

11

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

STATE FARM FIRE AND CASUALTY COMPANY,

plaintiff

v.

VALORIE BARRETT and ANTHONY BARRETT,

defendants,

and

VALORIE BARRETT,

third party plaintiff

v.

BANCOKLAHOMA MORTGAGE CORP., an
Oklahoma corporation and PAUL
DAVIS SYSTEMS, INC., an Oklahoma
corporation,

third party defendants

FILED

APR 19 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

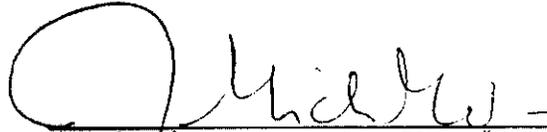
No. 95-C-237-
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DATE APR 20 1996

JOINT STIPULATION OF DISMISSAL OF
COUNTERCLAIM OF BANCOKLAHOMA MORTGAGE
CORP. AGAINST VALORIE BARRETT

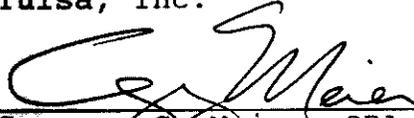
Come now BancOklahoma Mortgage Corp. ("BOMC"), Valorie and Anthony Barrett, State Farm Fire and Casualty Company and Paul Davis Systems of Tulsa, Inc., all the parties entering an appearance in this case, and stipulate, pursuant to F.R.C.P., Rule 41(A)(1)(ii), that BOMC's counterclaim against Valorie Barrett be dismissed without prejudice to its refiling.

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Frederic Dorwart, OBA #2436
J. Michael Medina, OBA #6113
Suite 100, 124 E. Fourth St.
Tulsa, Oklahoma 74103
(918) 583-9922

Attorneys for Third Party
Defendants BancOklahoma Mortgage
Corp. and Paul Davis Systems of
Tulsa, Inc.



Gregory G. Meier, OBA #6122
Jones, Givens, Gotcher & Bogan
3800 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4309
(918) 581-8252

Donald E. O'Dell, OBA #16389
1408 S. Denver Ave.
Tulsa, Oklahoma 74119
(918) 587-6568

Attorneys for Valorie and Anthony
Barrett



Neal E. Stauffer, OBA #13168
K. Bolling Rainey OBA #14619
Selman and Stauffer, Inc.
601 South Boulder, Suite 700
Tulsa, Oklahoma 74119
(918) 592-7000

Attorneys for State Farm Fire and
Casualty Company

F I L E D

APR 18 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

PRUDENTIAL SECURITIES,
INCORPORATED,

Plaintiff,

vs.

JOHN B. DALTON

Defendant.

Case No. 95-CV-1110-B

ENTERED ON DOCKET

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Mailed 4-23-96

ORDER

The Court has for consideration Cross-Motions for Summary Judgment pursuant to Fed.R.Civ.P. 56 of Plaintiff Prudential Securities, Incorporated ("Prudential") (docket #16), seeking confirmation of an Arbitration award, and Defendant/Counter-claimant John B. Dalton ("Dalton") (docket #14), seeking vacation of the same Arbitration award.

After an extensive review of the record and being fully advised, the Court concludes the Arbitration award should be and hereby is VACATED, based on the following analysis.¹

STIPULATED FACTS²

1. Dalton was employed with Prudential from January of 1983 through July of 1989. From April 1983 through March 1988, Dalton

¹In vacating the Arbitrator's dismissal of the complaint of John B. Dalton, the Court in no way suggests how the matter ultimately should be decided on the merits.

²Joint Stipulation of Parties filed January 29, 1996.

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served as office manager of the Tulsa branch of Prudential. Dalton was then demoted and remained with Prudential as a registered representative until he voluntarily resigned in July 1989.

2. As a prerequisite to employment in the securities industry, Dalton executed a Uniform Application for Securities Industry Registration ("U-4") on or about January 18, 1983.

3. Paragraph 5 of the U-4 contains an arbitration provision which is not disputed. In addition, both parties are governed by Section 3708(a) of the NASD Code of Arbitration Procedure ("Arbitration Code") which contains an additional arbitration clause.

4. On or about July 18, 1989, Dalton voluntarily left Prudential. At that time, as required by Article IV, Section 3(b) of the NASD By-Laws, Prudential issued an Uniform Termination Notice for Securities Industry Registration ("Form U-5" or "U-5") reflecting the reason for his departure.

5. On January 15, 1991, John Lytle ("Lytle"), a former client of Prudential, filed a Statement of Claim before the NASD against Prudential, Dalton, two subsequent branch managers of Prudential's Tulsa office, and a Prudential account executive. The claim alleged that (1) the account executive sold Lytle unsuitable investments, (2) Prudential, Dalton, and the two subsequent Prudential branch managers had failed to supervise the account executive, and (3) Prudential breached its fiduciary duty to Lytle and engaged in an ongoing fraud.

6. The NASD arbitration filed by Lytle alleged among other

things damages as a result of purchasing various limited partnerships through Prudential. Prudential has entered into class action settlements, as well as a settlement agreement with the SEC, with respect to the partnerships purchased by Lytle. In June 1992, Prudential was aware of investigations being conducted by the NASD and SEC with respect to the limited partnerships purchased by Lytle.³

7. The Lytle claim was settled by Prudential for the sum of \$137,000. Neither Dalton, nor the two subsequent Prudential branch managers, contributed to the settlement. As a result of that settlement, Prudential filed an Amended U-5 reflecting the Lytle settlement.⁴ No amendments were filed as to one of the subsequent branch managers.

8. Prior to filing the Amended U-5, Prudential wrote to Dalton's counsel, C. Raymond Patton ("Patton"), on April 24, 1992, enclosing a copy of the Disclosure Reporting Page from the proposed U-5 amendment. The page provided to Patton stated "Claimant alleged unsuitability in connection with investments in limited partnerships." It did not contain the additional language "alleged damages in excess of \$10,000." Boxes 13B(1) and 13B(2), which relate to questions in item 13, were not marked. Prudential received no response from either Patton or Dalton.

³While Prudential does not dispute the underlying facts as set forth in paragraph 6, it contends such facts are irrelevant to this proceeding.

⁴Prudential contends that its⁵ filing of the amended U-5 was required by law. Dalton disputes this contention.

9. On the Amended U-5 in response to Question 7 concerning Lytle's allegations, Prudential quoted from the allegation in the Lytle Statement of Claim and responded that "Claimant alleged unsuitability in connection with investments in limited partnerships. Alleged damages in excess of \$10,000." In addition, Prudential checked boxes 13B(1) and 13B(2) of the form indicating that Dalton had been the subject of an investment-related consumer initiated complaint that (1) alleged compensatory damages of \$10,000 or more, fraud, or the wrongful taking of property and (2) was settled or decided against the individual for \$5,000 or more, or found fraud or the wrongful taking of property.

10. On June 17, 1992, Patton, on behalf of Dalton, wrote to the NASD alleging that the Amended U-5 was misleading, and requesting that it be expunged from Dalton's record. Patton acknowledged that Dalton had a right to provide a summary of the transaction on the Disclosure Reporting Page, which Dalton did by filing an amended U-4 on July 23, 1992. On July 9, 1992, Keith E. Hinrichs, Assistant Director of the NASD, responded to Patton's letter by confirming that Prudential was required to amend Dalton's U-5 to include information concerning the Lytle settlement.

PROCEDURAL HISTORY

11. On May 215, 1994, Dalton initiated arbitration proceedings before the NASD by filing an Uniform Submission Agreement.

12. On May 27, 1994, Dalton filed his Statement of Claim.

13. On September 30, 1994, Prudential filed its Joint Response to the Statement of Claim and a motion to dismiss. Prudential also executed the Uniform Submission Agreement.

14. The Uniform Submission Agreement, which was signed by all parties, obligates the parties to conduct the arbitration in accordance with the Arbitration Code. The Uniform Submission Agreement provides in part:

1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, cross-claims and all related counter-claims and/or third party claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

* * *

3. The undersigned parties agree in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of Arbitration or the arbitrator(s). The undersigned parties further agree and understand that the arbitration will be in accordance with the Constitution, By-Laws, Rules, Regulations

and/or NASD Code of Arbitration procedure of the sponsoring organization.

* * *

4. The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agree that a judgment and any interest due thereon may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

15. The applicability of the Arbitration Code was not modified by the parties either in their agreement to arbitrate or in the Uniform Submission Agreements.

16. In addition to paragraph 4 of the Submission Agreement, Section 3741 of the NASD's Arbitration Code provides that:

(a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by applicable law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the applicable law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to

review or appeal.

17. On October 5, 1994, Dalton filed his response to Prudential's motion to dismiss. In his response Dalton noted the Arbitration Code does not refer to a motion proceeding which challenges the validity of a complaint. However, the Arbitration Code does not contain language precluding such a proceeding.

18. On December 21, 1994, Prudential filed its reply in support of its motion to dismiss.

19. On July 17, 1995, Prudential filed a supplemental brief. On August 10, 1995, Dalton filed his reply to Prudential's supplemental brief and Prudential filed a final supplement attaching a recent judicial opinion.

20. Prudential requested that the NASD schedule a pre-hearing conference for the purpose of hearing Prudential's motion to dismiss. On June 9, 1995, the NASD notified the parties that the pre-hearing conference was scheduled for August 18, 1995, at which time Prudential's motion to dismiss was to be heard.

21. On August 18, 1995, in Tulsa, Oklahoma, the parties attended a pre-hearing conference at which time the panel heard substantial argument on Prudential's motion to dismiss. At that time, the parties accepted the panel's composition. The panel did not admit evidence other than that which was attached to the Statement of Claim, Prudential's Response or other submissions made by the parties in regard to the motion to dismiss.

22. On August 24, 1995, the NASD arbitration administrator notified the parties that Prudential's motion had been granted,

thereby dismissing Dalton's claim with prejudice.

23. On October 12, 1995, the arbitration administrator wrote the parties enclosing a copy of the NASD final order setting forth the panel's ruling granting Prudential's motion to dismiss Dalton's claim.

24. Prudential's complaint was timely filed in accordance with Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9, which provides that a petition to confirm must be brought within one year after the award is made.

The Standard of Fed.R.Civ.P. 56
Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

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

574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980). The standard in reference to summary judgment is equally applicable to the granting of a partial summary judgment dictated in reference to a particular issue in the case.

Legal Analysis

"There is a presumption in the Federal Arbitration Act that arbitration awards will be confirmed." Bowles Financial v. Stifel, Nicolas, 1993 WL 663326, *2 (W.D. Okla.), *aff'd* 22 F.3d 1010 (10th Cir. 1994) (citing Robbins v. Day, 954 F.2d 679, 682 (11th Cir.), *cert. denied sub nom.* 113 S.Ct. 201 (1992); Booth v. Hume Publishing, Inc., 902 F.2d 925, 932 (11th Cir. 1990) (Section 9 of the arbitration act requires confirmation unless the court vacates, modifies, or corrects the award pursuant to 9 U.S.C. § 10 & 11)). The limits of judicial review of an arbitration award are very narrow. Foster v. Turley, 808 F.2d 38, 42 (10th Cir. 1986). Courts must strive to uphold the arbitrator's award, "lest the efficiency of the arbitration process be lost." Robbins, 954 F.2d at 682 (citing Anderson/Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215, 1217 (5th Cir.), *cert. denied*, 111 S.Ct. 2799 (1990)).

Despite such necessary constraints, avenues exist which allow

Courts to set aside arbitration awards for cause. The Federal Arbitration Act enumerates the limited instances in which federal Courts may vacate an arbitration award:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration...

(c) Where the arbitrators were guilty of misconduct in refusing ... to hear evidence pertinent and material to the controversy...

(d) Where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

9 U.S.C.A. § 10 (1996).

"[F]ederal courts have never limited their scope of review [of an arbitration award] to a strict reading of [9 U.S.C.A. § 10]." Bowles Financial v. Stifel, Nicolas, 22 F.3d 1010, 1012 (10th Cir. 1994) (citing Jenkins v. Prudential-Bache Sec., 847 F.2d 631, 633 (10th Cir. 1988)). An arbitrator is guided by a basic requirement to grant the parties a fundamentally fair hearing. This requirement has been expressed "in various forms." Bowles, 22 F.3d at 1013 (citing Burchell v. Marsh, 58 U.S. (17 Haw.) 344, 349, 15 L.Ed. 96 (1854) ("[i]f the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact"). Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990) ("In reviewing the district court's vacatur, we posit the...question...whether the arbitration proceedings were fundamentally unfair"); Hoteles

Condalo Beach v. Union de Trabajistas Local 901, 763 F.2d 34, 40 (1st Cir. 1985) ("Vacatur is appropriate only when the exclusion of relevant evidence 'so affects the rights of a party that it may be said that he was deprived of a fair hearing'" (citation omitted)); Bell Aerospace Co. Div. of Textron v. Local 516, Int'l Union, 500 F.2d 921, 923 (2d Cir. 1974) ("an arbitrator need not [observe] all the niceties [of] federal courts...[O]nly grant...a fundamentally fair hearing"))).

A fundamentally fair hearing requires the procedural steps of notice, an opportunity to be heard, the opportunity to present evidence which is relevant and material, and arbitrators who are not infected with bias. Bowles, 22 F.3d at 1013.

Dalton's contention is that untrue stigmatizing information was placed in the Amended U-5 by Prudential and filed with the NASD. Specifically, that which Dalton contends is stigmatizing in the Amended U-5 states the Lytle claim "was settled or decided against the individual (Dalton) for \$5,000.00 or more, or found fraud, or the wrongful taking of property."

Dalton contends that while it is true \$137,000.00 was paid by Prudential in settlement of the Lytle claim, he paid nothing, and any fraud involved was that of Prudential, not him. He further asserts that the untrue statement in the public document directly implicates him in precipitating the settlement, or that he was in some way guilty of fraud, and blackballs him in the securities industry from achieving a managerial position in the future. Dalton contends his former employer, Prudential, intentionally

falsified the U-5 to deflect attention from Prudential, who at that time was being investigated nationwide for fraud in urging their local managers and account executives to sell the subject limited partnerships sponsored by Prudential.

Dalton's principal claim alleges a breach of fiduciary duty by his former employer and tortious interference with future economic advantage under Oklahoma law. Dalton also asserts a claim in another matter to be reimbursed an attorney's fee which he alleges Prudential agreed to pay.

In response to Dalton's arbitration claim, Prudential filed a motion to dismiss for failure to state a claim and urged various defenses, i.e., the filing of the Amended U-5 is absolutely privileged, *res judicata*, estoppel, and statute of limitations.

In the arbitrator's order dismissing Dalton's complaint it is stated:

"After considering the pleadings, the oral arguments on the Motion to Dismiss and the evidence or materials presented at the pre-hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Prudential Securities Incorporated's Motion to Dismiss is hereby granted in its entirety; therefore, all claims asserted in the Statement of Claim are hereby dismissed in their entirety;
2. All requests for relief not specifically granted herein are hereby denied in their entirety; and
3. The parties shall bear their own costs of arbitration including attorneys' fees except for those costs specifically enumerated herein."

Dalton asks the Court to vacate the arbitration award pursuant to Section 10 of the FAA, 9 U.S.C. § 10, on the following grounds: the panel was guilty of misconduct in refusing to allow a complete presentation of evidence pertinent and material to the controversy; the arbitrators exceeded their powers provided by the Arbitration Code procedure in considering and granting the motion to dismiss for failure to state a claim; the arbitrators' award manifests a complete and total disregard of the law; and that the arbitrators' award is contrary to public policy. Prudential, in its motion for summary judgment, asserts a majority of the arbitration panel of three had authority under the circumstances to grant Prudential's motion to dismiss following the hearing thereon.

The NASD Uniform Submission Agreement signed by all the parties obligates them to conduct the arbitration in accordance with the Arbitration Code. The Arbitration Code, which sets forth the ground rules of arbitration, contains no provision for the filing of a motion to dismiss for failure to state a claim. It is also noted the Code does not prohibit such a motion. Because arbitration proceedings are recognized as informal, and not bound by the strict rules of the law and equity courts, in the appropriate case after hearing an argument, arbitrators would undoubtedly have authority to dismiss a claim which, on its face, does not state a claim entitling the claimant to relief, whether frivolous or not.

Herein, the arbitration panel's notice to claimant Dalton of the pre-hearing conference was scheduled for the purpose of hearing

Prudential's motion to dismiss. At the pre-hearing conference, the panel did not hear any testimony from witnesses but considered the oral presentation of counsel for the parties and considered documentation in the file consisting of the statement of the claim, Prudential's motion to dismiss, and the parties' briefs with attachments to same. Thus, claimant Dalton was not provided the opportunity to have his previous motion to compel production of documents heard, nor was he given the opportunity to present factual evidence at a hearing relative to the factual issues presented by his claim. The award of the arbitrators sustaining Prudential's motion to dismiss without a hearing on the merits was by a 2 to 1 vote.

Federal courts presented with a claim to vacate an arbitration award under § 10 of the FAA generally looked to a determination of whether the arbitration process provided fundamental fairness, in essence, fundamental due process. The Tenth Circuit Court of Appeals stated in Bowles Financial Group v. Stifel, Nicolaus & Co., 22 F. 3rd 1010 (10th Cir. 1994):

Federal courts have never limited their scope of review [of an arbitration award] to a strict reading of [9 U.S.C.A. § 10], "Jenkins, 847 F.2d at 633. Courts have created a basic requirement that an arbitrator must grant the parties a fundamentally fair hearing, expressing their requirement in various forms. Burchell v. Marsh, 58 U.S. (17 Haw.) 344, 349, 15 L.Ed. 96 (1854):

If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either "in law or in fact").

* * *

The courts seem to agree that a fundamentally fair hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers, and that the decision makers are not infected with bias. See Robbins v. Day, 954 F.2d 679, 685 (11th Cir.).

* * *

Sunshine Mining Co. v. United Steel Workers of Am., 823 F.2d 1289, 1295 (9th Cir. 1987) ("Hearing is fundamentally fair if it meets the minimum requirements of fairness '/ adequate notice, a hearing on the evidence . . . impartial decision'") (quoting Ficek v. Southern Pacific Co., 338 F.2d 655, 657 (9th Cir. 1964), cert. denied, 380 U.S. 988, 85 S.Ct. 1362, 14 L.Ed.2d 280 (1965)). (emphasis added.)

This Court is of the view the arbitration panel was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy and exceeded their powers in granting the motion to dismiss without hearing such evidence. The claimant was thereby denied fundamental fairness.

Before an arbitration panel should be able to dismiss a claim for failure to state a claim upon which relief can be granted, the claim should be facially deficient. Such is not the case here for if the allegations of the claimant's complaint are taken to be true, he would be entitled to some form of relief, even if it were limited to requiring Prudential to file a second Amended U-5 to set out the true nonstigmatizing facts. Thus, to assure fundamental fairness, claimant is entitled to offer evidence relevant to his claim.

Prudential, in support of the motion to dismiss, asserted that

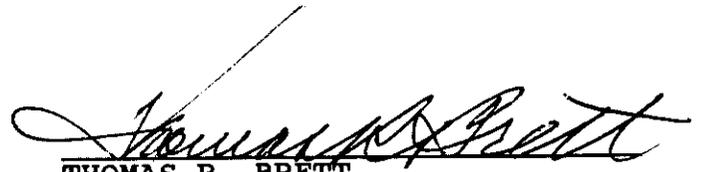
it was required to amend Dalton's form U-5, more than four years after his termination as branch manager, to update the Lytle claim when it was settled. The court believes this is correct as the NASD rules require updating the claim disposition. Prudential also states that the matters asserted in the amended form U-5 filed in June 1992 were true and accurate. Prudential further asserts that Dalton and his counsel were furnished with a copy of the appropriate page of the Amended U-5 for review and comment. The stipulated facts indicate to the contrary because Dalton and his counsel were not furnished with any part of the U-5 that stated the claim had been settled for \$137,000.00 against Dalton, or as the result of Dalton's fraudulent acts or wrongful taking of property. Further, if Dalton's allegations are correct, it was not his fraudulent acts that precipitated the settlement but those of his employer, Prudential, in sponsoring and urging the sale of the subject limited partnerships. For this reason, Prudential's claim of estoppel lacks validity, if Dalton's factual claims can be established. Additionally, Prudential urges that responses by a brokerage firm in a form U-5 are absolutely privileged. Prudential also cites legal authority in support. Dalton cites the case of Baravati v. Josephthal, Lyon and Ross, Incorporated, 28 F.3rd 704 (7th Cir. 1994). In Baravati, the court held that the U-5 termination notice required by the NASD is not absolutely privileged as a communication made in a judicial or quasi-judicial proceedings so as to insulate members from liability for contents of the form. The Court concludes that Baravati is the better view

and also conforms to Oklahoma law. Kirschstein v. Hanes, 788 P.2d 941, at 947 (Okla. 1990).

Prudential's *res judicata* defense does not appear to be supported by the record. The prior arbitration proceeding to which Prudential alludes involved different issues and different factual matters, unrelated to the Amended U-5 filing in the instant matter. Prudential also urged that the one year statute of limitations under Oklahoma in a defamation case has expired. However, the arbitration complaint herein by Dalton does not sound in defamation but in alleged breach of fiduciary duty and tortious interference with economic advantage, each of which have two year statutes of limitation under the law of Oklahoma.

The issue before the Court at this time is not who is ultimately going to prevail. The issue is whether or not claimant Dalton was granted a fair hearing under the Arbitration Code to offer evidence in support of his factual claims. As previously stated, the Court concludes by sustaining the motion to dismiss of Prudential the arbitration panel improperly denied claimant the right to a fundamentally fair hearing. Therefore, the Court hereby vacates the underlying arbitration award for the reasons stated above and directs the parties and the matter be remanded to a duly constituted NASD arbitration panel to proceed with an evidentiary hearing and ruling on the merits, within six months from this date.

IT IS SO ORDERED this 18th day of April, 1996.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett". The signature is written in black ink on a white background.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 4-19-96

FILED

APR 18 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,)
)
 PLAINTIFFS,)
)
 vs.)
)
 SUN COMPANY, INC., (R&M), a Pennsyl-)
 vania corporation; and SUN COMPANY,)
 INC., a Pennsylvania corporation,)
)
 DEFENDANTS.)

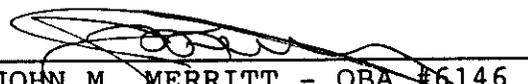
CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Hilda Bolen and Lucian Bolen, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.


JOHN M. MERRITT - OBA #6146
Merritt & Rooney, Inc.
P.O. Box 60708
Oklahoma City, OK 73146
(405) 236-2222
Attorneys for Plaintiffs


ROBERT P. REDEMANN - OBA #7454
Rhodes, Hieronymus, Jones
Tucker & Gable
2800 Fourth National Bank Bldg.
Tulsa, OK 74119
Attorneys for Defendants

ENTERED ON DOCKET

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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Phil Lombardi, Clerk
U.S. DISTRICT COURT

IDELL WARD, et al.,)
)
 PLAINTIFFS,)
)
 vs.)
)
 SUN COMPANY, INC., (R&M), a Pennsyl-)
 vania corporation; and SUN COMPANY,)
 INC., a Pennsylvania corporation,)
)
 DEFENDANTS.)

CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Mary Jackson, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.



JOHN M. MERRITT - OBA #6146
Merritt & Rooney, Inc.
P.O. Box 60708
Oklahoma City, OK 73146
(405) 236-2222
Attorneys for Plaintiffs



ROBERT P. REDEMANN - OBA #7454
Rhodes, Hieronymus, Jones
Tucker & Gable
2800 Fourth National Bank Bldg.
Tulsa, OK 74119
Attorneys for Defendants

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 18 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IDELL WARD, et al.,)
)
PLAINTIFFS,)
)
vs.)
)
SUN COMPANY, INC., (R&M), a Pennsyl-)
vania corporation; and SUN COMPANY,)
INC., a Pennsylvania corporation,)
)
DEFENDANTS.)

CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

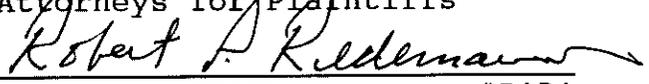
COME(S) NOW the Plaintiff, Mary Marshell, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.



JOHN M. MERRITT - OBA #6146
Merritt & Rooney, Inc.
P.O. Box 60708
Oklahoma City, OK 73146
(405) 236-2222
Attorneys for Plaintiffs



ROBERT P. REDEMANN - OBA #7454
Rhodes, Hieronymus, Jones
Tucker & Gable
2800 Fourth National Bank Bldg.
Tulsa, OK 74119
Attorneys for Defendants

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NORTHERN DISTRICT OF OKLAHOMA

APR 18 1996

IDELL WARD, et al.,)
)
PLAINTIFFS,)
)
vs.)
)
SUN COMPANY, INC., (R&M), a Pennsyl-)
vania corporation; and SUN COMPANY,)
INC., a Pennsylvania corporation,)
)
DEFENDANTS.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

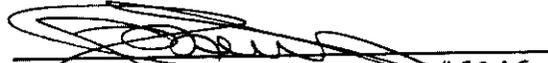
CASE NO. 94-C-1059-H

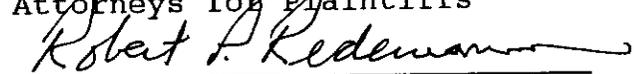
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Arthur Waquoi, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.


 JOHN M. MERRITT - OBA #6146
 Merritt & Rooney, Inc.
 P.O. Box 60708
 Oklahoma City, OK 73146
 (405) 236-2222
 Attorneys for Plaintiffs


 ROBERT P. REDEMANN - OBA #7454
 Rhodes, Hieronymus, Jones
 Tucker & Gable
 2800 Fourth National Bank Bldg.
 Tulsa, OK 74119
 Attorneys for Defendants

ENTERED ON DOCKET

4-19-96

FILED

APR 18 1996

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,
PLAINTIFFS,
vs.
SUN COMPANY, INC., (R&M), a Pennsyl-
vania corporation; and SUN COMPANY,
INC., a Pennsylvania corporation,
DEFENDANTS.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

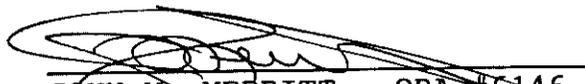
CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Steve Sweet, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.



JOHN M. MERRITT - OBA #6146
Merritt & Rooney, Inc.
P.O. Box 60708
Oklahoma City, OK 73146
(405) 236-2222
Attorneys for Plaintiffs



ROBERT P. REDEMANN - OBA #7454
Rhodes, Hieronymus, Jones
Tucker & Gable
2800 Fourth National Bank Bldg.
Tulsa, OK 74119
Attorneys for Defendants

ENTERED ON DOCKET
DATE 4-19-96

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,)
)
 PLAINTIFFS,)
)
 vs.)
)
 SUN COMPANY, INC., (R&M), a Pennsyl-)
 vania corporation; and SUN COMPANY,)
 INC., a Pennsylvania corporation,)
)
 DEFENDANTS.)

CASE NO. 94-C-1059-H

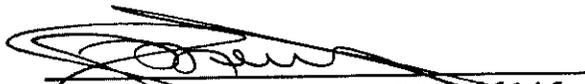
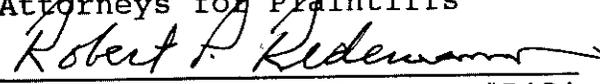
FILE
APR 18 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Eric Wilson, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.


JOHN M. MERRITT - OBA #6146
Merritt & Rooney, Inc.
P.O. Box 60708
Oklahoma City, OK 73146
(405) 236-2222
Attorneys for Plaintiffs

ROBERT P. REDEMANN - OBA #7454
Rhodes, Hieronymus, Jones
Tucker & Gable
2800 Fourth National Bank Bldg.
Tulsa, OK 74119
Attorneys for Defendants

ENTERED ON DOCKET
DATE 4-19-96
FILED

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

APR 18 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IDELL WARD, et al.,)
)
 PLAINTIFFS,)
)
 vs.)
)
 SUN COMPANY, INC., (R&M), a Pennsyl-)
 vania corporation; and SUN COMPANY,)
 INC., a Pennsylvania corporation,)
)
 DEFENDANTS.)

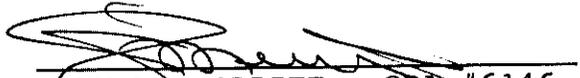
CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Charlotte Ellis, and Melissa Parrish, Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.


JOHN M. MERRITT - OBA #6146
Merritt & Rooney, Inc.
P.O. Box 60708
Oklahoma City, OK 73146
(405) 236-2222
Attorneys for Plaintiffs


ROBERT P. REDEMANN - OBA #7454
Rhodes, Hieronymus, Jones
Tucker & Gable
2800 Fourth National Bank Bldg.
Tulsa, OK 74119
Attorneys for Defendants

FILED

APR 18 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

MOVITA PATTERSON,

Plaintiff,

vs.

HILTI, INC.,

Defendant.

Case No. 95-C-758-E

ENTERED ON DOCKET

APR 19 1996

DATE

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Hilti, Inc. and against the Plaintiff, Movita Patterson. Plaintiff shall take nothing of her claim. Costs and attorney fees may be awarded upon proper application.

Dated, this 18th day of April, 1996.


**JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT**

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

F I L E D

APR 18 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MOVITA PATTERSON,)
)
Plaintiff,)
)
vs.)
)
HILTI, INC.,)
)
Defendant.)

Case No. 95-C-758-E

ENTERED ON DOCKET

DATE APR 19 1996

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #9) of the Defendant Hilti, Inc. (Hilti).

Plaintiff Movita Patterson (Patterson) brought this case claiming that her employer, Hilti, discharged her in retaliation for filing a charge of discrimination with the Oklahoma Human Rights Commission (OHRC). Patterson, a black female, was employed by Hilti from October 4, 1979 until her discharge on March 7, 1994. Beginning in April, 1992, until the time of her discharge, Patterson worked in the Drill Bit Testing Department. While in that department, she was disciplined on several occasions: she received verbal warnings on January 7 and February 25, 1993, and written warning on March 11, 1993 regarding her performance of her job. Subsequently, she filed a charge of discrimination with the OHRC, claiming that the discipline she received was discriminatory in that white workers in her department were doing the same things for which she was being written up, but they were not receiving any discipline. During the pendency of her complaint, she received another verbal warning for her performance on August 27, 1993, and a final written warning on September 8, 1993. Patterson's OHRC Complaint was dismissed by Order dated February 10, 1994, and Patterson received a copy of that Order either on February 12 or 14, 1994. Hilti received the Order

dismissing the Complaint on February 23, 1994. Patterson received another warning on February 28, 1994, and was then discharged on March 7, 1994. Patterson asserts that she was discharged in retaliation for having filed a complaint with the OHRC. Hilti argues that it is entitled to summary judgment on this claim because Plaintiff cannot establish a *prima facie* case of retaliation, and because it had non-pretextual, legitimate business reasons for terminating Patterson.

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

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Hilti urges that summary judgment is appropriate here because Patterson cannot establish a *prima facie* case of retaliation. A *prima facie* case of retaliation is established by showing that the employee: 1) engaged in protected opposition to discrimination or participated in a Title VII proceeding; 2) was disadvantaged by an action of her employer subsequent to the opposition or participation; and 3) that there is a causal connection between the protected activity and the adverse

employment action. Burrus v. United Telephone Company of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982). In this case, it is undisputed that Patterson can establish the first two elements of a prima facie case, and the sole controversy, therefore, revolves around Patterson's ability to establish a causal relationship between her OHRC claim and her termination. It is, however, also undisputed that the only evidence Patterson has to establish such a causal relationship is the timing of the filing of her complaint, the dismissal of her complaint, and her discharge. Patterson was discharged approximately ten months after her complaint was filed and thirteen days after Hilti received notice of the dismissal of her complaint. Thus, the only issue is whether this timing is sufficient to support an inference of a causal connection between protected activity and Patterson's discharge.

Patterson's theory of her case is that the close temporal relationship between Hilti receiving notice of the dismissal of her complaint and her discharge is sufficient to prove the necessary causal connection. In this respect, Patterson argues:

It was not Plaintiff's attitude that changed in February, 1994. It was the attitude of the Hilti supervisors and managers that changed on February 24, 1994, after they learned on February 23, 1994, that they were no longer faced with a pending charge of racial discrimination from Plaintiff. Those supervisors and managers felt free to document what they perceived as poor performance and fire Plaintiff without fear of retribution since Plaintiff's challenge to their previous racially motivated attempts to discipline her had been dismissed by the OHRC.

Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 6.

The authority in this circuit, however, does not support Patterson's attempt to gain an inference of retaliatory motive from the temporal relationship between the dismissal of the OHRC complaint and the Patterson's discharge. The Burrus court first addressed the temporal relationship as providing an inference of retaliatory motive: "The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct

closely followed by adverse action.” Burnus, 683 F.2d at 343. In that case, however, the court found that the three year gap between filing charges and termination was not sufficient to support an inference.

Subsequently, in Candelaria v. EG&G Energy Measurements, Inc., 33 F.3d 1259, 1261-62 (10th Cir. 1994), the court noted as follows:

We are mindful that a retaliatory motive can be inferred from the fact that an adverse employment action follows charges by an employee against his/her employer. Such an inference can only be made, however, where ‘close temporal proximity’ exists between the bringing of charges and the subsequent adverse action.

The Candelaria court did not quantify what was necessary for “close temporal proximity,” although it noted cases in which two and one half years was not sufficient, and two months was. What is notable, however, is that the Candelaria court made it clear that the temporal proximity that was relevant was between the filing of charges and the termination.

This point is emphasized by the court in Hayes v. State of Kansas, 76 F.3d 392, 1996 WL 41841 (10th Cir. (Kan.)). That court held that Plaintiff’s filing of charges did not raise an inference of retaliation when the discharge was more than four years after the filing of charges, and then specifically noted: “[t]hat those charges were pending and a probable cause finding had been made when plaintiff was discharged is not decisive.” The same must be true of the fact that charges had been pending and the charge dismissed immediately before discharge in this case. Under the law of this circuit, those fact are not decisive.

The Court further finds that the ten months between the filing of charges and the discharge is insufficient to support an inference of retaliatory motive. Therefore Patterson has not established a prima facie case, Defendant’s Motion for Summary Judgment (Docket #9) is granted, and the pretrial conference set for Friday, April 19, 1996, at 10:30 a.m. is stricken.

IT IS SO ORDERED THIS 18th DAY OF APRIL, 1996.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
vs.)
)
NATHAN EUGENE WILLIAMS; ANN)
LOUISE WILLIAMS; STATE OF)
OKLAHOMA ex rel OKLAHOMA TAX)
COMMISSION; COUNTY)
TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

F I L E D

APR 18 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 19 1996

Civil Case No. 95-C 707E

ORDER

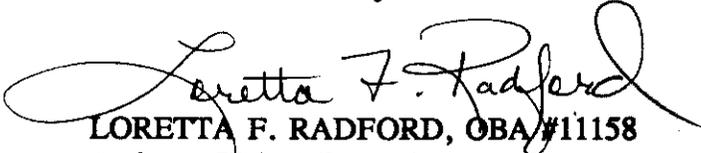
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that the sale of subject property set for April 23, 1996 is canceled, the Judgment of Foreclosure filed January 23, 1996 is vacated, and that this action shall be dismissed without prejudice.

Dated this 18 day of April, 1996.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Loretta F. Radford". The signature is written in black ink and is positioned above the printed name and contact information.

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 18 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

M. ALI DJAHEDIAN aka MOHAMAD A.)
DJAHEDIAN; JOYCE A. DJAHEDIAN)
aka JOYCE DJAHEDIAN; FEDERAL)
NATIONAL MORTGAGE ASSOCIATION;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)

Defendants.)

ENTERED ON DOCKET

DATE APR 19 1996

CIVIL ACTION NO. 93-C-519-E

ORDER OF DISBURSAL

NOW on the 18 day of April, 1996, there came on for

consideration the matter of disbursal of \$61,000.00 received by the United States Marshal for the sale of certain property described in the Notice of Sale in this case. The Court finds that the said \$61,000.00 should be disbursed as follows:

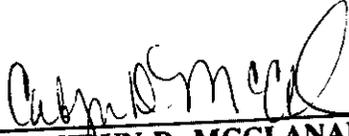
United States Marshal's Costs		\$ 462.42
Executing Order of Sale	\$ 3.00	
Advertising Sale Fee	3.00	
Conducting Sale	3.00	
Appointing Appraisers	6.00	
Appraisers' Fees	225.00	
Publisher's Fee (Notice of Sale)	179.82	
Publisher's Fee (Confirmation Hearing)	42.60	
County Treasurer, Tulsa County, Oklahoma		\$ 342.05
Federal National Mortgage Association		\$26,191.09
United States Department of Justice (Credit to Judgment of SBA)		\$34,004.44

S/ JAMES O. ELLISON

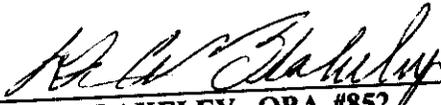
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



CATHRYN D. MCCLANAHAN, OBA #014853
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) 596-4841
Attorney for Defendants,
County Treasurer, Tulsa County, Oklahoma



THOMAS M. ASKEW, OBA #13568
900 ONEOK Plaza
Tulsa, Oklahoma 74103
(918) 584-4136
Attorney for Defendant,
Federal National Mortgage Association

Order of Disbursal
Civil Action No. 93-C-519-E

CDM:cm

4/17/96

FILED

APR 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

FRANCIS E. WILSON,

Plaintiff,

vs.

CITY OF BROKEN ARROW, MAYOR,
and POLICE CHIEF,

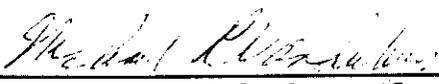
Defendants.

Civil Action No. 95-C-314-BU

ENTERED ON DOCKET
APR 18 1996
DATE _____

STIPULATION OF DISMISSAL WITH PREJUDICE

Comes now plaintiff, Frances E. Wilson, and, pursuant to Fed. R. Civ. R. 41(a)(1)(ii), hereby dismisses, as against defendants, City of Broken Arrow, Mayor and Police Chief, all claims and causes of action in this case, with prejudice to the refileing of same.



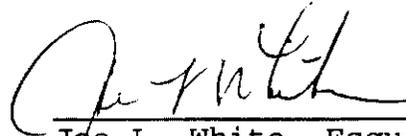
Michael R. Vanderburg for the
City of Broken Arrow, Mayor of
Broken Arrow and Police Chief
of Broken Arrow



Frances E. Wilson



S. M. Fallis, Jr., OBA # 2813
Steven M. Kobos, OBA # 01426
Nichols, Wolfe, Stamper, Nally,
Fallis & Robertson, Inc.
Suite 400 Old City Hall
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182



Joe L. White, Esquire
1718 West Broadway
Collinsville, Oklahoma 74021

ATTORNEY FOR FRANCES E. WILSON

ATTORNEYS FOR CITY OF BROKEN
ARROW, MAYOR OF BROKEN ARROW
and POLICE CHIEF OF BROKEN
ARROW

No. CRF-87-2693 as well as his conviction in Case No. CRF-86-282.¹ As to his conviction in Case No. CRF-87-2693, Petitioner alleged a violation of his Fifth Amendment right against double jeopardy because the trial court imposed consecutive rather than concurrent sentences.² He argued that his criminal activity could not give rise to the charging of three separate crimes. The Magistrate Judge found that Petitioner's three purchases of jewelry, each proved by a separate sale transaction, were separate and distinct offenses which justified the imposition of consecutive sentences. The Tenth Circuit Court of Appeals affirmed.

On January 23, 1992, Petitioner filed a second petition for a writ of habeas corpus in the Western District of Oklahoma, contending that Okla. Stat. tit. 57, § 332.7, had been retroactively applied to him in violation of the *Ex Post Facto* Clause of the Constitution. The action was transferred to the Northern District of Oklahoma where the Magistrate Judge recommended that Petitioner be considered immediately for parole. On June 21, 1994, the district court adopted and affirmed the Report and Recommendation.

In the instant action, filed on August 15, 1995, Petitioner again challenges his consecutive sentences in Tulsa County Case No.

¹ After remand from the Tenth Circuit Court of Appeals, Petitioner requested permission to amend his petition to include additional issues arising in CRF-87-2693 so as to avoid abusing the writ by any subsequent filing.

² Petitioner also alleged ineffective assistance of counsel and error by the trial court by use of both prior convictions for enhancement when they arose out of the same transaction in violation of Okla. Stat. tit. 21, § 51(B).

CRF-87-2693. He contends the trial court abused its discretion in sentencing him to three consecutive sentences, despite the provisions of Okla. Stat. tit. 22, § 404. Respondents take the position that Petitioner has not raised a new ground and therefore, that his petition is successive. Even if Petitioner has raised a new claim, Respondents contend it constitutes an abuse of the writ.

II. ANALYSIS

The law regarding dismissal of successive section 2254 petitions is clear. Rule 9(b) states as follows:

Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In this case it is undisputed that Petitioner previously filed two habeas corpus actions. Therefore, Petitioner bears the burden of showing that "the ends of justice would be served by a redetermination of the ground," Parks v. Reynolds, 958 F.2d 989, 994 (10th Cir. 1992) (quoting Sanders v. United States, 373 U.S. 1 (1963)), cert. denied, 503 U.S. 928 (1992), and the entry of an order granting relief. In McCleskey v. Zant, 499 U.S. 467, 495 (1991), the Supreme Court equated the "ends of justice" inquiry with the "fundamental miscarriage of justice" inquiry. See also Parks, 958 F.2d at 994.

The Supreme Court recently summarized its prior holdings involving a defendant's subsequent use of the habeas writ. In

Herrera v. Collins, 506 U.S. 390, 403-404 (1993), the Court stated

that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.

See also McCleskey v. Zant, 499 U.S. at 495; Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion); Parks, 958 F.2d at 995. But see Schlup v. Delo, 115 S.Ct. 851 (1995).

Petitioner has made no colorable showing of actual innocence as to his conviction in CRF-87-2693 which would justify reaching the merits of the successive claim. Therefore, the Court finds that Petitioner's claim should be dismissed as successive under Rule 9(b).

Liberalizing Petitioner's ground for habeas relief as a new claim under Rule 9(b), Petitioner may be excused from failing to raise the instant claim in his first habeas petition if he establishes "cause" and "prejudice" as defined by the standard used in procedural default cases. See McCleskey, 499 U.S. at 494. "Cause" must be an objective, external factor that impeded Petitioner from raising his claim earlier, such as interference by officials or a showing of the reasonable unavailability of factual or legal basis for a claim. Id. The lack of knowledge must be due to lack of reasonable access to law books and rules as opposed to mere ignorance of the rules or the law.³ Cf. Watson v. State of

³ The McCleskey's cause-and-prejudice standard applies to pro se litigants just as it does to those who are assisted by

New Mexico, 45 F.3d 385, 387 (10th Cir. 1995); Dulin v. Cook, 957 F.2d 758, 760 (10th Cir. 1992).

Petitioner alleges he was unaware of the instant claim at the time of filing his first habeas petition. He contends Oklahoma cases have not discussed Okla. Stat. tit. 22, § 404, for over twenty years, and the Tenth Circuit Court of Appeals did so for the first time in Mansfield v. Champion, 992 F.2d 1098 (10th Cir. 1993), after the filing of his first and second petitions for a writ of habeas corpus. Petitioner further contends that the law library at James Crabtree Correctional Center did not have case law from 1912 and, therefore, he could not have discovered Tucker v. State, 128 P. 313 (1912), had it not been for the Tenth Circuit ruling in Mansfield and its reliance on Tucker.

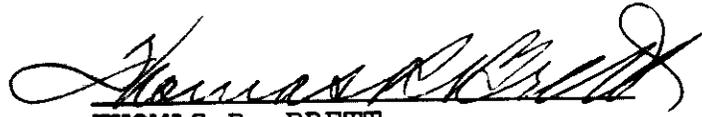
Petitioner's reliance on Mansfield and section 404 is misplaced. Since 1977 Oklahoma courts have recognized that section 404 was repealed by implication upon the enactment of 22 O.S. 1971, §§ 436 and 440. See State v. Lowe, 627 P.2d 442 (Okla.Crim.App. 1981) (citing Dodson v. State, 562 P.2d 916 (Okla.Crim.App. 1977) (Brett, J., specially concurring); and Phelps v. State, 598 P.2d 254 (Okla.Crim.App. 1979). Therefore "joinder of separately punishable offenses is permitted if the separate offenses arise out of one criminal act or transaction, or are part of a series of criminal acts or transactions." Pack v. State, 819 P.2d 280, 282

counsel. Watson v. State of New Mexico, 45 F.3d 385, 388 n.3 (10th Cir. 1995); Dulin v. Cook, 957 F.2d 758, 760; Saahir v. Collins, 956 F.2d 115, 119 (5th Cir. 1992); see also United States v. Flores, 981 F.2d 231, 236 n.8 (5th Cir. 1993).

(Okla.Crim.App. 1991) (citing Glass v. State, 701 P.2d 765, 768 (Okla.Crim.App. 1985)). Therefore, Petitioner cannot show cause and prejudice for failing to raise this claim in his first federal habeas action.

Accordingly, Respondent's motion to dismiss second petition for writ of habeas corpus (docket #4) is GRANTED and the petition is hereby DISMISSED pursuant to Rule 9(b) of the Rules Governing Section 2254 cases.

SO ORDERED THIS 15 day of Apr., 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

APR 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

C. VINSON REED,)
)
Plaintiff,)
)
vs.)
)
STATE OF OKLAHOMA ex rel.)
OKLAHOMA TAX COMMISSION, and)
THE UNITED STATES OF AMERICA)
ex rel. INTERNAL REVENUE)
SERVICE,)
)
Defendants.)

CASE NO. 93-C- 439B

ENTERED ON DOCKET
DATE APR 17 1996

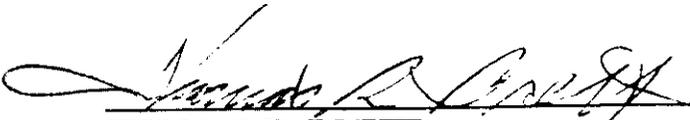
ORDER TO DISTRIBUTE INTERPLEAD FUNDS

This cause is before the Court on Defendants' Joint Motion to Distribute Interplead Funds.

The Court finds that based upon the decision of the United States Court of Appeals for the Tenth Circuit in *Burns v. Oklahoma Tax Commission and Internal Revenue Service*, 59 F.3d 147 (10th Cir. 1995) that the Plaintiff's interplead funds should be distributed as follows:

1. Oklahoma Tax Commission Warrant No. STS-87-003457 in the amount of Two Thousand Three Hundred Seventy-eight Dollars and Two Cents (\$2,378.02).

IT IS THEREFORE ORDERED that interplead funds from this case in the amount of Two Thousand Three Hundred Seventy-eight Dollars and Two Cents (\$2,378.02) be distributed to Defendant Oklahoma Tax Commission this 16th day of April, 1996.


THOMAS R. BRETT
United States Chief District Judge

FILED

APR 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

ENTERED ON DOCKET

DATE ~~APR 17 1996~~

No. 93-C-328-E ✓

ORDER

In accordance with the opinion and judgment entered by the Tenth Circuit Court of Appeals in Case No. 94-5135, the Court reverses the summary judgment in favor of First National Bank & Trust Company of Okmulgee granted by the Bankruptcy Court for the Northern District of Oklahoma, and remands the case to the Bankruptcy Court for further proceedings in light of the Tenth Circuit's ruling.

ORDERED this 16th day of April, 1996.



 JAMES O. ELLISON
 UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT **FILED**
FOR THE NORTHERN DISTRICT OF OKLAHOMA APR 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT E. PARKER, INC.,)
)
Plaintiff,)
)
vs.)
)
STATE OF OKLAHOMA, *ex rel.*)
OKLAHOMA TAX COMMISSION, and)
UNITED STATES OF AMERICA, *ex rel.*)
INTERNAL REVENUE SERVICE,)
)
Defendants.)

CASE NO. 93-C-111E

ENTERED ON DOCKET
DATE APR 17 1996

ORDER TO DISTRIBUTE INTERPLEAD FUNDS

The cause is before the Court on Defendants' Joint Motion to Distribute Interplead Funds.

The Court finds that based upon the decision of the United States Court of Appeals for the Tenth Circuit in *Burnus v. Oklahoma Tax Commission*, 59 F.3d 147 (10th Cir. 1995) that the Plaintiff's interplead funds should be distributed as follows:

1. Oklahoma Tax Commission Warrant No. 1118 in the amount of One Thousand Eight Hundred Eight Dollars and Seventy-six Cents (\$1,808.76);
2. Oklahoma Tax Commission Warrant No. 1150 in the amount of Twelve Thousand One Hundred Twenty-nine Dollars and Sixty Cents (\$12,129.60);
3. Oklahoma Tax Commission Warrant No. ITI87012566 in the amount of One Thousand Two Hundred Sixty-six Dollars and Seventy-two Cents (\$1,266.72);

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4-17

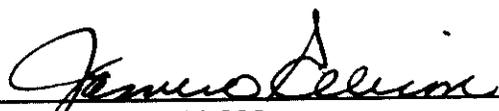
109

4. Oklahoma Tax Commission Warrant No. ITE89000204 in the amount of Two Hundred Ninety-seven Dollars and Thirty Cents (\$297.30);

5. Oklahoma Tax Commission Warrant No. ITI89001677 in the amount of Two Thousand Thirty-two Dollars and Sixty Cents (\$2,032.60);

6. Federal Tax Lien Serial Number 739127260 in the amount of Fourteen Thousand Nine Hundred Seventy-two Dollars and Forty-six Cents (\$14,972.46).

IT IS THEREFORE ORDERED that the Court Clerk disburse from the interplead monies previously tendered to the court (in the principle sum of \$32,507.44) the sum of Seventeen Thousand Five Hundred Thirty-four Dollars and Ninety-eight Cents (\$17,534.98) to Defendant Oklahoma Tax Commission. The Clerk is to distribute the remainder of the principle amount Fourteen Thousand Nine Hundred Seventy-two Dollars and Forty-six Cents (\$14,972.46), with accrued interest thereon, less the appropriate Registry Fee, to Defendant United States of America. The Court Clerk is to make such disbursements as soon as practicable after the next renewal date of the interest bearing account in which the monies are invested.



JAMES O. ELLISON
United States District Judge

C:\Bob\L93003.Ord

FILED

APR 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

CENTERDOR JACKSON,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 95-C-1153-E

ENTERED ON DOCKET

APR 17 1996

DATE

ORDER

This matter comes before the Court on Defendants' motion to dismiss or, in the alternative, for summary judgment filed on January 31, 1996. Plaintiff has not responded, although the Court granted him a twenty-five day extension of time on March 12, 1996.

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE for lack of prosecution.

SO ORDERED THIS 16th day of April, 1996.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

FILED

APR 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JOHN R. CARLETON, Personal Representative of)
the Estate of Angela Nell Carleton, deceased,)

Plaintiff,)

vs.)

CITY OF TULSA, OKLAHOMA, a municipal)
corporation, OFFICER MIKE HANLEY,)
CORPORAL DAN McSLARROW, and OFFICER)
JOHN DOE,)

Defendants.)

AND:

DEBORAH STURDIVAN BAUGHMAN,)

Plaintiff,)

vs.)

CITY OF TULSA, OKLAHOMA, a municipal)
corporation, OFFICER MIKE HANLEY,)
CORPORAL DAN McSLARROW, and OFFICER)
JOHN DOE,)

Defendants.)

Consolidated
Case No. 94-C-1033-E

ENTERED ON DOCKET
DATE APR 17 1996

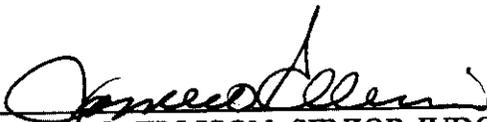
Case No. 94-C-1034-E

JUDGMENT

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants City of Tulsa, Oklahoma, Officer Mike Hanley and Dan McSlarrow and against the Plaintiffs John R. Carleton and Deborah Sturdivan Baughman. Plaintiffs shall take nothing of their claim. Costs and attorney fees may be

awarded upon proper application.

IT IS SO ORDERED THIS 16TH DAY OF APRIL, 1996.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

APR 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN R. CARLETON, Personal Representative of)
the Estate of Angela Nell Carleton, deceased,)
Plaintiff,)

vs.)

CITY OF TULSA, OKLAHOMA, a municipal)
corporation, OFFICER MIKE HANLEY,)
CORPORAL DAN McSLARROW, and OFFICER)
JOHN DOE,)
Defendants.)

Consolidated
Case No. 94-C-1033-E

ENTERED ON DOCKET
APR 17 1996
DATE _____

AND:

DEBORAH STURDIVAN BAUGHMAN,)
Plaintiff,)

vs.)

CITY OF TULSA, OKLAHOMA, a municipal)
corporation, OFFICER MIKE HANLEY,)
CORPORAL DAN McSLARROW, and OFFICER)
JOHN DOE,)
Defendants.)

Case No. 94-C-1034-E

ORDER

Now before the Court is the Motion for Summary Judgment (Docket # 16) of the Defendants Mike Hanley (Hanley), Dan McSlarrow (McSlarrow) and the City of Tulsa (City).

This case includes the consolidated claims of John Carleton as personal representative of the estate of Angela Nell Carleton, and Deborah Sturdivan Baughman. Plaintiffs bring these civil rights claims pursuant to 42 U.S.C. §§ 1983 and 1988, against the City of Tulsa and three of its police

officers, claiming that the police officers, acting under color of law, recklessly instituted and recklessly continued without justifiable cause, a high speed chase which resulted in a collision between the pursued vehicle and a vehicle driven by Angela Carleton.¹ Plaintiffs claim that the city is liable because of failure to adopt or enforce proper police policies regarding vehicle pursuits, and failure to adequately train, test, or supervise officers regarding vehicle pursuits.

The Defendants filed a motion for summary judgment, arguing that the officers are entitled to qualified immunity, that the officers were not reckless as a matter of law, and that the City had no policy or custom which deprived Plaintiffs' of their Fourteenth Amendment Due Process rights. In essence there are two issues: 1) whether the officers are entitled to qualified immunity in these circumstances; and 2) whether, as a matter of law, Plaintiffs can prove a violation of their constitutional rights.

Under qualified immunity, the officers are protected from personal liability unless the allegedly unlawful action was objectively legally unreasonable in light of legal rules that were clearly established at the time the action was taken. Chapman v. Nichols, 989 F.2d 393, 397 (10th Cir. 1993). Plaintiffs argue that the law is clearly established by Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992) that an officer could be liable for an injury caused not by the officer but by a suspect being chased by the officer, and that recklessness can give rise to a section 1983 claim based upon the due process clause. Plaintiffs note that Medina was decided prior to the accident at issue in this case.

Defendants argue that Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990), upon which the Medina court relied, merely "assumes" that reckless conduct could also form the basis for a due

¹ Angela Carleton was killed in the accident, and Baughman, a passenger, was injured.

process violation. They argue that the Supreme Court case of Collins v. Harker Heights, 112 S.Ct. 1061 (1992) removes recklessness as a basis and requires conduct that is arbitrary or consciously shocking. The Court finds, however, that Collins does not support the City's assertion, and that it was clearly established, at the time of the accident in this case, both that recklessness could form the basis of a due process violation and that an officer could be liable under section 1983 for an injury caused not by the officer but by a suspect being chased by the officer. See, e.g., Trigalet v. Young, 54 F.3d 645 (10th Cir. 1995).

The second relevant inquiry, however, is whether Defendants violated Plaintiffs' constitutional rights. Defendants argue that their conduct does not rise to the level of recklessness required by the Tenth Circuit in Webber v. Mefford, 43 F.3d 1340 (10th Cir. 1994)(recklessness requires wanton disregard or complete indifference to risk).

[I]njuries suffered during an automobile accident do not amount to Fourteenth Amendment violations merely because the accident occurred in the context of a high-speed automobile chase by the police. . . . Rather, a police officer in a high-speed automobile chase violates a bystander's Fourteenth Amendment substantive due process rights only when the police officer displays reckless indifference to the risk created and directs his actions toward the bystander. Medina, 960 F.2d at 1496. 'An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to risk, for example 'when the actor does not care whether the other person lives or dies despite knowing that there is a significant risk of death' or grievous bodily injury.' Id. (Quoting Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988)(en banc), cert. denied, 489 U.S. 1065, 109 S.Ct. 1338, 103 L.Ed. 2d 809 (1989).

Webber, 43 F.2d at 1343. "[R]eckless intent is established if the actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences." Medina, 960 F.2d at

The undisputed circumstances of the pursuit are as follows: Officer Mike Hanley was on routine patrol on November 8, 1992 at approximately 10:45 p.m. when he observed a vehicle sitting northbound at a red traffic light at the intersection of Pine and North Yale. He followed the vehicle because the bright lights were on and because the driver made a left hand turn in front of him (failing to yield to Officer Hanley's right of way) onto Pine. While following the vehicle, he noticed the vehicle swerving, and decided to stop the vehicle because he suspected the driver was intoxicated. Although he activated his lights and siren, the vehicle did not stop. As the vehicle turned south on Harvard, the suspect accelerated away from Hanley, and Hanley followed, with his emergency lights and sirens activated. During the chase, both the suspect vehicle and officer Hanley ran several red lights, and traveled at maximum speeds of approximately 50 to 60 miles per hour. By the time the suspect vehicle reached 11th and Harvard, at least two other police cars were involved in the chase, and the accident involving Plaintiffs occurred at 15th and Harvard when the suspect vehicle hit the vehicle driven by Carleton.

In arguing that they did not act recklessly, Defendants point out that they "evaluated whether the need to apprehend a possible drunk driver outweighed the degree of danger created by this pursuit"; followed the suspect with emergency lights and sirens operating at speeds no more than twenty miles over the speed limit; never bumped, rammed or crowded the suspect; and drove with due care, slowing as they approached the intersection. The essence of Plaintiffs' argument is that it was reckless for the officers to have initiated the chase in the first place. In supporting this argument, Plaintiffs assert that the suspect was not running red lights and speeding until the chase began, and question whether the need to apprehend a possible drunk driver outweighed the degree of danger created by the pursuit.

Under the undisputed facts in this case, and the Authority of Webber and Medina, the Court concludes that the conduct of the officers in this case was not reckless. To pursue a suspected drunk driver with lights and sirens operating, with consideration given to pedestrians and other automobiles on the road, simply does not rise to the level of complete indifference to risk required by Medina. Thus, the Plaintiffs' cannot prove that Defendants violated their constitutional rights.

In light of this Court's finding that the Defendant officers did not violate Plaintiffs' constitutional rights, summary judgment is also appropriate in favor of the City. "A claim or inadequate training, supervision and policies under §1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation by the person supervised." Webber, 43 F.3d at 1344-45.

Defendants' Motion for Summary Judgment (Docket #16) is granted.

IT IS SO ORDERED THIS 12th DAY OF APRIL, 1996.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIVIL ACTION NO. 92-C-293-E

ONE PARCEL OF REAL PROPERTY
CONTAINING 4.77 ACRES, MORE
OR LESS, IN SECTION 36,
TOWNSHIP 20 NORTH, RANGE
25 EAST, DELAWARE COUNTY,
OKLAHOMA, WITH ALL BUILD-
INGS, APPURTENANCES,
IMPROVEMENTS, AND CONTENTS,
THEREON, a/k/a ELKHORN
LOUNGE,

Defendant.

ENTERED ON DOCKET **F I L E D**

DATE APR 17 1996

APR 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture against the defendant real and personal properties, and all entities and/or persons interested in the defendant real and personal properties, or proceeds therefrom, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 9th day of April 1992, alleging that the defendant properties, to-wit:

REAL PROPERTY:

ONE PARCEL OF REAL PROPERTY
CONTAINING 4.77 ACRES, MORE
OR LESS, IN SECTION 36,
TOWNSHIP 20 NORTH, RANGE
25 EAST, DELAWARE COUNTY,
OKLAHOMA, WITH ALL BUILD-

**INGS, APPURTENANCES,
IMPROVEMENTS, AND CONTENTS,
THEREON, a/k/a BLKHORN
LOUNGE, MORE PARTICULARLY
DESCRIBED AS FOLLOWS:**

Part of the NE/4 of the NE/4 of Section 36, Township 20 North, Range 25 East, Delaware County, Oklahoma, more particularly described as follows:

Beginning at a point 324.00 feet South of the NE Corner of said Section 36, said point being in the County Road; thence South 15.90 feet along said road; thence South 26° 45' 31" West 112.16 feet along said Road; thence South 89° 49' 37" West 444.50 feet; thence North 18° 50' 11" West 229.94 feet; thence North 44° 12' 45" West 253.25 feet; thence North 00° 10' 23" West 40.00 feet to the centerline of Oklahoma State Highway 33 (now known as U. S. Highway 412); thence North 89° 49' 37" East 535.96 feet along said centerline; thence South 13° 52' 46" East 333.49 feet; thence North 89° 49' 37" East 130.00 feet to point of beginning, containing 4.77 acres, more or less, subject to the rights-of-way of said Highway and Road.

are subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7), because there is probable cause to believe it was used, or was intended for use, to commit, or to facilitate the commission of, a violation of Title 21 United States Code.

Warrant of Arrest and Notice In Rem as to the defendant real and personal properties was issued by The Honorable Thomas R. Brett, Judge of the United States District Court for the Northern

District of Oklahoma, for The Honorable James O. Ellison, the Judge to whom this case was is assigned, on April 9, 1992, providing that the United States Marshal for the Northern District of Oklahoma arrest, seize, and detain the defendant real and personal properties in his possession until the further order of this Court. In addition to the defendant real property, the personal properties arrested and seized by the United States Marshals Service are as follows:

PERSONAL PROPERTY

- 1) Contents of Elkhorn Lounge,
- 2) Mobile Home located behind the Elkhorn Lounge,
- 3) \$1,620.56 In United States Coin and Currency,
- 4) Approximately 100 cases of beer,
- 5) Liquor,
- 6) Two pool tables and a color television,

The Warrant further provided that the United States Marshals Service publish Notice of Arrest and Seizure in the Northern District of Oklahoma, according to law.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of

Arrest and Notice In Rem on the defendant real property, and contents thereof and personal property thereon, as follows:

Real Property Known As: Served:
Elkhorn Lounge April 11, 1992
located in Section 36-20N-25E,
Delaware County, Oklahoma
containing 4.77 Acres, More or Less,
which is more particularly described
elsewhere in this Judgment of Forfeiture.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on all known potential individuals or entities with standing to file a claim against the defendant properties:

Melvin Ames Served:
a/k/a Melvin Earl Ames April 10, 1992

Carrie Griffith Served:
April 11, 1992

Charles Griffith Served:
April 10, 1992

H & R Associates, Incorporated,
an Oklahoma Corporation Served:
April 10, 1992

Arkansas State Bank Served:
Siloam Springs, Arkansas April 17, 1992

Delaware County Treasurer Served:
Delaware County Courthouse April 17, 1992
Jay, Oklahoma

WILLIAM JOHNNIE JAMES Served:
December 26, 1995

USMS 285s reflecting the service upon the defendant real property, and all buildings, appurtenances, improvements, and contents thereon, and all individuals or entities known to have standing to file a claim to such properties, are on file herein.

H & R Associates, Inc., an Oklahoma Corporation, now suspended; Charles Griffith, Carrie Griffith, now Myers, Melvin Ames, and Arkansas State Bank, Siloam Springs, Arkansas, were determined at the commencement of this action to be the only known potential claimants with standing to file claim as to the defendant real and personal properties. Roy Griffith also filed his Claim and Answer to the defendant properties, but subsequently entered into a Stipulation for Forfeiture of the defendant properties. Subsequent to the deposition of Melvin Earl Ames on August 4, 1995, William Johnnie Janes was likewise determined to be a potential claimant in this action with possible standing to file a claim to the defendant real and/or personal properties, or proceeds therefrom, and all have either executed documents consenting to the forfeiture of the defendant real and personal properties to the United States of America or disclaiming any interest therein, or have had their claim to such property properly denied by the Court, as set forth in the Order filed October 6, 1995.

All persons or entities interested in the defendant real and personal properties, or proceeds therefrom, were required to file their claims herein within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of

the Notices of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

Proper claims and answers were filed by the following individuals or entities:

- 1) **Arkansas State Bank
Siloam Springs, Arkansas**
- 2) **H & R Associates, Incorporated,
and Oklahoma Corporation, now
suspended**
- 3) **Charles Griffith**
- 4) **Carrie Griffith, now Carrie Myers**
- 5) **Roy Griffith**
- 6) **Melvin Ames**

Disposition of the interest of the known individuals or entities with standing to file claims against the defendant properties, is as follows:

ARKANSAS STATE BANK, Siloam Springs, Arkansas, executed and filed a Stipulated Expedited Settlement Agreement on December 4, 1992, wherein it agreed to join with the government in any motions for interlocutory or stipulated sale of the defendant properties. Pursuant thereto an Agreed Motion for Order of Interlocutory Sale was filed September 29, 1994. The mortgage and allowable costs were paid to Arkansas State Bank from the proceeds of the sale.

H & R ASSOCIATES, INCORPORATED, an Oklahoma Corporation, now suspended, agreed to forfeiture of all of the defendant real and personal properties by virtue of Stipulation for Forfeiture executed by individuals who

were officers of the Corporation at the time of its insolvency.

CHARLES GRIFFITH executed a Stipulation for Forfeiture of all of the defendant real and personal properties on August 30, 1994. (Filed September 8, 1994).

CARRIE GRIFFITH, now CARRIE MYERS, executed a Stipulation for Forfeiture of the defendant real and personal properties on August 30, 1994. (Filed September 8, 1994).

ROY GRIFFITH, executed a Stipulation for Forfeiture of the Defendant real and personal properties on August 30, 1994. (Filed September 8, 1994).

MELVIN AMES, in a deposition taken on August 4, 1995, under oath, stated that he had sold all of his right, title, and interest in and to the corporate stock of H & R Associates, Incorporated, the record owner of the defendant real property, to William Johnnie Janes before the commencement of this forfeiture action, thereby leaving him with no interest in the defendant properties. Thereafter, on October 6, 1995, the Court entered an Order granting the plaintiff's Motion to Strike Claim and Answer of Melvin Ames and declaring the Application for Temporary Order filed by Ames as moot.

WILLIAM JOHNNIE JAMES and **SHIRLEY JAMES,** his wife, executed a Disclaimer of Interest in and to the defendant real and personal properties on January 11, 1996. (Filed January 16, 1996).

DISTRICT ATTORNEY OF DELAWARE COUNTY, OKLAHOMA executed a Disclaimer of Interest in and to the defendant real and personal properties, on behalf of the County Treasurer and the Board of County Commissioners of Delaware County, Oklahoma, which was filed April 24, 1992.

No other persons or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer, or other response or defense herein.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed, on April 23, 30, and May 7, 1992, and in the Delaware County Journal, Jay, Delaware County, Oklahoma, the county in which the defendant real and personal properties are located, on April 23 and 30 and May 7, 1995.

No other claims in respect to the defendant real and personal properties have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant real or personal properties, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant real and personal properties, or proceeds therefrom, and all persons and/or entities interested therein, except H & R Associates, Inc., an Oklahoma Corporation, now suspended, Charles Griffith, Carrie Griffith, now Myers, Roy Griffith, Melvin Earl Ames, William Johnnie Janes, Arkansas State Bank, Siloam Springs, Arkansas, and the County Treasurer of Delaware County, Oklahoma, who have either consented to the forfeiture of the defendant properties by virtue of a duly executed and filed Stipulation for Forfeiture, Stipulated Expedited Settlement Agreement, Disclaimer of Interest, or Order of the Court striking their claim and answer.

On October 3, 1994, an Order for Interlocutory Sale of the defendant real and personal properties was entered by the Court and the remaining properties, not sold previously at an

interlocutory sale of perishable goods, pursuant to order for such sale filed May 13, 1992, were sold by the United States Marshals Service on December 15, 1994.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant real and personal properties:

REAL PROPERTY:

ONE PARCEL OF REAL PROPERTY CONTAINING 4.77 ACRES, MORE OR LESS, IN SECTION 36, TOWNSHIP 20 NORTH, RANGE 25 EAST, DELAWARE COUNTY, OKLAHOMA, WITH ALL BUILDINGS, APPURTENANCES, IMPROVEMENTS, AND CONTENTS, THEREON, a/k/a ELKHORN LOUNGE, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

Part of the NE/4 of the NE/4 of Section 36, Township 20 North, Range 25 East, Delaware County, Oklahoma, more particularly described as follows:

Beginning at a point 324.00 feet South of the NE Corner of said Section 36, said point being in the County Road; thence South 15.90 feet along said road; thence South 26° 45' 31" West 112.16 feet along said Road; thence South 89° 49' 37" West 444.50 feet; thence North 18° 50' 11" West 229.94 feet; thence North 44° 12' 45" West 253.25 feet; thence North 00° 10' 23" West 40.00 feet to the centerline of Oklahoma State Highway 33 (now known as U. S. Highway 412); thence North 89° 49' 37" East 535.96 feet along said

centerline; thence South 13° 52' 46"
East 333.49 feet; thence North 89°
49' 37" East 130.00 feet to point of
beginning, containing 4.77 acres,
more or less, subject to the rights-
of-way of said Highway and Road.

PERSONAL PROPERTY

- 1) Contents of Elkhorn Lounge,
- 2) Mobile Home located behind the Elkhorn Lounge,
- 3) \$1,620.56 In United States Coins and Currency,
- 4) Approximately 100 cases of beer,
- 5) Liquor,
- 6) Two pool tables and a color television,

and that the defendant real and personal properties above described, as well as those perishable personal properties sold pursuant to Order for Interlocutory Sale filed May 13, 1992, be, and they hereby are, forfeited to the United States of America for disposition according to law, in the following priority:

- a) First, from the sale proceeds of the real and personal property, payment to the United States of America for all expenses of forfeiture of the defendant real and personal properties, including, but not limited to, expenses of seizure, maintenance and custody, advertising, and sale.

- b) Second, to Arkansas State Bank, pursuant to Stipulated Settlement Agreement, the sum of \$51,945.56, paid at closing of the sale of Elkhorn Lounge.
- c) Third, the remaining proceeds of the sale of the defendant real property known as Elkhorn Lounge, with all buildings, appurtenances, improvements, and contents thereon, shall be retained by the United States Marshals Service for disposition according to law.

S/ JAMES O. ELLISON

JAMES O. ELLISON, Senior Judge of the
United States District Court

SUBMITTED BY:



CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\AMES\05198

ENTERED ON DOCKET
DATE 4-17-96

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

FILED

APR 16 1996 *sa*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BLAKE'S LOTABURGER, INC., a New Mexico
corporation,)

Plaintiff,)

v.)

LOT-A-BURGER OF ARKANSAS, INC., an
Arkansas Corporation, et al.,)

Defendants.)

Case No. 95-CV-800-H ✓

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a **settlement** agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final **determination** of the litigation.

If, by May 16, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be **deemed** dismissed with prejudice.

IT IS SO ORDERED.

This 15TH day of April, 1996.


Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
DATE 4-17-96

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

FILED

APR 16 1996 *sa*

MARCUS LIGONS,)
)
 Plaintiff,)
)
 v.)
)
 McDONNELL DOUGLAS CORP.,)
)
 Defendant.)

Case No. 95-C-005-H

✓ Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on April 16, 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 16th day of April, 1996.


Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET

DATE 4-17-96

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

FILED

MARCUS LIGONS,)
)
 Plaintiff,)
)
 v.)
)
 McDONNELL DOUGLAS CORP.,)
)
 Defendant.)

Case No. 95-C-005-H ✓

APR 16 1996

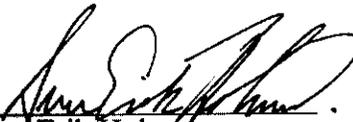
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before the Court on the motion for summary judgment of Defendant McDonnell Douglas Corporation (Docket # 15). On February 16, 1996, McDonnell Douglas moved for summary judgment on the basis that the undisputed facts entitle it to judgment as a matter of law. Plaintiff has failed to respond to Defendant's motion. For that reason, the Court hereby deems the matter confessed, pursuant to Northern District Local Rule 7.1(C), and grants Defendant's unopposed motion.

IT IS SO ORDERED.

This 15th day of April, 1996.


Sven Erik Holmes
United States District Judge

22

F I L E D

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

APR 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STEVEN G. FROST,

Plaintiff,

v.

THE EMPLOYERS FIRE INSURANCE
COMPANY, a/k/a COMMERCIAL UNION
INSURANCE COMPANIES, a
Massachusetts corporation; and,
GEORGE E. AYERS INSURANCE
AGENCY, INC., an Ohio
corporation,

Defendants.

Case No. 95-C-506-H

ENTERED ON DOCKET

DATE 4-16-96

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the plaintiff through his attorney of record, James R. Hicks, joining with the defendant The Employers Fire Insurance Company a/k/a Commercial Union Insurance Companies through their attorney of record, Tracy Pierce Nester, of King, Roberts & Beeler, and defendant George E. Ayers through their attorney of record, Richard Dan Wagner, and hereby submit the following stipulation of dismissal with prejudice to the Court.

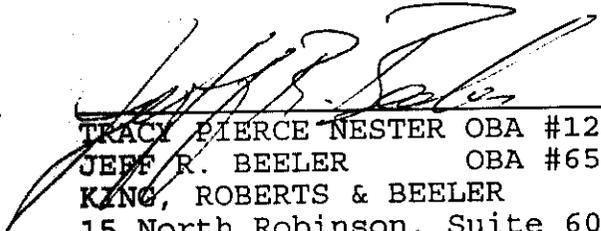
It is stipulated and agreed by and between the parties that the above-captioned cause is dismissed with prejudice as to the refiling of any future actions thereon, for the reason that the parties entered into a compromise settlement of any and all claims of plaintiff against said defendant.

Respectfully submitted,



JAMES R. HICKS, OBA #11345
MORREI, WEST, SAFFA,
GRAIGE & HICKS
5310 East 31st Street,
Suite 900
Tulsa, OK 74135-5014
(918) 664-0800

FOR PLAINTIFF



TRACY PIERCE NESTER OBA #12815
JEFF R. BEELER OBA #658
KING, ROBERTS & BEELER
15 North Robinson, Suite 600
Oklahoma City, Oklahoma 73102
(405) 239-6143

ATTORNEYS FOR DEFENDANT ATTORNEYS
EMPLOYERS FIRE INSURANCE
COMPANY



Richard Dan Wagner OBA #9269
I. Michele Drummond OBA #14859
902 S. Boulder
Tulsa, OK 74119-2034
(918) 582-4483

ATTORNEYS FOR DEFENDANT
GEORGE E. AYERS INSURANCE AGENCY, INC.

frost\pleading\frost.sod\slm\960401

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

FILED

APR 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JIMMY FOX and HAZEL FOX,)
)
Plaintiffs,)
)
vs.)
)
STATE FARM FIRE & CASUALTY)
COMPANY,)
)
Defendant.)

Case No. 95-C-722-B

ENTERED ON DOCKET
APR 16 1996

**ORDER OF DISMISSAL WITH PREJUDICE
AS TO ALL CLAIMS OF PLAINTIFFS AND DEFENDANT**

This matter comes before the Court on the parties' "Joint Stipulation of Dismissal With Prejudice As To All Claims Of Plaintiffs and Defendant." Upon due consideration thereof, it is hereby

ORDERED, ADJUDGED AND DECREED that the above-styled action and all claims of the plaintiffs and defendant as set forth therein, are hereby dismissed with prejudice to refiling thereof.

Dated this 15 day of April, 1996.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

APR 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WYANDOTTE TRIBE OF)
OKLAHOMA, a corporation chartered)
by the United States Government,)
)
Plaintiff,)
)
v.)
)
SAMUEL L. JACKSON, an individual,)
and CLINTON E. HUTCHCRAFT, an)
individual,)
)
Defendants.)

Case No. 95-C-779-B

ENTERED ON DOCKET

DATE APR 16 1996

PRELIMINARY INJUNCTION

UPON considering the Parties' Joint Motion for the entry of a Preliminary Injunction, filed herein, it is hereby

ORDERED that the Defendants, and each of them, shall prepare and file with the Court, within sixty (60) days of the filing of this Preliminary Injunction, an accounting (the "Report") that lists (A) the amount or value of all Money ever Paid to Them in connection with (i) any effort to form or operate an entity referred to by the name "Sovereign Nations Central Bank" ("SNCB") or (ii) any effort to perform any business on behalf of, under the name of, or for the benefit of SNCB¹; provided, however, Jackson and Hutchcraft will not be required

¹ For purposes of the parties' agreement, herein, "Money" shall be defined as all things of value and shall include, without limitation, commitments or promises (regardless whether they are executory, partially executory, or fully performed), expectancies, deposits, loan commitment fees, and fees paid in connection with any letter of credit;

"Paid" shall be defined as all transfers (regardless whether they are to be made in the future or have already been made);

(footnote continued)

to list in the Report any Money ever paid, in connection with such efforts, by any of the persons or entities identified in the definition of "Them" to any other of such persons or entities. In short, the List need not identify transfers between any of those defendant/insiders identified in the definition of "Them" set out in footnote 1 to the text, above. The truth and accuracy of the Report shall be sworn to by both Jackson and Hutchcraft under penalties of perjury.

IT IS FURTHER ORDERED that, if the Report lists any Money ever to Paid to Them, Jackson and Hutchcraft shall repay or transfer to those persons or entities who made the payments of Money listed on the Report, all of such Money; and, in addition, shall file with the Court a certification, within ninety (90) days of the filing of this Preliminary Injunction herein, that all of such repayments or transfers have been accomplished or, if not, why any of such repayments or transfers has not yet been accomplished or cannot ever be accomplished. If no Money was ever Paid to Them, Jackson and Hutchcraft shall file with the Court a certification, within sixty (60) days of the filing of this Preliminary Injunction, that no Money was ever Paid to Them. The truth and accuracy of either of such certifications shall be sworn to by both Jackson and Hutchcraft under penalties of perjury.

IT IS FURTHER ORDERED that, notwithstanding anything contained herein to the contrary, each of the Defendants shall submit a separate Report. Each such Report (one

(footnote continued)

"Them" shall be defined as SNCB, Jackson, Hutchcraft, Michael Alexander, Lowell A. Peters, Wayne J. Lennington, Wayne J. Lennington's Trust Account, Paramount Group, L.L.C., Paramount Assets, L.L.C., Paramount Guaranty L.L.C., Paramount Planning L.L.C., Puller Management, Inc., or any person or entity associated or affiliated with any of the persons or entities mentioned in this definition.

submitted by Clinton E. Hutchcraft and one submitted by Samuel L. Jackson) shall be prepared respectively by each Defendant with respect to his course of conduct and activities and Money, if any, paid to Them (as previously defined). Each such Report shall be based on all information that is available in any way to such reporting Defendant, whether upon inspection of pertinent documents of other information within his possession, custody or control, or upon inquiry or demand of others who might have such documents or information in their possession, custody or control. Both Reports will be filed simultaneously with the Court. The truth and accuracy of each Report will be sworn to by the individual Defendant who has given that Report. Such verification shall not extend to the Report given by the other Defendant.

IT IS FURTHER ORDERED that Jackson and Hutchcraft will cease and refrain from (i) holding themselves out on behalf of any entity named "Sovereign Nations Central Bank"; (ii) encouraging or importuning others to undertake or participate in any effort to promote the business of any entity so named; and (iii) representing or implying that any connection exists between any of Jackson's or Hutchcraft's activities and the Plaintiff.

IT IS FURTHER ORDERED that, because this Preliminary Injunction is entered upon the Parties' Joint Motion, and because such Motion does not require that Plaintiff provide any bond or security upon the entry of this injunction, no security shall be required of the Plaintiff.

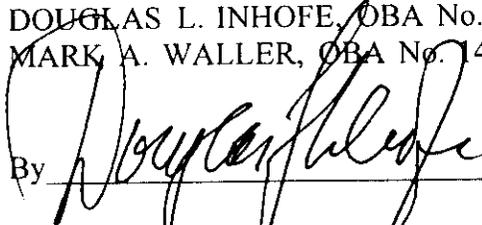
DATED this 11th day of April, 1996.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO
FORM AND CONTENT:

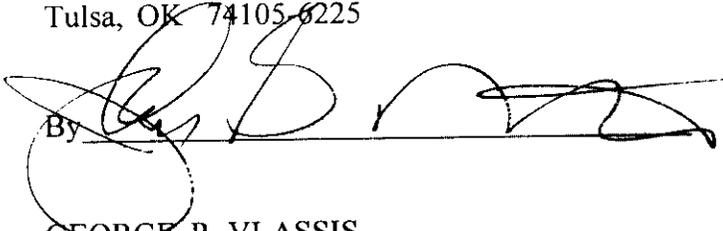
DOUGLAS L. INHOFE, OBA No. 4550
MARK A. WALLER, OBA No. 14831

By  _____

INHOFE & WALLER, P. C.
907 Philtower Building
427 South Boston Avenue
Tulsa, Oklahoma 74103-4114
(918) 583-4300 (Phone)
(918) 583-7100 (Fax)

Attorneys for Plaintiff
WYANDOTTE TRIBE OF OKLAHOMA

JOHN G. GHOSTBEAR, OBA NO. #3335
2738 East 51st Street
Elmcrest Park, Suite 220
Tulsa, OK 74105-6225

By  _____

GEORGE P. VLASSIS
VLASSIS & VLASSIS
1545 W. Thomas Road
Phoenix, Arizona 85015

By  _____

Attorneys for Defendants
SAMUEL L. JACKSON and
CLINTON E. HUTCHCRAFT

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

STATE OF OKLAHOMA, EX REL.,)
the OKLAHOMA BOARD OF PRIVATE)
VOCATIONAL SCHOOLS,)

Plaintiff,)

vs.)

ROY B. DAVID, individually,)
ALLIED HELICOPTER SERVICE,)
INC., and ALLIED HELICOPTER)
INTERNATIONAL, INC.,)

Defendants.)

ENTERED ON DOCKET
DATE APR 16 1996

Case No. 94-C-233-BU ✓

FILED

APR 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Motion to Alter or Amend and Brief in Support filed by Defendants on April 20, 1996 (Docket Entry #49); Plaintiff's Response to Defendants' Motion filed May 8, 1995 (Docket Entry #50); and Defendants' Reply Brief in Support of the Motion filed May 12, 1995 (Docket Entry #51). Upon consideration of these pleadings, this Court renders the ruling reflected herein.

This action was commenced by Plaintiff in the District Court in and for Tulsa, Oklahoma, from which Defendants sought removal to this Court. By order dated April 7, 1995, this Court found that complete preemption did not exist in this case, thereby defeating this Court's jurisdiction over the matter and requiring remand of the case to the Tulsa County District Court for adjudication.

By virtue of the Motion currently pending, Defendants request that this Court alter or amend the remand order, finding, in light of their arguments, that complete preemption does indeed exist in

this case and further requests a finding by this Court that the Plaintiff cannot require Defendants to obtain a state license before operating their FAA approved pilot schools.¹ Specifically, Defendants challenge this Court's finding that despite preemption by federal law in certain areas governing the opening and operation of flight schools, the State of Oklahoma maintains an interest in certain areas deemed "administrative" by this Court, including "financial stability, advertising practices and refund of tuition fees paid by students for courses of instruction or training not completed."² Defendants reference particular sections of the Code of Federal Regulations ("CFR") concerning the regulation of flight schools by the Secretary of Transportation as authorized by Congress in an attempt to demonstrate that federal law, in fact, permeates the areas cited by this Court wherein the State of Oklahoma has expressed a separate and distinct interest in regulating flight schools, not encompassed by federal law. Relying upon this recitation of federal law, Defendants urge this Court to reverse its prior ruling and find that complete preemption of federal law concerning the regulation of flight schools exists in this case. For its part, Plaintiff counters that an order of remand may not be reviewed and therefore this Court does not possess the requisite jurisdiction to reconsider or alter or amend its prior order of remand.

¹ Pursuant to Fed. R. Civ. P. 59(e), a motion to alter or amend must be filed within ten (10) days of the entry of a judgment or order. Although the order in question in this case was filed April 7, 1995, it was not entered on the court docket until April 10, 1995. Accordingly, Defendants' Motion is timely.

² Okla. Stat. tit. 70 § 21-107.

As a threshold matter, a dispute does indeed appear to exist between various courts concerning the ability of a court to review its order of remand. Generally, a remand made pursuant to 28 U.S.C. §1447 is not "reviewable on appeal or otherwise." 28 U.S.C. §1447(d). While a review of the authorities available to this Court reveals that the Tenth Circuit Court of Appeals has not addressed this issue, other courts have done so. From these authorities, some courts have barred reconsideration of an order of remand reading the rule quite literally,³ while other courts have determined that so long as the case has not physically been remanded to the state court by the service of a certified copy of the order of remand as required by 28 U.S.C. §1447(c), the trial court possesses the requisite jurisdiction to reconsider its order.⁴ Of these positions, this Court finds that the more well-reasoned is the latter. So long as the remand has not been completed in accordance with 28 U.S.C. §1447(c) by forwarding a copy of the remand order to the appropriate state court, thereby effectuating the remand, this Court possesses the requisite jurisdiction to alter, amend or otherwise correct an order that it issues. Accordingly, this Court possesses the requisite jurisdiction to consider Defendants' Motion in this case.

Defendants cite to several provisions in the CFR whereby the

³ Three J Farms, Inc. v. Alton Box Board Co., 609 F.2d 112, 115 (4th Cir. 1979).

⁴ Hubbard v. Combustion Engineering, Inc., 794 F.Supp. 221, 222 (D.C. E.D. Mich. 1992) citing Seedman v. United States District Court for the Central District of California, 837 F.2d 413, 414 (9th Cir. 1988) (per curiam); Bucy v. Nevada Construction Co., 125 F.2d 213, 217 (9th Cir. 1942); Hughes v. General Motors Corp., 764 F.Supp. 1231, 1237-38 (D.C. W.D. Mich. 1990).

Secretary of Transportation has promulgated rules governing various aspects of the opening and operation of flight schools.⁵ In particular, in regard to the subject matter cited by this Court reserved by state statute for state regulation, Plaintiff cites to 14 CFR § 141.23 concerning advertising limitations and § 141.83 on quality of instruction. In further review of this matter, this Court concurs with Defendants that 14 CFR § 141.23 demonstrates the intent of federal law to pre-empt state regulation of advertising practices and in this limited regard, this Court's April 7, 1995 order should be amended to reflect this fact. However, this Court declines to join in the remainder of Defendant's contentions. As stated in this Court's April 7, 1995 order, Oklahoma, through its statutory licensing requirements for private schools has expressed a desire to regulate the financial stability and required refund of tuitions paid by students for courses of instruction and training not completed. Nothing in any of the federal regulations cited by the Defendants demonstrates an equal desire by federal law to pre-empt the state's interests in regulating these areas. The particular sections of the CFR cited by Defendants in an attempted contravention of this assertion in fact apply to regulation of the quality of instruction and the required "graduation" rate as demonstrated by the licensing of pilots coming from these flight schools by the Federal Aviation Administration and the consequences for the flight school if such qualitative standards are not

⁵ See 14 CFR § 141.1 et seq.

maintained.⁶

Reiterating the findings made in the April 7, 1995 order, this Court maintains that complete preemption does not exist in this area of the law since federal law has not been promulgated to encompass the areas of interest expressed or regulation by the State of Oklahoma in insuring the financial stability of flight schools and further insuring that the students attending these schools are not placed at risk through the loss of tuition by unscrupulous or undercapitalized flight schools in the State of Oklahoma. Consequently, with the limited correction reflected herein, remand remains appropriate to the Tulsa County District Court for further adjudication.

⁶ 14 C.F.R. § 141.83 provides:

Quality of Instruction.

(a) Each holder of a pilot school or provisional pilot school certificate must comply with the approved course of training and must provide training and instruction of such quality that at least 8 out of the 10 students or graduates of that school most recently by an FAA inspector or designated pilot examiner, passed on their first attempt either of the following tests:

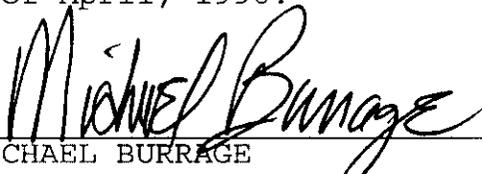
- (1) A test for a pilot certificate or rating, or for an operating privilege appropriate to the course from which the student graduated; or
- (2) A test given to a student to determine his competence and knowledge of a completed stage of the training course in which he is enrolled.

(b) The failure of a certificated pilot school or provisional pilot school to maintain the quality of instruction specified in paragraph (a) of this section is considered to be the basis for the suspension or revocation of the certificate held by that school.

Defendants request that this Court find that the State of Oklahoma cannot require the Defendants to obtain a state license before operating their FAA approved pilot schools is not an issue for determination on a motion to remand and may be brought up as a defense in the action remanded to the Tulsa County District Court.

IT IS THEREFORE ORDERED THAT Defendants' Motion to Alter or Amend filed April 20, 1995 (Docket Entry #49) is hereby GRANTED, in part, in that the regulation of advertising for flight schools contemplated by federal law preempts state laws attempting to regulate the same area. However, the remainder of the requested relief in the motion is DENIED. Accordingly, the Clerk of the Court shall effectuate the remand of this case to the District Court in and for Tulsa County, Oklahoma in accordance with 28 U.S.C. § 1447(c).

IT IS SO ORDERED THIS 15 day of April, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 4-16-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WAYNE L. WRIGHT; MARY D.)
 WRIGHT; SEARS ROEBUCK &)
 COMPANY; CITY OF BROKEN)
 ARROW, Oklahoma; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

APR 15 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 979K

ORDER

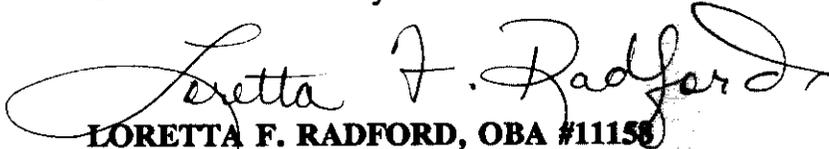
Upon the Motion of the **United States** of America, acting on behalf of the U.S. Department of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is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

Dated this 13 day of April, 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 that reads "Loretta F. Radford". The signature is written in black ink and is positioned above the printed name.

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney
333 W. 4th Street, Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/esf

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

FILED
APR 15 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONNA REESE COLLINS,
Plaintiff,

v.

PRINCIPAL MUTUAL LIFE
INSURANCE COMPANY,
a foreign corporation,
Defendant.

Case No. 95-CV-1109-BU

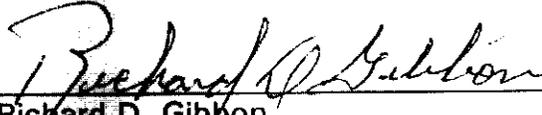
EOD 4/16/96

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

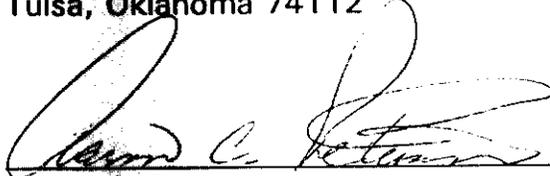
The parties, Plaintiff, Donna Reese Collins, and Defendant, Principal Mutual Life Insurance Company, by and through their attorneys of record, hereby stipulate to the entry by this Court of an order of dismissal with prejudice of any and all claims which have been asserted, or which might have been asserted, as a result of the matters described in the Plaintiff's Petition filed in the District Court in and for Tulsa County, State of Oklahoma, filed on October 16, 1995.

WHEREFORE, the parties jointly stipulate to the entry of an order by this Court dismissing this action, and the claims of the above-named Plaintiff, Donna Reese Collins, with prejudice to the filing or prosecution of a future action with each party to pay their own costs.

Respectfully submitted,



Richard D. Gibbon
1611 South Harvard Avenue
Tulsa, Oklahoma 74112



Aaron C. Peterson
5200 South Yale Avenue, Suite 601
Tulsa, Oklahoma 74135-7491

ATTORNEYS FOR PLAINTIFF,
DONNA REESE COLLINS



Elsie Draper, OBA No. 2482
GABLE & GOTWALS, INC.
2000 Bank IV Center
15 West 6th Street
Tulsa, Oklahoma 74119-5447
(918) 582-9201

ATTORNEYS FOR DEFENDANT, PRINCIPAL
MUTUAL LIFE INSURANCE COMPANY

FILED

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

APR 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Jackie J. Donaldson,

Plaintiff,

vs.

Rederiet A. P. Moller, A/S,
aka Maersk Drilling
Defendant.

Case No. 93-C-1032-H

ENTERED ON DOCKET

DATE 4-15-96

STIPULATION OF DISMISSAL

It is hereby stipulated by Plaintiff and Defendant pursuant to FRCP 41(a)(1)(ii) that the above-entitled action be dismissed with prejudice, without costs or attorney's fees to either party.

HANSON, HOLMES, SNIDER & SHIPLEY

BY Richard K. Holmes

Richard K. Holmes OBA #4327
5918 East 31st Street
Tulsa, Oklahoma 74135
(918) 627-4400
Attorneys for Plaintiff

Nichols Wolfe Stamper
Nally & Fallis, Inc.

BY Thomas Robertson

Thomas Robertson, OBA #7665
Suite 400, Old City Hall
124 E. 4th Street
Tulsa, Oklahoma 74103-5010

Attorneys for Defendant

ENTERED
DATE 4-15-96

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

LOGAN DRILLING COMPANY, INC.; STEVEN)
DON AND/OR DONNA LOGAN; DEBRA LYNN)
AND/OR DOUG MARTZ; TERRY AND/OR KIM)
LOGAN; ERNEST PAUL BLANTON AND KAY)
BLANTON; TIM MENDENHALL; BILL STEHR;)
JAY ALLISON BENGE AND/OR LUCINDA ANN)
BENGE; SAM J. MANKIN AND NITA MANKIN;)
LYLE KING; CHRISTOPHER PAUL BLANTON;)
JENNIFER DIANE BLANTON; LARRY)
MENDENHALL AND LADONNA E. MENDENHALL;)
LOUIS H. KRETHOW; DIANA L. KROUT;)
JOANETTA C. HANSON; KAREN S. HARRIS;)
PHIL L. LACK; JIM LACK; JEFF LACK;)
DAVID H. DONALDSON; DONNIE WELDON;)
RICHARD BOEPPLE; RICHARD KOKOJAN;)
DENNIS BEARD AND MELODEE BEARD; KEN)
ALLEN HUNGERFORD OR MARILYN HUNGERFORD;)
RICK CARUTHERS CONSTRUCTION, INC.;)
DONALD R. STEHR; STAN L. BALDWIN AND)
CAROL ANN BALDWIN; PAGE BELCHER, JR.;)
LOGAN EXPLORATION AND RESOURCES)
COMPANY, LTD.; DAVID L. BREWER OR)
JANELLE BREWER; S.C. KEALIHIER; ANDY)
BOGERT; RICHARD D. BOGERT; LOYD R.)
AND/OR LORETTA COWGER; ANDY FAKHOURY;)
TRESSA D. LINEHAN a/k/a TDL)
INVESTMENTS; JAMES ABERCROMBIE; and)
J.R. DRILLING CORP.,)

Plaintiffs,

v.

RESERVE EXPLORATION COMPANY; C.P.)
HOOVER; MAXINE HOOVER; FREEMAN,)
BOYDSTON & ROLYAT', INC.; HADCO,)
INTERNATIONAL, INC.; ESTATE OF ROBERT)
E. LEE; and DEMING LAND & INVESTMENTS,)
INC.,)

Defendants.

FILED
APR 12 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 96-C-0244H

AGREED TEMPORARY RESTRAINING ORDER

Now on this 12th day of April, 1996, Plaintiffs and Defendants, Reserve Exploration Company ("Reserve"), C.P. Hoover, Maxine Hoover and Deming Land & Investments, Inc. ("Deming") (hereinafter collectively referred to as "Defendants"), by and through their respective counsel of record, have stipulated and agreed that a Temporary Restraining Order should be entered in this action as hereinafter set forth.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Defendants are enjoined and restrained from selling, encumbering, transferring, moving, expending or otherwise dissipating any current or former assets, proceeds or other property of Reserve and Deming without the prior written consent of Plaintiffs.

2. Defendants shall make all books, records, bank statements, cancelled checks, invoices and any other information pertaining to Defendants and any related persons or entities available to Plaintiffs for inspection in order to provide Plaintiffs with a full accounting of all assets, liabilities, income and expenditures of Defendants and any related persons or entities. Defendants will also cooperate with Plaintiffs and answer any and all questions submitted by Plaintiffs necessary to facilitate completion of the accounting, including information regarding ownership and creditors of Reserve, the assets, proceeds or other property of Reserve and any transfers thereof. The information identified in this paragraph shall be produced within forty-eight (48) hours after notice from the Plaintiffs, unless exigent circumstances exist to make such request unreasonable.

3. C.P. Hoover, Maxine Hoover, Deming and any related persons or entities will disclose to Plaintiffs their respective interests in Reserve and any claims or interests in any current or former assets, proceeds or other property of Reserve. Defendants will further disclose any interests in any current or former assets, proceeds or property of Reserve held by any family trusts or any related or unrelated persons or entities. Defendants retain the right to file an objection with the Court as to whether any persons or entities are related as those terms are used in paragraphs 2 and 3 of this Order.

4. Defendants will return all assets, proceeds or other property of Reserve which have been improperly transferred. Defendants retain the right to file an objection with the Court as to the characterization of any specific transfer as "improper." In the event: (a) the parties cannot agree; (b) the Court determines the transfer to be improper; and (c) Defendants are unable to return any such assets, proceeds or property due to loss or destruction, Defendants shall supply adequate compensation, to be determined by the Court, for such items lost or destroyed.

5. Plaintiffs will be granted peaceful and reasonable access to inventory, inspect, test and explore all Reserve properties and other assets, including mining claims identified in paragraph 6 below, buildings, offices, laboratories and any other properties. Plaintiffs will conduct their activities in a peaceful and reasonable manner.

6. On behalf of, in the name of, and at the expense of Reserve, C.P. Hoover shall, with Plaintiffs' assistance, advice and consent, take all reasonable and necessary action to preserve and extend the 216 lode mining claims comprising 4,320 acres or more land known as

the Sierra de Oro Mining Claims located near Deming, New Mexico, previously approved by the U.S. Department of Interior, Bureau of Land Management and the State of New Mexico.

7. No party shall request a meeting of Reserve's shareholders or directors for 30 days following the date of this Order, except in the event of an emergency as determined by this Court. Upon the termination of such 30 days, Plaintiffs may request a meeting of the shareholders at any time pursuant to the Bylaws and/or the laws of the State of Colorado, and C.P. Hoover shall accordingly provide timely notice of such meeting to all shareholders of record.

8. The current composition of the board of directors is in dispute. The board will take no action, including but not limited to, the implementation of any resolutions which may have been passed on or after March 6, 1996, until thirty (30) days after the entry of this Order. This Order does not constitute a waiver of any claims regarding improper election of directors or any improper actions by any of the directors.

9. Plaintiffs agree to strike the hearing on their Motion for Appointment of Receiver *Pendente Lite* which was scheduled for April 12, 1996 at 9:30 a.m. Plaintiffs retain the right to reschedule the hearing at any time.

10. Entering into this Agreed Temporary Restraining Order shall not constitute an admission by any party hereto, nor shall it constitute a waiver of any claim or defense by any party.

11. In the event Reserve is presented with any business opportunity which requires action within thirty (30) days following the entry of this Order, such opportunity shall immediately be presented to the Court for its consideration and approval.

DATED this 12th day of April, 1996.

SVEN ERIK HOLMES

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED BY:



Mark K. Stonecipher, OBA #10483
Eric S. Eissenstat, OBA #10282
Fellers, Snider, Blankenship,
Bailey & Tippens
120 North Robinson, Suite 2400
Oklahoma City, Oklahoma 73102
(405) 232-0621 - Telephone
(405) 232-9659 - Facsimile

- and -

Roy C. Breedlove, OBA #1097
Fellers, Snider, Blankenship,
Bailey & Tippens
6 East 5th Street, Suite 800
Tulsa, Oklahoma 74103
(918) 599-0621 - Telephone
(918) 583-9659 - Facsimile

Attorneys for Plaintiffs

Cliff Cate

Clifford K. Cate
Boesche, McDermott & Eskridge
100 West 5th Street, Suite 800
Tulsa, Oklahoma 74103-4216
(918) 583-1777 - Telephone
(918) 592-5809 - Facsimile

Attorneys for Defendants,
Reserve Exploration Company,
C.P. Hoover, Maxine Hoover and
Deming Land & Investments, Inc.

66218:75863

ENTERED ON DOCKET

DATE 4-15-96

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

FILED

APR 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

W.L. HUGHES and
LUCILLE A. HUGHES,

Plaintiffs,

v.

E-Z SERVE PETROLEUM
MARKETING COMPANY,

Defendant.

Case No. 95-C-1240-H ✓

ORDER

This matter comes before the Court on Plaintiffs' Motion to Remand (Docket #5).

Plaintiffs originally brought this action in the District Court of Creek County. Their petition contains the following prayer for relief:

- (a) All of [Plaintiffs] damages which they may prove at trial in no event less than \$10,000;¹ and
- (b) Exemplary damages in no event less than \$10,000; and
- (c) That actual and punitive damages in no event, however, should exceed a total sum of \$49,900.00; and
- (d) Plaintiffs' costs herein, including, but not limited to, reasonable attorneys fees; and
- (e) Such other and further relief as the Court deems just and proper.

¹In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars (\$10,000), except in actions sounding in contract.

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Petition at 4. Defendant removed the case to this Court on the basis of diversity jurisdiction. Plaintiffs filed this motion to remand, claiming that diversity jurisdiction does not exist.

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$50,000. 28 U.S.C. § 1332(a). The Tenth Circuit has recently clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$50,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. (citation omitted) The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000." Moreover, there is a presumption against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995) (citation omitted).

In Laughlin, the plaintiff originally brought his action in state court. Defendant removed to federal court based on diversity jurisdiction. The court granted summary judgment to defendant, and plaintiff appealed. On appeal, the Tenth Circuit raised the issue of subject matter jurisdiction and remanded the case to state court. Neither the petition nor the notice of removal had established the requisite jurisdictional amount. The petition alleged that the amount in controversy was "in excess of \$10,000" for each of two claims. The notice of removal did not refer to an amount in controversy, but did contain a reference to the removal statute, 28 U.S.C. § 1441. In its brief on the issue of jurisdiction, Kmart set forth facts alleging that, at the time of removal, the amount in controversy was well above the jurisdictional minimum of \$50,000. However, Kmart failed to include those facts in its notice of removal.

The Tenth Circuit held that:

Kmart's economic analysis of Laughlin's claims for damages, prepared after the motion for removal and purporting to demonstrate the jurisdictional minimum, does not establish the existence of jurisdiction at the time the motion was made. Both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.

Laughlin, 50 F.3d at 873.

In Laughlin, Kmart attempted to rely on Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993). The Shaw court held that "the plaintiff had conceded jurisdiction because he failed to contest removal when the motion was originally made, and because he stated in his opening appellate brief that the amount in controversy exceeded \$50,000." The Tenth Circuit distinguished Shaw, stating:

[w]e do not agree, however, that jurisdiction can be "conceded." Rather, we agree with the dissenting opinion that "subject matter jurisdiction is not a matter of equity or of conscience or of efficiency," but is a matter of the "lack of judicial power to decide a controversy."

Laughlin, 50 F.3d at 874 (citation omitted).

In the instant case, Plaintiffs' petition seeks actual damages "in excess of \$10,000" and exemplary damages "in no event less than \$10,000." The petition further states that "actual and punitive damages in no event . . . should exceed a total sum of \$49,900." Defendant has not undertaken to satisfy in its Notice of Removal Laughlin's requirement for "underlying facts." Rather, Defendant attempted to meet its burden by making the following statement:

Although the Plaintiffs have claimed actual and punitive damages each in excess of \$10,000, they also state in their petition that in no event shall actual and punitive damages exceed a total sum of \$49,900.00. However, Plaintiffs also request attorneys fees, pursuant to Title 12 Okla. Stat. § 940 as this is an action to recover damages for injury to real property. Likewise, attorney fees are provided for in the lease agreement which is attached to Plaintiffs' Petition as Exhibit "A". Accordingly, should Plaintiffs prevail in this action and recover actual and punitive damages totaling \$49,900, the additional sum for attorneys fees would certainly exceed the jurisdictional requisite of \$50,000.00.

Notice of Removal at 2 ¶3.

The Court agrees that attorneys' fees may be included in the damage calculation for purposes of diversity jurisdiction when there is a statutory right to such fees. See Missouri State Life Ins. v. Jones, 290 U.S. 199 (1933); Molzahn v. State Farm Mut. Auto. Ins., 422 F.2d 1321 (10th Cir. 1970). Further, the Court accepts Defendant's statement that, if successful, Plaintiffs are legally entitled to attorneys fees pursuant to statutory and contractual rights. The Court disagrees, however, with Defendant's assertion that the starting point for purposes of the instant damage calculation is \$49,900.

A claim for damages "in no event less than \$10,000" and "in no event . . . exceed[ing] . . . \$49,900" is simply not a claim for damages in the amount of \$49,900. Rather, such a claim is the legal equivalent of a claim for damages "in excess of \$10,000." Therefore, the face of the petition in this case does not relieve Defendant of its obligation to demonstrate in its removal documents that it is entitled to federal jurisdiction. See Laughlin, 50 F.3d 871.

Where the face of the petition does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the Notice of Removal, not only the defendant's good faith belief that the amount in controversy exceeds \$50,000, but also underlying facts in support of the defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$50,000 at issue in the case. There is a presumption against removal jurisdiction, and the removing defendant bears the burden of establishing federal court jurisdiction. Laughlin, 50 F.3d at 873. The Tenth Circuit has clearly stated what is required to satisfy that burden. Because Defendant have not met its burden, as defined by the Laughlin court, this Court must grant Plaintiffs' motion to remand.

The Court hereby grants Plaintiffs' Motion to Remand (Docket # 5) and orders the Court Clerk to remand the case to District Court in and for Creek County.

IT IS SO ORDERED.

This 2TH day of April, 1996.


Sven Erik Holmes
United States District Judge

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

APR 12 1996

RUSSELL DAVIS and LYNDA DAVIS,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiffs,

vs.

Case No. 95 C 632E

KCI THERAPEUTIC SERVICES, INC.,

ENTERED ON DOCKET

Defendant.

DATE APR 15 1996

ORDER GRANTING MOTION TO DISMISS

The matter before the Court is Defendant's Motion to Dismiss for Plaintiffs' failure to enter an appearance. In accordance with such Motion and the Court's Minute Orders of January 31, 1996, and March 15, 1996, the Court is of the opinion that Defendant's Motion To Dismiss should be GRANTED.

IT IS THEREFORE ORDERED that this lawsuit is DISMISSED WITH PREJUDICE with respect to all Plaintiffs and with respect to all claims, each party to bear its own costs.

SIGNED this 12th day of April, 1996.

S/ JAMES O. ELLISON

Hon. James O. Ellison
United States District Judge

AEE15535

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

FILED

APR 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

[Handwritten signature]

DALE REED,

Plaintiff,

v.

TULSA WORLD PUBLISHING COMPANY
and NEWSPAPER PRINTING CORPORATION,

Defendants.

Case No. 96-C-88-H

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by May 8, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 11TH day of April, 1996.

[Handwritten signature of Sven Erik Holmes]

Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
DATE 4-15-96

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

FILED

APR 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-61-H ✓

DALE REED,
Plaintiff,

v.

TULSA WORLD PUBLISHING COMPANY
and NEWSPAPER PRINTING CORPORATION,
Defendants.

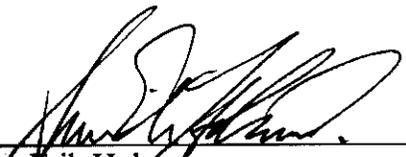
ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a **settlement** agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final **determination** of the litigation.

If, by May 8, 1996, the Parties have **not** reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 11th day of April, 1996.


Sven Erik Holmes
United States District Judge

65

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 11 1996

**Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JAKE BERNARD SIMMONS; MARY)
GAIL SIMMONS; UNKNOWN HEIRS,)
EXECUTORS, ADMINISTRATORS,)
DEVISEES, TRUSTEES, SUCCESSORS)
AND ASSIGNS, KNOWN AND)
UNKNOWN, IMMEDIATE AND)
REMOTE OF ELMER N. YODER,)
DECEASED; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
Defendants.)

Civil Case No. 95-CV 935BU

ENTERED ON DOCKET

DATE APR 13 1996

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 11th day of April,

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; and the Defendants, JAKE BERNARD SIMMONS, MARY GAIL SIMMONS, and THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF ELMER N. YODER, DECEASED, appear not, but make default.

**NOTE: THIS DOCUMENT IS TO BE MAILED
BY THE CLERK OF COURT TO THE
PROSECUTOR AND THE DEFENDANT
UPON RECEIPT.**

The Court being fully advised and having examined the court file finds that the Defendants, JAKE BERNARD SIMMONS and MARY GAIL SIMMONS, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, JAKE BERNARD SIMMONS, waived service of Summons on October 16, 1995; and the Defendant, MARY GAIL SIMMONS, waived service of Summons on October 17, 1995.

The Court further finds that the Defendants, THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF ELMER N. YODER, DECEASED, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning January 24, 1996, and continuing through February 28, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF ELMER N. YODER, DECEASED, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a

bonded abstracter filed herein with respect to the last known addresses of the Defendants, THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF ELMER N. YODER, DECEASED. 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 September 28, 1995; and that the Defendants, JAKE BERNARD SIMMONS, MARY GAIL SIMMONS, and THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF ELMER N. YODER, DECEASED, 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 Three (3), Block One (1), A Resubdivision of Block Seven (7), EAST CENTRAL HEIGHTS, an addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on December 18, 1981, Elmer N. Yoder, executed and delivered to WESTERN PACIFIC FINANCIAL CORPORATION his mortgage note in the amount of \$44,600.00, payable in monthly installments, with interest thereon at the rate of fifteen and one-half percent (15.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Elmer N. Yoder, executed and delivered to WESTERN PACIFIC FINANCIAL CORPORATION a mortgage dated December 18, 1981, covering the above-described property. Said mortgage was recorded on December 30, 1981, in Book 4587, Page 1157, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 2, 1987, SHEARSON LEHMAN MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, his successors and/or assigns. This Assignment of Mortgage was recorded on November 18, 1987, in Book 5064, Page 1819, in the records of Tulsa County, Oklahoma. It should be noted that Western Pacific Financial corporation changed their name under a certificate of incorporation to Shearson American

Express Mortgage Corporation; then there was an amendment to the Certificate of Incorporation changing the name to Shearson Lehman Mortgage Corporation.

The Court further finds that the Defendants, JAKE BERNARD SIMMONS and MARY GAIL SIMMONS, are the current record owners of the property by virtue of a General Warranty Deed dated August 31, 1984, and recorded on September 10, 1984 in Book 4815, Page 2275, in the records of Tulsa County, Oklahoma. The Defendants, JAKE BERNARD SIMMONS and MARY GAIL SIMMONS, are the current assumptors of the subject indebtedness.

The Court further finds that on January 1, 1989, the Defendant, JAKE BERNARD SIMMONS, 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 May 1, 1990 and October 1, 1990.

The Court further finds that on September 22, 1988, the Defendants, JAKE BERNARD SIMMONS and MARY GAIL SIMMONS, filed their petition for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 88-02836-W. This case was discharged on December 29, 1988 and subsequently closed on March 16, 1989. The Defendants listed the subject real property on Schedule B.

The Court further finds that the Defendants, JAKE BERNARD SIMMONS and MARY GAIL SIMMONS, 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, JAKE BERNARD SIMMONS and MARY GAIL

SIMMONS, are indebted to the Plaintiff in the principal sum of \$114,397.06, plus interest at the rate of 15.5 percent per annum from March 16, 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 \$24.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$24.00 which became a lien as of June 25, 1993; a lien in the amount of \$26.00 which became a lien as of June 26, 1992; and a lien in the amount of \$6.00 which became a lien as of July 2, 1990. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, JAKE BERNARD SIMMONS, MARY GAIL SIMMONS, and THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS, IMMEDIATE AND REMOTE, KNOWN AND UNKNOWN OF ELMER N. YODER, DECEASED, 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, JAKE BERNARD SIMMONS and MARY GAIL SIMMONS, in the principal sum of \$114,397.06, plus interest at the rate of 15.5 percent per annum from March 16, 1995 until judgment, plus interest thereafter at the current legal rate of 5.46 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 \$80.00, plus costs and interest, for personal property taxes for the years 1989, and 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, JAKE BERNARD SIMMONS, MARY GAIL SIMMONS 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, JAKE BERNARD SIMMONS and MARY GAIL SIMMONS, 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 \$80.00, 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.

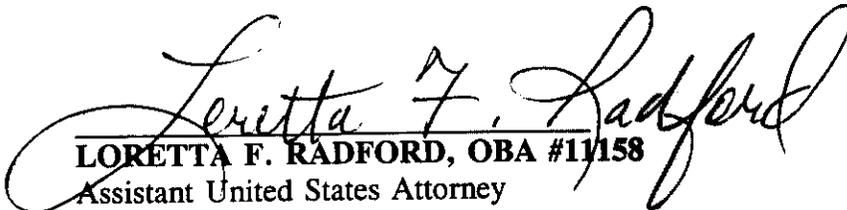
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

s/ MICHAEL BURRAGE

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 935BU

LFR/lg

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

HOMELAND STORES, INC.,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

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)

Case No. 96-C-0092-K

ENTERED ON DOCKET
DATE APR 13 1996

F I L E D

APR 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

Upon motion of plaintiff, and there being no objection from
defendant,

IT IS ORDERED that the above-styled case is hereby dismissed.

s/ TERRY C. KERN

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

APR 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DEBRA D. DAVIS,)
)
Plaintiff,)
)
vs.)
)
P-F BUSINESS SYSTEMS, INC.,)
)
Defendant.)

Case No. 95-C-594-BU ✓

ENTERED ON DOCKET

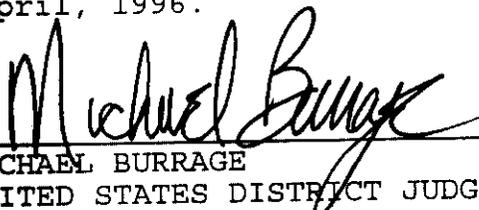
DATE APR 13 1996

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 30 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 11^m day of April, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

APR 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DEBRA D. DAVIS,)
)
Plaintiff,)
)
vs.)
)
P-F BUSINESS SYSTEMS, INC.,)
)
Defendant.)

Case No. 95-C-594-BU ✓

ORDER

In light of the parties' settlement and compromise of this matter, the Court **DECLARES MOOT** Defendant's Motion for Reconsideration of Ruling on Admissability of Defendant's Exhibit 15 (Docket Entry #33) and Motion for Reconsideration of Ruling on Admissability of Defendant's Exhibit 16 (Docket Entry #36).

ENTERED this 11th day of April, 1996.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

APR 11 1996 *rw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DORIS M. SNOW,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

CIVIL ACTION NO. 95-C-573-BU/

ORDER

ENTERED ON DOCKET
DATE APR 13 1996

This matter comes on before the court upon the stipulation of all parties and the court, being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, Doris M. Snow, against the United States of America are hereby dismissed with prejudice.

Dated this 11th day of April, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:



WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 W. 4th St., Suite 3460
Tulsa, OK 74103-3809
(918) 581-7463
Attorney for Defendant



JAMES R. HICKS
9th Floor, City Plaza West
5310 East 31st Street
Tulsa, OK 74135
(918) 664-0800
Attorney for Plaintiff

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

REGINALD KEITH LONG,
Petitioner,

vs.

RON CHAMPION,
Respondents.

No. 95-C-585-K

EDD 4/13/96

FILED

APR 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Petitioner's pro-se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is now before the Court for a decision. Respondent has filed a Rule 5 response.

In this proceeding, Petitioner challenges his convictions in Case Nos. CF-90-3900 and CF-90-2211 to the extent that they were improperly enhanced on the basis of his conviction in Case No. CF-87-4246. Petitioner pled guilty to Robbery with Firearm in Case No. CF-87-4246 and received a six-year sentence. Petitioner did not attempt to withdraw his guilty plea as required to perfect a certiorari appeal, but filed a petition for post-conviction relief which the district court denied on June 16, 1993. Petitioner did not appeal. Thereafter, Petitioner filed a second application for post-conviction relief, seeking an appeal out of time. The district court denied relief on res judicata grounds and the Court of Criminal Appeals affirmed.

In the present application for a writ of habeas corpus, Petitioner alleges the district court failed to advise him of his right to a trial by jury and of his right to a direct appeal. Respondent objects to the petition on the ground that Petitioner

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has procedurally defaulted his claims; the Oklahoma Court of Criminal Appeals rested its decision on an adequate and independent state procedural bar; and Petitioner cannot show cause and prejudice, or a fundamental miscarriage of justice to excuse his procedural default. Petitioner has not filed a reply brief.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). The "cause and prejudice" standard applies to pro se prisoners just as it applies to prisoners represented by counsel. Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991).

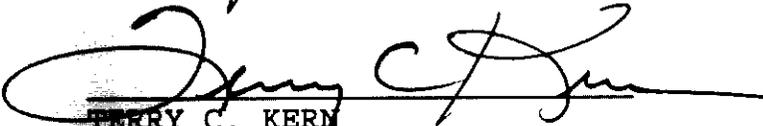
Petitioner does not dispute that he defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule when he failed to appeal the denial of his first application for post-conviction relief. See Okla. Stat. Ann. tit. 22, § 1087 (West 1986); Farrell v. Lane, 939 F.2d 409 (7th Cir. 1991) (petitioner defaulted claim of ineffective assistance of counsel for purposes of habeas review, even though he had raised that issue in post-conviction petition, where he had failed to appeal denial of post-conviction petition). In any event, the

Court finds Petitioner cannot show cause and prejudice for his default. Petitioner has no federal constitutional right to effective assistance of counsel at the post conviction level. See Coleman, 501 U.S. 722, 111 S.Ct. 2546, 2568 (1991) (no constitutional right to counsel in a state post-conviction proceeding); see also Carter v. Montgomery, 769 F.2d 1537, 1543 (11th Cir. 1985); Morrison v. Duckworth, 898 F.2d 1298, 1301 (7th Cir. 1990). Because Petitioner has not made the requisite showing of cause for his procedural default, the Court need not reach the prejudice prong of the cause-and-prejudice exception.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence. Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). Petitioner, however, does not claim actual innocence.

Accordingly, the petition for a writ of habeas corpus is hereby denied as procedurally barred.

SO ORDERED THIS 9 day of April, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

Wilson's recusal, there will be no Bankruptcy Judge assigned to this adversary proceeding; and no judicial officer will be available to issue any order or other directive in this adversary proceeding." Id.

Judge Wilson has taken the unusual step of suggesting withdrawal of reference himself by filing the present motion. This Court has found one reported decision in which a bankruptcy court sua sponte "recommended" to the district court the reference be withdrawn. In Re Moody, 64 B.R. 592 (Bankr.S.D.Tex. 1986). The Court will consider the motion.

The Court has searched for authority addressing whether the anticipated recusal of one bankruptcy judge in a district constitutes "cause shown" under 28 U.S.C. §157(d) for withdrawal of the reference, but has found none. There does not seem any impediment to so holding, under the facts of this case. Judge Cornish of the United States Bankruptcy Court for the Eastern District of Oklahoma has been authorized to handle proceedings in the Northern District pursuant to 28 U.S.C. §155(a). This Court has contacted Judge Cornish, who has expressed his willingness to be assigned this matter.

It is the Order of the Court that the emergency "motion" by the bankruptcy judge for withdrawal of reference is hereby GRANTED solely for the purpose of reassignment. The above-referenced matter is hereby referred, pursuant to 28 U.S.C. §157(a), to the United States Bankruptcy Court for the Northern District of Oklahoma, for reassignment to the Honorable Tom Cornish, United

States Bankruptcy Judge. This Order shall serve as a final order in case no. 96-C-254-K in the United States District Court for the Northern District of Oklahoma.

ORDERED this 9 day of April, 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

APR 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ERHAN OZEY,

Appellant,

v.

JOSEPH Q. ADAMS, TRUSTEE

Appellee.

Case No: 94-C-932-B

ENTERED ON DOCKET

DATE APR 11 1996

ORDER GRANTING MOTION TO DISMISS APPEAL

NOW, on this 10th day of April, 1996, this matter came on before me, upon the Motion to Dismiss Appeal filed herein by Erhan Ozey, Appellant. The court finds that the motion should be and is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss Appeal filed herein by Erhan Ozey, Appellant, is granted and this appeal is hereby dismissed.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

APR 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KRISTINE WHEATON)
)
 Plaintiff,)
)
 vs.)
)
 GREEN COMPANIES DEVELOPMENT)
 GROUP, INC., an Oklahoma corporation,)
 and ARTHUR C. SCHNEIDER, an)
 individual,)
)
 Defendants.)

Case No. 95-C-975H

ORDER

At a hearing held on April 4, 1996, the Court considered (1) Plaintiff's Application for Costs and Attorneys' Fees, (2) Plaintiff's Supplemental Application for Costs and Attorneys' Fees and (3) Plaintiff's Supplemental Application for Expert Witness Fees, together with (4) the Defendants' responsive pleadings in opposition. Janet M. Reasor and Robert S. Glass entered their appearance as legal counsel for the Plaintiff and Robert B. Sartin entered his appearance as legal counsel for the Defendants. The Court having reviewed its record and entertained statements of legal counsel for the parties, incorporates by this reference its findings and conclusions made a part of the record at the time of the hearing and enters its order as follows:

IT IS ORDERED that Plaintiff's Application for Costs and Attorneys' Fees is granted and that the attorneys' fees requested therein in the aggregate sum of \$11,734.00 be, and the same are hereby, awarded to Plaintiff. Plaintiff's Supplemental Application for Costs and Attorneys' Fees is hereby granted to the limited extent of \$1,000.00 with the additional relief requested therein by Plaintiff being hereby denied. The Plaintiff's Supplemental Application for Expert Witness Fees is hereby denied. The monetary relief awarded to the Plaintiff in the

aggregate sum of \$12,734.00 is an award against and shall be paid by Defendants, GREEN COMPANIES DEVELOPMENT GROUP, INC. and ARTHUR C. SCHNEIDER.

IT IS SO ORDERED April 10th, 1996.

S/ SVEN ERIK HOLMES

**Honorable Sven Erik Holmes,
United States District Court Judge
Northern District of Oklahoma**

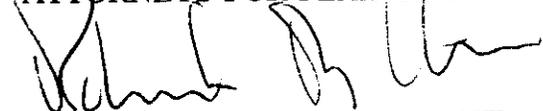
APPROVED FOR ENTRY:



Robert S. Glass, OBA No. 10824
JOHNSON, ALLEN, JONES & DORNBLASER
900 Petroleum Club Building
601 South Boulder
Tulsa, Oklahoma 74119
Telephone: (918) 584-6644

Janet M. Reasor, OBA No. 10937
ZIEREN & REASOR
321 S. Boston, Suite 900
Tulsa, Oklahoma 74103
Telephone: (918) 587-8644

ATTORNEYS FOR PLAINTIFF



Robert B. Sartin, OBA No. 12848
William R. Grimm, OBA No. 3628
BARROW GADDIS GRIFFITH & GRIMM
610 S. Main, Suite 300
Tulsa, Oklahoma 74119-1248
Telephone: (918) 584-1600
ATTORNEYS FOR DEFENDANTS

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

FILED

APR 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

The NORDAM Group, Inc.,)
)
 Plaintiff,)
)
 v.)
)
 BEDE JET CORPORATION,)
 a Missouri Corporation,)
)
 Defendant.)

Case No. 95-C-859H

AGREED JUDGMENT

The above action came before the Court and the parties having agreed to judgment as stated below, it is hereby;

ORDERED, ADJUDGED AND DECREED that Plaintiff, The NORDAM Group, Inc., have judgment against Defendant, Bede Jet Corporation, as follows:

- (1) For the principle sum of \$475,491.00;
 - (2) Taxable Court costs;
 - (3) Pre-judgment interest at the rate of 6%;
 - (4) Post-judgment interest at the federal statutory rate under 28 U.S.C. § 1961;
- and
- (5) Attorneys' fees.

It is SO ORDERED.

SIGNED AND ENTERED this 10th day of April, 1996.

S/ SVEN ERIK HOLMES

United States District Judge

APPROVED AS TO FORM AND CONTENT:

By: 

Robert F. Biolchini

Katy Day

STUART, BIOLCHINI, TURNER & GIVRAY

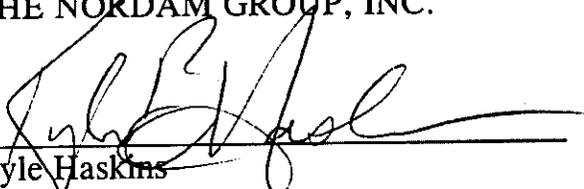
15 East Fifth Street, Suite 3300

First Place Tower

Tulsa, Oklahoma 74103

ATTORNEYS FOR PLAINTIFF,

THE NORDAM GROUP, INC.

By: 

Kyle Haskins

B. Hayden Crawford

CRAWFORD, CROWE, BAINBRIDGE & HASKINS, P.A.

2310 Mid-Continent Tower

401 South Boston Avenue

Tulsa, Oklahoma 74103-4059

ATTORNEYS FOR DEFENDANT,

BEDE JET CORPORATION

By: 

James R. Bede, FOR DEFENDANT

BEDE JET CORPORATION

18421 Edison Avenue

Chesterfield, Missouri 63012

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

FILED
APR 10 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CHARLES L. BOYD,)
)
 Plaintiff,)
)
 vs.)
)
 DISTRICT ATTORNEY LA FORTUNE, and)
 ASSISTANT PUBLIC DEFENDER CANTRAL,)
)
 Defendants.)

No. 96-C-113-H ✓

ORDER

Plaintiff, a pretrial detainee at the Tulsa County Jail, has filed with the Court this civil rights complaint, pursuant to 42 U.S.C. § 1983. On March 21, 1996, the Court granted Plaintiff leave to proceed in forma pauperis. The Court now reviews Plaintiff's complaint for frivolity under 42 U.S.C. § 1915(d).

Plaintiff sues his state public defender and the Tulsa County District Attorney for failure to reduce his bond.¹ He contends he is a non-violent offender who should be released from custody pending trial so that he can return to his previous employment and earn sufficient money to retain counsel of choice for his June trial.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to

¹ On April 9, 1996, the Court received from Plaintiff a proposed amended complaint seeking to add as defendant Judge Clifford Hopper.

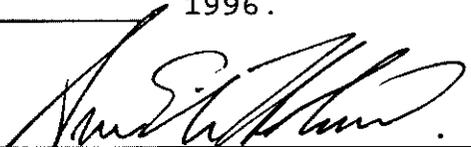
U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's allegations lack an arguable basis in law. Neither the Eighth nor the Fourteenth Amendment provides absolute entitlement to pretrial release. Williams v. Farrior, 626 F.Supp. 983, 985-86 (S.D. Miss. 1986).

Therefore, Plaintiff's complaint is hereby DISMISSED WITHOUT PREJUDICE as frivolous under 28 U.S.C. § 1915(d). The Clerk shall MAIL a copy of the complaint to Plaintiff.

IT IS S ORDERED.

This 10TH day of APRIL 1996.


Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
DATE 4-11-96

FILED

APR 10 1996

Ja

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

TONY LAMAR VANN,)
)
 Plaintiff,)
)
 vs.)
)
 DISTRICT JUDGE DAVID GAMBILL,)
 et al.,)
 Defendants.)

No. 96-CV-102-H

ORDER

On February 14, 1994, Tony Lamar Vann, a state inmate, filed a motion for leave to proceed in forma pauperis along with a civil rights complaint pursuant to 42 U.S.C. § 1983. The Court now reviews Plaintiff's complaint for frivolity under 28 U.S.C. § 1915(d).

Plaintiff alleges that on January 4, 1996, Defendants removed him from the pre-parole conditional supervision program (PPCS) and arrested him on the basis of a void warrant. He contends Defendants (1) falsified documents and concealed facts in violations of 31 U.S.C. § 3731 and 42 U.S.C. § 3795A, (2) conspired to violate his rights in violation of 18 U.S.C. § 241, and (3) "aided and abetted violations of his Fifth and Fourteenth Amendment rights." He seeks declaratory and injunctive relief, punitive damages, and a full scale investigation.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive

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litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

The Supreme Court has established two necessary elements for recovery of damages under a 42 U.S.C. § 1983 civil rights claim. A plaintiff must prove that he was deprived of a right secured by the United States Constitution and, that the deprivation was proximately caused by the defendant acting under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

Even liberally construing Plaintiff's complaint, in accordance with his pro se status, his allegations lack an arguable basis in law. Plaintiff's reliance on federal criminal statutes is insufficient to establish that he was deprived of a federal constitutional right under 42 U.S.C. § 1983.¹ See West v. Atkins, 487 U.S. 42, 48 (1988) (only the violation of a right secured by the Constitution or laws of the United States is actionable under 42 U.S.C. § 1983).

¹ To the extent Plaintiff is challenging his removal from the PPCS program he should do so by petition for a writ of habeas corpus. See Harper v. Young, 64 F.3d 563 (10th Cir. 1995).

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE as frivolous. The Clerk shall MAIL to Plaintiff the extra copies of the complaint and a habeas corpus package.

IT IS SO ORDERED this 10TH day of APRIL, 1996.


Sven Erik Holmes
United States District Judge

FILED

APR 10 1996

su

Paul Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

IN RE:

J. RAIFORD LUKER, JR.,
and YVONNE LUKER,
Debtors

)
)
) No. 83-00854-W
) Chapter 11
)
)
) No. 95-C-120-K ✓

ENTERED ON DOCKET
DATE 4-11-96

REPORT AND RECOMMENDATION

Before the undersigned United States Magistrate Judge is the motion of Appellant, Internal Revenue Service, to withdraw its notice of appeal in the captioned case [Dkt. 3]. The motion was filed January 26, 1996 and, to date there has been nothing filed in opposition to the motion. Therefore, the United States Magistrate Judge recommends that Appellant's Motion to Withdraw Notice of Appeal [Dkt. 3] be GRANTED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the findings and recommendations of the Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 10th day of April, 1996.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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ENTERED ON DOCKET

DATE 4-11-96

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

APR - 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THEODORE WILLIAM FORD)
)
 Petitioner,)
)
 vs.)
)
 STEVE HARGETT, Warden, et al.)
)
 Respondent.)

Case No. 95-C-364-B ✓

REPORT AND RECOMMENDATION

Petitioner, Theodore William Ford, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 24, 1995. Petitioner, currently confined in the Dick Conners Correctional Center at Hominy, Oklahoma, challenges *pro se* the judgment and sentence for (1) robbery with of a firearm, (2) forcible oral sodomy, (3) unauthorized use of a motor vehicle^{1/} (4) kidnapping, and (5) unauthorized use of a credit card, entered in Case No. CRF-83-1596. By minute order dated April 25, 1995, the District Court referred the petition for a writ of habeas corpus for further proceedings consistent with the jurisdiction of the United States Magistrate. For the reasons discussed below, the United States Magistrate Judge recommends that the petition for a writ of habeas corpus be **DISMISSED** without prejudice to refiling.

^{1/} Petitioner's conviction on this count was reversed by the Oklahoma Court of Criminal Appeals on Petitioner's direct appeal.

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I. FACTS AND PROCEDURAL BACKGROUND

Petitioner was found guilty, following a jury trial, on July 27, 1984. [Transcript of Proceedings, dated July 25-27, 1984, at 411-414]. Petitioner was convicted of robbery with a firearm (sentence 75 years), forcible oral sodomy (sentence 75 years), unauthorized use of a motor vehicle (sentence 50 years), kidnapping (sentence 75 years), and unauthorized use of a credit card (sentence 35 years).

Petitioner brought a habeas proceeding in this Court in 1988 (Case No. 88-C-631-C). By Report and Recommendation dated September 23, 1988, the United States Magistrate Judge recommended that Petitioner's application be denied on procedural grounds due to Petitioner's failure to perfect a direct appeal. By Order dated March 22, 1990, this Court stayed Petitioner's habeas action for six months to permit the Oklahoma Court of Appeals to provide Petitioner with a court-appointed attorney to aid in his direct appeal.

Petitioner's direct appeal was decided by the Oklahoma Court of Criminal Appeals by Order dated June 20, 1994. [Petitioner's Memorandum Brief in Support of Application for Habeas Corpus Relief, Doc. No. 2-1, exhibit 2]. Petitioner asserted that the trial court erred by failing to give a cautionary jury instruction related to eyewitness identification, that the trial court erred in overruling Petitioner's motion to suppress the victim's in-court identification, that the trial court erred by failing to merge Count III (unauthorized use of a motor vehicle) with Count V (unauthorized use of a credit card) and with Count I (robbery with a firearm), that a black venireman was improperly excluded from the jury, and that the sentence imposed was

excessive. The Oklahoma Court of Criminal Appeals held that charging Petitioner with both unauthorized use of a motor vehicle and robbery with a firearm was improper and ordered that the conviction based on Count III (unauthorized use of a motor vehicle) be reversed and dismissed. However, Petitioner's conviction and sentence was affirmed on all other counts.

Petitioner filed his Brief in Support of Application for Habeas Corpus on April 24, 1995 [Doc. No. 2-1]. Petitioner asserts the same grounds for relief in his Brief as he did in his direct appeal. Petitioner requested habeas relief because: (1) the trial court erred in failing to instruct the jury on eyewitness identification, (2) the trial court erred in failing to suppress the in court identification of Petitioner at the preliminary hearing, (3) the trial court erred when it refused to merge count three and count five into count one, (4) the state improperly used its preemptory challenges in removing a black venireman from the jury, and (5) the sentences imposed by the trial court were excessive. [Doc. No. 2-1].

Respondent filed a Response to the Petition for Writ of Habeas Corpus on June 13, 1995. [Doc. No. 5-1]. Respondent asserts that jury instructions cannot be used to set aside a state conviction unless the alleged error renders the trial fundamentally unfair, that the trial court did not err in permitting the victim to identify the Petitioner at the preliminary hearing, that the Oklahoma Court of Criminal Appeals remanded Count III with instructions to dismiss and Counts I and IV should not be merged, that the black venireman was not improperly excused from the jury, and that Petitioner's

sentence was not excessive. [Doc. No. 5-1]. On July 28, 1995, Petitioner filed his Reply to Respondent's Response to his Petition for Habeas Corpus. [Doc. No. 7-1].

On July 28, 1995, Petitioner filed a Motion for Leave of Court to Amend or Supplement Writ of Habeas Corpus. In the Brief attached to his Motion, Petitioner asserts that he was unhappy with the performance of his appointed public defender^{2/} and requested that a new attorney be appointed to represent him at trial. Petitioner asserts that the trial court refused to appoint another attorney, and refused to continue the trial of the action to permit Petitioner the opportunity to retain outside counsel. According to Petitioner, he was forced to proceed to trial and to represent himself *pro se*. Petitioner argues that the record does not support that he "knowingly and intelligently" waived his right to counsel, and that the trial court did not warn Petitioner of the disadvantages of self-representation. Petitioner asserts that he was deprived of his right to effective representation at trial and that such a deprivation constitutes reversible error.

Respondent filed an Objection to Petitioner's Motion to Amend on October 17, 1995. [Doc. No. 11-1]. Respondent requested that the Court deny Petitioner's motion to amend. By Order dated December 4, 1995, the Court granted Petitioner's Motion to Amend finding that Respondent's objections should be considered when

^{2/} Petitioner asserted that his appointed counsel had discussed Petitioner's case with another client in violation of the attorney-client privilege, had inadequately prepared for the case, had failed to follow-through in filing various motions or subpoenaing witnesses, and had taken some of Petitioner's property. See Transcript of Proceedings, dated July 25-27, 1984, at 5-31.

the Court addressed the merits of Petitioner request for a Writ of Habeas Corpus. Petitioner's Amended Brief was filed December 4, 1995.

II. REQUIREMENTS OF EXHAUSTION

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

Petitioner asserts in his Amended Brief to his Petition for a Writ of Habeas Corpus that the trial court denied him his right to trial counsel and failed to properly warn him of the dangers of self-representation.

According to Respondent, Petitioner was represented by counsel on his direct appeal, but the issue Petitioner now seeks to raise has not been exhausted in state court.^{3/} Respondent notes that Petitioner was granted permission to file a direct

^{3/} Petitioner asserts that these issues were presented to the highest court in the state on January 18, 1988, and were decided by the court on May 12, 1988. The Order referenced by Petitioner which denied Petitioner's request for post-conviction relief was issued because Petitioner had failed to file a direct appeal and had failed to present any justification for his failure to file a direct appeal. See Doc. No. 11-1, Exhibit D. Whether or not the issue Petitioner now raises was presented to the state's highest court is impossible to discern from a review of this Order. Regardless, Petitioner was permitted to file a direct appeal out of time in 1994. Petitioner has filed no post-conviction relief proceedings in state court since the

(continued...)

appeal out of time in the Court of Criminal Appeals, yet did not present the issue he now urges in that appeal. According to Respondent, because Petitioner failed to present this claim, the Court should deem Petitioner's argument procedurally barred and find that Petitioner is prohibited from raising this issue in a federal habeas petition.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the highest court of the state declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S. Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. Additionally, a finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. at 986 (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

^{3/} (...continued)

decision of the Oklahoma Court of Criminal Appeals on his direct appeal, and Petitioner has not raised any issues in state court related to the denial of his right to trial counsel.

Petitioner's claim that he was wrongfully deprived of his right to trial counsel was not raised and has not been decided by the Oklahoma courts, and is therefore not exhausted.

However, Respondent argues that Petitioner's claim should have been raised on direct appeal, and this Court should therefore find that Petitioner's claim is procedurally barred. Respondent refers the Court to Harris v. Champion, 48 F.3d 1127 (10th Cir. 1995). In Harris, the Tenth Circuit Court of Appeals determined that

If a federal court that is faced with a mixed petition determines that the petitioner's unexhausted claims would now be procedurally barred in state court, 'there is a procedural default for purposes of federal habeas.' Therefore, instead of dismissing the entire petition, the court can deem the unexhausted claims procedurally barred and address the properly exhausted claims.

Harris, 48 F.3d at 1131 n.3.

Although the Oklahoma state court may find that Petitioner's claim is procedurally barred, the Court chooses, under the facts of this case, not to predict what the state court will do. Petitioner's state proceedings have consisted of a direct appeal. Petitioner has filed no requests for post-conviction relief following his direct appeal, choosing instead to petition this Court for a writ of habeas corpus. Therefore the possibility exists that the state courts will apply an exception and permit a review of Petitioner's claim on the merits.^{4/}

^{4/} As noted, Petitioner can, in a request for post-conviction relief, argue that he was effectively deprived of his right to counsel at trial. In addition, because the counsel appointed to handle Petitioner's direct appeal out-of-time failed to raise this issue, Petitioner can argue ineffective assistance of direct appeal counsel. Before these issues are presented to this Court, however, the issues must have been "fairly presented" to the highest Oklahoma court--the Oklahoma Court of Criminal Appeals.

Having found that one of the issues raised by Petitioner has not been exhausted, the Court is now confronted with a "mixed petition."^{5/} "[A] district court must dismiss habeas petitions containing both unexhausted and exhausted claims." Rose v. Lundy, 445 U.S. 509, 522, 102 S. Ct. 1198, 1205, 71 L. Ed. 2d 379 (1982).

Of course a prisoner is permitted to amend his petition to include only the unexhausted claims, rather than return to state court to exhaust all of his claims. However, "the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. Under 28 U.S.C. § 2254 Rule 9(b), a district court may dismiss subsequent petitions if it finds that 'the failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of the writ.'" Id. at 521. See also Sanders v. United States, 373 U.S. 1, 18, 83 S. Ct. 1068, 1078, 10 L. Ed. 2d 148 (1963) ("[I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.").

^{5/} A "mixed petition" is a petition which contains both exhausted and unexhausted claims.

III. RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **DISMISS** Petitioner's Petition for Writ of Habeas Corpus without prejudice.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of the receipt of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 9 day of April 1996.



Sam A. Joyner
United States Magistrate Judge

DATE 4-11-96

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

F I L E D

APR 10 1996 *sa*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MARIE A. WALKER,)
SSN: 445-44-9152,)
)
Plaintiff(s),)
)
vs.)
)
SHIRLEY S. CHATER, Commissioner,)
Social Security Administration,)
)
Defendant.)

Case No. 95-C-354-M

ORDER

Plaintiff, Marie A. Walker, seeks **judicial review** of a decision of the Commissioner of the Social Security Administration (SSA) **denying Social Security benefits**.¹ In accordance with 28 U.S.C. § 636(c) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U.S.C. § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the

^{1/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The entire record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. The Court finds that the Administrative Law Judge (ALJ) has adequately and correctly set forth the facts and the required regulatory sequential evaluation process applicable to this case. The Court therefore incorporates that information into this order as the duplication of this effort would serve no useful purpose.

Plaintiff has appealed the denial of benefits by the SSA², alleging that the ALJ's decision is not supported by substantial evidence and that he erred by failing to obtain a medical examination to ascertain Plaintiff's current visual capabilities.

Plaintiff, Marie A. Walker, was, at the time of the final decision, 50 years old, a person closely approaching advanced age, with a high school education [R. 29, 167].

^{2/} Ms. Walker filed an application for disability benefits on March 4, 1993, which was denied July 9, 1993. The denial was affirmed on reconsideration on February 17, 1994. A hearing before an Administrative Law Judge was held July 20, 1994. By Decision dated August 2, 1994, the ALJ entered the findings which are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 13, 1995. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal, 20 C.F.R. §§ 404.981, 416.1481.

Her past relevant work has been as a home care provider for the Department of Human Services and as a salad maker in private country clubs [R. 66, 74, 78, 167]. She has not been gainfully employed since May 29, 1992. Plaintiff claims disability due to Diabetes Mellitus and Anterior Uveitis [R. 70]. She claims she cannot work due to severe problems with her feet and her vision caused by diabetes [R. 89, 161, 170]. She also claims nonexertional impairments of depression and of pain in her hands caused by arthritis [R. 61, 171]. The ALJ found that Plaintiff is impaired by poor vision in the right eye but that the impairment neither meets nor equals the Listings of Impairment criteria under 20 C.F.R. 404, Subpart P, Reg. 4. He decided that Plaintiff is unable to perform her past relevant work but that she has the residual functional capacity to perform a full range of sedentary and light work of an unskilled nature, subject to no close binocular vision. His finding, therefore, was that Plaintiff is not disabled under 42 U.S.C. § 423(d)(1)(A).

The medical evidence in the record consists of progress notes by Joe D. Cope, O.D., who treated Plaintiff for uveitis³ from May 29, 1992 to December 14, 1992 [R. 92-99] and his report dated May 11, 1993 [R. 91]. The record also contains progress notes by Steve P. Sanders, D.O., who treated Plaintiff for diabetes from June 12, 1992 through November 4, 1993 [R. 100-124], and medical records from Dr. Robert T. Willis, a foot doctor, from February 21, 1994 to May 24, 1994 [R. 138-141].

^{3/} Uveitis is defined in *Dorland's Illustrated Medical Dictionary*; W.B. Saunders Co., p. 1785 (28 ed. 1994), as an inflammation of part or all of the the uvea, the middle (vascular) tunic of the eye, and commonly involving the other tunics (the sclera and cornea, and the retina).

Anterior uveitis involves the structures of the iris and/or ciliary body, including iritis, cyclitis and iridocyclitis. Id.

Hand-written treatment notes from March 16, 1992 to March 8, 1994 of Margaret A. Stripling, D.O., are also in the record [R. 149-154]. Plaintiff was hospitalized for three days in July, 1992 at Tulsa Regional Medical Center for acute gastroenteritis. Those records and the lab reports from the Medical Center are included in the record [R. 125-131 and 146-148]. These records were all admitted as exhibits at the commencement of the administrative hearing on July 20, 1994. At that time, Plaintiff's attorney submitted Plaintiff's list of medications and stated that he desired no other additions to the record [R. 166].

Plaintiff complains that the record lacks sufficient evidence to support the ALJ's finding that she retains the capacity to perform the visual demands of alternative work [Statement of Facts, Dkt. 6]. She contends that the ALJ relied upon the report of Dr. Cope dated May 11, 1993 which stated that Plaintiff's binocular vision was decreased but that she should be able to perform certain tasks very well "as long as her left eye maintains its visual acuity". Plaintiff asserts that her condition worsened after Dr. Cope's report was written and that, lacking evidence to the contrary, the ALJ should have obtained a consultative medical examination and report as to her current visual acuity. She cites 42 U.S.C. § 423(d)(5)(B) and *Sanders v. Secretary of Health & Human Serv.*, 649 F.Supp. 71 (N.D. Ala. 1986) as her authority for this proposition.

The statute reads, in pertinent part:

(B) In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Secretary shall consider all evidence available in such individual's case record, and shall develop a complete medical history of at least the preceding twelve

months for any case in which a determination is made that the individual is not under a disability. In making any determination the Secretary shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on a consultative basis. *Id.*

This language is ambiguous because it does not specify what date or event the twelve month period must precede. The time period referred to by § 423(d)(5)(B) could be either the twelve month period prior to the date an application for benefits is filed or the twelve month period prior to the date a decision to deny benefits is rendered. The difference in the time periods produced by either of these options is significant because there is often a long delay between an application for benefits and a decision to deny benefits.

The Secretary has adopted a regulation that resolves the ambiguity in § 423(d)(5)(B). The pertinent regulation provides as follows:

Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application. . . .

20 C.F.R. § 404.1512(d) (emphasis added). See also 20 C.F.R. 416.912(d).

Congress has delegated to the Secretary broad power to adopt regulations "which are necessary or appropriate" to carry out the disability determination provisions of the Social Security Act. 42 U.S.C. §§ 405(a) & 1383(d)(1). Thus, this Court must accord deference to the Secretary's interpretation of the Social Security

Act. The Court's review of a regulation "is limited to determining whether the regulations are arbitrary and capricious or are inconsistent with the statute." *Everhart v. Bowen*, 853 F.2d 1532, 1535 (10th Cir. 1988), rev'd on other grounds, 494 U.S. 83 (1990); *Sullivan v. Zebley*, 493 U.S. 521, 528 (1990). Under the circumstances presented by this case, the Court finds no evidence that § 404.1512(d) or § 416.912(d) are arbitrary, capricious, or inconsistent with 42 U.S.C. § 423(d)(5)(B). There is no regulatory or statutory requirement that the ALJ update the medical record to the time of the ALJ's decision, as Plaintiff seems to argue. See *Luna v. Shalala*, 22 F.3d 687, 692-93 (7th Cir. 1994).

Plaintiff's application for benefits was filed on March 4, 1993. The medical records relied on by the ALJ span from March, 1992 to May, 1994. Therefore, the record for the twelve month period preceding the date Plaintiff filed her application was adequately developed.

The Court notes that the last report in the record by the physician who treated Plaintiff exclusively for her visual problems (uveiritis and/or iritis) is that of Dr. Cope dated May 11, 1993. However, her eye problems were assessed by another treating physician, Steve P. Sanders, D.O., as late as November 4, 1993 as "Peripheral iritis - stable" [R. 101]. It is noteworthy, also, that the medication Plaintiff was taking for iritis, Prednisone, was discontinued in November, 1992 [R. 92, 111] and was not included in her current list of medications submitted at the hearing [R. 159].

Plaintiff has also cited *Sanders v. Secretary of Health & Human Serv.*, 649 F.Supp. 71 (N.D. Ala. 1986) as requiring the ALJ to acquire a consultative examination

when medical evidence is not sufficient to evaluate the claimant's current condition. While the ALJ must consider all relevant medical evidence of record, *Baker v. Bowen*, 886 F.2d 289 (10th Cir. 1989), he has broad latitude in ordering a consultative examination, *Diaz v. Secretary of Health & Human Servs.*, 898 F.2d 774 (10th Cir. 1990). A consultative examination is not required unless the record establishes that such an examination is necessary to enable the administrative law judge to make the disability decision, *Turner v. Califano*, 563 F.2d 669 (5th Cir. 1977). In *Sanders*, supra., the medical records upon which the ALJ relied in granting benefits to the claimant were over two years old, a situation not present in this case.

The Court concludes that the ALJ had sufficient medical evidence before him to make an informed decision about Plaintiff's visual impairment without the need for a consultative medical examination.⁴ Plaintiff did not present objective medical evidence that would support a conclusion that she suffers from a visual impairment that affects her ability to work. And, the vocational expert did consider Plaintiff's complaints about a vision impairment in determining the types of work she could perform [R. 187]. Thus, the ALJ did not err in not obtaining a consultative examination of Plaintiff's current visual condition.

The evidence shows that Plaintiff was first diagnosed with iritis and told not to work on May 29, 1992 [R. 99] by Dr. Cope. In June, 1992, Dr. Cope told Plaintiff that he felt her eye would get well [R. 98]. Dr. Sanders stated that the iritis was

^{4/} The 10th Circuit reached the same conclusion on similar facts in a recent unpublished opinion, *McKenzie v. Chater*, 69 F.3rd 548, 1995 WL 649690 (10th Cir. (Okla.)).

improving and noted that Plaintiff was "able to read her watch" [R. 113]. He told her she could return to work on August 4, 1992 [R. 112]. And, on December 14, 1992, Dr. Cope stated that there was "no iritis at this time" [R. 92]. Plaintiff continued to see Dr. Sanders for her diabetic condition, who noted that the eye problem was improving and resolving [R. 111, 113,]. Dr. Cope's May, 1993 report assessed Plaintiff's visual acuity at 20/100 OD and 20/25 OS both near and far [R. 91]. Plaintiff asserts that Dr. Cope stated in this report that he expected her condition to recur [Statement of Facts, Dkt. 6]. However, Dr. Cope's exact language is: "Her condition; (sic) however has a tendency to be recurrent." Plaintiff also characterizes Dr. Cope's statement as allowing her performance of tasks only as long as her left eye vision remained stabilized. Dr. Cope actually said that Plaintiff was doing quite nicely and that her performance was limited due to "a decrease in her binocularity. She should be able to perform certain (sic) tasks very well though as long as her left eye maintains its visual acuity." There is no objective evidence in the record that the iritis has recurred or that the acuity of her left eye has decreased.

Plaintiff has insinuated that her visual problem was directly caused by diabetes and included the definition of Diabetes Mellitus and Retinopathy in her brief [Dkt. 6, p. 2]. There is no evidence, however, objective or otherwise, that Plaintiff suffers from Retinopathy. The reference in the July, 1992 hospital records to the possibility of Cystoid Macular Edema⁵ in the right eye (the left eye appeared normal) was not

^{5/} *Dorland's Illustrated Medical Dict., supra:*

At page 421: Cystoid: "resembling a cyst; a cystlike, circumscribed collection of softened material";
(continued...)

attributed to her diabetic condition. **Instead**, the report mentioned diabetes only in the "history" and stated that Plaintiff was **having** no eye pain and denied photophobia [R. 130]. There is no evidence in the record that a direct association between Plaintiff's degenerating diabetic condition and **iritis** exists. Dr. Sander's notes regarding "poor control" of Plaintiff's diabetic condition **were** actually chastisement to Plaintiff when she admitted "meds for diabetes not taken" in November, 1992 [R. 92] and again in August, 1993 [R. 102]. Furthermore, the dosage of medication taken by Plaintiff to control her diabetes moved from oral dosage of 10 mg. twice per day [R. 111] to Humulin N, 10 units once per day **well after** the iritis had been resolved [R. 110].

As to Plaintiff's claims of **disability** due to ulcers on the bottom of her feet [R. 170], the Court notes that the only **objective** evidence to a foot condition is Robert T. Willis's treatment records and report [R. 139-141]. Dr. Willis treated Plaintiff from February 21, 1994 to May 24, **1994** for an ulcer on her left foot which was "debreded". His prognosis was "**very good** with orthotics and orthopedic Shoes" [R. 139]. There is no medical evidence that Plaintiff suffers from ulcers or calluses on both feet. The Court finds that the **ALJ** evaluated the record as to Plaintiff's foot problems in accordance with the correct legal standards established by the Secretary and the courts. Likewise, Plaintiff **now** claims problems with arthritis [R. 85, 86] and testified at the hearing that she has **arthritis** in both hands [R. 171, 176]. The medical

^{5/} (...continued)

at page 978: Macula: "a stain, spot or thickening... a moderately dense scar of the cornea that can be seen without special optical aids..." and Macular: "**pertaining** to or characterized by the presence of macules; pertaining to the macula retinae" and at page 528: edema: "swelling".

evidence reveals that Plaintiff complained of losing strength and occasional swelling in her right hand on March 11, 1993 to Dr. Sanders. His assessment was "Probable osteoarthritis" [R. 106]. X-rays taken of both Plaintiff's hands were normal [R. 118] and Dr. Sanders noted that the condition was resolved with medication [R. 104]. The Court finds that the decision of the ALJ as to Plaintiff's complaints of arthritis is supported by substantial evidence.

The only evidence in the record of Plaintiff's worsened visual acuity and disabling pain is the testimony of Plaintiff at the hearing [R. 175-180]. The ALJ determined that those allegations are not credible based upon the medical evidence, the lack of medication for severe pain, failure of Plaintiff to seek relief through medical treatment and the lack of discomfort shown by her at the hearing [R. 15]. Plaintiff has admitted that the ALJ's finding was within his province [Statement of Facts, Dkt. 6, p. 4]. Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines [R. 22]. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of decreased visual acuity and pain in accordance with the correct legal standards established by the Secretary and the courts.

Finally, Plaintiff appears to have abandoned her claim of disability due to depression as no mention of the condition was made during the hearing on July 20,

1994 [R. 175-178] and the Plaintiff did not assert as error the ALJ's finding of no disability based upon anxiety disorder [R. 14] or his findings in the Psychiatric Review Techniques form appended to his decision [R. 19].

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 10th day of APRIL, 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE