicle he was driving at the time of the collision, Farber nonetheless maintains a bad faith claim as to this policy, alleging that State Farm initially denied coverage. The Tenth Circuit has explained, "The mere allegation that an insurer breached the duty of good faith and fair dealing does not automatically entitle a litigant to submit the issue to a jury for determination." Oulds v. Principal Mutual Life Insurance, 6 F.3d 1431, 1436 (10th Cir. 1993) (citing City National Bank & Trust Co. v. Jackson National Life Insurance Co., 804 P.2d 463, 468 (Okla. App. Ct. 1990)).

On a motion for summary judgment, the trial court must first determine, under the facts of the particular case and as a matter of law, whether insurer's conduct may be reasonably perceived as tortious. Until the facts, when construed most favorably against the insurer, have established what might reasonably be perceived as tortious conduct on the part of the insurer, the legal gate to submission of the issue to the jury remains closed. To hold otherwise would subject insurance companies to the risk of punitive damages whenever litigation arises from insurance claims.

Id. at 1436-37 (citing Manis v. Hartford Fire Ins. Co., 681 P.2d 760, 762 (Okla. 1984)). Farber alleges only that State Farm denied coverage as to all ten policies. He does not explain how State Farm's apparent delay in paying on this one policy constituted tortious conduct. This Court finds that there is no evidence in the record reasonably tending to show that State Farm acted in bad

faith with respect to this policy under which it has already paid Farber in full.

Since Farber has failed to make a showing sufficient to establish the existence of elements essential to his case and on which he would bear the burden of proof at trial, summary judgment is mandated by Rule 56. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). State Farm's motion for summary judgment is therefore GRANTED.

ORDERED this 9 day of February, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

THOMAS HUNTER, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 95-C-620-K  
 )  
 RONALD J. CHAMPION, et al., )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE FEB 13 1996

**FILED**

FEB 12 1996

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

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on September 15, 1995. Plaintiff, a pro se litigant, 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.<sup>1</sup>

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

- (1) Defendants' motion to dismiss or for summary judgment (doc. #6) is **granted** and the above captioned case is **dismissed** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10)

---

<sup>1</sup>Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

19

days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 9 day of February, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

ANN T. EARL,

Plaintiff,

vs.

RUTH McDONALD,

Defendant.

Case No. 95-C-868-K

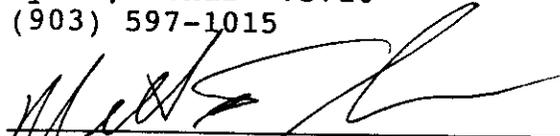
ENTERED FEB 12 1996  
DATE FEB 12 1996

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, ANN T. EARL, by and through her attorney, Frank O. McClendon, III, and Defendant, RUTH McDONALD, by and through her attorney, William F. Smith of the law firm Gladd, Smith & Harris, P.A., pursuant to Rule 41(A) of the Federal Rules of Civil Procedure, hereby stipulate that the above-styled and numbered cause of action is hereby dismissed with prejudice as all claims, demands and causes of action have been fully, finally and completely settled and resolved by the parties.

Dated this 12 day of February, 1996.

  
FRANK O. McCLENDON, III  
Attorney for Plaintiff  
P.O. Box 1049  
Tyler, Texas 75710  
(903) 597-1015

  
WILLIAM F. SMITH OBA #8420  
GLADD, SMITH & HARRIS, P.A.  
Attorney for Defendant  
2642 E. 21st St., Suite 150  
Tulsa, Oklahoma 74114  
(918) 744-5657



questions deserve further proceedings. Barefoot, 463 U.S. at 893. The Tenth Circuit applies the same standard. See Gallagher v. Hannigan, 24 F.3d 68 (10th Cir. 1994); Stevenson v. Thornburgh, 943 F.2d 1214, 1216 (10th Cir. 1991).

After considering the record, the Court concludes that a certificate of probable cause should not issue in this case because Petitioner has not made a substantial showing that he was denied a federal right. The record is devoid of any authority demonstrating that the Tenth Circuit Court of Appeals could resolve the issue differently.

**ACCORDINGLY, IT IS HEREBY ORDERED** that a certificate of probable cause is **denied**, see Fed. R. App. P. 22(b).

SO ORDERED THIS 9 day of February, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

FEB 12 1996

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

DOROTHY MOUNCE, individually and as  
Personal Representative of the ESTATE OF  
TIMOTHY MOUNCE, Deceased,

Plaintiff,

v.

PEGGY MOUNCE,

Defendant.

Case No. 94-C-747-H

ENTERED ON DOCKET

2-12-96

**J U D G M E N T**

This matter came before the Court on a motion for summary judgment by Plaintiff and a motion for summary judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on February 12, 1996.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff.

IT IS SO ORDERED.

This 12<sup>TH</sup> day of February, 1996.



Sven Erik Holmes  
United States District Judge

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

**FILED**

FEB 12 1996

*sa*

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

DOROTHY MOUNCE, individually and as )  
Personal Representative of the ESTATE OF )  
TIMOTHY MOUNCE, Deceased, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
PEGGY MOUNCE, )  
 )  
Defendant. )

Case No. 94-C-747-H ✓

FILED ON DOCKET

2-12-96

ORDER

This matter comes before the Court on a Motion for Summary Judgment by Defendant Peggy Mounce and a Motion for Summary Judgment by Plaintiff Dolores Mounce, individually and as personal representative of the estate of Timothy Mounce, deceased. The facts necessary to resolve these motions are not in dispute and are drawn largely from the stipulations of the parties.

I.

Timothy Mounce was an employee of WITCO and received the benefits of the WITCO Benefit Plan up until the time of his death. The Collective Bargaining Agreement between WITCO Corporation, Concarb Division, and the Oil, Chemical and Atomic Workers International Union, AFLCIO Local No. 5-857, of Ponca City, Oklahoma, for the period covering 1992 to 1995, shows that the Group Life Insurance Plan which covered the deceased was provided as a result of the Collective Bargaining Agreement. Group Contract No. G-17673, issued through Prudential Insurance Company, and the WITCO Employee Booklet, were in full force and effect and were the basis of said insurance contract as of the time of the death of Timothy Mounce. Payment of each month's premium for the life insurance came from the payroll deduction plan out of Timothy Mounce's earnings from WITCO.

12

Timothy Mounce and Peggy Mounce were married on September 18, 1974, and remained husband and wife until December 6, 1993. On September 24, 1985, Timothy Mounce designated Peggy Mounce as the sole beneficiary for his death benefits under the Group Life Insurance Policy. Peggy Mounce filed for divorce in the District Court of Kay County, Oklahoma on August 27, 1993 in Case #P 93-258 PC.

On August 31, 1993, four days after the Petition for Divorce was filed by Peggy Mounce, Timothy Mounce executed a form withdrawing all of his Thrift Savings Plan accumulations and designated his mother Dolores Mounce as future beneficiary of the Thrift Savings Plan. Their divorce became final on December 6, 1993 pursuant to a Decree of Divorce. On December 15, 1993 Timothy Mounce executed a Last Will and Testament naming his mother as his sole beneficiary. Timothy Mounce died on January 4, 1994. His will was admitted to probate by the District Court of Kay County, Oklahoma in Case #P 94-29 on March 17, 1994.

## II.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence

of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he 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. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

### III.

The parties agree that the benefits accrued by Timothy Mounce as a result of his employment with WITCO Corporation are part of an "employee benefit plan" and, thus, the terms of his benefits are governed by the Employee Retirement Income Security Act ("ERISA"). The parties further agree that, because his benefits are governed by ERISA, any state law claim based upon Okla. Stat. tit. 15, § 178 (1981) (statute pursuant to which all provisions in death benefits contracts in favor of

ex-spouse are revoked by operation of law) is preempted. Metropolitan Life Ins. Co. v. Hanslip, 939 F.2d 904, 907 (10th Cir. 1991).

There is also no dispute that the terms and conditions of the death benefits accruing to the deceased are set forth in Group Contract No. G-17673, issued through Prudential Insurance Company, and WITCO's Employee Benefit Booklet.

Plaintiff Dolores Mounce is the mother of the deceased; Peggy Mounce was married to the deceased until December 9, 1993, when the divorce decree was executed, shortly before the death of Timothy Mounce. Both Plaintiff and Defendant assert that they are entitled to the death benefits under Prudential Insurance Company Policy No. G-17673.

The parties agree that Timothy Mounce designated his then wife, Peggy Mounce, as sole beneficiary under the policy on September 24, 1985. The Employee Benefit Booklet prescribes the method through which an employee may change his or her designated beneficiary:

"Beneficiary" means a person chosen, on a form approved by Prudential, to receive the insurance benefits. You have the right to choose a Beneficiary. If there is a Beneficiary for the insurance, it is payable to that Beneficiary. Any amount of insurance for which there is no Beneficiary at your death will be payable to your estate. You may change the Beneficiary at any time without the consent of the present Beneficiary. The Beneficiary change form must be filed through the Contract Holder. The change will take effect the date the form is signed. But it will not apply to any amount paid by Prudential before it receives the form.

Plaintiff has attached affidavits from Bueford Jay Mounce, the decedent's brother; Larry D. Wagener, the decedent's divorce attorney; and herself, stating that the decedent had informed them that he had changed the beneficiary designation on the life insurance policy from his former wife, Peggy Mounce, to his mother, Dolores Mounce. However, neither WITCO nor any party to this litigation has produced a "Beneficiary change form" designating Dolores Mounce, or any other person, as beneficiary under the life insurance policy at issue.

Although WITCO has been unable to produce the required form, Wagener asserts in his affidavit that, on January 14, 1994 (ten days after the death of Timothy Mounce), he and the

decedent's brother conferred with Robert Howard, the WITCO employee charged with administering the employee benefits plan. Wagener states that:

Mr. Howard informed Jay Mounce and myself at that time that, prior to his death, Timothy R. Mounce had performed everything that was necessary to change the beneficiary on his life insurance from Peggy D. Mounce to Dolores Mounce, except the presentation of a final decree of divorce to WITCO. Mr. Howard said he had been after Tim to bring in the final decree as late as December 1993, and then showed us a copy of Tim's thrift plan change of beneficiary that Tim had signed in October of 1993. Mr. Howard advised both Mrs. Mounce and myself that the life insurance change of beneficiary could not be finished without the final decree. Jay Mounce gave Mr. Howard a copy of Tim's final decree of divorce and, Mr. Howard said he would go ahead and submit it to the home office.

Based upon the testimony contained in the three aforementioned affidavits, Plaintiff argues that the state law doctrine of substantial compliance dictates that the alleged intent of the deceased -- to change the beneficiary designation from his ex-wife to his mother -- should be carried out by distributing the proceeds of his life insurance policy to his mother.

The state law doctrine of substantial compliance is not preempted by ERISA. Peckham v. Gem. State Mut. of Utah, 964 F.2d 1043, 1053 (10th Cir. 1992). The doctrine operates to carry out the intent of the insured where "the insured has done all in his power to effect a change of beneficiar[y], and after his death only ministerial acts remain to be performed . . . ." Ivey v. Wood, 387 P.2d 621, 626 (Okla. 1963) (quoting Harjo v. Fox, 146 P.2d 298, 301 (Okla. 1944)).

In the instant case, Plaintiff fails to come within the purview of the doctrine for two reasons: first, the only evidence submitted by Plaintiff in support of her claim of substantial compliance is a claim that WITCO employer Robert Howard made certain statements which are in the form of inadmissible hearsay, see Fed. R. Civ. P. 56(e); Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1555 (10th Cir. 1995), and, second, even if the Court could consider such alleged statements, the deceased had not "done all in his power to effect a change of beneficiar[y]" because, even assuming such statements to be true, he had not completed the procedure required by WITCO to change the beneficiary designation under the policy. Therefore, the doctrine of substantial compliance does not save Plaintiff's claim.

Plaintiff argues alternatively that, pursuant to Timothy Mounce's divorce decree, the life insurance proceeds are part of his estate. If this were true, then the proceeds would be payable to Plaintiff because the will of the deceased names the Plaintiff, his mother, as his sole beneficiary. In support of her argument, Plaintiff relies upon Carland v. Metropolitan Life Insurance Co., 935 F.2d 1114 (10th Cir.) cert. denied, 502 U.S. 1020 (1991), which held that "qualified domestic relations orders" ("QDROs"), as defined by 29 U.S.C. § 1056(d)(3)(B)(i),<sup>1</sup> are excluded from the preemption clause of ERISA. However, the Mounce divorce decree does not meet the statutory requirements for a QDRO. The Mounce decree does not even address the designation of a beneficiary for the proceeds of Timothy Mounce's life insurance policy. Cf. Carland, 935 F.2d at 15 1116 (where divorce decree ordered insured "to make irrevocable designation of Plaintiff as sole primary beneficiary under and of, the policies of insurance on the life of Defendant," domestic relations order was not preempted by ERISA). Therefore, Plaintiff's second argument fails as well.

In summary, in accordance with the terms of the ERISA plan, the Court awards the proceeds of Timothy Mounce's life insurance policy to Defendant, who is the sole designated beneficiary of

---

<sup>1</sup> According to 29 U.S.C. § 1056(d), a court order relating to spousal property rights is a QDRO if it "creates or recognizes the existence of an alternate payee's right to . . . receive all or a portion of the benefits payable" under a plan. 29 U.S.C. § 1056(d)(3)(B)(i)(I). To qualify under the statute, a court order must include: (1) the name of the participant and the name and mailing address of an alternate payee covered by the order, (2) the amount or percentage of benefits payable to an alternate payee or a manner of determining the amount or percentage, (3) the number of payments or period affected by the order, and (4) the plan to which the order applies. Id. § 1056(d)(3)(B)(i)(II). (d)(3)(C).

record. Plaintiff's Motion for Summary Judgment (Docket #32) is denied, and Defendant's Motion for Summary Judgment (Docket #26) is granted.

IT IS SO ORDERED.

This 12<sup>TH</sup> day of February, 1996.



---

Sven Erik Holmes  
United States District Judge

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

ENTERED ON DOCKET

2-12-96

RADCO, INC., an Oklahoma  
corporation,

Plaintiff,

v.

Case No. 93-CV-1102-H ✓

MOHAWK STEEL COMPANY,  
INC., an Oklahoma corporation;  
SHELL OIL COMPANY, a  
Delaware corporation; FOSTER  
WHEELER USA CORP., a Delaware  
corporation; FOSTER WHEELER  
CORPORATION, a New York  
corporation; ABB LUMMUS CREST,  
INC., a Delaware corporation;  
LYONDELL-CITGO REFINING  
COMPANY, L.L.C., a Texas limited  
liability company; PETRO-CHEM  
DEVELOPMENT COMPANY, INC.,  
a Delaware corporation; and  
MARATHON OIL COMPANY,  
an Ohio corporation,

Defendants.

**FILED**

FEB 9 1996

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

ORDER

This matter comes before the Court upon consideration of the Report and Recommendation of the United States Magistrate Judge (Docket #51), Defendants' Motion to Bifurcate (Docket #58), and Defendant Foster Wheeler Corporation's USA's Motion to Dismiss (Docket #86).

The Magistrate Judge entered a Report and Recommendation on March 17, 1995, recommending that this Court deny Defendants' Motion for Summary Judgment. Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the

116

moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he 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. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the

light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

Upon a *de novo* review of the record and briefs, the Court holds that material issues of fact remain, thus foreclosing entry of summary judgment. The Report and Recommendation of the Magistrate Judge is hereby adopted and Defendants' motion for summary judgment is denied.

Subsequent to the Magistrate Judge's Report and Recommendation, Defendant ABB Lummus Crest, Inc., ("Lummus") filed a Motion for Summary Judgment (Docket #102). That motion reiterates the arguments set forth in the original defendants' summary judgment motion, which the Court has denied herein. Therefore, Lummus' motion for summary judgment is also denied. Plaintiff's Motion to Strike Lummus' summary judgment motion is hereby denied (Docket #108).

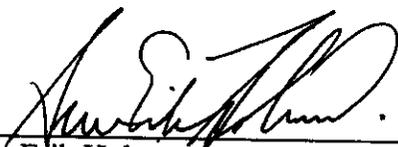
Defendants' seek to bifurcate the liability issue from the issues of willful infringement and damages. This Court may order a separate trial of any claim or separate issue "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Fed. R. Civ. P. 42(b); Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 964 (10th Cir. 1993). Bifurcation is appropriate where "such interests favor separation of issues and the issues are clearly separable." Angelo, 11 F.3d at 964. The Court concludes that bifurcation is not necessary or desirable in the present case. Therefore, Defendants' motion to bifurcate is denied.

Finally, Defendant Foster Wheeler Corporation ("FWC") filed a motion to dismiss (Docket #86). The Court concludes that it does not have personal jurisdiction over FWC, which has not "purposefully directed [its] activities at residents" of Oklahoma. See Akro Corp. v. Luker, 45 F.3d 1541, 1545 (Fed. Cir. 1995). Plaintiff's attempts to link FWC to the state solely on the basis of the Oklahoma ties of Foster Wheeler USA, FWC's wholly-owned subsidiary, must fail. FWC's motion to dismiss is therefore granted.

In summary, the Court hereby adopts the Report and Recommendation of the Magistrate Judge (Docket #51) and denies Defendants' Motion for Summary Judgment (Docket #11). The following motions also are denied: Defendant Lummus' Motion for Summary Judgment (Docket #102); Plaintiff's Motion to Strike Lummus' Motion for Summary Judgment (Docket #108); and Defendants' Motion to Bifurcate (Docket #58). Defendant FWC's Motion to Dismiss is hereby granted (Docket #86).

IT IS SO ORDERED.

This 9<sup>th</sup> day of February, 1996.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

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

**FILED**

FEB 9 1996

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

JUDITH BRANSCUM and  
KATHRYN ALLISON,

Plaintiffs,

v.

GRAND GATEWAY ECONOMIC  
DEVELOPMENT ASSOCIATION, et al.

Defendants.

Case No. 94-C-179-H

ENTERED ON DOCKET

DATE 2-12-96

**ORDER**

Before the Court for consideration is the Report and Recommendation of United States Magistrate Judge (Docket # 73) pertaining to the Motion to Dismiss of Defendants Mozingo, Pritchett, and the Board of County Commissioners of Mayes County (Docket # 2); the Motion to Dismiss of Defendant Portiss (Docket # 19); the Motion to Dismiss of Defendant Port of Catoosa (Docket # 20); the Motion to Dismiss of Defendants Leake and the Board of County Commissioners of Ottawa County (Docket # 23); the Motion to Dismiss of Defendants Poindexter and the Board of County Commissioners of Delaware County (Docket # 25); the Motion to Dismiss of Defendant Jimmie Mullin (Docket # 27); the Motion for Summary Judgment of Defendant Grand Gateway Economic Development Association (Docket # 30); the Motion to Dismiss of Defendants Payne, Guthrie and the Boards of Commissioners of Rogers and Craig Counties (Docket # 34); the Motion to Dismiss of Defendants Waylan, Wiford, and the City of Miami (Docket # 36); the Motion for Summary Judgment of Defendants Mozingo, Pritchett, and the Board of County Commissioners of Mayes County (Docket # 39); the Motion for Summary Judgment of Defendants Poindexter and the Board of County Commissioners of Delaware County (Docket # 51); and the Motion for Summary Judgment of Defendants Payne, Guthrie, and the Boards of County Commissioners of Rogers and Craig Counties (Docket # 63). Also before the Court is Plaintiffs' Objection to the Report and Recommendation (Docket # 75), Defendants Mozingo, Pritchett, and the Board of Commissioners

83

of Mayes County's Response to Plaintiffs' Objections (Docket # 77), and Defendants Poindexter and the Board of County Commissioners of Delaware County's Response to Plaintiffs' Objections (Docket # 78).

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Plaintiffs were formerly employed by Grand Gateway Economic Association ("Gateway"). Gateway is a non-profit organization; its membership is comprised of public entities, including city and county governments. Representatives from each of the participating governmental entities sit on Gateway's Board of Directors. Both Plaintiffs were terminated on March 1, 1993. At that time, Plaintiff Branscum was Director of the Area Agency on Aging and Plaintiff Allison held the position of Bookkeeper.

Plaintiffs allege each of the following: the existence of a "hostile and/or abusive work environment" in violation of Title VII, retaliatory discharge in violation of Title VII, violation of their First and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983, and wrongful discharge in violation of Oklahoma public policy.

The Report and Recommendation recommends granting the Motion to Dismiss of Defendants Mazingo, Pritchett, and the Board of County Commissioners of Mayes County (Docket # 2); the Motion to Dismiss of Defendant Portiss (Docket # 19); the Motion to Dismiss of Defendant Port of Catoosa (Docket # 20); the Motion to Dismiss of Defendants Leake and the Board of County Commissioners of Ottawa County (Docket # 23); the Motion to Dismiss of Defendants Poindexter and the Board of County Commissioners of Delaware County (Docket # 25); the Motion to Dismiss of Defendant Jimmie Mullin (Docket # 27); the Motion to Dismiss of Defendants Payne, Guthrie and

the Boards of Commissioners of Rogers and Craig Counties (Docket # 34); and the Motion to Dismiss of Defendants Waylan, Wiford, and the City of Miami (Docket # 36). In light of the dismissal of Plaintiff's federal claims against these Defendants, the Magistrate further recommends that Plaintiff's pendent state law claims be dismissed without prejudice in the interest of judicial economy. The Court has reviewed the issues de novo and agrees with the determination of the Magistrate Judge. Under the standards set forth above, the Court adopts this portion of the Magistrate's Report and Recommendation in its entirety.

The granting of the above Motions to Dismiss renders moot the Motion for Summary Judgment of Defendants Mazingo, Pritchett, and the Board of County Commissioners of Mayes County (Docket # 39); the Motion for Summary Judgment of Defendants Poindexter and the Board of County Commissioners of Delaware County (Docket # 51); and the Motion for Summary Judgment of Defendants Payne, Guthrie, and the Boards of County Commissioners of Rogers and Craig Counties (Docket # 63).

The final motion before the Court is the Motion for Summary Judgment of Defendant Grand Gateway Economic Development Association (Docket # 30). The Magistrate Judge recommends granting the Motion on Plaintiffs' Section 1983 claims and denying the Motion insofar as Plaintiffs' Title VII claims and pendent state law claims. The Court also adopts this portion of the Magistrate Judge's Report and Recommendation. Therefore, Gateway's Motion is granted, in part, and denied, in part.

Also at issue before the Court is Gateway's Motion to Consolidate Case Number 94-190(H) with this case, Case Number 94-179(H). Pursuant to Fed. R. Civ. P. 42(a), the Court believes that consolidation of these two cases is appropriate because the actions involve common questions of law and fact. Therefore, the Court orders that the two cases be consolidated under the lower case number 94-179(H). The caption of the newly consolidated case shall be amended to so reflect. Thus, the Court hereby grants Gateway's Motion to Consolidate (Docket # 72 in Case Number 94-190(H)).

In summary, the Court hereby adopts the Report and Recommendation (Docket # 73) in its entirety. The Court further consolidates the two related cases as indicated above. The remaining parties, Plaintiffs and Defendant Gateway, are ordered to appear by counsel for a case management conference for the newly consolidated case on the 8<sup>th</sup> day of March, 1996 at 3:30 p.m.

IT IS SO ORDERED.

This 9<sup>th</sup> day of FEBRUARY, 1996.



---

Sven Erik Holmes  
United States District Judge

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

ERGON ASPHALT AND EMULSIONS,) )  
INC., ) )  
an Oklahoma corporation, ) )  
 ) )  
Plaintiff, ) )  
 ) )  
vs. ) )  
 ) )  
KEYSTONE SERVICES, INC., and ) )  
MID-CONTINENT CASUALTY CO. ) )  
 ) )  
Defendants. ) )

**FILE**

FEB - 9 1996

M. Lawrence, Court

Civil Action

No. 95-C-410-*AM*

**ENTERED ON DOCKET  
DATE FEB 12 1996**

**STIPULATION OF DISMISSAL WITH PREJUDICE**

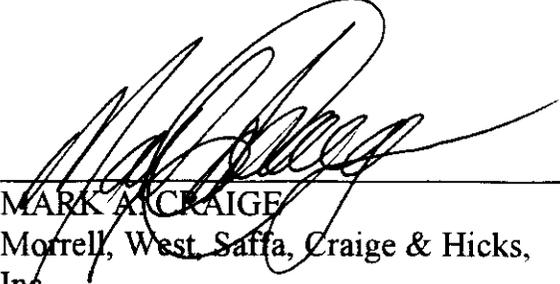
Pursuant to 41(a)(1), Fed. R. Civ. P., the Plaintiff, Ergon Asphalt and Emulsions, Inc., and the Defendants, Keystone Services, Inc. and Mid-Continent Casualty Co., hereby dismiss with prejudice all claims raised in the Plaintiff's Complaint and the Defendants' Counterclaim in the above-styled litigation.



PAUL E. SWAIN, III

Boone, Smith, Davis, Hurst & Dickman  
100 West Fifth Street, Suite 500  
Tulsa, Oklahoma 74103  
(918) 587-0000

**Attorneys for the Plaintiff, Ergon  
Asphalt and Emulsions, Inc.**



---

MARK A. CRAIGE

Morrell, West, Saffa, Craige & Hicks,  
Inc.

City Plaza West, 9<sup>th</sup> Floor

5310 East 31<sup>st</sup> Street

Tulsa, OK 74135

(918) 664-0800

**Attorneys for the Defendants,  
Keystone Services, Inc. and  
Mid-Continent Casualty Co.**

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

**FILED**

FEB - 9 1996

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

MOHAMMED AJAZ, an individual, )  
 )  
 )  
 Plaintiff, )  
 )  
 )  
 v. )  
 )  
 )  
 MAXWELL/TEMPS, INC., an )  
 )  
 Oklahoma Corporation, )  
 )  
 and KWIKSET CORPORATION )  
 )  
 a California Corporation, )  
 )  
 )  
 Defendants. )

Case No. 95-C-210-B

ENTERED ON DOCKET

FEB 12 1996

FEB 12 1996

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff and Defendant Maxwell/Temps, Inc., by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims against Maxwell/Temps, Inc., herein should be dismissed with prejudice with each side to bear its own costs and attorney fees.

DATED this 9<sup>th</sup> day of January, 1996.

Respectfully submitted,

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

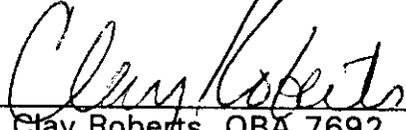
By: 

J. Patrick Cremin, OBA #2013  
Judith A. Colbert, OBA #13490  
4100 Bank of Oklahoma Tower  
One Williams Center  
Tulsa, Oklahoma 74172  
(918) 594-0400

ATTORNEYS FOR DEFENDANT  
MAXWELL/TEMPS, INC.

and

ROBERTS, MARRS & CARSON

By:  \_\_\_\_\_

C. Clay Roberts, OBA 7692  
Richard D. Marrs, OBA 5705  
Helen H. Blake, OBA 15727  
2250 East 73rd, Suite 330  
Tulsa, Oklahoma 74136

ATTORNEYS FOR PLAINTIFF

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

MOHAMMED AJAZ, an Individual,  
  
Plaintiff,

vs.

MAXWELL/TEMPS, INC., an  
Oklahoma Corporation; and  
KWIKSET CORPORATION, a  
California Corporation,  
  
Defendants.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

CASE NO. 95-C-210-B

ENTERED ON DOCKET  
DATE FEB 12 1996

FILED  
FEB - 9 1996

Ward M. Lawrence, Court Clerk  
DISTRICT COURT

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

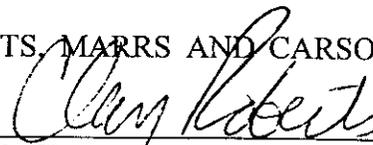
Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto stipulate that the Plaintiff shall dismiss with prejudice this matter.

WHEREFORE, the parties request the Court enter the Order of Dismissal with Prejudice, attached hereto as Attachment 1, and require each party to bear their respective attorneys' fees and costs.

Respectfully submitted,

ROBERTS, MARRS AND CARSON

By:

  
C. Clay Roberts, III  
OBA No.

2250 East 73rd St.  
Suite 330  
Tulsa, Oklahoma 74136  
Telephone: 918-492-6666

**COUNSEL FOR PLAINTIFF**

DOERNER, SAUNDERS, DANIEL &  
ANDERSON

By:   
Charles S. Plumb  
OBA No. 7194

320 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
Telephone: (918) 582-1211

CLARK , WEST, KELLER,  
BUTLER & ELLIS, L.L.P.

By:   
Allen Butler  
Texas Bar No. 03519000

1201 Elm Street  
4800 Renaissance Tower  
Dallas, Texas 75270  
Telephone: (214) 741-1001  
Facsimile: (214) 760-9812

ATTORNEYS FOR DEFENDANT  
KWIKSET CORPORATION