

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

IT-TULSA HOLDINGS, INC.,

Plaintiff,

v.

BIG FOUR FOUNDRIES CORP.,
an Oklahoma corporation,
and TULSA-SAPULPA UNION
RAILWAY CO., an Oklahoma
corporation,

Defendants.

ENTERED ON DOCKET
DATE MAY 10 1996

Case No. 94-CV-498-K

F I L E D

MAY 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

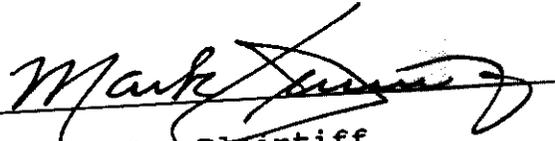
JOINT STIPULATION FOR DISMISSAL OF CLAIMS

Plaintiff, IT-Tulsa Holdings, Inc., and Defendant, Tulsa-Sapulpa Union Railway Co., pursuant to Fed.R.Civ.P. 41 (a)(1)(ii), hereby stipulate to the dismissal of their respective claims and counterclaims stated against each other herein, each party hereto to bear its own costs, expenses and attorneys' fees, in accordance with the Settlement Agreement and Release entered into between these parties.

Mark B. Jennings, OBA NO. 10082

SHIPLEY, JENNINGS & CHAMPLIN, P.C.
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By


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By


Attorneys for Defendant
TULSA-SAPULPA UNION RAILWAY
CO.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 9th day of May, 1996, a true and correct copy of the above and foregoing document was mailed, with proper postage thereon, to:

Linda C. Martin, Esq.
Doerner, Saunders, Daniel & Anderson
320 S. Boston, Suite 500
Tulsa, Oklahoma 74103

A handwritten signature in cursive script, appearing to read "Mark Saunders", is written over a horizontal line.

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

F I L E D

MAY 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BETTY L. BRIDGEWATER,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,)
)
Defendant.)

Case No: 95-C-46-W /

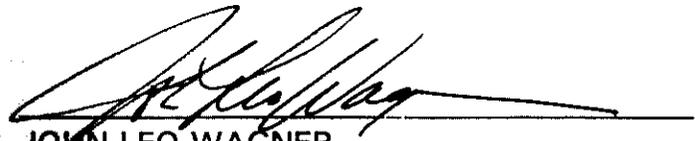
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MAY 10 1996

JUDGMENT

Judgment is entered in favor of the Plaintiff, Betty L. Bridgewater, in accordance with this court's Order filed May 9, 1996 remanding case to the Defendant for further review by the ALJ, a consultative examination of claimant, and additional vocational expert testimony concerning whether there are sedentary jobs which she could perform in the national economy given her age, eighth grade education, and back pain.

Dated this 9th day of May, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

F I L E D
MAY 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BETTY L. BRIDGEWATER)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

Case No. 95-C-46-W

ENTERED ON DOCKET
DATE MAY 10 1996

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(l) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge James D. Jordan (the "ALJ"), which summaries are incorporated herein by reference.

¹Effective 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. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant had a herniated disk causing pain in her lower back, hip, left foot and leg, and degenerative disc disease. He concluded that claimant had the residual functional capacity to perform the physical exertion requirements of work limited only by occasional stooping or crouching, and was able to perform her past relevant work as a sewing machine operator, waitress

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

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

or cook. Having determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts that the ALJ's decision is not supported by substantial evidence, because she suffers severe back pain which prevents her from doing even sedentary work.

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

Claimant contends that she has been unable to work since February 25, 1991, because of back pain. (TR 96). She was injured at work on February 15, 1991 when she reached to prevent a pallet from falling off a cart and twisted her back. (TR 149). This resulted in pain and some tingling in the dorsal aspect of the left foot and the middle three toes of the left foot with sitting. (TR 149). A CAT scan of her lumbar spine on March 12, 1991, showed a small bony fragment posteriorly near the midline, L5-S1, probably secondary to a small hard disc slightly indenting the anterior aspect of the thecal sac at the same level, slight disc bulgings at L4-5 and L5-S1, and moderately severe degenerative joint disease involving the facet joints at L4-5 and L5-S1. (TR 128).

A MRI of her back on June 3, 1991, showed a protruding disc in the midline at L5-S1, and possibility of a herniation was suggested. (TR 140). On June 20, 1991, she reported to her doctor that she had numbness in the lateral three toes of

her left foot and was unable to sleep at night because of pain in the back and lower limbs. (TR. 149). She returned to her doctor on June 20, 1991 for reevaluation. (TR 149). The doctor reported that straight leg raising was positive at 45 degrees on the left and, with her sitting, knee extension induced sciatic pain. (TR 149). This was not present on the right. (TR 149). She had a decrease in pin prick perception over the lateral aspect of her left calf and over the lateral aspect of the left foot. (TR 149). Her neurological examination had changed from the standpoint that the left Achilles tendon reflex was absent while that on the right was 1+. (TR 149). Her doctor repeated her CAT scan of the lumbar spine in late June 1991 and she had a small midline calcified bulge of the L5-S1 disc which was treated conservatively. (TR 149-150). On July 30, 1991, she reported a recurrence of pain and a CAT scan it showed a midline disc herniation at L5-S1 which corresponded to her neurologic deficit. (TR 150). Surgery was recommended. (TR 150).

On August 5, 1991, Dr. Samuel H. Shattuck, a Tulsa surgeon, performed a left L5-S1 modified hemilaminectomy and micro surgical removal of the herniated disc. (TR 152-160). However, by June 2, 1992, she was reporting back pain and inability to tolerate exercise. (TR 170). Her local treating physician, Dr. Mark Osborn, reported decreased flexion and extension and a positive straight leg raising test. (TR. 170).

On January 7, 1992, Dr. Osborn reported that she was continuing to have pain in the low mid back as well as radicular pain caused by sitting or riding in a car, her exercise tolerance was markedly limited, and she was unable to be up long enough

to fix dinner at home or to shop for groceries. (TR 172). The doctor noted that she was absent the left Achilles tendon reflex, had no gross motor sensory deficit and was still requiring pain medications. (TR 172). The doctor concluded that physical therapy was not helping her other than for heat packs and the like which can be continued at home. (TR 172). The doctor stated that her progress was disappointing and that she "does not believe that she will be able to return to work." (TR 172).

On February 7, 1992, Dr. Osborn concluded that "at this point, I do not feel like the patient will be able to return to work and it is my feeling that she is able only to do activities of daily living and has some discomfort with these. She is now able to cook but is only able to stand for 30 minutes. After a year, I do not see any significant new improvement being present and the hope of any improvement is probably small. Modalities including physical therapy have not been helpful and she still requires narcotic pain medication for relief and the ability to do housework." (TR 172).

On October 8, 1992, Dr. Jim Martin found that she had a permanent partial impairment of fifty percent to her whole person as a result of her back injury for workers' compensation purposes, and stated:

In addition, considering the patient's educational background of eighth grade and her employment history of manual labor, primarily working in house painting, as a waitress, and in factory work, and considering her age of 51, it is my opinion that she is 100% permanently economically disabled and unemployable. (TR 183-184).

On July 15, 1992, and December 17, 1992, another treating physician, Dr. Kenyon Kugler, to whom she had been referred by Dr. Osborn, found that she had neuritis,

instead of nerve root compression, and additional surgery was not recommended. (TR 189-191).

Dr. Michael Farrar found on **March 30, 1993**, that she had two significant spinal injuries that resulted in operative care, but she never had very good resolution and continued to suffer from right arm radicular symptoms. (TR 205). "Her activities of daily living are markedly depressed and she has never been able to return to work. . . It is my opinion at this time that **Ms. Bridgewater** has a material increase in her whole man impairment of 30 percent to the body as a whole by reason of said combination. She therefore shows at this time to have 77 percent permanent partial impairment to the body as a whole. It is furthermore, my opinion that **Ms. Bridgewater** is 100 percent permanently and totally disabled from an economic basis. She has an eighth grade education with no GED and has essentially worked manual labor jobs in the past including house painting, restaurant work and sewing factors. She is also noted to be 52 years of age. It is my opinion that she is unable to earn any wages in any employment for which she is or could become physically suited or reasonably fitted by education, training or experience and is considered 100 percent permanently and totally disabled from an economic basis." (TR 205).

At a hearing on **August 9, 1993**, claimant testified she does some meal preparation, no vacuuming, mopping, or yard work, helps do laundry, and spends most her time watching television and reading. (TR 227). The vocational expert testified that if she could lift no more than fifty pounds and frequently lift twenty-five pounds and stoop or crouch, she could do her past relevant work. (TR 241-243).

However, when asked whether she would be able to work if the expert accepted all her testimony as true, the expert stated:

A Well, she speaks of not being able to sit more than 15 minutes without pain. This would definitely have an effect on the sedentary positions that I have mentioned because you're expected to be sitting three-fourths of the time. She states that she cannot lift a ten-pound sack of potatoes. And this would also erode if you cannot lift as much as ten pounds, the sedentary strength demand. And it would also eliminate the light strength demand if she could not. If she cannot bend, reach -- she spoke of not being able to at times comb her hair, reach high enough. This would definitely have an effect upon light strength demand positions that I have mentioned because of the reaching that would be required for that. And then she would also be required to be alternating between a sitting to a standing position 50 percent of the time, standing or walking.

Q Now, am I correct in understanding that this would -- from your testimony that in your opinion it would eliminate all of --

A All --

Q -- the jobs?

A Yes, Your Honor.

Claimant stated that she takes Voltaren, Tylenol #3, Hydrocodone, Beconase and Lodine for pain and inflammation. (TR 201, 235).

There is merit to claimant's contention that the ALJ's decision that claimant could perform her past work is not supported by substantial evidence. In Baca v. Dept. of Health & Human Servs., 5 F.3d 476, 480 (10th Cir. 1993), the court held that "once a claimant proves by objective medical evidence the existence of a pain-producing impairment and a loose nexus between the impairment and the alleged

reviewed the claimant's medical record and concluded that her testimony was credible only to the extent that it reconciled with her ability to do light work. (TR 21). He noted that neither the evidence or the testimony established that her ability to function was so severely impaired by pain as to preclude work activity. (TR 22).

"Residual functional capacity" is defined by the regulations as what the claimant can still do despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567. "Light work" involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. . . . [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1567(b).

The ALJ's finding that claimant can do light work, which involves much walking or standing, is in direct conflict with the finding that she suffers a herniated disc causing lower back and leg pain. Several doctors have concluded that she cannot work.⁴

⁴ Two of these opinions were acknowledged by the ALJ on page 4 of his opinion:

The Administrative Law Judge is fully aware that the claimant had a claim pending in Worker's Compensation Court and that, in preparation for that action, medical reports had been secured. After a thorough

(continued...)

The ALJ should have exercised his discretionary power to order a consultative examination of claimant to determine her capabilities. Baker v. Bowen, 886 F.2d 289, 291-92 (10th Cir. 1989) (ALJ's reliance on absence of medical evidence was erroneous where it was within his power to obtain it); Channel, 747 F.2d at 582-83 (remanded for findings as to whether claimant's nonexertional skin impairments precluded performance of full range of sedentary jobs on a sustained basis).

The decision of the ALJ that claimant could perform her past relevant work is not supported by substantial evidence. This case is remanded for further review by the ALJ, a consultative examination of claimant, and additional vocational expert testimony concerning whether there are sedentary jobs which she could perform in the national economy given her age, eighth grade education, and back pain.

⁴(...continued)

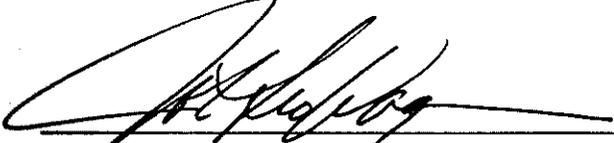
review of the records, the Administrative Law Judge is also cognizant of the fact that both Jimmy Martin, M.D., and Michael Farrar, D.O., have stated that the claimant is totally and permanently disabled (Exhibits 30 and 36). Every consideration is given to the opinion expressed by a physician that a claimant is disabled or unable to work; however, the Administrative Law Judge is persuaded in the instant case that the opinions of Dr. Kugler, a Board-certified neurological specialist who has treated the claimant over several years, are sufficient to rebut the opinions of consulting physicians who see the claimant only once.

However, Dr. Kugler never gave an opinion on the extent of the claimant's disability, but instead expressly declined to do so without an additional examination, stating in his December 17, 1992 letter:

If an estimate of her disability as a result of her problem is needed, she would need to be seen back in the office for re-evaluation in that regard.

(TR. 189).

Dated this 5th day of May, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

MAY 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALADENE CACY,

Plaintiff,

v.

PRUDENTIAL PROPERTY AND
CASUALTY INSURANCE COMPANY,
an Indiana corporation,

Defendants.

Case No: 95-C-786-W

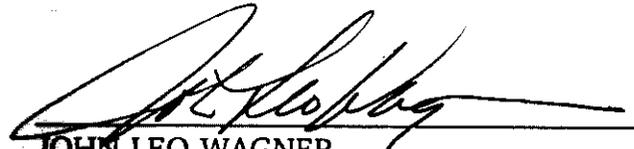
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MAY 10 1996

ORDER OF DISMISSAL

NOW, on this 8th day of May, 1996, this matter came on before me, upon the Joint Application for Order of Dismissal filed herein. The court finds that the joint application should be and is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-entitled cause of action is dismissed with prejudice to any future action.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

FILED

MAY 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL BASCOM SELSOR,

Petitioner,

vs.

STEPHEN KAISER,

Respondent.

No. 91-C-826-E

ENTERED ON DOCKET

DATE MAY 10 1996

ORDER

On May 2, 1996, the Tenth Circuit Court of Appeals in *Selsor v. Kaiser*, Case No. 94-5223, entered judgment in favor of Petitioner Michael Bascom Selsor, finding that his state court convictions were constitutionally deficient. In accordance with the Circuit Court's directive, the Court orders that a writ of habeas corpus shall issue unless the State of Oklahoma initiates proceedings to retry petitioner within one hundred and twenty (120) days of the date of this Order.

ORDERED this 9th day of May, 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

MAY 9 1996 *Li*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KELLEE JO BEARD, by her
parents and next friends,
Patty and Bill Beard, et al.,

Plaintiffs,

vs.

THE HISSOM MEMORIAL CENTER,
et al.

Defendants.

No. 87-C-704-E ✓

ENTERED ON DOCKET

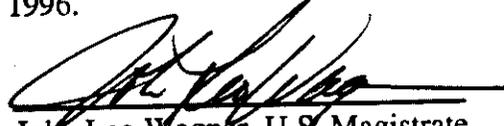
MAY 10 1996

DATE _____

**ORDER FOR TRANSFER OF
COMPENSATORY EDUCATION FUNDS**

Pursuant to contract entered into on January 25, 1995, between Defendant State Department of Education and Tulsa Public Schools, and an Order of this Court, \$150,000 was transferred from the Compensatory Education Fund to the school district for expenditure on compensatory education programs of classmembers as ordered and approved by the Court. As of this date, no money has been expended from the funds held by Tulsa Public Schools, and the Court hereby orders the sum of \$150,00 be transferred to the State Department of Education and deposited in the fund established for Compensatory Education of classmembers.

IT IS SO ORDERED this 9th day of May, 1996.


John Leo Wagner, U.S. Magistrate
United States District Court

(Handwritten mark)

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

ENTERED ON DOCKET
DATE 5-10-96

RACHEL SHARP, JOHN JAY SHARP,)
a minor, by and through his)
mother, RACHEL SHARP, FREDERICK)
DOUGLAS STONE, a minor, by and)
through his mother, RACHEL SHARP,)
PAMILA FISHER, ANGELA JACKSON,)
a minor, by and through her)
mother, PAMILA FISHER, and)
CHRISTINA FISHER, a minor, by)
and through her mother, PAMILA)
FISHER,)

Plaintiffs,)

vs.)

EARL EDDINGS, individually, and)
as an agent and employee of the)
City of Shidler, Oklahoma, and)
THE CITY OF SHIDLER, OKLAHOMA,)

Defendants.)

FILED

MAY 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

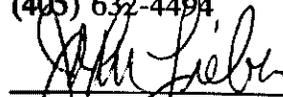
CASE NO.: 95 C 706H

STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, Earl Eddings and the City of Shidler, are hereby dismissed with prejudice.



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

F I L E D

MAY 9 1996 *ja*

BIZJET INTERNATIONAL SALES)
& SUPPORT, INC.,)
)
Plaintiff,)
)
v.)
)
INTERLEASE AVIATION CORPORATION,)
)
Defendant and)
Third-Party Plaintiff,)
)
v.)
)
JET AVIATION INTERNATIONAL,)
INC., et al.,)
)
Third-Party Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 94-C-533-H ✓

ORDER

The motions before the court upon the consent¹ of the parties are the Third-Party Defendant Jet Aviation International, Inc.'s Motion To Dismiss (Docket #11), Third-Party Defendant Jet Aviation Flugzeugwartung GMBH, Dusseldorf's Motion to Dismiss (Docket #36), and Third-Party Defendant's Motion to Dismiss the Third-Party Complaint (Docket #59).² A hearing was held on March 4, 1996 and oral arguments

¹These motions are considered by the magistrate judge under the partial consent procedure established pursuant to 28 U.S.C. § 636(c) and Rule 73 of the Federal Rules of Civil Procedure by Local Rule 73.1(C).

²The pleadings directly related to the motions are Third-Party Plaintiff's Response to Third-Party Defendant's Motion to Dismiss Third-Party Complaint (Docket #18), Third-Party Defendant Jet Aviation International, Inc.'s Reply in Support of Plaintiff's Motion to Dismiss Third-Party Complaint (Docket #19), Third-Party Plaintiff's Response to Third-Party Defendant's Motion to Dismiss Third-Party

were heard.

Bizjet International Sales & Support, Inc. ("Bizjet") is in the business of repairing and overhauling aircraft engines and is based in Tulsa, Oklahoma. Interlease Aviation Corporation ("Interlease") owns two CJ-610-6 aircraft engines and contacted Bizjet in March of 1993 to obtain an assessment of the engines' condition and a quotation for repair work on the engines, which had sustained damage from a bird strike. The engines had previously been sent to England for repair, but had been returned to Germany unrepaired. The engines were brought to Bizjet from Germany by Rene Dockwiller ("Dockwiller"), an employee of Jet Aviation Flugzeugwartung GMBH, Dusseldorf ("JDUS"), one of the Third-Party Defendants.

In June of 1992, Bizjet sent Interlease a quotation for the repair work to the 208 engine and a preliminary engine condition report with a letter to Interlease's Vice-President, Philip Coleman ("Coleman"). Coleman responded in a letter to Bizjet, requesting that Bizjet make the repairs to the 208 engine as described in the proposal and return the engine to airworthy condition, ready to be put back into service.

Bizjet made the repairs as outlined in its quotation, and sent Interlease a bill in the amount of \$99,894.90 on July 27, 1993. Interlease has not paid the bill,

Complaint (Docket #42), the Supplemental Materials included with Plaintiff's Application for Extension of Time (Docket #43), Third-Party Defendant Jet Aviation Flugzeugwartung GMBH's Reply in Support of its Motion to Dismiss Third-Party Complaint (Docket #46), Third-Party Plaintiff's Supplemental Response to Third-Party Defendant's Motion to Dismiss Third-Party Complaint (Docket #61), Interlease Aviation Corporation's Response to Third-Party Defendant's Motion to Dismiss (Docket #62), and the Response to Third-Party Defendant's Motion to Dismiss (Docket #68).

claiming that Bizjet breached the contract by failing to put the 208 engine back in airworthy condition. Interlease also contends that Bizjet breached the contract by failing to detect forged documents that were placed in the 208 and 216 engines' logbooks. Interlease alleges that one of the third-party defendants substituted the forged documents for the correct ones, which would have shown the limited life cycles of the engines, and that Bizjet did not follow industry practices in evaluating the 208 engine, because it should have recognized the forged documents.

In its Motion to Dismiss, Jet Aviation International, Inc. ("JAI"), claims that Interlease is trying to transform a simple collection case into an international case involving fraud and forgery in France, England and Germany. JAI contends that Interlease has sought to implead it "based on naked allegations of alter ego," when it has no contacts with Oklahoma and had nothing to do with any event described in the complaint or third-party complaint.

JAI argues that there is no basis on which this court can assert personal jurisdiction over it, and even if there were, the doctrine of forum non conveniens is directly applicable and should result in the dismissal of this case so it can be litigated in Germany. JAI claims to be an affiliate of JDUS, since they have a common parent, but a separate corporation not at all involved in the facts of this collection matter.

Interlease has the burden to establish that this Court can exercise personal jurisdiction over the third-party defendants. Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1130 (10th Cir. 1990); McClelland v. Watling Ladder Co., 729 F. Supp. 1316, 1317 (W.D. Okla. 1990) (citing Rambo v. American Southern Ins.

Co., 839 F.2d 1415, 1417 (10th Cir. 1988)). Oklahoma's long-arm statute extends the jurisdiction of the state's courts to the limits of due process. Okla. Stat. tit. 12 § 2004 F; Home-Stake Production Co. v. Talon Petroleum, C.A., 907 F.2d 1012, 1020 (10th Cir. 1990); Rambo, 839 F.2d at 1416.

In Home-Stake the Tenth Circuit concluded as follows:

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he had established no meaningful 'contacts, ties, or relations.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72, 105 S.Ct. 2174, 2181-82, 85 L.Ed.2d 528 (1985) (citation omitted). Jurisdiction is proper when the nonresident defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). The defendant's conduct and connection with the forum state must be such that it should reasonably anticipate being haled into court in the forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

Home-Stake, 907 F.2d at 1020.

The court in Rambo pointed out that jurisdiction over a corporation may be either general or specific. Rambo, 839 F.2d at 1418. There is specific jurisdiction if a suit arises out of, or relates to, the defendant's contacts with the forum. Id. There is general jurisdiction when the suit does not arise from, or relate to, the defendant's contacts with the forum, but jurisdiction can be premised on the defendant's presence or accumulated contacts with the forum. Id.

Third-Party Defendant Jet Aviation International, Inc.'s Motion to Dismiss (Docket #11) is granted. JAI has no contacts with Oklahoma. Plaintiff does not dispute that JAI (1) is not licensed to do business in Oklahoma, (2) has no service

agent in Oklahoma, (3) is not incorporated in Oklahoma, (4) has no property or assets in Oklahoma, (5) has paid no taxes in Oklahoma, (6) maintains no office or representation in Oklahoma, (7) is not listed in any Oklahoma telephone directory, (8) has no mailing address in Oklahoma, (9) has no agents, servants, or employees residing in or assigned to Oklahoma, and (10) does not actively or regularly enter Oklahoma to transact or solicit business. See, Affidavit of Rene Eichenberger ("Eichenberger Affidavit") (attachment to #11). Therefore, general jurisdiction cannot be asserted.

JAI also had no contacts with the engine at issue, Bizjet, or Interlease, and does not perform maintenance or repairs on any aircraft or engines. See, Eichenberger Affidavit. The only contact that any of the third-party defendants had with Oklahoma relating to this case is Dockwiller's trip accompanying the engine to Oklahoma, and he is an employee, not of JAI, but of JDUS, a separate corporation. See, Eichenberger Affidavit.

While Interlease has provided the court with voluminous evidence as exhibits to its Motion to Dismiss (Docket #18), the evidence does not link JAI to Oklahoma or suggest that JAI had control over JDUS. There is no evidence that JAI has control over the other third party defendants or that it had a role in directing Dockwiller to come to Tulsa. JAI has no meaningful contacts, ties, or relations with Oklahoma, has not purposefully availed itself of the privilege of conducting activities within Oklahoma, has no reason to anticipate being haled into court in Oklahoma, and lacks the requisite minimum contacts with the state.

Plaintiff points out that JAI is a subsidiary of Hirschmann Industrial Holding, Ltd, as is JDUS, and advertises itself as a worldwide corporation with its USA Headquarters in West Palm Beach, Florida, and employees and facilities servicing aircraft in several United States cities. However, merely being affiliated with another corporate entity, JDUS, does not transform JAI into the alter-ego or agent of JDUS. Lockett v. Bethlehem Steel Corp., 618 F.2d 1373, 1378 & n.4 (10th Cir. 1980). National advertising which reaches a forum state is insufficient alone to establish minimum contacts over a nonresident defendant. Federated Rural Elec. Ins. Corp. v. Kootenal Elec. Coop., 17 F.3d 1302, 1305 (10th Cir. 1994); Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1131 (10th Cir. 1991). While JAI may have facilities in Florida and other states, this does not mean it has contacts in the state of Oklahoma. It is a separate legal entity and the contacts of other subsidiary corporations of Hirschmann cannot be imputed to it.

In its Motion to Dismiss, JDUS raises the same arguments that JAI raises. JDUS claims that a simple collection dispute has been transformed into an international fraud case by plaintiff and that there is no basis on which the court can assert personal jurisdiction over JDUS. Even if there was a basis, JDUS argues that the doctrine of forum non conveniens should apply and result in the dismissal of this case.

Plaintiff does not dispute that JDUS (1) is not licensed to do business in Oklahoma, (2) has no service agent in Oklahoma, (3) is not incorporated in Oklahoma, (4) has no property or assets in Oklahoma, (5) has paid no taxes in Oklahoma, (6)

maintains no office or representation in Oklahoma, (7) is not listed in any Oklahoma telephone directory, (8) has no mailing address in Oklahoma, (9) has no agents, servants, or employees residing in or permanently assigned to Oklahoma, and (10) does not actively or regularly enter Oklahoma to transact or solicit business. See, Affidavit of Klaus-Dieter Hessenmuller ("Hessenmuller Affidavit") (Ex. "C" to #37 and #38).

However, JDUS admits that its employee, Dockwiller, accompanied the engine to Oklahoma. A single act provides a basis for personal jurisdiction if it creates a "substantial connection" with the forum. Burger King, 471 U.S. at 475 n.18. It is clear that JDUS "'purposefully directed' its activities toward the forum," and the lawsuit is "based upon injuries which 'arise out of' or 'relate to' the defendant's contacts with the state." Doe v. National Medical Servs., 974 F.2d 143, 145 (10th Cir. 1992) (quoting Burger King Corp., 471 U.S. at 472).

While JDUS argues that the single contact with Oklahoma took place after the alleged forgery occurred in Germany of entries on documents originally made by a French company, the court finds that it purposefully established a business connection and minimum contacts with the state. Defendant's conduct was such that it could reasonably anticipate "being haled into court" in Oklahoma. The transaction of business in one state by a nonresident is a sufficient basis for the assertion of long-arm jurisdiction over the nonresident. McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957). This court has specific jurisdiction over JDUS.

However, there is merit to the argument that Oklahoma has no interest in adjudicating a dispute involving forgery claims in Germany of entries originally made by a French company in logbooks of a German aircraft.

The presumption in favor of a plaintiff's choice of forum may be overcome when the private and public interest factors clearly point towards trial in the alternative forum. Piper Aircraft v. Reyno, 454 U.S. 235, 255 (1981). The public factors to be considered include the administrative difficulties which result when cases pile up in congested centers instead of being handled at their origin, the local interest in having localized controversies decided at home, the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems relating to conflict of laws, and the unfairness of burdening citizens in an unrelated forum with jury duty. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509 (1947). The private interests of the litigants include the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of viewing premises, if it is appropriate, and all other practical problems that make the trial of a case easy, expeditious, and inexpensive. *Id.* At 508.

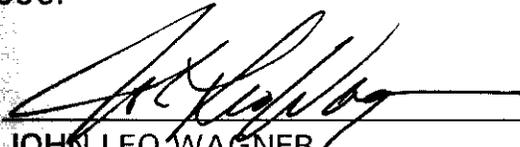
Germany's interest in the outcome of the dispute is significant. The alleged forgery occurred within its boundaries and was done by a German corporation concerning aircraft owned by a German corporation, operated by another German corporation, and registered with the German aviation authorities. Interlease chose to

do business with German corporations and should not object to litigating a dispute involving the business in Germany. Also, the burden on the parties in terms of cost, travel, and time of adjudicating the dispute in Oklahoma will be substantial.

Every witness whose knowledge is relevant to the issue of forgery lives in Europe and is beyond the reach of compulsory process. The third-party complaint lists these witnesses as Rene Dockwiler, Josef Wolf and Klaus Hessenmuller of Germany, P.E. Waker, Michael Preston, and Joe Hale of AAA in England, and Patrick Maniere of SECA in France. The evidence is in Europe and European law will apply to the controversy. On the other hand, if the case were tried in Oklahoma, the jury would be faced with the confusion of applying United States law to the breach of contract action between Bizjet and Interlease and foreign law to the third-party complaint, because the claims involving fraud and forgery allegedly occurred in Europe.

Third-Party Defendant Jet Aviation Flugzeugwartung GMBH, Dusseldorf's Motion to Dismiss (Docket #36) is granted on the grounds of forum non conveniens. As the third-party complaint is dismissed, the Third-Party Defendant's Motion to Dismiss the Third-Party Complaint (Docket #59) is rendered moot.

Dated this 9th day of May, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

CHRISTINA M. COX, KEVIN J. COX
and DANA COX, individually, and
as parents and next friends of
KELSEY COX, MELISSA COX and
BENJAMIN COX, minors,

Plaintiffs,

vs.

MARVIN BLADES, RUTH SCHRAMKE,
CYNTHIA HACKATHORN, THE TULSA
METROPOLITAN MINISTRY and
THE CITY OF TULSA,

Defendants.

FILED

MAY 8 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-0206E

ENTERED ON DOCKET

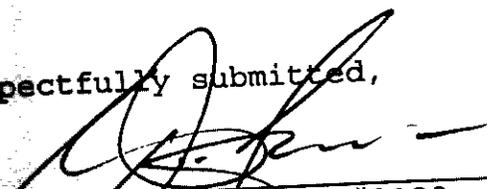
DATE MAY 09 1996

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANTS SCHRAMKE, HACKATHORN
AND TULSA METROPOLITAN MINISTRY ONLY**

COME NOW Christina M. Cox, Kevin J. Cox and Dana Cox, individually
and as parents and next friends of Kelsey Cox, Melissa Cox and Benjamin
Cox, minors, Plaintiffs herein, and Ruth Schramke, Cynthia Hackathorn
and Tulsa Metropolitan Ministry, Defendants herein, and pursuant to
Rule 41(A)(1) of the Federal Rules of Civil Procedure do stipulate to
the dismissal with prejudice of Defendants Schramke, Hackathorn and
Tulsa Metropolitan Ministry from the above styled and numbered cause.
This Stipulation shall not act as a dismissal of the Plaintiffs' claims
against any other Defendant.

WHEREFORE, premises considered, the parties hereto do stipulate to
the dismissal with prejudice from this action of Defendants Schramke,
Hackathorn and Tulsa Metropolitan Ministry.

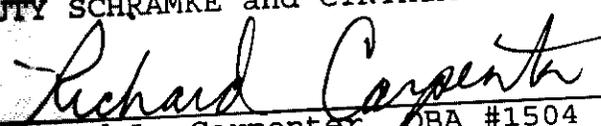
Respectfully submitted,


R. Jack Freeman, OBA #3128
Feldman, Hall, Franden,
Woodard & Fairis
525 S. Main, Suite 1400
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(918) 583-7129

ATTORNEYS FOR PLAINTIFFS


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ATTORNEYS FOR DEFENDANTS
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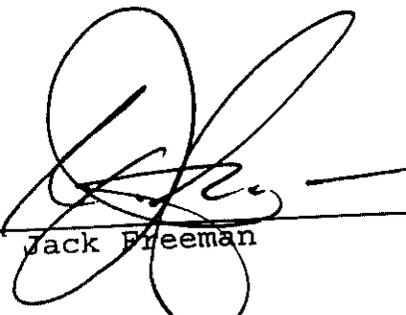
ATTORNEYS FOR DEFENDANT
TULSA METROPOLITAN MINISTRY

CERTIFICATE OF SERVICE

This is to certify that on the 8th day of May, 1996, a true and correct copy of the above and foregoing instrument was mailed with proper postage thereon fully prepaid to:

Larry Simmons, Esq.
City Attorney's Office
200 Civic Center, Room 316
Tulsa, OK 74103-3827

ATTORNEY FOR DEFENDANT
CITY OF TULSA


R. Jack Freeman

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

F I L E D

MAY 8 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SUSAN NEWCOMER, Individually)
and as Guardian of)
BENJAMIN NEWCOMER, ANDREW)
NEWCOMER and PETER NEWCOMER,)
and JOHN NEWCOMER,)

Plaintiffs,)

vs.)

Case No. 95-C-765 K

NORTHEAST OKLAHOMA ELECTRIC)
COOPERATIVE, INC., an Oklahoma)
corporation, and CEDAR PORT)
MARINA, an Oklahoma entity;)
and GRAND RIVER DAM AUTHORITY,)
an Oklahoma agency, and JOHN)
DOE CORPORATION;)

Defendants.)

ENTERED ON DOCKET
MAY 09 1996
DATE _____

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE
OF ALL CLAIMS AGAINST DEFENDANT GRAND RIVER DAM AUTHORITY

COME NOW, Susan Newcomer, individually, and as Guardian of Benjamin Newcomer, Andrew Newcomer, and Peter Newcomer, and John Newcomer, and the Defendant Grand River Dam Authority, an Oklahoma agency, and hereby stipulate that the action against this Defendant be dismissed with prejudice. Each party will bear their own fees and costs.



David Humphreys, OBA # 12346
Luke J. Wallace, OBA # 16070
Monica Cosentino-Hodges, OBA # 16633
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ATTORNEYS FOR PLAINTIFFS


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(918) 583-7129
(918) 584-3814 FAX

ATTORNEYS FOR GRAND RIVER
DAM AUTHORITY

CERTIFICATE OF SERVICE

I, David Humphreys, hereby state and certify that on the 3
day of May, 1996, a true and correct copy of the foregoing
instrument was mailed by deposited same in the U.S. Mail, proper
postage thereon fully prepaid, and addressed to:

David J. Shea
SOMMERS, SCHWARTZ, ET AL.
2000 Town Center, Suite 900
Southfield, Michigan 48075

Richard Dan Wagner
I. Michele Drummond
WAGNER, STUART & CANNON
902 South Boulder
Tulsa, Oklahoma 74119-2034

Thomas J. McGeady
LOGAN & LOWRY
Post Office Box 558
Vinita, Oklahoma 74301-0558



David Humphreys

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

In Re:)
)
FINIS W. SMITH, and DORIS L. SMITH,)
)
Debtors,)
)
)
UNITED STATES of AMERICA,)
)
Appellant,)
)
vs.)
)
FINIS W. SMITH, and DORIS L. SMITH,)
)
Appellee.)

ENTERED ON DOCKET
DATE MAY 09 1996

Case No. 95-C-899-K ✓

F I L E D

MAY 08 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On September 1, 1995, the Bankruptcy Court confirmed Appellee's (Debtor below) Chapter 13 Plan over the objection of the Appellant United States of America. Appellant appeals the decision of the Bankruptcy Court, and asserts that the Bankruptcy Court's finding that the Chapter 13 Plan was proposed in good faith is clearly erroneous. For the reasons discussed below, the Bankruptcy Court's decision is **AFFIRMED**.

I. STATEMENT OF FACTS & PROCEDURAL HISTORY

Appellee filed a voluntary petition under Chapter 13 on July 28, 1995. [See Record on Appeal ("ROA"), Docket for Case No. 95-02284-W]. Appellees submitted a "Schedule I - Current Income of Individual Debtors" indicating that Appellees' sole

5

source of income was from Social Security and "pension or retirement." Appellees total combined monthly income is listed as \$2,503. [See ROA, Schedule I -- Current Income of Individual Debtors.] Appellees' monthly expenses total \$2,095. [See ROA, Schedule J -- Current Expenditures of Individual Debtors.] Appellees indicated their total projected monthly disposable income at \$408.

Appellant filed an objection to confirmation of the Plan on August 29, 1995. At the Hearing on Confirmation of the Plan on August 30, 1995, the attorney for the Appellant initially requested a continuance for thirty days due to "some suspicions about other property the Smiths may own" and to inquire further into venue. [ROA, Hearing dated September 30, 1995, at 7.] Appellant's attorney noted that Appellant had some questions about Appellees' good faith because Appellees previously filed a Chapter 7 bankruptcy in which Appellees' tax liability was not discharged and Appellees now sought to discharge that debt under Chapter 13. [ROA, Hearing dated September 30, 1995, at 11.] Appellant's attorney stated that she had some concerns about a possessory lien on a truck (based on work being performed on it), some questions regarding \$2,400 that Appellees paid to renew a lease on a tract for a mobile home, a question related to transfers by the debtors to their family, payments by a company for a gas bill on Appellees' mobile home, and a question with respect to venue. [ROA, Hearing dated September 30, 1995, at 14-15.] Appellant's attorney introduced no evidence to support any of her statements, but stated that "[t]hese are questions and issues which the United States would like to explore in its objection to

confirmation of this plan for lack of **good faith.**" [ROA, Hearing dated September 30, 1995 at 15.]

At a hearing on August 30, 1995, the Bankruptcy Court approved the Plan over the objection of the Appellant. The Court noted that it was familiar with this matter and with the Appellees' circumstances. The Court took judicial notice of the prior bankruptcy filing by Appellees, and noted that it was quite familiar with the Appellees' case and filings because it had handled the previous bankruptcy proceeding. The Court concluded that "a review of the Petition, the Schedules, [and] the Statement of Affairs conclusively show[s] that the debtors have minimal or no assets." [ROA, Hearing dated September 30, 1995 at 18.]

By Order dated September 1, 1995, the Bankruptcy Court confirmed the proposed Chapter 13 Plan. [See ROA, Order Confirming Chapter 13 Plan.] The Bankruptcy Court specifically found that "[t]he Plan has been proposed in good faith and not by any means forbidden by law." [See ROA, Order Confirming Chapter 13 Plan, ¶ 5.]

In accordance with the Plan, a single payment of \$19,620.00 (the payment was a gift to Appellees from Patricia Smith, sister of Finis Smith) was to be made for distribution to the secured and unsecured creditors. The Plan provided for a single payment to debtor's attorney in the amount of \$1,160, a single payment of \$15,775.37 to the Internal Revenue Service (secured claim of \$15,520 plus interest), and the surrender of a 1987 Ford pickup to Bank One and Mick Hickey. In addition, under the Plan, the Internal Revenue Service's unsecured remaining claims (which

total \$113,387.22) would receive a pro rata distribution of approximately two percent. [See ROA, Order Confirming Chapter 13 Plan, dated September 1, 1995.]

II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "Whether a Chapter 13 plan has been proposed in good faith is a question of fact subject to the clearly erroneous standard of review." Robinson v. Tenantry, 987 F.2d 665, 668 (10th Cir. 1993). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently.

A trial court's findings may not be reversed if its perception of the evidence is logical or reasonable in light of the record." In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted).

III. ANALYSIS: Chapter 13 Good Faith Requirement

Section 1325(a)(3) of the Bankruptcy Code provides that a Chapter 13 plan must be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3). The Tenth Circuit in Elygare v. Boulden, 709 F.2d 1344 (10th Cir. 1983) addressed the Chapter 13 good faith requirement. The Tenth Circuit expressly rejected a "*per se* minimum payment rule," choosing instead to adopt the "factors" previously utilized by the Eighth Circuit in determining good faith. The following factors were listed by the Court as appropriate to use in evaluating the good faith of the debtor:

- (1) the amount of the proposed payments and the amount of the debtor's surplus;
- (2) the debtor's employment history, ability to earn and likelihood of future increases in income;
- (3) the probable or expected duration of the plan;
- (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
- (5) the extent of preferential treatment between classes of creditors;
- (6) the extent to which secured claims are modified;
- (7) the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7;
- (8) the existence of special circumstances such as inordinate medical expenses;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
- (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and
- (11) the burden which the plan's administration would place upon the trustee.

Elygare at 1347-48.

The record indicates that Appellees are submitting all of their disposable income for three years to the Plan. (Elygare factor 1). The Court specifically noted that "a review of the Petition, the Schedules, [and] the Statement of Affairs conclusively show that the debtors have minimal or no assets." (Elygare factors 4 & 10). [See ROA, Hearing dated September 30, 1995 at 18.] The Plan provides for the payment of all Appellee's secured creditors, and an approximate two percent payment to Appellee's unsecured creditors. (Elygare factors 4, 5, & 6). In addition, at the August 30, 1995 hearing the Bankruptcy Court noted that it was familiar with this matter and with the Appellee's circumstances because it had handled Appellee's prior

Chapter 7 bankruptcy. (Elygare factors 7 & 9). In its September 1, 1995 Order confirming the Chapter 13 Plan, the Bankruptcy Court found that the Plan had been proposed in good faith. [See ROA, Order Confirming Chapter 13 Plan, ¶ 5.] Based on a review of the record, the order of the Bankruptcy Court, the hearing on the confirmation, and the schedules and pleadings filed by the parties, this Court finds that the Bankruptcy Court's decision was not clearly erroneous and therefore must be upheld on appeal.

Appellant suggests that the Bankruptcy Court's finding is clearly erroneous because: (1) the \$130,516.22 unsecured claim which Appellees seek to discharge in this Chapter 13 was not discharged in a prior Chapter 7 proceeding, (2) this Chapter 13 proceeding was preceded by a Chapter 7 proceeding, (3) only two percent of Appellant's unsecured claim was being paid under the plan, (4) the debtors were paying \$2,400 for a lease in Arizona,^{1/} and (5) venue was improper.^{2/} See Reply Brief for the Appellant at 5. The Court is unpersuaded by Appellant's arguments.

The fact that the unsecured claim was previously not discharged, that the Appellees had previously filed under Chapter 7, and that Appellant's unsecured claims

^{1/}The record contains no evidence to support Appellant's argument. Appellant's attorney merely represented to the bankruptcy court that Appellant had some questions with respect to the purchase of land in Arizona and wanted additional time to investigate. A statement that one has some questions and wants to investigate does not constitute evidence. Because no evidence has been submitted to this Court in the Record on Appeal, the Court cannot give any weight to Appellant's argument on this point.

^{2/}Again, the record contains no evidence to support Appellant's "suspicions" with respect to venue. The Court cannot examine a claim that is not supported or substantiated in the record. See, e.g., Rubner & Kutner, P.C. v. U.S. Trustee, 997 F.2d 1321 (10th Cir. 1993) ("It is counsel's responsibility to see that the record excerpts are sufficient for consideration and determination of the issues on appeal and the court is under no obligation to remedy any failure of counsel to fulfill that responsibility. Without the record before us, we cannot review the bankruptcy court's factual findings and must accept them as true.") (citations omitted).

will receive a two percent pro rata payment does not mean that the Bankruptcy Court's finding that the Plan was filed in good faith is clearly erroneous. The fact of successive filings does not, by itself, constitute bad faith. See Pioneer Bank of Longmont v. Rasmussen, 888 F.2d 703 (10th Cir. 1989) ("This circuit has rejected a per se bad faith standard, holding instead that bad faith is to be judged by the totality of the circumstances on a case by case basis."). In addition, the Bankruptcy Court presided over the prior Chapter 7 filing, and consequently was aware of the details related to the discharge/non-discharge of Appellees' debts in that prior proceeding. Furthermore, as outlined above, the record does contain evidence to support the conclusion of the Bankruptcy Court that the Plan was submitted in good faith.

Appellant asserts that Pioneer Bank of Longmont v. Rasmussen, 888 F.2d 703 (1989), is "nearly identical" to this case and requires a finding that the Plan was presented in bad faith. In Pioneer Bank the Tenth Circuit did conclude that based on the totality of the circumstances the proposed plan in that case was not made in good faith. The debtor in Pioneer Bank had previously discharged his unsecured debts in a Chapter 7 proceeding. However, the bankruptcy court had disallowed the debt owed to Pioneer (in the Chapter 7 proceeding) because the debtor provided fraudulent loan information to obtain the loan. Twelve days after the Chapter 7 proceeding concluded, the debtor initiated a Chapter 13 proceeding listing the debt to Pioneer as the only obligation, and proposing a plan which would pay less than 1.5% of the value of the debt. The court noted that "[w]e reach this conclusion because the

Chapter 13 filing was a manipulation of the bankruptcy system in order to discharge a single debt for de minimis payments under a Chapter 13 plan which was ruled not dischargeable under an immediately previous Chapter 7 filing, when the debtor could not originally meet the jurisdictional requirements of Chapter 13." Pioneer Bank at 705.

The facts from Pioneer Bank are in sharp contrast to the facts of this case. Nothing indicates that the debts which Appellees now seek to discharge under Chapter 13 were procured through fraud.^{3/} The Appellees' Plan provides for the payment of all of their secured debt. In addition, the Bankruptcy Court, which also handled the previous Chapter 7 case,^{4/} determined that Appellees were not filing with the intention of manipulating the system. The Court cannot agree with Appellant that Pioneer Bank dictates a finding that the Bankruptcy Court's confirmation of the Plan in this case was clearly erroneous.

Appellant also asserts that the Bankruptcy Court was under a duty to inquire into a "broad range of pre- and post-filing conduct of the debtor," that the Bankruptcy

^{3/} See, e.g., Pioneer Bank, 888 F.2d at 705 ("Although the discharge of an obligation which would be nondischargable in Chapter 7 is not, standing alone, a sufficient basis on which to find bad faith or deny confirmation, it is a relevant factor to be considered in the § 1325(a)(3) good faith inquiry. Resort to the more liberal discharge provisions of Chapter 13, though lawful in itself, may well signal an "abuse of the provisions, purpose, or spirit" of the Act, especially where a major portion of the claims sought to be discharged arises out of pre-petition fraud or other wrongful conduct and the debtor proposes only minimal repayment of these claims under the plan. Similarly, a Chapter 13 plan may be confirmed despite even the most egregious pre-filing conduct where other factors suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditors' claims.") citing In re Neufield, 794 F.2d 152-153 (emphasis added).

^{4/} The Bankruptcy Court noted that the previous Chapter 7 discharge was entered in February 95, and that the current Chapter 13 proceeding was filed in July 1995. [ROA, Hearing dated September 30, 1995 at 17.]

Court failed to meet its duty, and that such a failure led to a clearly erroneous decision. Appellant relies on In re Nittler, 67 B.R. 217 (D. Kan. 1986).

In Nittler the court did note that the issue of good faith "requires an inquiry into . . . the conduct of the debtor." Nittler, 67 B.R. at 220. The court reversed the finding of the bankruptcy court that the debtor's filing was in good faith because, based on the facts of the case, "sufficient evidence was presented to the bankruptcy court on these three [Elygare] factors to warrant a much broader inquiry into good faith." Nittler at 222. However, as in Pioneer Bank, the evidence presented to the court in Nittler indicated that the debtor's conduct was questionable.^{5/} Nothing in this record indicates that Appellee engaged in any type of similar conduct. At most, Appellant seems to accuse Appellee of filing successive petitions and paying a small amount on an unsecured claim. However, as noted above, the determination of good faith under Chapter 13 is based on the "totality of the circumstances." Under the facts of this case the Court cannot conclude that the Bankruptcy Court's determination that Appellee was acting in good faith is clearly erroneous.

Accordingly, the decision of the Bankruptcy Court is **AFFIRMED**.

Dated this 7 day of May 1996.


TERRY C. KERN, District Judge
UNITED STATES DISTRICT COURT

^{5/} Among other things, the Nittler court noted that, with respect to one debt, the debtor had knowingly misrepresented that he owned certain property, had improperly identified property which he did not own as his own, and had produced false records that indicated his ownership of the property.

F I L E D

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

MAY 08 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KAREN SEIGEL,

Plaintiff,

vs.

LOWRANCE ELECTRONICS, INC.

Defendants.

No. 95-C-615-K

EOD 5/9/96

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 7 day of May, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

MAY 07 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD ELVIS NELSON)
)
) Plaintiff,)
)
 vs.)
)
 TULSA COUNTY OKLAHOMA, and STATE OF)
 OKLAHOMA)
)
) Defendants.)

Case No. 95-C-371-K

ENTERED ON DOCKET
DATE MAY 09 1996

REPORT AND RECOMMENDATION

Petitioner, Renard Elvis Nelson, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 26, 1995. Petitioner challenges his pre-trial confinement. By minute order dated April 26, 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 refileing.

I. FACTS AND PROCEDURAL BACKGROUND

Petitioner asserted, in his **Petition** (filed April 26, 1995), that he has been detained at the Tulsa County Jail at the request of the state for over seven weeks. In his Brief, Petitioner asserts that his trial has been passed twenty-five times with the most recent trial date now set for July 1, 1996. Petitioner asserts that his right to a speedy trial has been denied.

Respondent filed a Motion to Dismiss for Failure to Exhaust State Remedies on February 7, 1996. Petitioner's response was filed March 14, 1996.

II. REQUIREMENTS OF EXHAUSTION

Initially, although Petitioner has asserted a claim based on 28 U.S.C. § 2254, this section applies only to post-trial situations and affords relief to a petitioner "in custody pursuant to the judgment of a state court." 28 U.S.C. §§ 2254(a) and (b). Petitioner is a pre-trial detainee, and therefore 28 U.S.C. § 2254 is inapplicable. However, pre-trial petitions may be asserted under 28 U.S.C. § 2241(c)(3) which applies to persons in custody regardless of whether final judgment has been rendered, and regardless of the status of the case pending against him. See, e.g., Braden v. 30th Judicial Cir. Court of Ky., 410 U.S. 484, 503-04, 93 S. Ct. 1123, 1133-34 (1973) (Rehnquist, J. dissenting); Capps v. Sullivan, 13 F.3d 350 (10th Cir. 1993); Dickerson v. State of Louisiana, 816 F.2d 220, 224 (5th Cir. 1987); Moore v. DeYoung, 515 F.2d 437, 441-42 (3rd Cir. 1975).

As a preliminary matter, the Court must determine whether Petitioner's claim has been exhausted. See United States v. Castor, 937 F.2d 293, 296-97 (7th Cir. 1991). To meet the exhaustion requirements, Petitioner must establish that his claims have been "fairly presented" to the trial court and the Oklahoma Court of Criminal Appeals. Picard v. Conner, 404 U.S. 270, 275-76 (1971).

Petitioner asserts that he has exhausted the claims presented to this Court because he requested his appointed counsel to present "all possible motions." This assertion is not sufficient to meet the exhaustion requirements. Because Petitioner's

speedy trial issues have not been considered by the state courts, this Court should dismiss Petitioner's claim to allow him to first present his issues to the state courts. Capps v. Sullivan, 13 F.3d 350, 353-54 (10th Cir. 1993).

III. RECOMMENDATION

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

The parties must file with the Clerk of the Courts any objection to this Report and Recommendation within ten days after being served with a copy. 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 7 day of May 1996.


Sam A. Joyner
United States Magistrate Judge

MCW/af

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

FILED

MAY 8 - 1996

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

HAWKINS-SMITH, an Idaho General Partnership,)

Plaintiff,)

vs.)

SSI, INC., UNITED STATES FIDELITY & GUARANTY COMPANY, and INTERNATIONAL ROOFING, INC.,)

Defendants,)

ENTERED ON DOCKET

DATE 5-9-96

SSI, INC.,)

Third-Party Plaintiff,)

v.)

MULE-HIDE PRODUCTS CO., INC., and LARRY KESTER d/b/a ARCHITECTS COLLECTIVE,)

Third-Party Defendants.)

NO. 95-C-006-H

ORDER OF DISMISSAL WITHOUT PREJUDICE

COMES NOW before the Court, the Joint Application for Dismissal Without Prejudice of the Third-Party Plaintiff, SSI, Inc., and the Third-Party Defendant, Larry Kester, d/b/a Architects

Collective. For good cause shown, the Court finds that said Application should be, and is hereby, granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Third-Party claim of the Third-Party Plaintiff, SSI, Inc., against the Third-Party Defendant, Larry Kester, d/b/a Architects Collective, is hereby dismissed without prejudice to the refiling thereof.

S/ SVEN ERIK HOLMES

THE HONORABLE SVEN HOLMES
JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

ENTERED ON DOCKET
DATE 5-9-96

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

F I L E D

MAY 07 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROLYN A. ALFRED)
SS# 447-54-1273)

Plaintiff,)

v.)

SHIRLEY S. CHATER, Commissioner of)
Social Security Administration,)

Defendant.)

No. 95-C-623-J ✓

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 7 day of May 1996.



Sam A. Joyner
United States Magistrate Judge

DATE 5-9-96

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

MAY 07 1996 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROLYN A. ALFRED)
SS# 447-54-1273)

Plaintiff,)

v.)

No. 95-C-623-J ✓

SHIRLEY S. CHATER, Commissioner of)
Social Security Administration,)

Defendant.)

ORDER^{1/}

Plaintiff, Carolyn A. Alfred, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts error because (1) the denial of benefits at Step Four was improper, (2) the ALJ's determination of Plaintiff's Residual Functional Capacity ("RFC") was erroneous, and (3) the ALJ's hypothetical questions to the vocational witness were improper. For the reasons discussed below, the Court **REVERSES** the Commissioner's decision.

^{1/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{2/} Plaintiff filed an application for disability and supplemental security insurance benefits on January 12, 1994. [R. at 71]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Dana E. McDonald (hereafter, "ALJ") was held November 4, 1994. [R. at 38]. By order dated January 12, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 20-31]. The Plaintiff appealed the ALJ's decision to the Appeals Council. On May 8, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 4].

11

I. PLAINTIFF'S BACKGROUND

Plaintiff was born November 19, 1951 and is a high school graduate. [R. at 41]. Plaintiff's previous work history includes work as a bank teller and loan officer. [R. at 108]. Plaintiff asserts that she is unable to work due to carpal tunnel syndrome, migraine headaches, asthma, osteoarthritis, low blood sugar, depression, and chronic fatigue syndrome. [R. at 104].

II. STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

^{3/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987); *Williams v. Bowen*, 844 F.2d 748, 750-51 (10th Cir. 1988).

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will, however, meticulously examine the entire record. Williams, 844 F.2d at 750.

"The finding of the Secretary^{4/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401.

^{4/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Four. The ALJ concluded that Plaintiff's RFC permitted Plaintiff to perform light work. The ALJ noted the vocational expert's testimony indicated that Plaintiff's past relevant work was sedentary, and that Plaintiff's RFC and past work description indicated Plaintiff was capable of performing her past relevant work. The ALJ additionally proceeded to Step Five and concluded that even if Plaintiff could not perform her past work, the vocational expert identified a sufficient number of jobs in the regional and national economies which Plaintiff had the capability of performing. The ALJ concluded the Plaintiff was not disabled.

IV. REVIEW

Step Four

Plaintiff asserts that the ALJ failed to specify the physical and mental requirements of Plaintiff's past relevant work and failed to find that Plaintiff's RFC matched Plaintiff's physical capabilities.

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.

.....

[D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

The ALJ's decision at Step Four that Plaintiff can perform her past work is not supported by the record. The record does indicate some of the requirements of Plaintiff's past relevant work.^{5/} In addition, the vocational expert, who observed

^{5/} Plaintiff testified that she began working as a bank teller in 1969. Plaintiff stated that throughout her career she always had some responsibilities as a bank teller. [R. at 51]. Plaintiff began working as a consumer loan officer in 1978, and continued until 1985. [R. at 52]. Plaintiff took applications, sent out verifications on all of the information from the customer, prepared the loan for the loan committee and, depending upon whether or not the loan was approved, did the closing on it. [R. at 52]. Plaintiff also
(continued...)

Plaintiff's testimony, testified with respect to some of the physical requirements of Plaintiff's past relevant work.^{6/} However, the record contains nothing to indicate the sitting, standing, and push/pull requirements of Plaintiff's past relevant work, or the sitting, standing, and push/pull capabilities of Plaintiff. The ALJ's decision at Step Four does not comply with the social security regulations and is not supported by substantial evidence.

Plaintiff's RFC

Plaintiff asserts that the ALJ's finding that Plaintiff has the RFC to perform light work is not supported by the record. Plaintiff claims that she is unable to lift twenty pounds or stand/walk six hours in an eight hour day.

Plaintiff testified that her last day of work was May 11, 1993, and that she decided to stop working because she was "having problems with my left side arms and elbow, my joints." [R. at 43]. Plaintiff testified that she had carpal tunnel syndrome which affected her hands. [R. at 43]. Plaintiff also testified that she was unable to work because she was very nervous, extremely exhausted, had difficulty falling asleep, sometimes forgot things, and had difficulty concentrating. [R. at 46-

^{5/} (...continued)

worked as a loan secretary (opening new accounts) and as a general clerk (computer in-put, mail, and filing). [R. at 52-53]. Plaintiff testified that she would be unable to perform her past work because it required a lot of concentration and organization which she could no longer manage for eight hours. [R. at 54].

^{6/} The vocational expert stated that the bank teller position which Plaintiff held is generally considered light work but can involve lifting as much as 25 - 50 pounds (medium work). [R. at 64]. The loan origination and the "new accounts clerk" positions are considered sedentary work. The vocational expert additionally testified that the loan originator and the new accounts clerk positions would not require an individual to repetitively use their hands. [R. at 65]. The vocational expert noted that the loan originator and accounts clerk positions required an ability to concentrate and organize. [R. at 69].

47]. Plaintiff also stated that after sitting for over an hour she stiffens up which makes it very difficult when she starts walking. [R. at 49]. Plaintiff testified that she suffered from severe headaches approximately once each month. [R. at 56]. In addition, according to Plaintiff, beginning in September or October of 1994, she began to feel very sluggish and experienced chronic fatigue. [R. at 55]. Plaintiff maintains that she has been diagnosed with chronic fatigue syndrome. [R. at 55].⁷¹ Plaintiff stated she was able to lift only approximately ten pounds. [R. at 58].

Plaintiff additionally testified that she had no difficulty driving a car that had power steering. [R. at 42]. Plaintiff generally drives about four times each week, and the longest trip she takes is approximately fifteen miles. [R. at 60].

The ALJ determined that Plaintiff has the RFC to perform a wide range of light work. [R. at 24]. The ALJ noted that Plaintiff has the capability of lifting up to twenty pounds but that Plaintiff should not engage in repetitive wrist and hand movements. [R. at 24].

The regulations define "light work" as

lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of

⁷¹ The ALJ found that Plaintiff had chronic fatigue syndrome. [R. at 23]. However, the record contains little support for such a finding. One notation in Dr. Hastings' records does note "chronic fatigue." [R. at 182].

light work, you must have the ability to do substantially all of these activities. . . .

20 C.F.R. § 404.1567(b). Plaintiff testified that she could lift ten pounds. [R. at 58]. However, nothing in the record supports the ALJ's conclusion that Plaintiff can lift twenty pounds. The record does not contain a RFC Assessment, and the records from Plaintiff's physicians do not contain lifting, standing, or sitting capabilities.

An ALJ's findings must be supported by substantial evidence. Absent supporting evidence in the record, an ALJ should obtain an RFC Assessment or order a consultative examination to ascertain the individual's limitations. See, e.g., Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993) ("The ALJ, however, finding no evidence upon which to make a finding as to RFC, should have exercised his discretionary power to order a consultative examination of Ms. Thompson to determine her capabilities."). On remand, the ALJ should order a consultative exam to permit the ALJ to properly ascertain Plaintiff's RFC, and after determining Plaintiff's RFC, present the RFC and any restrictions to the vocational expert.

Plaintiff additionally contends that the ALJ's findings concerning the credibility of Plaintiff's testimony did not comply with Kepler. In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit noted that "[i]t is well settled that administrative agencies must give reasons for their decisions." The Tenth Circuit, in reviewing an ALJ's findings with respect to a claimant's pain, held that the ALJ must discuss a Plaintiff's complaints of pain (in accordance with Luna) and provide the reasoning

which supports the ALJ's decision, rather than providing mere conclusions concerning the claimant's pain. Id. at 8.

Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 9. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

In this case, the ALJ noted several reasons for her conclusions concerning Plaintiff's credibility. For example, Plaintiff left her job in May 1993, but drew unemployment until May 1994. While collecting unemployment, Plaintiff stated that she told the unemployment office that she was "ready, willing, and able" to work, but with restrictions placed on lifting and the repetitive use of her hands. [R. at 49]. However, Plaintiff applied for social security disability in January 1994, claiming she had been unable to work as of May 11, 1993. [R. at 71]. In addition, the ALJ listed numerous activities in which Plaintiff was able to participate that required some level of concentration and organization, including serving as treasurer of the PTA and attending church. [R. at 26]. The ALJ's conclusions with respect to Plaintiff's credibility are supported with sufficient reasons in accordance with Kepler.

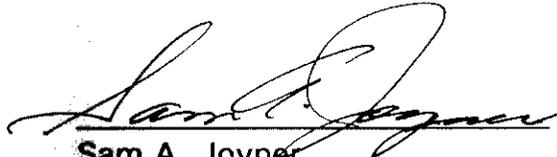
Hypothetical Questions to Vocational Expert

Plaintiff additionally complains that the hypothetical questions posed to the vocational expert were improper and based on the assumption that Plaintiff could

perform light work. An ALJ is not **required** to accept all of a plaintiff's testimony with respect to restrictions as true, but may **pose** such restrictions to the vocational expert which are accepted as true by the ALJ. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). However, in this case, the **record** does not contain any sitting, standing, or push/pull restrictions for Plaintiff.^{8/} In addition, as noted above, the record does not support the ALJ's conclusion that Plaintiff could engage in light work. Based on the record, the hypothetical questions **posed** to the expert witness are insufficient to support the ALJ's conclusions that Plaintiff was not disabled.

Accordingly, the Secretary's decision is **REVERSED AND REMANDED** for further proceedings consistent with **this order**.

Dated this 7 day of May 1996.


Sam A. Joyner
United States Magistrate Judge

^{8/} The vocational expert testified that **several jobs** existed at both the sedentary and light exertional level which Plaintiff can perform. However, **absent evidence** in the record to support Plaintiff's ability to perform the exertional requirements at either the **sedentary** or light exertional levels, the vocational expert's testimony cannot serve as substantial evidence.

RECEIVED

MAY - 8 1996

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FILED

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

MAY 8 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 94-C-1059-H

ENTERED ON DOCKET

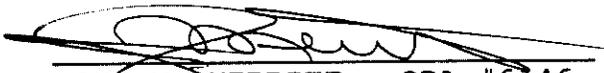
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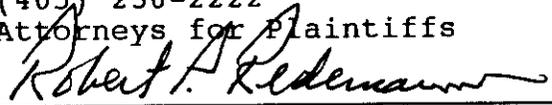
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Ronnie King, 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
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P.O. Box 60708
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(405) 236-2222
Attorneys for Plaintiffs


ROBERT P. REDEMANN - OBA #7454
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2800 Fourth National Bank Bldg.
Tulsa, OK 74119
Attorneys for Defendants

ENTERED ON DOCKET
DATE 5-9-96

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RECEIVED

IDELL WARD, et al.,
PLAINTIFFS,

FILED
MAY 8 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MAY - 8 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-
vania corporation; and SUN COMPANY,
INC., a Pennsylvania corporation,
DEFENDANTS.

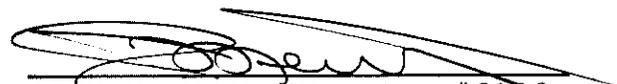
CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Randy Martin, 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.



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Attorneys for Defendants

ENTERED ON DOCKET

DATE 5-9-96

F I L E D

MAY 8 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.)

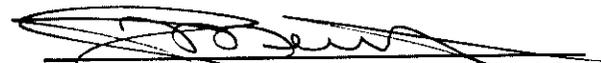
CASE NO. 94-C-1059-H

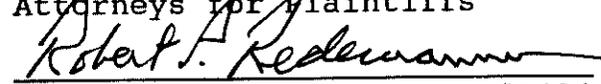
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Joe Young, 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.


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 Attorneys for Defendants

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

FILED

MAY 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EDWARD HILL,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No. 94-C-1017-K

ENTERED ON DOCKET
MAY 08 1996
DATE

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Glen E. Michael (the "ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹Effective 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. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant was severely impaired as the result of gout, gouty arthritis of his left foot, and essential hypertension. He concluded that the claimant did not experience pain of such intensity and severity as to prevent him from engaging in all substantial gainful activity. He found that the claimant was unable to return to his past relevant work, but retained the residual functional capacity to perform a full range of sedentary work. Having determined that claimant could do sedentary work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's decision that the claimant could do sedentary work is not supported by substantial evidence.
- (2) The ALJ erred in failing to call a vocational expert to testify concerning the impact of claimant's nonexertional impairments.
- (3) The ALJ improperly relied on the grids to determine disability.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Chanel v. Heckler, 747 F.2d 577, 579 (10th Cir.

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

1984).

Claimant was seen on October 15, 1991, by a doctor at Internal Medicine Specialists of Tulsa, Inc. (TR 125). The doctor reported that claimant had a "[f]rozen left ankle - likely secondary to limping and lack of use after onset of pain 7 months ago. Possible ligamentous or tendinous process. Unable to dorsiflex or invert foot [and] [v]erbal history of gout, on chronic Allopurinol therapy." (TR 128). The doctor continued his Allopurinol therapy and recommended he lose weight (TR 128).

Claimant contends that he has been unable to work since April 5, 1992 because of foot pain. The medical evidence shows that he went to the emergency room complaining of left ankle pain on May 4, 1992 (TR 120). His doctor reported the next day that claimant had been seen in the emergency room and "Dr. DeMarco saw him and is going to refer him back to me and also is going to reinforce what I had said before which is that he needs an orthopedist. His ankle x-ray is terrible and he probably needs an arthrodesis or a total joint replacement." (TR 120). On May 6, 1992, his doctor reported that "left foot shows no change except possibly some increased edema. No obvious evidence of cellulitis by warmth but the foot is grossly deformed. This could even represent a chronic gouty foot or even osteomyelitis. The x-ray from last night shows a lot of soft tissue problem but no acute fractures and there is chronic degeneration." (TR 120).

Tests done on May 8, 1992, showed: "[t]he bone scan is abnormal, showing abnormalities in both feet. The most prominent abnormality is increased uptake in the area of the left talus and to a lesser extent in the adjacent bones." (TR 130).

On May 12, 1992, Dr. Norman Dunitz, a specialist, reported that patient had

[r]ather marked swelling localized to the left foot and associated with pain on weight bearing. There is no warmth, redness or other sign indicative of infection.

X-rays . . . revealed gross degeneration of the midtarsal and subtalar joints.

I feel this is an exacerbation of degenerative joint disease of the foot and not especially of the ankle. I'm obtaining a bone scan to see if there could be a subliminal fracture line that might explain the increase in recent symptoms. Other than this, we will try a conservative course in casting but with his degree of findings, it may well be that arthrodesis⁴ would be the treatment of choice.

(TR 156).

On May 19, 1992, claimant's treating doctor reported that he was "trying conservative care for the tarsal coalition and peroneal spasm. The patient did not have time that he could take off work for a triple arthrodesis." (TR 133).

On July 28, 1992, Dr. Dunitz reported that claimant was definitely improved, but had a combination of problems, including "1) [c]hronic uricemia⁵ which is out of control; 2) [d]egenerative joint disease of the tarsal joints of the left foot; and 3) [m]ost likely stress fractures of the astragalus⁶ which has gradually proceeded to healing and is probably the cause of his recent exacerbation of pain and symptoms." (TR 147).

A year later claimant was seen by a consultative physician, who found: "[a]ll joints move freely without restriction of movement. Feet reveal severe pes planus.⁷ He was unable to move-invert his left foot There was no evidence of muscle atrophy or

⁴ The surgical immobilization of a joint. Taber's Cyclopedic Medical Dictionary, 17th Edition.

⁵ Excess uric acid in the blood. Uric Acid is a common constituent of gouty concretions. It must be excreted because it cannot be destroyed within the body. Taber's Cyclopedic Medical Dictionary, 17th Edition.

⁶ The ball of the ankle joint. Taber's Cyclopedic Medical Dictionary, 17th Edition.

⁷ Flatfoot. Taber's Cyclopedic Medical Dictionary, 17th Edition

paralysis." (TR 162A). The doctor reported no joint deformities, and concluded that claimant "will probably have problems standing on his feet due to severe pes planus." (TR 163).

Claimant testified at a hearing on March 7, 1994, that his daily activities included light housework, washing clothes, dusting, vacuuming, and watching television (TR 41-42). Most significantly, he testified that he was able to perform a job requiring lifting ten pounds and sitting for six hours in an eight-hour day:

Q Well if you had a job where you could sit at a table or desk like this and you'd have to use your hands to put parts together, you'd have to sit for six hours out of an eight hour day and lift 10 pounds, would you be able to handle that type of work?

A Yes, I think I could handle that?

Q You could handle that?

A I think I could handle -- I could handle it.

Q Well, why aren't you doing that?

A I haven't found anything -- because I'm limited on the amount of training.

Q Well, if you can handle that, you can't get Social Security disability. Now, we're talking about five days a week, everyday, eight hours a day on a continual basis. So, it's in your testimony you can do that?

A It probably wouldn't be very well.

Q What do you mean, it wouldn't be very well? What problems would you have, just tell us?

A The only problem I would see that I would be having, would be the pain in my feet and everything.

Q And would you have to sit with your feet elevated?

A Yes.

(TR 44-45).

There is no merit to claimant's contentions. There is substantial evidence to support the ALJ's decision that the claimant could do sedentary work. None of the doctors who treated him found that he was unable to work. There was no medical evidence to support his claim that he cannot do sedentary work, which involves:

lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 C.F.R. § 404.1567.

Social Security Ruling 83-10 has defined "occasionally" in the context of sedentary work as "occurring from very little up to one-third of the time." The Ruling further states, "Since being on one's feet is required 'occasionally' at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday." S.S.R. 83-10.

The Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Id.

In addition, the ALJ was not required to call a vocational expert to testify concerning claimant's ability to work. Only after a determination that claimant suffers

from an impairment or combination of impairments severe enough to preclude him from returning to his prior work activity is the ALJ under an obligation to use vocational expert testimony to determine what other employment is available to the claimant in the national economy. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990); Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Finally, the ALJ did not improperly rely on the medical-vocational guidelines developed by the Social Security Administration that relate a claimant's age, education and job experience with his ability to engage in work in the national economy at various levels of exertion ("grids") to determine claimant's ability to work. The court found in Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988), that automatic application of the grids is appropriate where a claimant's residual functional capacity (RFC) and other characteristics (age, work experience, education) precisely match a grid category. Such was the case here.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision should be affirmed.

Dated this 7th day of May, 1996.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

MAY 7 1996

PEGGY JONES STONECIPHER and)
RUPERT O. STONECIPHER,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiffs,)

vs.)

No. 95-C-1114-C

CHARLES TURNBO, Regional)
Manager, Bureau of Prisons, Dallas, TX,)
et al.,)

ENTERED ON DOCKET

DATE MAY 0 8 1996

Defendants.)

ORDER

Currently pending before the Court is the motion filed by defendants, Turnbo, Sugrue, Russell, Shingles, Baker, and Cheffey, seeking dismissal of the instant action and, in the alternative, summary judgment. Also pending before the Court is the motion filed by defendant, Rudeman, seeking dismissal of the instant action, or in the alternative, a more definite statement.

On November 7, 1995, plaintiffs, appearing pro se, filed the present action against defendants, invoking federal question jurisdiction pursuant to 28 U.S.C. § 1331, citing constitutional and civil rights violations. On March 19, 1996, defendants, Turnbo, Sugrue, Russell, Shingles, Baker, and Cheffey, filed their amended motion to dismiss and, in the alternative, for summary judgment, citing numerous errors in plaintiffs' complaint. On April 17, 1996, defendant, Rudeman, filed her motion to dismiss, citing lack of personal jurisdiction, as well as other errors in plaintiffs' complaint. Defendant, Robinson, has not filed any pleadings, and it appears to the Court that this particular defendant has not yet been served in this action.

Plaintiff, Rupert Stonecipher, pleaded **guilty** to conspiracy to launder monetary instruments in the U.S. District Court for the Southern District of West Virginia. On September 24, 1991, Stonecipher was sentenced by that court to a **term of thirty-three months imprisonment**, followed by three years of supervised release. Stonecipher was further ordered to pay a fine of \$10,000, to be paid in full not later than the date he **completes his term** of incarceration. In November of 1992, Stonecipher was transferred to Hutchins, Texas, and assigned to the Volunteers of America ("VOA"), a "half-way house" under contract with the **Bureau of Prisons ("BOP")**. Stonecipher joined the Urban Work Program, which employed **halfway-house inmates** and was run by the VOA.

During the program, Stonecipher **began having chest and stomach pains**. Stonecipher was permitted to travel to a local hospital on **February 15, 1993**. Stonecipher underwent bypass surgery. Stonecipher entered the post-recovery unit of the hospital, and spent the nights at his wife's residence. On February 23, 1993, Stonecipher was sent back to the VOA, based upon representations from his physician that he **would be able to return to work** within a few days. On February 26, 1993, Stonecipher was **transported to the Federal Medical Center in Fort Worth**, due to the fact that Stonecipher required **more care than the VOA could provide**. On September 24, 1993, Stonecipher was transported to the **VOA in Fort Worth**. During the time he resided in Texas, Stonecipher was required to pay **\$10.00 per month** toward his \$10,000 fine. Stonecipher was assigned to US Probation in March of 1994.

In September of 1994, Stonecipher **moved to Tulsa**. Based upon a review of Stonecipher's financial condition by the probation office in Tulsa, Stonecipher was directed by US Probation defendant, Cheffey, to increase the payment of **his fine** from \$10.00 per month to \$198.50 per month. Stonecipher received notice that if he did **not pay the required amount**, the probation office would

recommend revocation of community supervision.

Plaintiffs brought suit in this Court **alleging** improper medical care by the defendants in Texas, mental and physical anguish, and mental anguish resulting from the increase in the fine payment. Plaintiffs allege that the defendants in Texas were charged with the care and custody of Mr. Stonecipher, and were therefore responsible for his well-being. Plaintiffs seek a declaratory judgment that all defendants violated the Eighth Amendment to the Constitution, the federal laws, and federal regulations when the defendants forced Mr. Stonecipher to return to the VOA, a non-medical facility, following his operation and because defendants informed Mr. Stonecipher that he would return to prison if he did not make satisfactory payments on his fine. The defendants were sued in their individual and official capacities.

The Court first addresses the position taken by the Bureau of Prisons defendants, Turnbo, Sugrue, Russell, and Shingles (the “BOP defendants”). The BOP defendants raise several issues in support of their motion to dismiss, but the Court need only address one issue in disposing of their motion. The BOP defendants argue that venue is improper in this Court as to them, and they seek dismissal pursuant to Rule 12(b)(3) of the F.R.C.P. Since this is a civil action wherein jurisdiction is not founded solely on diversity, 28 U.S.C. § 1391(b) governs the choice of venue. Section 1391(b) provides that venue is proper *only* in, 1) a judicial district where any defendant resides, if all defendants reside in the same state, 2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or 3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

The Northern District of Oklahoma does not fall within any of these three criteria for

the selection of venue with respect to the **BOP defendants**. First, all of the defendants do not reside in the same state, and only the two **US Probation defendants** reside in this District. Second, it is undisputed that all of the **events giving rise to this cause of action** against the BOP defendants occurred in Texas, not the **Northern District of Oklahoma**. Third, there is a district in which this action may be brought, i.e., this action against the BOP defendants may properly be brought in Texas. Hence, it is clear that the proper venue with respect to the BOP defendants is in a **judicial district in Texas, not Oklahoma**.

Plaintiffs seem to rely on 28 U.S.C. § 1391(e), which provides that, in a civil action against the government or one of its **employees**, venue is proper where the plaintiff resides. However, § 1391(e) cannot apply here. **The Supreme Court in *Stafford v. Briggs*, 444 U.S. 527, 542 (1980)**, held that a suit for **money damages** which must be paid out of the pocket of an individual who happens to be a **government employee** is not one “essentially against the United States,” and thus is not **encompassed** by the venue provisions of § 1391(e). Furthermore, the Court indicated that **venue under § 1391(e)** was only proper in suits for mandamus, not for money damages. *Id.* at 543. Additionally, the court in *Bailes v. Morris*, 1988 WL 36114 (D.D.C.), held that **§ 1391(b)** governs venue of actions for damages against federal employees sued either in their **individual** or official capacities. Since the present suit is one for money damages against **government employees** in their individual and official capacities, § 1391(e) cannot govern the **choice of venue**. Hence, pursuant to the venue selection rules as set forth in **§ 1391(b)**, **venue in this judicial district is improper with respect to the BOP defendants**.

The fact that other defendants in this case, namely the US Probation defendants, are suable in this district does not deprive the BOP defendants of their personal venue rights. See, *Thompson v. U.S.*, 312 F.2d 516 (10th Cir.1962), cert. denied, 373 U.S. 912 (1963) (improper venue is a personal defense to a party). However, the fact that venue is improper as to some defendants does not require dismissal of the entire suit for improper venue. Where a case involves multiple dispensable defendants, the accepted procedure is to sever, pursuant to Rule 21 of the F.R.C.P, and dismiss or transfer only the claims against those parties as to whom venue is improper. *De La Fuente v. Interstate Commerce Commission*, 451 F.Supp. 867 (N.D.Ill. 1978). Accordingly, pursuant to Rule 12(b)(3) of the F.R.C.P. and 28 U.S.C. § 1406(a),¹ the Court hereby dismisses the instant action with respect to the BOP defendants on the basis of improper venue.²

¹ Section 1406(a) provides that, in a case concerning improper venue, the Court shall dismiss, or if it be in the interest of justice, transfer the case to the proper district. The decision whether to dismiss or transfer for improper venue is within the sound discretion of the Court. After a careful review of plaintiffs' claims as well as the materials submitted by the BOP defendants, the Court is inclined to exercise its discretion in favor of dismissing the present action against the BOP defendants on the grounds of improper venue, rather than transferring this action to a district in Texas. Plaintiffs have offered no reason why this case should be transferred rather than dismissed. Since the Court finds that plaintiffs have failed to show that the interests of justice would be better served by a transfer of this case, the Court elects to dismiss plaintiffs' claims against the BOP defendants without prejudice on the basis of improper venue. See, *General Electric Capital Corp v. Selph*, 718 F.Supp. 1495, 1497 (D.KS. 1989). However, pursuant to Rule 41(b) of the F.R.C.P., such dismissal based on improper venue does not operate as an adjudication upon the merits.

² Whether this Court has personal jurisdiction over the BOP defendants and whether service of process was proper are also highly questionable. However, since the Court dismisses the case due to improper venue with respect to the BOP defendants, these issues need not be addressed. See, *General Bedding Corp. v. Echevarria*, 714 F.Supp. 1142, 1143 (D.KS. 1989), and *Furry v. First National Monetary Corp.*, 602 F.Supp. 6, 7 (W.D.Okla. 1984).

The Court next turns to the motion raised by VOA defendant, Rudeman. Rudeman seeks dismissal on the basis of, *inter alia*, lack of personal jurisdiction, pursuant to Rule 12(b)(2) of the F.R.C.P. Personal jurisdiction is a Due Process issue. *See, International Shoe Co. v. Washington*, 326 U.S. 310, 319-320 (1945). The Tenth Circuit in *Behagen v. Amateur Basketball Ass'n of the United States*, 744 F.2d 731, 733 (10th Cir.1984), *cert. denied*, 471 U.S. 1010 (1985), held that the "plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. . . . [A]ll factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient" In *Kennedy v. Freeman*, 919 F.2d 126, 128 (10th Cir.1990), the Tenth Circuit further expanded on the principles of personal jurisdiction. The Circuit stated that in "order to establish specific jurisdiction, the defendant must do some act that represents an effort by the defendant to 'purposefully avail itself of the privilege of conducting activities within the forum state.' A defendant does so when she purposefully directs her foreign acts so that they have an effect in the forum state." *Id.*, citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Specific jurisdiction is predicated on a defendant's minimum contacts with the forum which give rise to the cause of action. General jurisdiction arises from a defendant's continuous and systematic activity in the forum state. *Kennedy*, at 128 n.2.

Plaintiffs have utterly failed to present any evidence whatsoever that Rudeman has

ever had any form of contact with this judicial district or with the state of Oklahoma. In their response to Rudeman's motion to dismiss, plaintiffs readily admit that Rudeman resided in Texas at the time the cause of action arose. Furthermore, it is clear that all of the acts giving rise to plaintiffs' cause of action against Rudeman occurred in Texas. Rudeman is now a resident of Indiana. Plaintiffs have not even made a prima facie showing that minimum contacts exist between Rudeman and Oklahoma in order to satisfy the personal jurisdiction requirement. Accordingly, pursuant to Rule 12(b)(2) of the F.R.C.P., the Court hereby dismisses the action against Rudeman for lack of personal jurisdiction.³

Finally, the Court addresses the motion raised by US Probation Office defendants, Baker and Cheffey. The Court agrees with the government that the instant action against Baker and Cheffey must be dismissed on the grounds of immunity, pursuant to Rule 12(b)(6) of the F.R.C.P. The Tenth Circuit in *Tripati v. U.S.I.N.S.*, 784 F.2d 345, 348 (10th Cir.1986), *cert. denied*, 484 U.S. 1028 (1988), held that when "challenged activities of a federal probation officer are intimately associated with the judicial phase of the criminal process, he or she is absolutely immune from a civil suit for damages." Plaintiffs' complaint merely reveals that the probation officers were doing the jobs assigned to them; that is, the probation officers were simply attempting to collect a fine lawfully imposed. The probation office reviewed Mr. Stonecipher's financial condition and Cheffey subsequently directed Stonecipher to increase his payments toward a fine which he was lawfully ordered to pay as

³ As with a dismissal based upon improper venue, Rule 41(b) of the F.R.C.P. provides that dismissal for lack of jurisdiction does not operate as an adjudication upon the merits.

part of his criminal sentence. Even if the probation office informed Stonecipher that he may possibly be sent back to prison for failing to pay his fine, such conduct does not give rise to any civil liability. The law clearly states that a knowing and willful failure to pay a delinquent fine imposed as part of a criminal sentence could result in the defendant being resentenced to any sentence which might originally have been imposed, including imprisonment. 18 U.S.C. § 3614. Furthermore, as a condition of Stonecipher's supervised release, he was instructed to pay a fine in the amount of \$10,000. In this case, the activities of the probation officers were associated with the judicial phase of the criminal process, i.e., requiring Stonecipher to pay his judicially-imposed fine which resulted from his criminal conviction and further informing Stonecipher of the consequences of a willful failure to pay such fine, as well as the consequences of failure to comply with the condition of his supervised release regarding such fine. The probation officers, Baker and Cheffey, are therefore absolutely immune from a civil suit for damages, and this action against them must be and hereby is dismissed, pursuant to Rule 12(b)(6) of the F.R.C.P.

Accordingly, the BOP defendants' motion to dismiss based on improper venue is hereby GRANTED; VOA defendant, Rudeman's, motion to dismiss based on lack of personal jurisdiction is hereby GRANTED; the US Probation Office defendants' motion to dismiss based on immunity is hereby GRANTED.

IT IS SO ORDERED this 7th day of May, 1996.

A handwritten signature in black ink, appearing to read "H. Dale Cook", written over a horizontal line.

H. Dale Cook
United States District Judge

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

F I L E D

MAY 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TINA BRESEE,

Plaintiff,

vs.

BRUNSWICK CORPORATION,

Defendant.

No. 95-C-912-C

ENTERED ON DOCKET

DATE MAY 08 1996

ORDER

Currently pending before the Court is the motion filed by defendant seeking summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

On September 13, 1995, plaintiff filed the present action against defendant, invoking diversity jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiff alleged that she was an employee of defendant and was subjected to tortious conduct during such employment. On October 20, 1995, defendant filed its answer, in which defendant alleged that plaintiff was never employed by defendant, and, consequently, plaintiff failed to state a claim for relief against defendant. On March 1, 1996, defendant filed the present motion for summary judgment on the grounds that plaintiff sued the wrong party.

The standard for granting summary judgment is rather strict and demanding. Rule 56(c) of the F.R.C.P. provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Furthermore, the "trial court has no real discretion in determining

whether to grant summary judgment. . . . A moving party must establish his right to a summary judgment as a matter of law, and beyond a reasonable doubt.” U.S. v. Gammache, 713 F.2d 588, 594 (10th Cir.1983). “Pleadings and documentary evidence are to be construed liberally in favor of a party opposing a Rule 56 motion.” First Western Government Securities, Inc. v. U.S., 796 F.2d 356, 357 (10th Cir.1986). Summary judgment is considered a drastic relief and must be applied with caution. Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230, 234 (10th Cir.1975). “However, it is not enough that the nonmovant’s evidence be ‘merely colorable’ or anything short of ‘significantly probative;’ . . . the nonmovant must come forward with specific facts showing a genuine issue for trial.” Frank v. U.S. West, Inc., 3 F.3d 1357, 1361 (10th Cir.1993).

Upon examining the briefs and exhibits submitted by the parties, the Court concludes that defendant’s motion has merit and that summary judgment should be granted in defendant’s favor. All inferences that may properly be drawn from the documents presented indicate that defendant was not the employer of plaintiff at any relevant time. Rather, it is apparent from the record that Bayliner Marine Corporation (“Bayliner”) was plaintiff’s employer during the time that the alleged tortious conduct took place. It is also evident that Bayliner is legally recognized as a separate and distinct corporate entity from defendant, although Bayliner is a wholly-owned subsidiary of defendant. The record further demonstrates that defendant notified plaintiff on numerous occasions that plaintiff had sued the wrong party, citing the fact that defendant had never employed plaintiff.

In her opposition to defendant’s motion for summary judgment, plaintiff argues that Bayliner is the alter ego or mere instrumentality of defendant, and, as such, defendant is liable for the acts of Bayliner. This argument was raised for the first time in plaintiff’s opposition to summary judgment, and was not included in any of her previous pleadings. It would certainly appear that such an

allegation should have been made in plaintiff's initial complaint, in order to show why plaintiff is entitled to relief from a defendant who was not her actual employer. In her response to defendant's motion for summary judgment, plaintiff states that "[i]t is questionable whether the issue of piercing the corporate veil even needs to be raised in a pleading. However, even if it did, this response effectively amends the pleadings." Plaintiff cites U.S. ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512 (9th Cir.1995), for support. The Ninth Circuit held, however, that "when a party raises a claim in materials filed in opposition to a motion for summary judgment, the district court should treat the filing as a request to amend the pleadings and should consider whether the evidence presented creates a triable issue of material fact." Id. at 1524. Hence, plaintiff is simply mistaken when she claims that her response effectively amends her pleadings. Rather, plaintiff's response, filed on March 28, 1996, is merely a *request* to amend her pleadings. Leave of Court is required to amend the pleadings at this stage. This Court will not permit parties to circumvent the rules of procedure by attempting to amend pleadings without seeking leave of Court when such is required. Plaintiff never sought leave of Court to amend her pleadings with respect to this alter ego argument, and, consequently, plaintiff's response does not amend any pleading previously submitted by her. Furthermore, the Court notes that the Scheduling Order set January 15, 1996, as the deadline for the joinder of additional parties and/or amendment of pleadings. It is well-settled that untimeliness alone is sufficient to deny leave to amend. Frank, 3 F.3d at 1365. However, even considering plaintiff's alter ego argument, the Court nevertheless concludes that defendant must prevail.

The general rule is well-settled that "the separate corporate status of a parent corporation and its subsidiary will be recognized. This is true even where the parent corporation owns all the shares in the subsidiary and the two enterprises share directors and officers." McKinney v. Gannett Co., Inc.,

817 F.2d 659, 665-666 (10th Cir.1987). The alter ego theory, however, has been employed where the separate corporate status has been used to work an injustice. "Piercing the corporate veil through the alter ego doctrine is an equitable remedy." *Id.* at 666.

Plaintiff cites Frazier v. Bryan Memorial Hospital Authority, 775 P.2d 281 (Okla. 1989), as support for her alter ego theory. The Supreme Court of Oklahoma stated that if "one corporation is but an instrumentality or agent of another, corporate distinctions must be disregarded and the two separate entities must be treated as one." *Id.* at 288. This inquiry gives rise to a question of fact. The Supreme Court of Oklahoma went on to hold that,

The question whether an **allegedly** dominant corporation may be held liable for a subservient entity's tort hinges primarily on *control*. Factors which may be considered at trial include whether 1) the parent corporation owns all or **most** of the subsidiary's stock, 2) the corporations have common **directors** or officers, 3) the parent provides financing to its **subsidiary**, 4) the dominant corporation subscribes to all the other's **stock**, 5) the subordinate corporation is grossly undercapitalized, 6) the parent pays the salaries, expenses or losses of the subsidiary, 7) **almost** all of the subsidiary's business is with the parent or the assets of the former were conveyed from the latter, 8) the parent refers to its **subsidiary** as a division or department, 9) the subsidiary's officers or directors follow directions from the parent corporation and 10) **legal** formalities for keeping the entities separate and independent are observed. *Id.*

The court noted that when one corporation is but an instrumentality of another, the court may look beyond the form to the substance, and hold the dominant corporation responsible for the liabilities of the "sham corporation." *Id.* at n.34.

The court in Frazier found that the **materials** tendered in the court below clearly showed the existence of factual issues that must be **left to the** trier of fact, i.e., whether the subsidiary is a "dummy" corporation or mere instrumentality of the parent. Hence, the court reversed the trial

court's grant of summary judgment, citing **evidentiary** materials which tend to establish a genuine issue of material fact.

In Key v. Liquid Energy Corp., 906 F.2d 500 (10th Cir.1990), the Circuit Court interpreted Oklahoma law with respect to the alter ego **issues raised** herein. The Circuit held that it is clear that in order for a plaintiff to prevail against a **defendant** for the acts of the defendant's subsidiary, the plaintiff must establish that the subsidiary is a mere instrumentality or alter ego of the defendant, and/or, show that the use of the separate **corporate structures** resulted in fraud, illegality, or inequity.¹ Id. at 503-504. The plaintiff "cannot carry this burden by a simple showing that the parent wholly owns the subsidiary, or that the corporations **share** some personnel." Id. at 504. See also, Luckett v. Bethlehem Steel Corp., 618 F.2d 1373 (10th Cir.1980) (summary judgment proper where majority of factors of instrumentality test were shown to be lacking so that corporate veil could not be pierced).

The Tenth Circuit in Frank, supra, **further expanded** upon the effect and purpose of separate corporate structures. The Circuit noted that the "law allows businesses to incorporate to limit liability and isolate liabilities among separate entities." Id. at 1362. Significantly, the "doctrine of limited liability creates a strong presumption that a **parent** company is not the employer of its subsidiary's

¹ The Circuit Court noted that it **need not decide** the question of whether, under Oklahoma law, proof that a subsidiary is the mere instrumentality of its parent is sufficient to pierce the corporate veil or whether the plaintiff **must also establish** fraud, illegality or inequity. The Oklahoma case law is not precisely clear on this point. Frazier focuses solely upon the instrumentality test. The court in Tara Petroleum Corp. v. Hughey, 630 P.2d 1269, 1275 (Okla.1981), stated that the corporate veil may be pierced if 1) the separate corporate existence is a design to perpetrate fraud, or 2) one corporation is the mere instrumentality of the other, i.e., one corporation is merely a dummy or a **sham**. See, Key, at 504 n.1. In any event, this Court concludes that plaintiff has failed to demonstrate either fraud, illegality or inequity, or that Bayliner is the mere instrumentality of defendant.

employees, and the courts have found otherwise only in extraordinary circumstances.” Id.

Given the foregoing, this Court concludes that plaintiff failed to come forward with sufficient facts showing a genuine issue for trial. Plaintiff has in no way shown that Bayliner is a sham or “dummy” corporation. Further, plaintiff has failed to show that Bayliner is the mere instrumentality or alter ego of defendant. At most, plaintiff has shown that Bayliner is a wholly-owned subsidiary of defendant, that defendant is a stockholder of Bayliner, that Bayliner does business as US Marine, that defendant may provide certain financial assistance to Bayliner, and that Bayliner Marine Corporation is listed under the “U.S. Marine Division” of the defendant corporation. Such evidence, even construed liberally in favor of plaintiff, utterly fails to convince the Court that the corporate veil should be pierced in this case. In addition to failing to satisfy several of the factors set out in the above instrumentality test, plaintiff has offered absolutely no evidence that Bayliner is incorporated separately from defendant in order to perpetrate some form of fraud, illegality, or inequity. There is simply no evidence that Bayliner is either a “sham” corporation or one designed to effect an injustice. The Court can therefore find no justification for avoiding the well-established principle of permitting corporations to limit and isolate liabilities by maintaining a subsidiary corporation. The very concept of limited liability would certainly be thwarted and negated if this Court were to ignore the separate corporate structure in this particular case. “Disregarding the corporate form is a drastic remedy. . . . [C]orporate veils exist for a reason and should be pierced only reluctantly and cautiously. The law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities.” Skidmore, Owings & Merrill v. Canada Life Assurance Co., 907 F.2d 1026, 1027 (10th Cir.1990) (quoting, Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1576 (10th Cir.1990)). From the materials presented, this case surely is not one in which the Court is inclined

to disregard the traditional and long-standing principles of law designed to insulate entities via the corporate form.

Accordingly, defendant's motion for summary judgment based on the grounds that plaintiff sued the wrong party is hereby GRANTED.

IT IS SO ORDERED this 7th day of May, 1996.



H. Dale Cook
U.S. District Judge

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

DONALD E. SWAN,
(SSN: 189-40-3090)

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,

Defendant.

MAY 03 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

624
No. 95-C-408-J ✓

FILED ON DCL

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JUDGMENT

This action has come before the Court for consideration. An Order reversing the decision of the Commissioner has been entered, and this case has been remanded for further review. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 3 day of May 1996.


Sam A. Joyner
United States Magistrate Judge

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

DONALD E. SWAN,
(SSN: 189-40-3090)

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,

Defendant.

MAY 03 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-⁶²⁴488-J ✓

ENTERED ON ECF

DATE MAY 3 1996

ORDER^{1/}

Now before the Court is Plaintiff's appeal of the Commissioner's decision denying him Disability Insurance and Supplemental Security Income. The Administrative Law Judge ("ALJ"), Richard J. Kallsnick, found that Plaintiff was not disabled because (1) Plaintiff retained the Residual Functional Capacity ("RFC") to perform at least sedentary work, and (2) there were significant jobs in the national economy which Plaintiff could still perform despite his limitations.

Plaintiff argues that (1) the ALJ's determination that Plaintiff could perform sedentary work is not supported by substantial evidence, and (2) the ALJ used the wrong legal standard to evaluate Plaintiff's subjective complaints. The Court finds that the ALJ did not correctly evaluate Plaintiff's subjective complaints. Consequently, the Commissioner's denial of benefits is **REVERSED** and this case is remanded for further review in accordance with the terms of this Order.

^{1/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge, filed August 14, 1995.

I. PLAINTIFF'S BACKGROUND

At the time of the hearing below, Plaintiff was a 44 year old male with an 8th grade education. Plaintiff's past relevant work was primarily that of an assistant galvanizer. Plaintiff worked as an assistant galvanizer for almost 11 years. Plaintiff then worked as a janitor and an amusement ride operator for approximately eight months each. *R. at 40-45, 103-108.* Plaintiff alleges that his health deteriorated beginning around February 1992 and he eventually quit working sometime around October or November of 1992. *R. at 46.*

Plaintiff's medical records indicate that he is an obese male who smokes cigarettes. Plaintiff is somewhere between 5'6" and 5'9" tall and his weight has fluctuated from 250 pounds to 286 pounds. At the hearing, Plaintiff testified that he was 5'9" tall and weighed approximately 260-265 pounds. *R. at 9-13, 40, 130-144.* Plaintiff alleges that his smoking, fumes from the galvanizing plant where he worked, and his obesity, all combine to cause him severe shortness of breath. Plaintiff has been diagnosed with chronic obstructive pulmonary disease ("COPD"). *R. at 9-13, 126-144*

Plaintiff also injured his left knee and ankle while at work. The ankle was injured approximately 22 years prior to the hearing and the knee was injured approximately nine years prior to the hearing. *R. at 50-51, 143-144.* Plaintiff alleges that he is unable to work due to the shortness of breath caused by his COPD and due to the pain and stiffness caused by arthritis in his left knee and ankle.

The ALJ determined that despite his COPD, Plaintiff retained the residual functional capacity ("RFC") to perform light work. The ALJ then presented to a vocational expert ("VE") additional restrictions on Plaintiff's ability to perform the full range of light work. Given these additional limitations, the VE opined that Plaintiff would still be able to perform a significant number of jobs in the national economy. Plaintiff disagrees with the ALJ's conclusion that he could perform light work. Plaintiff also alleges that the ALJ presented an improper hypothetical question to the VE, which did not adequately reflect his impairments.

II. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.^{2/}

^{2/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or
(continued...)

The standard of review to be applied by this Court to the Commissioner's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ALJ's ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the

^{2/} (...continued)

if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

II. DISCUSSION

The ALJ determined that Plaintiff retained the RFC to perform light work, which includes sedentary work. The Court will conduct its review at the lower level of sedentary work. Sedentary work "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 404.1567(a). Occasional walking or standing means that walking or standing should not account for more than two hours in an eight hour day. Soc.Sec.Rul. 83-10. Plaintiff disagrees with the ALJ's assessment of his RFC.

On January 18, 1993, approximately two months after Plaintiff alleges he quit working, Plaintiff went to the emergency room in Terre Haute, Indiana. Plaintiff complained that he was having difficulty breathing. Plaintiff was examined by the

hospital staff. Plaintiff stated that he had a history of asthma as a child but that he had not had a recurrence as an adult. Plaintiff also denied having chest pain or history of heart problems. In fact, his heart was found to be normal. Plaintiff's lungs were also found to be uncongested and clear of any active infiltrates. Plaintiff was found to be obese and he did have audible wheezing. Plaintiff was also diaphoretic (i.e., he was sweating profusely). The doctors concluded that Plaintiff had a mild thickening of the membrane surrounding the lungs, but that Plaintiff's examination was otherwise unremarkable. The ultimate diagnosis was bronchitis with an element of COPD. *R. at 126-29.*

There are no other medical records for almost two years, when Plaintiff was seen again on October 25, 1994 and November 8, 1994 at the University of Oklahoma Tulsa Medical Center. Plaintiff again complained of shortness of breath. Upon examination and X-ray, it was determined that Plaintiff's heart was normal and his lungs were clear. Plaintiff did have expiratory wheezes in his left lung and he was producing a yellowish-green sputum. Plaintiff was ultimately diagnosed with COPD. He was encouraged to stop smoking and he was given medication to prevent infection in his lungs and to help open his bronchial passages. *R. at 9-14, 154.*

Almost four months later, Plaintiff was referred by the Commissioner to Doug Gillespie, M.D. for a consultive examination. Dr. Gillespie found a normal range of motion in Plaintiff's left knee and ankle. Dr. Gillespie found that Plaintiff had no red, warm, tender or swollen joints in his knees or ankles. Dr. Gillespie also performed a spirometry test, which tested Plaintiff's pulmonary capability. Dr. Gillespie concluded

that Plaintiff suffered from restrictive and obstructive lung disease, obesity and hypertension. *Id.*

Two RFC assessments were also performed by two different doctors. One was performed in March of 1993 and the other was performed in July of 1993. Both doctors found that Plaintiff could occasionally lift 50 pounds and frequently lift 25 pounds. They also found that Plaintiff could sit, stand and walk for up to six hours in an eight hour day, with normal breaks. No other limitations were noted. *R. at 83-90.* These RFC assessments are consistent with a conclusion that Plaintiff could perform at least sedentary work.

Plaintiff testified at the hearing that he does not have a car and that he gets around by walking or having his mother drive him. *R. at 42.* Plaintiff also testified that breathing gas fumes does not bother him, but that breathing battery acid fumes does. *R. at 48.* Even on a bad day, Plaintiff testified that he could lift 10 pounds three to four times in a row. *R. at 51.* Plaintiff also testified that if he did not have problems breathing, he could work. *R. at 50.* Plaintiff also goes to church every Sunday for two hours, with one break. *R. at 52.* Plaintiff also testified that none of his doctors have ever placed any physical restrictions on him. *R. at 53.* Plaintiff does testify that he has to take an inhaler 2-3 times a day to catch his breath. However, it appears as if the inhaler was prescribed to be taken 2-3 time a day to help Plaintiff's breathing. *R. at 10, 49.*

With respect to his left knee and ankle, Plaintiff testifies that these joints get stiff and he has to walk on them to limber them up. Plaintiff was able to work for

almost ten years despite these problems. Plaintiff explains that they are now worse because he believes that he has arthritis in his left knee and ankle. *R. at 50-51.* There are, however, no medical records which substantiate any arthritic change in Plaintiff's ankle or knee.

Nothing in the objective medical record discussed this far detracts from the ALJ's conclusion that Plaintiff could perform sedentary work. The Plaintiff does, however, have subjective complaints of breathing difficulty which, if true, would detract from a finding that Plaintiff can perform sedentary work. Plaintiff testified that on good days (i.e., 10 out of a month), if he were to walk from the hearing room to the edge of the parking lot^{3/} and back, he would be out of breath, dizzy and have chest pain. Plaintiff testified that on bad days, which constitute the majority of a month (i.e. 20 out of a month), he would not even be able to walk out to the parking lot. Also, on bad days, Plaintiff would have to take his inhaler more than the prescribed 2-3 times a day and lay down often. *R. at 47-49.* Plaintiff's mother also testified that Plaintiff has severe problems breathing when he climbs the stairs at her house. *R. at 54-55.*

Some medical evidence in the record tends to substantiate Plaintiff's subjective complaints. As mentioned, Dr. Gillespie performed a spirometry test to determine Plaintiff's pulmonary capability. The following results were obtained from this test:

^{3/} There is no indication of how far a distance it is from the hearing room to the edge of the parking lot.

	FVC ^{4/}	% of Predicted	FEV1 ^{5/}	% of Predicted	MVV ^{6/}	% of Predicted
Before Bronchodilation	2.98	58%	1.70	44%	39.23	28%
After Bronchodilation	3.27	64%	1.98	52%	50.23	36%

R. at 130-44. Numbers as low as **28%**, **36%**, **44%** and **52%** of predicted values would appear to be consistent with Plaintiff's subjective breathing complaints. There is, however, nothing in the medical record which indicates the significance of these low percentages.

At the time of Plaintiff's spirometer test, Dr. Gillespie found that Plaintiff was 66" tall and weighed 277 pounds. *R. at 130-44.* As a frame of reference, Plaintiff would have met the obesity listing had he weighed seven more pounds and had his FVC been less than or equal to **2.0**, instead of between 2.98 and 3.27. *See*, 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 9.09. Plaintiff would have met a respiratory listing if either his FEV1 was equal to or less than 1.35, instead of 1.70 to 1.98, or his FVC was equal to or less than **1.55**, instead of 2.98 to 3.27. *See*, 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.02. The Court is able to recite this numbers, but nothing in the record indicates the relative significance of these numbers. For example, is an

^{4/} "FVC" -- Forced vital capacity. *The Merck Manual*, p. 608, Tbl. 30-1 (16th ed. 1992).

^{5/} "FEV1" -- Forced expiratory volume in one second. *The Merck Manual*, p. 608, Tbl. 30-1 (16th ed. 1992).

^{6/} "MVV" -- Maximal Voluntary Ventilation. *The Merck Manual* p. 608, Tbl. 30-1 (16th ed. 1992).

FEV1 of 1.70 significantly or only slightly better than an FEV1 of 1.35. Plaintiff's view of these numbers is that they demonstrate that he was very close to meeting a Listing (i.e., he was almost *per se* disabled). Defendant's brief offers nothing to counter this inference. Thus, it appears as if Plaintiff's spirometer readings would also tend to substantiate his subjective breathing complaints.

The problem here is that the ALJ failed to evaluate Plaintiff's subjective complaints in accordance with Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995). The familiar nexus test in Luna v. Bowen, 834 F.2d 151 (10th Cir. 1987) was developed as a guide to explain when an ALJ must consider a claimant's subjective complaints. If the nexus between a medically diagnosed impairment and subjective allegations can be established, Luna requires that an ALJ consider the claimant's subjective complaints. That is, the ALJ must assess the Plaintiff's credibility to determine whether to accept or reject Plaintiff's subjective complaints. Luna, 834 F.2d at 161-63.

Both Kepler and Luna list specific factors which an ALJ should consider to make a credibility determination. See Kepler, 68 F.3d at 391. In this case, the ALJ referred to none of these factors. In fact, the ALJ's opinion contains no credibility findings whatsoever with respect to Plaintiff's subjective complaints. The Court is simply left to speculate what evidence led the ALJ to reject Plaintiff's subjective complaints.

Credibility determinations are peculiarly within the province of the ALJ. Diaz v. Secretary of HH&S, 898 F.2d 774, 777 (10th Cir. 1990). It is, however, well

settled that administrative agencies must give reasons for their decisions. Reyes v. Bowen, 845 F.2d 242, 244 (10th Cir. 1988). Findings as to credibility should be closely and affirmative linked to **substantial evidence**. Hustson v. Bowen, 838 F.2d 1125, 1133 (10th Cir. 1988). There must be an affirmative link between the ALJ's credibility determination and the evidence. Kepler, 68 F.3d at 391. As the Court in Kepler held:

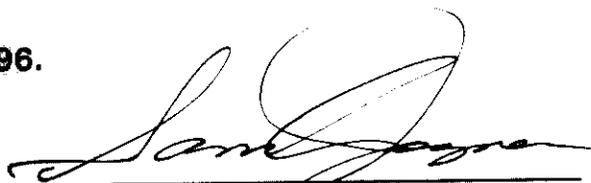
We therefore order a **limited** remand of this case for the Commissioner to make **express** findings in accordance with Luna, with reference to **relevant** evidence as appropriate, concerning claimant's [subjective breathing complaints]. We do not dictate any **result**. Our remand 'simply assures that the correct legal **standards** are invoked in reaching a decision based on the **facts** of the case.' Hudson, 838 F.2d at 1132.

Kepler, 68 F.3d at 391-92 (internal citations omitted).

The Commissioner's disability **determination** is, therefore, **REVERSED**. This case is remanded for proceedings **not inconsistent** with this Order.

IT IS SO ORDERED.

Dated this 9 day of May 1996.



Sam A. Joyner
United States Magistrate Judge

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

FILED

MAY - 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LAWRENCE T. HOMOLKA,

Plaintiff,

v.

HARTFORD INSURANCE GROUP,
Individually and d/b/a
HARTFORD UNDERWRITERS INSURANCE
COMPANY,

Defendants.

Case No. 95-C-760B ✓

ENTERED ON DOCKET

MAY 8 1996

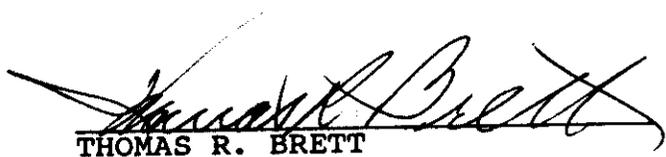
JUDGMENT

Pursuant to the Order sustaining Defendant Hartford Underwriters Insurance Group's ("Hartford") Motion for Summary Judgment filed this date, Judgment is hereby entered in favor of Hartford and against Plaintiff Lawrence T. Homolka ("Homolka") and Homolka's action is hereby dismissed.

Pursuant to Local Rule 54.1, costs of this action are awarded to Hartford and against Homolka if a proper bill of costs is filed within fourteen (14) days of this date.

Each party shall bear their own attorney's fees.

IT IS SO ORDERED THIS 5th day of May, 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

MAY - 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LAWRENCE T. HOMOLKA,)
)
Plaintiff,)
)
v.)
)
HARTFORD INSURANCE GROUP,)
Individually and d/b/a)
HARTFORD UNDERWRITERS INSURANCE)
COMPANY,)
)
Defendants.)

Case No. 95-C-760B ✓

ENTERED ON DOCKET
MAY 8 1996

ORDER

Comes now for consideration Defendant Hartford Underwriters Insurance Company's ("Hartford") Motion for Summary Judgment (Docket # 25). After careful consideration of the record and applicable legal authorities, the Court hereby GRANTS Hartford's Motion for Summary Judgment.

UNCONTROVERTED FACTS¹

1. Hartford insured Lawrence J. Homolka (Plaintiff's father) under two automobile policies. Policy no. 55-PH-703269 insured two vehicles; a 1973 Ford Galaxie and a 1989 Buick. Policy no. 55-PHD-483188 insured a 1972 Ford pickup. (Df.'s Brief, Ex. A, B).

¹The Court notes the point made in footnote 1 of Df.'s Reply Brief is well-taken. However, in an abundance of caution the Court scoured Pl.'s Response Brief in search of instances where Df.'s undisputed facts were, in fact, disputed by Pl. The Court found only one fact to be directly disputed. Undisputed fact 5, page 5, Df.'s Brief, proclaims Pl. was not a resident relative of the same household as his father at the time of the accident. Pl., on page 5 of his Response Brief, rebuts by saying it is a fact Pl. was a resident of his father's household on the date of the accident. However, this "fact" is a legal conclusion. As such, the Court will disregard these statements and look only to the undisputed facts, as set out below, in ruling on this Motion.

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2. The Ford Galaxie was registered and licensed in the State of Kansas, and has never been licensed or registered in the State of Oklahoma. (Deposition of Lawrence J. Homolka, p. 44, lines 10-22).

3. Policy no. 55-PH-703269, which provided coverage for the Galaxie, was issued to Lawrence J. Homolka in the State of Kansas. (Declarations page, Df.'s Brief, Ex. C). The policy provides Personal Injury Protection Coverage ("PIP"), and Uninsured Motorist Coverage ("UM"), pursuant to the law of the State of Kansas. (Df.'s Brief, Ex. F, G).

4. The PIP coverage section of the policy contains a provision which limits PIP coverage to accidents which occur in the State of Kansas, except for accidents involving the "named insured" or resident relatives of a named insured. Specifically, the PIP endorsement provides in pertinent part:

Policy Period; Territory

This coverage applies only to accidents which occur during the policy period:

- (a) In the State of Kansas, and;
- (b) With respect to the named insured or a relative, while occupying or when struck by any motor vehicle, outside the State of Kansas, but within the United States of America, its territories, or possessions, or Canada.

(Df.'s Brief, Ex. F, p. 3). The policy defines the term "relative" as follows: "Relative" means a spouse or any other person related to the named insured by blood, marriage or adoption (including a ward or foster child) who is a resident of the same household as

the named insured, or who usually makes his or her home in the same household, but temporarily lives elsewhere." (Df.'s Brief, Ex. F, p. 2).

5. The living arrangements of Plaintiff in the months prior to the accident were as follows:

(a) The Plaintiff first moved to Oklahoma from Salina, Kansas in 1988. (Depo. of Pl., p. 59, lines 11-15, and p. 60, lines 1-2). Upon first arriving in Oklahoma, the Plaintiff lived in Catoosa, Oklahoma with his sister, her husband and their three children. (Depo. of Pl., p. 60, lines 5-7).

(b) Within a few months of moving to Oklahoma, the Plaintiff moved from his sister's house to a rental house on Archer Street in Tulsa, Oklahoma. (Depo. of Pl., p. 60, lines 20 through p. 61, line 16, and p. 62, lines 14-16).

(c) After living for a short time at the house on Archer Street in Tulsa, the Plaintiff moved to 418 S. Chickasaw Street in Claremore, Oklahoma. (Depo. of Pl., pp. 14-22).

(d) During the first six months of 1991, the Plaintiff resided in the Rogers County Jail, where he was incarcerated for theft of an automobile. (Depo. of Pl., p. 67, lines 6-9, page 22, lines 19-25, and p. 33, lines 8-12).

(e) After being released from jail in June, 1991, the Plaintiff lived at the Okie Inn Motel in Claremore, Oklahoma. (Depo. of Pl., p. 71, line 23 through p. 72, line 7). The Plaintiff moved out of the Okie Inn Motel in approximately August, 1991, and moved in with his girlfriend for approximately two

months. (Depo. of Pl., p. 82, lines 17-21).

(f) After living with his girlfriend for two months, the Plaintiff moved into the Elms Hotel in Claremore, Oklahoma. (Depo. of Pl., p. 82, lines 17-21). The Plaintiff lived at the Elms Motel for approximately a year or a year-and-a-half. (Id.)

(g) In the fall of 1992, the Court ordered the Plaintiff to submit to treatment at an alcohol rehabilitation center in Little Rock, Arkansas. The Plaintiff went to the center on October 10, 1992, and stayed at the center until the middle of November, 1992. (Depo. of Pl., p. 136, line 24 through p. 137, line 10).

(h) After leaving the rehabilitation center in Little Rock, Arkansas, in November, 1992, the Plaintiff returned to Claremore, Oklahoma, and moved into the Okie Inn Motel. (Depo. of Pl., p. 137, lines 7-12). The Plaintiff lived at the Okie Inn Motel until October, 1993. (Depo. of Pl., p. 142, lines 22-24, and p. 146, lines 12-19).

(i) During the fall of 1993, the Plaintiff applied with the United States Federal Government for Indian Housing. The Plaintiff was approved for Indian Housing in October, 1993. (Depo. of Pl., p. 127, lines 9-14, and p. 146, line 20 through p. 147, line 5).

(j) The Indian Housing Guidelines required the Plaintiff to find a house or an apartment which met the Guidelines. The Plaintiff found a trailer house located on Highway 88 near Claremore, Oklahoma. (Depo. of Pl., p. 127, lines 18-22). The trailer was owned by a private citizen, who would be paid rent by

the Government while the Plaintiff lived in the trailer house. (Depo. of Pl., p. 128, lines 2-5).

(k) The Plaintiff moved out of the Okie Inn Motel in October, 1993, and moved directly into his Indian Housing, i.e., the trailer house. (Depo. of Pl., p. 153, lines 21-24, and p. 155, lines 7-11).

(l) The Indian Housing Guidelines allow recipients to be approved for one year intervals. The Plaintiff was approved for a one-year period beginning in October, 1993. (Depo. of Pl., p. 147, lines 10-12). The Plaintiff testified that it was his intent to live in the trailer house from October, 1993, until October, 1994. (Depo of Pl., p. 155, line 25 through p. 156, line 6). In this regard, the Plaintiff testified as follows:

Q. Once you moved into the trailer, was it your intention to live there for one year?

A. Yes, it was.

(Depo. of Pl., p. 126, lines 23-25).

(m) When the Plaintiff moved into the trailer house in October, 1993, his furniture had been in a storage facility. The Plaintiff testified that he moved his furniture and clothes from the storage facility into the trailer, and completed a change of address form. (Depo. of Pl., p. 156, lines 1-25).

(n) On December 15, 1993, an Inspector from the Indian Housing Agency determined that the heater in the Plaintiff's trailer house did not meet the Indian Housing standards. (Depo. of Pl., p. 156, line 23 through p. 159, line 3, and p. 159, lines 20-25).

(o) The Plaintiff's landlord informed him that the heater would be fixed within a week to ten days. (Depo. of Pl., p. 164, lines 12-15). The Plaintiff informed his landlord that he was going to stay with his father "until the heater was fixed." (Depo. of Pl., page 164, lines 9-11). The Plaintiff's father, Lawrence J. Homolka, maintained two residences. He had an apartment in Salina, Kansas, which he considered his home, and an apartment at a senior citizen home located in the Millam Building, 1302 North Willow Drive, Claremore, Oklahoma. (Depo. of Lawrence J. Homolka, p. 16, lines 16-19; Depo. of Pl., p. 130, lines 14-21). Even though he considered his apartment in Salina, Kansas, to be his home, he has lived at the senior citizen home in Claremore since April, 1990. (Id.) The Plaintiff went to his father's apartment at the senior citizen home on December 15, 1993. During the Plaintiff's stay at his father's apartment, he slept on the couch in the living room of the apartment. (Depo. of Pl., p. 169, lines 16-22).

(p) The Plaintiff testified that when he went to stay with his father, it was his intent to return to his trailer house as soon as the heater was repaired. (Depo. of Pl., p. 170, lines 2-4).

6. Plaintiff was "staying and living with" his father at the time of the accident. (Depo. of Pl., p. 184, line 11). Plaintiff had a key to his father's apartment. (Depo. of Pl., p. 221, line 22).

7. At approximately 1:00 a.m. on December 19, 1993, the

Plaintiff was driving the Galaxie near the intersection of Highways 88 and 169, near Claremore, Oklahoma, when the Galaxie ran out of gas. (Depo. of Pl., p. 190, lines 4-13). The Plaintiff pulled the Galaxie onto the shoulder of the road, exited the vehicle, and began walking north on Highway 169 to a Circle K store to purchase some gasoline. (Depo. of Pl., p. 192, lines 6-17).

8. After walking a short distance, two gentlemen in a pickup truck stopped and offered the Plaintiff a ride. (Depo. of Pl., p. 193, lines 3-5). The Plaintiff accepted, and the men drove the Plaintiff to the Circle K store where he purchased one dollar's worth of gasoline. (Depo. of Pl., p. 196, line 12 through p. 197, line 25). The men then drove the Plaintiff back to the place where the Galaxie was parked. (Depo. of Pl., p. 198, lines 22-25).

9. When the Plaintiff and the two men arrived at the location where the Galaxie was parked, they parked their pickup truck on the side of the highway that was opposite the Galaxie. They then exited the pickup truck, and walked across the highway to the Galaxie. (Depo. of Pl., p. 198, line 24 through p. 199, line 13). The Plaintiff unlocked the lid to the fuel tank on the Galaxie, and poured three-quarters of the gasoline into the fuel tank of the Galaxie. (Depo. of Pl., p. 199, lines 8-13). The Plaintiff left one-quarter of the gasoline in the can because he "felt that [he would] need some to prime the carburetor." (Depo. of Pl., p. 199, lines 14-17).

10. The Plaintiff explained "priming" as follows: "Well, you pour a small amount in the carburetor and let it drain down through and then you go in and try to start it." (Depo. of Pl., p. 199, lines 19-21). The Plaintiff testified that he had "primed" cars on three or four occasions when he had run out of gas. (Depo. of Pl., p. 199, lines 22-23; p. 200, lines 3-9; and p. 201, line 24 through p. 202, line 4). The Plaintiff testified that he knew that "priming" could cause sparks or a fire. (Depo. of Pl., p. 201, lines 2-21). The Plaintiff testified that he knew that "priming" could cause a fire because of "common sense," and because he had been a fireman in the Navy. (Depo. of Pl., p. 201, lines 5-21).

11. After pouring three-quarters of the gasoline into the fuel tank of the Galaxie, the Plaintiff opened the engine hood to the car, handed one of the men the gasoline can, and told the man "just to put a small amount" in the carburetor. (Depo. of Pl., p. 205, lines 14-17). The Plaintiff then got into the car so that he could start the car after it was "primed." Since the raised hood blocked the windshield, the Plaintiff could not see what the men were doing at the front of the car. Thus, the Plaintiff does not know how much gasoline the men actually poured into the carburetor of the car. (Depo. of Pl., p. 257, lines 15-23).

12. After getting into the car, the Plaintiff waited 15 to 20 seconds before he attempted to start the car. He then turned over the ignition and pumped the foot feed, when suddenly the

engine backfired, and a fire erupted near the hood of the car. (Depo. of Pl., p. 207, lines 7-16). The Plaintiff testified: "The dash started melting. The windshield turned black. It started getting smoky and [he] couldn't get the door open." (Depo. of Pl. p. 207, lines 23-25). The Plaintiff believes that in his panic, he may have locked the unlocked door of the car. (Depo. of Pl., p. 210, lines 4-8). One of the men then broke out the glass of the window of the car, and pulled the Plaintiff out of the car to safety. (Depo. of Pl., p. 215, lines 9-12).

13. The Plaintiff contends that prior to being pulled from the vehicle, he was "hitting and kicking" the door of the car with his right knee. (Depo. of Pl., p. 212, lines 2-7). The Plaintiff contends that after he was pulled out of the car, he "fell backwards with [his] right leg under [him]." (Depo. of Pl., p. 212, lines 2-7). The Plaintiff contends that he injured his right knee in the foregoing incident. (Depo. of Pl., p. 233, lines 12-15).

14. The Plaintiff testified that he had known that the fuel gauge on the Galaxie was broken for months prior to the incident of December 19, 1993. (Depo. of Pl., p. 227, line 21 through p. 228, line 3). Notwithstanding the fact that the Plaintiff knew that the fuel gauge in the Galaxie did not work, he did not know how many miles that the Galaxie would operate per gallon of gasoline. (Depo. of Pl., p. 185, lines 15-21). Furthermore, he had not purchased gasoline for the vehicle since buying \$5.00 worth of fuel, two days earlier. (Depo. of Pl., p. 190, lines 7-

13). Neither the Plaintiff, nor his father, were interested in repairing the fuel gauge in the Galaxie, because the Galaxie had been damaged when it was struck by the roof of a building during a windstorm. (Depo. of Pl., p. 178, lines 17-23).

15. Shortly after the Plaintiff was pulled from the burning car by the men who were assisting him, the fire department and police department arrived at the scene. After completing his work at the scene, the police officer gave the Plaintiff a ride to his trailer house, where he spent the remainder of the night. (Depo. of Pl., p. 217, lines 14-18).

16. The heater in the Plaintiff's trailer house was repaired prior to December 25, 1993. The Plaintiff discontinued his temporary stay at his father's apartment on December 25, 1993, and went back to his trailer house. (Depo. of Pl., p. 229, line 25). Thus, as a result of the malfunctioning heater in the Plaintiff's trailer house, the Plaintiff stayed at his father's apartment for ten days (i.e., he began staying at his father's apartment on 12-15-93, and returned to his trailer house on 12-25-93). The Plaintiff continued living in the trailer house until January, 1995, when he moved into an apartment, which was also provided to him by Indian Housing. (Depo. of Pl., p. 231, lines 3-22).

17. The Plaintiff did not seek medical attention for his alleged knee injury until approximately four months after the accident. (Depo. of Pl., p. 235, lines 7-12). Shortly thereafter the Plaintiff began submitting his medical bills to

Hartford, and Hartford began paying the bills under the PIP coverage of the policy, which covered the Galaxie.

18. During his deposition, the Plaintiff was asked whether he believed that either of the two men who assisted him on the night of the fire were careless in any way. Specifically, the Plaintiff testified as follows:

Q. Do you think that either of the two men that helped you on the night of this fire acted carelessly, or inappropriately?

A. No, I don't believe they did.

Q. You don't have any criticism of them, do you?

A. No, I don't.

(Depo. of Pl., p. 245, lines 6-12). Shortly after the Plaintiff testified that the two men who helped him (and essentially saved his life) were not careless, his attorney suggested a break in the deposition. After the break, the Plaintiff's attorney stated that the Plaintiff wanted to "qualify" his prior answer. (Depo. of Pl., p. 245, lines 2-11). The "qualification" was a change of Plaintiff's testimony, and followed the conversation with Plaintiff's attorney in the hallway. After the break and conversation with his attorney, Plaintiff testified that he did have a criticism of the men, because he believed that they poured too much gasoline in the carburetor. (Depo. of Pl., p. 256, line 21).

19. Hartford paid the Plaintiff the limits of all available benefits under the PIP coverage provided by his father's Hartford policy, with the exception of the limits for Rehabilitation

Expenses. The limits of PIP coverage provided by the subject Hartford policy are stated on the Declarations page of the policy as follows:

Personal Injury Protection
Additional Personal Injury Protection

- A. Medical Expenses \$12,500 per person
- B. Rehabilitation Expenses, \$12,500 per person
- C. Work Loss \$1,050 per month 1 year maximum
- D. Essential Services Expenses \$25 per day
1 year maximum
- E. Funeral expenses \$2,000 per person
- F. Survivor's loss
\$1,050 monthly earnings 1 year maximum
\$25 per day essential services expenses
1 year maximum

(Declarations page to Policy No. 55-PH-703269, p. 2).

20. On February 27, 1995, Hartford sent a letter to the Plaintiff, explaining to him that it had paid the policy limits of PIP benefits with the exception of the limits that were available for Rehabilitation Expenses. In that letter, Hartford advised the Plaintiff as follows: "There is a \$12,500 limit on coverage for occupational therapy. Should you have any expenses for occupational therapy, please forward them to this office for consideration of payment under the Lawrence J. Homolka policy." (Pl. Depo., Vol. II, p. 47, lines 8-25, and letter dated 2-27-95, attached as Exhibit "J" to Df.'s Brief). It is undisputed that the Plaintiff has never sent to Hartford any expense incurred for occupational or rehabilitation therapy. (Depo. of Pl., Vol. II, p. 47, lines 5-25).

21. The Plaintiff subsequently filed this action, alleging that Hartford had breached the insurance contract by failing to pay him additional PIP benefits, and by failing to pay him UM coverage.

22. Hartford has paid \$33,897.00 to Plaintiff, despite their current claims Plaintiff is not entitled to any benefits under either policy.

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 Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

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

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

Legal Analysis

1. The "resident relative" issue.

The parties agree the critical issue in this case is whether Plaintiff was a resident relative of his father's household at the time of the accident giving rise to Plaintiff's injuries. If the Plaintiff was not a resident relative of his father's

household at the time of the injury-producing accident, Plaintiff is not eligible for coverage under either policy owned by his father.

The Court is unable to find any reported Oklahoma or Kansas cases setting forth the specific requirements one must fulfill to be a resident relative of an insured's household for purposes of uninsured motorist coverage. The parties cite multiple cases wherein various Courts have established factors to be considered in a determination of residency. While the Courts are not uniform in the language used to describe their residency requirements, a common element is present. The common element is an intent to permanently inhabit a household. See Henderson v. Eaves, 516 P.2d 270 (Okla. 1973); Midwest Mut. Ins. Co. v. Titus, 849 P.2d 908 (Colo.App. 1993); Furrow v. State Farm Mut. Auto. Ins. Co., 375 S.E.2d 738 (Va. 1989); Fireman's Ins. Co. v. Viktora, 318 N.W.2d 704 (Minn. 1982); Grinnell Mut. Reinsurance Co. v. Scott, 628 S.W.2d 355 (Mo.App. 1981); Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 146 S.E.2d 410 (N.C. 1966).

It is Plaintiff's contention he was a resident of his father's household by virtue of the fact he was "staying and living with" his father at the time of the accident. Plaintiff tries to bolster this conclusion by testifying he had a key to his father's apartment. Both facts are true and undisputed. However, staying and living with someone whose apartment one has a key to does not necessarily rise to the status of being a resident of that household. The focus is on whether Plaintiff

intended to permanently inhabit his father's Claremore apartment.

The following dialogue confirms Plaintiff's temporary living arrangement at his father's Claremore apartment:

"Q: Was it your intention to return to the trailer as soon as the heater was fixed?

A: That's a correct statement, sir."

(Depo. of Pl., p. 170, lines 2-4). Plaintiff's contention he was a resident of his father's household until the heater was fixed does not establish a settled and permanent status. Based on Plaintiff's undisputed testimony, no material factual dispute remains permitting an inference that Plaintiff was a resident of his father's household. Without the requisite intent, Plaintiff can not be a resident relative of his father's household and Hartford is entitled to judgment pursuant to Fed.R.Civ.P. 56.

Additionally, by definition, language of the two insurance policies negate UM coverage herein. The policies provide:

"However, uninsured motor vehicle does not include any vehicle or equipment:

1. Owned by ... you or any family member."

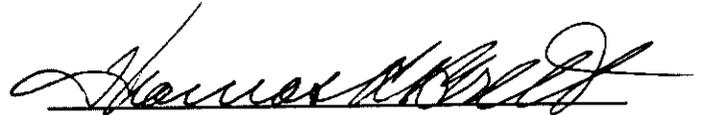
(Policy No. 55-PH-703269 and Policy No. 55-PHD-483188, Part C-Uninsured Motorist Coverage, p. 5 of 11). It is an undisputed fact the Galaxie vehicle involved was owned by Plaintiff's father.

Regarding the PIP coverage, the record reflects Hartford has paid Plaintiff \$33,897.00 under the PIP coverages of the Galaxie policy. The PIP coverage has the same resident relative of household requirement as the UM coverage. Thus, the injuries

sustained by Plaintiff in the accident at hand do not qualify for PIP benefits. In making the PIP payments to Plaintiff thus far, Hartford has apparently been a volunteer. For the reasons expressed herein concerning Plaintiff not being a resident relative of his father's household, no further PIP coverage is due Plaintiff.

For the reasons set forth the Court finds no genuine issue as to any material fact exists and Hartford is entitled to judgment as a matter of law. It is the Order of this Court that Defendant Hartford's Motion for Summary Judgment should be and is hereby GRANTED.

IT IS SO ORDERED THIS 6th day of May, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

C. VINSON REED,
Plaintiff,

v.

STATE OF OKLAHOMA, ex rel
OKLAHOMA TAX COMMISSION,
and THE UNITED STATES OF
AMERICA ex rel INTERNAL REVENUE
SERVICE,

Defendants.

CASE NO. 93-C-439-B

ENTERED ON DOCKET **F I L E D**
MAY 8 1996 MAY 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

This matter comes on for consideration of the proceedings which have heretofore transpired in the instant case.

The Court finds that the parties herein, at the February 15, 1996, status conference, agreed that Plaintiff would pay into Court the sum of \$2,378.02 pursuant to Order of the Court which was entered March 25, 1996; that the Court would thereupon direct that said sum be distributed to the Oklahoma Tax Commission, which was done by Order entered April 16, 1996, and that thereafter this matter may be closed. The Court further finds that said sum has been paid over to the Oklahoma Tax Commission pursuant to said Order of April 16, 1996.

IT IS THEREFORE ORDERED that this matter be and the same is herewith DISMISSED.

IT IS SO ORDERED this 6th day of May, 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
MAY 07 1996
DATE _____

DEBORAH ROBINSON, D.O.,

Plaintiff,

vs.

No. 96-C-0160-K

ARMEN MAROUK, D.O.;
STEPHEN EICHERT, D.O.;
GREGORY WILSON, D.O.;
DANIEL FIEKER, D.O.;
OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION
d/b/a TULSA REGIONAL MEDICAL CENTER; and
OKLAHOMA STATE UNIVERSITY
COLLEGE OF OSTEOPATHIC MEDICINE,

Defendants.

FILED

MAY 6 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**NOTICE OF DISMISSAL
OF OKLAHOMA STATE UNIVERSITY**

The plaintiff, Deborah Robinson, through her attorney, Louis W. Bullock, pursuant to Rule 41 of the Federal Rules of Civil Procedure, gives notice of the dismissal of the Oklahoma State University College of Osteopathic Medicine.

Respectfully submitted,



Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, Oklahoma 74103
(918) 584-2001

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF MAILING

The undersigned does hereby **certify** that on the 6th day of May, 1996, a true and correct copy of the above and foregoing **document** was mailed, postage prepaid, to:

Michael Barkley
Jennifer Keglovits
Barkley & Rodolf
401 S Boston, Suite 2700
Tulsa OK 74103

Stephen J. Rodolf
Karen L. Callahan
Barkley & Rodolf
401 S Boston, Suite 2700
Tulsa OK 74103

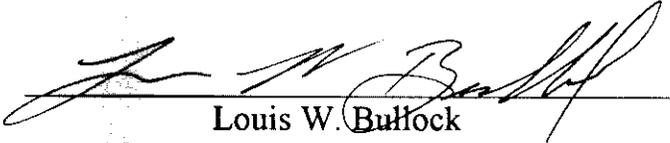
Charles E. Drake
Office of Legal Counsel
Oklahoma State University
Student Union Bldg, Suite 220
Stillwater OK 74078

James K. Secrest
Roger N. Butler, Jr.
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K. Clark Phipps
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525 S Main
Tulsa OK 74105

Leslie Zieren
Janet M. Reasor
Zieren & Reasor
321 S Boston, Suite 900
Tulsa OK 74103



Louis W. Bullock

Dismissal.OSU

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAY 07 1996

UNITED STATES OF AMERICA,)
on behalf of Rural Housing and Community)
Development Service, formerly Farmers Home)
Administration,)

Plaintiff,)

v.)

ANNA BARBER, a single person;)
COUNTY TREASURER, Mayes County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Mayes County, Oklahoma,)

Defendants.)

FILED

MAY 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-C-0004-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6 day of May,
1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney;
the Defendants, County Treasurer, Mayes County, Oklahoma, and Board of County
Commissioners, Mayes County, Oklahoma, appear by Charles A. Ramsey, Assistant
District Attorney, Mayes County, Oklahoma; and the Defendant, Anna Barber, a single
person, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the
Defendant, Anna Barber, a single person, was served on February 23, 1996 by certified
mail, return receipt requested, delivery restricted to the addressee.

It appears that the Defendants, County Treasurer, Mayes County,
Oklahoma, and Board of County Commissioners, Mayes County, Oklahoma, filed their
Answer on or about January 16, 1996.

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

The Court further finds that Rural Housing and Community Development Service, formerly Farmers Home Administration, is now known as Rural Housing Service.

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

Lot Numbered One (1) and the North Fifteen (15) Feet of Lot Numbered Two (2), in Block Thirty-eight (38) in the Town of ADAIR, Mayes County, State of Oklahoma, according to the United States Government Survey thereof.

The Court further finds that on September 19, 1984, the Defendant, Anna Barber, a single person, executed and delivered to the United States of America, acting through the Farmers Home Administration, formerly Rural Housing and Community Development Service, now known as Rural Housing Service, her promissory note in the amount of \$36,900.00, payable in monthly installments, with interest thereon at the rate of 11.875 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Anna Barber, a single person, executed and delivered to the United States of America, acting through the Farmers Home Administration, formerly Rural Housing and Community Development Service, now known as Rural Housing Service, a real estate mortgage dated September 19, 1984, covering the above-described property, situated in the State of Oklahoma, Mayes County. This mortgage was recorded on September 19, 1984, in Book 633, Page 372, in the records of Mayes County, Oklahoma.

The Court further finds that on September 19, 1984, July 13, 1985, July 27, 1986, August 5, 1987, July 20, 1988, July 20, 1989, July 17, 1990, June 7, 1991, June 25, 1992, September 20, 1993, and June 3, 1994, the Defendant, Anna Barber, a single person, executed and delivered to the United States of America, acting through the Farmers Home Administration, formerly Rural Housing and Community Development Service, now known as Rural Housing Service, Interest Credit Agreements pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendant, Anna Barber, a single person, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Anna Barber, a single person, is indebted to the Plaintiff in the principal sum of \$30,108.75, plus accrued interest in the amount of \$1,755.45 as of August 9, 1995, plus interest accruing thereafter at the rate of 11.875 percent per annum or \$9.7957 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$29,171.08, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Mayes County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$221.71, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Mayes 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 \$18.39 which became a lien on the property as of 1995. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Rural Housing Service, formerly Rural Housing and Community Development Service, formerly Farmers Home Administration, have and recover judgment against the Defendant, Anna Barber, a single person, in the principal sum of \$30,108.75, plus accrued interest in the amount of \$1,755.45 as of August 9, 1995, plus interest accruing thereafter at the rate of 11.875 percent per annum or \$9.7957 per day until judgment, plus interest thereafter at the current legal rate of 5.60 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of \$29,171.08, plus interest thereafter at the current legal rate of 5.60 percent per annum until fully paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Mayes County, Oklahoma, have and recover judgment in the amount of \$221.71, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Mayes County, Oklahoma**, have and recover judgment in the amount of \$18.39 for personal property taxes for the year 1995, plus the costs of this action.

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

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

First:

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

Second:

In payment of the judgment rendered herein in favor of the Defendant, **County Treasurer, Mayes County, Oklahoma**, for ad valorem taxes;

Third:

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

Fourth:

In payment of the judgment rendered herein in favor of the Defendant, **County Treasurer, Mayes County, Oklahoma**, for personal property taxes.

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

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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



CHARLES A. RAMSEY, OBA #10116
Assistant District Attorney
P.O. Box 845
Pryor, Oklahoma 74362
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Mayes County, Oklahoma

Judgment of Foreclosure
Case No. 96-C-0004-K

CDM:cm

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of)
Veterans Affairs,)

Plaintiff,)

v.)

THE UNKNOWN HEIRS, EXECUTORS,)
ADMINISTRATORS, DEVISEES,)
TRUSTEES, SUCCESSORS AND)
ASSIGNS OF FLORENE HARDIN)
aka Florence Hardin, Deceased;)
DALE ANN SONTAG;)
BILLY JAY JAMES aka Billy J. James;)
PAT DOBSON aka Patty Dobson;)
LINDA KAY HILL aka Linda K. Hill;)
DEL HARDIN;)
RESOLUTION TRUST CORPORATION,)
as Receiver for First Federal)
Savings & Loan Association of)
Coffeyville, Coffeyville, Kansas;)
JOE H. HILL;)
MARLITA S. HILL;)
STATE OF OKLAHOMA ex rel.)
Oklahoma Tax Commission;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)

Defendants.)

ENTERED ON DOCKET
DATE MAY 07 1996

FILED

MAY 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 95-C-383-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6 day of May,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County

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

Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendants, Joe H. Hill and Marlita S. Hill, appear pro se; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears not, having previously filed its Disclaimer; and the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin aka Florence Hardin, Deceased; Dale Ann Sontag; Billy Jay James aka Billy J. James; Pat Dobson aka Patty Dobson; Linda Kay Hill aka Linda K. Hill; Del Hardin; and Resolution Trust Corporation, as Receiver for First Federal Savings & Loan Association of Coffeyville, Coffeyville, Kansas, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Billy Jay James aka Billy J. James**, executed a Waiver of Service of Summons on April 29, 1995 which was filed on **May 4, 1995**; that the Defendant, **Linda Kay Hill aka Linda K. Hill**, was served by certified mail, return receipt requested, delivery restricted to the addressee on September 18, 1995; that the Defendant, **Resolution Trust Corporation, as Receiver for First Federal Savings & Loan Association of Coffeyville, Coffeyville, Kansas**, was served by certified mail, return receipt requested, delivery restricted to the addressee on July 10, 1995 and September 22, 1995; that the Defendant, **Joe H. Hill**, executed a Waiver of Service of Summons on September 18, 1995 which was filed on September 20, 1995; the Defendant, **Marlita S. Hill**, executed a Waiver of Service of Summons on September 18, 1995 which was filed on September 20, 1995.

The Court further finds that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin aka Florence Hardin, Deceased; Dale Ann Sontag; Pat Dobson aka Patty Dobson; and Del**

Hardin, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning December 15, 1995, and continuing through January 19, 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 of Florene Hardin aka Florence Hardin, Deceased; Dale Ann Sontag; Pat Dobson aka Patty Dobson; and Del Hardin**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin aka Florence Hardin, Deceased; Dale Ann Sontag; Pat Dobson aka Patty Dobson; and Del Hardin**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by

publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on May 11, 1995; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on or about May 26, 1995; that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin aka Florence Hardin, Deceased; Dale Ann Sontag; Billy Jay James aka Billy J. James; Pat Dobson aka Patty Dobson; Linda Kay Hill aka Linda K. Hill; Del Hardin; and Resolution Trust Corporation, as Receiver for First Federal Savings & Loan Association of Coffeyville, Coffeyville, Kansas, 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 promissory note and for foreclosure of a mortgage upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Fourteen (14), Block Twenty (20), in NORTHRIDGE, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that this a suit brought for the further purpose of judicially determining any additional heirs of Florene Hardin.

The Court further finds that Floyd F. Hardin, Sr. aka Floyd Franklin Hardin (hereinafter referred to by either name) and Florene Hardin aka Florence Hardin (hereinafter

referred to by either name) became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated April 13, 1972, from Donald E. Johnson as Administrator of Veterans Affairs to Floyd F. Hardin, Sr. and Florene Hardin, husband and wife, as joint tenants, and not as tenants in common, with full right of survivorship, the whole estate to vest in the survivor in the event of the death of either, which Warranty Deed was filed of record on April 17, 1972, in Book 4012, Page 665, in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that Floyd Franklin Hardin died on September 25, 1979, in the City of Tulsa, Tulsa County, State of Oklahoma. Upon the death of Floyd Franklin Hardin, the subject property vested in his surviving joint tenant, Florene Hardin, by operation of law. Certificate of Death No. 792962 issued by the Oklahoma State Department of Health certifies Floyd Franklin Hardin's death.

The Court further finds that on December 6, 1983, Florene Hardin executed an Affidavit of Surviving Joint Tenant which terminated the joint tenancy of Floyd F. Hardin, Sr. and Florene Hardin. This Affidavit of Surviving Joint Tenant was recorded on December 6, 1983, in Book 4749, Page 1912, in the records of Tulsa County, Oklahoma.

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

The Court further finds that on April 28, 1994, Florene Hardin's death was judicially determined to have occurred on May 23, 1992, in the City of Tulsa, Tulsa County,

State of Oklahoma. See USA v. Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin, Deceased, et al., United States District Court, Northern District of Oklahoma, Case No. 93-C-1020-E.

The Court further finds that on April 28, 1994, Linda K. Hill, Billy J. James, Patty Dobson and Del Hardin were judicially determined to be the known heirs of Florene Hardin. See USA v. Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin, Deceased, et al., Case No. 93-C-1020-E, United States District Court, Northern District of Oklahoma. Plaintiff now has knowledge that Dale Ann Sontag is an additional heir of Florene Hardin; therefore, Plaintiff, United States of America, seeks a judicial determination of Dale Ann Sontag as an additional heir of Florene Hardin.

The Court further finds that on April 14, 1972, Floyd F. Hardin, Sr. and Florene Hardin executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$9,100.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Floyd F. Hardin, Sr. and Florene Hardin, husband and wife, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated April 14, 1972, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on April 17, 1972, in Book 4012, Page 668, in the records of Tulsa County, Oklahoma.

The Court further finds that **Floyd F. Hardin, Sr. aka Floyd Franklin Hardin**, now deceased, and **Florene Hardin aka Florence Hardin**, now deceased, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of **\$5,359.53**, plus administrative charges in the amount of **\$680.00**, plus penalty charges in the amount of **\$38.08**, plus accrued interest in the amount of **\$998.81** as of August 22, 1994, plus interest accruing thereafter at the rate of 7.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of **\$770.72** (**\$385.72** publication fees, **\$10.00** fee for recording Notice of Lis Pendens, **\$175.00** fee for abstracting, and **\$200.00** fee for evidentiary affidavit).

The Court further finds that **Plaintiff, United States of America**, is entitled to a judicial determination of any additional heirs of **Florene Hardin**.

The Court further finds that the **Defendants, Joe H. Hill and Marlita S. Hill**, have a lien on the property which is the subject matter of this action in the amount due and owing on a **Second Real Estate Mortgage, dated August 4, 1990**, and recorded on July 22, 1991, in Book 5336, Page 1677 in the records of Tulsa County, Oklahoma.

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

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action in the total amount of \$77.00 plus penalties and interest by virtue of following described personal property taxes.

Personal Property Taxes	Tax Year	Amount	Date on Lien Docket
93-02-3402860	1993	\$ 8.00	06/23/94
93-02-3402870	1993	9.00	06/23/94
92-02-3402150	1992	8.00	06/25/93
92-02-3402160	1992	9.00	06/25/93
91-03-3382830	1991	17.00	06/26/92
91-03-3382840	1991	17.00	06/26/92
89-03-3088330	1989	2.00	07/02/90
88-03-3086720	1988	3.00	07/05/89
87-03-3094300	1987	4.00	07/07/88

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

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin aka Florence Hardin, Deceased; Dale Ann Sontag; Billy Jay James aka Billy J. James; Pat Dobson aka Patty Dobson; Linda Kay Hill aka Linda K. Hill; Del Hardin; Resolution Trust Corporation, as Receiver for First Federal Savings & Loan Association of Coffeyville, Coffeyville, Kansas, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that on April 28, 1994, the death of Florene Hardin was judicially determined to have occurred on

May 23, 1992, in the City of Tulsa, Tulsa County, State of Oklahoma. See USA v. Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin, Deceased, et al., Case No. 93-C-1020-E, United States District Court, Northern District of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only additional known heir of Florene Hardin, Deceased, is Dale Ann Sontag, and that despite the exercise of due diligence by Plaintiff and its counsel, no other additional heirs of Florene Hardin, Deceased, have been discovered and it is hereby judicially determined that Dale Ann Sontag is the only known additional heir of Florene Hardin, Deceased, and that Florene Hardin, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns except for Linda Kay Hill aka Linda K. Hill, Billy Jay James aka Billy J. James, Pat Dobson aka Patty Dobson and Del Hardin who were judicially determined to be the known heirs of Florene Hardin on April 28, 1994. See USA v. Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin, Deceased, et al., Case No. 93-C-1020-E, United States District Court, Northern District of Oklahoma. The Court approves the Certificate of Publication and Mailing filed on April 10, 1996 regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem in the principal sum of \$5,359.53, plus administrative charges in the amount of \$680.00, plus penalty charges in the amount of \$38.08, plus accrued interest in the amount of \$998.81 as of August 22, 1994, plus interest accruing thereafter at the rate of 7.5 percent per annum until judgment, plus interest thereafter at the

legal rate until fully paid, plus the costs of this action in the amount of \$770.72 (\$385.72 publication fees, \$10.00 fee for recording Notice of Lis Pendens, \$175.00 fee for abstracting, and \$200.00 fee for evidentiary affidavit), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Joe H. Hill and Marlita S. Hill**, have and recover judgment in the amount due and owing on a Second Real Estate Mortgage, dated August 4, 1990, and recorded on July 22, 1991, in Book 5336, Page 1677 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$77.00 plus penalties and interest for personal property taxes described above.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Florene Hardin aka Florence Hardin, Deceased; Dale Ann Sontag; Billy Jay James aka Billy J. James; Pat Dobson aka Patty Dobson; Linda Kay Hill aka Linda K. Hill; Del Hardin; Resolution Trust Corporation, as Receiver for First Federal Savings & Loan Association of Coffeyville, Coffeyville, Kansas; State of Oklahoma ex rel. Oklahoma Tax Commission; 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 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 the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma, for 1987, 1988 and 1989 personal property taxes;

Fourth:

In payment of the judgment rendered herein in favor of the Defendants, Joe H. Hill and Marlita S. Hill;

Fifth:

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma, for 1991, 1992, and 1993 personal property taxes.

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

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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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APR 2 1996

Joe H. Hill

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Marlita S. Hill

MARLITA S. HILL, pro se
5588 Southwest Hager
Claremore, Oklahoma 75015

Judgment of Foreclosure
Case No. 95-C-383-K (Hardin)

CDM:cm

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

JOHN FRANCIS ROURKE,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

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No. 94-C-748-K ✓

ENTERED ON DOCKET

DATE MAY 07 1996

FILED

MAY 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the defendant's motion to dismiss or, in the alternative, for summary judgment pursuant to Fed.R.Civ.P. 12(b)(6) and 56 (Docket #63). The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith, the Court finds summary judgment is appropriate in favor of defendant United States of America.

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

ORDERED this 3 day of May, 1996.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

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

JOHN FRANCIS ROURKE,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

No. 94-C-748-K ✓

ENTERED ON DOCKET
DATE MAY 07 1996

FILED
MAY 6 1996 *PLW*
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendants' motion to dismiss or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 12(b)(6) and 56. (Docket #63.) Plaintiff has objected.

In this action predicated on the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), Plaintiff, a former inmate of the Bureau of Prisons (BOP), sues the United States Government for negligence, misrepresentation, and denial of medical care. He alleges that, while in the custody of the BOP, he contracted a skin disorder called "acne rosacea" which caused severe facial scarring and ultimately a cancerous growth on his nose. Medical personnel allegedly promised to remove the tumor with plastic surgery. Plaintiff alleges the BOP's failure to keep its promise breached a duty to provide plastic surgery and caused additional scarring on his face. In his Reply, Plaintiff explains the gist of his complaint as follows:

if professional medical personnel in Oklahoma would lead an individual to believe that cosmetic surgery was to be performed but did not perform such and the patient is injured, a tort exists. This is the case here.

[Docket #71, ¶9]. Plaintiff seeks monetary damages for the alleged misrepresentation.

Defendant refutes some of Plaintiff's allegations by relying on matters outside the pleadings. Rule 12(b) provides that if a motion for failure to state a claim relies on matters outside the pleadings, the court shall treat the motion as one for summary judgment under Fed. R. Civ. P. 56, and shall give all parties "reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." See Fed. R. Civ. P. 12(b). See also *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991). The notice requirement has been met in this case. See *Prospero Assocs. v. Burroughs Corp.*, 714 F.2d 1022, 1025 (10th Cir. 1983) (conversion without notice acceptable where court reasonably believed nonmovant treated motion as one for summary judgment and waived right to formal notice). Plaintiff, a pro se litigant, has objected by "Reply" [Docket #71], filed January 22, 1996, indicating "the record supports summary judgment in his favor." Defendant responded on January 26, 1996 [Docket #72], reasserting the Defendant is entitled to judgment as a matter of law.

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment is not a disfavored procedural shortcut, but an integral part of the federal rules as a whole. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Like the motion to dismiss, the court must view the evidence in the light most favorable to the nonmoving party. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Id.* Conclusory allegations are insufficient to establish a genuine issue of fact. *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988). Nor does the existence of an alleged factual dispute defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

I. ANALYSIS

The Court liberally construes the complaint to seek monetary damages against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, as well as monetary damages against individual federal officers for violation of federal constitutional rights under *Bivens v. Six Unknown Named Agents*, 403

U.S. 388 (1971).¹ See Engle v. Mecke, 24 F.3d 133, 134 (10th Cir. 1994) (recognizing that a plaintiff may bring *Bivens* claim against individual officer based on constitutional violation, or he may bring common-law tort action against United States under FTCA, but not both).

A. **Federal Tort Claims Act**

1. Exhaustion of Administrative Remedies

Plaintiff attaches four exhibits to his amended complaint, three of which purportedly document his exhaustion of administrative remedies. [Docket #47, Ex. 2,3,4]. According to Ex. 4, a letter from the Regional Counsel for the South Central Regional Office of the Federal Bureau of Prisons, Plaintiff presented the following claims to the BOP:

(1) that he contracted a skin disorder called "acne rosacea" causing severe facial scarring while in the custody of the Bureau of Prisons; (2) that this skin disorder caused a cancerous growth on his nose; (3) that the Health Services Administrator ("HSA") at Seagoville promised in writing to provide him with plastic surgery to correct the facial scarring and to remove the tumor; (4) that when the surgery was performed, only standard procedures were used causing additional scarring; and (5) that he should be compensated in the sum of \$20,000.00.

On April 1, 1994, the BOP administratively denied the above

¹ Although Plaintiff did not allege an eighth amendment claim in his complaint, the Court liberally construes his "Reply" as an attempt to amend the complaint to allege a constitutional violation against an individual officer.

claims pursuant to 28 C.F.R. §§ 549.50 and 549.51.² The BOP stated (a) the cosmetic surgery for acne scarring as requested was not medically necessary; (b) Rourke had never suffered from any institutional adjustment problems; (c) acne rosacea is a chronic inflammatory acneiform eruption and not an infectious disease; (d) no medical evidence indicated acne rosacea was a precipitating factor in basal cell carcinoma; (e) the HSA approved a referral to a dermatologist for the removal of the nose tumor; (f) Rourke

²Code of Federal Regulations, Title 28, § 549.50 reads as follows:

Purpose and scope. The correction of obvious disfigurements on any part of the body, particularly facial disfigurements or functional impairments, can be a significant factor in improving an inmate's self-image, emotional stability, and social adjustment. The result may well affect institutional adjustment and particularly post-release adjustment and employability. Therefore, such a procedure can be an integral part of an inmate's overall correctional program. The Bureau of Prisons provides, within available resources, corrective and reconstructive surgery for an inmate to correct obvious disfigurement. The Warden shall establish criteria for the selection of an inmate for plastic surgery procedures which may alter an inmate's physical appearance or otherwise affect identification.

Code of Federal Regulations, Title 28 § 549.51 reads as follows:

(a) The inmate's written request for plastic surgery may be approved by the Warden with approval by the appropriate medical and other institutional staff. Plastic surgery may be performed only by qualified medical persons and only with the written consent of the inmate involved.

(b) Staff shall approve an inmate for plastic surgery when:
(1) It is indicated for medical reasons; or
(2) It is believed that such surgery will assist the inmate's institutional or particularly his post-release adjustment.

(c) Staff shall consider for correction repulsive disfigurements and nude, lewd, or lascivious tattoos.

(d) Staff is not restricted to those areas of paragraph (c) of this section when other sound medical or psychological and social reasons are identified.

(e) Staff shall photograph and make written descriptions of an inmate's features that are to be altered before and after surgery. Any operation which changes the identification of the inmate in any way is made a part of his record and shall be reported to the FBI.

accepted the risks of and consented to the surgery; and (g) the HSA specifically informed him he was not entitled to plastic surgery for acne scarring.

The Tenth Circuit has held that "a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their ... treatment during confinement." *McCarthy v. Maddigan*, 914 F.2d 1411, 1412 (10th Cir. 1990) (citing *Hessbrook v. Lennon*, 777 F.2d 999, 1007 (5th Cir. 1985)). Liberally construing the pleadings and exhibits submitted by Plaintiff, the Court concludes, over the Defendant's objection, that Plaintiff has exhausted his administrative remedies. He has submitted his claims to the relevant federal agency, has received a denial of his appeal, and has properly proceeded before this Court.³ See 28 U.S.C. § 2675(b).

2. Merits of Plaintiff's FTCA claim

The FTCA provides a remedy for a "negligent or wrongful act or omission" by an officer or employee of the federal government acting within the scope of his employment. 28 U.S.C. § 2672. Neither 28 U.S.C. § 2674 (the Federal Tort Claims Act) nor 28 U.S.C.A. § 1346(b) provide an independent cause of action. These statutes simply waive the sovereign immunity of the United States

³Plaintiff incorrectly references 28 U.S.C. §§ 549.50, 549.51 in his amended complaint as the basis for petitioning the prison officials. The Court construes this inaccuracy as reference to 28 C.F.R. § 549.50 and § 549.51.

and render the Government liable "in tort claims 'in the same manner and to the same extent as a private individual under like circumstances,' 28 U.S.C. § 2674, 'in accordance with the law of the place where the act or omission occurred,' 28 U.S.C. § 1346(b)." *Ayala v. United States*, 49 F.3d 607, 610 (10th Cir. 1995). "Even if specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes a comparable liability for private persons." *Id.* Therefore, the Court must look to Oklahoma law, the law of the state in which the alleged tortious activity occurred, to determine the Government's liability under the FTCA. *Id.*

In Oklahoma, "[t]he threshold question in any suit based on negligence is whether defendant had a duty to the particular plaintiff alleged to have been harmed." *Baine v. Oklahoma Gas & Electric*, 850 P.2d 346, 348 (Okla.App. 1993) (quoting *Rose v. Sapulpa Rural Water Co.*, 631 P.2d 752, 756 (Okla. 1981)). The existence of such a duty is a question of law. *Baine*, 850 P.2d at 348. Applicable in this instance, the state has a constitutional obligation or duty to provide medical care for those whom it is punishing by incarceration. *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980). It is this duty that necessarily requires the state to "make available to inmates a level of medical care which is reasonably designed to meet the routine and emergency health care needs of inmates." *Id.* (citations omitted).

Plaintiff cites no Oklahoma statute or common law case imposing a duty of care on prison officials to provide plastic surgery. He merely contends a duty exists because "professional medical personnel in Oklahoma . . . [led him] to believe that cosmetic surgery was to be performed but did not perform such and . . . [he was] injured." [Docket #71 at 6.] He states "that Doctor Pastrana informed [him] that plastic surgery was to be performed . . . but was not; [and] that when [he was] confronted with this fact, Pastrana agreed that it would be performed later without giving Rourke a definitive date." [Id.] Therefore, the Court concludes there is no duty of care under Oklahoma law to provide plastic surgery to an inmate, and as a result the U.S. Government is not liable under the FTCA.

Even assuming Plaintiff could establish that the Defendant had a duty not to misstate that he "was to undergo plastic surgery to remove the cancerous cells," [Docket #71 at 3], this claim is specifically barred by the misrepresentation exception to the FTCA. See 28 U.S.C. § 2680(h).⁴ The Tenth Circuit has held that "no recovery may be had under the Federal Tort Claims Act by virtue of specific exceptions carved out under 28 U.S.C. § 2680, including any claim arising out of misrepresentation." *Reynolds v. U.S.*, 643

⁴ The relevant list of exclusions includes:
"[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights...." 28 U.S.C. § 2680(h).

F.2d 707 (10th Cir. 1981), cert. denied, 454 U.S. 817 (1981). This "misrepresentation" exception has been broadly construed to include false representations of any type.

In any event, viewing the evidence in the light most favorable to Plaintiff, the Court finds Plaintiff received appropriate medical treatment. Plaintiff's conclusory allegations are insufficient to refute the affidavit of Dr. Mark Koone, a board certified dermatologist who performed surgery on Rourke [Docket #65], and the declaration of Dr. J. Pastrana, one of the prison doctors who routinely treated Rourke [Docket # 63, Ex. 2]. Both doctors attest Rourke had a "significant" and "fairly long-term" acne problem. They prescribed appropriate medication on a consistent and routine basis for treatment of Rourke's acne and/or carcinoma problem. Both doctors attest that Rourke needed surgical removal of basal cell carcinoma, which was accomplished by electrodesiccation and curettage after obtaining Rourke's consent. Both doctors confirmed that electrodesiccation and curettage, and not plastic surgery, is the standard treatment for basal cell carcinoma, including lesions such as the type Rourke had.

Accordingly, Defendant's motion for summary judgment is hereby granted on Plaintiff's claim under the FTCA.

B. Bivens Claim

In his "Reply," Rourke contends the medical records "clearly

show that the Defendant intentionally deprived [him] of proper medical care" [Docket #71, ¶12]. In light of Plaintiff's pro se status, and in light of Federal Rule of Civil Procedure 15(a)'s requirement that leave to amend be "freely given," the Court construes Plaintiff's response as an attempt to amend his complaint to allege an Eighth Amendment claim under *Bivens*. "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall*, 935 F.2d at 1110. Having reviewed Plaintiff's constitutional claim, however, the Court concludes that Plaintiff's motion should be denied; Plaintiff's claim could not withstand a motion for summary judgment. See *Ketchum v. Cruz*, 961 F.2d 916, 920 (10th Cir. 1992) (futility of amendment is an adequate justification to refuse to grant leave to amend).

Plaintiff's claim alleging denial of medical attention must be judged against the "deliberate indifference to serious medical needs" test set out in *Estelle v. Gamble*, 429 U.S. 97 (1976). See *Martin v. Board of County Com'rs of County of Pueblo*, 909 F.2d 402, 406 (10th Cir. 1990). That test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991). *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980) (citations omitted). A medical need is

serious if it is

one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. Deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment.

Id. at 575.

Rourke cannot satisfy either the objective or the subjective component necessary for recovery under the Eighth Amendment. Rourke has failed to allege any acts or omissions sufficiently harmful, evidencing such indifference that can offend "evolving standards of decency." *Estelle*, 429 U.S. 97, 102 (1976). Denial of cosmetic dermabrasion for acne scarring does not rise to the level of seriousness contemplated by the *Estelle* court.

In any event, the Court finds Defendants were not deliberately indifferent to Plaintiff's acne problem and the surgical removal of the basal cell carcinoma. The medical decision to have the cancerous cells removed by a board certified dermatologist, as opposed to a plastic surgeon, does not change the end result. Rourke received adequate and proper medical treatment. There is no evidence that the prison personnel or the doctors intentionally denied or delayed Rourke's access to medical treatment or were callously indifferent to his medical needs. Nor is there any evidence of such gross deficiencies in staffing, facilities, equipment or procedures that effectively denied Rourke access to

medical care. *Estelle*, 429 U.S. at 104-105. At most, Rourke differs with the medical judgment of the prison doctor in the treatment of his acne and surgical removal of the basal cell carcinoma. The Tenth Circuit and the U.S. Supreme Court have traditionally held that "such a difference of opinion does not support a claim of cruel and unusual punishment." *Olson v. Stotts*, 9 F.3d 1475, 1477 (citations omitted). See also *Estelle*, 429 U.S. at 107 (a prisoner's disagreement with the diagnostic techniques or forms of treatment utilized by prison medical personnel does not give rise to a cognizable Eighth Amendment claim); *Wilson v. Seiter*, 501 U.S. 294 (1991).

II. CONCLUSION

Viewing the evidence in the light most favorable to Plaintiff, the Court finds there remain no genuine issues of material fact and Defendant is entitled to judgment as a matter of law. Accordingly, the Defendant's motion for summary judgment (docket #63) is hereby granted. See *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991).

IT IS SO ORDERED this 3 day of May, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

JON M. WERTHEN, for himself and)
as guardian of JON M. WERTHEN, JR.,)
)
Plaintiff,)
)
vs.)
)
PRUDENTIAL INSURANCE COMPANY)
OF AMERICA,)
)
Defendant.)

ENTERED ON DOCKET
DATE MAY 07 1996

Case No. 96-CV-0040K

FILED
MAY 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Upon consideration of the parties' Joint Stipulation and Application for an Order of Dismissal With Prejudice of any and all claims that have been asserted or which might have been asserted in this action, and good cause having been shown, it is this 3 day of May, 1996,

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

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

s/ TERRY C. KERN

THE HONORABLE TERRY KERN,
United States District Judge

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

FILED

MAY - 6 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BOYD ROSENE AND ASSOCIATES, INC.,)

Plaintiff,)

vs.)

Case No. 95-C-674-B ✓

KANSAS MUNICIPAL GAS AGENCY, an)

interlocal municipal agency, and)

CITY OF WINFIELD, KANSAS, a)

municipality,)

Defendants.)

ENTERED ON DOCKET
DATE MAY 7 1996

ORDER

The Court has for consideration Plaintiff Boyd Rosene's ("Boyd Rosene") Motion for Partial Summary Judgment (Docket # 24), and Defendant City of Winfield, Kansas' ("Winfield") Motion to Dismiss, and in the alternative, for Summary Judgment (Docket # 44) pursuant to Fed.R.Civ.P. 56. The Court, being fully apprised of the parties positions via the various briefs, exhibits, and affidavits, hereby GRANTS Winfield's Motion to Dismiss. Boyd Rosene's Motion for Partial Summary Judgment and Winfield's Motion for Summary Judgment are hereby moot.

I. Uncontroverted Facts

1. Boyd Rosene and Associates, Inc., is an Oklahoma corporation with its principal place of business in the State of Oklahoma, and is an Oklahoma citizen for purposes of diversity jurisdiction. (Kent Dunbar Affidavit, Pl. App. Doc. #1).

2. Defendant Kansas Municipal Gas Agency ("KMGA") is an agency created by certain Kansas municipalities and organized under the

Kansas Interlocal Cooperation Act with its principal place of business in the State of Kansas. (Para. 4, Answer of KMGGA to Second Amended Complaint).

3. KMGGA was formed by a group of municipalities to obtain a reliable, competitively-priced, long-term source of natural gas and to provide suppliers to meet the long-term gas needs of its members. (Para. 5, Answer of KMGGA to Second Amended Complaint).

4. The Defendant City of Winfield is a Kansas municipality and an associate member of the KMGGA. (Para. 6, Answer of KMGGA to Second Amended Complaint).

5. In April 1992, KMGGA and Winfield entered into a written contract titled "Gas Acquisition Management Project Participation Agreement" ("City Agreement"). The City Agreement provided, *inter alia*,

a. KMGGA agreed to act on behalf of the project participants to acquire natural gas, arrange for transportation and delivery, and provide other management services.

b. Winfield agreed it would purchase from KMGGA at least 75% of its gas requirements.

c. Winfield would pay KMGGA certain project management fees. (Pl. Ex. 1, P 2052-2065; App. Doc. #5).

6. The City Agreement was in place between May 1, 1994 and April 30, 1995. (Gas Participation Management Project Participation Agreement, Pl. App. Doc. # 5).

7. On March 4, 1994 KMGGA sent a Request for Proposal ("RFP") to Boyd Rosene. The RFP stated KMGGA sought suppliers to commit

supplies at competitive prices to serve the gas requirements of its members. (Pl. Ex. 2, pgs. 16-17, Pl. App. Doc. # 2).

8. The RFP also included a Nomination Schedule setting forth a monthly estimate of the total and peak gas requirements of KMGGA's applicable members. (Pl. Ex. 2, pgs. 16-17, Pl. App. Doc #2).

9. On April 12, 1994 Boyd Rosene submitted a bid to KMGGA to supply gas to KMGGA. (Rosene Affidavit, Pl. App. Doc. #1).

10. On or about April 12, 1994 Deborah Roberson, Director of the Gas Project, contacted a representative of Winfield and inquired if Winfield would accept Boyd Rosene as a gas supplier. Subsequently, Winfield notified KMGGA that it preferred Arkla, even though Arkla gas was more expensive than that offered by Boyd Rosene. (Pl. App. Doc. #9).

11. On April 14, 1994 Boyd Rosene sent a Letter of Intent to KMGGA. KMGGA signed the Letter of Intent on April 26, 1994. (Pl. App. Doc. #8).

12. On May 1, 1994 KMGGA and Boyd Rosene entered into a Gas Acquisition Management Project Purchase Agreement ("KMGGA/Boyd Rosene Agreement") by which KMGGA agreed to "purchase and receive monthly, the monthly total of the daily quantities nominated, agreed to, and described in Exhibit A", and Boyd Rosene agreed to "sell and deliver quantities nominated by KMGGA." (Para. 13, Answer of KMGGA to Second Amended Complaint). Winfield is not a party to the KMGGA and Boyd Rosene Gas Acquisition Agreement.

13. Between May 1, 1994 and April, 30, 1995, Winfield consumed 1,700,084 MMBtu's of natural gas. (Roberson Transcript,

P. 82 L. 4 through P. 83 L. 3).

14. Pursuant to the City Agreement, Winfield was obligated to purchase from KMGGA at least seventy-five percent (75%) of the natural gas it consumed between May 1, 1994 and April 30, 1995. Thus, Winfield was obligated to purchase at least 1,275,063 MMBtu's of natural gas from KMGGA for this period. (Gas Acquisition Management Project Participation Agreement, pg. 3-4).

15. Between May 1, 1994 and April 30, 1995, Winfield purchased 779,946 MMBtu's of natural gas from KMGGA, resulting in an under purchase of 495,117 MMBtu's of natural gas. (Invoice, Pl. App. Doc. #13).

16. A term of the City Agreement provided Winfield would pay KMGGA \$0.07 for each MMBtu of natural gas KMGGA sold to Winfield. Upon learning of the deficiency, KMGGA invoiced Winfield \$34,658.19 (495,117 x \$0.07) which Winfield paid. (Invoice, Pl. App. Doc. #13).

II. Legal Analysis

A. Winfield's Motion to Dismiss

1. Personal Jurisdiction

Winfield urges this Court to enter a dismissal of all claims of Boyd Rosene on the basis this Court lacks *in personam* jurisdiction. "Whether a federal court has personal jurisdiction over a nonresident defendant in a diversity action is determined by the law of the forum state." Yarbrough v. Elmer Bunker and Associates, 669 F.2d 614 (10th Cir. 1982). Oklahoma's law, 12 O.S.

§2004(f) provides:

"A court of this state may exercise jurisdiction on any basis consistent with the Constitution of the United States."

The United States Supreme Court held that before *in personam* jurisdiction can be exercised, the Due Process Clause of the Fourteenth Amendment requires minimum contacts between the state exercising personal jurisdiction and the defendant. International Shoe Co. v. State of Washington, et al., 326 U.S. 310, 90 L.Ed.2d 95 (1945). It is critical to due process that "defendant's conduct and connection with the forum state are such that he would reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559 (1980); Burger King v. Rudzewicz, 471 U.S. 462 (1985). A minimum contacts inquiry must focus on the totality of the relationship between the defendant and the forum state. Colwell v. Triple T, 785 F.2d 1330 (5th Cir. 1986); All American Car Wash v. NPE, 550 F.Supp. 166 (W.D.Okla. 1981). "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." Hanson v. Denckla, 357 U.S. 235 (1958). Further, contracting with an out-of-state party alone cannot automatically "establish sufficient minimum contacts in the other party's home forum." Burger King v. Rudzewicz, 471 U.S. 462 (1985).

The first issue is whether Winfield has established sufficient minimum contacts with Oklahoma so that exercising personal jurisdiction would not offend due process. This analysis must

focus on whether Winfield's contacts represent an effort to purposefully avail itself of the privilege of conducting activities within Oklahoma that invoke the benefits and protection of Oklahoma's laws. Hanson v. Denckla, 357 U.S. 235, 253 (1958); Burger King, 471 U.S. at 474.

In support of its position that minimum contacts between Winfield and Oklahoma have not been established, Winfield states; it is not a party to the KMGA/Boyd Rosene Agreement; KMGA is not the agent of Winfield; Winfield is a Kansas municipality, the sole "business" functions of which are to serve the public good; Winfield does not do business in Oklahoma and is not authorized by state or local law to do so; Winfield has no contact with the State of Oklahoma in connection with the activities alleged in Boyd Rosene's Second Amended Complaint whereby Winfield has sought to take advantage of any economic benefit in the State of Oklahoma; Winfield's utility activities are regulated by the Kansas Corporation Commission and not by any other state regulatory body, including the Oklahoma Corporation Commission.

In seeking to establish its *prima facie* case of *in personam* jurisdiction, Boyd Rosene proffers, *inter alia*, the following to show minimum contacts do exist between Oklahoma and Winfield: KMGA is the agent of Winfield for purposes of natural gas acquisition; Boyd Rosene is a third party beneficiary of the City Agreement; the KMGA/Boyd Rosene Agreement requires Winfield to purchase all its natural gas requirements from Boyd Rosene.

In spite of Plaintiff's counsel's feverish attempts to the

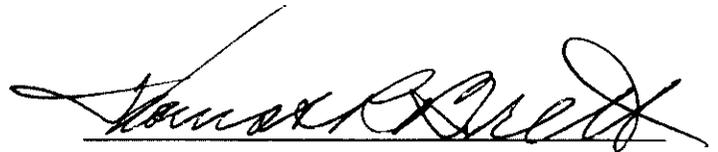
contrary, the Court concludes that Winfield's conduct and connection with Oklahoma, if any, are not such that Winfield would reasonably anticipate being haled into an Oklahoma court or the Northern District of Oklahoma concerning the subject natural gas purchase and supply. KMGGA was free to find its own sources of natural gas. Winfield had no authority to control KMGGA, nor actually exercised such authority, in carrying out the details of the natural gas acquisition or purchase. So in such, KMGGA was not acting as the agent of Winfield. See Bell v. Tollefsen, 782 P.2d 934 (Okla. 1989); Crisp, Courtemanche, Meador & Associates v. Medler, 663 P.2d 388 (Okla. 1983); Elliott v. Mutual Life Ins. Co. of New York, 91 P.2d 746 (Okla. 1939); Continental Supply Co. v Sinclair Oil & Gas Co., 235 P. 471 (Okla. 1925).

The absence of a principal-agent relationship between KMGGA and Winfield does not preclude this Court from exercising *in personam* jurisdiction over Winfield if other facts reveal minimum contacts with Oklahoma. However, the record does not provide facts which establish such minimum contacts. Winfield has not directly solicited business in Oklahoma. Winfield has not purchased natural gas from any Oklahoma business related to this lawsuit. Winfield's conduct, in the context of this action, is limited to that of a purchaser of natural gas from a Kansas interlocal municipal agency pursuant to an integrated contract executed some two years before the KMGGA/Boyd Rosene Agreement. Title to the subject natural gas purchased by Winfield passed from KMGGA, a Kansas corporation, to Winfield at Winfield's city gate in Kansas. Winfield played no

part in the solicitation of Boyd Rosene as a supplier, did no negotiating with Boyd Rosene with respect to the KMGAs/Boyd Rosene Agreement, and did not sign the integrated KMGAs/Boyd Rosene Agreement. The integrated KMGAs/Boyd Rosene Agreement makes no mention of Winfield, much less Winfield being KMGAs's principal. The totality of Winfield's relationship with Oklahoma is minimal at best, and insufficient to subject the City of Winfield, Kansas to *in personam* jurisdiction in the Northern District of Oklahoma.

Thus, the Court hereby GRANTS Winfield's Motion to Dismiss. In view of the Court's ruling herein, Winfield's Motion for Summary Judgment and Boyd Rosene's Motion for Partial Summary Judgment are hereby rendered moot.

IT IS SO ORDERED this 5th day of May, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

MAY - 6 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

Case No. 95-C-364-B

ENTERED ON DOCKET
DATE MAY 7 1996

ORDER

A Report and Recommendation of the Magistrate was filed April 9, 1996. No objections have been filed by the parties. The Court adopts the Magistrate's Report and Recommendation and **GRANTS** the Motion to Dismiss without prejudice.

Dated this 5 day of May 1996.



THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

twenty-year sentence. This was in direct violation of Okla. Stat. tit. 21, §61.1, which requires an inmate to serve multiple sentences in the order in which they are received by the DOC, unless they are to be served concurrently.¹

In 1994, the DOC attempted to correct the above error by recalculating the time served as though Petitioner had served his parole revocation sentence before the twenty-year sentence. The DOC determined that Petitioner had discharged his parole revocation sentence on January 14, 1994, and began serving the twenty-year sentence the next day.

In the instant action Petitioner alleges he doesn't have to serve the rest of his twenty-year sentence because the DOC improperly interrupted it in favor of his parole revocation sentence. He contends

the State lost jurisdiction over Petitioner once the State billed him as serving the 1992 sentence imposed in Case No. CRF-92-1488, then terminated service of that sentence to properly bill him as serving the revoked term of 1980 sentence(s). Simply put, the State cannot (legally) 'start, stop and start anew' sentences imposed pursuant to criminal convictions.

¹ Section 61.1 reads as follows:

When any person is convicted of two or more crimes in the same proceeding or court or in different proceedings or courts, and the judgment and sentence for each conviction arrives at a state penal institution on different dates, the sentence which is first received at the institution shall commence and be followed by those sentences which are subsequently received at the institution, in the order in which they are received by the institution, regardless of the order in which the judgments and sentences were rendered by the respective courts, unless a judgment and sentence provides that it is to run concurrently with another judgment and sentence. This section shall not affect the credits allowed under Section 138 of Title 57.

(Petitioner, docket #1, at 5B.)

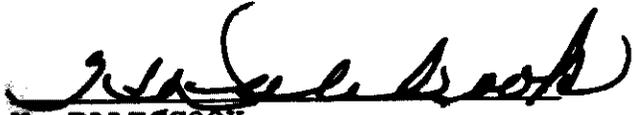
To the extent Petitioner contends the DOC breached Okla. Stat. tit. 21, § 61.1, that claim does not entitle him to federal habeas relief. 28 U.S.C. § 2254 provides habeas relief only when a person is in custody in violation of the Constitution or laws or treaties of the United States. In any event, the Court notes the DOC has corrected its error and granted Petitioner all the relief he was entitled to. Petitioner's claim that he was denied the opportunity to secure a job assignment which would have allowed him to earn extra credits toward the parole revocation sentence is purely speculative and will not be considered in this action.

Next Petitioner argues he was denied the right to serve his sentence continuously without interruption as alluded in McDonald v. Lee, 217 F.2d 619, 623 (5th Cir. 1954), vacated on other grounds, 349 U.S. 948 (1955). The Court finds this claim patently frivolous. The DOC at no time required Petitioner to serve his twenty-year sentence in installments, by discharging him from prison and then requiring him to return to prison at a later time to serve the remainder of his sentence. Compare White v. Pearlman, 42 F.2d 788, 789 (10th Cir. 1930) (cited in McDonald) (when a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, his sentence continues to run while he is at liberty), with Brown v. Brittain, 773 P.2d 570 (Colo. 1989) (prisoner who kept silent when Colorado authorities mistakenly released him from jail instead of turning him over to prison authorities, and

subsequently went to Louisiana where he was arrested and served a five-year sentence, could not be granted credit against the Colorado sentence for time served in Louisiana). Moreover, the trial court did not enhance Petitioner's sentence after entry of the judgment and sentence as in United States v. Jones, 722 F.2d 632, 639 (11th Cir. 1983) (where the district court enhanced the defendants sentence after realizing that it was mistaken about the nature and extent of the financial transaction). But see Hicks v. Duckworth, 708 F.Supp. 214, 217 (N.D. Ind. 1989).

Therefore, Petitioner is not in custody in violation of the Constitution, laws or treaties of the United States, and his petition for a writ of habeas corpus must be and is hereby DENIED.

SO ORDERED THIS 6 day of May, 1996.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAY - 6 1996

HORSEHEAD INDUSTRIES, INC., d/b/a)
ZINC CORPORATION OF AMERICA,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,)

v.)

No. 94-C-98-B

ST. JOE MINERALS CORPORATION,)
et al.,)

ENTERED ON DOCKET

Defendants.)

DATE MAY 7 1996

AMENDED FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This action is now commenced by Plaintiffs, Horsehead Industries, Inc. ("Horsehead"), d/b/a Zinc Corporation of America ("ZCA"), St. Joe Minerals Corporation ("St. Joe"), Fluor Corporation ("Fluor"), and Salomon, Inc. ("Salomon"), pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675, and various common law theories against Cyprus Amax Minerals Company ("Cyprus"). The suit arises out of past and future response and remedial costs incurred that have and will result from zinc smelting refinery operations occurring on-site and off-site on property located in Bartlesville, Oklahoma, from 1907 to 1993. Cyprus asserts a counterclaim against Plaintiffs for some past and future response and remedial costs it has and will incur for off-site remediation.

The case was tried to the Court, sitting without a jury, on the dates of December 4, 5, 6, 7, 11, 14, 15, 18, 19 and 20, 1995.

Following a consideration of the issues, evidence, arguments of counsel and applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law pursuant to Fed.R.Civ.P. 52.

FINDINGS OF FACT

I. JURISDICTION, VENUE AND PROCEDURAL BACKGROUND

1. Plaintiffs brought this action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and various common law theories of liability.

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 9613(b).

3. The suit arises out of response actions that resulted from various zinc smelter and recovery operations that occurred on property located in Bartlesville, Oklahoma (the "Bartlesville Facility"), from 1907 to 1993. Three response actions currently are underway. The first, being ordered under the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), addresses the approximately 150 acres where horizontal retort zinc smelters and an electrolytic zinc refinery physically operated (the "On-Site Area" or "Bartlesville Facility"). (See Pretrial Order ("PTO"), Stip. 1, 2 at pp. 6-7)

4. In addition, surrounding areas within Bartlesville (the "Off-Site Area") are being addressed in two separate and distinct operable units under CERCLA. Operable Unit One addresses the

portions of the Off-Site Area containing soils with lead and cadmium above designated action levels considered most likely to impact human health. Operable Unit Two concerns certain ecological threats and is focused on a stream system located to the south of the Bartlesville Facility. (See 12/7 Trial Testimony of Robert H. Oliver ("Oliver Test.") at 11-16)

5. In February 1994, ZCA brought this action against St. Joe, Fluor, Salomon and Cyprus, seeking contribution for response costs incurred, and to be incurred, with respect to the On-Site Area.

6. In August 1994, ZCA entered into a settlement with St. Joe, Fluor and Salomon by which these parties, all now aligned as Plaintiffs, are jointly funding the investigation and necessary corrective measures for the On-Site Area. Cyprus has not participated in the Plaintiffs' remedial efforts regarding the On-Site Area. (See PTO, Stip. 40, 42, 43 at p. 12; Oliver 12/7 Test. at 32-34; Trial Testimony of Thomas E. Janeck ("Janeck Test.") at 45)

7. As discussed more fully below, Salomon and Cyprus have participated in certain response actions in the Off-Site Area. Cyprus has asserted counterclaims against Plaintiffs seeking contribution for response costs it has allegedly incurred for the Off-Site Area. Plaintiff Salomon seeks a declaratory judgment against Cyprus for its equitable share of response costs to be incurred in the Off-Site Area. (PTO at 2)

8. Hazardous substances generated at the Bartlesville

Facility have been detected at the Facility and at certain areas around the Facility. (PTO, Stip. 3 at 7)

9. Both the On-Site Area and the Off-Site Area are "facilities" within the meaning of CERCLA Section 101(9), 42 U.S.C. § 9601(9). Further, a "release" of "hazardous substances" within the meaning of CERCLA Sections 101(14) and 101(22) has occurred at both the On-Site Area and the Off-Site Area. (PTO, Stip. 4 at p. 7)

II. THE PARTIES

10. Beginning in 1907, three horizontal retort smelters commenced operation at the Bartlesville Facility. One of those smelters was owned by the Bartlesville Zinc Company (the "BZC smelter") and operated from 1907 to 1924. A second smelter was owned by the Lanyon-Starr Smelting Company (the "LSSC smelter") and operated from 1907 to 1924. The properties used for these smelter operations were owned by LSSC and/or BZC until 1930. The parent corporation of BZC and LSSC was American Metals Company (Limited) ("AMCO"). (November 17, 1995, Order, at 4-12)

11. Cyprus is a Delaware corporation with its principal place of business in Colorado. Cyprus is the surviving entity of a merger between Cyprus Minerals Company and Amax, Inc., in December 1993, and as such is the successor to Amax, Inc., which was formerly known as and is the successor company to AMCO. Cyprus has admitted that it became the corporate successor to AMCO in 1957. (Id., Plaintiffs' Ex. 284)

12. This Court previously has found that AMCO controlled the operations of the BZC and LSSC smelters from 1907 to 1924. Accordingly, the Court has held that Cyprus, as the admitted successor to AMCO, is liable as a former owner/operator under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). (Court Order Nov. 17, 1995, Doc. #185).

13. The third horizontal retort smelter that began operation at the Bartlesville Facility in 1907 was built and owned by National Zinc Company, a New York corporation ("NZNY"). NZNY was incorporated in 1907 as a subsidiary of Beer, Sondheimer & Co. of Frankfurt, Germany ("Beer Germany"). (Defendant's Exs. 846 at 1, 679 at 2; Plaintiffs' Exs. 781, 819, 830)

14. In 1915, Beer, Sondheimer & Co. ("Beer NY") was incorporated in New York. The NZNY stock held by Beer Germany then was transferred to Beer NY. (Plaintiffs' Exs. 824, 827)

15. In approximately 1920, Beer NY changed its name to International Minerals and Metals Corporation ("IM&M"), a New York corporation. (Plaintiffs' Ex. 827)

16. Also in or about 1920, National Zinc Company, Inc., ("NZCI") was incorporated. Assets of NZNY were transferred to NZCI, whose parent company also was IM&M. IM&M continued operation of the smelter through NZCI until 1972. (Trial Testimony of Thomas Vogt ("Vogt Test.") at 6-9; Plaintiffs' Exs. 545, 783)

17. In 1972, IM&M sold the Bartlesville Facility (minus the inventory of raw materials) for \$400,000, to a group of former NZCI management personnel who incorporated in Oklahoma under the name

J-V Smelting Company ("JVSC"). JVSC subsequently changed its name to National Zinc Company, Inc. ("NZ Oklahoma"). NZ Oklahoma no longer exists. (Vogt Test. at 10-13, 30, 166; Plaintiffs' Exs. 248, 535, 545)

18. Plaintiff Salomon is a Delaware corporation with its principal place of business in New York. Salomon has stipulated that, for purposes of this litigation, it would consent to be treated as the parent corporation of National Zinc Company ("NZC"), a Delaware corporation that purchased the Bartlesville Facility from NZ Oklahoma in February 1974, and operated it until NZC was sold to a third party in December 1983. See *infra*, ¶¶ 31-59.

19. NZC continued to operate the horizontal retort smelter at the Bartlesville Facility from February 1974 to July 1976, at which time the retort smelter operation ceased. Beginning in December 1976, NZC commenced operation of an electrolytic zinc refinery built with funds from Salomon at a cost of \$41.5 million. As discussed more fully below, the electrolytic zinc refinery was a different zinc smelting process than the prior horizontal retort process. See *infra* ¶¶ 54-57.

20. Plaintiff St. Joe is a New York corporation with its principal place of business in St. Louis, Missouri. St. Joe was a former subsidiary of Plaintiff Fluor (collectively, "St. Joe"). St. Joe purchased the Bartlesville Facility in August 1984 and operated the Facility until August 1987. St. Joe has admitted that it was the owner and operator of the Bartlesville Facility during that period of time. St. Joe operated the electrolytic zinc

refinery only. (PTO, Stip. 14 at p. 8)

21. Plaintiff ZCA purchased the Bartlesville Facility in August 1987 and is the current owner of the Facility. ZCA has admitted that it was the owner and operator of the Bartlesville Facility from August 1987 to date. ZCA operated the electrolytic zinc refinery only.¹ (PTO, Stip. 15 at p. 8)

22. The BZC and LSSC smelters were located on what is now the western portion of the Bartlesville Facility, a total of approximately 38 acres equally divided. The NZCI smelter was located in the south part of the Bartlesville Facility.

III. CONTINUITY OF INTEREST

23. IM&M, through various corporate names and structures, retained control of the National Zinc smelter at the Bartlesville Facility from 1907 until 1972, when the Facility was sold to JVSC. (Findings of Fact 13-16)

24. JVSC was formed by Frederick Jeffrey, president of NZCI and vice president of IM&M, and Thomas Vogt, vice president of NZCI, to purchase the NZCI site that they, as management officials, had been responsible for operating for IM&M. (Vogt Test. at 10)

25. Jeffrey and Vogt acquired financing by bringing together investors for the purchase. (Vogt Test. at 10)

¹The Plaintiffs in this case, Salomon, St. Joe and ZCA, have reached a settlement among themselves concerning the percentage of past and future allocation of damages for on-site and off-site remedial costs.

26. The purchase agreement did not expressly address environmental liabilities, but it did provide generally for JVSC to assume NZCI's liabilities (with certain non-environmental exceptions). (Vogt Test. at 15; Plaintiffs' Ex. 248 (§ 2.1(b) and Ex. C))

27. Bartlesville, Oklahoma, residents owned 65 percent of NZ Oklahoma, while Jeffrey and Kerramerican, Inc., a Canadian corporation, owned the remainder. There is no evidence that the NZ Oklahoma stockholders also owned stock in IM&M. (Vogt Test. at 11-12; Plaintiff's Exs. 244, 245)

28. Due to shortage of capital, NZ Oklahoma's horizontal retort refinery business primarily was via tolling contracts and/or sales agency agreements with raw materials suppliers, rather than purchase of raw materials, production and sales (Vogt Test. at 16-17); however, most other aspects of the business did not change:

* Jeffrey and Vogt were managers of the National Zinc facility under both IM&M and JVSC/NZ Oklahoma. (Vogt Test. at 10) Jeffrey was chairman of the board of NZ Oklahoma and an "active executive"; Vogt became president and chief executive officer of NZ Oklahoma. (Defendant's Ex. 846, pp. 3, 5)

* Both before and after the sale, Jeffrey was instrumental in operating and management decisions concerning the facility, usually during monthly visits to Bartlesville. (Vogt Test. at 9; Defendant's Exs. 829-845; Van Aken Test. 18-19)

* While managing NZ Oklahoma, both Jeffrey and Vogt had office space in New York leased from IM&M. (Defendant's Ex. 629)

* JVSC purchased the National Zinc name, and continued using the same industry-recognized logo on equipment, railroad tank cars, advertisements, billboards, stationary, the molds used to cast metal (the brand was seen on the metal), and the plant itself. Further, the logo was a registered brand on the commodity exchanges and had been used in the industry since 1907. (Vogt Test. at 30)

* Both operating employees and operating management of the facility under IM&M/NZCI remained the same after the facility was sold to JVSC/NZ Oklahoma. (Vogt Test. at 157; Defendant's Ex. 846 at p. 3)

* The sale included the "entire business, its name, good will, and all plant facilities together with essentially all its assets and liabilities". (Defendant's Ex. 846 at p. 3)

* A "Memorandum Concerning Acquisition of Assets of National Zinc Co..." written by Frederick Jeffrey and Thomas Vogt states that, after JVSC acquired the Bartlesville Facility, "[t]he Company will continue the business presently engaged in by National Zinc Company, Inc., ... in substantially the same form, except that the new company will primarily refine and process ores

belonging to others, rather than on its own account".
(Defendant's Ex. 626 at 1)

* The Memorandum further stated that JVSC was organized "for the purpose of acquiring and carrying on the zinc smelting and refining business of National Zinc Company, Inc., ...". (Defendant's Ex. 626 at 2)

29. To address air emissions concerns, NZ Oklahoma increased the height of the stacks on the sulfuric acid plant and the sinter plant in order to increase dissipation. (Vogt Test. at 18)

30. In February 1973, NZ Oklahoma received a one-year air emissions variance from the state of Oklahoma regarding the particulate and visible emission regulations for operation of the retort smelter. (Vogt Test. at 23; Plaintiff's Ex. 87)

31. On or about February 11, 1974, NZ Oklahoma sold the Bartlesville Facility to Iskane, Inc., (a subsidiary created by Salomon, Inc., to purchase the facility) for \$4 million and a promise to replace the retort smelters with an electrolytic zinc processing refinery. (Rothschild Test. at 11; Vogt Test. at 26)

32. Iskane, Inc., changed its name to National Zinc Company ("NZC").

33. Salomon admits liability for the actions of NZC. (Opening Statements at 25)

34. As a condition of the purchase, NZ Oklahoma obtained a one-year continuation of its air emissions variance from the state of Oklahoma. (Plaintiffs' Ex. 155) This variance allowed NZC to operate the retort smelter while constructing the electrolytic

plant that eventually would replace the smelter, about two and a half years later. (Vogt Test. at 22-24, 47-48; Plaintiffs' Exs. 155, 158)

35. Salomon/NZC assumed millions of dollars of specified liabilities, including accounts payable, taxes payable, accrued payroll and employee benefits. (Plaintiffs' Ex. 155) Salomon, however, expressly attempted to avoid assuming environmental liabilities. Salomon's Letter of Intent stated that:

[NZ Oklahoma] will sell and convey all of its assets, properties, business and good will, including the use of its name and open contracts ... excluding, however, in each case any liabilities for pollution matters....

Rather, the Letter provided that Salomon would:

indemnify the [NZ Oklahoma] shareholders against distributee liability, if any, for pollution matters, in excess of the amount of escrow for such matters....

(Defendant's Ex. 100) Also, the Acquisition Agreement excluded:

liabilities or obligations, contingent or otherwise ... arising out of or relating or attributable to any damage to persons or property on account of discharges prior to the Closing Date into the air or water or on the land by any plant or plants now or heretofore located on premises presently occupied by [NZ Oklahoma], or any laws or regulations governing pollution matters (all such debts, liabilities and obligations being hereinafter referred to as "Pollution Liabilities")....

(Defendant's Ex. 92)

36. Salomon/NZC agreed with NZ Oklahoma to keep intact substantially all of NZ Oklahoma's organization, officers, employees, goodwill and customer base. (Defendant's Ex. 92, § 1.03)

37. Salomon/NZC retained most of the operational employees at the Bartlesville Facility, as well as existing management. (Vogt Test. at 167-69; Knobler Dep. at 62; Defendant's Exs. 92, 106, 117, 238, 425, 643)²

38. Thomas Vogt, who served as vice president of NZCI when NZCI owned the site, and who served as president of NZ Oklahoma when NZ Oklahoma owned the site, was one of two non-Salomon members of NZC's board of directors. (Vogt Test. at 41)

39. Vogt continued to make decisions regarding day-to-day operations of the Bartlesville Facility. (Vogt Test. at 176; Defendant's Ex. 129)

40. Frederick Jeffery, who served as president of NZCI and vice president of IM&M when IM&M/NZCI owned the site, and who served as chairman of the board of NZ Oklahoma when NZ Oklahoma owned the site, was the second of two non-Salomon members of NZC's board of directors. (Vogt Test. at 41)

41. For two and a half years, Salomon/NZC continued to use the same production facilities as did previous owners of the site: the horizontal retort smelter, the acid plant, the sintering plant and all other auxiliary operations. (Vogt Test. at 159-60; Defendant's Ex. 685)

42. After Salomon/NZC converted to the electrolytic process, it used some of the older buildings as maintenance shops and

²Plaintiffs' contention that such personnel had to be retrained when the facility switched to the electrolytic process is irrelevant to the issue of whether NZ Oklahoma employees were retained by Salomon/NZC.

storage areas. (Vogt Test. at 103)

43. The facility continued to produce zinc after Salomon/NZC's acquisition and continued to serve the same customers as before the acquisition.³ (Vogt Test. at 103-04)

44. The Bartlesville Facility continued as a custom smelter after Salomon/NZC's acquisition, and it continued to produce zinc, cadmium and sulfuric acid from zinc concentrates and secondaries. (Knobler Dep. at 93-4; Vogt Test. at 103-04, 167; Defendant's Exs. 447, 695, 1331)

45. Salomon/NZC bought the name, assets, business, goodwill, contracts and accounts receivable from NZ Oklahoma. (Vogt Test. at 165; Defendant's Exs. 92, 105, 1372)

46. Salomon/NZC used the name "National Zinc Company" because it was a name that was recognized in the industry. (Vogt Test. at 30; Defendant's Exs. 105)

47. Salomon/NZC's logo was essentially the same as that used by NZ Oklahoma; the company name at the top of the letterhead was in the same type size and style, but removed "inc." from the name and removed the zip code. (Defendant's Exs. 769, 752)

48. Salomon/NZC continued to sell zinc slab made in molds that imprinted the National Zinc logo. (Vogt Test. at 171, 173)

³The retort smelter produced Prime Western zinc, which is about 98.5 percent zinc and 1.5 percent lead. Two years later, after startup of the electrolytic facility, the site produced "high-grade" zinc, which is about 99.95 percent zinc, that could be sold to new customers. (Knobler Dep. at 201-03) However, to retain the former customer base, Salomon/NZC continued to produce Prime Western zinc with the electrolytic facility by adding lead or aluminum to the high-grade zinc. (Vogt Test. at 180-84)

49. Salomon/NZC held itself out to the general public as a continuation of the National Zinc enterprise that had operated at the Bartlesville Facility since 1907. (Vogt Test. at 186-88; Defendant's Exs. 1369, 1375)

50. Salomon/NZC ran the retort smelter for two and a half years. During this time, the operation used some more advanced equipment to help reduce emissions and wastes from the horizontal retort process. (Zunkel Test. at 30-36, 58; Vogt Test. at 48; Marlatt Test. at 22-23; Plaintiffs' Exs. 98, 402, p. 12)

51. Also during this time, NZC continued to maintain and improve the surface water impoundment and pumpback system, thereby somewhat reducing releases of lead and cadmium into the Off-Site Area by containing any such pollution on-site. (Vogt Test. 54-58)

52. Further, Salomon/NZC also financed construction of an electrostatic precipitator on the sinter plant to provide interim controls on particulate emissions. This precipitator was installed in 1974. (Vogt Test. 23-25, 47-50; Plaintiffs' Exs. 90, 102)

53. While operating the retort smelter, which was shut down on July 31, 1976, NZC received numerous extensions of its air emissions variance (originally obtained by NZ Oklahoma) from the state of Oklahoma. All such variances were submitted to the EPA, and the EPA never approved or disapproved them. (Vogt Test. at 6, 42, 48)

* First extension: until February 20, 1975. This variance was submitted to the EPA in March 1974, and the EPA never approved or disapproved it. (Vogt Test. at 47-48;

Plaintiffs' Exs. 91, 155, 265);

* Second extension: until February 20, 1976. This variance extended the shutdown date for the retort furnaces from May 31, 1975, until May 31, 1976; provided for shutdown of the sinter plant on August 31, 1976; and for startup of the electrolytic refinery on May 31, 1976. This extension also was submitted to the EPA and was never approved or disapproved. (Plaintiffs' Ex. 94, 98)

* Third extension: until July 31, 1976 for shutdown of the smelter and completion of the electrolytic refinery. This was submitted to the EPA on June 4, 1976, and was never approved or disapproved. (Plaintiffs' Ex. 98)

54. The electrolytic zinc refinery process is fundamentally different than the horizontal retort process. The retort process is pyrometallurgical in nature, using high temperature operations to process zinc-bearing raw materials. The electrolytic process is a chemical process based on hydrometallurgy and electrometallurgy, i.e., leaching solids and plating zinc with electric current in solution. (PTO, Stip. 63 at p. 16)

55. The electrolytic refinery was constructed at a cost in excess of \$40 million, more than \$23 million above the original estimate. (Knobler Dep. at 188; Rothschild Test. at 9, 11; Plaintiff's Exs. 105, 170)

56. Construction of the refinery was funded by loans from Salomon to NZC. These loans subsequently were converted into capital contributions. (Rothschild Test. at 11-14; Plaintiff's

Ex. 1196)

57. Salomon/NZC undertook a sizeable expenditure to clean up the operation by replacing the retort process with the electrolytic process. The principal motivation of Salomon, however, after acquiring the zinc smelting refinery at a "bargain-basement price" in 1974, was long-term legitimate profit, not altruism. (Defendant's Ex. 452; see also Defendant's Exs. 422, 425, 447)

58. Effective May 22, 1974, the EPA conditionally approved a variance for Salomon/NZC with an expiration date of February 20, 1974, and a "final compliance date" of July 1, 1974, for the sintering process, and May 31, 1975, for the retort furnace smelting process. (39 Fed. Reg. at 17,982)

59. On or about December 30, 1983, the Salomon subsidiary then holding the capital stock of NZC sold that stock to Lee Consulting Group pursuant to a Stock Purchase Agreement. (Plaintiffs' Ex. 285) The president of Lee Consulting Group was a former Salomon executive and director of Salomon's National Zinc subsidiary. (Defendant's Ex. 1082)

IV. SOURCES OF CONTAMINATION

A. The BZC and LSSC Smelters

60. The BZC, LSSC and NZCI smelters were horizontal retort smelters. Horizontal retort smelting is a pyrometallurgical process, meaning that it is a burning process that, in the case of the BZC, LSSC and NZCI smelters, used natural gas to fuel the process. Because horizontal retorting is a pyrometallurgical

process, the process generates significant quantities of air emissions. (Trial Testimony of Dr. Alan D. Zunkel ("Zunkel Test.") at 6-7; Plaintiffs' Ex. 402)

61. Ore concentrates received at the plant were first roasted in roasters; the roasted material was then, together with coal and certain other materials, heated in a sinter plant to agglomerate the roasted ore into a porous aggregate; the sinter from the sinter plant was then fed to retort furnaces where the zinc was vaporized, collected in condensers, and thereafter made into final products. (PTO Stip. No. 53 and Plaintiffs' Demonstrative Ex. D)

62. The primary source points for air emissions from the type of horizontal retort process operated at the BZC, LSSC and NZCI smelters were the roasters, the retort furnaces and in the case of BZC and LSSC clinkering. If not captured or contained, significant quantities of lead and cadmium were released into the environment from the horizontal retort process through air emissions. (Zunkel Test. at 7-8)

63. In addition, the horizontal retort process generates a residue that contains lead and cadmium from the burning of zinc concentrates in the retort furnaces. In the period of the operation of the horizontal retort smelters ("BZC" and "LSSC" (1907-1924) and NZCI and successors (1907-1976)), it was the practice of smelter operators to collect this residue in the basement of the retort furnaces, remove it from the furnaces and dispose of the residue on the surface of the ground. The chemical composition and amount of retort residue was a function of the

efficiency of the horizontal retort smelter process. The less efficient the operation, the more lead and cadmium was left in the residue. (Zunkel Test. at 12-14; Bodenhamer Test. at 84-85; Plaintiffs' Exs. 186, 404)

64. The volume of zinc smelting (including emissions and residues) in the horizontal retort smelters is generally measured in retort years as follows:⁴

BZC-LSSC (1907-1924) 139,968 retort years: 30%

NZCI (or NZC) (1907-1976) 327,424 retort years: 70%⁵

These percentages derive from the following number of retorts operated by each smelter. (Defendant's Ex. 1876; Defendant's Ex.

⁴Plaintiffs, in their Response to Defendant's Supplemental Proposed Findings of Fact and Conclusions of Law, state: "Here, the same hazardous substances are being addressed, and each party engaged is in the recovery of zinc. Thus, the time of use and volume of production--i.e., "retort years"--provides an appropriate place in which to initiate an equitable allocation approach." (Response Brief, p. 70)

⁵The Court herein is required to make an equitable allocation of the past and future on-site and off-site remedial costs. Thus, the principal dispute centers in who should bear the costs from 1907-1972 for contamination caused by the orphan, NZCI. Clearly, Cyprus Amax, successor of BZC and LSSC by way of a predecessor's merger with its owner parent, AMCO, in 1958, should bear the remediation cost for the on-site and off-site contamination caused by BZC and LSSC from 1907 to 1924. (Court Order Nov. 17, 1995, Doc. #185). (Plaintiffs' contention that Cyprus should be responsible as an "arranger" from 1951 to 1957 is not supported by the record). As between Cyprus and Plaintiffs (Salomon, St. Joe and ZCA), the Court concludes that Plaintiffs, on a theory of substantial continuity of interest, should bear the remedial costs of the orphan share, plus its own operations from 1974 to 1993, when the Facility ceased operation. The Court is not pleased with this equitable result, but under the circumstances of CERCLA's strict liability and the parties before the Court, it is as equitable a result as can and should be achieved.

1877; Defendant's Ex. 1882; and Paulsen Test. at 6)

BZC: 3,456 to 5,184 retorts from 1907-24;

LSSC: 2,880 to 3,456 retorts from 1907-24; and

NZCI/NZC: 4,864 retorts from 1907-76.

(Rosasco Test. 44-46; Plaintiffs' Exs. 402, pp. 8, 10, 11; 313)

65. In allocating costs as set forth hereafter, the 70%-30% allocation between Plaintiffs and Cyprus, respectively, can be further supported by the following rationale:

- (A) Natural attenuation of older emissions;
- (B) Gradual emissions improvements over the seventy years of the NZCI and NZC operations;
- (C) Most of the vehicle transfer of residues from on-site to off-site were caused or permitted by NZCI after 1924;
- (D) NZCI and Plaintiffs operated generally over the entire 150-acre Bartlesville Facility after BZC and LSSC ceased operation in 1924; and
- (E) From about 1930 until Plaintiffs' ownership and occupation of the site, NZCI moved demolition debris and retort residues from BZC's and LSSC's western portion of the site to the central portion.

66. The lead, cadmium and sulphur dioxide from the BZC, LSSC and NZCI/NZC smelters were disbursed and deposited throughout the soils and surface water at the Bartlesville Facility as a result of both air and ground deposition. The horizontal retort smelter roasters had uncontrolled emissions of sulfur dioxide which, when

combined with moisture, creates sulfurous acid, which, when it comes in contact with lead and cadmium in soils, the metals are mobilized and can move more freely through the soils and surface water. In 1928, NZCI incorporated some improvements in the sulfur dioxide emissions. However, sulfur dioxide emissions continued throughout the operations of the zinc smelters. (Zunkel Test. at 16; Runnells Test. at 44-45; Marlatt Test. at 10, 12, 16, 21; Rosasco Test. at 163-64; Paulsen Test. at 21-22; Lee Test. at 67-68; Bodenhamer Test. at 70-73; Plaintiffs' Ex. 186; Defendant's Exs. 1622-23)

67. The BZC, LSSC and NZCI smelters did not utilize any system to contain, treat or control surface water runoff until 1970. As a result, surface water transported lead and cadmium generated from the BZC, LSSC and NZCI smelter operations throughout the Bartlesville Facility property, and contaminated surface water was permitted to be discharged in an uncontrolled manner off the Bartlesville Facility property. (Runnells Test. at 10-12, 47; Rosasco Test. at 164; Plaintiffs' Exs. 386, 504, 505; Lawmaster Test. 114-23; Defendant's Ex. 1849)

68. The BZC, LSSC and NZCI/NZC smelters contributed to the lead and cadmium located throughout the soils, surface water and groundwater both on-site and off-site at the Bartlesville Facility that is being addressed by the ongoing response actions. As recently as 1988, ZCA learned that it was capturing less than 10% of the cadmium in its emissions rather than the 90% asserted in the equipment specifications. (Defendant's Ex. 597)

69. About every ten years from 1928 to 1973, NZCI made various improvements in the zinc smelting process intended to reduce lead, cadmium and sulfur dioxide emissions and residues. (Paulsen Test. 13, 24-26; Van Aken Test. 20-23, 45-48; Zunkel Test. 45-48; Vogt Test. 5-6, 54-55, 58, 62-63, 78-80; Marlatt Test. 22-23; Bodenhamer Test. 70-73, 77-78; Rosasco Test. 11-12, 169; Knapp Jr. Test. 4-6; Plaintiffs' Exs. 443, 490; and Defendant's Exs. 540, 597, 1054, 1622-23)

70. In 1972, environmental regulators required NZCI to construct a water impoundment and pumpback system in an attempt to contain and treat surface water containing lead, cadmium and sulfur dioxide, from past and present smelting operations, prior to it being discharged from the Bartlesville Facility. This system would reduce off-site runoff contamination but could increase on-site contamination. (Vogt Test. 54-55, 58, 129; Rosasco Test. 11-12; Knapp Jr. Test. 4-6, 11-12; Bodenhamer Test. 77-78; Plaintiffs' Exs. 133, 134, 209, 271, 386; Defendant's Ex. 54)

71. In July 1991, the Bartlesville Facility became subject to regulation under RCRA because ZCA was actively managing hazardous wastes at the Facility. ZCA was required to obtain a permit from EPA in order to continue to manage the wastes in what the EPA refers to as "solid waste management units" or "SWMUs." "SWMUs are defined as any discernable waste management unit at a RCRA facility from which hazardous constituents might migrate. The definition does not include accidental spills from production areas..." (Deft. Ex. 36 at 213). ZCA sought a permit for 15 SWMUs at the

Bartlesville Facility. (Lawmaster Test. 5-6, 10-11; Janeck Test. 36-37 and Defendant's Exs. 33, 36, 63-65)

72. The EPA identified an additional 22 SWMUs; the EPA ultimately identified a total of 37 SWMUs which constituted areas at the Bartlesville Facility that needed to be investigated by ZCA because of the potential that these areas contained elevated levels of lead and cadmium. EPA concluded that there were SWMUs, evidencing the fact that different operations had existed at the same physical location, and each had contributed lead and cadmium at the facility. ZCA was required to investigate the 37 SWMUs to determine if they contained elevated levels of lead and cadmium that would have to be addressed and submit a closure plan for each SWMU. The investigation and potential remediation involved the soils, surface water and groundwater at the Bartlesville Facility. The SWMUs involved contamination as a result of the various zinc smelting operations from 1907 until the early 1990s. (Lawmaster Test. 7, 11-12, 15; Janeck Test. 38-39; Bodenhamer Test. 97-98, 100-03; and Defendant's Exs. 36 and 74)

73. ZCA retained a consulting firm, Roberts, Schornick and Associates ("RSA"), to assist it in the investigation and potential remediation of the SWMUs identified by the EPA. RSA, on behalf of ZCA, commenced various studies that culminated in various reports to the EPA and to the Oklahoma Department of Environmental Quality ("ODEQ"). The investigation and reporting performed by RSA from 1991 through September 1993 concerned ZCA's current operations, including designing closure plans for the goethite and

nickel/cobalt piles, negotiating with Salomon and St. Joe in Plaintiff's indemnity dispute, and studying the nature and extent of the lead and cadmium present in the soils, surface water and groundwater at the Bartlesville Facility, as well as other matters. (Lawmaster Test. 15-16, 125-32, 134-35, 137-38, 146-54, 153-54; Janeck Test. 39-40, Plaintiffs' Exs. 70, 112, 130, 139, 142, 143, 144-45, 146, 150, 204-05, 231, 480-81, 487; Defendant's Demonstrative Exs. C and D)

74. In September 1993, while ZCA was still operating the electrolytic zinc refinery, ZCA entered into an administrative order on consent docket No. U.S. VI-006(h)93-H ("AOC") with the EPA pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h). The hazardous substances of concern to EPA that were to be addressed by ZCA through the AOC and its investigation and suggested corrective action were the lead and cadmium present in the soils, surface water and the groundwater throughout the Bartlesville Facility. The EPA made a specific finding that the lead and cadmium present at the Bartlesville Facility was the result of 80 years of historic operations commencing in 1907. (Janeck Test. 39; Lawmaster Test. 15-16; Bodenhamer Test. 82; Defendant's Ex. 43; Plaintiffs' Ex. 68)

75. In September 1993, subsequent to the issuance of the AOC, ZCA ceased the operation of the electrolytic zinc refinery and operations of the zinc refinery have not been resumed. (Janeck Test. 40-41; Lawmaster Test. 29-30; Wagoner Test. 56-57, 62).

76. In July 1995, ZCA was issued a Part B permit under RCRA

which superseded the AOC. In addition, the ODEQ assumed responsibility from EPA for the Bartlesville Facility remediation. Under the Part B permit, ZCA was required to continue its investigation and potential remediation of the lead and cadmium present in the soils, surface water and groundwater at the Bartlesville site. The focus of the permit now is on closure of the Facility. (Lawmaster Test. 22-23; Rosasco Test. 158-59; Wagoner Test. 57-58; Plaintiffs' Ex. 449)

77. The source of the lead and cadmium in the soils, surface water and groundwater in many instances cannot be identified or "fingerprinted" to any particular company's operations at the Bartlesville Facility. However, the probable source of some of the lead and cadmium found at a particular location or at a particular SWMU at the Bartlesville facility might reasonably be inferred from the operations conducted at that location or SWMU. Each of the parties' operations from 1907 through 1993 contributed to the lead and cadmium that are still present in the media at the facility, are the subject of investigation and will be addressed through remediation, if it is ultimately determined levels requiring remediation are present. (Lawmaster Test. 15-16; Knapp Test. 149; Runnels Test. 4-9, 19-20, 27; Paulsen Test. 7-8, 14, 28, 29; Lee Test. 68; Bodenhamer Test. 16-17, 81-82, 104-105; Plaintiffs' Ex. 384; Defendant's Ex. 74)

78. In addition, lead and cadmium are present in retort residues that were deposited at the facility property since the horizontal retort smelters operated from 1907 to 1976. It is not

yet known if lead and cadmium levels exist from the retort residues at levels requiring remediation. (Lawmaster Test. 33-39, 203-210, 230; Knapp Test. 149; Paulsen Test. 15-16; Bodenhamer Test. 19, 87, 95; Plaintiffs' Exs. 488 (Table 3-13), 504, 505; Defendant's Exs. 1856, 1878, 1879)

79. There probably will not be a "single comprehensive remedy" for the Bartlesville Facility because, according to the corrective measures study currently underway, different media at the sight may require different remedies. A capping remedy on part of the site may be required, the cost of which would be driven by the aerial extent of the cap. (Lawmaster Test. 43-44; Oliver Test. 58-59; Rosasco Test. 59-61; Wagoner Test. 55-56; Plaintiffs' Ex. 488, pp. 1-3, section 1.2)

80. In 1992, following initiation of certain emergency soil removal in the Off-Site Area, the EPA proposed the Off-Site Area for inclusion on the CERCLA National Priorities List based on perceived need to address lead and cadmium in the soils. (Oliver 12-7 Test. at 7-9; Plaintiffs' Exs. 83 and 111 (HRS documentation record) at 24)

81. The EPA determined to defer any listing of the Off-Site Area on the NPL based on the commitment of the ODEQ to assume oversight responsibility for the selection and performance of necessary response actions. The EPA delegated authority to ODEQ for this purpose pursuant to a state delegation pilot project. (Oliver 12/7 Test. at 9)

82. On February 2, 1994, EPA issued a Unilateral Administrative Order (UAO) pursuant to CERCLA directing Salomon, Cyprus and Kerramerican, Inc., to continue the emergency soil removal work previously conducted by the EPA in the Off-Site Area Unit 1. Cyprus and Salomon agreed to participate in the performance of the UAO. Kerramerican declined to participate. The UAO was not issued to ZCA, but ZCA already was under the on-site RCRA AOC with EPA. (Oliver Test. 5-7; Lee Test. 16-17, 54-56; Zaneck Test. 138-39; Plaintiffs' Ex. 65; Defendant's Ex. 43 (AOC))

83. ODEQ, with concurrence of the EPA, determined to divide the Off-Site Area into two operable units for study and remediation: Operable Unit 1 to address perceived risks to human health from soil contamination, and Operable Unit 2 to address perceived risks to ecological receptors, including surface water runoff and groundwater seepage. (Oliver 12/7 Test. at 11)

84. In April 1994, Cyprus and Salomon entered into a Consent Agreement and Final Order (CAFO) with ODEQ to perform the remedial investigation, feasibility study and remedial design for remedies selected to address concern in the two operable units in the Off-Site Area. (Oliver 12/7 Test. at 9-10; Plaintiffs' Ex. 66)

85. In February 1994, Cyprus and Salomon entered into an agreement to share equally the costs incurred by each of them to perform the UAO and the 1994 CAFO, and further agreed that this division of costs for these items would be final as between them, with no right of future reallocation or adjustment. (Oliver 12/7

Test. at 17; Plaintiffs' Ex. 1340)

86. By August 1995, Cyprus and Salomon each had expended approximately \$5.6 million to implement the UAO and the 1994 CAFO. Because Cyprus implemented the August 1995 remedial action CAFO with ODEQ, with which Salomon declined to proceed, Cyprus has spent an additional \$572,244 through October 18, 1995, making a total of approximately \$6.17 million expended by Cyprus through October 18, 1995 on the UAO and the 1994 and 1995 CAFOs. (Oliver 12/7 Test. 29-30; Lee Test. 36-37, 63; Plaintiffs' Ex. 1343; Defendant's Ex. 1360)

87. In December 1994, ODEQ selected a remedy for Operable Unit One in the Off-Site Area intended to address the portions of this area likely to impact human health. The remedy involves remediation of soil containing lead and cadmium in excess of specified action levels. (Plaintiffs' Ex. 82)

88. In selecting the remedy for Operable Unit One, the ODEQ found:

In approximately 1907, three horizontal retort zinc smelters commenced operation at this location. Two of the smelters appear to have ceased operation in the 1920s. In 1976, the remaining horizontal retort smelter was converted to a electrolytic zinc refinery, which is not currently operative. During the time the horizontal retorts were in operation, metals contained in the airborne emissions from the smelter [sic] were deposited over much of the area of Bartlesville that lies west of the Caney River ... Airborne emissions from historical smelting operations and associated activities appear to be the predominant mechanism of dispersal of the contaminants across the Site....

(Plaintiffs' Ex. 82, pp. 1, 4)

89. Scott Thompson, the ODEQ's Project Manager for the Off-Site Area, stated:

Based on investigations and sampling conducted by the U.S.E.P.A., ODEQ and other parties concerning the area surrounding the Bartlesville Facility, ODEQ has determined that the soil contamination (which requires the remediation being conducted under Operable Unit One) is not attributable to operation of the electrolytic refinery and related activities at the Bartlesville Facility from 1977 to 1993. ODEQ and EPA have considered the source of heavy metals in soils which is the subject of the Operable Unit One remediation to be emissions and solid wastes from smelter operations at the Bartlesville Facility from 1907-1976.

(Plaintiffs' Ex. 1214)

The ODEQ also found:

In addition, spillage and wind transport of ore concentrates from rail cars may have also contributed to elevated metals at the Site. It is also likely that solid waste materials from the smelters were physically moved to areas within the Site boundaries for uses [sic] as fill or for other purposes.

(Plaintiffs' Ex. 82 at 4)

90. The goethite piles generated by the electrolytic refinery commencing in 1977 located in the northwest section of the Bartlesville Facility have contributed some to the air emissions and groundwater contamination on-site and off-site, but certainly to a lesser extent and degree than the horizontal retort smelters. (Defendant's Ex. 40; Bodenhamer Test. 9, 65-66) The lead and cadmium emissions from the electrolytic refinery operations were indivisible from that of the lead and cadmium emissions of the

earlier horizontal retort smelters.

91. The primary source of contaminants from the Bartlesville Facility to Operable Unit 1 is from air emissions and solid waste vehicular transport of materials from the facility for use in driveways, as road bed or as fill. The lead and cadmium in the soils cannot be attributed to any particular company's operation at the Bartlesville Facility. (Lee Test. at 34-36, 41, 62; Vogt Test. at 66, 90-92; Van Aken Test. at 32-33; Zunkel Test. at 21-24)

92. The Court does not conclude that operation of horizontal retort smelters conducted in Collinsville, Oklahoma, from 1911 to 1918, and at Blackwell, Oklahoma, from 1921 to 1974, has any particular relevance by way of analysis or comparison to the on-site or off-site conditions at the Bartlesville Facility.

93. The Operable Unit 2 remedy has not been selected. It will address portions of the Off-Site Area that may pose undue risks to environmental receptors, including surface water runoff, and is focused on streams and a drainage basin to the south of the Bartlesville Facility. (Oliver 12/7 Test. at 11-14; Plaintiffs' Ex. 485)

94. Operable Unit 2 has more direct affinity with the historical drainage area for the National Zinc smelter operations but it also was impacted by lead and cadmium generated by more than 80 years of zinc smelting and refining. (Oliver 12/7 Test. at 11-12, 27-28, 71; Oliver Test. 12/11 at 16-18, 30; Oliver Test. 12/14 at 87; Van Aken Test. at 8-9; Runnells Test. 4-8, 10-12,

16-17; Rosasco Test. 50-52, 164; Paulsen Test. 6-7, 22-23; Lee Test. 67-68; Vogt Test. at 55; Defendant's Exs. 1428, 1880)

95. Plaintiffs excluded from costs they seek under CERCLA those costs that relate solely to the operation of the electrolytic zinc refinery. In addition, Plaintiffs are not seeking from Cyprus the costs associated with the maintenance of the goethite, nickel/cobalt, hot tower precipitate ("HTP") and Cherryvale piles in the northwest portion of the Facility that were generated by the electrolytic refinery, such as the cost of spraying the piles with a dust suppressant. Plaintiffs also are not seeking future costs that will be incurred to treat, regrade or remove those materials piles. (Janeck Test. at 45-46; Oliver 12/7 Test. at 34; Knapp Test. at 34; Rosasco Test. at 8)

96. Cyprus agrees that "RCRA and AOC Activities" are properly response costs under CERCLA. (Cyprus' Response to Plaintiffs' Supplemental Proposed Findings of Fact and Conclusions of Law, p. 65 at 197)

97. Regarding the costs incurred for stormwater collection and treatment prior to shutdown of the zinc refinery in September 1993, the Court finds that 50 percent of these costs are response costs under CERCLA, and 50 percent are operational and therefore not recoverable under CERCLA. Regarding the costs incurred for stormwater collection and treatment since shutdown of the zinc refinery in September 1993, the Court finds that 100% of these costs are response costs under CERCLA. Therefore, Plaintiffs are entitled to pre-judgment interest under the 70%-30% allocation on

50 percent of the requested \$10,547,725 pre-October 1, 1993 costs (50% equals \$5,273,862) and on 100% of the requested costs of \$1,180,375 for the period from October 1, 1993 through December 31, 1994.⁶ Allocation of this total of \$6,454,237 in response costs is subject to the 70%-30% split as outlined below.

98. As previously stated, the Court concludes an equitable allocation of on-site and off-site (Operable Units 1 and 2) remedial costs, past and future, is 70% to Plaintiffs (Salomon, St. Joe, ZCA) and 30% to Defendant, Cyprus. Excepting therefrom only the off-site UAO and 1994 CAFO costs expended by agreement of Salomon and Cyprus (approximately \$5.6 million each as of August 1995); and 50% of the pre-October 1, 1993 surface water collection and treatment costs of \$10,547,725, which the Court concludes was 50% normal operations of the zinc smelting refinery and 50% remedial under CERCLA. In other words, Cyprus recoups from Plaintiffs (Salomon, St. Joe or ZCA) its 1995 CAFO costs under the 70%-30% allocation, but not its UAO expenditures, nor its costs to perform the 1994 off-site CAFO; of their claimed surface water collection and treatment costs, Plaintiffs recoup 50% of the requested \$10,547,725 pre-October 1, 1993 costs, and 100% of their requested \$1,180,375 for the period October 1, 1993 through December 31, 1994, i.e., a total of \$6,454,237, subject to the

⁶Plaintiffs, in their Response to Defendant's Supplemental Proposed Findings of Fact and Conclusions of Law, provide to the Court a table of figures that they say are correct, which includes a total of \$11,728,000 for Stormwater Processing Cost. However, the Court notes that, according to Plaintiffs' Ex. 1341, the correct figure should be \$11,728,100.

70%-30% allocation.

99. Specifically, the 70%-30% split applies to the following past on-site response costs expended by Plaintiff:⁷

<u>ACTIVITY</u>	<u>COST</u>
Stormwater Processing Cost (1980-Sept. 1993 - 1/2 of total of \$10,547,725.)	\$5,273,862
Stormwater Processing Cost (October 1993 - December 1994)	\$1,180,375
Limerock	\$294,915
ZCA Administrative Costs (paid through July 1995)	\$391,500
RSA Charges (work performed through Sept. 2, 1995):	
Facility Study	\$180,669
Groundwater Monitoring	\$87,731
General/Part B/ MTR (through 1994)	\$889,582
General/Part B/ MTR (1995)	\$153,055
RCRA/AOC (through 1994)	\$519,882
RCRA/AOC (1995)	\$317,987

⁷This calculation differs from Plaintiffs' Demonstrative Exhibit "E" at trial because Plaintiffs admitted they made an addition error in their arithmetic. Plaintiffs state that their calculations in their Response to Defendant's Supplemental Proposed Findings of Fact and Conclusions of Law are correct (however, see Footnote 6, *supra*). Plaintiffs seem to have trouble with arithmetic, as is reflected in their Footnote 5, page 7 of their Response, wherein they state that the years from 1931 to 1950 and 1958 to 1974 (35 years) total 27 years, which is obviously incorrect.

Management Comm. (1995 Costs paid through Oct. 31, 1995)	\$1,166,583
SUBTOTAL	\$10,456,141
30% thereof	\$3,136,842
Prejudgment interest thereon	? ⁸
<u>TOTAL ON-SITE COSTS</u>	?
<u>PLUS PREJUDGMENT INTEREST</u>	

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §§ 9607 and 9613(f).

2. Any Finding of Fact above which might be properly characterized as a Conclusion of Law is incorporated herein.

3. The declarations of liability (the percentage allocation) set forth in the Findings of Fact above shall be binding in any subsequent action or actions to recover response costs or damages, on-site and off-site.

4. The Bartlesville Facility and the surrounding areas constitute a "facility" within the meaning of CERCLA. (Pretrial Stipulation No. 4).

5. Under CERCLA, current and former owners and operators of a "facility" are liable when there has been a release or a

⁸Plaintiffs are entitled to prejudgment interest from the later of the date of payment or the date they filed or initially notified Cyprus of their respective claims here (ZCA-February, 4, 1994; Salomon and St. Joe-April 10, 1995), and Defendant Cyprus is entitled to be reimbursed 70 percent of its expenditures to perform the 1995 CAFO since August 1995, plus prejudgment interest from date of payment as calculated pursuant to the formula set out in 42 U.S.C. 9607(a)(4) (See Conclusions of Law Nos. 41-2 at p. 47).

threatened release of a hazardous substance from the facility and the release or threatened release has caused the claimant to incur response costs. 42 U.S.C. § 9607(a); FMC Corp. v. Aero Indus., 998 F.2d 842, 845 (10th Cir. 1993).

6. Responsible parties under CERCLA include (1) the current owner and operator of the facility; and (2) the owner or operator of the facility at the time hazardous substances were disposed of. 42 U.S.C. § 9607(a).

7. Hazardous substances generated at the Bartlesville Facility have been detected at certain locations at the Facility and at certain areas around the Facility. Pretrial Stipulation No. 3.

8. There is no threshold amount of a release for purposes of CERCLA liability; any amount of leaching, emitting or discharging of a hazardous substance to the environment constitutes a "release." Burlington N. R.R. v. Wood Indus. Inc., 815 F. Supp. 1384, 1391 (E.D. Wash. 1993).

9. CERCLA liability attaches only where a release or threatened release of a hazardous substance "causes the incurrence of response costs." Private party plaintiffs that seek to recover their costs must show some causal link between the release of the hazardous substance and the incurrence of response costs.

10. The statute is quite broad regarding what costs might be considered as response or remedial costs. 42 U.S.C. § 9601(24) states:

The term [remedial action] includes, but is not limited to, such actions at the location

of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and run-off, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

Regarding "remove" or "removal", 42 U.S.C. § 9601(23)

states:

[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed materials, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

Regarding "remedy" or "remedial action," 42 U.S.C. §

9601(24) states:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

11. CERCLA "removal" actions are short-term measures implemented "to abate a present and serious threat to public

welfare," health or the environment and should contribute to the efficient performance of any long-term remedial action. Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 711 (D. Kan. 1991); Versatile Metals, 693 F. Supp. 1563, 1577 (E.D. Pa. 1988); see also 42 U.S.C. § 9604(a)(2).

12. A "remedial action," in contrast, offers "a long-term or permanent solution to the problem." Remedial actions typically are permanent attempts to restore environmental quality by significantly reducing the volume, toxicity or mobility of the hazardous substances. 42 U.S.C. § 9621; Greene v. Product Mfg. Corp., 842 F. Supp. 1321, 1325 (D. Kan. 1993); Fairchild Semiconductor Corp. v. EPA, 769 F. Supp. 1553, 1555 (N.D. Cal. 1991), aff'd, 984 F.2d 283 (9th Cir. 1993).

13. Different National Contingency Plan ("NCP") standards apply to "removal" and "remedial" actions. The NCP requirements for "removals" are "relatively simple" in comparison to the "more detailed procedural and substantive" NCP requirements applicable to remedial actions. Amland Properties Corp. v. Alcoa, 711 F. Supp. 784, 795 (D. N.J. 1989), aff'd, 31 F.3d 1170 (3d Cir. 1994).

14. Once having established that its costs were "response costs," a "private party must prove affirmatively that its response costs were both necessary and consistent with the NCP in order to recover under CERCLA." County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1512 (10th Cir. 1991).

15. For response costs to be "necessary" under CERCLA, plaintiffs must establish that the costs were incurred in response

to a threat to public health or the environment, and in response to the NCP in effect at the time. Normal costs of operation do not qualify as "necessary" response costs under this standard. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669-70 (5th Cir. 1989); In re Bell Petroleum Servs., 3 F.3d 889, 904-06 (5th Cir. 1993); County Line, 933 F.2d at 1512; City of Philadelphia v. Stepan Chem. Co., 748 F. Supp. 283, 290 (E.D. Pa. 1990).

16. A wastewater treatment system has operated at the Bartlesville Facility since 1958. The System was upgraded in 1972 and 1980, in part to comply with more exacting standards applicable to operating zinc refineries. The system had a dual purpose of both operations and compliance with CERCLA. G. J. Leasing Co. v. Union Electric Co., 854 F. Supp. 539, 562 (S.D. Ill. 1994); and see e.g., Dedham Water Co. v. Cumberland Farms Dairy, 770 F. Supp. 41, 42-3 (D. Mass. 1991), aff'd, 972 F.2d 453 (1st Cir. 1992).

17. Of the \$10,547,725.00 expended and claimed by Plaintiffs for stormwater processing up through September 1993, the Court concludes one-half of same (\$5,273,862.50) is "cleanup or removal of released hazardous substances" under CERCLA, and the other half related to the ongoing operations of the zinc refinery from 1980 through September 1993. Of the \$1,180,375 expended and claimed by Plaintiffs for stormwater processing from October 1, 1993 through December 1994, the Court concludes all of same is "cleanup or removal of released hazardous substances" under CERCLA. Of the costs expended and claimed by Plaintiffs for stormwater processing for the period January 1, 1995 through October 31, 1995 (which

Plaintiffs have included in their Management Committee cost category), the Court concludes all of same are "cleanup or removal of released hazardous substances" under CERCLA.

18. The allocation of CERCLA response costs among liable parties is "an inexact science." Accordingly, CERCLA permits courts to establish an allocation through use of "such equitable factors as the court determines are appropriate." CERCLA "does not limit courts to any particular list of factors nor does the section direct the courts to employ any particular test." Rather, "Courts may consider any criteria relevant to determining whether there should be an apportionment, and are to resolve claims for apportionment on a case-by-case basis." One Wheeler Road Associates v. The Foxboro Company, 1995 WL 791937 at *26, citing 42 U.S.C. § 9613(f)(1); Atlantic Richfield Co. v. American Airlines, 836 F. Supp. 763 (N.D. Okla. 1993).

19. "A district court has considerable discretion in apportioning equitable shares of response costs." FMC Corp. v. Aero Indus. Inc., 998 F.2d 842, 846 (10th Cir. 1993).

20. In allocating responsibility for commingling of contaminants, the Court may look to joint use of the site over the years in making a reasonable and rational approximation of each party's contribution. Hatco Corp. v. W.R. Grace & Co., 836 F. Supp. 1049, 1059, 1088 (D. N.J. 1993); Bell Petroleum Servs., 3 F.3d 889 at 903 (5th Cir. 1993).

21. Where no direct correlation can be drawn between the parties' activities and the contamination existing at the site, the

so-called Gore Factors provide a "nonexhaustive but valuable roster of equitable apportionment considerations."⁹ "A court may consider several factors, a few factors, or only one determining factor ... depending on the totality of circumstances presented to the court." Environmental Trans. Sys. Inc. v. EnSCO, Inc., 969 F.2d 503, 509 (7th Cir. 1992). See also Atlantic Richfield Co. v. American Airlines, 836 F. Supp. 763 (N.D. Okla. 1993).

22. Pursuant to their acknowledged commitment, Plaintiffs are allocated full responsibility for the remediation costs associated with their goethite, nickel/cobalt, hot tower precipitate and Cherryvale waste pile deposits from the electrolytic process.

23. The phrase "caused solely by" in section 107(b)(3) incorporates traditional notions of proximate or legal causation. Lincoln Properties, 823 F. Supp. at 1539-42; G.J. Leasing Co., Inc. v. Union Elec. Co., 854 F. Supp. 539, 567 (S.D. Ill. 1994) ("Under CERCLA, 'sole cause' means proximate or legal cause."),

⁹The Gore Factors include:

- (1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of hazardous waste can be distinguished;
- (2) the amount of hazardous waste involved;
- (3) the degree of toxicity of the hazardous waste involved;
- (4) the degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste;
- (5) The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (6) the degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment.

United States v. R.W. Meyer, Inc., 932 F.2d 568, 571 (6th Cir. 1991).

aff'd, 54 F.3d 379 (7th Cir. 1995).

24. The need for national uniformity of CERCLA liability requires that federal common law govern the imposition of successor liability under CERCLA. United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992); Smith Land & Improv. Corp. v. Celotex Corp., 851 F.2d 86, 91-2 (3d Cir. 1988) ("In resolving the successor liability issues here, the district court must consider national uniformity; otherwise, CERCLA aims may be evaded easily by a responsible party's choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability."); Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (agreeing with Third Circuit that "successor liability under CERCLA is governed by federal law.") Cf. Denver v. Adolph Coors Co., 813 F. Supp. 1471, 1474 (D. Colo. 1992) (federal common law governs issues of corporate capacity to be sued); see also November 17, 1995, Order (rejecting application of state law of "piercing the corporate veil" to find parent AMCO liable for actions of its subsidiaries BZC and LSSC).

25. The broad remedial purpose of CERCLA requires application of the more flexible continuity of enterprise theory of successor liability to prevent responsible parties from evading CERCLA liability through strategic behavior or transactional technicalities. United States v. Mexico Feed & Seed Co., 980 F.2d 478, 488 (8th Cir. 1992) ("in the CERCLA context, the imposition of successor liability under the 'substantial continuation [a.k.a.

continuity of enterprise]' test is justified by a showing that in substance, if not in form, the successor is a responsible party."); Atlantic Richfield Co. v. Blossenski, 847 F. Supp. 1261, 1283-85 (E.D. Pa. 1994); see also, Kleen Laundry & Dry Cleaning Servs. v. Total Waste Management, 867 F. Supp. 1136, 1141 (D. N.H. 1994).

26. To find successor liability under the "continuity of enterprise" approach, courts look to the following factors:

- whether the successor retains the same employees;
- whether the successor retains the same supervisory personnel;
- whether the successor retains the same production facilities in the same location;
- whether the successor produces the same products;
- whether there is a continuity of assets and business operations;
- whether the successor retains the same business name; and
- whether the successor holds itself out to the public as a continuation of the previous enterprise.

Carolina Transformer Co., 978 F.2d at 838.

27. Like any other equitable multi-factor test, all eight factors need not be present to support the imposition of successor liability under the continuity of enterprise doctrine. HRW Sys. v. Washington Gas Light Co., 823 F. Supp. 318, 334 (D. Md. 1993) (applying multi-factored *de facto* merger test); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1010 (D. Mass. 1989) (same).

28. The continuity of enterprise doctrine evolved to address

situations where, as here, a purchaser structures an acquisition deal under traditional principles of successor liability so as to avoid liability and thereby frustrate the remedial purposes of CERCLA. State of New York v. N. Storonske Cooperage Co., 174 B.R. 366, 373 (N.D. N.Y. 1994) (doctrine developed to prevent strategic behavior by purchasers to structure acquisition deals so as to avoid liability); Carolina Transformer Co., 978 F.2d at 838 (courts must consider whether the acquisition "was part of an effort to continue the business of the former corporation yet avoid its existing or potential state or federal environmental liability").

29. The doctrine is especially applicable to situations where a party shifts all environmental liability--existing and potential--onto a corporate shell that is left either with "dirty assets" or, as is the case here, no assets at all. Mexico Feed & Seed, 980 F.2d at 489; Carolina Transformer Co., 978 F.2d at 838.

30. Plaintiffs have a direct nexus to the operations of the National Zinc enterprise from 1907-73.¹⁰ In particular, Salomon stepped directly into the National Zinc operation. In a similar context, a federal district court ruled that, even where the precise factors for successor liability were not present, equitable considerations dictated that the company that "essentially placed itself into [another's] shoes, so to speak, by continuing all

¹⁰Many facts exist in the record that support no per se successor liability by Salomon, St. Joe and ZCA. However, the concept of substantial continuity of interest liability under CERCLA is supported in the record.

aspects [of the other company's] prior practices would succeed to the environmental liabilities of the first company." United States v. Atlas Minerals & Chem., Inc., 1995 U.S. Dist. LEXIS 13,097 at *262.

31. The fact that Salomon purchased National Zinc before the enactment of CERCLA does not preclude the imposition of successor liability under the continuity of enterprise theory. American National Can Co. v. Kerr Glass Mfg. Corp., 1990 U.S. Dist. LEXIS 10,999 (N.D.Ill. 1990) at *20 op. withdrawn, in part, recons. denied, in part, 1990 U.S. Dist. LEXIS 11,417 (N.D.Ill. Aug. 29, 1990) (requiring notice of CERCLA liability in a 1938, pre-CERCLA asset purchase would be "anomalous"); United States v. Peirce, 1995 U.S. Dist. LEXIS 4042 (N.D.N.Y. February 18, 1995); Northwestern Mut. Life Ins. Co. v. Atlantic Research Corp., 847 F. Supp. 389 (E.D. Va. 1994) (1972 asset purchase).

32. "Federally permitted releases", which are defined by reference to existing law, are not considered hazardous and are not therefore subject to the provisions of CERCLA. Joy v. The Louisiana Conference Association of Seventh-Day Adventists, 1992 WL 165670 at *4 (E.D. La.). See 42 U.S.C. § 9607(j).

33. Recovery can be made, however, for permitted release response costs that (1) were not expressly permitted, (2) exceeded the limitations of the permit, or (3) occurred at a time when there was no permit. United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1541 (E.D. Cal. 1992), citing State of Idaho v. Bunker Hill, 635 F. Supp. 665, 673-74 (Idaho 1986).

34. The party claiming exemption for the release of hazardous substances (in this case, the Plaintiffs) bears the burden of proving which releases are federally permitted and what portion of the damages are allocable to the federally permitted releases. Lincoln Properties, Ltd., 1993 WL 217429 at *16 (E.D. Cal.), citing United States v. Shell Oil Co., 1992 WL 144296 at *6 (C.D. Cal.). See also In re Acushnet River and New Bedford Harbor, 722 F. Supp. 893 (D. Mass. 1989)¹¹

35. As to both the retort smelter and the electrolytic refinery, Plaintiffs have failed to meet their burden of proving which releases were federally permitted and which were not. The Court finds, and the parties admit, that individual sources of lead and cadmium cannot be fingerprinted.

36. Plaintiffs are entitled to prejudgment interest for amounts recoverable under CERCLA. 42 U.S.C. § 9607(a)(4).

37. Prejudgment interest "accrues from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned." 42 U.S.C. § 9607(a).

38. The statute "clearly requires a written demand for specified response costs". Bancamerica Commercial Corp. v. Trinity Industries, 900 F. Supp. 1427 (D. Kan. 1995). Courts are split,

¹¹Plaintiffs point out that Acushnet River in this case would require Cyprus to meet a burden of production: introducing evidence sufficient to warrant a factfinder's conclusion that the damages from exemptions are indivisible. Id. at n.9. The Court notes, however, the Acushnet River court pointed out that neither the Restatement (Second) of Torts nor decided CERCLA cases explicitly required such a burden be placed on the opposing party. Id.

however, on what form the demand must take. Several district courts have held that such written demand must include a specific dollar amount. State of Colorado v. United States, 867 F. Supp. 948, 950 (D. Colo. 1994). See also United States v. Hardage, 750 F. Supp. 1460, 1505 (W.D. Okla. 1990), *aff'd in part, rev'd in part*, 982 F.2d 1436 (10th Cir. 1992).

39. The Fifth Circuit Court of Appeals holds, however, that the Complaint constitutes a sufficient written demand for payment, even if the Complaint does not specify an exact amount, as is the case here. In the Matter of Bell Petroleum Services, Inc., 3 F.3d 889 (5th Cir. 1993). See also American Color & Chemical Co. v. Tenneco Polymers, Inc. 1995 WL 813221 (D. S.C.) (applying Bell Petroleum Services).

40. Because there is no evidence in the record indicating that a written demand for payment was made by Plaintiffs to Cyprus, the Court holds that the filing of the Complaint constitutes such demand, as per Bell Petroleum Services. Therefore, as to costs incurred before the Complaint was filed, prejudgment interest, as calculated per the formula in 42 U.S.C. § 9607(a)(4), should be assessed from the date the Complaint was filed. With respect to costs, if any, incurred after the Complaint was filed, prejudgment interest should be assessed from the date of the expenditures. Cyprus also is entitled to prejudgment interest as to off-site Operable Unit One expenditures post-August 1995.

41. Plaintiffs (Salomon, St. Joe and ZCA) are to be granted judgment against Cyprus for 30 percent of the total sum reflected

in Finding of Fact No. 99, which is \$10,456,141 (30 percent equals \$3,136,842), plus prejudgment interest thereon; and Defendant Cyprus is to be granted judgment against Plaintiffs on its counterclaim for 70 percent of the sum of \$572,244 plus prejudgment interest thereon.

42. The parties are hereby ordered to submit an agreed Judgment in keeping with these Findings of Fact and Conclusions of Law, including the rate and amount of prejudgment interest allowable to Plaintiffs and to Cyprus, by May 29, 1996. Failing in such, a hearing thereon will be held on May 30, 1996, and each party is to submit proposed Findings of Fact and Conclusions of Law (not to exceed five pages) on the prejudgment interest issue and a proposed judgment in accordance with these Findings of Fact and Conclusions of Law within three days in advance of the hearing.

43. In its Opposed Motion for Amendment or Clarification filed on April 12, 1996, ten days after the Court entered its original Findings of Fact and Conclusions of Law, Cyprus requested that the Court rule on whether any of Plaintiffs' respective claims for stormwater processing costs dating back to 1980 were barred by CERCLA's statute of limitations, 42 U.S.C. § 9613(g). The Court declines to make the requested ruling or to allow amendment of the pretrial order to set forth the statute of limitations defense, concluding that Cyprus has waived the statute of limitations defense as not being timely asserted because the defense was not raised in the final pretrial order and it was not raised at trial either at the conclusion of Plaintiffs' evidence or at the

conclusion of Defendant's evidence.

IT IS SO ORDERED, this 5th day of May, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 5-6-96

FILED

MAY 3 1996

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

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

IN RE:)
)
J. RAIFORD LUKER, JR.)
and YVONNE LUKER,)
)
Debtors,)
)

Case No: 95-C-311-H

ORDER

The appeal of Defendant, the United States of America, is dismissed.

Dated this 2nd day of MAY, 1996.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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

FILED
MAY 3 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY LEE GRAVES,

Petitioner,

v.

MICHAEL W. CARR,

Respondent.

Case No. 95-C-284-H

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket #12) and Petitioner's Objection to the Report and Recommendation of the United States Magistrate Judge (Docket #13).

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

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

Based on a review of the Report and Recommendation of the Magistrate Judge and the Objection thereto, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. The petition for a writ of habeas corpus is hereby denied.

IT IS SO ORDERED.

This 2ND day of May, 1996.


Sven Erik Holmes
United States District Judge

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

FILED

MAY 3 1996

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

C. R. YOUNG, an individual aka Tad Young,

Plaintiff,

v.

ZELLERBACH DIVISION, an Ohio corporation,
and THE MEAD CORPORATION,

Defendants.

Case No. 95-CV-1066-H ✓

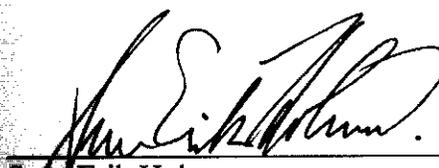
ADMINISTRATIVE CLOSING ORDER

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 June 3, 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 3RD day of May 1996.



Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET

DATE 5-6-96

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

F I L E D

MAY 02 1996 *sa*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VERNETTA B. CARTER,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,¹¹

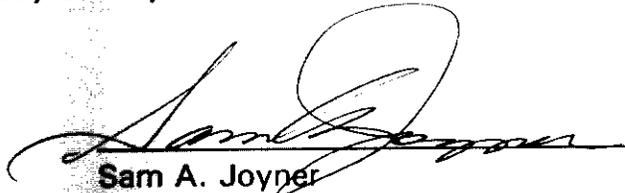
Defendant.

No. 94-C-920-J ✓

ORDER REMANDING CASE TO ALJ

Pursuant to the mandate of the United States Court of Appeals for the Tenth Circuit (appeal number 96-5004), the above-referenced matter is **REMANDED** to the Commissioner for additional administrative proceedings.

It is so ordered this 2 day of May 1996.



Sam A. Joyner
United States Magistrate Judge

¹¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

FILED

MAY - 1 1996

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

MARQUIS L. JONES,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No. 95-C-474-W

ENTERED ON DOCKET,

DATE MAY 6 1996

ORDER

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

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Glen E. Michael (the "ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹Effective 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. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertion and nonexertional requirements of work, except for work in excess of a medium residual functional capacity demand. He concluded that claimant was therefore unable to perform his past relevant work as a machinist helper. He found that the claimant was 32 years old, which is defined as a younger individual, had a high school equivalent education, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. Having determined that claimant's impairments did not prevent him from performing work at the full range of the medium exertional level, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ failed in his duty to fully develop the record concerning the claimant's treatment for mental illness.
- (2) The decision of the ALJ that claimant has the residual functional capacity to do medium work is not supported by substantial evidence.
- (3) The ALJ erred in failing to secure the testimony of a vocational

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

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

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

expert to testify regarding claimant's ability to work.

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

The ALJ noted that in February of 1992 claimant was evaluated by Dr. Charles Mallory and found to be suffering mild major depression and polysubstance abuse (TR 24, 143). Claimant also was seen by Dr. George Simon on June 30, 1992 (TR 148-153). The ALJ noted that Dr. Simon found that claimant rationalized about his behavior and subsequent treatment in prison, was evasive about the circumstances leading to his incarceration, and should be able to work if substance free and adhering to treatment (TR 24, 149, 153). Dr. Simon also found:

Patient is not engaging in age-appropriate self-care. He depends on others for financial and emotional support The patient has a history of irresponsible conduct and major societal norm violations. He has little or no meaningful insight into self-defeating behavior patterns and his preferred defense mechanisms (denial, projection, rationalization) block the acquisition of a more responsible coping pattern.

He does appear to be significantly anxious, agitated and depressed. He is not taking appropriate responsibility for his treatment and is technically in violation of the terms of his release from prison. He would not function responsibly without very close supervision.

(TR 152). Dr. Simon concluded:

Prognosis for amelioration of psychiatric condition would be good if the patient could be counted on to reliably follow through with treatment. Prognosis for change in personality pattern as it relates to leading a responsible lifestyle or working in a situation without close supervision is poor.

(TR 153).

Dr. W.L. Bentley did a social security disability determination the next month, on July 29, 1992, finding claimant had "depression, substance abuse history, antisocial personality trait, sleep disturbance, and lower back pain." (TR 160). He concluded: "I agree with Dr. Simon, that this patient is able to work if substance free and adhering to his psychiatric treatment but he presently is too depressed to work. He needs several months of psychiatric treatment and skills training before he is employable." (TR 161). When discussing this report the ALJ focused on the fact that Dr. Bentley found that claimant had a full range of motion of all extremities, could flex his back 80 degrees and had a negative neurological examination and normal spine x-rays, and mentioned the diagnosis of low back pain. (TR 24).

The ALJ reported that claimant "was hospitalized for a suicide attempt on October 16, 1992" (TR 24). At that time, doctors at the University of Arkansas Hospital concluded he was suffering from "polysubstance abuse/dependence" and "major depression." (TR 169). The ALJ also referenced claimant's treatment at Parkside Community Psychiatric Services and Hospital on January 31, 1994, when he was diagnosed with depression and alcohol abuse, noting his concentration was fair, his insight good, and his spelling correct (TR 24, 190).

Claimant points out that the ALJ failed to mention that the Parkside report on January 31st stated: "he is having difficulty meeting his basic needs . . . is not medication compliant . . . his abuse of alcohol is likely to increase his depression . . . [h]e needs self-esteem building, socialization, and increased awareness of thought process control." (TR 193). However, six weeks later, on February 16, 1994, claimant was released from

Parkside and the doctor reported:

[H]e's trying to come up with money to get car and drive to Ark. to check on wife and kids. Wife wants him to bring 4 and 5 y.o. and 8 mo. old grandson back to Tulsa. Still sleeping ok. No sx's of depression. Wide range of affect. Psychomotor activity WNL. No evidence of thought disorder. No thoughts of self harm. No side effects [sic] from meds

Client affect was restricted but thoughts were clearer and without the influence of substances No SHI or AVH were present. Client says he feels in more control of his life and although this responsibility has come suddenly through the illness of his wife, he welcomes the purpose to live. 'I can't drink now. I have to buy PAMPERS'

Client attended OT and Socialization group. He was able to interact with peers and actively participated in groups. Affect was restricted but brighter than [sic] in the past. Thoughts were clear and coherent. Appearance was casual and although his personal hygiene appeared to be clean, his clothing was soiled. Client says these are his work [sic] clothes and he must leave early today to go to work to get money for the trip to ARK.

(emphasis added). (TR 183).

The ALJ concluded that claimant had "mild depression and some substance abuse," but "[m]ost importantly is the evaluation indicating that the claimant can work." The ALJ completed a Psychiatric Review Technique Form ("PRTF"), finding that claimant's activities of daily living were constricted because of pain and not due to any mental impairment, that he could function socially, as he interacts with treating personnel and groups, that he had fair concentration, indicating that he possesses the necessary concentration to perform mental work-related activities, and that he had had no episodes of deterioration or decompensation in work or work-like settings. (TR 26). He then concluded that claimant could do medium work, but not his past work as a machinist. (TR 27).

The ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. 42 U.S.C. § 423(d)(5)(B); Henrie v. U.S. Dept. of Health & Human Servs.,

13 F.3d 359, 360-61 (10th Cir. 1993); Baca v. Dept. of Health & Human Servs., 5 F.3d 476, 479 (10th Cir. 1993). This duty exists even when the claimant is represented by counsel. Henrie, 13 F.3d at 361; Baker v. Bowen, 886 F.2d 289, 292 n.1 (10th Cir. 1989). Under 42 U.S.C. § 423(d)(5)(B), an ALJ is to "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"

When evidence of a disabling mental impairment is presented, the ALJ must follow the procedure outlined in 20 C.F.R. § 404.1520a. Cruse v. U.S. Dept. of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1995).

This procedure first requires the Secretary to determine the presence or absence of 'certain medical findings which have been found especially relevant to the ability to work,' sometimes referred to as the 'Part A' criteria [of the Listings]. 20 C.F.R. § 404.1520a(b)(2). The Secretary must then evaluate the degree of functional loss resulting from the impairment, using the 'Part B' criteria [of the Listings]. [20 C.F.R.] § 404.1520a(b)(3). To record her conclusions, the Secretary then prepares a standard document called a Psychiatric Review Technique Form (PRT form) that tracks the listing requirements and evaluates the claimant under the Part A and B criteria.

When the ALJ completes the PRT form himself, the record must contain substantial evidence to support each of his findings and he must "discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." Id. at 617-18 (quoting Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994)).

There is no merit to claimant's contentions. Claimant contends that, because he reported in his request for reconsideration application that he had seen a Dr. D. Nossaman in Tulsa one time, on April 30, 1993, and was given "Amitriptyline for nerves" and referred "for surgery," the ALJ was required to obtain Dr. Nossaman's records. However, claimant

was represented by counsel and the record was left open for thirty days after the hearing for submission of additional records and nothing from Dr. Nossaman was submitted. Claimant's statement that he was treated for "nerves" did not suggest that he had a disabling mental condition in 1993 and the later Parkside records show his condition was controlled by medications. (TR 183).

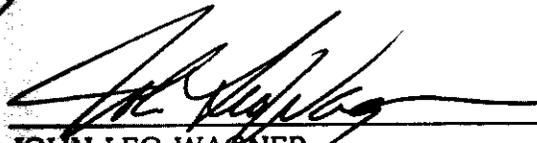
Claimant also argues that the ALJ also did not mention the "Physician's Certification of Borrower's Total and Permanent Disability" form dated May 25, 1994, from the Star Community Mental Health Clinic which summarily recited that he had a severe mental illness and a guarded prognosis unless he followed a medication regime (TR 14).⁴ However, the ALJ could not have reviewed this, as it was never provided by claimant's counsel to the ALJ and was only provided on September 8, 1994 to the Appeals Council. The Council renewed it and affirmed the ALJ's decision (3-4). The court notes that this was a conclusionary report, unsupported by objective medical evidence. It was apparently completed in connection with loan application submitted to the U.S. Department of Education by claimant. (TR 14).

The ALJ's decision on the second part of the PRT form, concerning claimant's functional loss, is supported by substantial evidence. His decision that claimant could do medium work was based on the complete record and was based on evidence that was generated within the twelve months preceding the decision (TR 179-198).

⁴ This half-page form is more than a little ambiguous. It does not reflect the basis of the summary conclusions stated within it. The top part of the form was dated May 25, 1994 by the claimant, but the space for the date above the physician's signature is blank. The part to be filled in by the physician refers to a diagnosis of mental illness starting on October 11, 1991, and predicts an improved prognosis from "guarded" to "fair" if claimant is medically compliant. Significantly, the physician signing the form also did not fill in the portion of the form that purports to certify that claimant was unable to engage in substantial gainful activity.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 15th day of May, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

FILED

MAY - 1 1996

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

MARQUIS L. JONES,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social
Security,

Defendant.

Case No: 95-C-474-W

ENTERED ON DOCKET

MAY 6 1996

DATE _____

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed May 1, 1996.

Dated this 1st day of May, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:judgment

(the "Unit") located in the Southwest Quarter (SW 1/4) of the Northeast Quarter (NE 1/4) of Section 35, Township 1 North (T1N), Range 3 West (R3W), Garvin County, Oklahoma ("Section 35") (the "Pooling Proceeding").

6. Minstar was named as a respondent to the Pooling Proceeding.

7. The Amended Application recites that ONEOK made a "bona fide effort . . . to reach an agreement with each of the respondents as to the unit development as a unit."

8. On December 15, 1993, ONEOK notified Minstar by fax that ONEOK had a title opinion which showed Minstar's title in the Unit to be in dispute.

9. On December 29, 1993, ONEOK sent to Minstar a letter with an attached Exhibit showing Minstar not to have an interest in the Unit and not to be a party to the Joint Operating Agreement covering the Unit.

10. The Dennis #1-35 located in Grady County, Oklahoma (the "Dennis Well") was spudded on December 29, 1993, and drilled to completion in the Unit.

11. On the morning of January 4, 1994, Roger K. Brown, a Minstar landman, met with Matthew R. Westfall, a ONEOK landman, in ONEOK's offices in Tulsa, Oklahoma (the "January 4 meeting"). Mr. Ming, President of Minstar, participated in those discussions by telephone. The parties discussed the terms of a possible agreement pursuant to which Minstar would participate as a working interest owner in the Dennis Well.

12. At the January 4 meeting, Mr. Brown tendered to Mr. Westfall a signature page to a December 2, 1993, Joint Operating Agreement covering the Unit. The signature page was signed by Mr. Ming. Mr. Westfall refused to accept the signature page.

13. Minstar has never been a party to the December 2, 1993, Joint Operating Agreement covering the Unit.

14. Also at the January 4 meeting, Mr. Westfall signed a proposed letter agreement, which he drafted, relating to the Dennis Well (the "Letter Agreement"). The Letter Agreement was then

sent to Mr. Ming by fax, signed by Mr. Ming and returned to ONEOK by fax. The Letter Agreement provides as follows:

Gentlemen:

ONEOK RESOURCES #1-35 DENNIS
SW/4NE/4 SECTION 35-1N-3W
GARVIN COUNTY, OKLAHOMA

The following shall constitute the mutual understanding between Minstar and ONEOK Resources with regards to the aforementioned well:

- 1) Minstar will participate in the well as a Respondent to the pooling hearing on 1/4/94.
- 2) Minstar will not be required to prepay its proportionate share of well costs at this time. However, it is agreed that ONEOK will prepare and forward an actual cost invoice to Minstar and Minstar agrees to pay in accordance to the terms of said billing.
- 3) ONEOK will hold all well information as confidential until such time as Minstar has elected to participate in the well.
- 4) Minstar agrees, and it is fully understood, that its record title is inadequate, and will require a quiet title suit in order to clear the inadequacies, with the burden of proof being the exclusive responsibility of Minstar.

Should you agree with the above, please evidence the same by executing one (1) copy and returning to the undersigned.

Should you have any questions, please advise.

15. After Mr. Ming executed the Letter Agreement, ONEOK began faxing Daily Drilling Reports to him.

16. In a separate letter dated January 4, 1994, ONEOK sent to Minstar an Amended Exhibit which identified Minstar as having a 25% working interest in the Unit.

17. Also, on January 4, 1994, after the January 4 meeting, ONEOK's Amended Application came on for hearing (the "Commission Hearing") before the Commission.

18. At the Commission Hearing, Mr. Westfall, a landman who has been involved in several hundred forced pooling applications on behalf of ONEOK and was primarily involved with the Pooling Proceeding:

(a) Testified that ONEOK had not reached an agreement with the persons (including Minstar) listed on Exhibit A to the Amended Application;

(b) Recommended that in the event Minstar elected not to participate in the Dennis Well, Minstar be paid only \$1.00 per acre for its interest (because Minstar's interest was burdened by a royalty in excess of 25%);

(c) Recommended parties owning the right to drill in the Unit should be given 15 days from the date of the Commission order within which to make an election concerning their participation in the Dennis Well; and

(d) Recommended that in the event a party failed to make an election within 15 days and pay their share of well costs within 20 days of the Commission order, those parties should be "deemed to have accepted the higher cash bonus and royalty for which their interest would qualify."

19. Also at the Commission Hearing, Mr. Westfall dismissed from the Pooling Proceeding sixteen persons or entities who were named respondents. They were dismissed because ONEOK or another participant in the well had reached a private agreement with them regarding the drilling of the Dennis Well or for some other reason. Minstar was not one of the named respondents dismissed from the Pooling Proceeding.

20. Mr. Westfall did not testify at the Commission Hearing that ONEOK and Minstar had reached a private agreement concerning Minstar's election to participate in the Dennis Well.

21. On January 11, 1994, the Commission entered Order No. 379222 (the "Pooling Order") in the Pooling Proceeding. The Pooling Order recites in part that the "rights and equities of all oil and gas owners covered hereby are pooled, adjudicated, and determined," The Pooling Order provides, among other things, that:

(a) Minstar, among others, was a respondent to the Pooling Proceeding and was named on Exhibit "A" to the Pooling Order;

(b) “[T]he Commission **has jurisdiction** over the subject matter herein and of the persons interested therein.”;

(c) Sixteen named **respondents** (those identified by Mr. Westfall at the Commission Hearing) were **dismissed from the Pooling Proceeding**; and

(d) A **special finding that Minstar’s interest, if any, is burdened with a royalty in excess of 25% and that if Minstar, or any other respondent whose interest is burdened with a royalty in excess of 25%, elects or is deemed to elect not to participate in the Dennis Well, that they be paid \$1.00 per net mineral acre for their interest.**

22. The Pooling Order does **not contain any finding with respect to any prior agreement between ONEOK and Minstar concerning Minstar’s participation in the Dennis Well.**

23. The Pooling Order ordered, **among other things:**

(a) Respondents to the **Pooling Proceeding** be given 15 days from the date of the Order within which to **elect to participate in the Dennis Well**;

(b) The manner of **election was required to be by written notice to ONEOK at a specified address; and**

(c) In the event a **respondent failed to make an election, such respondent would be deemed to have relinquished unto ONEOK its interest except for a royalty interest or other share of production.**

24. The Pooling Order was **not appealed by any party within 30 days of its issuance.**

25. Minstar did not send to **ONEOK a written election under the Pooling Order within 15 days of the date of the Pooling Order.**

26. Minstar did not make an **election to participate in the Dennis Well as specified by the provisions of the Pooling Order.**

27. Subsequent to entry of the **Pooling Order, ONEOK did not assign to Minstar any interest that ONEOK acquired pursuant to the Pooling Order.**

28. Subsequent to entry of the **Pooling Order**, Minstar did not, in writing or orally, state to ONEOK that it agreed to participate in the **Dennis Well**.

29. Twenty-five percent (25%) of the drilling costs for the Dennis Well amounts to \$151,607.97.

30. The main function of the **pooling application** is to force the respondents to make an election with respect to participation in the **proposed well**. The pooling application also serves to pool the interests, if any, of persons who **cannot be located**.

31. Peggy C. White, a landman **retained** by Minstar, provided Minstar with an ownership report dated August 23, 1993.

32. In mid-January 1994, Ms. **White** provided Minstar with an amended ownership report dated January 12, 1994.

33. A letter from ONEOK dated **February 2**, 1994, was sent to Mr. Ming, executed by him, and returned to ONEOK. The letter **provides** as follows:

Dear Interest Owner:

ONEOK RESOURCES #1-35 DENNIS
SWNE SECTION 35-1N-3W
GARVIN COUNTY, OKLAHOMA

The aforementioned well has been **drilled to a total depth of 8, 141'**. Upon review of the logs, ONEOK Resources **recommends that** production casing be run to 4,750' and the well be tested in the **Aldridge (Springer) interval** from 4570' to 4590'. In addition, ONEOK recommends that the **Tatum interval** be tested from 1270' to 1300'.

Attached are copies of the **log intervals to be tested**, along with the completion AFE for the well testing to be performed. **Per the JOA** governing the well, please advise the undersigned in the **immediate future regarding your election**.

Conclusions of Law

1. The Court has jurisdiction **over this diversity action** under 28 U.S.C. § 1332, and venue is proper in this Court.

2. A federal court sitting in diversity must apply the law of the forum state, in this case Oklahoma, and thus must ascertain and apply Oklahoma law with the objective that the result obtained in the federal court should be the result that would be reached in an Oklahoma court.

Wood v. Eli Lilly & Co., 38 F.3d 510, 512 (10th Cir. 1994).

3. As an officer or director of Minstar, pursuant to 68 O.S. 1991, § 1212(c), Mr. Ming is personally liable for the debts he incurred on behalf of Minstar.

4. Oklahoma courts follow the *Restatement (Second) of Judgments* § 27 (1982), which prevents a collateral attack on a judgment when the issue sought to be barred has been previously litigated. Ruyle v. Continental Oil Co., 44 F.3d 837, 843 (10th Cir. 1994); Vieser v. Armstrong, 688 P.2d 796, 800 (Okl. 1984); Underside v. Lathrop, 645 P.2d 514, 516 (Okl. 1982).

5. Courts are bound by collateral estoppel from re-litigating issues of fact or law previously determined by the Oklahoma Corporation Commission in a proceeding involving the same parties. 52 O.S. 1991, § 111; Ruyle, 44 F.3d 837; Wagner & Brown v. Ward Petroleum Corp., 876 F. Supp. 255, 258 (W.D. Okl. 1994).

6. A federal district court's examination of a final order of the Commission is limited to determining, from inspection of the record, whether the Commission had jurisdiction to issue the order. Wagner & Brown, 876 F. Supp. at 258.

7. The Oklahoma Corporation Commission has no jurisdiction to determine issues of title. 52 O.S. 1991, § 87.1; Samson Resources Co. v. Oklahoma Corp. Comm'n, 859 P.2d 1118, 1120 (Okl. Ct. App. 1993); Amoco Prod. Co. v. Corporation Comm'n, 751 P.2d 203, 208 (Okl. Ct. App. 1986).

8. The Commission had jurisdiction to enter the Pooling Order. 52 O.S. 1991, § 87.1; Kaneb Prod. Co. v. GHK Exploration Co., 769 P.2d 1388 (Okl. 1989).

9. As a matter of law, a pooling order transfers to the applicant the property rights of those respondents who do not elect to participate under the order. Grace Petroleum Corp. v. Corporation Comm'n, 841 P.2d 1172, 1174 (Okl. Ct. App. 1992); Amoco Prod. Co. v. Corporation Comm'n, 751 P.2d 203 (Okl. Ct. App. 1986). Because Minstar did not elect to participate in the Dennis Well under the Pooling Order, Minstar was divested of any working interest Minstar held in the Unit by operation of law.

10. ONEOK is collaterally estopped from contending that Minstar elected to participate in the Dennis Well prior to filing of the Pooling Order. Kaneb Prod., 769 P.2d 1388.

11. A contract must be interpreted so as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful. 15 O.S. 1991, § 152.

12. When the provisions of an agreement are ambiguous, the Court can look to the actions and construction placed thereon by the parties to ascertain its true meaning. Payne v. Kings Van & Storage, Inc., 367 P.2d 173, 176 (Okl. 1967).

13. If the language used in a contract is ambiguous and susceptible of two (2) constructions, it will be interpreted in a fair and rational sense. Mortgage Clearing Corp. v. Baughman Lumber Co., 435 P.2d 135 (Okl. 1967).

14. Under Oklahoma law, courts, not the Corporation Commission, have jurisdiction to determine the rights of individuals who have entered into private agreements concerning the operation of oil and gas wells. Leede Oil & Gas v. Corporation Comm'n, 747 P.2d 294 (Okl. 1987). This principle of law is inapposite to the Letter Agreement under the facts and circumstances of this case.

15. A ratification is the adoption of a contract which relates back to the execution of the contract and renders it obligatory from its inception. East Cent. Okl. Elec. Coop. v. Oklahoma Gas & Elec. Co., 505 P.2d 1324, 1329 (Okl. 1973). Before there can be a ratification,

there must first be a voidable contract which can be ratified. See First Nat'l Bank v. Alton Mercantile Co., 18 F.2d 213, 215 (8th Cir. 1927) (applying Oklahoma law); Guaranty Bank & Trust Co. v. Federal Reserve Bank of Kansas City, 454 F. Supp. 488 (W.D. Okl. 1977) (in the context of agency, "[r]atification is the adoption by a principal of a voidable contract made by an agent . . ."); 17A Am. Jur. 2d *Contracts* § 7 (1991), at 32 ("The defect in a voidable contract may be cured by ratification . . ."). Because the Court is bound by collateral estoppel to find that no agreement to participate pre-dated the Pooling Order, the Court concludes that there can be no ratification of a pre-existing agreement in the instant case.

16. Mr. Ming could not ratify the Letter Agreement by executing and returning the February 2, 1994 letter to ONEOK. The Pooling Order of the Commission extinguished the Letter Agreement.

17. The Court hereby finds in favor of Defendant and against Plaintiff.

IT IS SO ORDERED.

This 3RD day of May, 1996.


Sven Erik Holmes
United States District Court

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

SAMUEL GARRISON,

Plaintiff,

v.

U.S. DEPARTMENT OF THE
ARMY,

Defendant.

F I L E D

MAY 2 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL CASE NO. 95-C-826-BU

ENTERED ON DOCKET

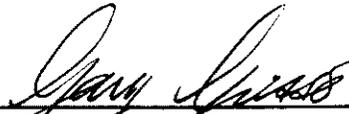
STIPULATION OF DISMISSAL DATE MAY 0 3 1996

The plaintiff, Samuel Garrison, by his attorney of record, Gary Grisso, and the defendant, United States of America, acting on behalf of the United States Department of the Army, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 30th day of April, 1996.



CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809
Attorney for Defendant



GARY GRISSO
Attorney at Law
46 E. 16th St.
Tulsa, OK 74159
Attorney for Plaintiff

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

F I L E D

MAY 3 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROSE ANNE YOAKUM,

Plaintiff,

vs

ST. JOHN MEDICAL CENTER, INC.,
a nonprofit corporation incorporated
in the State of Oklahoma,

Defendant.

Case No. 95-C-963-BU

JURY TRIAL DEMAND

ENTERED ON DOCKET

DATE MAY 03 1996

JOINT STIPULATION OF DISMISSAL OF CERTAIN CLAIMS

Pursuant to Fed. R. Civ. P. Rule 41(a)(1)(ii), the parties hereby stipulate to the voluntary dismissal of Plaintiff ROSE ANNE YOAKUM'S Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., claim against Defendant ST JOHN MEDICAL CENTER. The instant dismissal is filed by stipulation of all parties who have appeared in the action. This dismissal specifically excludes the dismissal of the remaining claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. and the Civil Rights Act of 1991, and Plaintiff's state law claims pursuant to 28 U.S.C. §1367.

LEBLANG & CLAY

By: Katherine T. Waller
KATHERINE T. WALLER OBA#15051
7666 E. 61st Street, Suite 251
Tulsa, OK 74133

Attorney for Plaintiff
Rose Anne Yoakum

DOERNER, SAUNDERS, DANIEL &
ANDERSON

By: Kathy R Neal
KATHY R. NEAL
320 South Boston, Suite 500
Tulsa, OK 74103

Attorney for Defendant
ST. JOHN MEDICAL CENTER

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

INSURANCE COMPANY OF NORTH
AMERICA,)

Plaintiff,)

v.)

SANJAYLYN COMPANY, a)
partnership; MEMOREX-TELEX,)
a Delaware corporation, and)
AMERICAN HOME ASSURANCE COMPANY,)
a New York corporation,)

Defendant.)

ENTERED ON DOCKET

DATE MAY 03 1996

No. 95-C-1137E.

FILED

MAY 2 - 1996

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

JOINT STIPULATION AND ORDER OF DISMISSAL
OF DEFENDANT, SANJAYLYN COMPANY, A PARTNERSHIP

The above styled and numbered cause of action comes on for Status and Scheduling Conference. The Plaintiff, Insurance Company of North America, was represented by counsel, C. Todd Ward. The Defendant, Sanjaylyn Company, a partnership, was represented by John R. Woodard, III. The Defendant, Memorex-Telex, was represented by Robert Redemann, and the Defendant, American Home Assurance Company, was represented by Kenneth Elliott.

Following a discussion of the facts of the case and the underlying litigation, 91-C-955E, United States District Court, captioned Memorex-Telex v. Three Way, et al., the parties entered into the following stipulation.

The Plaintiff's claim herein does not seek any determination of coverage for the claim of Memorex-Telex against Sanjaylyn. Furthermore, the Plaintiff is defending Sanjaylyn against the claim of Memorex-Telex and indemnifying Sanjaylyn therein and does not assert that there are any coverage defenses to the claim of

Memorex-Telex as against the Defendant Sanjaylyn. The parties further stipulate that Sanjaylyn Company is not a necessary party to this action wherein the Plaintiff, Insurance Company of North America, and the Defendant, Memorex-Telex, seek to adjudicate the rights and liabilities of the insurance companies and the policies issued to Three Way Corporation by INA and American Home Assurance Company.

Based on the above and foregoing stipulation, the Court finds that Sanjaylyn is not a necessary party to the issues in this case and is hereby dismissed.

AND IT IS SO ORDERED.


United States District Judge

~~So Stipulated:~~

~~_____
Attorney for the Insurance Company
of North America, Plaintiff~~

~~So Stipulated:~~

~~_____
Attorney for Sanjaylyn Company,
a Partnership~~

~~So Stipulated:~~

~~_____
Attorney for Memorex-Telex~~

~~So Stipulated:~~

~~_____
Attorney for American Home Assurance
Company~~

ENTERED ON DOCKET
DATE 5-3-96

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

MAY 01 1996 *sa*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NORMAN POUND)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER, Commissioner of)
Social Security,^{1/})
)
Defendant.)

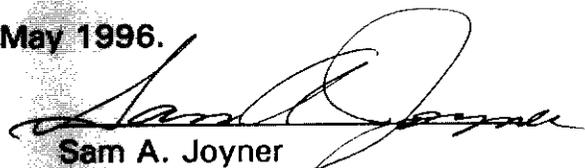
No. 93-C-1058-J ✓

ORDER

Now before the Court is Plaintiff's Motion for an award of attorney's fees and other expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412. [Doc. No. 22-1]. Defendant filed a response on April 26, 1996 [Doc. No. 24-1], stating that he has no objection to Plaintiff's motion for attorney fees. Therefore, the Court hereby **GRANTS** Plaintiff's motion [Doc. No. 22-1] and awards Plaintiff's counsel the \$2,643.75 requested in Plaintiff's motion.

If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, Plaintiff's counsel shall refund the smaller award to Plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986).

Dated this 1 day of May 1996.


Sam A. Joyner
United States Magistrate Judge

^{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. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

25

ENTERED ON DOCKET
DATE 5-3-96

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

AMERICAN BANK & TRUST COMPANY,
an Oklahoma Banking Corporation,

Plaintiff,

vs.

WILLIAM E. ELKINS, C.D.T.,
D.D.S., F.A.D.I., INC., an
Oklahoma Corporation, and
WILLIAM E. ELKINS, an
individual, and UNITED STATES
OF AMERICA, intervenor

Defendants,

and

DENTURECARE, INCORPORATED

Garnishee.

FILED

MAY 2 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil No. 95-C-875H

ORDER FOR ENTRY OF CONSENT JUDGMENT

Having considered the Joint Motion of the parties for entry of a Consent Judgment and pursuant to Fed. R. Civ. P. 54, it is ORDERED that judgment be entered in this matter as follows:

Whereas Garnishee, DentureCare, Incorporated has withheld from defendant William E. Elkins wages for pay periods between May 19, 1995 and November 15, 1995 as detailed herein;

Whereas this case involves a dispute regarding the relative priorities of the parties' interests in the wages of William E. Elkins for the period described above;

Whereas Garnishee, DentureCare, Incorporated, has paid to American Bank & Trust Company directly, the sum of \$1,395.36 representing certain of the wages for the period described above;

9

Whereas Garnishee, DentureCare, Incorporated, has tendered, in trust, to American Bank & Trust Company, in care of plaintiff's attorneys James R. Gotwals & Associates, Inc., the sum of \$753.56 representing certain of the wages for the period described above;

Whereas Garnishee, DentureCare, Incorporated, has paid into the trust account of Garnishee's attorneys, English & Wood, P.C., the sum of \$9,065.00 representing certain of the wages for the period described above;

Whereas the sum total of these wages withheld from William E. Elkins for the period described above is \$11,213.92;

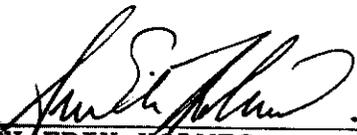
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that \$6913.92 of the sum total of \$11,213.92 shall be provided to the United States of America and the remaining \$4300.00 of this sum shall be provided to American Bank & Trust Co.

To effect this apportionment of the sums described above, Garnishee, DentureCare, Incorporated shall provide an attorneys' trust account, cashiers or certified check made payable to the United States for the amount of \$6913.92 to counsel for the United States within fifteen days of the entry of this Consent Judgment and shall provide the remaining \$2151.08 in its attorneys' trust account relating to this matter to American Bank & Trust Co. American Bank & Trust Co. shall also retain the sum of \$1,395.36 previously paid directly to American Bank & Trust Co., and the sum of \$753.56, previously tendered, in trust, to

American Bank & Trust Company, in care of plaintiff's attorneys
James R. Gotwals & Associates, Inc.

IT IS SO ORDERED.

This the 2ND day of May, 1996.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 1 - 1996

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

MICHAEL TRUJILLO, YVONNE
TRUJILLO, and MID-CENTURY
INSURANCE COMPANY,

Plaintiffs,

vs.

TULSA LITHO COMPANY,
and MULLER MARTINI
CORPORATION,

Defendants.

Case No. 95-C-1159-BU ✓

ENTERED ON DOCKET

DATE MAY 0 2 1996

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendant, Tulsa Litho Company ("Tulsa Litho"). Plaintiffs, Michael Trujillo ("Trujillo"), Yvonne Trujillo and Mid-Century Insurance Company, have responded to the motion and Defendant has replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

The facts relevant to the instant motion are undisputed. On April 11, 1995, Plaintiffs filed an action against Tulsa Litho in the United States District Court for the District of Colorado, seeking to recover damages resulting from a work-related hand injury sustained by Trujillo on April 12, 1993. Plaintiffs specifically alleged that Trujillo injured his hand due to the failure of an "inching switch" on an industrial stitching machine. The stitching machine was at one time owned by Tulsa Litho. On August 24, 1995, the district court, upon Tulsa Litho's motion, dismissed the action against Tulsa Litho without prejudice for lack

of personal jurisdiction. Subsequently, on November 22, 1995, Plaintiffs filed a complaint in this Court. In the complaint, Plaintiffs specifically alleged that Trujillo's injury was caused by Tulsa Litho's negligent modifications of the stitching machine.

In the instant motion, Tulsa Litho contends that Plaintiffs' action is barred by the two-year statute of limitations set forth in Okla. Stat. tit. 12, § 95(3).¹ Tulsa Litho asserts that Plaintiffs' complaint was filed two years and seven months after Trujillo's injury. Citing to Morris v. Wise, 293 P.2d 547 (Okla. 1955), Tulsa Litho argues that Plaintiffs cannot rely upon Oklahoma's "saving statute," Okla. Stat. tit. 12, § 100,² to maintain this action since the original lawsuit was not filed in Oklahoma. Furthermore, citing to Western Natural Gas Co. v. Cities Service Gas Co., 507 P.2d 1236 (Okla. 1972), appeal dismissed, cert. denied, 409 U.S. 1052, 93 S.Ct. 559, 34 L.Ed.2d 506 (1972), Tulsa Litho argues that Plaintiffs may not rely upon Colorado's

¹ Section 95(3) provides in pertinent part:

Civil actions other than for recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

* * * *

3. Within two years: . . . an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated

² Section 100 provides in pertinent part:

If any action is commenced within due time, and . . . the plaintiff fail in such action otherwise than upon the merits, the plaintiff . . . may commence a new action within one (1) year after the . . . failure although the time limit for commencing the action shall have expired before the new action is filed.

"saving statute," Colo. Rev. Stat. § 13-80-111, to maintain this action pursuant to Oklahoma's "borrowing statute," Okla. Stat. tit. 12, § 105,³ as the United States District Court for the District of Colorado did not have personal jurisdiction over Tulsa Litho.

Plaintiffs, in response, concede that this action has been filed beyond the applicable two-year statute of limitations. They additionally concede that Oklahoma's "saving statute," has no applicability to this action. Notwithstanding these concessions, Plaintiffs contend that they may pursue this action under Oklahoma's "borrowing statute" as section 105 incorporates Colorado's "saving statute." According to Plaintiffs, Western constitutes old case law and interprets section 105 prior to its 1970 amendment.⁴ Plaintiffs maintain that the 1970 amendment to section 105 liberalized the limitations law and permits cases, such as the instant case, to be prosecuted. In addition, Plaintiffs assert that the choice of language used by the Oklahoma Supreme Court in Western is "unfortunate" and creates "confusing dictum." They contend that the Oklahoma Supreme Court was simply dealing

³ Section 105 provides:

The period of limitation applicable to a claim accruing outside of this state shall be that prescribed either by the law of the place where the claim accrued or by the law of this state, whichever last bars the claim.

⁴ The statute in Western read:

The period of limitation applicable to a claim accruing outside of this state shall be that prescribed either by the law of the place where the claim accrued or by the law of the place where the claim accrued or by the law of this state, whichever first bars the claim. (emphasis added).

with the issue of where the claim in Western arose. Furthermore, Plaintiffs argue that dictum in Western conflicts with the Oklahoma Supreme Court's interpretation of the "saving statute" found in section 100. Relying upon Griesel v. Fabian, 84 P.2d 634, 635 (Okla. 1938), Plaintiffs maintain that the Oklahoma Supreme Court has consistently held that an action may be refiled under Oklahoma's "saving statute," even if no jurisdiction existed in the court where the original action was filed.

In reply, Tulsa Litho contends that Plaintiffs have failed to cite any authority to support their position that they may "borrow" the Colorado "saving statute" to maintain this action, even though Tulsa Litho could not be summoned in Colorado. Moreover, Tulsa Litho argues that the Oklahoma Supreme Court in Western specifically rejected Plaintiffs' position. Tulsa Litho also asserts that the rule enunciated in Western does not conflict with Oklahoma's "saving statute." Tulsa Litho maintains that the statements in Griesel are complete dicta, as the previous action at issue was not dismissed for lack of jurisdiction. It additionally asserts that the Oklahoma Supreme Court has never permitted a party to rely upon the "saving statute" for a claim originally filed and dismissed outside the state. Furthermore, Tulsa Litho argues that the 1970 amendment to Oklahoma's "borrowing statute" did not change the effect of the Western decision. Tulsa Litho maintains that the 1970 amendment did not change the definition of where a claim accrues.

Upon review, the Court finds that Plaintiffs may not rely upon

the limitation laws of Colorado in order to prosecute the instant action. The Court finds that the Western decision is applicable to this case. Although Western examined section 105 prior to its amendment in 1970, the Court concludes that the Oklahoma Supreme Court's interpretation of the present section 105 would not differ. The Court concurs with Tulsa Litho that the 1970 amendment to section 105 has no effect upon the determination of where a claim accrues. Moreover, the Court finds that the 1970 amendment to section 105 did not show any intent by the Oklahoma Legislature to borrow the limitation laws of a jurisdiction in which the defendant cannot be summoned. The Court accordingly concludes that Oklahoma will not borrow the limitations law of Colorado when Tulsa Litho cannot be summoned there. See, e.g., Feldman v. Pioneer Petroleum, Inc., 606 F.Supp. 916, 922 n. 4 (W.D. Okla. 1985).

The Court rejects Plaintiffs' arguments that the Oklahoma Supreme Court's interpretation of the "borrowing statute" in Western conflicts with the Oklahoma Supreme Court's interpretation of the "saving statute" in other cases. The "borrowing statute" in section 105 determines whether a party may borrow the limitations laws of the state where the claim accrued, if that claim arose out of Oklahoma. On the other hand, the "saving statute" in section 100 determines whether a party's claim may be refiled if the claim, commenced in due time, was dismissed "otherwise than on its merits."

Because Plaintiffs may not rely upon either Colorado's "saving statute" or Oklahoma's "saving statute" to pursue their action

against Tulsa Litho and Plaintiffs' action is clearly outside the applicable two-year statute of limitations, the Court finds that Plaintiffs' action is time barred and Tulsa Litho is entitled to summary judgment under Rule 56, Fed. R. Civ. P.

Accordingly, Defendant, Tulsa Litho Company's Motion for Summary Judgment (Docket Entry #9) is GRANTED.

ENTERED this 1st day of May, 1996.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5-1-96

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

F I L E D

APR 29 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SUSAN NEWCOMER, individually)
and as Guardian of BENJAMIN)
NEWCOMER, ANDREW NEWCOMER)
and PETER NEWCOMER, and)
JOHN NEWCOMER,)

Plaintiffs,)

v.)

Case No.: 95 C-765K

NORTHEAST OKLAHOMA ELECTRIC)
COOPERATIVE, INC., an Oklahoma)
corporation, and CEDAR PORT)
MARINA, an Oklahoma entity; and)
GRAND RIVER DAM AUTHORITY,)
an Oklahoma agency, and JOHN DOE)
CORPORATION,)

Defendants.)

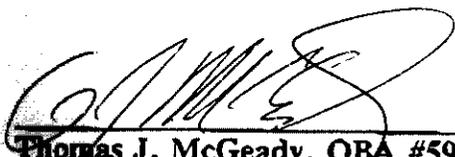
**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE
OF ALL CLAIMS AGAINST DEFENDANT CEDAR PORT MARINA**

COME NOW, Susan Newcomer, individually, and as Guardian of Benjamin Newcomer, Andrew Newcomer and Peter Newcomer, and John Newcomer, and the Defendant Bratco, Inc., d/b/a Cedar Port Marina, an Oklahoma entity, and hereby stipulate that the action against this Defendant be dismissed with prejudice. Each party will bear their own fees and costs.



David Humphreys, OBA #12346
Luke J. Wallace, OBA #16070
Monica Cosentino-Hodges, OBA #16633
THE HUMPHREYS LAW FIRM
1602 South Main Street, Suite A
Tulsa, Oklahoma 74119-4455
(918) 584-2244
(918) 584-2245 FAX

ATTORNEYS FOR PLAINTIFFS



Thomas J. McGeady, OBA #5984

LOGAN & LOWRY

Post Office Box 558

Vinita, Oklahoma 74301-0558

(918) 256-7511

(918) 256-3187 FAX

**ATTORNEYS FOR BRATCO, INC., D/B/A
CEDAR PORT MARINA**

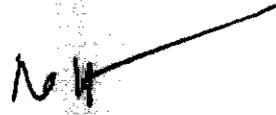
CERTIFICATE OF SERVICE

I, David Humphreys, hereby state and certify that on the 25 day of April 1996, a true and correct copy of the foregoing instrument was mailed by depositing same in the U.S. Mail, proper postage thereon fully prepaid, and addressed to:

David J. Shea
SOMMERS, SCHWARTZ, ET AL
2000 Town Center, Suite 900
Southfield, Michigan 48075

Richard Dan Wagner
I. Michele Drummond
WAGNER, STUART & CANNON
902 South Boulder
Tulsa, Oklahoma 74119-2034

Robert A. Franden
Kristin Blue Fisher
FELDMAN, HALL, FRANDEN ET AL
525 South Main, Suite 1400
Tulsa, Oklahoma 74103-4523



David Humphreys

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

FILED

APR 30 1996

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

DON BLACK,

Plaintiff,

vs.

Case No. 96-CV-0107H ✓

F. M. STEWART TRUCKING COMPANY,
INC.; ACME TRUCK LINE OF OKLAHOMA,
INC.; AND BAKER HUGHES OILFIELD
OPERATIONS, INC., individually,
and d/b/a CENTRILIFT and ALLEN
SERVICES,

Defendants.

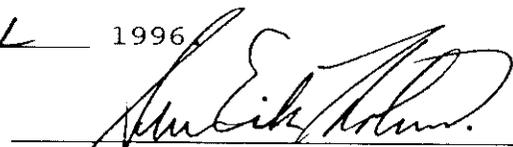
ENTERED ON DOCKET

DATE 5-1-96

ORDER GRANTING JOINT MOTION FOR CHANGE OF VENUE

Upon the Joint Motion of Plaintiff and Defendants for a change of venue, and for good cause shown, the case is hereby transferred to the United States District Court for the Western District of Oklahoma. The Clerk of this Court is hereby directed to transfer the Court file in this case to the Clerk of the United States District Court for the Western District of Oklahoma.

Done this 30TH day of APRIL 1996

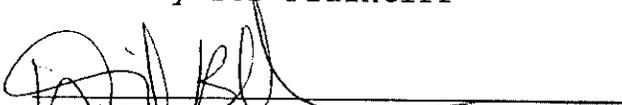


Sven Erik Holmes
U.S. DISTRICT JUDGE

APPROVED:



G. Timothy Armstrong, OBA #324
3033 N.W. 63rd, Suite 150
Oklahoma City, OK 73116
(405) 840-4383
Attorney for Plaintiff



David W. Schneider, OBA #7969
210 Park Avenue, Suite 1120
Oklahoma City, OK 73102
(405) 232-9990
Attorney for Defendants

5-1-96

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

FILED

APR 30 1996

gk

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAUL K. CARR, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 THE ALLWASTE CORP., RICK)
 CARR and THE STRATEGIC)
 MATERIALS COMPANY,)
)
 Defendants.)

No. 96-CV-18-B ✓

ORDER

Pursuant to Plaintiff's application to dismiss, this action is dismissed without prejudice to timely refile same.

DATED this 30th day of April, 1996.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

8

Sum
✓

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

F I L E D

APR 30 1996 *ja*

SAMUEL GARRISON,)
)
Plaintiff,)
vs.)
)
U.S. DEPARTMENT OF THE ARMY,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-826-BU ✓

OFFICE OF CLERK

DATE 5-1-96

ADMINISTRATIVE CLOSING ORDER

The Court has reviewed the Notice of Settlement and Joint Application to Suspend the Scheduling Order and Strike the Trial Setting filed on April 29, 1996. Having done so, the Court **DENIES** the Joint Application to Suspend the Scheduling Order and Strike the Trial Setting, as submitted. Instead, the Court hereby **ORDERS** that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

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

Entered this 30 day of April, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

25

a parole violation warrant on July 2, 1987. Petitioner was subsequently convicted in Tulsa County on the charge of possession of a stolen vehicle by a felon and received a ten-year sentence. The Commission supplemented the warrant with Petitioner's conviction for possession of a stolen vehicle as well as with charges for speeding, failing to appear, failing to report his arrest, falsifying his supervision report. In addition to all these charges, Petitioner was convicted of second degree burglary and sentenced to an 18-year term of imprisonment to run concurrently with his ten-year sentence.

On March 24, 1988, the U.S. Marshals Service lodged the Commission's warrant as a detainer with the Oklahoma Department of Corrections. On September 21, 1988, a dispositional review was conducted. The Commission ordered that the detainer stand and that Petitioner be scheduled for a record review in September 1991 or a dispositional revocation hearing upon his return to federal custody, whichever came first. For some unexplained reason, the Commission failed to conduct a record review in September 1991. In its response, the Government advises that Petitioner's file has been forwarded to the Commission's Regional Office so that a record review can be completed.

On July 31, 1995, Petitioner filed the instant habeas corpus action challenging his "custody" under the parole violation detainer. He contends (1) the delay in his revocation hearing amounts to a violation of his due process rights; (2) the delay hinders his ability to secure witnesses and gather evidence in his

defense, (3) the detainer lodged against him has prevented his participation in educational and rehabilitative programs while in the custody of the Oklahoma Department of Corrections (DOC), and (4) a prompt hearing would give Petitioner an opportunity for early release because following the Commission's actions he could request that the Oklahoma state judge reduce his state sentence as he had originally intended.

II. ANALYSIS

The conditional freedom that a parolee enjoys is a liberty interest that cannot be terminated absent due process safeguards. Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972). Accordingly, parolees are entitled to a revocation hearing "within a reasonable time" after being taken into custody. Id. at 488. In Moody v. Daggett, 429 U.S. 78, 86-87 (1976), the Supreme Court held that when a federal parolee, serving an independent intervening sentence in the same jurisdiction, has no constitutional right to a prompt revocation hearing. While the Court expressly reserved the question whether the result would be different had the federal parole violator warrant been lodged as a detainer with state prison authorities, lower courts have extended Moody to these circumstances. See Heath v. United States Parole Com'n, 788 F.2d 85, 91 (2nd Cir. 1986), cert. denied, 479 U.S. 953 (1986), and cases cited therein; Coronado v. United States Bd. of Parole, 551 F.2d 275, 276 (10th Cir. 1977).

The warrant at issue in this case was never executed, but

lodged instead as a detainer. Therefore, until the federal warrant is executed and Petitioner is returned to federal custody, he is not entitled to a parole revocation hearing under either the Constitution or 18 U.S.C. § 4214(b)(1). Moody, 429 U.S. at 86-87; Heath, 788 F.2d at 90.¹

Petitioner argues in his reply that pursuant to 28 C.F.R. §2.47(b)(1)(i)(A)-(B) (1986) he is entitled to a revocation hearing upon completion of twenty-four months of confinement on his state conviction.² Petitioner argues his revocation hearing is overdue since he has been confined for over eight years. Petitioner's reliance on the 1986 version of section 2.47(b) is misplaced. On May 8, 1987, section 2.47 was formally amended to grant the Commission discretion to hold a revocation hearing before the

¹ In any event a petition for a writ of habeas corpus is not the proper remedy absent some showing that the delay was both unreasonable and prejudicial. Poynor v. U.S. Parole Com's, 878 F.2d 275, 277 (9th Cir. 1989); Vargas v. U.S. Parole Com'n, 865 F.2d 191, 194 (9th Cir. 1988). However, delay in holding the revocation hearing is grounds for a writ of mandamus to compel compliance with § 4214(c). Poynor, 878 F.2d at 277.

² Petitioner relies on the 1986 version of 28 C.F.R. § 2.47 which states as follows:

(b) Following a dispositional record review, the Regional Commissioner may:

(b)(1) Pursuant to the general policy of the Commission, let the warrant stand as a detainer and:

(b)(1)(i) If the prisoner is serving a state or local sentence, order that a revocation hearing be scheduled--

(b)(1)(i)(A) Upon return to a federal institution or

(b)(1)(i)(B) Upon completion of the period of confinement required by the minimum of the applicable guideline range as tentatively assessed, but not less than twenty-four months, whichever (A) or (B) comes first.

parolee is retaken into federal custody. See 28 C.F.R. § 2.47(c)(i)-(iii) (1994).³ See also Wasylak v. Thornberg, 744 F.Supp. 387, 389 (D.N.H. 1990).

Petitioner's argument concerning lost witnesses is meritless. Since Petitioner received new criminal convictions for possession of stolen vehicle and second degree burglary, he cannot contest the use of these convictions as parole violations. To the extent Petitioner contends the State of Oklahoma has arbitrarily and capriciously used the federal detainer to deny him rehabilitation and parole in violation of state law or without procedural due process, he should exhaust his state remedies. See Hopper v. U.S. Parole Com'n, 702 F.2d 842, 845 (9th Cir. 1983). Moreover, the appropriate Respondents in such a situation are state prison officials and the state parole authorities and not the U.S. Parole commission. See Ex rel Caruso v. U.S. Board of Parole, 570 F.2d

³ The present version of 28 C.F.R. § 2.47(c) reads as follows:

If the prisoner is serving a new state or local sentence, the Regional Commissioner, following a dispositional record review may:

(i) Withdraw the detainer and order reinstatement of the parolee to supervision upon release from custody, or close the case if the expiration date has passed.

(ii) Order a revocation hearing to be conducted by a hearing examiner or an official designated by the Regional commissioner at the institution in which the parolee is confined.

(iii) Let the detainer stand and order further review at an appropriate time. If the warrant is not withdrawn and no revocation hearing is conducted while the prisoner is in state or local custody, an institutional revocation hearing shall be conducted after the prisoner's return to federal custody.

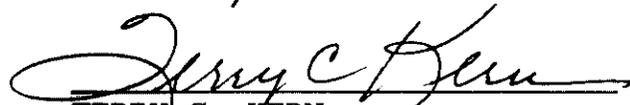
1150, 1154 (3rd Cir.), cert. denied, 436 U.S. 911 (1978).

Lastly, Petitioner argues that he would have the opportunity for early release had he received his parole revocation hearing. This argument is purely speculative. the Commission has the sole authority, under 18 U.S.C. § 4210(b)(2), to determine whether the federal term should be consecutive to, or concurrent with, the Oklahoma sentences. See Heath, 788 F.2d at 92.

III. CONCLUSION

Accordingly, Petitioner's due process rights have not been violated and the petition for a writ of habeas corpus is hereby DENIED.

SO ORDERED THIS 29 day of April, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 5-1-96

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

STEVE KITCHELL, President of)
Group K Corporation, Inc., d/b/a)
MIDNIGHT RODEO,)

Plaintiff,)

vs.)

CITY OF TULSA,)

Defendant.)

Case No. 93-C-1066-E ✓

APR 30 1996 *fa*

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

DISMISSAL BY STIPULATION

COME NOW the Plaintiff, by and through his attorney of record, Everett R. Bennett, Jr., and Mark Newbold, Attorney for the Defendant City of Tulsa, pursuant to F.R.C.P. 41(a)(1), and stipulate to the dismissal of the above-styled action without prejudice.

WHEREFORE, premises considered, the parties dismiss without prejudice the above-styled action.

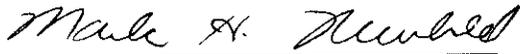
Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By:


Everett R. Bennett, Jr. OBA#11224
1700 Southwest Boulevard
P.O. Box 799
Tulsa, OK 74101-0799
(918) 584-4724

APPROVED AS TO FORM:



Mark Newbold
Attorney for City of Tulsa

CERTIFICATE OF MAILING

I hereby certify that on the 30 day of April, 1996, I mailed a true and correct copy of the above and foregoing instrument to:

Mark Newbold
Assistant City Attorney
200 Civic Center, Room 316
Tulsa, OK 74103

with the correct and proper postage thereon fully prepaid.


Everett R. Bennett, Jr.

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ENTERED ON DOCKET
DATE 5-1-96

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 30 1996 *ja*

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.)

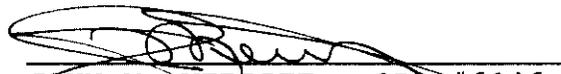
CASE NO. 94-C-1059-H ✓

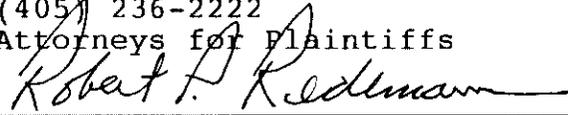
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Louis Penochio, 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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c/5

ENTERED ON DOCKET

DATE 5-1-96

F I L E D

APR 30 1996 *ja*

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 Plaintiff, Estella Guy, 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
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(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

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 30 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.)

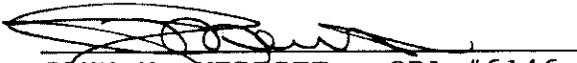
CASE NO. 94-C-1059-H ✓

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Leroy Alfred, 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 5-1-96

FILED
APR 30 1996 *ja*

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

LARRY LOGGINS and JOYCE LOGGINS,)
)
 Plaintiffs,)
)
 vs.)
)
 ALLSTATE INSURANCE COMPANY,)
)
 Defendant.)

Case No. 96 C 218 H ✓

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, Larry Loggins and Joyce Loggins, and the Defendant, Allstate Insurance Company, and hereby stipulate that the above referenced action be dismissed with prejudice. Each party will bear their own attorneys fees and costs.

SELMAN AND STAUFFER, INC.

BY: *Paul B. Harmon*
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ATTORNEYS FOR DEFENDANT

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C. Rabon Martin, OBA 5718
Todd Tucker, Esq. OBA 15469
Martin and Associates, P.C.
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Tulsa, OK 74103
(918) 587-9000

ATTORNEYS FOR PLAINTIFFS