

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

FILED

NOV 26 1996

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

HOUSSAM ELSOUEISSI, an individual)

Plaintiff,)

vs.)

DENNY'S, INC., a California)
corporation,)

Defendant.)

Case No. 96-CV-0832-H

NOV 26 1996 ✓

ORDER DEEMING DEFENDANT'S MOTION TO DISMISSED CONFESSED

There comes before the Court Defendant's Motion for Default against Plaintiff for Plaintiff's failure to respond to Defendant's Motion to Dismiss. By order of this Court, Plaintiff's Brief in Response to Defendant's Motion to Dismiss was due on November 19, 1996. Plaintiff has failed to file his response brief within the time allotted by the Court, and accordingly, the Court deems the matters contained in Defendant's motion to dismiss to be confessed pursuant to Local Rule 7.1(C).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's claims against Defendant are dismissed with prejudice.

Dated: November 26th, 1996.

S/ SVEN ERIK HOLMBO

UNITED STATES DISTRICT JUDGE

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

NOV 20 1996

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

JANICE MASTERSON, for herself and)
all others similarly situated,)
)
Plaintiff,)
)
vs.)
)
McDONNELL DOUGLAS CORPORATION,)
a foreign corporation,)
)
Defendant.)

Case No. 96-C-363-H ✓

NOV 20 1996

ORDER

This matter came before the Court on November 15, 1996, for hearing. After considering the briefs of the parties, and the arguments of counsel, the Court rules as follows:

Plaintiffs' Motion to Dismiss Don D. Rossier, Samlee R. Harrison, James Pruitt, and Anthony F. Masefield as named Plaintiffs, and to dismiss all of their claims without prejudice against McDonnell Douglas Corporation, is hereby granted.

Plaintiffs' Motion to add Debbie Pense and Larry Logue as named Plaintiffs, is hereby denied. This action shall henceforth be styled as *Janice Masterson v. McDonnell Douglas Corporation*, Case No. 96-C-363-H.

Plaintiff Masterson's Motion for leave to amend her Complaint, to add the allegation that she was denied hire on the C-17 project, is hereby granted. Plaintiff's attorneys are to submit a new Amended Complaint to this Court, bearing the new case style, and all appropriate substantive amendments, within seven (7) days of the date of this Order.

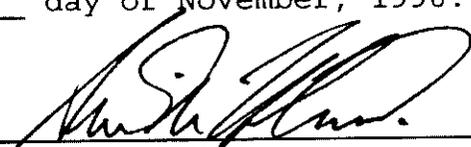
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If Defendant believes that there is any basis to challenge Plaintiff Masterson's allegations that she was denied hire on the C-17 project, Defendant is to submit a brief on that issue by November 29, 1996. Responses and replies are to be filed within the times established by the Local Rules of Court.

If either party wishes to submit additional briefs on class certification, or the issue of consolidating this case with the *Millsap* case, such briefs shall be submitted by December 16, 1996. Responses to those briefs, if any, shall be filed by December 31, 1996.

This Court shall hold a hearing on the issue of class certification and consolidation of this class with the *Millsap* case on January 3, 1997, at ^{10:50}~~10:30~~ a.m.

IT IS SO ORDERED this 26TH day of November, 1996.


SVEN ERIK HOLMES
United States District Judge

IN THE UNITED STATES DISTRICT COURT
STATE OF OKLAHOMA

ENTERED ON BOOKS

DATE NOV 29 1996

LARANDALL HILL,

Plaintiff,

vs.

Case No: 96 CV 458 B

STANLEY GLANZ, in his official
capacity as Sheriff of Tulsa
County, Oklahoma;
STATE OF OKLAHOMA DEPARTMENT
OF CORRECTIONS;
CORRECTIONAL MEDICAL SYSTEMS,
a tradename for Correctional
Medical Services, Inc., a
Missouri corporation;
OTIS ELEVATOR COMPANY, a
New Jersey corporation; and
WESTINGHOUSE ELECTRIC CORPORATION,
a Pennsylvania corporation,

Defendants.

FILED

NOV 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

COMES NOW all parties herein, by stipulation, and request this
Court dismiss the above-styled and captioned matter in its entirety
without prejudice.


David C. Phillips, III, OBA #13551
D.C. PHILLIPS & ASSOCIATES, P.C.
115 W. 3rd St., Ste. 525
Tulsa, OK 74103
(918) 584-5062


Linda Samuel-Jaha
Asst. Attorney General
Litigation Division
(Re: OK Dept. of Corrections)
4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105-3498

Michael Maloan

Michael T. Maloan, OBA # 15097
Foliart, Huff, Ottaway & Caldwell
(Re: Correctional Medical Services)
20th Floor, First National Center
120 N. Robinson
Oklahoma City, OK 73102

Shannon K. Emmons
Robert E. Manchester, OBA # 5652
Shannon K. Emmons, OBA # 14272
(Re: Otis Elevator Company)
9th Floor, Robinson Renaissance
119 N. Robinson Avenue
Oklahoma City, OK 73102


Linda K. Greaves OBA #16502
Re: Sheriff Glanz
500 South Denver
406 County Courthouse
Tulsa, OK. 74103

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 26 1996

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

UNITED STATES OF AMERICA,

Plaintiff,

Civil Action No. 96-CV-725B

JEANETTA WILLIAMS,

Defendant.

ENTERED ON DOCKET

DATE NOV 27 1996

DEFAULT JUDGMENT

This matter comes on for consideration this 25th day of Nov., 1996, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Jeanetta Williams, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jeanetta Williams, was served with Summons and Complaint on October 1, 1996. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

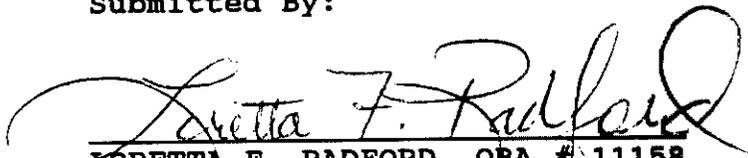
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Jeanetta Williams, for the principal amount of \$668.61, plus accrued interest of \$299.52, plus interest thereafter at the rate of 8 percent per annum until judgment, a surcharge of 10% of the

(6)

amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 26 1996

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOANN BAKER,

Defendant.

Civil Action No. 96CV-780B ✓

ENTERED ON DOCKET

DATE NOV 27 1996

DEFAULT JUDGMENT

This matter comes on for consideration this 25 day of Nov., 1996, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Joann Baker, appearing not.

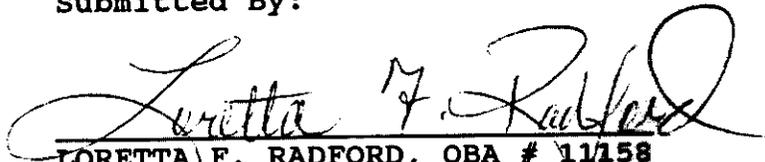
The Court being fully advised and having examined the court file finds that Defendant, Joann Baker, was served with Summons and Complaint on October 9, 1996. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Joann Baker, for the principal amount of \$950.27, plus accrued interest of \$9.19, plus interest thereafter at the rate of 6.79 percent per annum until judgment, a surcharge of 10% of the amount of the

debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:



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

11-27-96

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

FILED
NOV 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

USA)
)
)
Plaintiff(s),)
vs.)
)
)
ESTATE OF RONALD L. McMUNN, et al.)
)
Defendant(s).)

Civil No.: 96-CV-601-K ✓

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of November 26, 1996 to date party is in default and George S. Stoia, Administrator of the Estate of Ronald L. McMunn and Linda Kay Meakes, the parties in default against whom judgment for affirmative relief is sought in this action, have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma on this 27th day of November.

PHIL LOMBARDI,
Clerk, U.S. District Court

S. Schwebke
S. Schwebke, Deputy Clerk

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RECEIVED ON 11-27-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,
v.
JAMES A. FENDER,
Defendant.

Civil Action No. 96CV-778K ✓

FILED

NOV 26 1996

DEFAULT JUDGMENT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

This matter comes on for consideration this 26 day of November, 1996, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, James A. Fender, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, James A. Fender, was served with Summons and Complaint on October 22, 1996. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

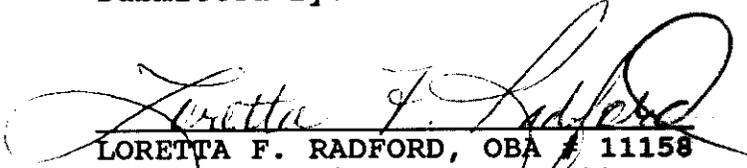
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, James A. Fender, for the principal amount of \$1,610.89, plus administrative charges in the amount of \$105.00, plus accrued interest of \$109.89, plus interest thereafter at the rate of

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4 percent per annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

11-27-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)
)
v.)
)
MICHAEL SHUE DECORTE, et al.,)
)
Defendants.)

NOV 26 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-CV-550-K

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of Nov 26, 1996 and the declaration of Peter Bernhardt, Assistant United States Attorney, that the Defendants, **Michael Shue DeCorte, Gloria L. DeCorte fka Gloria Lois Stone, Phil Russell Stone, and Household Finance Corporation III**, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 26 day of November, 1996.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By J. Schwabke
Deputy

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

RICK VARNER,)
)
 Plaintiff,)
)
 vs.)
)
 HAWKEYE EAGLE TRANSPORTATION)
 EQUIPMENT CO., INC., et al.,)
)
 Defendants.)

No. 95-C-925-K ✓

11-27-96

FILED

NOV 26 1996

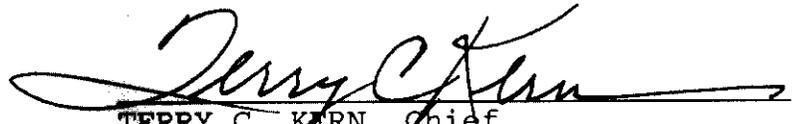
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 25th day of November, 1996.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

DATE 11/27/96

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

F I L E D

JOYCE M. DARLING,)
(SSN: 492-66-6629))

Plaintiff,)

v.)

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

Defendant.)

NOV 25 1996 *SLC*

**Phil Lombardi, Clerk
U.S. DISTRICT COURT**

No. 95-C-1100-J ✓

ORDER^{1/}

Now before the Court is Plaintiff's appeal of the Commissioner's decision denying Plaintiff Supplemental Security Income Benefits. The Administrative Law Judge ("ALJ"), John M. Slater, found that Plaintiff was not disabled because (1) Plaintiff retained the Residual Functional Capacity ("RFC") to perform work at the medium exertional level, and (2) the Vocational Expert identified significant jobs in the national economy which Plaintiff could still perform despite her limitations.

Plaintiff argues that the ALJ erred (1) by not giving Plaintiff's treating doctor's opinion the appropriate weight, (2) by failing to properly consider Plaintiff's extreme obesity in combination with her other impairments, (3) by applying an incorrect legal standard to evaluate Plaintiff's credibility. The undersigned finds that the ALJ's conclusion that Plaintiff could perform the full range of medium work is not supported

^{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 December 7, 1995.

by substantial evidence. Consequently, the Commissioner's denial of benefits is **REVERSED**.

I. 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/}

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

^{2/} Step one requires the claimant to **establish** that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 416.910 and 416.972. **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. § 416.921. 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"). See 20 C.F.R. § 416.925. 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 past 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. § 416.920; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

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 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. MEDICAL/VOCATIONAL EVIDENCE

At the time of the hearing below, Plaintiff was a 37 year old female with a 10th grade education. *R. at 39*. The ALJ found that none of Plaintiff's past work experiences qualified as "past relevant work."^{3/} *R. at 23*. The record reflects, however, that Plaintiff had sporadic employment as a waitress, nurse's aide, grocery store clerk, janitor, manufacturing inspector, and envelope stuffer. *R. at 39-40, 90-95, 100*. Focusing on the waitressing, the VE identified this work as light^{4/} and unskilled. *R. at 53*. Plaintiff has received some vocational training in auto mechanics. *R. at 96-103*. Plaintiff alleges that she became unable to work as of September 1990 due to (1) pain in her back, legs and shoulder; (2) numbness and tingling in her forearms and hands; and (3) depression. *Plaintiff's Brief, p. 1 and R. at 43, & 60-63, 96-103*.

From 1990 to 1992, Plaintiff was admitted to the Tulsa Regional Medical Center's ("TRMC") emergency room six times. In October 1990, Plaintiff was admitted for vomiting and severe epigastric pain related to gallbladder and/or kidney stones. At that time, Plaintiff indicated that she was taking no medications. Plaintiff was treated and released each time on the date of admission. *R. at 124-138*.

In July 1991, Plaintiff was admitted to TRMC for a wax and flame burn on her left hand. Plaintiff was treated and released the same day. *R. at 143*. In August

^{3/} See 20 C.F.R. §§ 416.960(b), 416.965, 416.972.

^{4/} See 20 C.F.R. § 416.967.

1991, Plaintiff was admitted due to an injury to the middle finger of her left hand. The injury occurred while Plaintiff was trying to close a door. An X-ray taken at the time showed that the injury produced a slight bone fragment. Again, Plaintiff was treated and released on the same day. *R. at 146-49*. In January 1992, Plaintiff was admitted to TRMC with difficulty breathing due to the flu. Plaintiff was treated and released. *R. at 150-53*. In February 1992, Plaintiff was admitted to TRMC for two days to pass a kidney stone. *R. at 154-66*. Apart from the injury to Plaintiff's left, middle finger, none of these hospitalizations appear to be relevant to the impairments Plaintiff alleges are disabling.

From 1990 to 1992, Plaintiff made several visits to a clinic at Morton Comprehensive Health Services, Inc. ("Morton"). In June 1991, Plaintiff began to complain of pain in her lumbar and sacral region along with pain in various joints. Plaintiff reported that she had been having this pain for the past three years (i.e., since June 1990). *R. at 217, 222*. Plaintiff complained again of pain in her back in September 1991. Beginning in October 1991, Plaintiff complained of swelling, pain and numbness in her hands. *R. at 216-17*. After complaining of pain in her right lumbar region, an x-ray was taken in January 1992. The x-ray showed a normal lumbar spine and there was a notation of "bilateral osteitis ilii." *R. at 213, 229*. The Court has not been able to determine what "bilateral osteitis ilii" is other than some type of inflammation of a bone. See Taber's Cyclopedic Medical Dictionary p. 1380 (17th ed. 1993) (defining "osteitis"). Plaintiff complained of muscle tenderness in her

upper back and shoulders in June 1992. Plaintiff complained again of low back pain in August 1992. *R. at 210-11.*

Plaintiff filed her application for **benefits** in July 1992 and was examined at the Commissioner's request by Angelo **Dalessandro**, D.O. in September 1992. Plaintiff reported to Dr. Dalessandro that she **could not stand on her feet** because she had muscle weakness in her back and **her back was "killing" her**. Plaintiff reported that both arms often went numb from **the elbows down**, with tremors in her hands. Plaintiff reported that her back problems **had been present since 1982** and that her arm numbness had only been present for **the past several years**. Plaintiff reported that she often had swollen ankles, leg pain **when walking**, and shortness of breath upon exertion. Plaintiff stated that she **was nervous**, depressed, had problems sleeping and as a result had chronic fatigue. Plaintiff **reported** having frequent headaches and some memory loss. Plaintiff denied, however, **any dizziness or fainting**. Plaintiff denied eye pain, heart pain, heart palpitations, **and/or irregular pulse**. Plaintiff reported that she was taking Motrin to control her pain. *R. at 167-68.*

Upon examination of Plaintiff, **Dr. Dalessandro** found that Plaintiff was a 35 year old obese female who was **65½" tall and 261^{5/} pounds** with a blood pressure of 140/90. Plaintiff had some **tenderness** in the epigastric area of the abdomen. Examination of Plaintiff's **extremities** showed no evidence of chronic venous

^{5/} The record demonstrates that from **June 1991** to January 1993, Plaintiff's weight fluctuated from 254 to 277 pounds. *R. at 227.* At the **hearing in June 1994**, Plaintiff testified that she weighed 294 pounds. Plaintiff also testified that she was **67 inches tall**, not 65½ as found by Dr. Dalessandro. *R. at 38.*

obstruction or arterial insufficiency. Plaintiff did, however, have some tissue-fluid in and around her feet (i.e., "pedal edema"^{6/}). Plaintiff had a minimal limitation of the range of motion in her back, with no muscle spasm and some pain on flexion and extension of the lumbosacral spine. Plaintiff had normal range of motion in all other joints. There was no swelling, redness, heat, or deformity of any joints. There was also no evidence of muscle atrophy or paralysis. *R. at 167-74.*

Dr. Dalessandro found that Plaintiff had a normal gait in terms of speed, stability and safety. Plaintiff needed no assistive device and she had no problem getting on and off the examination table without help. Plaintiff's heel and toe walking was normal. Plaintiff had no pain upon doing a straight leg raising while sitting, but some pain upon doing a straight leg raising while lying down. All of Plaintiff's reflexes were normal. Plaintiff had no problems with the range of motion in her hands or wrists. Her manual dexterity, gross and fine manipulation skills, and grip strength were intact. Dr. Dalessandro found that Plaintiff could oppose her thumbs to her finger tips and could manipulate small objects and could grasp tools such as a hammer. Dr. Dalessandro also found Plaintiff's mentation to be normal (i.e., she was relevant, coherent and oriented). *R. at 167-74.*

Overall, Dr. Dalessandro found Plaintiff to be in no distress. Dr. Dalessandro's final impression was hypertension and obesity. Dr. Dalessandro wanted to rule out "cervical radiculopathy," which is a disease of the roots of spinal nerves in the neck.

^{6/} Taber's Cyclopedic Medical Dictionary pp. 606, 1449 (17th ed. 1993).

Taber's Cyclopedic Medical Dictionary p. 1665 (17th ed. 1993). Dr. Dalessandro also wanted to rule out "osteoarthritis," which is a disease primarily of the body's weight-bearing joints. Id. at p. 1381.

In the papers filed with the Commissioner, Plaintiff states that she can be on her feet for only 10-15 minutes at a time due to pain. The social security employee completing the forms with Plaintiff observed that Plaintiff was short of breath after walking from the reception area and that Plaintiff walked and sat down slowly. Plaintiff also complained of pain during the interview. Plaintiff stated that she crochets for a few minutes at a time, swims when she can, visits friends almost every night, and writes recipes. Plaintiff stated that she watches 2-3 hours of TV per day and that she loves to read often and for long periods of time if her hands are not hurting. Plaintiff stated that although it might take her all day to clean the house (i.e., working in 20 minute spurts) she did laundry, made beds, did light dusting and vacuuming. Plaintiff said she did need help with the dishes, sweeping, mopping and shopping. Plaintiff also said she needed help brushing her hair, washing her back and shaving her legs because these activities caused pain in her back and arms. Plaintiff reported that she got along well with the persons she was living with, although she was easily upset. *R. at 96-109.*

When asked about her pain, Plaintiff stated that she had sharp, stabbing pain in her lower back "and up" and in her hands, arms, knees and legs. Plaintiff stated that this pain was brought on by sitting after walking and that she had had the pain since 1986-87. Plaintiff reported that because of the pain she could only sleep 4-5

hours per night and often cried in bed because of the pain. Plaintiff also reported having severe headaches. Plaintiff reported taking 3 to 7 Motrin per day for pain, with no side effects from the Motrin. *R. at 104-111.*

Based on the record above, Plaintiff's claim was denied at the state disability determination level in October 1992. *R. at 64-66.* Plaintiff filed a request for reconsideration in December 1992. *R. at 70-71.* Between the original denial and the request for reconsideration, Plaintiff was involved in a pedestrian/motor vehicle accident on November 24, 1992 in which Plaintiff was the pedestrian.

Plaintiff was struck by a car traveling 35-40 miles per hour. Plaintiff was taken to TRMC. Upon arriving, Plaintiff was in mild distress, complaining of head pain, low back pain and knee pain. Plaintiff had a 2cm horizontal cut on her right upper forehead, superficial bruises on her abdomen and multiple bruises on her right hip and both knees. Plaintiff's joints were found to be stable and her gross motor and sensory functioning were intact. X-rays of Plaintiff's cervical spine, pelvis, and chest showed no fractures. A CT scan of the abdomen and head showed nothing which appeared to be in any way caused by the car accident. The CT scan did, however, show bifrontal lobe atrophy in the brain, infiltrates in the liver and hardening of the aortic arteries (i.e., atherosclerosis). *R. at 176-196.*

The car accident occurred around 9:30 p.m. Plaintiff was admitted to TRMC at 10:17 p.m. Plaintiff left TRMC against medical advice at 2:15 a.m. the next morning. By 9:50 the following night, however, Plaintiff went to the emergency room at Hillcrest Medical Center. X-rays were taken and they were all normal. *R. at 200-*

203. Plaintiff was discharged in good condition, told to go home and rest and see her own doctor if she had any problems. *R. at 197-203.* One month later, Plaintiff went to the clinic at Morton's and reported pain in both legs and dizzy spells "off and on." *R. at 206.* The diagnosis by the clinic was "muscle skeleton pain vs. malingering." *Id.* The doctors refused to prescribe narcotic pain medication and instead continued Plaintiff on Motrin for pain. *Id.*

As a result of litigation concerning the car accident, it appears that Plaintiff began to see Stuart T. Hinkle, D.O., in early 1993. Dr. Hinkle's progress notes begin in April 1993. However, Plaintiff was examined by Edward Glazier, M.D. on February 17, 1993 and he reports that Plaintiff was referred to him by Dr. Hinkle. *R. at 235-36, & 283-93.* Dr. Hinkle's referring diagnosis was decreased knee jerk and apparent ruptures of muscles in both legs. Plaintiff told Dr. Glazier that she had pain in the low back and hips which radiated into her legs and tingling and numbness in her legs. Plaintiff related the onset of these symptoms to the November 24, 1992 car accident. Dr. Glazier conducted a Current Perception Threshold test of the nerves at the L4, L5 and S1 vertebrae. Dr. Glazier stated that his findings were consistent with Plaintiff's subjective complaints, but that Plaintiff's complaints would respond favorably to treatment. Dr. Glazier felt, however, that an MRI was needed to confirm his diagnosis. *R. at 235-37.*

At the Commissioner's request, Plaintiff was examined by a psychiatrist, Donald R. Inbody, M.D., on February 23, 1993. When Dr. Inbody asked Plaintiff why she was unable to work, Plaintiff responded "severe depression lately." *R. at 239.* Plaintiff

stated that she had been depressed since 1985, but had never sought any kind of treatment for her alleged depression. Plaintiff stated that she had recently been prescribed anti-depressant medication but that she stopped taking it because the medication made her mouth dry and caused her some hair loss. Plaintiff reported that she had some suicidal ideation, but no serious attempts or plans had been made. Plaintiff also told Dr. Inbody that her daily activities consisted of keeping house, cooking for her boyfriend, doing needlework and crossword puzzles, watching TV and visiting with friends. *R. at 239-41.*

Upon examination, Dr. Inbody found the following: (1) a pleasant, obese female with logical, coherent, sequential speech; (2) no affective disturbances or associational defects in thinking; (3) no psychotic symptomology; (4) no signs of clinical depression; (5) no disturbances in recent or remote memory; (6) no disturbances in attention and concentration; (7) no anxiousness; (8) average intelligence with intact judgment. *R. at 239-41.* Dr. Inbody's diagnosis was (1) mild adjustment disorder with depressed mood and without psychotic features, (2) borderline personality disorder, and (3) normal psychological stressors. *Id.* Carolyn Goodrich, Ph.D., performed a psychiatric review of Plaintiff's file on March 3, 1993 and her diagnosis concurred with Dr. Inbody's.

Dr. Goodrich found that Plaintiff had a mild affective disorder which was not severe. According to Dr. Goodrich, Plaintiff's affective disorder (1) caused a slight restriction in her activities of daily living; (2) caused slight difficulty maintaining social functioning; (3) would seldom cause deficiencies in concentration, persistence or pace;

and (4) had never caused an episode of **decompensation** in a work-like setting. *R. at 73-81.*

Plaintiff reported to Dr. Inbody that she had been attending physical therapy three times a week. Two weeks after seeking Dr. Inbody, Plaintiff reported to the Morton clinic that the physical therapy was working, that she had less swelling, and that her legs were doing better. *R. at 262.* Morton clinic ordered an MRI of both of Plaintiff's femurs in March 1993. The MRI indicated swelling and some fluid retention in the mid portion of Plaintiff's right, lateral thigh. *R. at 246.* Other than a letter from Dr. Hinkle's secretary to Plaintiff's lawyer, there are no records in the file regarding Plaintiff's physical therapy. The letter from Dr. Hinkle's office indicates that Plaintiff was "not very compliant in seeing Dr. Hinkle or attending physical therapy." *R. at 244.* The letter indicates that Plaintiff only attended eight therapy session between February 9, 1993 and March 19, 1993, rather than the three per week which were apparently scheduled. *Id.*

In May 1993, Plaintiff's personal injury lawyer apparently had Plaintiff referred via Dr. Hinkle to Fort Smith Rehabilitation Hospital ("FSRH") for evaluation. Plaintiff told the staff at Morton's clinic that the insurance company of the driver who had hit her was paying for this treatment. *R. at 260 & 303.* Plaintiff was at FSRH for approximately six days. While at FSRH, Plaintiff was seen by Bradley M. Short, D.O., and Donald Chambers, M.D., for a physical evaluation and by Ronald E. Huisman, Ph.D., for a mental evaluation. Dr. Chambers examined Plaintiff first. Plaintiff reported to Dr. Chambers that since the accident, (1) she had not been able to walk

normally, (2) she had been more intensely depressed, (3) she was more irritable and more easily upset with a shorter temper, and (4) she was having trouble remembering things that had been said or done in the very recent past. Dr. Chambers reported that Plaintiff was alert, cooperative, oriented, had a good account of recent events, and had insight into her problems. Dr. Chambers' impression was mild head injury. However, Dr. Chambers recommended no medications or treatment. *R. at 276-77.*

Plaintiff next saw Dr. Short and she reported to him that since the accident she began having (1) headaches, (2) pain in her neck, low back and thoracic region, (3) swelling in the right thigh, and (3) the depression, memory and personality problems described to Dr. Chambers. Plaintiff admitted to Dr. Short that for the most part, she was "independent in all aspects of activities of daily living, however, [she] is limited by some pain" *R. at 274.* Upon examination, Dr. Short found Plaintiff to be pleasant, alert, cooperative and overweight. Plaintiff's speech was oriented and fluent. Plaintiff's neck was supple and it had a full range of motion with no spasticity. Plaintiff's gait was normal and her sensation was grossly intact. Dr. Short found a rather large swelling in the right quadriceps region and what he thought was a fluid-filled cavity. Dr. Short's final impression was a traumatic pain injury with rupture of the right quadriceps tendon. *R. at 274-75.* After writing his report Dr. Short ordered a sonogram of Plaintiff's right thigh, which contradicted Dr. Short's diagnosis. A sonogram was performed on both thighs and they were then compared. The right thigh showed no abnormal fluid collections or hematomas and there was a normal vein and artery present. *R. at 292.*

Plaintiff was seen by Dr. Huisman for a mental evaluation. Plaintiff reported to Dr. Huisman that her primary complaints were pain in her thighs and left arm pain which produced restricted motion and strength. Plaintiff's secondary complaints were minor cognitive changes and headaches. Dr. Huisman found Plaintiff to be alert, oriented, pleasant and cooperative. Plaintiff interacted appropriately and did not appear to exaggerate her symptoms. Dr. Huisman found Plaintiff's grip and dexterity to be normal on the right and mildly impaired on the left. After performing various IQ tests, Dr. Huisman found Plaintiff to be "in the average range of tested psychometric intellectual functioning." *R. at 2/9*. Dr. Huisman noted, however, that there was a significant discrepancy between Plaintiff's verbal and visual skills. Dr. Huisman believes that Plaintiff has significant problems with verbal symbolic functioning. This was compensated for by Plaintiff's superior visual perception skills. Dr. Huisman attributed this discrepancy to an unspecified learning disability. Consequently, Plaintiff's visual memory is superior, while her verbal memory is significantly impaired. Overall, Dr. Huisman found Plaintiff's neuropsychological test performances to be within normal limits. *R. at 278-82*.

Dr. Huisman did determine that Plaintiff was suffering from major depression.

The following paragraph summarizes Dr. Huisman's findings:

The profile of clinical scales indicated significant depression with ruminative anxiety and over ideational thinking, suspicious irritability, and increased somatic complaints superimposed on an impulsive personality style. These patients tend also to have difficulty in social interactions, often feel misunderstood and quite frequently engage in life styles or behavior patterns that go far against social norms.

R. at 281. Despite these findings, Dr. Huisman noted that Plaintiff had the "potential for being vocationally employed." *R. at 282.* Dr. Huisman concluded that Plaintiff "was felt to have collectively mild impairment" and that her depression and anxiety could be expected to improve over the next three months. *R. at 273, 278-82.*

As mentioned above, Plaintiff apparently began seeing Dr. Hinkle sometime after her car accident. There are very few records from Dr. Hinkle and most of the records that are in the file are illegible. *R. at 283-91 & 293.* In July 1993, Dr. Hinkle's notes indicate that the edema (i.e., swelling) in Plaintiff's right upper leg had decreased in size and that the strength in her right leg had improved. Plaintiff also reported that she could walk comfortably for 30-45 minutes. Plaintiff's dizziness was reported as gone. Plaintiff was, however, still complaining of numbness in her legs and pain in her back and left arm. Plaintiff was also still complaining of decreased concentration, loss of memory and irritability. *R. at 288-90.* Dr. Hinkle prescribed physical therapy three times a week for eight weeks. *R. at 291.* There are no records regarding whether Plaintiff actually attended this therapy.

Dr. Hinkle wrote two letters on Plaintiff's behalf -- one to the food stamp division of the department of human services and one to a local housing authority. In the letter to the housing authority, Dr. Hinkle stated that Plaintiff "has complex neuro-orthopedic problems as a result of being struck by an automobile." *R. at 287.* Dr. Hinkle recommended that as a result of these problems, Plaintiff not work for one year. *Id.* In his letter to the DHS, Dr. Hinkle referred to the following in opining that Plaintiff was unable to work at any job: (1) "multiple neuroorthopedic [not readable]

abnormalities," (2) "traumatic brain injury," (3) "hypertensive cardiovascular disease," (4) "anxiety/depression," (5) "cognitive brain impairment and learning disability." *R. at 283.*

In her testimony and in the papers filed with her request for reconsideration, Plaintiff alleges that she has severe headaches, she is forgetful, she cannot maintain a train of thought and she gets real depressed. Plaintiff states that she cooks very little and only walks to the bathroom. Plaintiff's boyfriend helps her bathe in a shower. Plaintiff states that she has quit reading because she cannot understand what she reads. After being put on anti-depressant medication, Plaintiff states that she can now sleep 7-10 hours a night. *R. at 116-23.* Plaintiff testified that the number one reason she cannot work is pain in her legs and back and depression. *R. at 43.* Plaintiff testified that she can only sit 10-15 minutes at a time and she can only walk a block to a block and a half. Plaintiff states that she has severe headaches four times a week. *R. at 43-48.*

III. DISCUSSION

The ALJ determined that Plaintiff could perform work at the medium exertional level. "Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." 20 C.F.R. § 416.967. Upon questioning by the ALJ at step five of the sequential evaluation process, the VE identified the following jobs at the medium exertional level: janitor, dish washer, and kitchen helper. Despite all the medical evidence discussed above, there is absolutely nothing in the file which supports the ALJ's conclusion that Plaintiff could perform the

lifting requirements of medium work or that she could perform the standing and walking requirements of the jobs identified by the VE.

The medical evidence discussed above does identify various limitations and does discuss their relative severity. However, no doctor ever attempts to quantify the severity of Plaintiff's limitations in terms of her ability to sit, walk, stand, push, pull, or lift. This type of information is typically found in an RFC assessment performed by a doctor at the request of the Commissioner. While an RFC assessment is not *per se* necessary, one is required once the ALJ determines that a claimant has a severe impairment in terms of step two and there is no evidence in the record which quantifies Plaintiff's ability to sit, walk, stand, push, pull, or lift.^{7/} The Court is left to speculate as to the effect of the above-discussed limitations on Plaintiff's ability to sit, walk, stand, push, pull and lift. See Thompson v. Sullivan, 987 F.2d 1482, 1491 (10th Cir. 1993) (discussing the need for evidence regarding the demands of each exertional category). The Court, therefore, remands this case so that the Commissioner may obtain a consultive examination to determine the effect of Plaintiff's limitations on her ability to sit, walk, stand, push, pull and lift.

Because the Court is remanding with regard to a determination of Plaintiff's physical RFC, the Court feels compelled to make a few observations with regard to Plaintiff's mental RFC. Dr. Huisman conducted extensive testing of Plaintiff and found that her verbal memory was significantly impaired as a result of a learning disability,

^{7/} It appears as if the state disability determination unit requested an RFC assessment. *R. at 82*. There is, however, no such assessment in the file.

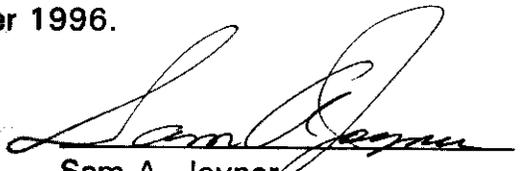
while her visual memory was superior. This finding is consistent with Plaintiff's abnormal electroencephalogram and with the CT scan which showed bifrontal lobe atrophy. *R. at 248.* This would seem to suggest that Plaintiff would have significant difficulty recalling and carrying out verbal instructions. The vocational expert, upon cross examination seemed to indicate that a person who could not carry out short, verbal instructions would not be able to maintain a job. *R. at 55-56.* Dr. Inbody's report may contradict Dr. Huisman's conclusion. It is clear, however, that Dr. Huisman's report was based on extensive testing of Plaintiff over a six day stay in the hospital, while Dr. Inbody's report was based on a one time visit. *R. at 273-282.* The Court points this out only to ensure that on remand the ALJ adequately addresses this issue of Plaintiff's ability to understand, remember, interpret and carry out verbal instructions.

CONCLUSION

The undersigned finds that the ALJ's determination that Plaintiff could perform the full range of medium work is not supported by substantial evidence. Consequently, the Commissioner's decision to deny benefits is **REVERSED** and this case is **REMANDED** for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this 25 day of November 1996.


Sam A. Joyner
United States Magistrate Judge

DATE 11/27/96

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

JOYCE M. DARLING,
(SSN: 492-66-6629)

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant.

NOV 25 1996 *SA*

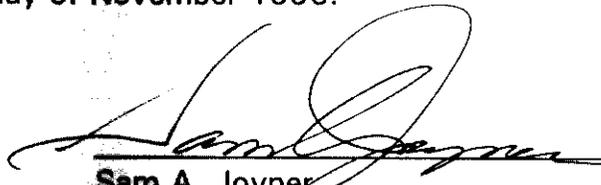
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-1100-J ✓

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's denial of benefits and remanding the case to the Commissioner has been entered. Consequently, judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 25 day of November 1996.



Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FRANCES STANLEY,
SS# 448-50-2598

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security Administration,

Defendant.

NOV 25 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-818-J ✓

ENTERED

DATE 11/27/96

ORDER^{1/}

Plaintiff, Frances Stanley, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ failed to apply the "treating physician rule" or the previous order of remand from this court, (2) the ALJ improperly discounted Plaintiff's credibility, (3) the ALJ refused to recognize that the Plaintiff suffers from Systemic Lupus Erythematosus ("SLE"), and (4) the ALJ improperly

^{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 September 22, 1989. [R. at 106]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Stephen C. Calvarese (hereafter, "ALJ") was March 21, 1990. [R. at 46]. By order dated April 2, 1990, the ALJ determined that Plaintiff was not disabled. [R. at 33]. Plaintiff appealed the ALJ's decision to the Appeals Council. On March 8, 1991, the Appeals Council denied Plaintiff's request for review. [R. at 4]. Plaintiff appealed the Decision to the District Court. By Report and Recommendation dated May 15, 1992, United States Magistrate Judge Jeffrey S. Wolfe recommended that the case be reversed and remanded to the Secretary for further proceedings. By Order dated July 29, 1992, the District Court adopted the Report and Recommendation. A second hearing before ALJ Calvarese was held January 14, 1994. [R. at 296]. By order dated February 7, 1994, the ALJ again determined that Plaintiff was not disabled. [R. at 272]. The Plaintiff appealed the decision to the Appeals Council, which, on June 28, 1995, denied Plaintiff's request for review. Plaintiff subsequently appealed to the District Court.

evaluated Plaintiff's complaints of pain. For the reasons discussed below, the Court affirms the decision of the Commissioner.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on January 16, 1949, was 41 years old at the time of her first hearing, and testified that although she attended high school she did not graduate because she had not passed two courses. [R. at 64]. Plaintiff previously worked at Zebco, winding spools for fishing rods and reels. Plaintiff began work at Zebco in 1976. [R. at 65]. Plaintiff worked at Zebco for approximately nine or ten years, and stated that she resigned her position in 1985 due to problems with her back and high blood pressure. [R. at 20].

Plaintiff testified that she first sought treatment some time in July of 1989. [R. at 68]. Plaintiff's last day of insurance for the purposes of social security disability is September 30, 1989. The records indicate that Plaintiff's initial diagnosis of SLE was probably in September of 1989. Plaintiff claims that she is currently disabled and was disabled on or before September 30, 1989.

II. SOCIAL SECURITY LAW & 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

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

^{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 Commissioner 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).

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

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

^{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."

This Court must also 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.

III. THE ALJ'S DECISION

In this case, the ALJ concluded that Plaintiff retained the ability to perform a full range of work activities from September 1985 through September 1989, and was not disabled prior to the expiration of her insured status. The ALJ noted that the medical evidence indicated that Plaintiff did have lupus prior to September 1989, but that Plaintiff had no physical restrictions from lupus prior to the expiration of her insured status.

In evaluating Plaintiff's alleged disability, the ALJ initially concluded that Plaintiff had not met the required level of severity to pass Step Two of the sequential evaluation process. In the alternative, the ALJ concluded that (due to the prior remand by the Court, if the Magistrate Judge's opinion was interpreted as indicating that Plaintiff did have a "severe" injury), Plaintiff did not meet a Listing, and was additionally not disabled under Step Four, but could do her prior work (at least until September 30, 1989).

IV. REVIEW

Insured Status and "Onset"^{5/} of Disability

Social security disability^{6/} provides a system of limited benefits to individuals who meet certain requirements. Generally, an individual must establish that he or she was disabled prior to the expiration of his or her "insured status." Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990) ("the relevant analysis is whether the claimant was actually *disabled* prior to the expiration of her insured status. . . . A **retrospective** diagnosis without evidence of actual disability is insufficient. This is **especially** true where the disease is progressive.") (citations omitted, emphasis added).

In this case, Plaintiff's last **date of eligibility** for disability insurance is September 30, 1989. [R. at 50]. The record **contains** very few medical records for Plaintiff prior to September 1989. The record **does indicate**, and the ALJ did find that Plaintiff had lupus in September 1989. However, the critical question is not whether or not Plaintiff suffered from a particular **disease**, but whether or not Plaintiff was disabled from the limitations imposed on her **by the disease** prior to September 30, 1989. To

^{5/} "The onset date of disability is the **first day** an individual is disabled as defined in the Act and the regulations." Soc. Sec. Rep. Serv., Rulings **1983-1991**, SSR 83-20 (West 1983).

^{6/} SSI, or supplemental security income **is a separate** social security program which provides similar benefits to disabled individuals whose income **is below** a certain level. SSI benefits do not have the same "insured status" requirements as social security disability benefits or "SDI." According to the records, Plaintiff's monthly household income is **too high to qualify** for SSI, and issues related to SSI are not before the Court. [R. at 109]. Therefore, to qualify for social security benefits Plaintiff must establish that she was disabled prior to the expiration of her insured status.

qualify for disability under the Social Security Act, an individual must be determined "disabled" prior to the expiration of the individual's insured status.

Treating Physician & Prior Remand

Plaintiff initially asserts that the ALJ failed to follow the treating physician rule. Plaintiff argues that the medical evidence from Plaintiff's treating physicians (Doctors McKay, Gramolini, and Vaughn) establish that Plaintiff had SLE. However, as noted above, whether or not Plaintiff actually had SLE is not the issue for the purpose of determining disability; the issue is whether Plaintiff was disabled from any limitations imposed by SLE prior to the expiration of her insured status.

In December of 1984, Plaintiff was involved in a motor vehicle accident. One week after the accident Plaintiff was treated in the emergency room for bruising and ecchymosis on her left lower leg. The records indicated she had full range of motion in her left knee and ankle. The doctor noted that he reassured the patient that the ecchymosis was not gangrene. No other reports with respect to the motor vehicle accident are in the record. [R. at 172-73].

Plaintiff, on February 19, 1985, indicated that she was feeling "okay," that her ear was much better, and that her throat was well. Plaintiff reported to the doctor that she was "laid off" from work approximately three weeks ago. [R. at 187].

Plaintiff was treated for a fracture of her right finger in March of 1985. [R. at 171]. In December 1985, Plaintiff reported a 26 pound weight loss and was "doing just fine." [R. at 190].

Douglas M. Vaughn, D.O., is listed as Plaintiff's dermatologist. He notes that his initial consultation occurred on August 9, 1989, and he suspected SLE. On August 9, 1989, the records indicate that specimen was obtained from Plaintiff's "vertex scalp, right temple." The diagnosis was "discoid lupus." [R. at 231]. Dr. Vaughn placed Plaintiff on SPF 29 sun screen for use with exposure to the sun. [R. at 232]. Dr. Vaughn requested that Dr. Buster McKay, D.O., consult with him as to whether Plaintiff did have SLE and as to any recommended treatment. [R. at 229].

Plaintiff's medical records are sparse until she began seeing Dr. McKay. Plaintiff's first record from Dr. McKay is dated September 6, 1989. Dr. McKay notes that Dr. Cannon requested that he provide a consultation with respect to Plaintiff. Dr. McKay reported that Plaintiff "has a history of arthralgias^{7/} of approximately two years' duration. She feels that over the last six months these symptoms have become progressive and seem to involve her hips, knees and elbows. She admits to one hour of morning stiffness and relates her fingers are puffy at times." [R. at 202]. Dr. McKay reported that Plaintiff's "gait and station were unremarkable." [R. at 203]. In addition, her "[j]oint examination revealed no evidence of active synovitis, effusion, warmth or erythema. Range of motion was normal in the cervical spine, shoulders, elbows, wrists, hips, knees and ankles. There was mild "puffiness" involving the proximal interphalangeal joints in both hands. Raynaud's phenomenon was not noted." [R. at 203].

^{7/} Taber's Cyclopedic Medical Dictionary 153 (17th ed. 1993), defines "arthralgia" as "pain in a joint."

On September 11, 1989, Dr. McKay indicated that Plaintiff "probably has systemic lupus erythematosus. However, currently she is not in an apparent flare. Her criteria consists of photosensitivity, discoid lupus, double-stranded DNA (immunologic), and positive fluorescent antinuclear antibody." [R. at 199]. Dr. McKay further noted that "[c]urrently, her main symptoms seem to be that of arthralgia, and probably nonsteroidal agents are our best choice at this time." [R. at 199].

On September 14, 1989, Dr. McKay reported that he was concerned about the possibility of SLE. He indicated that his examination of that day indicated that conditions were relatively unchanged. "Joint exam revealed no evidence of active synovitis, effusion, warmth or erythema. She does complain of discomfort involving the sacroiliac joint but I feel this is probably mechanical in nature." [R. at 197]. Dr. McKay reported that "[a]t this point in time, I do not feel her symptoms require anything stronger than a nonsteroidal agent although Plaquenil as I have mentioned may be considered in the future. . . . I feel at the present time her SLE is quiescent and requires no further therapy other than nonsteroidal agents." [R. at 197].

On October 17, 1989, Dr. McKay indicates that Plaintiff had no erythema, but did have some tenderness upon range of motion in both of her wrists. In addition, she "continue[d] to be troubled with arthralgias and myalgias."^{8/} [R. at 255] Plaintiff was

^{8/} Taber's Cyclopedic Medical Dictionary 1256 (17th ed. 1993), defines myalgia as "tenderness or pain in the muscles; muscular rheumatism."

placed on Plaquenil, after a discussion of possible side effects, for control of her arthralgias and myalgias. [R. at 255].

On November 15, 1989, Dr. McKay noted that Plaintiff "returned today with 30 minutes of morning stiffness and described her most symptomatic joints as being her knees and ankles. She denied any erythematous, warm or swollen joint." [R. at 252]. Plaintiff's prescription of Plaquenil was continued at its current dose. [R. at 253].

A Residual Physical Functional Capacity Assessment ("RFC Assessment"), completed on December 1, 1989, indicated that Plaintiff had the ability to occasionally lift fifty pounds, frequently lift 25 pounds, stand or walk with normal breaks for at least six hours in a normal workday, sit for at least six hours in a normal workday, and push or pull an unlimited amount. [R. at 155]. An RFC Assessment completed on November 3, 1989 indicated that Plaintiff could lift a maximum of fifty pounds, frequently lift or carry 25 pounds, stand or walk approximately six hours in a normal work day, and sit approximately six hours in a normal work day. No other limitations were indicated. [R. at 166].

On January 16, 1990, Dr. McKay reported that Plaintiff "has had no changes in coordination, walking, speech, buttoning buttons or doing the normal daily activities of living." [R. at 250].

By letter dated January 18, 1990, Dr. McKay noted that he initially saw Plaintiff for the diagnosis of SLE, and that since that time he had seen her on a regular basis. "She has been troubled with progressive fatigue, arthralgias and myalgias. At the present time, her disease is actively flaring. It is my impression that it would be very

difficult if not impossible for her to perform any duties while standing due to her joint and muscle symptomatology. It is also questionable whether or not she would be able to do fine motor movements with her hands."^{9/} [R. at 244].

However, on January 24, 1990, Dr. McKay noted that he had seen Plaintiff one week ago for numbness and tingling, and that on her return visit of this date she "has had complete resolution of her symptoms. She continued to describe fatigue and low backache. She has less than one hour of morning stiffness. She has not had any cutaneous lesions, fever, nausea, vomiting, dyspnea, chest pain or diarrhea." [R. at 248]. In addition, her "[g]ait and station were normal . . . [and] [t]here was no paresthesias, paresis or paralysis. . . . Joint exam revealed no evidence of synovitis, warmth, effusion or erythema." [R. at 248]. Dr. McKay concluded that he could not completely exclude Plaintiff's recent "symptoms" as a flare of her lupus, but that he did not think that they were caused by Plaintiff's lupus.

By letter dated February 14, 1990, Gary W. Cannon, D.O. noted that Plaintiff had been under his care since August 2, 1989, for treatment of SLE, rheumatoid arthritis, and hypertension. Dr. Coleman noted that Plaintiff had a great deal of swelling from her arthritis and on some days was unable to dress herself. Additional records from Dr. Cannon are sparse.

Plaintiff completed and Dr. Gramolini signed an application for handicapped parking permit on June 5, 1991. [R. at 417].

^{9/} The ALJ does refer to the diagnoses of Dr. McKay, but the ALJ observes that such diagnoses are "current" rather than retrospective.

On May 22, 1992, Dr. McKay noted that "[a]rticular examination reveals no synovitis, effusion, warmth or erythema in any joint. Range of motion was normal in the cervical spine, shoulders, elbows, wrists, hips, knees and ankles." [R. at 393].

Plaintiff initially asserts that the ALJ ignored the relevant evidence from her treating physicians. Plaintiff is correct that a treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). The opinion of a treating physician may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

(1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Id. at 290; 20 C.F.R. § 404.1527(d)(2)-(6).

However, contrary to Plaintiff's **assertion**, the ALJ's opinion does not indicate that the medical evidence from Plaintiff's **treating physicians** was ignored. The ALJ concluded that Plaintiff did have **lupus**, but that "[t]he medical evidence demonstrates that none of the claimant's **treating physicians** placed any restrictions on the claimant's performance of any **activities** during the adjudicatory period." The ALJ notes that "Dr. McKay's **medical documentation** during the adjudicatory period includes a very clear indication that the claimant **suffered** from Lupus and the Administrative Law Judge will treat Dr. McKay's **opinions** as stating such. However, Dr. McKay's examinations do not show any **restrictions** on the claimant's physical capabilities, her physical examination was negative for **any restrictions** with respect to the claimant's joints or other systems. . . . The **September 14, 1989**, opinion of Dr. McKay demonstrated that there had been **no change**, in other words the claimant was still without any significant **manifestations** of Lupus, and the Lupus was described as 'quiescent' (inactive or dormant)." [R. at 283].

The ALJ found that although Plaintiff had SLE prior to the expiration of her insured status, she had no **limitations imposed** by SLE that would affect her ability to perform work prior to **September 30, 1989** and that she was therefore not disabled. The ALJ's findings are supported by **substantial** evidence, and do not indicate that he ignored the opinions of the **treating physicians**.

As noted above, one of Plaintiff's **treating physician's**, Dr. McKay, on **September 14, 1989**, indicated that Plaintiff's **gait and station** was stable and that Plaintiff had

no evidence of "active synovitis, effusion, warmth or erythema." [R. at 197]. At this time, Plaintiff was treated with Ibuprofen, and was to use an SPF 29 skin block when exposed to the sun. [R. at 197].

Dr. McKay additionally noted that Plaintiff's disease was progressive. By January and February of 1990, Plaintiff's doctors indicated that Plaintiff did have some limitations as a result of her lupus. Dr. McKay indicated that Plaintiff suffered from fatigue and arthralgia and would have difficulty standing for any length of time. [R. at 244]. Dr. Cannon indicated that Plaintiff had difficulty dressing and performing some daily activities. However, none of the doctors indicated that Plaintiff suffered from such limitations prior to the expiration of her insured status.

The ALJ additionally considered evidence from Plaintiff's doctors which was obtained and submitted after the expiration of Plaintiff's insured status (on September 30, 1989) in his decision as to whether or not Plaintiff was disabled. And, such use is proper. The Commissioner may use evidence obtained after the expiration of the insured status period in determining whether or not an individual was disabled prior to the expiration of the individual's insured status. The Tenth Circuit has held that although "retrospective diagnosis and subjective testimony can be used to diagnose a physical or mental condition, this type of evidence alone cannot justify an award of benefits." Flint v. Sullivan, 951 F.2d 264 (10th Cir. 1991). See also Potter v. Secretary of Health & Human Serv., 905 F.2d 1346, 1348-49 (10th Cir. 1990) ("the relevant analysis is whether the claimant was actually disabled prior to the expiration

of her insured status. A retrospective diagnosis without evidence of actual disability is insufficient.") (citations omitted).^{10/}

Plaintiff additionally asserts that the ALJ failed to follow the prior remand Order of the court. As noted, the ALJ found, first, that Plaintiff's asserted disability did not meet the Step Two requirements. In the alternative, the ALJ concluded, under Step Four, that Plaintiff could perform her past relevant work.

The prior decision of the court which remanded this case to the Secretary for further proceedings, concluded that the Secretary had failed to follow the treating physician rule. Arguably, a conclusion by the previous court that the Secretary had failed to follow this rule required a finding that Plaintiff's "impairments" must have met the Step Two "severity" requirement. (This issue is not specifically addressed in the remand order.) Plaintiff therefore asserts that the ALJ ignored the prior remand order by failing to proceed in his evaluation to Steps Four and Five, and by again ignoring the treating physician rule.

^{10/} The Court notes the recent decision of Miller v. Chater, ___ F.3d ___, 1996 WL 635165 (10th Cir. Nov. 1, 1996). In Miller, the ALJ had determined that Plaintiff had the RFC to perform light and sedentary work and was not disabled prior to the expiration of the claimant's insured status. The ALJ concluded that, based on the evidence, the claimant had failed to establish his disability prior to the expiration of the claimant's insured status. The Tenth Circuit reversed because the ALJ had shifted the burden of proof to the claimant, when, at Step Five the Commissioner has the burden of proof. Initially, in this case, the ALJ concluded based on the evidence in the record that although Plaintiff did have SLE, she had no limitations as a result of her SLE. Furthermore, in this case the ALJ first found that Plaintiff did not meet Step Two. In the alternative, the ALJ concluded that Plaintiff was not disabled under Step Four. At Step Four, Plaintiff still has the burden of proof. Consequently, the situation presented to the Tenth Circuit in Miller is not present before the Court here.

Plaintiff's argument is without merit. As noted, the ALJ "alternatively" found that Plaintiff was not disabled prior to the expiration of her insured status at Step Four.^{11/} In addition, as noted above, the ALJ did not ignore the treating physician rule.

Plaintiff additionally references an April 13, 1993 RFC, asserting that it was improperly ignored by the ALJ. The 1993 RFC does impose significant limitations upon Plaintiff's ability to perform work-related functions. Plaintiff is indicated as being able to sit for approximately two hours (eight hour day), stand and walk for approximately 10-30 minutes each (eight hour day), lift five pounds occasionally, and lift ten pounds infrequently. However, as noted above, the relevant inquiry is what limitations Plaintiff had before September 30, 1989. The ALJ did consider medical evidence after September 30, 1989, but only in determining whether or not it indicated that Plaintiff was disabled **before** that date. Plaintiff's disease is progressive. Although the 1993 RFC may indicate that Plaintiff was disabled in 1993, the Court cannot conclude that the ALJ erred by failing to give it controlling weight in his determination that Plaintiff was not disabled prior to September 30, 1989.^{12/}

^{11/} The ALJ's findings at Step Four are not specifically challenged by Plaintiff. Nevertheless, they are supported by substantial evidence. As noted above, none of Plaintiff's treating physicians placed any specific limitations upon Plaintiff's physical capabilities prior to September 30, 1989. In addition two RFC's (completed in November and December 1989) indicated that Plaintiff had the physical capability to perform her previous work. [R. at 155, 166]. Furthermore, the vocational expert at the first hearing testified that Plaintiff would be able to return to her past relevant work.

^{12/} The ALJ did note that the 1993 RFC contained several discrepancies with respect to Plaintiff's performance of some of the tests. [R. at 282].

Plaintiff's Credibility

Plaintiff additionally argues that the ALJ erred in assessing her credibility. Initially, Plaintiff observes that she should not be faulted for a "poor memory" due to the lapse in time between her claim of disability (1989) and her testimony at the second hearing (1994), when the remand and subsequent passage of time is due, in part, to the Commissioner. The Court agrees, and discounts this reason as a basis for analyzing Plaintiff's credibility. However, this reason is not the sole reason given by the ALJ for discounting Plaintiff's credibility.

Initially, the Court notes that Plaintiff testified at two hearings before the ALJ. The first hearing was in March 21, 1990, and the second hearing occurred on January 14, 1994. Consequently, the Court and the ALJ has available to it testimony from the Plaintiff at her first hearing which was reasonably close in time to the date of the expiration of her insured status. In addition, Plaintiff's testimony from each of the two hearings is not substantially different.

The ALJ noted that Plaintiff testified that her property line was approximately 330 feet from her house and she was able to walk to the back of it. Plaintiff stated that she could only go about ten or twelve feet before needing to rest, that she rested for approximately five minutes, and that it took her approximately fifteen to twenty minutes to complete the entire distance. [R. at 71]. The ALJ noted that Plaintiff's testimony was inconsistent because three to four rest periods of five minutes would be approximately fifteen to twenty minutes, and yet Plaintiff would have travelled only 36-48 feet. [R. at 283]. Plaintiff states that the ALJ's analysis "was taken totally out

of context," but Plaintiff does not explain how or why. The ALJ merely summarized Plaintiff's testimony, concluding that the numbers given by Plaintiff simply did not "add up."

The ALJ additionally noted that although Plaintiff complained of pain "all over her body" Plaintiff did not exhibit the signs consistent with the pain to which she testified. Plaintiff argues that Plaintiff never made a declarative statement that she had pain "all over her body,"^{13/} and that Plaintiff was undergoing various treatments for pain. As noted above, prior to the expiration of her insured status, Dr. McKay noted that Plaintiff's SLE was adequately controlled with Ibuprofen. (By October, Dr. McKay had prescribe Plaquenil.) The medical records do not indicate that Plaintiff used paraffin dips or hotpacks prior to the expiration of her insured status.

The ALJ additionally noted the 1993 RFC which, according to the ALJ, indicated inconsistencies in the Plaintiff's statements. The RFC noted that Plaintiff had no limitation on the ability to use her feet for repetitive movements because she was able to drive. The doctor himself noted that there were several "discrepancies on today's examination. . . ." [R. at 364]. Plaintiff argues that the ALJ's reliance on this examination is curious because this doctor placed numerous restrictions on Plaintiff. As previously noted, the ALJ did review this medical evidence but found that the doctor's conclusions as to Plaintiff's limitations were of dubious value given the date

^{13/} Although Plaintiff may have not have specifically stated she had pain "all over her body," her testimony and her applications for disability indicated that she had pain in her legs, hips, feet, elbows, knees and hands. [R. at 112, 116].

of the examination (April 1993), and the expiration of Plaintiff's insured status (September 1989).

The Court concludes that the ALJ's findings with respect to Plaintiff's credibility are not taken out of context and are supported by substantial evidence.

Plaintiff Suffered from SLE

Plaintiff argues that she suffered from SLE and was therefore precluded from working on a sustained basis. The ALJ agreed that Plaintiff did have SLE prior to September 30, 1989, but concluded that Plaintiff had no limitations which would preclude her from working after that date.

Plaintiff argues that Dr. McKay never said that she could return to work, even in September of 1989. However, as pointed out by the ALJ, Plaintiff has the burden of proof to initially establish that she could not work, and Dr. McKay did not place any limitations on Plaintiff (or note any limitations) in September of 1989. To the contrary, Dr. McKay's reports at that time indicate that Plaintiff had no synovitis or effusion and that her gait was stable.

Plaintiff additionally notes, almost as an "aside" that the ALJ did not give due consideration to Plaintiff's depression. The record does indicate that in November of 1987 Plaintiff overdosed on sixty (5 mg.) Valiums. [R. at 456]. The record gives no indication of treatment for any form of depression or mental complaints, and Plaintiff's doctors do not indicate that Plaintiff has or had a mental impairment. In addition, Plaintiff's disability applications indicate that her disability is due to pain in her legs,

hips, feet, elbows, knees and hands. [R. at 112, 116]. The ALJ's conclusion that Plaintiff did not suffer from a mental impairment is substantiated by the record.

Evaluation of Pain

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

Plaintiff asserts that the ALJ failed to follow Luna.

Initially, the ALJ summarized Luna and its requirements. [R. at 281-82]. The ALJ first concluded that Plaintiff's complaints of pain did not have a sufficient medical basis and therefore Plaintiff did not meet the first prong of the Luna analysis. [R. at 286]. The ALJ did conclude that Plaintiff had SLE, which is a medical impairment that could be expected to produce pain. However, the ALJ concluded that the medical records did not substantiate Plaintiff's claims of pain or limitations.^{14/} However, Plaintiff also analyzed Plaintiff's subjective complaints of pain in accordance with the third step of Luna.

In giving his rationale for concluding that Plaintiff was not disabled due to pain, the ALJ initially noted that if Plaintiff's pain was as described, one would expect to find more signs of the effects of the pain. The ALJ noted discrepancies in Plaintiff's

^{14/} In accordance with Luna, a claimant must first establish, by medical evidence, an impairment which could reasonably be expected to produce pain. Only after Plaintiff has met this burden is the ALJ required to analyze a claimant's subjective complaints of pain.

1993 RFC, and discrepancies in Plaintiff's testimony. [R. at 282, 283]. The ALJ reviewed the medical evidence and concluded that none of Plaintiff's treating physicians placed any restrictions on her during the adjudicatory period. The ALJ noted that Dr. McKay reported that Plaintiff stated she had stiffness for one hour in the morning but that Dr. McKay made no findings that were consistent with stiffness and reported that Plaintiff's gait and station were stable. [R. at 183]. The ALJ additionally considered evidence after the adjudicatory period but concluded that Plaintiff still had no more than mild restrictions on her abilities. The ALJ observed that Plaintiff's complaints of pain were not substantiated by her medical records or her doctors' reports. [R. at 285]. The ALJ noted that in September 1989, Plaintiff was placed on Ibuprofen, and Plaintiff's doctor indicated that Plaintiff's symptoms, at that point, required nothing stronger. [R. at 278].

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). The Court concludes that the ALJ's determination that Plaintiff did not suffer from disabling pain is supported by substantial evidence.

Plaintiff also suggests that the testimony of the vocational expert at the first hearing was "completely unrealistic." The ALJ concluded that Plaintiff was disabled at Step Four, which does not necessarily require the testimony of a vocational expert. See, e.g., Glenn v. Shalala, 21 F.3d 983, 988 (10th Cir. 1994). Plaintiff does not specifically challenge the Commissioner's Step Four findings. Furthermore, Plaintiff does not state why the vocational expert's testimony was "completely unrealistic," and Plaintiff offers no contrary evidence. The vocational expert testified that an individual who was restricted to light or sedentary work, experienced intermittent pain and arthralgias in joints, hips, knees and feet, with inflammation approximately 50% of the time in the elbows and arms, and was required to stay out of the sunlight, would be able to perform several jobs, including those of a dispatcher, a cashier, and a file clerk. [R. at 101-02].

Plaintiff refers to the vocational expert testimony at the supplemental hearing and states it supports her position that she cannot return to her past relevant work. The ALJ based his hypothetical question on Plaintiff's 1993 RFC.^{15/} The vocational expert concluded that Plaintiff would be unable to return to her past relevant work, but would be able to work as an assembler or an information clerk. [R. at 345-46]. Consequently, Plaintiff is correct that, based on several additional limitations, the vocational expert at the 1994 hearing stated that Plaintiff would be unable to do her

^{15/} The hypothetical included sitting two hours at a time, standing thirty minutes to one hour, walking ten to thirty minutes, lifting six to ten pounds frequently, and ten pounds occasionally, and carrying five pounds, with no limitations for foot controls, but a weak grasp. [R. at 344].

past relevant work. However, the ALJ rejected these limitations because Plaintiff did not exhibit such limitations prior to the date of the expiration of her insured status.

In this case, as noted, the ALJ concluded that although Plaintiff had SLE, Plaintiff was able to return to her past relevant work. The ALJ's findings are supported by the record, and the testimony of the vocational expert at the first hearing. In addition, at the second hearing, when the ALJ expanded the hypothetical to include limitations based on a 1993 RFC, the vocational expert still concluded that Plaintiff could perform work in the national economy.

Accordingly, the Commissioner's decision is AFFIRMED.

Dated this 25 day of November 1996.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 25 1996 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRANCES STANLEY,
SS# 448-50-2598

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security Administration,

Defendant.

No. 95-C-818-J ✓

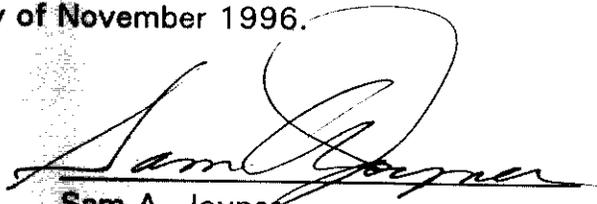
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DATE 11/27/96

JUDGMENT

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

It is so ordered this 25 day of November 1996.



Sam A. Joyner
United States Magistrate Judge

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FILED

NOV 25 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DELBERT D. TOWNLEY,

Defendant.

Civil Action No. 96CV-723B

ENTERED ON DOCKET
NOV 26 1996

DEFAULT JUDGMENT

This matter comes on for consideration this 25th day of Nov., 1996, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Delbert D. Townley, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Delbert D. Townley, was served with Summons and Complaint on October 9, 1996. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

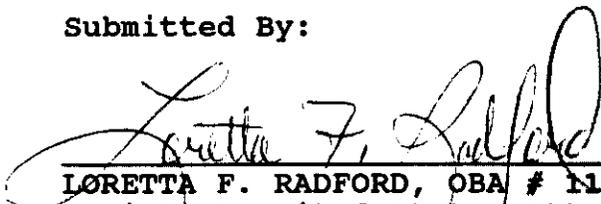
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Delbert D. Townley, for the principal amount of \$1,327.48, plus accrued interest of \$45.93, plus interest thereafter at the rate of 8 percent per annum until judgment, a surcharge of 10% of the

(6)

amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$120.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

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

F I L E D

NOV 25 1996

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

MARY BIG ELK and SAM McCLANE,)
)
Plaintiffs,)
)
vs.)
)
DONNA KASTNING, et al.,)
)
Defendants.)

No. 96-C-0087-B

ENTERED ON DOCKET
DATE NOV 26 1996

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby entered as follows:

1. The Court enters judgment in favor of the Plaintiff Mary Big Elk and against Defendant Jana Welch for actual damages in the amount of \$12,350.00 damages to horses; \$2,000.00 emotional distress; \$4,928.95 as expense incurred in State Court attorney fees (total actual damages \$19,278.95); \$1,000 punitive damages, as well as pre-judgment interest at the rate of 9.55% from the date of filing until the date of this Judgment, and post-judgment interest at the rate of 5.49% from the date of this Judgment until said judgment is paid in full.

2. The Defendant, Jana Welch, is entitled to an offset of \$3,125.00 from said Judgment, said sum previously paid Mary Big Elk in settlement by co-defendants Tina Kastning, Clavin Kastning and Michael Kastning.

3. The Court enters judgment in favor of the Plaintiff Sam McClane and against Defendant Jana Welch in the amount of \$2,100.00 actual damages, \$1,000.00 punitive damages, as well as pre-judgment interest at the rate of 9.55% from the date of filing until

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the date of this Judgment, and post-judgment interest at the rate of 5.49% from the date of this Judgment until said judgment is paid in full.

DATED this 25th day of November, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

11-26-96

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

F I L E D

NOV 22 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RON RANDOLPH, as parent and
next friend of his minor
daughter, AMANDA M. (MIMI)
RANDOLPH; *et al.*,

Plaintiffs,

v.

OWASSO INDEPENDENT SCHOOL
DISTRICT NO. I-011, a/k/a
OWASSO PUBLIC SCHOOLS; *et al.*,

Defendants.

Case No. 96-CV-0105K

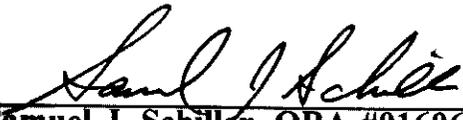
**JOINT STIPULATION OF
DISMISSAL OF INDIVIDUAL DEFENDANTS**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiffs, Ron Randolph, Coy and Candace Brown, Robert and Susan Parker, Robert and Vicki Randolph, Jim and Kay Pigg, Tom and Becky Martin, hereby stipulate with the Defendants, Owasso Independent School District No. I-011, Dale Johnson (individually and in his official capacity), Rick Dossett (individually and in his official capacity), and John Scott (individually and in his official capacity), that this action shall be dismissed with prejudice as to Defendant Johnson in his individual capacity, Defendant Dossett in his individual capacity, and Defendant Scott in his individual capacity.

Respectfully submitted,


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Attorneys for Plaintiffs and Class

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

F I L E D

NOV 26 1996

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

MARY BIG ELK and SAM McCLANE,)
)
Plaintiffs,)
)
vs.)
)
DONNA KASTNING, et al.,)
)
Defendants.)

No. 96-C-0087-B

ENTERED ON DOCKET
NOV 26 1996
DATE

FINDINGS OF FACT AND CONCLUSIONS OF LAW
REGARDING JUDGMENT AGAINST DEFENDANT JANA WELCH

This matter brought pursuant to 42 U.S.C. § 1983 came on for hearing of evidence of damages following entry of default judgment against Defendant Jana Welch only in the above-styled case. Counsel present for the Plaintiffs Mary Big Elk and Sam McClane were Mike McBride III, McBride Law Offices, Tulsa, Oklahoma, and Micheal Salem, Esq. of Salem Law Offices, Norman, Oklahoma. Neither Defendant Jana Welch nor any attorney on her behalf appeared, although she had timely notice of the hearing.

The Plaintiffs presented testimony from Gary Ingerham and Plaintiffs Mary Big Elk and Sam McClane. After hearing testimony from witnesses and receiving evidence, the Court makes the following Findings:

FINDINGS OF FACT

The Court finds:

1. The Plaintiff Mary Big Elk was the owner of nine (9) horses known as:

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Kihekah Stud, Swan Mare, Gene Herren Mare, Jack Wheeler Stud, Yellow Mare, W. Wooyard Mare, Barr King 234, L. Roberts Mare, J. Wheeler Gray Mare.

2. That Plaintiff Mary Big Elk, together with Plaintiff Sam McClane, her agent, were in the business of buying, selling, raising and training horses.

3. That Plaintiff Mary Big Elk and Sam McClane derived their economic livelihood from such horse enterprise.

4. That on or about June 2 and June 26, 1994, Defendant Jana Welch, acting in conspiracy, concert and joint participation with other co-defendants, including state actors, took horses belonging to Plaintiff Mary Big Elk from the Osage County Fairground Stables.

5. That neither Defendant Jana Welch, nor other Defendants, had any sort of legal process or document entitling them to take possession of the horses, including a judgment, replevin order of a court, an execution, perfected security interest or other court order or process that gave them the legal right to take the animals.

6. Plaintiffs Mary Big Elk and Sam McClane were denied the use of the horses throughout the time of deprivation during the summer of 1994.

7. That the Defendant Jana Welch wrongfully exercised dominion and control over the horses together with co-conspirators and co-defendants by padlocking horses in their stalls prior to taking or assisting in taking the horses.

8. That Plaintiffs Mary Big Elk and Sam McClane were without their horses for over two (2) months and a total of nine (9) horses as described above were taken from Plaintiffs Mary Big Elk and Sam McClane.

9. That the reasonable value of the horses prior to the taking in June of 1994, not including colts in gestation, was \$14,950.00.

10. That one of the horses, known as Barr King 234, was returned to the Plaintiffs within days of taking, thus Plaintiff Mary Big Elk only suffered negligible economic injury to this horse only.

11. That the horses suffered from malnourishment, mistreatment, excessive exposure to the elements, and suffered from injuries while in the care of the defendants during the two month deprivation from the Plaintiffs.

12. That it became necessary for Plaintiffs Mary Big Elk and Sam McClane to hire an attorney, Mike McBride III, to assist them in legal actions and negotiations to secure return of their horses. They incurred reasonable legal costs, fees and expenses in the amount of \$4,928.95 in state court proceedings to secure return of the horses.

13. The Plaintiffs and Defendants Michael and Tina Kastning entered into a settlement agreement which provided for the return of the horses to Plaintiffs Mary Big Elk and Sam McClane.

14. The terms of the settlement agreement provided that there would be no breach of the peace, that the Defendants would remain away from the Plaintiffs during the return of the horses and that no other parties would be present.

15. On August 29, 1994, the Defendants Michael and Tina Kastning, including Jana Welch, violated the settlement agreement by having others present, by assaulting the Plaintiffs Mary Big Elk and Sam McClane through verbal assaults, slurs, taunts, throwing

beer on Sam McClane, chasing the **Plaintiffs** off the property and ultimately battering Plaintiff Sam McClane with fists and a radiator hose. Jana Welch was not personally involved in the assault and battery.

16. The assault and battery on **Plaintiffs** McClane and Big Elk caused McClane to lose control of Mary Big Elk's pick-up truck causing it to collide into Gary Ingerham's pick-up truck, resulting in \$2,100.00 in **damage** and Sam McClane is liable to Gary Ingerham for said damages.

17. That upon return of the horses, four (4) mares previously pregnant with colts were no longer in foal (the mares had **aborted** their colts).

18. Gary Ingerham, a professional horse trader with extensive experience in buying and selling horses, testified as to the horses' and colts' value before and the diminished value after the taking of the horses.

19. The horses diminished in value after their return in the total amount of \$12,350.00.

20. The **Plaintiffs** Mary Big Elk and Sam McClane suffered emotional distress from the loss of possession and use of the horses, as well as from the conduct of the Defendants, including Defendant Jana Welch.

21. That Mary Big Elk is **entitled to damages** for emotional distress in the amount of \$2,000.00, regarding the wrongful **taking** of her horses.

22. That Defendant Jana Welch **was** present at both horse takings on or about June 2 and June 26, 1994, and at the time of the **return** of the horses to the **Plaintiffs** on or about

August 29, 1994.

23. That Jana Welch was **served** with a Summons, Complaint and Request for Admissions on July 8, 1996, by a **personal** process server in Fort Worth, Texas.

24. That an Affidavit of Service **was** filed of record in this case on July 19, 1996.

25. That Jana Welch has **wholly defaulted** in any response to the Complaint and discovery and has been deemed in **default** and the facts of the Complaint should be admitted.

26. That Plaintiffs Mary Big Elk and Sam McClane could neither engage their horses in "stud" breeding activity nor **earn stud fees**, nor impregnate their mares during the period of deprivation.

27. That the actions of Jana Welch were in reckless disregard of the rights of the Plaintiffs in the contemplated peaceful **ownership** of the horses.

28. The Plaintiffs are each **entitled** to punitive damages against Defendant Jana Welch in the amount of \$1,000.00 **each** for Defendant Welch's actions.

29. That Plaintiff, Mary Big Elk, **previously** received \$2,500.00 from Defendants Tina Kastning, Calvin Kastning and Michael Kastning in settlement of her claim.

30. That Plaintiff, Mary big Elk, also received a saddle valued at \$625.00 from Defendants Tina Kastning, Calvin Kastning and Michael Kastning in settlement of her claim.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter herein pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.
2. The nine (9) horses belonging to Mary Big Elk were taken without legal justification.
3. One or more deputies of the Osage County Sheriff's Department acted in concert and joint participation with private individuals, including Defendant Jana Welch, to take horses belonging to Mary Big Elk.
4. A procedure whereby private individuals take possession of horses while county law enforcement deputies "stand by" to "prevent a breach of the peace" involves state action. Soldal v. Cook County, 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992).
5. The prehearing taking of horses without court process or perfected security interest by state actors is an unreasonable seizure in violation of the Fourth and Fourteenth Amendments. Soldal v. Cook County, 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992).
6. The prehearing taking of horses without court process or perfected security interest by state actors is a violation of due process and under the Fourteenth Amendment of the Constitution.
7. Private individuals who act in concert and joint participation with state actors to violate constitutional rights of plaintiffs are liable to the same extent under 42 U.S.C. § 1983 as state actors. Dennis v. Sparks, 449 U.S. 24, 27-8, 100 S.Ct. 1336, 63 L.Ed.2d 775 (1980); United States v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1967); Adickes

v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

8. Private individuals are **not entitled** to qualified immunity for civil rights violations when they act in concert and **joint participation** with state actors. Wyatt v. Cole, 504 U.S. 158, 118 L.Ed.2d 504, 112 S.Ct. 1827 (1992); Norton v. Liddel, 660 F.2d 1375, 1379 (10th Cir. 1980).

9. It is an **unreasonable seizure** for private individuals to take prejudgment possession of horses with the **assistance of one** or more county deputies state actors when the private individuals have no **proof of title**, perfected security interest, court process or court order.

10. A person whose **constitutional rights** are violated is entitled to those damages which would normally flow from such an **injury** including diminished value, loss of income, emotional distress. Memphis Community School District v. Stachura, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986).

11. A person whose **constitutional rights** are violated is entitled to punitive damages when the illegal conduct is **willful, wanton** and in reckless disregard of the rights of others. Bell v. Little Axe, 766 F.2d 1391 (10th Cir. 1985); Smith v. Wade, 461 U.S. 30, 75 L.Ed.2d 632, 103 S.Ct. 1625 (1983); Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976).

12. The Plaintiff Mary Big Elk is **entitled** to actual and punitive damages herein as follows: Loss and diminishment of **value** of the horses in the amount of \$12,350.00; emotional distress in the amount of **\$2,000.00**; **attorney fees and expenses** incurred the State Court action in the amount of **\$4,928.95**; **and punitive damages** in the amount of **\$1,000.00**;

less an offset in the amount of \$3,125.00 for monies and property received by way of settlement with Defendants Tina Kastning, Calvin Kastning and Michael Kastning.

13. The Plaintiff Sam McClane is entitled to actual and punitive damages herein as follows: Actual damages in the amount of \$2,100.00, and punitive damages in the amount of \$1,000.00.

14. The Court will defer review of Plaintiffs' Application for Reasonable Attorneys Fees for preparing claims and in seeking judgment against Defendant Jana Welch until adjudication of Plaintiffs' claims against remaining Defendants.

15. The Court will grant prejudgment interest at the Oklahoma statutory rate of 9.55% from the date of filing until the date of this Entry of Judgment.

16. The Court grants post-judgment interest under federal statute 28 U.S.C. § 1961 at the rate of 5.49 percent per annum from the date of Entry of Judgment until judgment is paid in full.

A separate Judgment in keeping with the Findings herein shall be entered contemporaneously herewith.

IT IS HEREBY SO ORDERED this 25th day of November, 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

NOV 22 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

No. 96-C-714-B

ROBERT L. DOSSEY, Individually)
and in his capacity as Director and)
President of Maricopa Foundation)
for Affordable Housing,)

Defendant.)

ENTERED ON DOCKET

DATE NOV 26 1996

ORDER

Before the Court is the Motion to Dismiss filed by defendant Robert L. Dossey ("Dossey") (Docket No. 2). Dossey argues that this action should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Motions to dismiss under Fed.R.Civ.P. 12(b) admit all well-pleaded facts. *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. *Olpin v. Ideal National Ins. Co.*, 419 F.2d 1250 (10th Cir. 1969), cert. denied, 397 U.S. 1074 (1970).

The United States sues Dossey under three legal theories: (1) violation of a HUD regulatory agreement for multifamily housing, 12 U.S.C. §1715z-4a; (2) unjust enrichment and constructive trust; and (3) the False Claims Act, 31 U.S.C. §§3729-3731. In essence, the government alleges that Dossey as Director and President of Maricopa Foundation for Affordable Housing ("Maricopa")

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breached a regulatory agreement regarding the development of Breckenridge Apartments into low income housing, which agreement was entered into in consideration of the United States insuring the mortgage covering the development project. Specifically, the government alleges that Dossey violated the terms of the regulatory agreement by taking or using assets or income of Breckenridge Apartments, and as a result, was unjustly enriched by such monies or assets. Further, the government alleges that Dossey knowingly and fraudulently diverted monies from the Breckenridge Apartment project through Applications for Insurance of Advance of Mortgage Proceeds to HUD. The Court finds these allegations sufficient to support the stated claims.

Dossey also argues that the government failed to state a claim against him individually as it has not alleged sufficient facts to pierce the corporate veil. The government responds that allegations supporting piercing the corporate veil are unnecessary as it has alleged that Dossey signed and agreed to Paragraph 17 of the HUD Regulatory Agreement for Multifamily Housing which states:

The following owners: Maricopa Foundation for Affordable Housing and its officers, directors and members do not assume personal liability for the payments to the reserve for replacements, or for matters not under their control, provided that said Owners shall remain liable under this Agreement only with respect to the matters hereinafter stated; namely; (1) for funds or property of the project coming into their hands which, by the provisions hereof, they are not entitled to retain; and (b) for their own acts and deeds or acts and deeds of others which they have authorized in violation of the provisions hereof.

Complaint, Paragraph 16. The Court concludes that this provision together with the allegations of Dossey's misappropriation of funds sufficiently state a claim against Dossey individually.

For the reasons stated above, the Court denies Dossey's motion to dismiss. (Docket No. 2).

ORDERED this 21 day of November, 1996.



THOMAS R. BRETT

UNITED STATES DISTRICT COURT

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

F I L E D

NOV 22 1996

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

CHARLES ROBERT TAYLOR)
and GEORGIA L. TAYLOR,)

Plaintiffs,)

vs.)

Case No. 95-C-820B ✓

MARTIN EDWARD GUSS, JR.,)
M.T. FARMS, INC., a foreign)
corporation, MARTIN GUSS,)
d/b/a MARTIN TRUCK REPAIR,)
KEVIN SCHREINER, SUNNY)
ACRES, INC. and NORTHLAND)
INSURANCE COMPANIES,)

Defendants.)

ENTERED ON DOCKET
DATE NOV 26 1996

J U D G M E N T

Pursuant to the Jury's Verdict **accepted** and filed of record on the 21st day of November, 1996, it is hereby **ADJUDGED** and **DECREED** that Plaintiff, Charles Robert Taylor, recover \$93,500.00 in actual damages against the **Defendants**, Martin Guss, Jr., M.T. Farms, Inc., Martin Guss, doing business as Martin Truck Repair, Northland Insurance Companies, Kevin Schreiner and Sunny Acres, Inc., and Plaintiff, Georgia L. Taylor, recover \$63,000.00 in actual damages from said Defendants, plus pre-judgment interest at the **rate** of 9.55 percent per annum from August 23, 1995, until November 21, 1996, and post judgment interest thereafter at the rate of 5.49 percent per annum from the date hereon until paid.

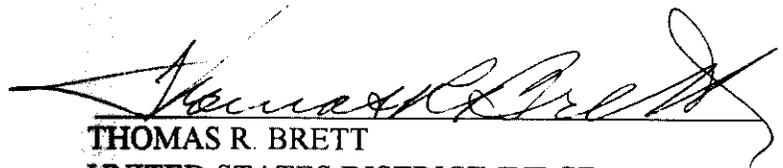
It is further **ADJUDGED** and **DECREED** that Plaintiffs, Charles Robert Taylor and Georgia L. Taylor, recover \$5,000.00 in punitive **damages** against Defendants Martin Guss, Jr., M.T. Farms,

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Inc. and Martin Guss, doing business as **Martin** Truck Repair, and that Plaintiffs, Charles Robert Taylor and Georgia L. Taylor, recover \$10,000.00 in punitive damages against Defendants Kevin Schreiner and Sunny Acres, Inc., plus post judgment interest thereafter at the rate of 5.49 percent per annum from the date hereon until paid.

Costs are assessed against the **Defendants** and may be awarded upon timely application pursuant to local Rule 54.1. Each party is to **pay** its respective attorneys' fees.

IT IS SO ORDERED, this 21st day of November, 1996.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

CHARLES BURNS and)
LINDA BURNS,)
)
Appellants,)
)
)
)
v.)
)
SALINA SPEEDWAY, INC.)
and MARK A. CRAIGE, Trustee,)
)
Appellees.)

NOV 26 1996

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

WP

Case No. 96-C-625-BU ✓

ENTERED ON DOCKET

DATE ~~NOV 26 1996~~

ORDER

This order pertains to the appeal of Charles and Linda Burns ("the Burns"), as the shareholders of Salina Speedway, Inc. ("debtor"), from the order entered by the bankruptcy judge for the Northern District of Oklahoma on March 11, 1996, approving the March 8, 1996 auction sale of several tracts of real property owned by the debtor. The property was sold at a public auction and transferred to the purchasers, and the cash proceeds have been distributed to the creditors of the debtor.

The record shows that this Chapter 11 case was filed on March 15, 1995. A trustee was appointed on December 27, 1995, and a Motion for Authority to Sell Real Property was filed on February 6, 1996. An objection was filed by the Burns on February 26, 1996, claiming that the Trustee's motion failed to establish the defined parcels which would be sold and a minimum bid price greater than written offers previously submitted. A hearing was held on February 29, 1996, and the court

overruled the objection and granted the Motion for Authority to Sell Real Property.

An Order Authorizing Sale of Real and Personal Property was entered on March 1, 1996, setting the sale of the real estate for March 8, 1996, and shortening the notice period for the sale appropriately. The Burns did not appeal or object to the shortened notice. A Notice of Public Sale of Real Property was filed on February 29, 1996, and sent to the Burns and their counsel. The Burns did not object to the notice.

On March 8, 1996, the auction was conducted by the bankruptcy judge and the Burns attended. The properties were sold to the highest bidders for cash, with the sales to close in ten days. At the conclusion of the auction, which was conducted in the bankruptcy court, the Trustee requested the bankruptcy judge to approve the sales. The Burns did not object, and the court confirmed the sales in an order entered on March 11, 1996.

The Burns appealed, but did not move to stay the sales or the distribution of the proceeds. They claim that the March 11, 1996 order violated the bankruptcy rules, since it was "entered ex parte, without notice and opportunity being furnished to the parties in interest to object."

The Burns acknowledge the limited impact this appeal can have on the sales of property that occurred. As a practical matter, the court cannot undo the sales and the distribution of the proceeds. In addition, because the Burns were present at the auction and raised no objection to the court's approving them and did not seek to stay the sales by posting a bond upon appeal, they have waived their right to object

to the bankruptcy court's actions. While the Burns rely on the fact that they objected to the Trustee's motion seeking authorization to sell the property, this objection was overruled by the court and cannot be considered an objection to the sales requiring a confirmation hearing.

An appeal must be dismissed as moot when an appellate court cannot fashion any effectual relief due to events that occurred while the appeal was pending. In re Osborn, 24 F.3d 1199, 1203 (10th Cir. 1994). This appeal is moot and is dismissed.

The court finds that the procedure which was followed by the bankruptcy court comported with the bankruptcy rules and the requirements of due process. Bankruptcy sales are governed by 11 U.S.C. § 363. This provision requires the Trustee to obtain the court's approval of any sales out of the ordinary course of business.¹ This section makes no reference to the manner in which a sale is to be conducted or how notice is to be given.

Rule 6004 of the Fed.R.Bankr.P. governs the procedural framework for sales and the manner in which notice must be given. The Advisory Committee Notes of Rule 6004 state in part:

If a timely objection is filed, a hearing is required with respect to the use, sale, or lease of property. Subdivision (d) renders the filing of an objection tantamount to requesting a hearing so as to require a hearing

¹ Title 11 at Section 363 states in part:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

pursuant to §§ 363(b) and 102(1)(B)(i).

Subdivision (e) is derived in part from former Bankruptcy Rule 606(b) but does not carry forward the requirement of that rule that court approval be obtained for sales of property. Pursuant to § 363(b) court approval is not required unless timely objection is made to the proposed sale . . .

Rule 6004 incorporates Fed.R.Bankr.P. 2002(a)(2) regarding notice of a proposed use, sale, or lease of property of the estate other than in the ordinary course of business. Rule 2002(a)(2) of the Federal Rules of Bankruptcy Procedure provides that twenty days notice of sale must be given unless the court shortens the time or directs another method of giving notice.

Rule 6004 also incorporates Rule 2002(c)(1), which specifies the requirements of the notice of sale. Such notice must include the time and place of any public sale, the terms and conditions of any private sale, the time for filing objections, and a general description of the property. As the court stated in In re Marcus Hook Dev. Park, Inc., 143 Bankr. 648, 660 (Bankr. W.D. Pa. 1992), the notice and hearing requirement "satisfy constitutional requirements where one's interest in property will be adversely affected as a result of judicial action It requires that notice be given to a creditor whose property rights are being affected so that the creditor may have its day in court."

There is no provision in the Bankruptcy Code or the Federal Rules of Bankruptcy which requires a confirmation of sales in bankruptcy. "[N]either the code nor the (local or national) Rules in effect at the time this sale was consummated require that the judge approve such a sale in the absence of objections." In re

Rabzak, 79 Bankr. 960, 963 (Bankr. E.D. Penn. 1987). "The commentators agree that in the absence of a dispute, **there is** no judicial involvement in and no court supervision of a sale." In re Robert L. Hallamore Corp., 40 Bankr. 181, 182 (Bankr. D. Mass. 1984).

The Burns did not object to **the Notice** of Sale and were present at the sale when the court approved the bids and **ordered** the Trustee to close the sales. There is no authority for their argument that, **because** they objected to the Trustee's Motion for Authority to conduct the sale, a **hearing** to confirm the sale was required. It is clear that the Burns had notice of **the sale**, and thus their rights were not violated.

The decision of the bankruptcy judge in the order dated March 11, 1996 is affirmed.

Dated this 25th day of November, 1996.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

S: burns.adv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 22 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES A. FENDER,

Defendant.

Civil Action No. 96CV-778K

FILED ON COURT

11-25-96

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of November 22, 1996 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, James A. Fender, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 22 day of November, 1996.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By A. Schuelke
Deputy

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

FILED

NOV 21 1996

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

THURMAN L. ROWE,)
)
Plaintiff,)
)
vs.)
)
GRAND RIVER DAM AUTHORITY,)
)
Defendant.)

Case No. 95-C-747-BU

ENTERED ON DOCKET

DATE NOV 22 1996

ADMINISTRATIVE CLOSING ORDER

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

If the parties have not reopened this case within 60 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 21st day of November, 1996.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D
NOV 2 1 1996

PATTY BLEDSAW,)
)
 Plaintiff,)
)
 vs.)
)
 HEIDELBERGER DRUCKMASCHINEN)
 AKTIENGESELLSCHAFT, a)
 foreign corporation,)
)
 Defendant.)

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

Case No. 96-C-127-BU

NOV 2 1996

ADMINISTRATIVE CLOSING ORDER

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

If the parties have not reopened this case within 60 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 21st day of November, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

DOCKET

NOV 22 1996

ROBERT E. LANDINGHAM,
Plaintiff,
vs.
JAMES SAFFLE, et al.,
Defendants.

No. 96-CV-1082-B

FILED
NOV 29 1996
Phil Lombardi
U.S. DISTRICT COURT

ORDER

Before the court is Plaintiff's pro se motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and civil rights complaint pursuant to 42 U.S.C. § 1983. Also before the Court is Plaintiff's motion for an emergency temporary restraining order and preliminary injunction. Upon review of the complaint and for the reasons set forth below, the Court finds that venue is not proper in this district and that the action should be transferred to the proper district.

The Court may raise sua sponte the issue of venue in the setting of a section 1915 case. See Yellen v. Cooper, 828 F.2d 1471, 1474-76 (10th Cir. 1987) (allowing for dismissal, under 1915(d) on grounds that would be the basis of an affirmative defense); see also Costlow v. Weeks, 790 F.2d 1486, 1487-88 (9th Cir. 1986) (allowing dismissal sua sponte for lack of venue before responsive pleading had been filed; issue had not been waived). The applicable venue provision for this action is found under 28 U.S.C. §1391(b) which provides as follows:

A civil action wherein jurisdiction is not founded solely

on diversity of citizenship may, except as otherwise provided by law, be brought 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 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.

There is no applicable law with regard to venue under 42 U.S.C. §1983 which would exempt this case from the general provisions of 28 U.S.C. §1391(b). Coleman v. Crisp, 444 F. Supp. 31 (W.D. Okla. 1977); D'Amico v Treat, 379 F. Supp. 1004 (N.D. Ill. 1974).

Plaintiff bases his Complaint on allegations that Defendants have failed to provide him an adequate diet as a result of his allergy to eggs. According to the Complaint, the Defendants are either residents of Oklahoma City or Taft, Oklahoma. The Court takes judicial notice that the city of Taft is located within the Eastern District of Oklahoma. 28 U.S.C. §116. Thus, it is clear that venue is not proper before this Court.

When venue is not proper, the Court may dismiss the action, or if it be in the interest of justice, may transfer the case to the district in which it should have been brought. 28 U.S.C. §1406(a). Due to the fact that Plaintiff is acting pro se, the undersigned finds that it would be in the best interest of justice and judicial efficiency to transfer the case to the proper district.

ACCORDINGLY, IT IS HEREBY ORDERED that this matter is

transferred to the United States District Court for the Eastern District of Oklahoma.

IT IS SO ORDERED this 22^d day of November, 1996.

James O. Brett
By: THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

NOV 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SINCLAIR OIL CORPORATION,
a Wyoming corporation,
Plaintiff,

v.

Case No. 94-C-795-H

WILLIAM R. THOMAS, d/b/a SINCLAIR
GAS MARKETING CO. and SINCLAIR
OIL & GAS COMPANY,
Defendant.

ENTERED ON DOCKET

DATE NOV 22 1996

JUDGMENT

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of Plaintiff.

IT IS THEREFORE ORDERED that Defendant make payment to Plaintiff in the amount of \$ 6,075,399.00.

IT IS SO ORDERED

This 21st day of November, 1996.


Sven Erik Holmes
United States District Judge

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

FILED

NOV 21 1996

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

UNITED STATES OF AMERICA,)
BARBARA PRITCHARD, Revenue)
Officer, and JAN SWAFFORD,)
Revenue Agent, Internal Revenue)
Service,)

Petitioners,)

v.) Case No. 96-MC-49-H ✓

MARK A. WRIGHT, P.C.)
MARK A. WRIGHT, President,)

Respondent.)

NOV 22 1996

ORDER OF DISMISSAL

Upon consideration of the United States' Motion to Dismiss Petition and Strike Hearing, and for good cause shown, IT IS HEREBY ORDERED that this case is dismissed without prejudice to refile petitions to enforce future summonses, and the hearing set for November 21, 1996 IS HEREBY STRICKEN.



SVEN E. HOLMES
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
ASSISTANT UNITED STATES ATTORNEY



CATHRYN McCLANAHAN
ASSISTANT UNITED STATES ATTORNEY
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

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

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

ESTELA VASQUEZ AVILA,
the Next of Kin of HUMBERTO
VASQUEZ DE JESUS, Deceased,

Plaintiff,

-vs-

JOHN DOE, the Unknown Personal
Representative of EMILIAND
GARCIA GAMA, Deceased;
STEVESON'S L.P. GAS TRANSPORT,
INC.; and, JIMMIE LEE DISHMAN,

Defendants.

ENTERED ON DOCKET
DATE NOV 22 1996

Case No. 96-56E

FILED

NOV 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION FOR DISMISSAL

COME NOW Plaintiff and Defendants, each and all, and, pursuant to Fed.R.Civ.Proc. 41(a)(1), hereby stipulate to the voluntary dismissal of the above-referenced action by Plaintiff, without prejudice.

DATED this 20 day of November, 1996.

Respectfully submitted,

LAW OFFICES OF KORT A. BESORE
Post Office Drawer 450939
10 East 13th Street
Grove, Oklahoma 74345-0939
Telephone: (918) 786-6002

ATTORNEYS FOR PLAINTIFF

By: 

Kort A. BeSore, O.B.A. #14674

AND,

BEST, SHARP, HOLDEN, SHERIDAN,
BEST & SULLIVAN
Suite 808
100 West 5th Street
Tulsa, Oklahoma 74103-4225

ATTORNEYS FOR DEFENDANTS

By:



Steven E. Holden, O.B.A. #4289
Brian E. Dittrich, O.B.A. #14934

Prepared by:

Kort A. BeSore, O.B.A. #14674
LAW OFFICES OF KORT A. BESORE
Post Office Drawer 450939
10 East 13th Street
Grove, Oklahoma 74345-0939
Telephone: (918) 786-6002

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

F I L E D

NOV 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORYX ENERGY COMPANY,)
)
Plaintiff,)

vs.)

UNITED STATES DEPARTMENT OF THE)
INTERIOR,)
Defendant.)

Case No. 92-C-1052-E ✓

ENTERED ON DOCKET
DATE NOV 22 1996

UNITED STATES OF AMERICA,)
)
Plaintiff,)

vs.)

ORYX ENERGY COMPANY,)
)
Defendant.)

Case No. 93-C-265-E
(Consolidated)

ORDER

Now before the Court are the cross motions for summary judgment of Oryx Energy Company (Oryx, Docket # 155) and the United States Department of the Interior (DOI, Docket #104) on the royalty valuation issue.

Facts

Oryx, a lessee under various Federal oil and gas leases located offshore on the Outer Continental Shelf, filed this claim contesting the Department of Interior's Order determining that Oryx owes royalties on cost reimbursements it received related to the sale of natural gas. DOI, in turn, filed a separate claim for the amount of royalties due. The two matters were consolidated.

DOI audited Oryx' royalty payments for its leased mineral interests on the Outer Continental Shelf and demanded that Oryx remit \$24,716.12 in royalty under payments. That demand was upheld by the DOI in an order dated March 26, 1992, denying Oryx' appeal in all respects. It is undisputed that Oryx has the obligation to pay royalties on the basis of a specified percentage of the "value of the production saved, removed, or sold" from the lease. 43 U.S.C. §1337(a)(1)(A). The issue here, however, is whether money paid to Oryx by the purchaser, Trunkline Gas Company (Trunkline), as reimbursement for certain costs¹, is part of the "value of the production." DOI takes the position that the reimbursements were for costs necessary to put the gas in marketable condition, and were therefore part of Oryx' gross proceeds subject to royalty. Oryx argues that the reimbursement were not received as gross proceeds from the sale of the natural gas, or in the alternative that the services performed constitute transportation, for which an allowance should be given.

Standard of Review

DOI argues that the Administrative Procedure Act, 5 U.S.C. §706(2)(A) and (C), governs here, and that the Assistant Secretary's decision must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or contrary to statutory right or authority." Oryx asserts that DOI's complaint is not reviewed under the Administrative Procedures Act because DOI is seeking a money judgment based on a claimed breach of contract, and therefore the Court should decide all issues of fact and law raised by that complaint *de novo*.

¹ The services for which Trunkline reimbursed Oryx were for moving the natural gas from the points of production (the wellheads) to the point on the platform where the natural gas is delivered to Trunkline. The parties have stipulated: "12. In accordance with FERC Order 94 and subsequent FERC Orders, Trunkline reimbursed Oryx for the cost of moving the natural gas from the points of production (i.e., various reservoirs in the subsoil of the Outer Continental Shelf) to the point where the natural gas is delivered to Trunkline, for the gas produced during the period July 25, 1980 through August 31, 1981."

Oryx' position, advanced without any authority, is unconvincing. This claim began with Oryx contesting the DOI's March 26, 1992 Order assessing royalties on Order 94 cost reimbursements, and seeking, among other things, a finding that that Order is "arbitrary, capricious, an abuse of discretion, and otherwise unlawful." The mere fact that DOI filed its own claim² to enforce that Order does not change the nature of this Court's review. Therefore, the Court must not set aside the DOI's findings unless its decision was "arbitrary, capricious, or otherwise not in accordance with law." Mesa Operating Limited Partnership v. U.S. Department of the Interior, 931 F.2d 318, 322 (5th Cir. 1991).

Legal Analysis

The parties do not dispute that Oryx must pay royalties based on the "amount or value of production saved, removed, or sold," and that the value of production is never less than "the gross proceeds accruing to the lessee from the disposition of the produced substances." 43 U.S.C. §1337, 30 C.F.R. §206.150 (1987). Moreover, under the marketable condition rule, "[t]he lessee shall put into marketable condition, if commercially feasible, all products produced from the leased land. In calculating the royalty payment, the lessee may not deduct the costs of treatment." 30 C.F.R. §250.42 (1987). Marketable condition is defined as "... lease products that are sufficiently free from impurities and otherwise in a condition that they will be accepted by a purchaser under a sales contract typical for a field or area." 30 C.F.R. §206.151 (1988).

The "cost reimbursements" that are at issue in this case came about through the Natural Gas Policy Act (NGPA), §110(a), 15 U.S.C. 3320 (a) wherein FERC could allow gas producers to charge more than the otherwise applicable ceiling price to recover certain costs. Thus, §110 excepts from

² DOI asserts that the only reason it filed its own claim was to protect against the argument that the statute of limitations had run during the pendency of this suit.

the ceiling price certain post-production costs, allowing producers to recover these (i.e. be reimbursed for) costs in addition to the unit price for delivered gas from purchasers. Section 110 provides in pertinent part:

. . . [A] price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part is such first sale price exceeds the maximum lawful price to the extent necessary to recover--

- (1) State severance taxes. . . ; and
- (2) any costs or compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the [FERC].

By subsequent orders, FERC provided that a first seller of natural gas may receive payment for production-related costs in addition to the ceiling price. Production-related costs were defined as "costs, other than production costs, that are incurred: (1) To deliver, compress, treat, liquefy, or condition natural gas. . . ." 18 C.F.R. §271.1104(c)(7)(I) (1990).

The sole issue to be decided on these cross motions for summary judgment is whether or not the cost reimbursements were for services necessary to put the gas in marketable condition, and thus royalty bearing. The parties have stipulated to the following facts in the Second Joint Stipulation of Facts:

5. Platform "A" provides a structure for producing natural gas from the reservoirs underlying the lease and bringing that natural gas stream to a central accumulation point. This is accomplished by production casing that extends from the deck of the platform to the productive reservoirs underlying the leased premises. Natural gas flows from a given reservoir into the production casing that penetrates that reservoir. Production tubing is located inside the production casing to the top of the producing reservoir. The natural gas is then carried by the production tubing to the platform where it is commingled and accumulated in a manifold with the natural gas carried to the platform by other strings of production tubing. From the reservoirs to the manifold the natural gas is moved through least 3,00 linear feet of production tubing and, in some cases, through as much as 7,000 feet of production tubing.

6. Platform "A" also provides a structure for performing a variety of operations on

the natural gas after it has been produced and accumulated in the manifold. These operations include moving the natural gas stream from the manifold to a separation unit, where the gas is separated from liquid products. The separated gas is then moved from the separation unit to a dehydration unit, where water vapor is removed. Finally, the gas is moved from the dehydration unit to metering facilities on the platform. At those facilities, the natural gas is measured and then delivered to the purchaser. From the manifold to the delivery point, the natural gas is moved through approximately 300 linear feet of pipe.

11. Under the provisions of Article III-A of Exhibit "A" of the April 4, 1977 contract, Oryx agreed that the natural gas delivered to Trunkline would meet certain quality requirements. For example, the natural gas that Oryx delivers to Trunkline cannot contain more than a specified amount of solids, liquids, oxygen, carbon dioxide, hydrogen sulfide, and water. Under the contract, Oryx cannot charge Trunkline for any treatment costs that may be necessary in order for the natural gas to meet those quality requirements.

12. In accordance with FERC Order 94 and subsequent FERC Orders, Trunkline reimbursed Oryx for the cost of moving the natural gas from the points of production (i.e., various reservoirs in the Subsoil of the Outer Continental Shelf) to the point where the natural gas is delivered to Trunkline, for gas produced during the period July 25, 1980 through August 31, 1981. During that period, Oryx did not request Trunkline to reimburse Oryx for any of the services that Oryx was required to perform so that the natural gas would meet the quality specifications of Article III-A of Exhibit A of the contract.

The contract further provides that "The point of delivery for all gas delivered hereunder shall be the inlet side of a measuring station to be installed and operated by Buyer or Buyer's designee on Seller's production platform "A" to be located in Block 380, Eugene Island Area (South Addition)."

Two recent cases bear on the royalty valuation. In Mesa Operating limited Partnership v. U.S. Department of the Interior, 931 F.2d 318 (5th Cir. 1991), the court reviewed DOI's decision that cost reimbursements would be included in the gross proceeds amount for calculating royalties. In Mesa Operating, the DOI defended its position, as in this case, with the assertion that the "justification for treating §110 reimbursements as royalty bearing payments is firmly grounded in that rule's requirement that 'the lessee must bear the costs of marketing the production.'" Id., at p. 322. The

court characterized DOI's interpretation of the regulations to provide that:

"[R]oyalties are due on the gross proceeds accruing to the lessee; the term 'gross proceeds' includes payments for the costs of treatment including measuring, gathering, compressing, sweetening, and dehydrating 'where such services are necessary to place gas in marketable condition,' whether the costs are absorbed in the price the purchaser pays pursuant to the set NGPA ceiling or are ultimately borne by the purchaser under §110; accordingly, where the purchaser reimburses the lessee for treatment costs in accordance with §110 and the Order 94 regulations, these payments become part of the value of production (gross proceeds) subject to royalty."

Id., at p. 323. Finding that the agency's interpretation was permissible and reasonable, the court affirmed the order of the DOI. Thus, Mesa Operating stands for the proposition that it is permissible to assess royalties on cost reimbursements, and that §110 cost reimbursements can be part of the gross proceeds.

Xeno, Inc., 134 IBLA 172 (1995) similarly holds that royalty is due on production related costs, such as costs of measuring, gathering, and compressing gas, "where such services are necessary to place the gas in marketable condition." However, Xeno deals with the factual circumstance that a market for the gas existed at the wellhead, instead of at the more common point of delivery at the entry of the pipeline of the purchaser. 134 IBLA at 182-83. That opinion states:

Concluding that the sole service provided by BCGGS was the gathering and compression of the produced gas to put it in marketable condition, MMS held it was justified in valuing the gas at the price paid by Montana Power. However, the record reflects no analysis of what constitutes marketable condition in the context of gas produced in the field at issue. Appellant has provided substantial evidence that the gas was in marketable condition at the time it was sold to BCGGS. Although the contract with BCGGS, an affiliated firm, is not itself persuasive regarding the marketable condition of gas at the wellhead, appellant has introduced other evidence. It appears from the record that, following completion of the discovery well in the field in 1977, the lessees negotiated to market the gas from the field with numerous firms and that competing offers to purchase the gas at the wellhead were made by Montana Power, an intrastate pipeline company, and Northern Natural Gas, an interstate pipeline company. . . . While the cost of gathering gas from the wellhead and moving it to a nearby delivery point in the field has been disallowed as a cost required to place the production in marketable condition where the lessee is obligated to do so under

the sale contract, the evidence shows that in this case the gas is in marketable condition at the wellhead.

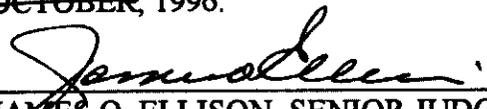
Id. Xeno clearly turns on the evidence produced by Xeno that competing offers were made to purchase the gas at the wellhead, and that, **therefore**, in that field, the gas was in marketable condition at the wellhead, prior to gathering. No such evidence has been presented in this case. Additionally, Oryx' assertion that the burden to show that no market exists at the wellhead is on the government is not persuasive. Absent evidence similar to that produced by Xeno, this case is more factually similar to The Texas Co., 64 I.D. 76 (1957), and The California Co. 66 I.D. 54 (1959), wherein gathering was treated as an expense necessary to put the gas in marketable condition, and therefore royalty bearing. The Court cannot conclude that the DOI's decision that the services were to put the product in marketable condition was arbitrary, capricious, or not in accordance with the law.

Oryx' second argument is that the services it performed were transportation services, which are not royalty bearing. Oryx relies on Xeno, to support its assertion that movement of the gas from the wellhead to the platform can constitute deductible transportation services. The court does not interpret Xeno in this way. In fact, Xeno recites the authority that holds that transportation allowances apply when there is no market in the field. Xeno, at p. 180, 183. Here it is undisputed that the gas was sold at the Lease, and therefore the services performed were not transportation services.

Lastly, the Court does not find convincing Oryx' argument that overpayments of other lessees or its overpayments on other leases are at issue in this lawsuit. The complaint clearly deals with the royalty valuations on this one lease and the amount is uncontested.

DOI's Motion for Summary Judgment (Docket #104) is granted. Oryx' Motion for Summary Judgment (Docket #155) is denied.

IT IS SO ORDERED THIS 20th ^{November} DAY OF ~~OCTOBER~~, 1996.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

11-19

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiff,)

v.)

RAYMOND C. BELL;)

EASTER JO BELL;)

SEARS, ROEBUCK AND CO.;)

COUNTY TREASURER, Tulsa County,)

Oklahoma;)

BOARD OF COUNTY COMMISSIONERS,)

Tulsa County, Oklahoma,)

ROBERT W. GILES,)

Defendants.)

ENTERED ON DOCKET

DATE NOV 22 1996

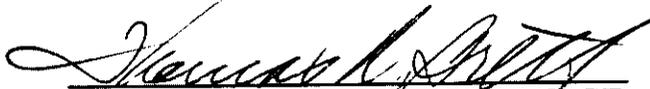
CIVIL ACTION NO. 95-C-1024-B ✓

ORDER OF DISBURSAL

NOW on the 21 day of Nov., 1996, there came on for

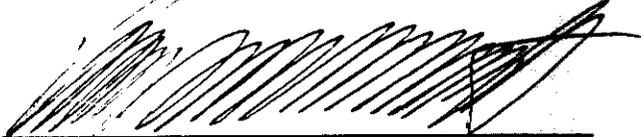
consideration the matter of disbursement of \$18,677.00 received by the United States Marshal for the sale of certain property described in the Notice of Sale in this case. The Court finds that the said \$18,677.00 should be disbursed as follows:

United States Marshal's Costs		\$ 15.00
Executing Order of Sale	\$ 3.00	
Advertising Sale Fee	3.00	
Conducting Sale	3.00	
Appointing Appraisers	6.00	
United States Department of Justice		\$18,662.00
Recording Notice of Lis Pendens	\$ 8.00	
Credit to Judgment of VA	18,654.00	


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Order of Disbursal
Civil Action No. 95-C-1024-B (Bell)

PB:cas

11-14
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 21 1996 *Le*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiff,

v.

HOMER I. STILL;
SHEILA R. STILL;
COUNTY TREASURER, Rogers County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Rogers County, Oklahoma,

Defendants.

ENTERED ON DOCKET
NOV 22 1996
DATE _____

CIVIL ACTION NO. 96-CV-548-C ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 21st day of Nov.,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, Homer I. Still and Sheila R. Still, appear not, summary judgment being entered on October 25, 1996.

The Court being fully advised and having examined the court file finds that the Defendant, Sheila R. Still, executed a Waiver of Service of Summons on July 5, 1996.

It appears that the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, filed their Answer on or after June 19, 1996; that the Defendants, Homer I. Still and Sheila R. Still, filed their

6

Answer on August 22, 1996 through their attorney D. Joel Hulett; and that on October 25, 1996, summary judgment was entered against Defendants, Homer I. Still and Sheila R. Still.

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

**LOT 7, IN BLOCK 1, OF WHISPERING PINES, A
SUBDIVISION IN SECTION 22, TOWNSHIP 21 NORTH,
RANGE 14 EAST OF THE I. B. & M., ROGERS COUNTY,
OKLAHOMA, ACCORDING TO THE RECORDED PLAT
THEREOF.**

The Court further finds that on July 27, 1990, the Defendants, Homer I. Still and Sheila R. Still, executed and delivered to United Savings Assn of the Southwest FSB their mortgage note in the amount of \$116,437.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Homer I. Still and Sheila R. Still, husband and wife, executed and delivered to United Savings Assn of the Southwest FSB, a real estate mortgage dated July 27, 1990, covering the above-described property, situated in the State of Oklahoma, Rogers County. This mortgage was recorded on July 30, 1990, in Book 835, Page 820, in the records of Rogers County, Oklahoma.

The Court further finds that the Secretary of Veterans Affairs is currently the owner of the above-described note and mortgage through mesne conveyances.

The Court further finds that the Defendants, Homer I. Still and Sheila R. Still, made default under the terms of the aforesaid note and mortgage by reason of their failure to

make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Homer I. Still and Sheila R. Still, are indebted to the Plaintiff in the principal sum of \$124,831.00, plus administrative charges in the amount of \$424.00, plus penalty charges in the amount of \$352.00, plus accrued interest in the amount of \$7,960.59 as of October 17, 1995, plus interest accruing thereafter at the rate of 8 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 \$163.00 (\$155.00 abstracting fee, \$8.00 fee for recording Notice of Lis Pendens).

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment against the Defendants, Homer I. Still and Sheila R. Still, in the principal sum of \$124,831.00, plus administrative charges in the amount of \$424.00, plus penalty charges in the amount of \$352.00, plus accrued interest in the amount of \$7,960.59 as of October 17, 1995, plus interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus the costs of this action in the amount of \$163.00 (\$155.00 abstracting fee, \$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 Defendants, County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

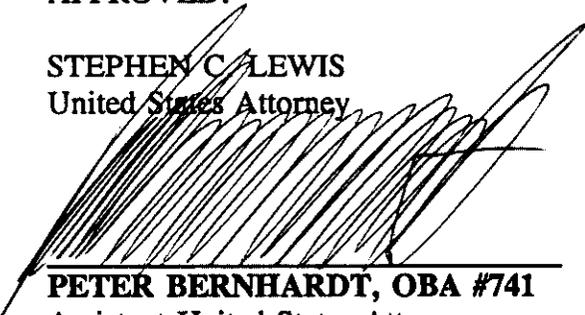
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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.

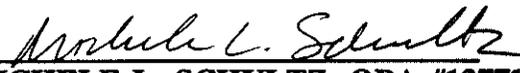

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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

Judgment of Foreclosure
Case No. 96-CV-548-C (Still)

PB:css

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

11-22-96

B & J OPERATING, INC.,)
)
)
 Plaintiff,)
)
 vs.)
)
 APACHE CORPORATION,)
)
)
 Defendant.)

No. 95-C-1170-K ✓

FILED

NOV 21 1996

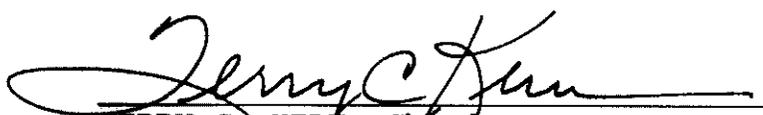
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

ORDERED THIS DAY OF 19th NOVEMBER, 1996


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

DATE 11-22-96

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

FILED

NOV 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

B & J OPERATING, INC.,

Plaintiff,

vs.

APACHE CORPORATION,

Defendant.

No. 95-C-1170-K

ORDER

Now before the Court is the Motion by the defendant for summary judgment. Plaintiff is the owner of a working interest in the Potter-State 1-20 well ("the well") located in Beckham County, Oklahoma. The well was originally drilled and completed in 1979. Defendant has been the operator of the well at all times relevant to this action. Plaintiff acquired its working interest in the well and one other well in 1990 from Pacific Enterprises Oil Company.

Plaintiff filed suit November 28, 1995 alleging breach of fiduciary duty, misrepresentation, and failure to pay sums due. Plaintiff seeks money damages and an accounting for the production activity of the well. The focus of defendant's motion is the assertion that the statute of limitation bars plaintiff's claims.

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." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party

must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

The well was drilled pursuant to the terms of the Joint Operating Agreement ("JOA"). Sarkey's Inc. ("Sarkey's") was the original owner of plaintiff's working interest; Sarkey's executed and was a party to the JOA. In 1979, Sabine Corporation ("Sabine") acquired Sarkey's interest in the well, and in 1989 merged into Pacific Enterprises Oil Company. In 1980, defendant proposed a "workover"¹ attempt on the well, to repair a break in the well's tubing. An Authority for Expenditure ("AFE") was sent by letter dated February 22, 1980 from defendant to other working interest owners, including Sabine, plaintiff's predecessor. The AFE estimated the workover cost at \$329,000.00. Sabine elected a "non-consent" status on the workover attempt and thereby incurred a penalty under the terms of the JOA.

The actual workover cost ultimately calculated by defendant in December 1980 was approximately \$1,070,000.00. Sabine received

¹Workovers are operations on a producing well to restore or increase production. 8 Williams & Meyers, Oil and Gas Law, at 1227 (1995).

copies of the payout statements as early as April 1983² and noted the discrepancy between the AFE and the actual cost. The Manager of Sabine's Internal Audit Department in 1985, Curtis Carver, discussed the matter with other Sabine employees and indicated in a memo that Sabine may wish to further review the issue. By letter dated February 25, 1986, Annette Northcutt, a landman employed by Sabine, contacted defendant about the figures and requested additional documents. The documents were provided; defendant's records do not reflect either Sabine or Pacific Enterprises taking exception to the disputed charges or requesting an audit of defendant's records. Plaintiff has presented no evidence to the contrary.

Plaintiff purchased Pacific/Sabine's working interest in the well in May, 1990. Copies of defendant's payout statements were contained in the Pacific Enterprises files plaintiff received in 1990. A copy of the Curtis Carver memo discussing the discrepancy in the AFE and the amounts shown on the payout statements was also in the Pacific Enterprises files. By certified letter dated October 31, 1994, plaintiff for the first time disputed the charges reflected on the payout statements and demanded additional production revenues from 1981 to 1988, plus interest thereon.

First, defendant points to language in the JOA which states:

Payment of any such bills shall not prejudice
the right of any Non-Operator to protest or

²The date appears in paragraph 8 of the affidavit executed by Patrick K. Brennan, a landman for defendant. He represents it is based upon review of defendant's records. Plaintiff has not disputed the date.

question the correctness thereof; provided, however, all bills and statements rendered to Non-Operators by Operator during any calendar year shall conclusively be presumed to be true and correct after twenty-four (24) months following the end of any such calendar year unless within the said twenty-four (24) months a Non-Operator takes written exception thereto and makes claim for adjustment.

It is undisputed plaintiff's predecessors made no claim for adjustment and indeed plaintiff itself did not make such a claim until its October 31, 1994 letter.

The United States Court of Appeals for the Fifth Circuit has upheld such a "twenty-four months" provision. The court emphasized such a provision should not be interpreted as an impermissible limit on applicable statutes of limitation, but as establishing an evidentiary presumption which can be rebutted upon a showing of fraud or bad faith. See Exxon Corp. v. Crosby-Mississippi Resources, Ltd., 40 F.3d 1474 (5th Cir.1995). See also Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408 (5th Cir.1993).

Plaintiff cites Ludey v. Pure Oil Co., 11 P.2d 102 (Okla.1931) for the proposition that "[b]efore the statute of limitations will start in favor of a tenant in common, there must have been an actual ouster of the one asserting the statute." Id. at 104. Defendant says Ludey merely describes the common law principle that a joint tenant repudiating a co-tenant's interest must oust the co-tenant in order to put them on notice, since both have equal right to possession. Plaintiff has pointed to no case holding that claims for production proceeds, royalties, etc. may be brought at

any time, with no limitation period.³ Also, as defendant points out, plaintiff and defendant were not co-tenants prior to 1990.

Since Ludey, the Oklahoma legislature has passed statutes of limitation directed at production revenues. Those limitations are three years for production occurring prior to September 1, 1992 and five years for production occurring after September 1, 1992. See In re Tulsa Energy, Inc., 181 B.R. 544, 548 (Bankr.N.D.Okla.1995). See also 52 O.S. §570.14(D).

The applicable statute of limitation for breach of contract is also five years, pursuant to 12 O.S. §95(1). The United States Court of Appeals for the Tenth Circuit has applied the five-year statute to a non-operator's claim for audit exceptions made pursuant to the Joint Operating Agreement. See Meridian Oil Production, Inc. v. Universal Resources Corp., 978 F.2d 1267, 1992 WL 32214 (10th Cir.1992). The latest year in which production proceeds were paid to plaintiff's predecessors was 1988. Accordingly, even applying the five-year statute of limitation, any claim was time-barred in 1993.⁴ Plaintiff is bound by its predecessors' failure to exercise rights under the JOA because an assignee requires no greater interest or rights than his assignor

³Plaintiff and defendant have cited unpublished decisions of the Oklahoma Court of Appeals. Pursuant to 20 O.S. § 30.5, such opinions are without precedential value. The Court nevertheless finds the decisions cited by plaintiff factually distinguishable.

⁴Plaintiff has submitted an affidavit of its president, John Bode, which purports to interpret the JOA and describe duties under it, as would an expert witness. Mr. Bode was not designated as an expert witness and he may not offer legal opinions under guise of a self-serving affidavit.

and takes the assignment **subject** to all equities and defenses that existed against the assignor. See Tennant v. Dodsworth, 349 P.2d 9, 11 (Okla.1960).

Finally, plaintiff's **claim** for fraud also fails. In his deposition, plaintiff's **president** testified he did not believe defendant had engaged in any **intentional** misrepresentation. (Bode deposition, p.37 ll.6-7). In any event, 12 O.S. §95(3) bars a claim of fraud after three **years** from the time of the discovery of the fraud or from such **time as** the victim by the exercise of ordinary diligence might have **discovered** same. Baker v. Massey, 569 P.2d 987, 991 (Okla.1977). Plaintiff had access to all its predecessors relevant files, and therefore had the opportunity to discover any alleged fraud in 1990, after obtaining the working interest in the property.

For the reasons discussed above, the Defendant's Motion for Summary Judgment (#11) is **granted**. All other pending motions are declared moot.

ORDERED THIS DAY OF 19th NOVEMBER, 1996


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

11-22-96

UNITED STATES OF AMERICA,

Plaintiff,

FOX RUN APARTMENTS, LORRAINE
DRAKE, CHRISTINA BROWN,
SPRADLIN & ASSOCIATES, INC.,
NORTHCORP REALTY ADVISORS,
INC.,

Defendants.

CASE NO. 95-C-443-K

FILED

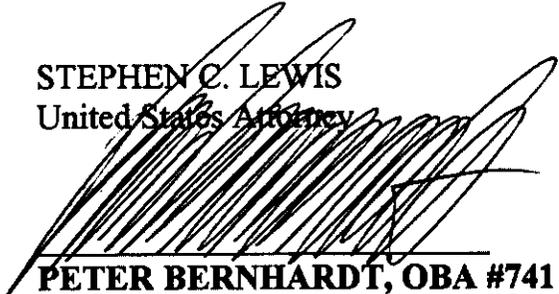
NOV 21 1996

U.S. District Court
Northern District of Oklahoma

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, **United States of America**, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, **Lorraine Drake**, represented by legal counsel Dan Murdock, pursuant to Fed. R. Civ. P.41(a)(1) hereby stipulate to the dismissal of this civil action with prejudice.

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West Fourth Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463



DAN MURDOCK, OBA #6521
3800 NW 70th
Oklahoma City, OK 73116
(405) 842-8621

ENTERED ON DOCKET
DATE 11-22-96

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

MARGARET HELLWEGE,)
)
 Plaintiff,)
)
 v.)
)
 ALLSTATE INSURANCE COMPANY,)
)
 Defendant.)

No. 95-C-1236K

F I L E D

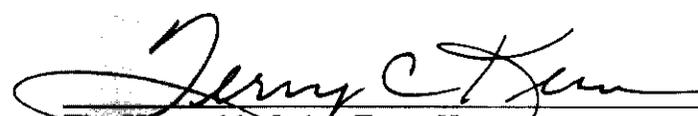
NOV 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P., Rule 41(a), and in accordance with the Stipulation of Dismissal With Prejudice filed by the parties in this action, and in accordance with the General Release of All Claims executed by the parties, the parties hereby dismiss all claims in the above-captioned action with prejudice.

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


The Honorable Judge Terry Kern

360\2\order6.glb

ENTERED ON DOCKET
DATE 11-22-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 PATRICIA MICHELLE JAGGERS, et al.)
)
 Defendants.)

FILED

NOV 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

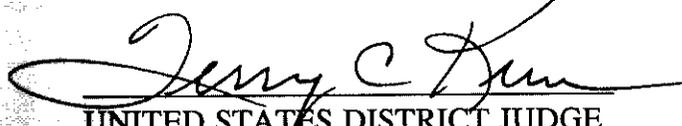
Civil Case No. 95-C 432K ✓

ORDER OF SUMMARY JUDGMENT

Before the Court is the Plaintiff's Motion for Summary Judgment against the Defendants, **Patricia Michelle Jagers and Ronald Dean Jagers.**

As there exists no genuine **issue** of material fact, the Court grants the Plaintiff's Motion for Summary Judgment, entitling the Plaintiff to judgment **in rem** in the amount of 44,297.30 as of March 10, 1995, plus **interest** accruing thereafter at the rate of 8.5% percent per annum, plus interest thereafter at the **legal rate** until paid, plus the costs of this action accrued and accruing, 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. **The Court** directs the Plaintiff to submit to the Court a Judgment of Foreclosure in accordance **with this Order.**

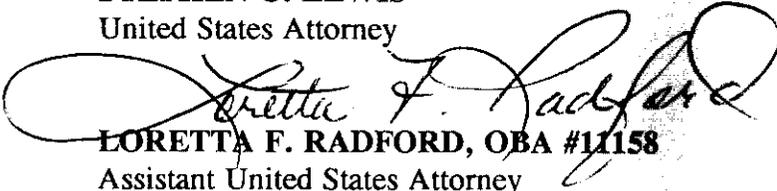
IT IS SO ORDERED, this 18th Day of November, 1996.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS

United States Attorney

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written over the printed name and extends to the left and right.

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, OK 74103

(918) 581-7463

Order for Summary Judgment

Civil Action No. 95-C 432K

LFR:FLV

F I L E D

NOV 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JOSEPH L. COX, JR.,
Plaintiff/Petitioner,

vs.

ROBERT STEPHENS, CARL DAVIS,
ALAN B. FOSTER,

Defendant/Respondent.

No. 96-CV-867-B

ENTERED ON DOCKET
DATE NOV 22 1996

ORDER

On October 29, 1996, the Court directed Plaintiff to cure certain deficiencies in his tendered civil rights action or his action would be dismissed without prejudice. On November 12, 1996, Plaintiff's copy of the above order was returned to the court since he left no forwarding address.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is DISMISSED WITHOUT PREJUDICE for lack of prosecution. Plaintiff's motion for leave to proceed in forma pauperis (Docket #2) is DENIED as it was tendered on the wrong form.

IT IS SO ORDERED this 20 day of Nov, 1996.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 20 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JANE I. SODERSTROM; JOHN F.)
 SODERSTROM; PAMELA JO)
 HANKINS; COUNTY TREASURER,)
 Creek County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Creek)
 County, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE NOV 21 1996

Civil Case No. 95-C 980H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of November, 1996, there comes

on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on September 5, 1996, pursuant to an Order of Sale dated May 9, 1996, of the following described property located in Creek County, Oklahoma:

The South 5 feet of Lot Four (4) and all of Lot Five (5), and the North 10 feet of Lot Six (6), in Block Thirteen (13) BURNETT ADDITION to the City of Sapulpa, in Creek County, State of Oklahoma, according to the recorded Plat thereof. aka 414 N. Elizabeth.

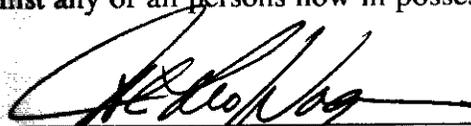
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Jane I. Soderstrom, John F. Soderstrom, County Treasurer, Creek County, Oklahoma and Board of County Commissioners, Creek County, Oklahoma and to the purchasers, Paul Carnes and Phyllis

Carnes, by mail and to the Defendant, Pamela Jo Hankins, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Sapulpa Legal News, a newspaper published and of general circulation in Creek County, Oklahoma, and that on the day fixed in the notice the property was sold to Paul Carnes and Phyllis Carnes, their being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Paul Carnes and Phyllis Carnes, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

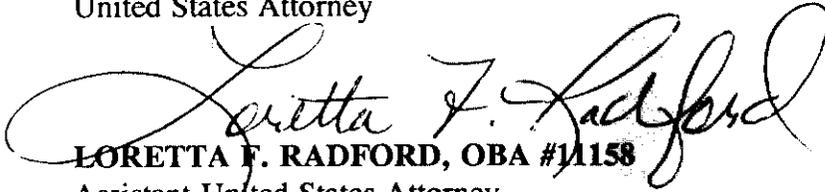

UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 21st Day of November, 1996.
C. Postell, Deputy Clerk

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with large, flowing loops.

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 980H

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 20 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MICHAEL WADE BORRELL aka Mike)
 Borrell; SHARON JEAN BORRELL aka)
 Sharon Borrell; COUNTY TREASURER,)
 Osage County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Osage)
 County, Oklahoma,)
)
 Defendants.)

NOV 21 1996 ✓
Civil Case No. 95 C 1169H ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20 day of November, 1996, there comes on for hearing before the Magistrate Judge the **Motion** of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on September 6, 1996, pursuant to an Order of Sale dated April 4, 1996, of the following described property located in Osage County, Oklahoma:

THAT PART OF THE WEST HALF OF THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER (W/2 NW/4 SE/4 NE/4) OF SECTION THIRTY-TWO (32), TOWNSHIP TWENTY-ONE (21) NORTH, RANGE TWELVE (12) EAST OF THE INDIAN MERIDIAN, LYING WEST OF COUNTY ROAD, OSAGE COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE U.S. GOVERNMENT SURVEY THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendant, Michael Wade Borrell, Sharon Jean Borrell, County Treasurer, Osage County, Oklahoma and Board of County Commissioners,

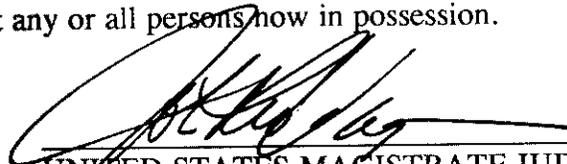
20

and to the purchaser John L. Berrey, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Pawhuska Journal-Capital, a newspaper published and of general circulation in Osage County, Oklahoma, and that on the day fixed in the notice the property was sold to John L. Berrey, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, John L. Berrey, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

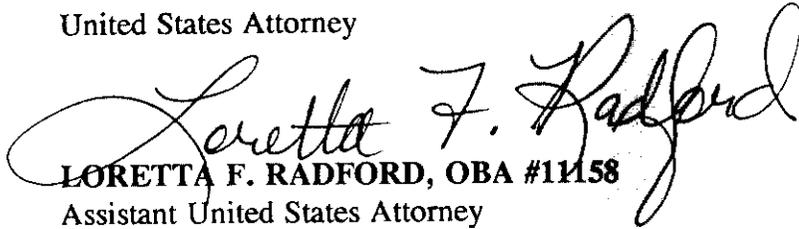

UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 21 Day of November, 1946.
C. Stahler, Deputy Clerk

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

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

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95 C 1169H

ENTERED ON DOCKET
DATE 11-21-96

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

FILED
NOV 20 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARK ZUMWALT, as next friend,
of TZ, a minor, and
STEVE NICHOLSON, as next friend,
of KN, a minor,

Plaintiffs,

vs.

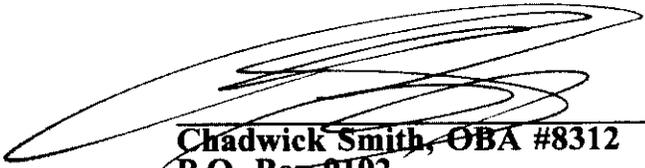
PARK NEWSPAPERS OF SAPULPA,
INC., an Oklahoma corporation;
CITY OF SAPULPA, a Municipal
Corporation; SAPULPA PUBLIC
SCHOOLS, Independent School
District #33; ART COX; and
CHARLES LAKE,

Defendants.

Case No. 96-CV-108-K

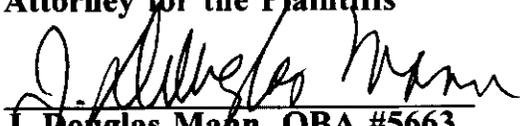
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, the plaintiffs, Mark Zumwalt, as next friend of TZ, a minor, and Steve Nicholson, as next friend of TN, a minor, and the defendant, Independent School District No. 33 of Creek County, Oklahoma, jointly stipulate to the dismissal with prejudice of this matter as it relates to these stipulating parties only.



Chadwick Smith, OBA #8312
P.O. Box 9192
Tulsa, OK 74157-0192
(918) 446-4601

Attorney for the Plaintiffs



J. Douglas Mann, OBA #5663
Rosenstein, Fist & Ringold
525 South Main, Suite 700
Tulsa, OK 74103-4500
(918) 585-9211

Attorneys for Independent School
District No. 33 of Creek County,
Oklahoma

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 23 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 RUSSELL W. INDERMILL;)
 ROXANNE M. INDERMILL;)
 GILCREASE HILLS HOMEOWNER'S)
 ASSOCIATION; MARTHA LEGGINS;)
 COUNTY TREASURER, Osage County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Osage County,)
 Oklahoma,)
)
 Defendants.)

Civil Case No. 95cv 996K ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20 day of November, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on September 6, 1996, pursuant to an Order of Sale dated June 14, 1996, of the following described property located in Osage County, Oklahoma:

Lot Nine (9), Block Eleven (11), GILCREASE HILLS VILLAGE II, BLOCKS 11 AND 12, a Subdivision of Osage County, State of Oklahoma, according to the recorded Plat thereof.

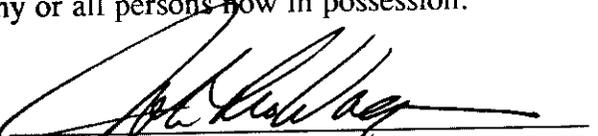
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Gilcrease Hills Homeowner's Association, County Treasurer, Osage County, Oklahoma and Board of County Commissioners, Osage County, Oklahoma, by mail and to the Defendants, Russell W.

Indermill, Roxanne M. Indermill and Martha Leggins by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Pawhuska Journal-Capital, a newspaper published and of general circulation in Osage County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

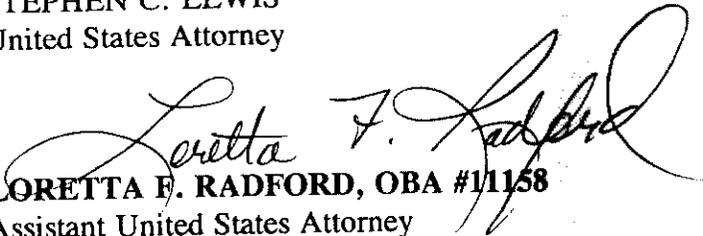
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95cv 996K

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 20 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RL

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
)
 vs.)
)
)
 COLLEEN K. IVEY aka Colleen Ivey;)
 ONISHA IVEY; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
)
 Defendants.)

ENTERED ON DOCKET
DATE NOV 21 1996

Civil Case No. 95 C 1063E ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20 day of November, 1996, there comes on for hearing before the Magistrate Judge the **Motion** of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on September 4, 1996, pursuant to an **Order of Sale** dated June 14, 1996, of the following described property located in Tulsa County, Oklahoma:

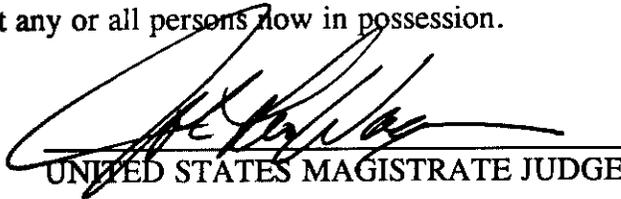
Lot Ten (10), in Block One (1), NORTHRIDGE, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, **Colleen K. Ivey, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma**, by mail and to the **Defendant, Onisha Ivey**, by Publication, and they do not appear. Upon hearing, the **Magistrate Judge** makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT: . . .

STEPHEN C. LEWIS
United States Attorney

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

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 1063 E

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 20 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
HOWARD I. PEACH aka HOWARD)
IRVING PEACH aka HOWARD I.)
PEACH, JR.; PATRICIA L. PEACH aka)
PATRICIA LYNN PEACH; STATE OF)
OKLAHOMA ex rel OKLAHOMA TAX)
COMMISSION; CITY OF BROKEN)
ARROW, Oklahoma; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
Defendants.)

ENTERED ON DOCKET
DATE NOV 21 1996

Civil Case No. 95-C 1082C

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of November, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on September 4, 1996, pursuant to an Order of Sale dated May 30, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Twenty (20), Block Three (3), WOODSTOCK, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat No. 4199.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Howard I. Peach, Patricia L. Peach, State of Oklahoma, ex rel. Oklahoma Tax Commission, City of Broken Arrow,

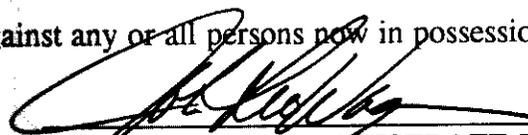
19

Oklahoma, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Broken Arrow Ledger, a newspaper published and of general circulation in Broken Arrow, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

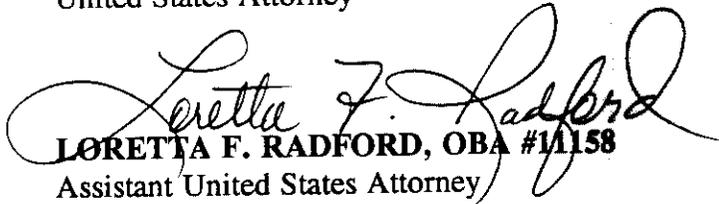
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 1082C

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

NOV 20 1996

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
LESLIE D. ROWE; LISE A. ROWE;)
UNITED BANKERS MORTGAGE)
CORPORATION; STATE OF)
OKLAHOMA *ex rel* OKLAHOMA TAX)
COMMISSION; COUNTY TREASURER,)
Washington County, Oklahoma; BOARD)
OF COUNTY COMMISSIONERS,)
Washington County, Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE NOV 21 1996

Civil Case No. 95-CV 1002C ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20 day of November, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on September 16, 1996, pursuant to an Order of Sale dated May 9, 1996, of the following described property located in Washington County, Oklahoma:

THE NORTH 10 ACRES OF LOT 1 OF SECTION 14,
TOWNSHIP 27 NORTH, RANGE 12 EAST OF THE
INDIAN MERIDIAN, WASHINGTON COUNTY,
OKLAHOMA.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Leslie D. Rowe, Lise A. Rowe, United Bankers Mortgage Corp., State of Oklahoma, *ex rel*. Oklahoma Tax Commission, County Treasurer, Washington County, Oklahoma and Board of County Commissioners,

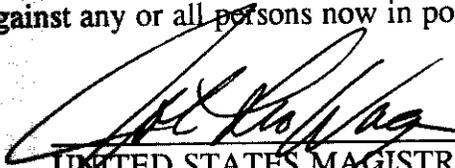
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Washington County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following **report and recommendation**.

The Magistrate Judge has **examined** the proceedings of the United States Marshal under the Order of Sale. Upon **statement** of counsel and examination of the court file, the Magistrate Judge finds that due **and legal** notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Examiner-Enterprise, a newspaper published and of **general circulation** in Washington County, Oklahoma, and that on the day fixed in the notice the property **was sold** to the United States of America on behalf of the Secretary of Housing and Urban **Development**, it being the highest bidder. The Magistrate Judge further finds that the sale was in **all respects** in conformity with the law and judgment of this Court.

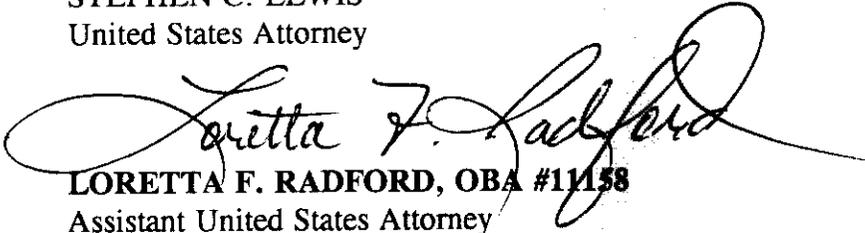
It is therefore the **recommendation** of the United States Magistrate Judge that the United States Marshal's Sale and **all proceedings** under the Order of Sale be hereby approved and confirmed and that the **United States Marshal** for the Northern District of Oklahoma make and execute to the **purchaser**, the United States of America on behalf of the Secretary of Housing and Urban **Development**, a good and sufficient deed for the property.

It is the further **recommendation** of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the **purchaser** by the United State Marshal, the purchaser be granted possession of the property **against** any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large, looping initial "L".

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

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-CV 1002C

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Housing)
and Urban Development,)

Plaintiff,)

v.)

HARRON JAMES EDWARDS;)
MINUETTA MAXINE EDWARDS)
aka Minnette M. Edwards;)
STATE OF OKLAHOMA ex rel.)

Department of Human Services;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)

BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma;)

LEWIS EDWARDS, Tenant,)
SPOUSE OF LEWIS EDWARDS, Tenant,)
aka Sandra Mayfield,)

Defendants.)

F I L E D

NOV 20 1996

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

ENTERED ON DOCKET
DATE NOV 21 1996

CIVIL ACTION NO. 95-C-433-B ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 19th day of Nov,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, State of Oklahoma ex rel. Department of Human Services, appears by its attorney Tammy Bruce Whitham; the Defendant, Harron James Edwards, appears not, summary judgment being entered on OCT. 24 1995; and the Defendants, Minuetta Maxine Edwards aka Minnette M. Edwards; Lewis Edwards,

Tenant; and Spouse of Lewis Edwards, Tenant aka Sandra Mayfield, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Harron James Edwards, was served** with Summons and Amended Complaint on August 3, 1995 by a United States Deputy Marshal; that the Defendant, **Minuetta Maxine Edwards aka Minnette M. Edwards, was served** with Summons and Second Amended Complaint on October 24, 1995 by a United States Deputy Marshal; that the Defendant, **Lewis Edwards, Tenant, was served with Summons and Amended Complaint** on August 2, 1995 by a United States Deputy Marshal.

The Court further finds that the Defendant, **Spouse of Lewis Edwards, Tenant aka Sandra Mayfield, was served by publishing notice** of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning April 12, 1996, and continuing through May 17, 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 Defendant, **Spouse of Lewis Edwards, Tenant aka Sandra Mayfield, and service cannot be made upon said Defendant** by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Spouse of Lewis Edwards, Tenant aka Sandra Mayfield.** The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon

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

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on May 31, 1995, that the Defendant, State of Oklahoma ex rel. Department of Human Services, filed its Answer on May 30, 1995; that the Defendant, Harron James Edwards, filed his Motion For Stay Of Judgment on or after April 10, 1996, which motion was denied by Order of this Court filed on July 22, 1996; and that the Defendants, Minuetta Maxine Edwards aka Minnette M. Edwards; Lewis Edwards, Tenant; and Spouse of Lewis Edwards, Tenant aka Sandra Mayfield, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Thirteen (13), Block Fifteen (15), NORTHRIDGE, an Addition to Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on July 18, 1980, Lawrence H. Stidham and Donice Stidham executed and delivered to Worthen First Mortgage Company, their mortgage note in the amount of \$22,800.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Lawrence H. Stidham and Donice Stidham executed and delivered to Worthen First Mortgage Company, a real estate mortgage dated July 18, 1980, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on September 4, 1980, in Book 4495, Page 93, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 22, 1980, Worthen First Mortgage Company assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage was recorded on December 29, 1980, in Book 4518, Page 999, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 17, 1991, Federal National Mortgage Association assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development. This Assignment was recorded on April 25, 1991, in Book 5317, Page 1039, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, Harron James Edwards and Minuetta Maxine Edwards, currently hold the fee simple title to the property by virtue of General Warranty Deed, dated July 17, 1987, and recorded on July 17, 1987, in Book 5039, Page

2310 in the records of Tulsa County, Oklahoma, and are the current assumptors of the subject indebtedness.

The Court further finds that on August 11, 1993, the Defendant, Harron James Edwards, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, Harron James Edwards and Minuetta Maxine Edwards aka Minnette M. Edwards, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Harron James Edwards and Minuetta Maxine Edwards aka Minnette M. Edwards, are indebted to the Plaintiff in the principal sum of \$21,112.21, plus administrative charges in the amount of \$41.50, plus penalty charges in the amount of \$30.75, plus accrued interest in the amount of \$7,864.24 as of January 1, 1995, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that Defendant, County Treasurer, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the total amount of \$27.00, plus penalties and interest. See table below. Said liens are inferior to the interest of the Plaintiff, United States of America.

Tax No.	Tax Year	Amount	Recorded
93-02-3192370	1993	\$ 7.00	6/23/94
92-02-3186360	1992	\$ 7.00	6/25/93
91-03-3176790	1991	\$13.00	6/26/92

The Court further finds that Defendant, State of Oklahoma ex rel. Department of Human Services, has a lien on the property which is the subject matter of this action by virtue of an Order and Affidavit of Judgment, Case No. FD 89-4992, filed on August 5, 1992, in the District Court of Tulsa County, State of Oklahoma, and recorded on August 7, 1992, in Book 5425, Page 2180 in the records of Tulsa County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendant, Harron James Edwards, filed his Motion For Stay Of Judgment on or after April 10, 1996, which motion was denied by Order of this Court filed on July 22, 1996. Order granting summary judgment was entered on OCT. 24 1998; therefore, Defendant, Harron James Edwards, has no right, title or interest in the subject real property.

The Court further finds that the Defendants, Minuetta Maxine Edwards aka Minnette M. Edwards; Lewis Edwards, Tenant; and Spouse of Lewis Edwards, Tenant aka Sandra Mayfield, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Internal Revenue Service has a lien upon the property by virtue of a Notice of Federal Tax Lien dated March 17, 1991, and recorded on March 19, 1991, in Book 5309, Page 1761 in the records of the Tulsa County Clerk, Tulsa County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however,

by agreement of the agencies the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Secretary of Housing and Urban Development.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Harron James Edwards and Minuetta Maxine Edwards aka Minnette M. Edwards**, in the principal sum of \$21,112.21, plus administrative charges in the amount of \$41.50, plus penalty charges in the amount of \$30.75, plus accrued interest in the amount of \$7,864.24 as of January 1, 1995, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$27.00, plus penalties and interest, for personal property taxes described above, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Department of Human Services, have and recover judgment in the amount due and owing on an Order and Affidavit of Judgment, Case No. FD 89-4992, filed on August 5, 1992, in the District Court of Tulsa County, State of Oklahoma, and recorded on August 7, 1992, in Book 5425, Page 2180 in the records of Tulsa County, Oklahoma, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Harron James Edwards; Minuetta Maxine Edwards aka Minnette M. Edwards; Lewis Edwards, Tenant; Spouse of Lewis Edwards, Tenant aka Sandra Mayfield; and Board of County Commissioners, Tulsa County, Oklahoma,** have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Harron James Edwards and Minuetta Maxine Edwards aka Minnette M. Edwards,** to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

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

Fourth:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Department of Human Services;

Fifth:

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

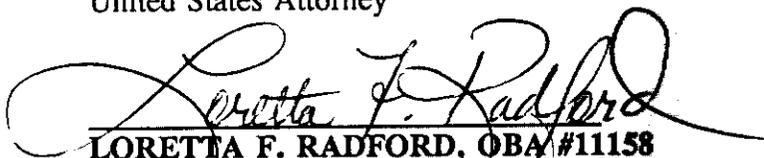
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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.

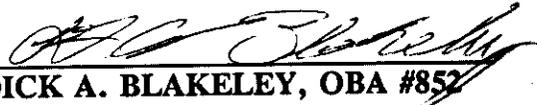

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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Assistant United States Attorney
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Tulsa, Oklahoma 74103
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Judgment of Foreclosure
Case No. 95-C-433-B (Edwards)

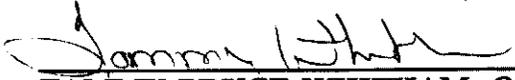


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Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 95-C-433-B (Edwards)



TAMMY BRUCE WHITHAM, OBA #44

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Tulsa, Oklahoma 74101

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Attorney for Defendant,

State of Oklahoma ex rel. Department of Human Services

**Judgment of Foreclosure
Case No. 95-C-433-B (Edwards)**

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