

3/12/97
502

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN E. EASILEY aka Melvin
Easiley; DENISE L. EASILEY; CITY OF
GLENPOOL, Oklahoma; COUNTY
TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

MAR 20 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

MAR 20 1997

Civil Case No. 95-C 437B

AMENDED ORDER OF DISBURSAL

NOW on the 20 day of March, 1997, there came on for
consideration the matter of disbursal of \$57,500.00 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 \$57,500.00 should be disbursed as follows:

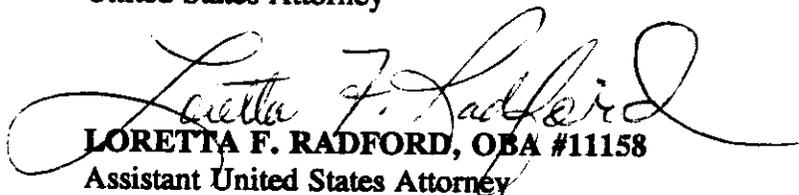
United States Marshal's Costs		\$416.10
Executing Order of Sale	3.00	
Advertising Sale Fee	3.00	
Conducting Sale	3.00	
Appointing Appraisers	6.00	
Appraisers' Fees	225.00	
Publisher's Fee	176.10	
United States Department of Justice Credit for Judgment of \$113,590.87		\$57,083.90

Shawna K. Best
UNITED STATES DISTRICT JUDGE

23

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



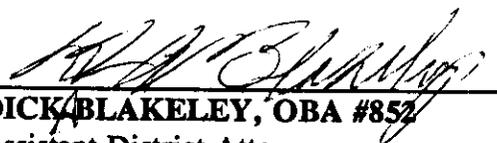
LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463



DICK BLAKELEY, OBA #852

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4841

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Tulsa County, Oklahoma

LFR:flv

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ONE PARCEL OF REAL PROPERTY KNOWN)
 AS:)
)
 E/2 NW/4 SE/4 AND W/2 NE/4 SE/4)
 (40.0 ACRES))
)
 and)
)
 ONE PARCEL OF REAL PROPERTY KNOWN)
 AS:)
)
 E/2 W/2 NW/4 SE/4 (10.0 ACRES))
)
)
 ALL IN SECTION 29, TOWNSHIP 18 NORTH,)
 RANGE 10 EAST, CREEK COUNTY,)
 OKLAHOMA, AND ALL BUILDINGS,)
 APPURTENANCES, AND IMPROVEMENTS)
 THEREON,)
)
 Defendants.)

Case No. 92-C-037-E ✓

FILED

MAR 19 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAR 20 1997

ORDER

Now before the Court is the Motion to Reconsider Order Staying Judgment or Order Pending Appeal (Docket #58) of the Claimant, Melvin Gann.

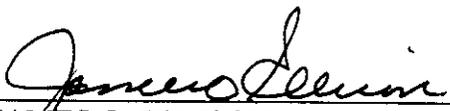
In this case, the government sought forfeiture of property owned by Melvin Gann. Gann opposed the forfeiture, and a Judgment for Forfeiture was ultimately entered. Gann then sought stay of the Judgment so he could appeal. The government responded to that motion stating that a bond

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should be required before granting a stay and that the property was worth \$30,000. The Court therefore stayed the judgment contingent on the posting of a bond in the amount of \$30,000. Gann now objects to the amount of the bond requirement, asserting that he lacks the financial means to post such a bond. Gann, however, gives no basis for his assertion that \$5,000 is a more appropriate amount for the bond, nor does he present any evidence calling into question the reasonableness of the \$30,000 requirement. Lastly, Gann does not demonstrate the factors necessary for waiver of the bond. United States v. Various Tracts of Land in Muskogee and Cherokee Counties, 74 F.3d 197 (10th Cir. 1996).

Gann's Motion to Reconsider (Docket #58) is denied.

IT IS SO ORDERED THIS 19th DAY OF MARCH, 1997.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LYNDA L. HEARD aka)
 Lynda Lee Heard fka)
 Rhonda Jean Heard nka Rhonda)
 Jean Matthews; CECILIA KAY)
 HEARD; JOHN EDWARD HEARD;)
 CRYSTAL JANE HEARD; THE)
 UNKNOWN HEIRS, PERSONAL)
 REPRESENTATIVES, EXECUTORS,)
 ADMINISTRATORS, DEVISEES,)
 TRUSTEES, SUCCESSORS AND)
 ASSIGNS, IMMEDIATE AND REMOTE,)
 KNOWN AND UNKNOWN, OF Leslie)
 Joe Heard, DECEASED; SERVICE)
 COLLECTION ASSOCIATION, INC.;)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION;)
 STATE OF OKLAHOMA, ex rel.)
 DEPARTMENT OF HUMAN)
 SERVICES; CITY OF GLENPOOL,)
 Oklahoma; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD)
 OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED
IN OPEN COURT

MAR 19 1997



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

ENTERED ON CLERK'S OFFICE
DATE MAR 20 1997

CIVIL ACTION NO. 94-C-525-E ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of March, 1997, 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 January 22, 1997, pursuant to an Order of Sale dated October 2, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Eleven (11), Block Four (4),
BRENTWOOD II, an Addition to the City of
Glenpool, Tulsa County, State of



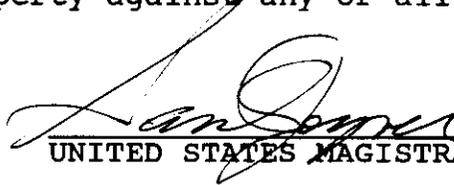
Oklahoma, according to the Amended recorded plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, **Crystal Jane Heard; Service Collection Association, Inc.; State of Oklahoma, ex rel. Oklahoma Tax Commission; City of Glenpool, Oklahoma; State of Oklahoma, ex rel. Department of Human Services; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma; and to the purchaser, Jarry M. Jones, by mail and to the Defendants, Lynda L. Heard; Cecilia Kay Heard; John Edward Heard; The Unknown Heirs Personal, Representatives, Executors, Administrators, Devisees, Trustees, Successors and Assigns, Immediate and Remote, Known and Unknown of Leslie Joe Heard, Deceased, 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 Glenpool Post, a newspaper published and of general circulation in Glenpool, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry M. Jones, 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.

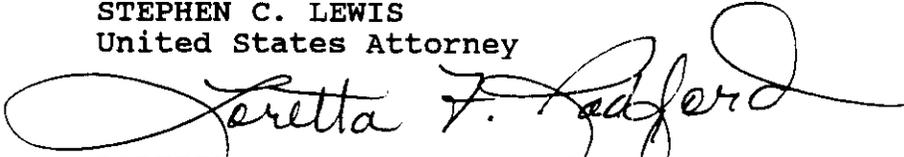
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Jarry M. Jones, 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. 94-C-525-E

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DONALD J. KLOBUCHAR aka Donald)
 Jeffrey Klobuchar; LORI D.)
 KLOBUCHAR aka Lori Denise Klobuchar)
 aka Lori Denise Schnaithman; TERRY)
 WOODARD; MARY WOODARD;)
 SAMUEL RADER dba Rader Group,)
 Realtors; 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.)

FILED
IN OPEN COURT

MAR 19 1997

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

ENTERED ON DOCKET
DATE MAR 20 1997

Civil Case No. 95-C 582E

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19 day of March, 1997, 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 January 21, 1997, pursuant to an Order of Sale dated September 24, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot One (1), Block Seven (7), SOUTHBROOK III, an Addition to the City of Broken Arrow, 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, Terry Woodard, Mary Woodard,

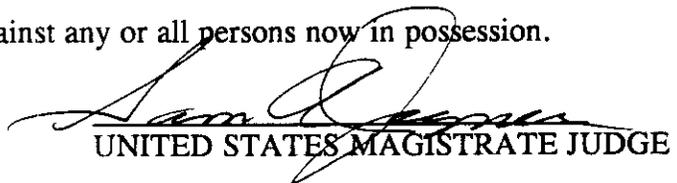
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Samuel Rader, State of Oklahoma, ex rel. Oklahoma Tax Commission, City of Broken Arrow, Oklahoma, County Treasurer, Tulsa County, Oklahoma, Board of County Commissioners, Tulsa County, Oklahoma, Philip Holmes, Inc., Joseph Wesley Jones and to the purchasers, Susan Khoury, Inc., and Bahnmaier Enterprises, Inc., by mail, and to the Defendants, Donald J. Klobuchar and Lori D. Klobuchar 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 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 Susan Khoury, Inc., and Bahnmaier Enterprises, Inc., 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.

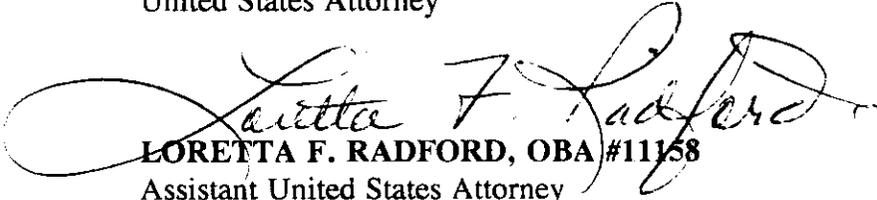
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Susan Khoury, Inc., and Bahnmaier Enterprises, Inc., 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-C 582E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 19 1997

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

NATHAN R. GRIFFITH,

Plaintiff,

v.

JOHN CALLAHAN, Commissioner,
Social Security Administration,

Defendant.

Civil Action No. 95-C-1117-M

ENTERED ON DOCKET

DATE 3/20/97

ORDER

On December 30, 1996, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded to the Commissioner for further proceedings. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on March 3, 1997, the parties have stipulated that an award in the amount of \$2,525.25 for attorney fees (no costs) for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees (no costs) under the Equal Access To Justice Act in the amount of \$2,525.25. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED this 19th day of March, 1997.

S/Frank H. McCarthy
U.S. Magistrate

FRANK H. MCCARTHY
United States Magistrate Judge

NOTE: THIS ORDER IS TO BE MAILED
BY THE CLERK OF COURT TO THE
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

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

FILED
MAR 19 1997

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

DONNA ROGERS,
Plaintiff,

vs.

ROGERS GALVANIZING COMPANY,
BENJAMIN C. BISHOP and THE TRUST
COMPANY OF OKLAHOMA,
Defendants.

Case No. 95-cv-525-H

ENTERED ON DOCKET
DATE MAR 20 1997

ORDER

This matter comes before the Court on a Motion to Dismiss Plaintiff's Claims for Lack of Standing by Defendant North American Galvanizing Company¹ ("NAGC") (Docket # 94) and Defendant Benjamin C. Bishop ("Bishop") (Docket # 97). Plaintiff brought this shareholder's derivative action under federal diversity jurisdiction, seeking damages on behalf of the corporation for corporate waste and breach of fiduciary duty.

Defendants NAGC and Bishop filed these motions on January 13, 1997 and January 17, 1997, respectively. Under Local Rule 7.1, Plaintiff's response to Defendant's motion "shall be filed within fifteen (15) days." Plaintiff has failed to respond to Defendants' motions to dismiss for lack of standing. This failure "authorize[s] the court, in its discretion, to deem the matter confessed, and enter the relief requested." Local Rule 7.1 (C).

Even if the Court were not authorized to deem the lack of standing to be admitted, Plaintiff's surrender of all certificates held individually and jointly amounts to a loss of standing under Delaware law which requires dismissal of Plaintiff's claims. Where, as here, a cause of

¹NAGC is the corporate successor in interest to named Defendant Rogers Galvanizing Company ("RGC").

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action arises under state law, state law should govern the issue of standing. See City of Moore v. Atchison, Topeka & S.F. Ry. Co., 699 F.2d 507, 511 (10th Cir. 1983) (state law determines who has standing to challenge state statutes on state constitutional grounds); see also Hausman v. Buckley, 299 F.2d 696, 702 (2d Cir.), cert. denied 369 U.S. 885 (1962); Kreindler v. Marx, 85 F.R.D. 612, 615-16 (N.D. Ill. 1979). Under the Delaware law governing this action, a plaintiff bringing a derivative suit "who ceases to be a stockholder, whether by reason of a merger or any other reason, loses standing to continue a derivative suit." Lewis v. Anderson, 477 A.2d 1040, 1049 (Del. 1984).

Defendants have presented evidence by sworn affidavit attesting that Plaintiff surrendered all stock certificates held individually and jointly in exchange for the per share purchase price agreed to in the merger agreement between NAGC and RGC, and that Kinark Corporation currently owns all the issued and outstanding stock in NAGC, the surviving corporation. See Chastain Aff. 2-4 (Docket # 96). Plaintiff has not disputed this evidence. Upon surrendering all stock certificates she held individually and jointly with her mother in exchange for the purchase price provided in the merger agreement, Plaintiff ceased to be a shareholder. Accordingly, under Delaware law, Plaintiff cannot maintain this derivative action.

For the reasons set forth above, the Court finds that the motions to dismiss due to lack of standing brought by Defendant NAGC and Defendant Bishop should be granted. Defendants' requests for sanctions against Plaintiff and her counsel are hereby expressly reserved for determination by the Court at a future date.

IT IS SO ORDERED.

This 19TH day of March, 1997.


Sven Erik Holmes
United States District Judge

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

FILED

MAR 19 1997

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

Case No. 95-CV-909-H

DONNA ROGERS,)
Plaintiff,)
vs.)
THE TRUST COMPANY OF OKLAHOMA)
and WILLIAM E. MEYER,)
Defendants)

ENTERED ON DOCKET
MAR 20 1997
DATE _____

ORDER

This matter comes before the Court on Defendant William Meyer's Motion for Summary Judgment (Docket # 5).¹

In this diversity action, Plaintiff alleges that Defendant Meyer wrongfully terminated her from the position of Advisory Director of Rogers Galvanizing Company ("RGC"), a Delaware corporation, in retaliation for filing a shareholder's derivative action against RGC, The Trust Company of Oklahoma, and other named individuals.

I.

Summary judgment is appropriate where there is "no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Wendon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied.

¹The Trust Company of Oklahoma is not a party to this motion, and is no longer a party to this lawsuit. On November 7, 1995, Plaintiff moved to dismiss this action without prejudice against both defendants, and the Court entered an Order dismissing the action without prejudice on November 9, 1995 (Docket # 13). However, on November 18, 1995, Defendants filed a Joint Motion to Reconsider and Vacate Order of Dismissal with the Court (Docket # 18). On February 23, 1996, the Court granted Plaintiff's Motion to Dismiss Without Prejudice as to Defendant Trust Company of Oklahoma, but also granted Defendant's Motion to Vacate Order of Dismissal as to Defendant Meyer's claims.

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480 U.S. 947 (1987), and “the moving party is entitled to judgment as a matter of law,” Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

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

Summary judgment is only appropriate if “there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Id. at 250. The Supreme Court stated: “[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); see Anderson, 477 U.S. at 250 (“there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” (citations omitted)).

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

II.

The Court finds that the following facts are uncontroverted for purposes of the instant motion for summary judgment.²

Defendant William Meyer is a Senior Vice President of The Trust Company of Oklahoma (“TCO”). TCO serves as the interim trustee for the C.L. Simpson and Alta Rogers Simpson Trusts, which collectively own 600 shares of common stock in RGC. As interim trustee of the Simpson Trusts, TCO is authorized to exercise the voting rights of the shares of common stock

²The Court notes that, under Local Rule 56.1, “[a] brief in support of a motion for summary judgment . . . shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists.” Local Rule 56.1(A). The rule further requires that

[t]he response brief to a motion for summary judgment . . . shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant’s fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

Local Rule 56.1(B) (emphasis added). Plaintiff’s Brief in Support of Plaintiff’s Reply in Opposition to Defendant’s Motion for Summary Judgment (Docket #22) fails to comply with the requirements of Local Rule 56.1(B), and therefore, the statement of facts offered in Defendant’s brief in support of its motion for summary judgment, which follows the requirements of Local Rule 56.1(A), will be deemed admitted.

owned by the Simpson Trusts. In his capacity as Senior Vice President of TCO, Defendant Meyer occasionally nominated and voted for directors and advisory directors of RGC. On such occasions, TCO's Discretionary Committee limited Mr. Meyer's authority to the voting rights of 300 shares of the 600 total shares owned by the Simpson Trusts.

Plaintiff Donna Rogers was elected an Advisory Director of RGC in July 1990. Plaintiff was paid \$6000 per quarter for her services as Advisory Director of RGC. Plaintiff did not exercise the voting power of a regular director of RGC and was not involved in the daily management of RGC. Plaintiff was never an officer or employee of RGC and, other than the quarterly fee she received as Advisory Director, Plaintiff never received any salary or wages from RGC.

On June 12, 1995, Plaintiff filed a shareholder's derivative action against RGC, TCO, and Benjamin Bishop in this Court.

Prior to August 9, 1995, the bylaws of RGC provided for removal of any director with or without cause by a two-thirds vote of the shareholders of RGC entitled to vote. On August 9, 1995, in accordance with Delaware law, RGC's bylaws were amended to provide for removal of any director with or without cause by a majority vote of the shareholders of RGC entitled to vote. Pursuant to this new provision of the bylaws, Plaintiff was removed by a majority of the voting shareholders of RGC from her position as Advisory Director of RGC on August 9, 1995.

III.

Plaintiff asserts Mr. Meyer's role in removing her from the board of RGC sounds in tort and is governed by Oklahoma's public policy exception to the employment-at-will doctrine. See Burk v. K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989). Burk's applicability, however, requires the

existence of an employment relationship between Plaintiff and Defendant. See id. Plaintiff has not alleged in her complaint the existence of any employment relationship in this case. Rather, Plaintiff concedes for purposes of this motion that directors of closely-held corporations are not employees of the majority shareholders who elect them, and further admits that under Oklahoma law governing removal of corporate directors, a majority of shareholders may remove a director without cause. See Okla. Stat. Ann. tit. 18, § 1027(H) (West. 1986 & Supp. 1997). Plaintiff nevertheless requests this Court to extend Burk to encompass the relationship between members of corporate boards of directors and the majority shareholders who elect them.

In Burk, the Oklahoma Supreme Court noted that the public policy exception to the at-will termination rule should apply only “in a narrow class of cases.” Burk, 770 P.2d at 28. Oklahoma courts have construed Burk to encompass and regulate only those terminations which arise from an employment relationship. See Groce v. Foster, 880 P.2d 902 (Okla. 1994); Smith v. Farmer’s Cooperative Ass’n, 825 P.2d 1323 (Okla. 1992); Brown v. MFC Finance Co., 838 P.2d 524 (Okla. Ct. App. 1992); see also Williams v. Dub Ross Co., 895 P.2d 1344 (Okla. Ct. App. 1995) (refusing to extend the Burk exception to encompass a failure or refusal to hire). There is no genuine issue of material fact as to whether an employment relationship existed in this case.³ Thus, Plaintiff’s position can be sustained only by extending Burk to cover the instant facts. The Court, however, finds that there is no basis upon which to extend Burk to the relationship between directors and shareholders. Accordingly, the Court holds that the public policy exception to the employment-at-will doctrine recognized in Burk v. K-Mart Corp. does not apply in this

³Plaintiff alleged no such relationship in her complaint, and submitted no evidence of an employment relationship in her Brief in Opposition to Defendant’s Motion for Summary Judgment (Docket #22). Further, Plaintiff admitted in her Brief that no such relationship existed here.

case and summary judgment in favor of Defendant William E. Meyer is appropriate. Defendant's motion for Summary Judgment (Docket #5) is hereby granted.

IT IS SO ORDERED.

This 18TH day of March, 1997.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 EDWARD GUY THOMPSON;)
 DEBORAH K. THOMPSON;)
 STATE OF OKLAHOMA ex rel.)
 OKLAHOMA TAX COMMISSION;)
 SPRINGER CLINIC, INC.;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE MAR 19 1997

FILED

MAR 19 1997

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

Civil Case No. 95-C 739H

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Judgment of Foreclosure filed August 6, 1996 is vacated, and that this action shall be dismissed without prejudice.

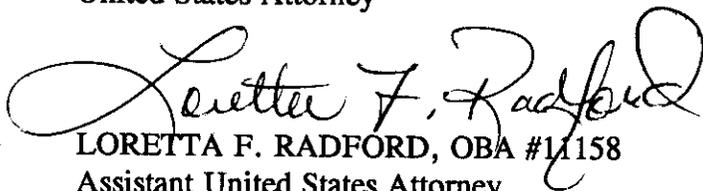
Dated this 17th day of March, 1997.

SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

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

LFR/esf

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

PROCEEDS, INCLUDING ACCRUED
INTEREST, IN BANK OF
OKLAHOMA CHECKING ACCOUNT
NO. 8 020 6127 0, STYLED
IN THE NAME: "TEXACO
MARKETING SOFT BALL LEAGUE;"

PROCEEDS, INCLUDING ACCRUED
INTEREST, IN BANK OF
OKLAHOMA CHECKING ACCOUNT
NO. 802 051 051, IN THE NAME
OF ROY CORN AND THELMA CORN;

ONE 1991 CHEVROLET CORVETTE,
VIN 1G1YY2383M5112091;

ONE 1993 JEEP CHEROKEE
LAREDO, VIN
1J4GZ5889PC550999,

Defendant.

CIVIL ACTION NO. 96-CV-564-H

FILED

MAR 17 1997

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

ENTERED ON DOCKET

DATE MAR 19 1997

JUDGMENT OF FORFEITURE

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

The verified Complaint for Forfeiture In Rem was filed in this action on the 24th day of June 1996, alleging that the defendant personal properties, to-wit:

7

PROCEEDS

PROCEEDS, INCLUDING ACCRUED INTEREST
IN BANK OF OKLAHOMA CHECKING ACCOUNT
NO. 8 020 6127 0 STYLED IN THE NAME
OF "TEXACO REFINING AND MARKETING
SOFTBALL LEAGUE;"

PROCEEDS, INCLUDING ACCRUED
INTEREST, IN BANK OF OKLAHOMA
CHECKING ACCOUNT NO. 802 051 051, IN
THE NAME OF ROY CORN AND THELMA
CORN;

VEHICLES:

ONE 1991 CHEVROLET CORVETTE, VIN
1G1YY2383M5112091;

ONE 1993 JEEP CHEROKEE LAREDO, VIN
1JRGZ58S9PC550999,

are subject to forfeiture pursuant to 18 U.S.C. § 981, because they
are proceeds or constitute proceeds obtained directly or indirectly
from a violation of 18 U.S.C. § 1344.

Warrants of Arrest and Notices In Rem were issued by the
Clerk of this Court on the 6th day of August, 1996, providing that
the United States Marshal for the Northern District of Oklahoma
publish Notice of Arrest and Seizure once a week for three
consecutive weeks in the Tulsa Daily Commerce & Legal News, Tulsa,
Oklahoma, a newspaper of general circulation in the district in
which this action is pending and in which the defendant proceeds
are located, and providing that the United States Marshals Service
for the Northern District of California publish Notice of Arrest

for the Northern District of California publish Notice of Arrest and Seizure once a week for three consecutive weeks in the San Francisco Daily Journal, San Francisco, California, the county in which the defendant vehicles are located, and further providing that the United States Marshals Service serve all known owners of the defendant properties with a copy of the Complaint for Forfeiture In Rem and Warrants of Arrest and Notices In Rem; and that immediately upon the arrest and seizure of the defendant properties the United States Marshals Service take custody of the defendant and personal properties and retain the same in its possession until the further order of this Court.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrants of Arrest and Notices In Rem on the defendant personal properties and all known potential individuals or entities with standing to file a claim to the defendant properties, as follows:

**Proceeds, Including Accrued Interest,
in Bank of Oklahoma Checking Account
No. 8 020 6127 0 Styled In The Name of
'Texaco Refining and Marketing Softball
League;'**

**Served:
October 11, 1996**

**Proceeds, Including Accrued Interest,
In Bank of Oklahoma Checking Account
No. 802 051 051, In the Name of Roy
Corn and Thelma Corn;**

**Served:
October 11, 1996**

**One 1991 Chevrolet Corvette,
VIN 1G1YY2383M5112091;**

**Served:
November 18, 1996**

One 1993 Jeep Cherokee Laredo,
VIN 1JRGZ58S9PC550999

Served:
November 18, 1996

Roy Corn
By Serving: Ketra Oberlander,
Legal Secretary for Penny Cooper,
Attorney for Roy Corn

Served:
January 24, 1997

Thelma Corn
By Serving: ROY A. CORN,
Her Husband, At Their Residence

Served:
October 15, 1996,

and that Roy Corn and Thelma Corn are the only known potential claimants to the defendant personal properties.

USMS 285s reflecting service upon the defendant personal properties and on Roy Corn and Thelma Corn, the only individuals or entities known to have standing to file a claim to the defendant properties, are on file herein.

All persons or entities interested in the defendant properties were required to file their claims herein within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No persons or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer, or other response or defense herein, and the time for presenting claims and answers, or other pleadings, has expired, and, therefore, default

exists as to the defendant personal properties against all persons and/or entities interested therein.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed and in which the defendant proceeds are located, on January 16, 23, and 30, 1997, and in the San Francisco Daily Journal, San Francisco, California, the county in which the defendant vehicles are located, on January 10, 17, and 24, 1997.

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

PROCEEDS

PROCEEDS, INCLUDING ACCRUED INTEREST IN BANK OF OKLAHOMA CHECKING ACCOUNT NO. 8 020 6127 0 STYLED IN THE NAME OF "TEXACO REFINING AND MARKETING SOFTBALL LEAGUE;"

PROCEEDS, INCLUDING ACCRUED INTEREST, IN BANK OF OKLAHOMA CHECKING ACCOUNT NO. 802 051 051, IN THE NAME OF ROY CORN AND THELMA CORN;

VEHICLES:

ONE 1991 CHEVROLET CORVETTE, VIN 1G1YY2383M5112091;

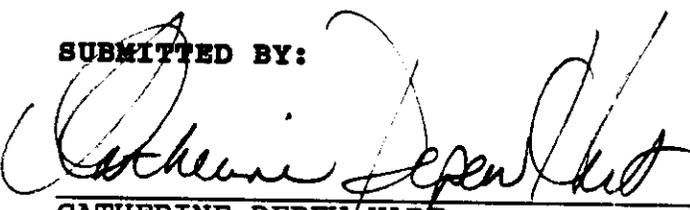
ONE 1993 JEEP CHEROKEE LAREDO, VIN 1JRGZ5889PC550999,

and that said property be, and it is, forfeited to the United States of America for disposition according to law, in the following priority:

- a) First, from account proceeds and the sale proceeds of the defendant vehicles, payment to the United States of America for all expenses of forfeiture of the defendant real and personal properties, including, but not limited to, expenses of seizure, maintenance, and custody, advertising, and sale.
- b) Second, the remaining proceeds from the bank accounts and the sale of the defendant vehicles shall be retained by the United States Marshals Service for disposition according to law.


SVEN E. HOLMES, Judge of the
United States District Court for the
Northern District of Oklahoma

SUBMITTED BY:


CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\CORN1\05928

FILED ON DOCKET
3-19-97

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

G. C. BROACH COMPANY,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
ULTRAMAR INC.,)
a California corporation,)
)
Defendant.)

No. 96 CV 822 H

FILED

MAR 19 1997

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

ORDER OF DISMISSAL WITH PREJUDICE

Upon the joint application of Plaintiff and Defendant, the Court finds that the issues between the parties have been settled and that this cause should be and is hereby dismissed with prejudice.

DATED this 17TH day of MARCH, 1997.


Sven Erik Holmes
United States District Judge

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

FILED

MAR 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
SUPERIOR TESTING, INC.,)
)
ERNIE C. BUSBY and)
)
SHARON BUSBY,)
)
Defendants.)

Case No. 96-C-594-BU

DATE MAR 19 1997

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 18th day of March, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

24

FILED

MAR 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

BEVERLY A. HENDERSON,)

Plaintiff,)

vs.)

Case No. 96-CV-1057-C ✓

PUBLIC SERVICE COMPANY OF)
OKLAHOMA,)

Defendant.)

ENTERED ON DOCKET

DATE MAR 18 1997

ORDER

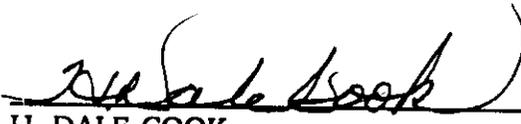
Before the Court is defendant's motion to dismiss for lack of jurisdiction and, alternatively, for summary judgment. Defendant contends that plaintiff's action is time barred in that she has failed to establish the filing of a complaint with the Equal Employment Opportunity Commission within 300 days of the defendant's alleged discriminatory conduct. For the reasons set forth below, defendant's motion to dismiss is granted.

According to Title 42, United States Code, Section 2000e-5(e), a charge of discrimination must be filed with the EEOC within 300 days after the alleged unlawful practice occurs. This filing is a prerequisite to a civil suit under Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Plaintiff has failed to provide a copy of her alleged complaint, which she contends was mailed to the EEOC prior to the expiration of the statutory period. Plaintiff has offered no proof that the EEOC received her complaint within the 300 day statutory period. The only evidence supplied by plaintiff is a letter from EEOC dated March 29, 1996 in which the EEOC referred to "correspondence" sent by the plaintiff. However the March 29, 1996 letter is dated 28 days beyond the limitation

period. Such evidence does not establish that such "correspondence" from the plaintiff was received by the EEOC prior to March 1, 1996. Finally, plaintiff furnishes an affidavit regarding the timing of mailing her complaint to the EEOC in Oklahoma City. Plaintiff's affidavit is insufficient in that it does not specify a date or year in which her "charge of discrimination" was allegedly filed or mailed.

Accordingly, it is the order of the Court, that defendant's motion to dismiss, or alternatively for summary judgment, should be and hereby is GRANTED.

IT IS SO ORDERED this 18th day of March, 1997.



H. DALE COOK
Senior, United States District Judge

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

F I L E D

MAR 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT LOUIS WIRTZ, JR.

Plaintiff,

vs.

SHERIFF STANLEY GLANZ,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Case No. 95-CV-631-C

ENTERED ON CLERK'S
MAR 19 1997
DATE

JUDGMENT

This matter came before the Court for consideration of defendant's motion to dismiss or, alternatively for summary judgment on plaintiff's claim brought pursuant to Title 42, United States Code, Section 1983. The issues having been duly considered and a decision having been rendered as set forth in the Order entered herein and filed March 13, 1997.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for the defendant Stanley Glanz, and against the plaintiff Robert Louis Wirtz, Jr.

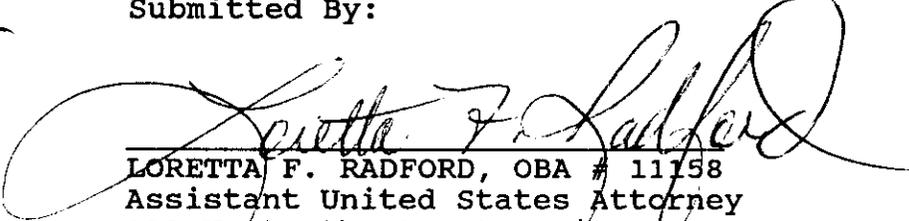
IT IS SO ORDERED this 18th of March, 1997.


H. DALE COOK
Senior, United States District Judge

amount of \$87.00, plus interest thereafter at the rate of 3 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 5.67 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 1460
Tulsa, Oklahoma 74103
(918) 581-7463

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

F I L E D

VERL D. HAVICE,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

MAR 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 94-C-953-W ✓

ENTERED ON DOCKET

DATE 3/19/97

ORDER AND JUDGMENT

This case is remanded to the Secretary for an immediate award of benefits consistent with the Tenth Circuit Court of Appeals' Order and Judgment, attached hereto.

Dated this 17th day of March, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\orders\judg.2

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

FILED
United States Court of Appeals
Tenth Circuit

JAN 10 1997

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VERL D. HAVICE,
Plaintiff-Appellant,

v.

SHIRLEY S. CHATER,
Commissioner, Social Security
Administration,*

Defendant-Appellee.

No. 96-5074
(D.C. No. CV-94-953-W)
(N.D. Okla.)

ORDER AND JUDGMENT**

Before EBEL and HENRY, Circuit Judges, and DOWNES,*** District Judge.

* Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. App. P. 43(c), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the defendant in this action. Although we have substituted the Commissioner for the Secretary in the caption, in the text we continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

*** Honorable William F. Downes, District Judge, United States District Court for the District of Wyoming, sitting by designation.

reduction. Several months later, claimant fell and refractured the patella. In 1977, claimant was injured in an explosion at work, sustaining second and third degree burns to both legs which required skin grafts. In 1978, he was diagnosed with diabetes mellitus, controlled with insulin injections and limited diet. He was also diagnosed with hypertension, controlled with medication. In 1979, claimant was examined by orthopedic surgeon Sisler for intermittent episodes of low back pain, stemming from the 1977 explosion. Dr. Sisler diagnosed claimant with chronic strain, noting that the x-rays showed latent disc manifestations.

In July 1985, claimant was diagnosed with right-sided Bell's Palsy, which included paralysis of the face, tinnitus of the right ear, reduced balance and right arm weakness. Most of these symptoms resolved after several months, except for persistent tinnitus in the right ear. In December 1985, claimant was diagnosed with left-sided Bell's Palsy, which again took several months to resolve.

In December 1987, claimant slipped and fell on the ice, injuring his right knee and elbow. He was treated for several months by Dr. McCreight for right knee pain, occasional give-way weakness, and "popping" with ambulation. Based on x-rays, Dr. McCreight diagnosed moderate osteoarthritis of the right knee, and referred claimant to orthopedic surgeon Sisler for further evaluation.

In April 1988, Dr. Sisler's examination revealed right knee swelling, increased temperature, reduced range of motion, crepitation, tenderness, and bony irregularity of the patella. R. II-A at 284. Upon reviewing claimant's January

moderate nature which would include being on his feet 50 percent of the time but minimal climbing and no squatting or kneeling.” Id. at 279.

In November 1988, claimant returned to Dr. Sisler with complaints of continued knee instability. A series of six x-ray views showed:

moderately advanced arthritic changes in the joint noted particularly along the medial sides of the femur and tibia. When the films are compared to the films of 4/14/88, there appears to be some progression of the size of the osteophytes particularly on the medial side.

Id. at 278. Dr. Sisler opined that claimant’s symptoms were those of traumatic arthritis, and that, although he still walked well, the symptoms were slowly progressing. The surgeon opined that claimant was unable to work at that time.

In April 1989, claimant was examined by consulting physician Sullivan, who found deformity of the right knee with detectible osteophytes, reduced range of motion, and mild subpatellar crepitation; bilateral diffuse tenderness of the cervical spine, trapezius, and lumbar sacral spine; and distinctly decreased sensation in the feet bilaterally. Dr. Sullivan diagnosed traumatic arthritis to the right knee, mild osteoarthritis in the cervical and lumbosacral spines and in scattered joints, very mild peripheral neuropathy of the feet due to diabetes, and the ongoing conditions of diabetes and hypertension. He opined that

[Claimant] has chronic problems with traumatic arthritis of the right knee which prevent him from pursuing work that involves a great deal of physical labor or being on his feet. He cannot . . . squat or climb stairs or ladders. He is none-the-less, able to walk perfectly adequately. He is thus fully capable of performing sedentary labor

knee, that the knee was swollen and significantly tender with a reduced range of motion and loss of strength, and that claimant's neck had a limited range of motion with paraspinous muscle tenderness. Dr. McKenzie's review of claimant's x-rays revealed "severe arthritis of the right knee, [and] irregularity of the right patella with osteophyte at the inferior pole." Id. at 366. Dr. McKenzie concluded that claimant had been totally disabled from April to July, 1988, and from August 1989 to the date of the current exam, and that he had a total permanent impairment to the right lower extremity of 53.5%, and a 10% impairment based on claimant's neck.

In August 1990, Dr. Sisler again examined claimant and took x-rays of his cervical spine and right knee. The surgeon found claimant's cervical spine range of motion to be about fifty percent of normal, and noted obvious swelling and joint effusion in claimant's knee, ambulation with a distinct limp, reduced range of motion, inability to squat, palpable osteophytes and tenderness, and audible and palpable crepitation during knee motion. Sisler reaffirmed his diagnosis of traumatic arthritis, and opined that claimant suffered from chronic strain of the cervical spine. R. II-B at 412-13.

Claimant was also treated from July 1985 to March 1993 by the Veterans Administration. VA medical records indicate ongoing treatment for diabetes and hypertension, as well as treatment for Bell's Palsy, headaches, cervical pain, low back pain, dizziness, neuropathy, and various infections. In March 1989,

December 1992, the VA diagnosed a cochlear lesion, explaining claimant's intermittent complaints of dizziness and tinnitus.

In May 1993, claimant was examined by consulting physician Dandridge, who noted that he walked with an unsteady gait and a slight limp on the right, had restricted range of motion in the cervical spine, moderate swelling and pitting edema in both legs, restricted motion in both knees, especially the right, restricted motion of the right hip, hypesthesia over both arms and legs, and limited ability to squat. Dr. Dandridge opined that claimant could only stand and walk one hour per day, could sit for six hours, could lift and carry 11-20 pounds occasionally, could bend and reach occasionally, but could not use the right leg for pushing and pulling controls, and could not squat, crawl, or climb. *Id.* at 534-39.

Claimant filed for disability insurance benefits and supplemental security income (SSI) in February 1989, alleging an inability to work after April 1988. In May 1990, after two administrative hearings, an administrative law judge (ALJ) issued a decision finding claimant capable of performing light work. In December 1991, the district court remanded the case to the Secretary, holding that the record did not support the ALJ's conclusion.

Almost two years later, in October 1993, a supplemental hearing was held on claimant's application. After the hearing, at which a vocational expert testified, the ALJ again found claimant capable of performing light work, including the jobs of light tool maintenance worker, light template maker, and

conclusion that he could perform skilled sedentary work before that date, and that he is entitled to disability benefits as a matter of law. We agree.

Claimant's Ability to Perform Light Work

Light work generally requires "standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday. Sitting may occur intermittently during the remaining time." Soc. Sec. Rul. 83-10. To find that claimant retained the ability to perform light work, the ALJ rejected the opinions of both Dr. Sisler and Dr. Sullivan that claimant could not stand and walk on a prolonged basis. The ALJ found that these opinions were inconsistent with the doctors' findings that claimant walked well, accepting instead the VA radiologist's statement that claimant's knee condition had remained stable since February 1986. Neither of these reasons provided a legitimate basis for rejecting the opinions of Dr. Sisler or Dr. Sullivan.

First, the observation that claimant still walked well was not inconsistent with the ultimate opinion that claimant could not perform work requiring prolonged standing and walking. Claimant's ability to walk is a separate question from his ability to perform such activity on a sustained basis. See, e.g., Ragland v. Shalala, 992 F.2d 1056, 1059 (10th Cir. 1993)(holding "[t]he fact that plaintiff may intermit a tiring or painful upright task with periods of seated rest . . . does

treating physician's opinion is inconsistent with other medical evidence, the ALJ must "examine the other physicians' reports to see if they 'outweigh[]' the treating physician's report, not the other way around." Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 290 (10th 1995)(quotations omitted). In addition, the ALJ must consider the following specific factors to determine what 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.; 20 C.F.R. § 404.1527(d)(2)-(6).

Here, Dr. Sisler treated claimant's knee comprehensively for two and a half years. He physically examined the knee on eleven occasions, took x-rays on five occasions, compared a total of twenty-two views of claimant's knee, and personally observed the degenerative changes during arthroscopic surgery. His opinion is consistent with that of every other physician who examined claimant, and is consistent with the signs and symptoms of deterioration noted over the years. In addition, he is a specialist in the area in which he rendered his opinion.

In contrast, the VA records do not show treatment of claimant's knee before August 1992, and do not reflect that x-rays were taken in February 1986.

education, residual functional capacity, and transferable skills. After January 26, 1989, given claimant's age, limited education, and capacity to do sedentary work, the grids directed a conclusion of "disabled" if he lacked transferable skills, but "not disabled" if he had such transferable skills. Id., Rules 201.10, 201.11.

The district court concluded, based on the vocational expert's testimony, that claimant was not disabled because he had skills which would transfer to production assembly work and stock and inventory work. R. I at 22. It is true that, at the hearing, the vocational expert testified that claimant had such transferable skills. On cross-examination, however, she retracted both these statements, after being informed that claimant's past assembly work occurred more than fifteen years earlier, and upon noting that claimant lacked training in the computer technologies currently used in stock and inventory work. See R. II-B at 626-27, 633-34. There is no substantial evidence, therefore, upon which to base a finding that claimant had transferable skills. In the absence of such skills, Rule 201.10 of the grids directs a conclusion that claimant became disabled when he turned fifty years old.

Claimant filed his application for disability benefits almost eight years ago. After three hearings, the Secretary still has not met her burden of showing that claimant retained the ability to perform a significant number of jobs in the economy after January 26, 1989. "The Secretary is not entitled to adjudicate a case 'ad infinitum until [she] correctly applies the proper legal standard and

163-20

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
ENTERED ON DOCKET
DATE MAR 18 1997

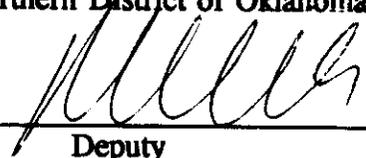
and accruing, plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendants, Victor L. Green aka Victor Green and Laurene Falegi aka Laurene Felegi aka Laurene Sue Green, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisalment and to apply the proceeds to the payment of the costs of the sale and the Plaintiff's judgment. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisalment, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 17th day of March, 1997.

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

By _____



Deputy

Order of Sale
Case No. 96-C-373-H (Green)

CDM:cm

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

FILED
MAR 17 1997

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

JOSEPH ANGELO DICESARE,)
)
) Plaintiffs,)
)
 v.)
)
) J.D. BALDRIDGE, et al.,)
)
) Defendants.)

Case No. 93-C-507-H ✓

ENTERED ON DOCKET
DATE MAR 18 1997

JUDGMENT

This matter came before the Court on a motion for summary judgment filed by Defendants. The Court duly considered the issues and rendered a decision in an order filed on January 21, 1997.

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

IT IS SO ORDERED.

This 17TH day of March, 1997.



Sven Erik Holmes
United States District Judge

600

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

3-18-97

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

Plaintiff,

v.

FRANK ALLEN BISHOP, a single person;
COUNTY TREASURER, Osage County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Osage County, Oklahoma,

Defendants.

F I L E D

MAR 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-CV-1194-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17th day of March, 1997.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, appear by John S. Boggs, Assistant District Attorney, Osage County, Oklahoma; and the Defendant, Frank Allen Bishop, a single person, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, Frank Allen Bishop, a single person, executed a Waiver Of Service of Summons on January 24, 1997.

It appears that the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, filed their Answer on February 14, 1997; that the Defendant, Frank Allen Bishop, has failed to answer and his default has therefore been entered by the Clerk of this Court.

7

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 Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Ten (10), Block Two (2), SKYLINE RIDGE ADDITION, Block 1 to 10 inclusive, an Addition to Tulsa, Osage County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on October 1, 1986, the Defendant, Frank Allen Bishop, a single person, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, his mortgage note in the amount of \$40,000.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Frank Allen Bishop, a single person, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated October 1, 1986, covering the above-described property, situated in the State of Oklahoma, Osage County. This mortgage was recorded on October 2, 1986, in Book 0703, Page 570, in the records of Osage County, Oklahoma.

The Court further finds that due to a scrivener's error, the word "SKYLINE" was typed as "SHYLINE" on the original mortgage recorded on October 2, 1986, in Book 0703, Page 570, in the records of Osage County, Oklahoma. The legal description should reflect the correct spelling of the word "SKYLINE." Therefore, the mortgage should be reformed to show the correct spelling of the word "SKYLINE."

The Court further finds that the Defendant, Frank Allen Bishop, a single person, made default under the terms of the aforesaid note and mortgage by reason of his failure to make

the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Frank Allen Bishop, a single person, is indebted to the Plaintiff in the principal sum of \$34,018.68, plus administrative charges in the amount of \$287.58, plus penalty charges in the amount of \$57.58, plus accrued interest in the amount of \$890.88 as of May 21, 1996, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the current legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Osage 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 Defendant, Frank Allen Bishop, a single person, in the principal sum of \$34,018.68, plus administrative charges in the amount of \$287.58, plus penalty charges in the amount of \$57.58, plus accrued interest in the amount of \$890.88 as of May 21, 1996, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the mortgage recorded on October 2, 1986, in Book 0703, Page 570, in the records of Osage County, Oklahoma, is reformed to show the correct spelling of the word "SKYLINE."

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have no right, title or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Frank Allen Bishop, a single person, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without 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.

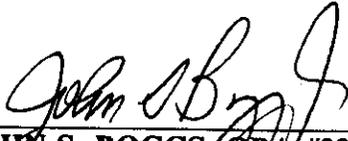

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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

Judgment of Foreclosure
Case No. 96-CV-1194-K

PP:css

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

MT. HAWLEY INSURANCE)
COMPANY, an Illinois corporation,)

Plaintiff,)

vs.)

Case No. 96-CV-144-E ✓

IMPERIAL UNDERGROUND)
SPRINKLER COMPANY, a)
Kansas Corporation,)

Defendant and Third)
Party Plaintiff,)

vs.)

FILED

MAR 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PARKFORD MANAGEMENT, INC.,)
Texas corporation, d/b/a)
Chardonnay Apartments, and)
BUSHMASTERS, INC., an)
Oklahoma corporation,)

Third-Party Defendants,)

BUSHMASTERS, INC., an)
Oklahoma corporation,)

Third-Party Plaintiff,)

vs.)

ENTERED ON DOCKET
DATE MAR 18 1997

JOHN A. DEWBERRY, d/b/a)
J.D.I. SALES,)

Third-Party Defendant.)

ORDER ALLOWING DISMISSAL WITH PREJUDICE

This matter comes before the Court on the parties' *Joint Stipulation of Dismissal With Prejudice* as to all of the respective parties' claims against the other parties, including direct claims,

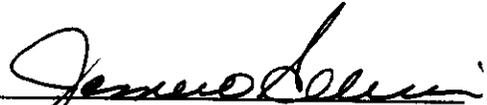
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counter claims, cross claims and third party claims. Upon due consideration, it is hereby

ORDERED and **ADJUDGED** that this cause be dismissed with prejudice to the right of the parties to refile another suit based upon the same claims as set forth in the pleadings on file herein, and it is further,

ORDERED and **ADJUDGED** that the parties shall bear their respective attorney fees and costs incurred in this suit.

Dated this 17th day of March, 1997.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JORDAN F. MILLER CORPORATION,)
a California corporation, and JORDAN F.)
MILLER, an individual, and AMERICAN)
EAGLE INSURANCE COMPANY, a)
foreign insurance corporation,)

Plaintiffs,)

vs.)

Case No. 95-C-469-B ✓

MID-CONTINENT AIRCRAFT SERVICE,)
INC., an Oklahoma corporation, JET CENTER)
TULSA, INC., an Oklahoma corporation,)

Defendants and Third Party)
Plaintiffs,)

ENTERED ON DOCKET
MAR 18 1997
DATE _____

vs.)

E.U. BAIN, JR.,)

Third Party Defendant,)
Plaintiff,)

vs.)

VICTOR MILLER,)

Third Party Defendant.)

ORDER

The Court has for decision the Defendants', Mid-Continent Aircraft Service, Inc. ("MCAS") and Jet Center Tulsa, Inc.'s ("JCT"), motion for sanctions (Docket #63) against Plaintiffs based on spoliation of evidence and failure to cooperate in discovery. Essentially, the dispute involves aircraft damage arising from the collapse of the left landing gear on a

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Cessna 421-B during landing on December 18, 1993, at Montgomery Field in San Diego, California. The issue centers in what caused the left landing gear to collapse, i.e., was it improperly installed,¹ an improper hard landing, gear manufacturing or design defects, patent or latent metallurgical fatigue failure, or a combination of the above. The problem at hand is the inexplicable discarding or loss of the many components of the damaged left landing gear, save one, by the repair agency selected by the Plaintiffs to repair the aircraft. Thus, Defendants are denied the opportunity to inspect and test the subject landing gear, the collapse of which caused the aircraft damage.

Factual Background

On November 22, 1991, Plaintiff, Jordan F. Miller Corporation ("JFMC"), entered into a written purchase contract with Defendant, JCT, to trade a Cessna 340 (1973) and \$10,000.00 cash, for a Cessna 421-B (1971) (Plaintiffs' Joint Response - Ex. A).² Considerable work was done on the Cessna 421-B by MCAS to get it in an airworthy condition for delivery. The aircraft was not delivered until December 17, 1993. After taking possession of the Cessna 421-B from Defendants, Plaintiff, Jordan F. Miller, accompanied by his sons, Bret Miller and Victor Miller,³ proceeded to fly the airplane to San Diego,

¹ Plaintiffs' principal contention is Defendant MCAS misrigged or improperly installed the left landing gear.

² Plaintiffs allege a written contract with both Defendants.

³ Defendant MCAS employee, Victor Miller, son of Jordan F. Miller, was chief mechanic with overall responsibility for the assembly of the Cessna 421-B for the Defendants.

California. Upon landing, the left landing gear collapsed causing the plane to crash and skid off the runway.⁴

Plaintiff, Jordan F. Miller, had hull damage insurance with Plaintiff, AmericanEagle Insurance Company ("AEI"), and AEI employed Arnold & Arnold ("A&A"), insurance investigators and adjusters, to investigate and settle the insurance claim of JFMC. Kenneth Harris of A & A, with approval of AEI and JFMC, in January 1994, selected Southern Cal Aircraft Repair ("SCAR") to make the necessary repairs. In June 1994, A&A, on behalf of AEI, was considering subrogation possibilities. (Ex. D to Defendants' Brief in Support of Sanctions).

Plaintiff, Jordan F. Miller, on May 22, 1995, filed this action against Defendants alleging breach of contract, breach of warranty, negligence and products liability, and seeking damages in excess of \$275,000.00, or alternatively, rescission of the contract. As the subrogated carrier, AEI was joined as party plaintiff on February 22, 1996.

Following a case management conference on January 11, 1996, on January 19, 1996, Defendants, in writing, requested Plaintiffs produce the subject left landing gear components, and then followed this request by filing a formal request for production of the left landing gear components (all aircraft parts) on February 28, 1996. On March 30, 1996, Plaintiff formally responded to the request stating:

⁴ There were no personal injuries.

“Aircraft components in possession of American Eagle Insurance Company will be made available at a mutually agreeable time. No testing will be done without notice to this party.” (Ex. E to Defendants' Brief in Support of Motion for Sanctions filed 12-4-96).

Then, on May 24, 1996, Plaintiffs' counsel clarified Plaintiffs' position regarding the components in a letter to Defendants, stating:

“The components and parts which were removed from the aircraft in the process of repairing it and making it airworthy are in the possession of the various repair facilities which have worked on the aircraft or are currently working on it. At my request, a list of all such parts and components is being made. Once this has been done, it is my understanding that the parties will confer and agree to inspection and non-destructive testing of those parts and components.” (Ex. E to Defendants' Brief in Support of Motion for Sanctions filed 12-4-96).

On August 14, 1996, the deposition of Ted Hazlewood, President of SCAR, was taken to identify and mark all left landing gear components for shipment to Oklahoma and then inspection and approved testing by Defendants' selected experts. At the deposition, Ted Hazlewood testified only one damaged component of the aircraft's left landing gear remained, a broken upper link;⁵ all other components had been discarded or lost. Apparently, this was the first time this had been disclosed to the parties.

Hazlewood testified as follows at his deposition:

“Q: Now, of any of those parts destroyed or damaged as of December 18th, 1993, we did not retain any of those here at this facility?”

A: I did for a while, but I don't know what happened to them. I didn't

⁵ Without the other numerous components of the left landing gear, it cannot be determined whether the upper link caused the collapse or was damaged in the crash.

know about all this litigation, so I don't like keeping old parts from damaged airplanes. I throw them out, because the FAA is on this bogus parts deal, so I don't keep them around. And I'm thinking they got thrown out. That's my guess." (Ex. A-7, Defendants' Reply Brief filed 1-14-97).

On December 12, 1996, Ted Hazlewood signed a supplemental affidavit filed herein which stated:

"That at some time after the aircraft arrived at Southern Cal Aircraft, the exact date being unknown, affiant was informed by the aircraft's owner, Mr. Jordan Miller, and by Mr. Miller's attorney, Mr. Richard B. O'Connor, that all parts removed from the aircraft were to be preserved as evidence in a possible lawsuit." (Defendants' Reply Brief to Plaintiffs' Joint Response to Motion to Dismiss, p. 6).⁶

Photographs and video tape were taken of the aircraft and various components of the damaged left landing gear that are available.

Following the initial investigation of the FAA investigator, he concluded, *inter alia*,

"The aircraft sustained damage to the left landing gear, propellor, lower engine cowl, fuselage skin and elevator fairings. It appears that the landing gear failed due to a fatigue crack in the trunion area." (Defendants' Brief in Support of Motion for Sanctions, Ex.-A).⁷

⁶ Established law states that where sworn deposition testimony conflicts with a subsequent affidavit, the sworn deposition testimony may be reviewed as the most reliable. *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986); *Canfield Tires, Inc. v. Michelin Tire Corporation*, 719 F.2d 1361 (8th Cir. 1983); *Radobenko v. Automatic Equipment Corporation*, 520 F.2d 540 (9th Cir. 1975); and *Perma Research and Development Company v. The Singer Company*, 410 F.2d 572, 578 (2nd Cir. 1969).

⁷ The trunion area component parts of the left landing gear are some of the parts no longer available for inspection and testing.

Plaintiffs' Procedural Contentions

Plaintiffs assert Defendants did not comply with Local Rule 37.1 and Fed.R.Civ.P. 37 regarding a good faith meeting of counsel to resolve their discovery differences prior to seeking court intervention. This contention is without merit because once Plaintiffs' counsel stated the lost left landing gear components could not be produced, further discussion would not have produced them.

Plaintiffs' assertion that Defendants should have sought a timely protective order to preserve the left landing gear components is also without merit. A reasonable time after Plaintiffs commenced this lawsuit, Defendants requested the subject landing gear components be made available for inspection and testing. Plaintiffs responded that an inspection was permissible, but stated the parts would not leave their possession. When the time came for Defendants' inspection and testing, Plaintiffs learned that their selected repair agency had inexplicably lost or destroyed the subject landing gear components. Early on, Plaintiffs represented the pertinent left landing gear damaged components would be preserved. Defendants had no reason to seek a protective order until they learned too late that the components had been discarded.

Analysis and Legal Conclusion

The pivotal question is, how critical in a due process-fair trial analysis is it for Defendants and their expert to have the right to visually inspect and appropriately test pertinent components of the aircraft left landing gear. Due at least in part to the initial opinion offered by the FAA investigator, "it appears that the landing gear failed due to a

fatigue crack in the trunion area,” the Court concludes that it is critical to a fair trial.

There is no direct evidence the landing gear components were intentionally discarded or lost. It is clear, however, that it was Plaintiffs' selected repair agency that inexplicably discarded or lost the subject components. Plaintiffs have inspected and viewed the damaged landing gear components after the crash, both on and off the aircraft, to develop their misrigging theory.⁸ Without the subject parts Defendants are denied this right, as well as, the right of appropriate actual testing of the left landing gear components. This places Defendants in the position of defending with one arm tied behind their back.

By way of supplementing the record as requested by the Court, under oath, Plaintiffs' and Defendants' experts have expressed opinions about how critical actual inspection and testing of the lost left landing gear components is in prosecution or defense of the claim. Plaintiffs' expert posits actual inspection and testing is not critical or necessary, and Defendants' experts' opinions are absolutely to the contrary.

The Court concludes hands-on inspection and testing is critical to a fair trial and due process for the Defendants, particularly in view of the impartial FAA investigator's initial “fatigue crack in the trunion area” conclusion.⁹ The sworn opinion of an expert is not entitled to probative credit if the hypothesis upon which it is based is flawed. *Leeway Motor*

⁸ Plaintiffs state there is evidence the right landing gear was misrigged, but it is not the one that collapsed.

⁹ The trunion area is included in the missing left landing gear components.

Freight v. True, 165 F.2d 38 (10th Cir. 1948); *F.W. Woolworth Co. v. Davis*, 41 F.2d 342 (10th Cir. 1930); *McNamara v. American Motors Corp.*, 247 F.2d 445 (5th Cir. 1957); *Smith v. General Motors Corp.*, 227 F.2d 210 (5th Cir. 1955); *Finney v. Ford Motor Co.*, 331 F.Supp. 321 (W.D. Pa. 1971); *Downs v. Longfellow Corporation*, 351 P.2d 999 (Okla. 1960); and 32 C.J.S. Evidence §569.

The Court has inherent authority, while acting with judicious restraint and discretion, to impose appropriate sanctions in such matters. *Roadway Express v. Piper*, 447 U.S. 752, 764 (1980). Sanctions could include dismissal, claim preclusion, or the giving of an adverse inference instruction. The Court may also impose no sanction. A court should strive under the circumstances to select the least onerous sanction to cure the prejudice suffered by the party. *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994).

Plaintiffs contend only in intentional destruction of evidence cases is a dismissal or the giving of an adverse inference instruction sanction appropriate. The Court disagrees as dismissal or entry of a judgment may be justified when there is unintentional or negligent spoliation of material evidence which prevents a party from receiving a fair trial. Cases supporting the Court's inherent power to impose the sanction of dismissal or the granting of summary judgment against the despoiler absent intentional, bad-faith destruction or loss of material evidence are: *Barker v. Bledsoe*, 85 F.R.D. 545 (W.D. Okla. 1979); *Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing Corp.*, 982 F.2d 363 (9th Cir. 1992); *Lee v. Boyle-Midway Household Products, Inc.*, 792 F.Supp. 1001 (W.D.Pa. 1992); *Roselli v. General Electric Co.*, 599 A.2d 685 (Pa.Super. 1991); *Martin v.*

Volkswagen of America, Inc., 1989 WL 81296 (E.D.Pa. 1989); *Jackson v. Nissan Motor Corp.*, 121 F.R.D. 511 (M.D. Tenn. 1988); *Fire Insurance Exchange v. Zenith Corp.*, 747 P.2d 911 (Nev. 1987); and *Friend v. Pep Boys*, 3 Phila. 363 (1979), *appeal denied*, 292 Pa.Super. 569, 433 A.2d 539 (1981).

In this case, it appears from the record that only the predicate inspection and testing of the subject offending left landing gear by both Plaintiffs and Defendants will assure a fair trial. Plaintiffs have had this opportunity and have developed their theory, but Defendants have been denied the right of inspection and testing because Plaintiffs' repair agency inexplicably discarded most of the pertinent left landing gear components. Even the giving of an adverse inference instruction will not restore Defendants' right to a fair trial. Such an instruction is ill-defined and would result only in probative ambiguity in such a case as this.

For the reasons expressed above, Defendants' motion for sanctions of dismissal based upon spoliation of evidence is hereby sustained. Plaintiffs' claim for damages arising from collapse of the left landing gear of the Cessna 421-B on December 18, 1993, in San Diego, California, is hereby dismissed with prejudice.

IT IS SO ORDERED this 17 day of March, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3/18/97

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

F I L E D

MAR 14 1997

Prin. [unclear], Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LINDSEY K. SPRINGER, et. al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, et. al.,

Defendants.

Case No.96-CV-838-H ✓

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Defendants' Motion to Dismiss [Dkt. 18]; Defendants' Motion to Substitute the United States as the Sole and Proper Defendant to this Action [Dkt. 20]; Plaintiffs' Motion to Require Each Defendant to Obtain Independent Counsel [Dkt. 14]; Plaintiffs' Motion to Dismiss Counterclaim [Dkt. 33]; and Plaintiffs' Motion for Summary Judgment [Dkt. 35] have been referred to the undersigned United States Magistrate Judge for report and recommendation.

BACKGROUND

On September 11, 1996, the 73 plaintiffs filed their complaint seeking damages in the amount of twenty million dollars each from the United States of America, and 34 named present and former employees of the Internal Revenue Service. Plaintiffs allege that the defendants have:

recklessly and intentionally disregarded the provisions of title 26 section 6013(g)(h), 871(d) and the regulations promulgated thereunder and have refused, by fraud, coercion, fear to allow the Plaintiffs their rights to revoke the original Forms 1040 "elections" for all tax years ab initio, pursuant to 26 C.F.R. § 1.6013-6(b) and 1.871-10(d)(1) . . .

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[Dkt. 1, ¶ 22]. This allegation is identical to one contained in a "Complaint for Refund" filed April 8, 1994 by 51 of the Plaintiffs involved in this suit, Case No. 94-C-350-Bu ("Springer I"). That case was dismissed by Judge Michael J. Burrage for lack of subject matter jurisdiction by order dated February 22, 1995. *Springer v. Collector of Internal Revenue*, 1995 WL 434333 (N.D. Okla.) (copy attached hereto as Appendix A). The dismissal was affirmed on appeal by the Tenth Circuit, *Springer v. Internal Revenue Service*, 81 F.3d 173, 1996 WL 164459 (10th Cir. (Okla.)) (copy attached hereto as Appendix B).

In addition to the allegations contained in *Springer I*, Plaintiffs have added the following:

The Defendants, have in part, within their official capacities and in part without official capacities, consciously, knowingly and willingly placed each Plaintiff herein under involuntary subjection to the 16th amendment, in violation of the 13th amendment to the Constitution for the United States of America. [Dkt. 1, ¶ 24].

Essentially, Plaintiffs allege that the payment of federal income tax is voluntary and they became obligated to pay such tax only upon signing tax returns. Plaintiffs maintain that the signature of the person filing a tax return constitutes an "election" to be treated as a taxpayer and allege that through various means, the defendants have somehow tricked or coerced Plaintiffs into signing tax returns. Plaintiffs allege they have unsuccessfully attempted to revoke their "election" to be treated as taxpayers and assert that any failure to recognize their right to revoke their "election, and any action taken toward requiring them to file tax returns subjects them to

involuntary servitude, or slavery, in violation of the Thirteenth Amendment¹ to the United States Constitution.

MOTION TO SUBSTITUTE UNITED STATES AS SOLE AND PROPER DEFENDANT

Defendants have moved, pursuant to Fed.R.Civ.P. 21 and 25, to substitute the United States of America as the sole and proper defendant in this action. The Defendants argue that regardless of how this case is construed, as an action for damages arising from alleged improper tax collection activity under 26 U.S.C. § 7433, or one for a refund of federal taxes pursuant to 26 U.S.C. § 7422, it may be maintained, if at all, only against the United States of America.

In response to Defendants' motion to substitute, Plaintiffs state that they have not filed this action seeking a "refund" under 26 U.S.C. § 7422 but rather, pursuant to 26 U.S.C. § 7433 and 28 U.S.C. § 1340. They argue that because they sought a refund in *Springer I* but are not seeking a refund in this case, and because 26 U.S.C. § 7433 has been amended since *Springer I* to permit suits for damages arising from unauthorized federal tax collection actions without exhaustion of administrative remedies, this Court should not substitute the United States of America as the sole defendant in this action as was done in *Springer I*. However, Plaintiffs have not demonstrated that the named individuals are appropriate parties to this action or that this case is sufficiently different from *Springer I* to require a different result.

¹ "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S.C.A. Const. Amend. 13, §1.

Plaintiffs have asserted this action against named individual defendants in their capacities as officers, employees and agents of the government of the United States of America. [Dkt. 1, ¶¶ 3, 4]. Where, as here, an action is asserted against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States. *Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989). Accordingly, to the extent Plaintiffs have alleged an action against the individual defendants in their official capacities, the United States is properly substituted as the defendant.²

This result is appropriate considering the language of 26 U.S.C. § 7433 which provides in relevant part:

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions. [emphasis supplied].

The language of § 7433 is quite clear that suit brought pursuant to that section is appropriate only against the United States of America. Section 7433 contains no

² Plaintiffs' complaint also contains the allegation: "Defendants United States, et al., are acting as agents of a foreign principal and not agents of the United States Government." [Dkt. 1, ¶ 2]. The existence of this allegation does not change the result. It is clear from Plaintiffs' complaint that the actions they complain of consist of actions taken by defendants in their capacities as officers and employees of the United States Internal Revenue Service.

provision which would enable Plaintiffs to maintain an action against individual officers and employees of the Internal Revenue Service.

Under certain circumstances, an action can be maintained against federal officers or agents in their individual capacities for violations of constitutional rights. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 2404, 29 L.Ed.2d 619 (1971). However, a *Bivens* action is not available when Congress has expressly precluded such a remedy by "declaring that existing statutes provide the exclusive mode of redress." *Bush v. Lucas*, 462 U.S. 367, 373, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). By including the language that a civil action under § 7433 "shall be the exclusive remedy for recovering damages," Congress unmistakably precluded a *Bivens* remedy. Thus, Plaintiffs may not maintain a *Bivens* action against the 34 individually named defendants.

Since § 7433 does not permit an action to be maintained against the individual defendants in their official capacities and since the language of § 7433 also forecloses a *Bivens* action against the individual defendants, the undersigned United States Magistrate Judge RECOMMENDS that the Motion to Substitute the United States as the Sole and Proper Defendant to This Action [Dkt. 20] be GRANTED. This result renders MOOT Plaintiffs' Motion to Require Each Defendant to Obtain Independent Counsel. [Dkt. 14].

MOTION TO DISMISS

The United States of America seeks dismissal of Plaintiffs' action under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction to the extent Plaintiffs

seek a refund of taxes, and under Fed.R.Civ.P. 12(b)(6) for the failure to state a claim upon which relief can be granted.

Subject Matter Jurisdiction

The United States asserts lack of subject matter jurisdiction as a ground for dismissal to the extent that Plaintiffs' complaint can be read as seeking a refund of taxes under 26 U.S.C. § 7422. Although it is not clear from their complaint, Plaintiffs' subsequent filings have made it abundantly clear that they are not seeking a refund.³ Accordingly, the Court rejects the failure of Plaintiffs to meet the jurisdictional prerequisites of § 7422 as a basis for dismissal.

Failure to State a Claim

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P 12(b)(6). However, a complaint may not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (footnote omitted). A court reviewing the sufficiency of a complaint under Rule 12(b)(6) presumes all of the plaintiff's factual allegations are true and construes them in the light most favorable to the Plaintiff. *Hall v. Bellmon*, 935 F.2d 1106,1109 (10th Cir. 1991).

Basically, in reviewing a 12(b)(6) motion, "the court will accept the pleader's description of what happened to him along with any conclusion that can reasonably

³ See e.g. Docket No. 45, page 5, wherein Plaintiffs state: "The Plaintiffs' [sic] **HAVE NOT FILED AN ACTION PURSUANT TO 26 U.S.C. 7422, OK.**" [emphasis in original]

be drawn therefrom." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure, Civil 2d*, § 1357. However, the court is not required to accept the conclusory allegations concerning the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from the description of what happened. *Id.*, See also *Hall*, 935 F.2d at 1110.

Applying this standard to the Plaintiffs' allegations, the Court concludes that Plaintiffs have failed to state a claim upon which relief can be granted under 26 U.S.C. § 7433 and therefore their complaint should be dismissed.

Because Plaintiff's suit is an internal revenue action, the Court has general subject matter jurisdiction as provided by 28 U.S.C. § 1340. However, the grant of subject matter jurisdiction within 28 U.S.C. § 1340 does not constitute a waiver of sovereign immunity. *Guthrie v. Sawyer*, 970 F.2d 733, 735 (10th Cir. 1992). "It has long been established, ... that the United States, as sovereign, 'is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *U.S. v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976)(quoting *U.S. v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 770, 85 L.Ed. 1058 (1941)). A waiver of sovereign immunity cannot be implied, but must be explicitly expressed. *U.S. v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502-03, 23 L.Ed.2d 52 (1969). The burden is on the taxpayer to find and prove an "explicit waiver of sovereign immunity." *Lonsdale v. U.S.*, 919 F.2d 1440, 1444 (10th Cir. 1990). The Court must therefore ascertain whether the

United States has waived its sovereign immunity and consented to be sued according to Plaintiffs' allegations.

Plaintiffs have brought their action under 26 U.S.C. § 7433 which entitles a taxpayer to bring an action against the United States for damages, "[i]f, in connection with any collection of Federal tax" any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of the tax code, or any regulation promulgated thereunder. 28 U.S.C. § 7433(a). Section 7433 is a limited waiver of the sovereign immunity of the United States. Like any other such waiver, in accordance with the cited authorities, it must be strictly observed, and construed in favor of the sovereign. In addition, the court may not enlarge the waiver beyond what the express language of the statute creating the waiver requires. These limiting principles are fatal to the Plaintiffs' claims under Section 7433.

Section 7433 authorizes suits only where an IRS agent has violated the Internal Revenue Code or regulations "in connection with any **collection** of a Federal tax." However, Plaintiffs do not allege any violation of a code provision or regulation in connection with **collection** of a federal tax. Rather, they allege the position taken by the IRS and its agents that income tax is not voluntary is fundamentally wrong. In maintaining that federal income tax is voluntary and that they have been prevented from revoking their previous "elections" to be treated as taxpayers, Plaintiffs are actually complaining that taxes have been improperly **assessed** against them.

As demonstrated by its precise language and legislative history, the waiver of sovereign immunity in section 7433 does not encompass Plaintiffs' action. In

Gonsalves v. I.R.S., 975 F.2d 13, 15 (1st Cir. 1992), the First Circuit reviewed the legislative history of § 7433 to determine its scope.

The legislative history of Section 7433 tells us that "an action under this provision may not be based on alleged ... disregard in connection with the determination of tax." Conf.Rep. 1104, 100th Cong., 2d Sess., at 229, reprinted in 1988-3 Internal Revenue Cum.Bull. 473, 719. Taxpayers who wish to challenge the IRS' calculation of their tax liability must file either a petition for redetermination in the Tax Court, 26 U.S.C. §§ 6213, 6214, or a refund action in the district court. 26 U.S.C. § 7422. Section 7433 was not intended to supplement or supersede, or to allow taxpayers to circumvent, these procedures. *Cf. McMillen v. United States Department of Treasury*, 960 F.2d 187, 190 (1st Cir. 1991)(per curiam)(Section 7432 does not authorize taxpayers to circumvent refund action process by litigating merits of assessment in suit for damages allegedly caused by IRS' refusal to release liens on taxpayers' property).

The Fifth and Ninth Circuit Courts of Appeal have also held that "based upon the plain language of the statute [§ 7433], which is clearly supported by the statutes' legislative history, a taxpayer cannot seek damages under § 7433 for improper assessment of taxes." *Shaw v. U.S.*, 20 F.3d 182, 184 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 635, 130 L.Ed.2d 540 (1994); *Miller v. U.S.*, 66 F.3d 220, 223 (9th Cir. 1995).

Plaintiffs cannot maintain their action under section 7433 because the United States has not waived sovereign immunity for such an action. Absent a waiver of sovereign immunity, the Court is without the power to adjudicate Plaintiffs' claims. The Court concludes therefore that Plaintiffs' action should be dismissed for failure to state a claim upon which relief can be granted.

Further, the Court finds that it would be futile to permit Plaintiffs to amend their complaint. In addition to Plaintiffs' failure to allege an action within the terms of §7433, the law is well-settled that federal income tax is valid, constitutional and is not voluntary as Plaintiffs argue.

In 1954, the Tenth Circuit soundly rejected a challenge to the federal income tax as placing a taxpayer in a position of involuntary servitude contrary to the Thirteenth Amendment to the United States Constitution. The Court labeled the allegations "far-fetched and frivolous." *Porth v. Brodrick*, 214 F.2d 925 (10th Cir. 1954). More recently, in *U.S. v. Mann*, 884 F.2d 532, 535 (10th Cir. 1989), the Court rejected the argument that the Sixteenth Amendment⁴ only applies to corporations as "untrue." In addition, in *Mann*, the Court said views similar to the arguments posed by the plaintiffs⁵ were "somewhere on a continuum between untrue and absurd." Further, in *Lonsdale v. U.S.*, 919 F.2d 1440, 1448 (10th Cir. 1990), the Court stated that many cases have made it "abundantly clear" that the following arguments "are completely lacking in legal merit and patently frivolous:"

(1) individuals ("free born, white, preamble, sovereign, natural, individual common law 'de jure' citizens of a state, etc.") are not "persons subject to taxation under the Internal Revenue code;

⁴ "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S.C.A. Const. Amend. 16.

⁵ The following quote was included among the views the *Mann* Court regarded as falling somewhere between untrue and absurd: "[T]here is no law, and never has been, which requires an individual American freeman to file a return or pay an income tax. The IRS and state gets its [sic] powers through terror and fear and not by the law when it comes to taxes." *Mann*, 884 F.2d 534, n.1.

* * *

(4) the Sixteenth Amendment to the Constitution is either invalid or applies only to corporations; (5) wages are not income; (6) the income tax is voluntary; (7) no statutory authority exists for imposing an income tax on individuals; (8) the term "income" is vague and indefinite; (9) individuals are not required to file tax returns fully reporting their income; and (10) the Anti-Injunction Act is invalid.

It is beyond question that Plaintiffs' position that the income tax is voluntary has been squarely rejected by the courts.

Plaintiffs have failed to demonstrate a waiver of sovereign immunity applicable to their action. In addition, the very premise of Plaintiffs' suit has been unambiguously rejected by the courts. Therefore, the Court concludes that Plaintiffs will not be able to amend their complaint to state a claim. Accordingly, the undersigned United States Magistrate Judge RECOMMENDS that the Motion to Dismiss [Dkt. 18] filed by the United States be GRANTED. This result renders MOOT Plaintiffs' Motion for Summary Judgment.⁶ [Dkt. 35].

PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIM

The United States has asserted a counterclaim against Plaintiffs seeking judgment for a penalty not in excess of \$10,000 each, pursuant to 26 U.S.C. § 6673(b)(1). Section 6673(b)(1) provides:

§ 6673. Sanctions and costs awarded by courts

* * *

(b) Proceedings in other courts.--

⁶ In their Motion for Summary Judgment Plaintiffs argue that they are entitled to judgment because, in its answer the United States admitted that filing and paying income tax is mandatory. This, they argue, is conclusive proof of their enslavement contrary to the Sixteenth Amendment.

(1) Claims under section 7433.--Whenever it appears to the court that the taxpayer's position in the proceedings before the court instituted or maintained by such taxpayer under section 7433 is frivolous or groundless the court may require the taxpayer to pay to the United States a penalty not in excess of \$10,000.

In its counterclaim the United States alleges that Plaintiffs' positions as set forth in their "Complaint For Damages" are frivolous or groundless because they are contrary to established law and are unsupported by a colorable argument for a change in the law.

Plaintiffs argue that: the Court lacks subject matter jurisdiction over the counterclaim; the counterclaim is frivolous; and the counterclaim fails to state a claim upon which relief can be granted. Plaintiffs' arguments are conclusory and are unsupported by any citation to authority.

This Court has subject matter jurisdiction over the counterclaim pursuant to 26 U.S.C. § 7402 and 28 U.S.C. § § 1340, 1345. The counterclaim falls precisely within the express language of 26 U.S.C. § 6673(b)(1). Accordingly, the Court finds that the counterclaim is not frivolous and it states a claim upon which relief can be granted. The undersigned United States Magistrate Judge therefore RECOMMENDS that Plaintiffs' Motion to Dismiss Counterclaim [Dkt. 33] be DENIED.

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that:

The Motion to Substitute the United States as the Sole and Proper Defendant to this Action [Dkt. 20] be GRANTED and the individual defendants be DISMISSED.

The Motion to Dismiss [Dkt. 18] filed by the United States be GRANTED.

Plaintiffs' Motion to Dismiss Counterclaim [Dkt. 33] be DENIED.

Acceptance of the forgoing recommendations will render the following motions MOOT: Plaintiffs' Motion to Require Each Defendant to Obtain Independent Counsel [Dkt. 14]; and Plaintiffs' Motion for Summary Judgment [Dkt. 35].

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 14th day of March 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

Lindsey K. SPRINGER, et al., Plaintiffs,
v.
COLLECTOR OF INTERNAL REVENUE, et
al., John Does 1 through 10, Defendants.

No. 94-C-350-BU.

United States District Court, N.D. Oklahoma.

Feb. 22, 1995.

All plaintiffs pro se.

John A. DiCicco, Virginia M. Navarrete, U.S.
Dept. of Justice, Tax Division, Washington, DC,
for IRS.

John A. DiCicco, U.S. Dept. of Justice, Tax
Division, Washington, D.C., for John Doe.

ORDER

BURRAGE, District Judge.

*1 This matter comes before the Court upon the motion of the defendants to dismiss this action pursuant to Rule 12(b)(1) and Rule 12(b)(6), Fed.R.Civ.P. Based upon the parties' submissions, the Court makes its determination.

On April 8, 1994, the plaintiffs filed a " 'Class Action'--Complaint for Refund" against the defendants, Collector of Internal Revenue and John Does 1 through 10. In their complaint, the plaintiffs seek damages for certain alleged unauthorized collection actions by the defendants. The plaintiffs allege that they are nonresident alien individuals who at no time during the taxable year are engaged in a trade or business in the United States. The plaintiffs contend that all income received by the plaintiffs is gross income from sources "without the United States" as that phrase is defined in 26 CFR 1.862-1. The plaintiffs claim that the defendants have refused to allow the plaintiffs to revoke all 1040 Form "elections" which stated they were to be treated as residents of the United States and their real property income was to be treated as effectively connected with the United States. The plaintiffs allege that in refusing to do so, the defendants have recklessly and intentionally disregarded the provisions of 26 U.S.C. §§ 6013 and 871 and the

regulations promulgated thereunder. The plaintiffs seek damages against the defendants and a refund of their taxes. The plaintiffs contend that the Court has jurisdiction over their action pursuant to 28 U.S.C. § 1340 and 26 U.S.C. § 7433.

In their motion to dismiss, the defendants contend that the plaintiffs' complaint should be dismissed on the basis that the Court lacks subject matter jurisdiction over the plaintiffs' action and the plaintiffs' complaint fails to state a claim upon which relief may be granted. In regard to subject matter jurisdiction, the defendants argue that the United States of America is the real party in interest to this action and that it is immune from suit under the doctrine of sovereign immunity. Even though 28 U.S.C. § 1340 grants the Court original jurisdiction over claims arising under any Act of Congress providing for internal revenue, the defendants maintain that section 1340 is not a waiver of sovereign immunity. The defendants also maintain that 26 U.S.C. § 7433 provides no basis of relief against the United States of America because the plaintiffs failed to exhaust their administrative remedies as required by that section. To the extent the plaintiffs seek a refund of federal income taxes under 26 U.S.C. § 7422, the defendants further claim that such action is barred for the plaintiffs' failure to file a claim for refund with the Internal Revenue Service. Finally, the defendants contend to the extent the plaintiffs' complaint may be construed as seeking injunctive relief, it fails to state a claim for which relief may be granted. The defendants state that the Anti-Injunction Act, 26 U.S.C. § 7421, specifically precludes injunctive relief against the United States of America if such relief interrupts the flow of revenue to the United States of America.

*2 In response, the plaintiffs contend that the Collector of Internal Revenue is a proper party to this action and may be sued under 28 U.S.C. § 1340. The plaintiffs also contend that the defendants must initially move to have the United States of America added as party defendant before the Court can determine whether the United States of America is the real party of interest in this action. However, assuming the United States of America is the real party in interest, the plaintiffs assert that the United States of America has waived its sovereign immunity under 26 U.S.C. § 7433. Contrary to the defendants' allegations, the plaintiffs assert that they

have exhausted their administrative remedies as shown by the "(2nd) Second Codicils" attached to their supplemental response. The plaintiffs also maintain that the United States of America has waived its immunity under section 3772 [I.R.C.1939]. The plaintiffs further contend that the Anti-Injunction Act does not apply to their action. [FN1]

At the outset, the Court finds that the United States of America should be substituted as the defendant in this action. The plaintiffs in their complaint seek a refund of taxes. They also seek monetary damages under section 7433. An action seeking the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected is to be maintained against the United States of America. 26 U.S.C. 7422(f)(1). In addition, section 7433 provides for an action against the United States of America when any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of the Internal Revenue Code or any regulation thereunder in connection with the collections of federal taxes. In light of the plaintiffs' claims, the Court finds that the United States of America is the proper party to this action. [FN2] Although the defendants have not formally moved to substitute the United States of America as the defendant, the Court construes their motion as seeking such relief and hereby substitutes the United States of America as defendant.

As previously stated, Section 7433(a) authorizes a taxpayer to bring a civil action for damages against the United States of America when any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of the Internal Revenue Code or any regulation promulgated thereunder. Subsection 7433(d)(1), however, precludes an award against the United States of America "unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service." 26 U.S.C. § 7433(d)(1). The Department of Treasury has promulgated the specific requirements which must be adhered to prior to bringing a civil action against the United States of America. 26 CFR 301.7433-1(e)(1) provides that an administrative claim shall be sent in writing to the district director of the district in which the taxpayer currently resides. 26 CFR

301.7433-1(e)(2) provides that the administrative claim shall include:

- *3 (i) The name, current address, current home and work telephone numbers and any convenient times to be contacted, and taxpayer identification number of the taxpayer making the claims;
- (ii) The grounds, in reasonable detail, for the claim (includes copies of any available substantiating documentation or correspondence with the Internal Revenue Service);
- (iii) A description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence);
- (iv) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and
- (v) The signature of the taxpayer or duly authorized representative.

For purposes of this paragraph, a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney who has a written power of attorney executed by the taxpayer."

Although the "(2nd) Second Codicils" of the plaintiffs are addressed to the Tulsa, Oklahoma City and Austin directors of the Internal Revenue Service, the Court finds that the "(2nd) Second Codicils," "Affidavits in Support of Codicils" and "Constructive Notices of Non-taxpayers" fail to meet the specific requirements of section 301.7433-1(e)(2) and are inadequate to trigger administrative review. None of the documents include a phone number or convenient time to be contacted. The documents include no indication of the dollar amount of the plaintiffs' claim. Finally, the documents never specifically mention a claim for damages in relation to the alleged illegal collection activities.

Because the plaintiffs have failed to adhere to the statutory prerequisite of section 7433(d)(1), the Court finds that it lacks subject matter jurisdiction over the plaintiffs' action under section 7433. *Confonte v. U.S.*, 979 F.2d 1375 (9th Cir.1992).

Even if the Court were to find that the plaintiffs did exhaust their administrative remedies, the Court concludes that the plaintiffs' complaint fails to state a claim for which relief may be granted under section 7433. Section 7433 applies to acts of officers and employees of the Internal Revenue Service "in connection with any collection of Federal tax...." The plaintiffs' complaint does not allege that collection procedures were instigated or activated by the Internal Revenue Service. The allegations reveal that the plaintiffs paid the federal taxes at issue. Because no collection activities were instigated by the Internal Revenue Service, the Court finds that the plaintiffs do not state a claim for relief under section 7433. *V-1 Oil v. U.S.*, 813 F.Supp. 730, 731 (D.Idaho 1992) (Section 7433's waiver of sovereign immunity limited to actions involving wrongful conduct during collection of federal taxes).

*4 In their complaint, the plaintiffs also seek a refund of taxes paid. The Court, however, concludes that the Court lacks subject matter jurisdiction over the plaintiffs' action. Section 7422(a) provides that no suit shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected until a claim for refund has been duly filed with the Secretary. In the instant case, there has been no claim of refund filed with Secretary by any of the plaintiffs. Therefore, the Court finds that the action against the United States of America for a refund of taxes cannot be maintained.

Finally, the plaintiffs cite other statutes such as 28 U.S.C. § 1340 and section 3772 [I.R.C.1939] as conferring jurisdiction over their action. Sovereign immunity, however, is not waived by the general jurisdictional statute of 28 U.S.C. § 1340. *Guthrie v. Sawyer*, 970 F.2d 733, 735 n. 2 (10th Cir.1992). In addition, section 3772 [I.R.C.1939] is now 26 U.S.C. §§ 6532 and 7422. Section 6532 pertains to statute of limitations on suits for the recovery of income tax and section 7422 pertains to actions for tax refunds. The plaintiffs, as stated above, have not complied with the jurisdictional prerequisite of section 7422 of filing a tax refund claim. Therefore, the Court lacks subject matter jurisdiction over the plaintiffs' action.

Based upon the foregoing, Defendants' Motion to

Dismiss (Docket No. 22) is GRANTED. This action is DISMISSED. In light of the Court's ruling, Plaintiffs' Motion for Summary Judgment--With Prayer Request for Hearing Before Unbiased Referee to Issue Refunds and to Assess Damages (Docket No. 35) is declared MOOT.

FN1. In light of the fact that the " 'Class Action'--Complaint for Refund" does not indicate any request for an injunction against the defendants and the plaintiffs maintain that they do not seek to enjoin any collection of taxes, the Court finds it unnecessary to address the application of the Anti-Injunction Act.

FN2. In addition, the general rule is that a suit is against the United States of America if the judgment sought would expend itself on the public treasury or domain or if the effect of the judgment would be to restrain the United States of America from acting, or to compel it to act. *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963). The effect of the instant action, if successful, would be to expend itself on the public treasury for there is little doubt that a refund of taxes or a recovery of monetary damages would have to come from the public treasury. Therefore, this action is one against the United States of America rather than the federal officers nominally named.

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NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Lindsey K. SPRINGER, Plaintiff-Appellant,
v.
Paul A. Bischoff, Leella J. Bischoff, Harold D. Boos, Michelle D. Brashier,
Dowell N. Buckner, Lawrence M. Buckner,
Ronald Wayne Buck, Suzanne Buck, Thomas M. Burton, Russell L. Dark, Tom D. Davenport,
Jeanne J. Davenport, Dennis Dazey, Carol D. Dazey, Charles D. Hathaway,
Judy E. Hathaway, Robert L. Huffman, Norma W. Huffman, John P. Krueger,
James L. Lambert, Stephanie V. Krueger, Vernon L. Noah, Marlene D. Noah,
Marcus Craig, Jan R. Oswald, William D. Perry, Georgia M. Perry, Jeffrey A. Robbins,
Cynthia K. Robbins, Jonathan C. Shannon, Gaylord D. Snitker, Jim A. Spargur, Barbara J. Sparks, John N. Teel, James R. Timmons, Jim H. Waggoner, Wanda J. Whitham, Jean D. Whitham, Melvin D. Whitham, Reta M. Whitham, Rodney K. Williams, Anetta L. Williams, David Wollman, Aline Wollman, James E. Turner, Marsha R. Turner, Robert D. Hembree,
Plaintiffs,

v.
INTERNAL REVENUE SERVICE, sued as:
Collector of Internal Revenue; John Doe,
sued as John Does I through 10, Defendants-Appellees.
Lindsey K. SPRINGER, Paul A. Bischoff, Leella J. Bischoff, Harold D. Boos,
Michelle D. Brashier, Dowell N. Buckner,
Lawrence M. Buckner, Ronald Wayne Buck, Suzanne Buck, Thomas M. Burton, Russell

L. Dark, Tom D. Davenport, Jeanne J. Davenport, Dennis Dazey, Carol D. Dazey, Charles D. Hathaway, Judy E. Hathaway, Robert L. Huffman, Norma W. Huffman, John P. Krueger, James L. Lambert, Stephanie V. Krueger, Vernon L. Noah, Marlene D. Noah, Marcus Craig, Jan R. Oswald, William D. Perry, Georgia M. Perry, Jeffrey A. Robbins, Cynthia K. Robbins, Jonathan C. Shannon, Gaylord D. Snitker, Sandra W. Snitker, Jim A. Spargur, Barbara J. Sparks, John N. Teel, James R. Timmons, Jim H. Waggoner, Wanda J. Waggoner, Kenton D. Whitham, Jean D. Whitham, Melvin D. Whitham, Reta M. Whitham, Rodney K. Williams, Anetta L. Williams, David Wollman, Aline Wollman, James E. Turner, Marsha R. Turner, Robert D. Hembree, Timothy Farr, Timothy F. Goddard, Young Ja Goddard, Richard Labat, Rebecca J. Labat,
Plaintiffs-Appellants,

v.
INTERNAL REVENUE SERVICE, sued as:
Collector of Internal Revenue; John Doe,
sued as John Does I through 10, Defendants-Appellees.

No. 95-5072.

United States Court of Appeals, Tenth Circuit.

April 8, 1996.

ORDER AND JUDGMENT [FN1]

FN1. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before KELLY and BARRETT, Circuit Judges,
and BROWN, [FN**] Senior District Judge.

FN** Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these consolidated appeals. See Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

We note initially that these appeals proceed only as to Lindsey K. Springer because none of the other pro se parties signed the brief. See 10th Cir. R. 46.5. Mr. Springer, who is proceeding pro se, is precluded from representing any others in these appeals because he is not a member of the bar.

Mr. Springer's allegations on appeal are without merit. It is clear that the district court was correct in substituting the United States of America as the proper defendant with respect to these claims. 26 U.S.C. 7422(f)(2) and 7433(a). It is also clear the district court correctly dismissed plaintiffs' complaint for lack of subject matter jurisdiction.

The government moved for sanctions against Mr. Springer, and Mr. Springer has not responded, although he had an opportunity to do so. We agree that the appeals in this case are frivolous. Pursuant to our authority under 28 U.S.C.1912 and Fed. R.App. P. 38, we hereby impose sanctions on Mr. Springer in the amount of \$2,000 in lieu of costs and attorney fees. All other outstanding motions are denied.

The judgment of the United States District Court for the Northern District of Oklahoma is **AFFIRMED** for substantially the same reasons as set forth in its February 22, 1995 order.

The mandate shall issue forthwith.

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

FILED

MAR 14 1997

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

FRANCISCO FRANCO)
SS# 407-86-4105)

Plaintiff,)

v.)

NO. 94-C-486-M ✓

JOHN J. CALLAHAN¹,)
Acting Commissioner Social Security)
Administration,)

Defendant.)

ENTERED ON DOCKET

DATE 3/18/97

JUDGMENT

Judgment is hereby entered for the Defendant and against Plaintiff on Plaintiff's application for fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d).

DATED this 14th day of March, 1997.

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

¹ President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Fed.R.Civ.P. 25(d)(1) John J. Callahan is substituted as the defendant in this suit.

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

F I L E D

FRANCISCO FRANCO)
SS# 407-86-4105)
Plaintiff,)
v.)
JOHN J. CALLAHAN¹,)
Acting Commissioner Social Security)
Administration,)
Defendant.)

NO. 94-C-486-M

MAR 14 1997 SA
PHIL WOODRIDGE, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 3/18/97

ORDER

PLAINTIFF'S MOTION FOR ATTORNEY FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT AND MOTION FOR AWARD OF COURT COSTS [Dkt. 15], filed January 2, 1997, is before the Court for consideration.

The Equal Access to Justice Act ("EAJA") requires the United States to pay attorney fees and costs to a "prevailing party" unless the court finds the position of the United States was substantially justified, or special circumstances make an award unjust. 28 U.S.C. § 2412(d). The United States bears the burden of proving that its position was substantially justified. *Kemp v. Bowen*, 822 F.2d 966, 967 (10th Cir. 1987).

In *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), the Supreme Court defined "substantially justified" as "justified in substance or in the main--that is, justified to a

¹ President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Fed.R.Civ.P. 25(d)(1) John J. Callahan is substituted as the defendant in this suit.

degree that could satisfy a reasonable person." "Substantially justified" is more than "merely undeserving of sanctions for frivolousness." *Id.*

[A] position can be justified even though it is not correct, and . . . it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

Id. at n.2. A position may be substantially justified even though it was not supported by substantial evidence. If this were not the case, there would be "an automatic award of attorney's fees in all social security cases in which the government was unsuccessful on the merits." *Hadden v. Bowen*, 851 F.2d 1266, 1269 (10th Cir. 1988). Reasoning that such an automatic award of fees under the EAJA would be contrary to the intent of Congress, the Tenth Circuit has adopted the majority rule "that a lack of substantial evidence on the merits does not necessarily mean that the government's position was not substantially justified." *Id.* at 1267.

In this case the ALJ denied benefits at step-one of the five-step evaluative process. Finding "no evidence that the claimant's work activity did not involve significant physical or mental activities for pay or profit," the ALJ concluded that the work activity Plaintiff had engaged in during the period in question constituted substantial gainful activity so as to preclude a finding of disability. [R. 24]. The undersigned United States Magistrate Judge affirmed the agency decision as being supported by substantial evidence. [Dkt. 8]. The decision was appealed to the Tenth Circuit Court of Appeals where the case was reversed and remanded for further proceedings:

Because the ALJ failed to consider evidence presented by claimant which may rebut the earnings presumption relied upon to support the decision . . .

[Dkt. 13, p. 2].

Plaintiff worked two part-time jobs during the time he alleges disability. The record contains a questionnaire from one of the employers, Beaumont School District, reflecting that Plaintiff was hired, worked, and was paid on the same basis as other similar employees and "does an exceptional job." [R. 90-94]. There is nothing in the record from the other employer, Lamar University, concerning the conditions of Plaintiff's employment, although the record contains a letter verifying Plaintiff's employment there. [R. 89]. However, the Tenth Circuit focused its attention on a work activity report form completed by Plaintiff and submitted to the Social Security Administration. Plaintiff checked boxes on the form which indicated he worked shorter hours, required extra assistance, had fewer duties, and frequent absences for the same pay other employees receive. [R. 63-64]. The form requested an explanation of the answers checked and that the employer to whom the answers pertained be identified. Plaintiff's entire explanation was: "I do not have to do the lab work. I miss work about once per month." [R. 64]. Although the Plaintiff did not identify which employer the answers related to, the Tenth Circuit interpreted the information as relating to Plaintiff's experiences at Lamar University. The Tenth Circuit acknowledged the existence of evidence contrary to Plaintiff's contentions and acknowledged that it is Plaintiff's burden to prove disability, but remanded the case for further development of the record concerning Plaintiff's work at Lamar University and for

consideration and discussion of Plaintiff's contentions about his work at Lamar University. [Dkt. 13, p. 5].

The controlling question now before this Court is whether the government was reasonable in arguing that there was substantial evidence in the record to support the ALJ's decision. *Weatley v. Bowen*, 803 F.2d 575 (10th Cir. 1986). In evaluating whether the government's position was substantially justified, the focus is on the issue that led to remand, rather than the ultimate issue of disability. *Flores v. Shalala*, 49 F.3d 562, 566 (9th Cir. 1995). The position that must be justified for EAJA purposes is the government's litigation position. *United States v. 2116 Boxes of Boned Beef*, 726 F.2d 1481, 1487 (10th Cir. 1984).

The Court has reviewed the brief Plaintiff filed in this Court seeking reversal of the denial decision and finds that Plaintiff did not assert substandard job performance, absenteeism, or reduced job duties as a basis for finding that his work did not constitute substantial gainful activity. In his brief before this Court, Plaintiff asserted a very general argument that the ALJ mechanically applied the earnings guidelines in 20 C.F.R. § 404.1574 to conclude that he was not entitled to benefits. However, Plaintiff did not cite to or discuss specific references in the record that would demonstrate that the record contained evidence to rebut the regulatory presumption that his earnings level constituted substantial gainful activity.

Of the record citations in Plaintiff's brief, only the citation to page 157 contains any mention of his work. Page 157 is part of a psychiatric consultative examination report which contains the following statement:

Concentration: The patient showed decreased attention in concentration, easy distractability [sic] on cognitive testing manifested by poor reverse digit spans and poor object recall.

The poor functioning on the job is primarily due to decreased concentration and increased distractability [sic], unable to maintain a train of thought. It causes him to give lectures that are suboptimal.

Nothing within Plaintiff's brief relates this comment concerning "suboptimal lectures" to the position at Lamar University. Viewed in the context of the arguments contained in Plaintiff's brief, this single reference to "poor functioning on the job" was not sufficient to alert the government, or this Court, of Plaintiff's claim that the ALJ failed to consider evidence related to the conditions of his employment that would rebut the earnings presumption.

The Tenth Circuit has firmly applied the waiver rule that, absent compelling circumstances, issues not presented to the district court will not be reviewed on appeal. *See, Crow v. Shalala*, 40 F.3d 323, 324 (10th Cir. 1994). This Court has not had the benefit of reading Plaintiff's brief to the Tenth Circuit. Therefore, it has no knowledge of what "compelling circumstances" persuaded the Circuit Court to address the claim that the ALJ failed to consider Plaintiff's evidence concerning his working conditions at Lamar University. However, this issue was not raised in the district court. Since the issue which led to remand by the circuit was not raised before the district court, the Court finds the government was substantially justified in not specifically addressing that issue.

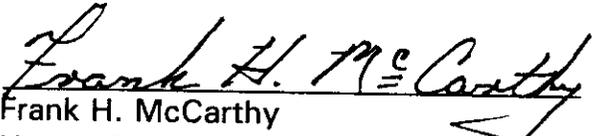
Further, even if Plaintiff were considered to have asserted this issue, the Court finds that the government has sustained its burden of proving that its position was substantially justified. The government's brief opposing Plaintiff's application for EAJA fees recounts its arguments with citations to the record to support its position. Plaintiff's brief in support of his application for EAJA fees addresses the legal standard for an EAJA award, contains an itemization of fees and costs sought and only generally states his contention that "the actions of the Secretary of Health and Human Services . . . were not justified in this case." [Dkt. 16, p. 3]. Aside from the bare fact that the Tenth Circuit remanded the case for further proceedings, there is nothing before the Court to rebut the arguments asserted by the government to demonstrate that its position was substantially justified.

Finally, the Court finds that the position taken by the government in response to the specific issues raised by Plaintiff before this Court was substantially justified. The record reflects that following his injury, and throughout the time he alleges he was disabled, Plaintiff continued to work at two part-time jobs he held before his allegedly disabling injury. [R. 166-198]. The relevant regulations specifically state that "work may be substantial even if it is done on a part-time basis." 20 C.F.R. § 404.1572(a). Work activity is considered gainful "if it is the kind of work usually done for pay or profit, whether or not a profit is realized." 20 C.F.R. §404.1572(b). Substantial work activity "involves doing significant physical or mental activities." The Court finds the government's position that Plaintiff's part-time jobs, teaching at the college level and in an adult education program, constituted work activity that is both substantial and

gainful has a reasonable basis in law and fact and is therefore substantially justified.
See Gatson v. Bowen, 854 F.2d 379 (10th Cir. 1988).

Based on the foregoing, PLAINTIFF'S MOTION FOR ATTORNEY FEES PURSUANT TO THE
EQUAL ACCESS TO JUSTICE ACT AND MOTION FOR AWARD OF COURT COSTS [Dkt. 15] is
DENIED.

SO ORDERED this 14th day of March, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

ENTERED ON DOCKET
DATE **MAR 17 1997**

CURTIS R. PEOPLES,)
)
Plaintiff,)
)
v.)
)
AMERICAN NATIONAL CAN)
COMPANY, d/b/a LIBERTY GLASS)
and LOG, INC., formerly)
known as LIBERTY GLASS)
COMPANY,)
)
Defendant.)

Case No. 96-cv-84-H

FILED

MAR 13 1997

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

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 13TH day of MARCH, 1997, this matter comes on before me, the undersigned United States District Judge, on the Joint Application of the parties for an Order of Dismissal With Prejudice, and the Court being advised that all claims of the Plaintiff have been settled in full, and for good cause shown, finds that the Joint Application of the parties is granted, and this action is and should be dismissed with prejudice to the right of refileing.

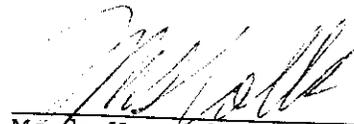
IT IS SO ORDERED.



Judge of the United States
District Court

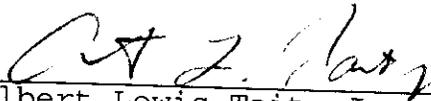
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APPROVAL:



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Attorney for Defendant,
American National Can Company

alt\peoples\pleading\order.dwp/jrf

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

FILED

MAR 13 1997

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

Case No. 96-C-1070-H

JERRY METZ,

Plaintiff,

v.

THE NORTHERN ASSURANCE
COMPANY OF AMERICA, a
Massachusetts corporation,

Defendant.

ENTERED ON DOCKET

MAR 17 1997

DATE

ORDER

This matter comes before the Court on Plaintiff's Motion to Remand (Docket # 8). Plaintiff originally brought this action in Tulsa County District Court, alleging breach of contract and bad faith, and requesting damages in excess of \$10,000. Defendant removed the case to this Court on the basis of diversity jurisdiction. Plaintiff now moves to remand, claiming that diversity jurisdiction does not exist.

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$50,000. 28 U.S.C. § 1332(a). The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995) (citation omitted). Where the face of the petition does not affirmatively establish the requisite amount in controversy, Laughlin requires a removing defendant to set forth in the removal documents the specific facts which form the basis of its belief that there is more than \$50,000 at issue in the case. Id. There is a presumption against removal jurisdiction. Id.

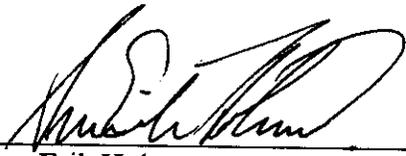
In this case, neither the allegations in the petition nor the allegations in the removal documents establish the requisite jurisdictional amount. Plaintiff's petition seeks damages "in excess of \$10,000," and Defendant has not complied with the requirements of Laughlin in the notice of removal. The conclusory statement that "[t]he matter in controversy exceeds, exclusive of costs and disbursements,

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the sum of \$50,000." does not satisfy the requirements of Laughlin. Accordingly, Plaintiff's motion to remand (Docket # 8) is granted.

IT IS SO ORDERED.

This 13TH day of March, 1997.



Sven Erik Holmes
United States District Judge

FILED

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

MAR 13 1997

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

UNITED STATES OF AMERICA,

Plaintiff

v.

ROSIE CARTER,

Defendant.

Civil Action No. 96CV1092H

ENTERED ON DOCKET

DATE MAR 17 1997

DEFAULT JUDGMENT

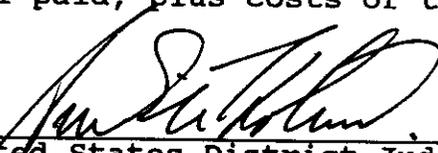
This matter comes on for consideration this 13TH day of MARCH, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Rosie Carter, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Rosie Carter, was served with Summons and Complaint on December 5, 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, Rosie Carter, for the principal amount of \$1,050.00, plus accrued interest of \$533.65, plus administrative charges in the amount of \$87.00, plus interest thereafter at the rate of 3 percent per

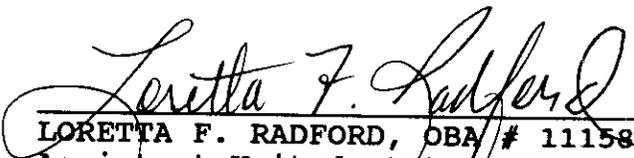
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annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus 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 5.67 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

FILED

MAR 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY BURTON,)
)
 Plaintiff,)
)
 vs.)
)
 TOYOTA MOTOR SALES, U.S.A.,)
 INC., ex. rel. LEXUS)
 MANUFACTURERS, FURMAN, INC.)
 d/b/a LEXUS OF TULSA,)
)
 Defendants.)

No. 97-C-48-B

MAR 17 1997

ORDER

Before the Court is the Motion to Remand to State Court filed by Plaintiff Gary Burton ("Burton") (Docket No. 6) and the Motion to Strike Furman, Inc. d/b/a Lexus of Tulsa ("Furman"), as Party Defendant filed by Defendant Lexus Manufacturers ("Lexus") (Docket No. 11).

On January 2, 1996, Burton filed a petition in Tulsa County District Court against Lexus seeking damages for negligence, personal injury and product liability arising from an alleged malfunction in the airbag of his 1991 Lexus LS400 during an accident which occurred on May 5, 1994. After several extensions of time for service of Summons, Defendant Lexus was finally served by certified mail on December 31, 1996. On January 16, 1997, Defendant Lexus removed the action based on diversity jurisdiction, alleging that it is a corporation organized and existing under the laws of a state other than Oklahoma, whose principal place of business is outside of Oklahoma. On February 6, 1997, Burton simultaneously filed an Amended Complaint adding Furman as a Party Defendant and a Motion to Remand based on lack of diversity jurisdiction. In ¶2 of the Amended Complaint, Burton alleges the following:

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Plaintiff adds Furman, Inc. doing business as Lexus of Tulsa, as a Defendant in the present case before this Court. Furman, Inc., was not listed as a Defendant in the original Petition, but after further research, it was discovered that Furman, Inc. is an indispensable party that is necessary for a fair adjudication of this case, because Furman, Inc., was in custody of the automobile in question and sold the automobile to the Plaintiff.

In moving to remand, Burton asserts that pursuant to Fed.R.Civ.P. 15(a) he was not required to seek leave of Court or the permission of opposing counsel before adding Furman as a defendant because the Amended Complaint was filed before a responsive pleading was served. Burton further contends that because Furman is a nondiverse defendant, complete diversity does not exist and the case should be remanded to Tulsa County District Court. Defendant Lexus moves to strike Furman as a party defendant and objects to remand of this case on the ground that the two year statute of limitations bars any negligence or product liability claim against Furman because the subject accident allegedly occurred on May 5, 1994 and Furman was not added as a defendant in this case until February 6, 1997. Burton counters by arguing that Rule 15(c)(3) allows his claim against Furman to relate back to the filing of the original petition in January 1996 as it arose out of the same conduct, transaction or occurrence set forth in the original petition, and Furman, as Lexus' dealer, was on notice of the claim.

Section 1447(e), title 28 of the United States Code provides that

[i]f after removal a plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

Congress enacted §1447(e) to allow the possibility of remand rather than dismissal when a non-diverse party is joined after removal:

[Section 1447(e)] takes advantage of the opportunity opened by removal from a state court to permit remand if a plaintiff seeks to join a diversity-destroying defendant after removal. Joinder coupled with remand may be more attractive than either dismissal under [Fed.R.Civ.P.] 19(b) or denial of joinder.

Yniques v. Cabral, 985 F.2d 1031, 1034 (9th Cir. 1993) (quoting H.R.Rep. No. 889, 100th Cong., 2d Sess. 72-73 (1988)). “Federal courts and commentators have concluded that, under §1447(e), the joinder or substitution of nondiverse defendants after removal destroys diversity jurisdiction, regardless whether such defendants are dispensable or indispensable to the action.” *Casas Office Machines, Inc. v. Mita Copystar America, Inc.*, 42 F.3d 668, 674 (1st Cir. 1995); *Yniques*, 985 f.2d at 1034; *Washington Suburban Sanitary Comm’n v. CRS/Sirrinc, Inc.*, 917 F.2d 834, 835 (4th Cir. 1990).

Burton was not required to seek leave to join Furman as Furman was properly added as a defendant pursuant to Rule 15(a). His addition destroyed diversity jurisdiction. Lexus’ claim that the statute of limitations bars any claim against Furman is one it will have to pursue in state court as this Court lacks subject matter jurisdiction. Therefore, the Court grants Plaintiff’s Motion to Remand (Docket No. 6) and denies Defendant’s Motion to Strike (Docket No. 11).

ORDERED this 14th day of March, 1997.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
3-17-97
FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MAR 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
 v.)
)
 DANA ELAINE HARRIS-BAKER,)
)
 Defendant.)

Civil Action No. 96CV1112K

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of March 14, 1997 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Dana Elaine Harris-Baker**, 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 14 day of March, 1997.

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

By J. Schwelke
Deputy Court Clerk for Phil Lombardi

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

F I L E D

MAR 14 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD POUNDS, et al.,)
)
)
 Plaintiffs,)
)
 v.)
)
 OTTAWA COUNTY DISTRICT)
 COURT, et al.,)
)
 Defendants.)

Case No. 96-C-895-K ✓

REPORT AND RECOMMENDATION AND ORDER OF U. S. MAGISTRATE JUDGE

This report and recommendation and order pertains to the Motion to Dismiss of Sam C. Fullerton, IV (Docket #13), Plaintiffs' Motion to Dismiss Counsel and Associates: Due to Conflict of Interest (Docket #18), Plaintiffs' Motion to Quash Federal Defendants' Motion for Extension of Time (Docket #19), the Motion for Order for Immediate Return of Grandchildren and Motion for Hearing on Damages Contained in Plaintiffs' Response to Answers (Docket #20), Plaintiffs' Motion for an Extension of Time on Defendants' Subpoena (Docket #21), Plaintiffs' Motion to Dismiss Federal Counsel: Due to Conflict of Interest and Constitutional Violations (Docket #24), Plaintiffs' Application: For Entry of Default (Docket #27), Plaintiffs' Motion to Quash Defendants' Motion for Extension of Time (Docket #29), Plaintiffs' Motion to Quash Federal Defendants' Second Motion for Extension of Time (Docket #31), and Defendants' Request for Status Conference Under Local Rule 16 (Docket #34).

Plaintiffs bring this action pro se seeking a writ of habeas corpus and damages in the amount of \$1,000,000.00 for the alleged illegal removal of three minor Indian

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children from their home and denial of visitation with the family. Plaintiff Mary McRae is apparently the children's grandmother and plaintiff Richard Pounds is married to Mary McRae and therefore the children's step-grandfather. The mother of the minor children, an Eastern Shawnee Indian, is not a party to the case.

Attachments to plaintiffs' complaint and defendants' motion to consolidate actions and to dismiss show that, in January of 1996, the children's mother applied to the Eastern Shawnee tribe to take custody of her children and signed a voluntary grant of her custodial rights. Richard James, prosecuting attorney for the Court of Indian Offenses, filed an Application for Emergency Custody to bring the matter before the Court of Indian Offenses, Juvenile Division, on January 11, 1996. The court granted custody to the tribe, and the children were placed in the foster care of Mary McRae temporarily, subject to the tribe's supervision. When Mary McRae did not cooperate with the tribe in its efforts to supervise the situation, an application for an order authorizing the apprehension of the juveniles was granted. On January 23, 1996, Richard James filed a Petition for Adjudication as Children in Need of Care. The court issued an Order of Adjudication as Children in Need of Care on March 14, 1996, which decreed that the custody of the children be continued with the Eastern Shawnee nation and their placement determined by the Indian Child Welfare Department. They were removed from the care of Richard Pounds and Mary McRae, and this lawsuit resulted.

REPORT AND RECOMMENDATION

The court has reviewed the pleadings and finds as follows. The Motion to

Dismiss of Sam C. Fullerton, IV (Docket #13) should be granted. District Judge Sam Fullerton, who entered the order upon the application of the Tribe making the children wards of the Courts of Indian Offenses, is immune from suit for his actions taken in his capacity as a judge. The courts have long recognized the doctrine of judicial immunity from suit for money damages for judges acting in their judicial capacity within their jurisdiction. Mireles v. Waco, 502 U.S. 9, 9-10 (1991); Van Sickle v. Holloway, 791 F.2d 1431, 1435-36 (10th Cir. 1986).

In Mireles, the Supreme Court stated that whether a judge's act is a "judicial" one relates to the nature of the act itself and whether it is a function normally performed by a judge and whether the parties dealt with him as a judge. 502 U.S. at 12. The court went on to say that a judge is not deprived of immunity because the action he took was in error or in excess of his authority. Id. at 13.

Judge Fullerton is a district court judge with unlimited original jurisdiction of all justiciable matters under Art. 7, § 7 of the Oklahoma Constitution, and the acts of which plaintiffs complain were clearly judicial in nature. He should be found immune from suit for his actions taken in his judicial capacity.

ORDER

Plaintiffs' Motion to Dismiss Counsel and Associates: Due to Conflict of Interest (Docket #18), which the court construes as a motion to disqualify, is denied. Plaintiffs claim that they had communications with Michael McBride and Nathan Young in the Eastern Shawnee Tribal Council office before this case was filed, and therefore they should be disqualified from representing the defendants in this case.

Mary McRae admitted that Mr. McBride told her he could not represent her because he already represented the tribe. In Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985), the court noted that disqualification motions may not be used as strategic litigation tactics. Disqualification of counsel impinges on parties' rights to employ counsel of their own choice. Evans v. Artek Sys. Corp., 715 F.2d 788, 791 (2nd Cir. 1983). Therefore, courts require parties seeking disqualification of counsel to meet a high standard of proof before disqualification will be granted. Id. Past representation may be a basis for a motion to disqualify, but these attorneys have never represented plaintiffs and there was no attorney-client relationship between them. There is no indication that the attorneys gained confidential information from plaintiffs in any brief contacts prior to the filing of this lawsuit which can now be used against them.

Plaintiffs' Motion to Quash Federal Defendants' Motion for Extension of Time (Docket #19) is moot. On January 2, 1997, the federal defendants' motion for extension of time was granted.

The Motion for Order for Immediate Return of Grandchildren and Motion for Hearing on Damages Contained in Plaintiffs' Response to Answers (Docket #20) is denied. In this pleading, plaintiffs ask for an order for immediate return of their grandchildren and a hearing to determine the damages plaintiffs should be awarded for violation of their rights. Under 25 U.S.C. § 1303, any person detained by order of an Indian Tribe may test the validity of that detention in the federal courts by way of a writ of habeas corpus. However, federal courts in which Indian child custody

issues have been brought under this section have held that they have no jurisdiction to review child custody decisions, which are within the jurisdiction of the tribal courts.¹ LeBeau v. Dakota, 815 F.Supp. 1074, 1076 (W.D. Mich. 1993); Sandman v. Dakota, 816 F.Supp. 448, 451 (W.D. Mich. 1992), aff'd, 7 F.3d 234 (6th Cir. 1993); DeMent v. Oglala Sioux Tribal Ct., 874 F.2d 510, 514 (8th Cir. 1989).

Plaintiffs' Motion for an Extension of Time on Defendants' Subpoena (Docket #21) is moot. On January 2, 1997, the federal defendants' motion for extension of time was granted.

Plaintiffs' Motion to Dismiss Federal Counsel: Due to Conflict of Interest and Constitutional Violations (Docket #24), which the court construes as a motion to disqualify, is denied. This pleading contains allegations similar to those in plaintiffs' Motion to Dismiss Counsel and Associates: Due to Conflict of Interest (Docket #18). The attorneys in the United States Attorneys' Office have never represented plaintiffs, and there was no attorney-client relationship between them. There is no indication

¹ The Secretary of the Interior established the Courts of Indian Offenses to provide for law enforcement on Indian reservations with no courts of their own in 25 C.F.R. §§ 11.1-11.32C, and these courts are referred to as "CFR courts." The Tenth Circuit held in Tillett v. Lujan, 931 F.2d 636, 640 (10th Cir. 1991), that the creation of these courts was a valid exercise of the Secretary of the Interior as delegated to him by Congress which holds plenary power over Indian tribes.

The Indian Child Welfare Act, 25 U.S.C. §1901 et seq., makes no distinction between C.F.R. Courts and tribal courts in the definitional section at 25 U.S.C. § 1903(12). The Eastern Shawnee Tribe does not have a tribal court, so the C.F.R. court has jurisdiction over Eastern Shawnee child welfare matters under 25 C.F.R. § 11.900-912 and proceedings in which a minor is alleged to be a minor-in-need-of-care under 25 C.F.R. 11.905(b).

that the attorneys gained confidential information from plaintiffs in early conversations prior to the filing of this lawsuit which can now be used against them.

Plaintiffs' Application for Entry of Default (Docket #27) is denied. The federal defendants' second motion for extension of time and request for instructions from the court (Docket #28) was granted on February 24, 1997, giving the federal defendants additional time in which to answer or otherwise plead.

Plaintiffs' Motion to Quash Defendants' Motion for Extension of Time (Docket #29) is moot. On February 13, 1997, the federal defendants' motion for extension of time was granted.

Plaintiffs' Motion to Quash Federal Defendants' Second Motion for Extension of Time (Docket #31) is moot. On February 24, 1997, the federal defendants' second motion for extension of time was granted.

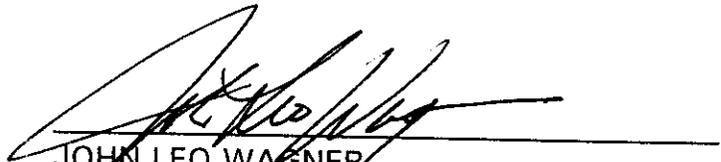
Defendants' Request for Status Conference Under Local Rule 16 (Docket #34) is denied. The court finds that a status conference is not necessary at this time. Discovery in this case is stayed pending a ruling on Defendants' Motion to Consolidate Actions and to Dismiss (Docket #39).

In summary, the Motion to Dismiss of Sam C. Fullerton, IV (Docket #13) should be granted. Plaintiffs' Motion to Dismiss Counsel and Associates: Due to Conflict of Interest (Docket #18), the Motion for Order for Immediate Return of Grandchildren and Motion for Hearing on Damages Contained in Plaintiffs' Response to Answers (Docket #20), Plaintiffs' Motion to Dismiss Federal Counsel: Due to Conflict of Interest and Constitutional Violations (Docket #24), Plaintiffs' Application for Entry

of Default (Docket #27), and Defendants' Request for Status Conference Under Local Rule 16 (Docket #34) are denied. Plaintiffs' Motion to Quash Federal Defendants' Motion for Extension of Time (Docket #19), Plaintiffs' Motion for an Extension of Time on Defendants' Subpoena (Docket #21), Plaintiffs' Motion to Quash Defendants' Motion for Extension of time (Docket #29), and Plaintiffs' Motion to Quash Federal Defendants' Second Motion for Extension of Time (Docket #31) are moot.

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

Dated this 14th day of March, 1997.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:\r&r\pounds.rr

3-17-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
 on behalf of the Secretary of Veterans Affairs,)
)
 Plaintiff,)
)
 v.)
)
 FRANK ALLEN BISHOP, a single person;)
 COUNTY TREASURER, Osage County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Osage County, Oklahoma,)
)
 Defendants.)

CIVIL ACTION NO. 96-CV-1194-K

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of ~~this Court~~ as of March 13, 1997 and the declaration of Phil Pinnell, Assistant United States Attorney, that the Defendant, **Frank Allen Bishop, a single person**, 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 13 day of March, 1997.

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

By A. Schwabke
 Deputy

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

LASHONN JOHNSON)
)
 Plaintiff,)
)
 vs.)
)
 DILLARD'S DEPARTMENT STORES, INC.,)
 a foreign corporation,)
)
 Defendant.)

No. 95-C-1187K ✓

F I L E D

MAR 13 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Defendant Dillard's Department Stores, Inc.'s ("Dillard's") Motion for Summary Judgment.

Statement of Facts¹

Plaintiff was hired on December 13, 1990 by Dillard's at their Promenade Mall, Tulsa, Oklahoma, store where she worked as a sales associate for a cosmetics line known as Fashion Fair. The Plaintiff asserts that after she had been working at Dillard's for awhile, she was subjected to a racial atmosphere which was so intolerable that she was forced to quit her job. Plaintiff claims that she was constructively discharged on November 9, 1991 because of her race, African American, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Most of the Plaintiff's allegations of racial conduct relate to actions taken or statements made by co-workers who were employed in the Ladies' Fragrances section of the cosmetics department at Dillard's. The cosmetics

¹ Due to the Plaintiff's failure to submit a statement of facts disputing Defendant's statement of facts as required by N.D. LR 56.1(B), the Court accepts the Defendant's statement of facts as admitted by the Plaintiff and supplements this section with information gleaned from the record submitted by the Defendant.

area in the Tulsa Promenade Dillard's store was divided into "bays", which are separate areas for the sale of different product brands. The Fashion Fair product line shared a bay with Ladies' Fragrances [Exhibit A, Defendant's Motion for Summary Judgment at 111]. Specifically, Plaintiff alleges (1) that six of her Caucasian co-workers who worked in the Ladies' Fragrances bay treated African American or Asian customers less courteously than Caucasian customers [Id. at 103]; (2) that on two separate occasions, her co-workers told racial jokes which had punch lines using words such as "nigger whore", and "you're so black you're navy"[Id. at 138]; (3) that her co-worker, Tammy Thomason, asked to touch Plaintiff's hair, and asked how Plaintiff got her hair straight instead of kinky [Id. at 140]; (4) that co-worker JoAnn Carolan called her and another black employee names that the Plaintiff felt were racially motivated such as "spook", "speck", "spot", "colored", and "creature from the black lagoon" [Id. at 134-136, 141]; (5) that she was told by JoAnn Carolan that certain lipstick wasn't "for colored people" [Id.]; (6) that Plaintiff's Fashion Fair counter cases were "trashed" because of her race [Id. at 143-144]; (7) that her work schedule was constantly changed because JoAnn Carolan would speak to Beth Jorishie and cause Plaintiff's schedule to change [Id. at 115-117]; and (8) that her request for a transfer to Ladies' Fragrances in order to make more money was denied, whereas a white woman's request to transfer to Ladies' Fragrances was granted [Id. at 148-149]. Plaintiff asserts that she complained to her immediate supervisor, Beth Jorishie, on several occasions giving her specific examples of racial comments and the identities of those employees making such comments, but that nothing was ever done [Id. at 144, 151, 153-154]. Plaintiff also states that she finally approached the store manager, John Walters, toward the end of her employment because nothing was being done about the problem [Id. at 155]. Plaintiff asserts that she asked Mr. Walters if she could transfer to another position within the store because of the racial problems, but

was told there were no openings in the store [*Id. at 148*]. Plaintiff contends that she told Mr. Walters specifically about the problems she was facing, and gave him a list of racially derogatory comments that she had heard, but quit shortly thereafter [*Id. at 155-156*]. Plaintiff admits that on one other occasion, Mr. Walters had adequately addressed a situation involving racial harassment of the Plaintiff by a Promenade Mall security guard [*Id. at 142-143*]. Plaintiff likewise admits that Mr. Walters did speak with one employee regarding Plaintiff's complaints, but did not know whether that employee was disciplined or not [*Id. at 157*]. It is undisputed that after Plaintiff resigned, at least one employee was reprimanded by Beth Jorishie after an investigation showed that the employee in question had used racially derogatory language [*Exhibit H, Defendant's Motion for Summary Judgment*].

On November 9, 1997, Plaintiff informed Beth Jorishie that she was quitting her employment at Dillard's and told her that "she knew why" Plaintiff was quitting [*Id. at 161*]. Plaintiff asserts that she quit because of the "constant racism" as well as the unsettled scheduling problems and other "little things" [*Id. at 162*].

In its defense, Dillard's has asserted that, as a matter of law, Plaintiff's working conditions were not so intolerable that Plaintiff was compelled to resign. Additionally, Dillard's claims that Plaintiff has presented no evidence to support holding Dillard's liable for the discriminatory conduct alleged by Plaintiff.²

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and .

² Dillard's also asserts that the alleged conduct occurred prior to the enactment of the 1991 amendments to the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and therefore the Plaintiff is not entitled to compensatory or punitive damages. Plaintiff has conceded this issue, thus summary judgment as to the applicability of the 1991 Amendments is resolved in favor of the Defendant.

... 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).

Discussion

In determining whether summary judgment is appropriate, the Court must address two issues: (1) whether or not the Plaintiff submitted sufficient evidence to hold Dillard's liable for the alleged discriminatory actions of Plaintiff's co-workers; and (2) whether the atmosphere at Dillard's was so intolerable that a reasonable person in the same circumstances would have felt compelled to resign.

To hold Dillard's liable for the alleged actions of its employees, the Plaintiff must show that (1) the persecution occurred within the scope of the coworkers' employment; (2) the employer acted negligently or recklessly in failing to recognize and deal with the racist remarks levied against the Plaintiff; or (3) the coworkers in their abuse of the Plaintiff acted under apparent authority of the employer. Bolden v. PRC Inc., 43 F.3d 545, 552 (10th Cir. 1994). Of these possibilities, only the second, that Dillard's acted negligently or recklessly in failing to recognize and deal with the racial harassment, is applicable to this case. Dillard's asserts that even if Beth Jorishie failed to take action on Plaintiff's alleged complaints, Dillard's cannot be held liable because Plaintiff could have gone to Mr. Walters, and Plaintiff knew that Mr. Walters had appropriately addressed Plaintiff's complaints regarding racial discrimination on other occasions. However, Dillard's ignores the fact that Ms.

Jorishie was Plaintiff's superior, and that despite the Plaintiff's numerous complaints to Ms. Jorishie, Ms. Jorishie failed to take any action. *Compare, Bolden*, 43 F.3d at 552 (finding that neither the employer, nor the plaintiff's supervisor acted negligently or recklessly in failing to recognize and deal with the plaintiff's torment within the workshop where the plaintiff admitted he often did not complain to his supervisor about his social problems in the workshop and he never shared with any of the supervisors his belief he was treated poorly because of his race). Dillard's cannot escape liability by merely asserting that the Plaintiff should have gone over Ms. Jorishie's head. Indeed, Dillard's own harassment policy states that harassment or suspected harassment should be reported to one's supervisor, and that the supervisor is responsible for informing higher management [*Exhibit C, Defendant's Motion for Summary Judgment at 4*]. Ms. Jorishie acted in a management capacity, and assuming Plaintiff's allegations are true, it was Ms. Jorishie, not the Plaintiff, who had the responsibility to report the harassment to Mr. Walters. While the Court concludes that Dillard's can be held liable for Ms. Jorishie's alleged failure to adequately respond to the Plaintiff's complaints, the fact that Plaintiff could have approached Mr. Walters is relevant to the issue of whether or not the Plaintiff had options other than resigning. The Court finds that Dillard's is not entitled to summary judgment as to the issue of whether or not Dillard's could be held liable for the alleged acts of Plaintiff's co-employees.

The second issue, whether the atmosphere was so intolerable that the Plaintiff was forced to quit, is more complex. Generally, a constructive discharge occurs when an employer deliberately makes or allows the employee's working conditions to become so intolerable that the employee has no other choice but to quit. *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 557 (10th Cir. 1995); *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982). The question on which constructive

discharge cases turn is whether the employer, by its illegal discriminatory acts, has fostered a climate in the workplace that would compel a reasonable person in the employee's position to resign. *Hogue v. MQS Inspection, Inc.*, 875 F.Supp. 714, 723 (D. Colo. 1995) citing *James v. Sears, Roebuck and Co., Inc.*, 21 F.3d 989, 992 (10th Cir. 1994). See also, *Acrey v. American Sheep Industry Ass'n*, 981 F.2d 1569, 1573-74 (10th Cir. 1992). There is no mathematically precise test of what is intolerable. Such circumstances may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift*, 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993). Casual or sporadic racial slurs do not always give rise to a constructive discharge, *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir.1981), rather there must be a "steady barrage of opprobrious racial comment." *Id.*

Plaintiff has cited a number of incidences in support of her constructive discharge claim; however, the Defendant has presented legitimate, nondiscriminatory reasons rebutting many of these incidences. Specifically, the Defendant asserts that, pursuant to company policy, the Plaintiff was not transferred simply because transfers of sales associates between cosmetics lines were not allowed unless there is a change in the employee's status. Plaintiff wanted to transfer from a full-time position in Fashion Fair to a full-time position in Ladies' Fragrances contrary to Dillard's policy. The Defendant claims that the Plaintiff was offered a part-time position in Ladies' Fragrances, but she refused to accept that position. Defendant further asserts that the white employee who transferred into Ladies' Fragrances changed her work status from full-time to part-time [*Exhibits F & G, Defendant's Motion for Summary Judgment*]. Plaintiff has failed to submit responsive materials establishing that the Defendant's legitimate, non-discriminatory reason for failing to transfer the

Plaintiff was pretextual. Plaintiff has not met her burden of providing evidence beyond mere assertion, thus Dillard's failure to transfer the Plaintiff to the Ladies' Fragrances department does not provide evidence of racial hostility.

Defendant likewise submitted unrefuted evidence regarding the “trashing” of the Plaintiff's counter cases. According to Plaintiff's own testimony, the counter spaces often had to be cleared or rearranged to accommodate new products. Defendant claims that the area was not trashed, but rather that some things were moved around and alphabetized because the Dillards' buyers from Dallas had ordered that one of the Fashion Fair display cases be cleared out to make room for a different product [*Exhibit E, Defendant's Supplementation to Motion for Summary Judgment at 12-13*]. Plaintiff does not dispute that this is the reason her display cases were rearranged, and she admits that when she complained, Beth Jorishie found nothing wrong with the arrangement left by Plaintiff's co-workers.

One of the coworkers responsible for the rearrangement stated that the counter area was left in better shape than it was before [*Exhibit E, Defendant's Supplement to the Motion for Summary Judgment*].

Plaintiff has produced no evidence that this rearrangement was done because of her race, and stands solely on her subjective belief that race was the motivating factor behind the rearrangement of her display cases. Plaintiff has not met her burden of providing evidence beyond mere assertion or subjective belief, thus the rearrangement or “trashing” incident likewise does not provide evidence of racial hostility.

The remainder of Plaintiff's allegations do provide some evidence of a racially biased atmosphere. Specifically, Plaintiff has alleged that her work schedule was constantly being rearranged whereas the schedules of the white employees were more stable [*Exhibit A, Defendant's Motion for Summary Judgment at 115-119*]. Plaintiff has admitted that she has no idea why her schedule was

constantly changing, but merely states that she suspects that it was racially motivated since the white employees seem to have a more stable work schedule. Defendant has failed to articulate a legitimate, non-discriminatory reason for the difference in schedules alleged by the Plaintiff, thus the scheduling conflict may be considered evidence of a racially hostile atmosphere. Similarly, the Plaintiff has presented evidence that she overheard two racially offensive jokes, and was constantly being subjected to racist statements from her co-workers including being called names, and being questioned about why “all black people” do certain things [*Exhibit A, Defendant's Motion for Summary Judgment at 153*]. While two jokes over an eleven month employment period, standing alone, do not constitute evidence of a racially hostile environment, combining those incidents with the other allegations, Plaintiff has presented sufficient evidence that the conduct of her coworkers may have created an atmosphere that was sufficiently pervasive to alter her conditions of employment and create an abusive working environment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986); *Bolden*, 43 F.3d at 551.

The Defendant compares the facts in *Bolden* to suggest that Plaintiff's allegations, taken as true, do not constitute a racially hostile environment as a matter of law; however, the facts and reasoning in *Bolden* actually support submitting Plaintiff's claims for trial rather than dismissing them as a matter of law. While there were numerous offensive episodes described in *Bolden*, only a few could be tied to race. The 10th Circuit noted that the racial comments or slurs came only from a couple of co-workers on a couple of occasions. *Bolden*, 43 F.3d at 551. The *Bolden* plaintiff could not recall specific racial remarks or jokes made by one co-worker, and the co-worker jokingly referred to everyone in the shop as “nigger” and “honky” rather than singling out the plaintiff. Indeed, over the course of eight years, the plaintiff could only complain of two overtly racial remarks

and one arguably racial comment. *Id.* The Court in *Bolden* further noted that

[t]here is no evidence in the record concerning the racial makeup of the workshop, whether Mr. Bolden was the only African American in the shop, or whether the other recipients of such general taunting were African American. Mr. Bolden's workplace was permeated with "intimidation, ridicule, and insult"; however, the record reveals the intimidation, ridicule, and insult were directed indiscriminately, not targeted at Mr. Bolden due to his race.

The Court further stated that the "holding in this case is narrow." Unlike the plaintiff in *Bolden*, the Plaintiff in this case has stated that she was constantly being subjected to inappropriate comments which were clearly racially motivated. She has indicated that her Caucasian co-workers treated African American customers less courteously; that Jo Ann Carolan, who was according to the Plaintiff's allegations, the most culpable co-worker regarding racist comments, would influence Beth Jorishie into altering Plaintiff's work schedule whereas the Caucasian employees would work more consistent schedules; that Jo Ann Carolan would constantly refer to the Plaintiff and another black employee by derogatory names such as "creature from the black lagoon", "spot", "spook", or "speck", but would not call white employees by these names; that jokes with racist punch lines were told in her presence on two occasions; and that she was asked questions which she found offensive due to their stereotypical content such as "why do all black people . . .?", "[c]an I touch your hair", etc. These remarks are clearly racially motivated and aimed at the Plaintiff alone because of her race. This is not the situation presented in *Bolden* where a crude, joking and offensive atmosphere existed and was indiscriminately aimed at the entire workforce. In this case the Plaintiff was harassed and treated differently *because* she was African American.

The Court holds that there might have been sufficient evidence of a racist atmosphere pervasive enough to alter Plaintiff's working conditions such that summary judgment could not be

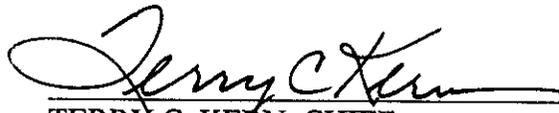
granted as to a hostile environment claim; however, Plaintiff has not pursued a hostile environment claim, but rather has alleged that she was constructively discharged. To prove a constructive discharge claim, the Plaintiff must show not only that the atmosphere was intolerable, but also that the illegal acts of her *employer* forced her to quit her job. The Court finds that the Plaintiff has failed to present sufficient evidence that she had no alternative to resignation. According to the Plaintiff, she took a number of steps prior to resigning her position at Dillard's. First, she complained of the racist comments to her immediate supervisor, Beth Jorishie. Second, when she determined that Ms. Jorishie was not going to do anything to remedy her situation, "at the very end" the Plaintiff approached Mr. Walters, the store manager, and complained about the racist atmosphere in the Cosmetics Department. Plaintiff provided Mr. Walters with a "list" of language used in the Cosmetics Department, but could not remember whether she told him specific perpetrators' names or not. Mr. Walters told the Plaintiff that he would "handle" the situation. The record reflects that an investigation was initiated at that time, and that one employee, Roberta Bowers, was disciplined as a result. Plaintiff has failed to rebut this claim, and it is uncontroverted that she quit shortly after complaining to Mr. Walters. Defendant has asserted that the investigation into Plaintiff's complaints was ongoing at the time the Plaintiff quit. The Plaintiff admits that she did not complain to Mr. Walters on any other occasion except to request a transfer to another department. Plaintiff was told that no openings were available at that time, and she has presented no evidence suggesting that this claim was untrue.

The Plaintiff has presented no evidence whatsoever to rebut the Defendant's assertion that she quit before Dillard's was given an adequate opportunity to address her complaints. Although Beth Jorishie failed to respond to Plaintiff's allegations, it is undisputed that the Plaintiff had complained

to Mr. Walters, and that he began an investigation which led to disciplinary action against one of Plaintiff's co-workers. Plaintiff admits that Mr. Walters had effectively responded to earlier complaints of racism, and had caused a Promenade Mall security guard to apologize for his racist treatment of the Plaintiff and her husband on a prior occasion. Plaintiff has admitted that the situation was not desperate. She requested to transfer into the Ladies' Fragrances department in order to earn more money despite the fact that she would have been working even more closely with her alleged harassers. The Court finds that the Plaintiff has provided no evidence that she was constructively discharged because a reasonable person in the Plaintiff's situation would have waited to see if her complaints to a reliable source would bring an end to the racially hostile environment in the Cosmetic's Department. *See generally, Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159 (3d Cir. 1993) (holding that a reasonable employee will usually explore alternative avenues thoroughly before coming to the conclusion that resignation is the only option); *Hogue v. MQS Inspection, Inc.*, 875 F.Supp. 714, 724 (D. Colo. 1995) (finding no constructive discharge where the plaintiff took no steps short of resignation to make working conditions more tolerable).

For the foregoing reasons, Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED THIS 13th DAY OF MARCH, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 13 1997

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

UNITED STATES OF AMERICA,
Plaintiff

v.

GAIL STEVENS,
Defendant.

Civil Action No. 96CV1113H

ENTERED ON DOCKET
MAR 14 1997

DEFAULT JUDGMENT

This matter comes on for consideration this 13TH day of MARCH, 1997, 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, Gail Stevens, appearing not.

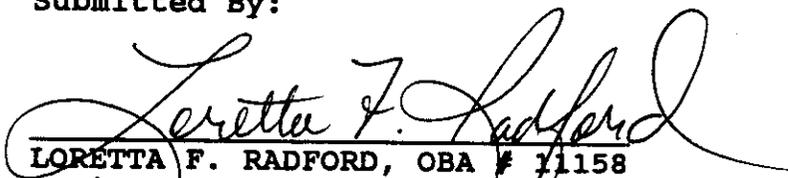
The Court being fully advised and having examined the court file finds that Defendant, Gail Stevens, is served with Summons and Complaint on January 14, 1997. Time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant 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, DECREED that the Plaintiff have and recover judgment against Defendant, Gail Stevens, for the principal amount of \$456.79 accrued interest of \$244.62, plus interest thereafter at the rate of 5 percent per annum until judgment, a surcharge 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 5.67 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

FILED

MAR 13 1997

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

BOBBY J. GILES,)
SS# 447-54-2802)

Plaintiff,)

v.)

NO. 95-C-340-M

JOHN J. CALLAHAN¹,)

Acting Commissioner Social Security)

Administration,)

Defendant.)

ENTERED ON DOCKET

DATE 3/14/97

JUDGMENT IN A CIVIL CASE

This action came before the Court, Honorable Frank H. McCarthy, United States Magistrate Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED:

That the plaintiff, Bobby J. Giles, recover from the defendant, John J. Callahan, Acting Commissioner Social Security Administration the sum of \$2,671.31, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (d).

DATED this 13th day of March, 1997.

Phil Lombardi
Clerk of the Court

J. Mayer
(By) Deputy Clerk

¹ President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Fed.R.Civ.P. 25(d)(1) John J. Callahan is substituted as the defendant in this suit.

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

FILED

MAR 13 1997

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

JACK E. THOMAS, et al,

Plaintiffs,

vs.

USA,

Defendant.

Case No. 96-C-525-B ✓

MAR 14 1997

ADMINISTRATIVE CLOSING ORDER

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

IF, by 8-1-97, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 14th day of March, 1997.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

MAR 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DON and SUE TYLER,)
individually and as Guardians,)
ad Litem for SABRINA TYLER,)
)
Plaintiffs,)
)
vs.)
)
STERLING DRUG, INC.,)
)
Defendant.)

Case No. 96-CV-531-C

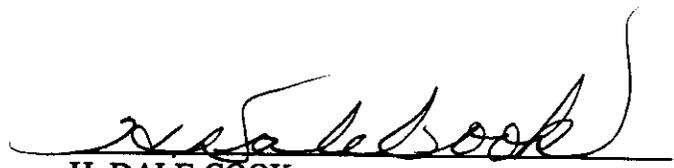
MAR 14 1997

**ORDER GRANTING STIPULATION FOR
DISMISSAL WITHOUT PREJUDICE**

COMES on for review this 13 day of March, 1997, Plaintiffs' Stipulation for Dismissal Without Prejudice. The Plaintiffs request this Court enter an order of dismissal without prejudice for Plaintiff Don Tyler's cause of action against the Defendant, Sterling Drug, Inc., in the above styled action, pursuant to Rule 41 FRCP (a)(1).

IT IS THEREFORE ORDERED that Don Tyler's cause of action against the Defendant, Sterling Drug, Inc., is hereby dismissed without prejudice.

Dated this 13th day of March, 1997.


H. DALE COOK
Senior U.S. District Judge

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

F I L E D

MAR 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT LOUIS WIRTZ, JR.)

Plaintiff,)

vs.)

SHERIFF STANLEY GLANZ,)

Defendant.)

Case No. 95-C-631-C

ENTERED ON FILE

MAR 14 1997

ORDER

Before the Court for its consideration are the objections of plaintiff Robert Wirtz, Jr. to the Report and Recommendation entered by the magistrate. The magistrate recommends that the motion to dismiss, or alternative, for summary judgment filed by defendant Stanley Glanz be granted.

Based upon a review of the record, magistrate's report, plaintiff's objections and applicable law, the Court accepts the magistrate's report and adopts it as the findings and conclusions of this Court.

Plaintiff brings this action against Tulsa County Sheriff Stanley Glanz, asserting that certain employees of the Tulsa County Jail allegedly committed numerous constitutional violations against plaintiff Wirtz. These alleged violations included excessive use of force, deliberate indifference to serious medical needs, denial of access to the courts, denial of outside exercising, and unsanitary food and premises while Wirtz was temporarily held as a pretrial detainee at the Tulsa County Jail. Wirtz has subsequently been transferred to a state prison located in Buena Vista, Colorado. In this action, Plaintiff seeks both injunctive relief and monetary damages against Sheriff Glanz.

In his complaint, Wirtz has failed to set forth facts to show or infer a custom or policy on the part of Sheriff Glanz which would tend to authorize any of the constitutional violations alleged by plaintiff Wirtz. The jailhouse records offered as exhibits in this case all indicate a reasonably prompt response to each of the complaints made by Wirtz. Although the medical records do not substantiate plaintiff's claim that he was injured by the use of pepper gas, the records do establish that plaintiff Wirtz was receiving regular medical treatment as a result of each of the requests for medical care he filed. There is no indication in the record that complaints filed by plaintiff Wirtz were ignored.

The record substantiates that plaintiff Wirtz was provided reasonable access to his legal papers, a trained legal assistant and the county law library.

Sheriff Glanz provided trained medical personnel to monitor plaintiff Wirtz's medical condition, including authorizing outside medical treatment and obtaining Wirtz's past medical records for assistance in such treatment.

The record reflects that outside exercising was denied to plaintiff Wirtz because he was classified as a flight risk, and such decision is within the discretionary policy making function of the Tulsa County Jail. The Court does not find that such policy is unreasonable under the circumstances of this case.

The record reflects that plaintiff Wirtz was regularly receiving clean clothing and towels. In each instance when cleaning supplies were requested, the supplies were furnished. It is the policy of the Tulsa County Jail to require inmates to clean their cells regularly, or on additional occasions if cleaning supplies are requested by an inmate.

Plaintiff has failed to plead that defendant Glanz approved either formally or tacitly

any policy or custom of permitting any of the alleged constitutional violations. To the contrary, the record and exhibits submitted clearly establish that such policies do not exist at the Tulsa County Jail.

ACCORDINGLY, IT IS THE ORDER OF THE COURT that defendant's motion to dismiss, or alternatively, for summary judgment is hereby GRANTED. This order renders moot all other outstanding motions in this case.

IT IS SO ORDERED this 13th day of March, 1994.


H. DALE COOK
Senior, United States District Judge

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

MT. HAWLEY INSURANCE
COMPANY, an Illinois corporation,)

Plaintiff,)

vs.)

Case No. 96-CV-144-E ✓

IMPERIAL UNDERGROUND
SPRINKLER COMPANY, a
Kansas Corporation,)

Defendant and Third
Party Plaintiff,)

vs.)

PARKFORD MANAGEMENT, INC.,
Texas corporation, d/b/a
Chardonnay Apartments, and
BUSHMASTERS, INC., an
Oklahoma corporation,)

Third-Party Defendants,)

BUSHMASTERS, INC., an
Oklahoma corporation,)

Third-Party Plaintiff,)

vs.)

JOHN A. DEWBERRY, d/b/a
J.D.I. SALES,)

Third-Party Defendant.)

FILED

MAR 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED CLERK'S OFFICE
MAR 14 1997

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Come now all the parties and pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure,
hereby stipulate to dismiss all of their claims against each other in the above-entitled action with

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ALT

prejudice including direct claims, counter-claims, cross-claims and third-party claims, and with each party to bear their respective costs and attorneys fees.

RESPECTFULLY SUBMITTED,

By: 

TOM H. GUDGEL, OBA #13913
NEAL E. STAUFFER, OBA #13168
1100 Petroleum Club Bldg.
601 S. Boulder
Tulsa, Oklahoma 74119

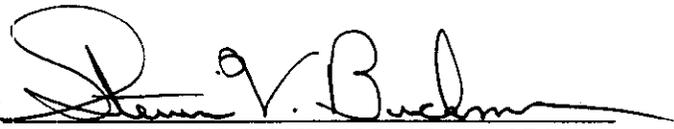
ATTORNEYS FOR PLAINTIFF
MT. HAWLEY INSURANCE,
an Illinois corporation

By:


MICHAEL J. EDWARDS, OBA #2644
DAVID S. LANDERS, OBA #12367
EDWARDS & LANDERS
3030 Mid-Continent Tower
401 South Boston Ave.
Tulsa, Oklahoma 74103-4016

ATTORNEYS FOR DEFENDANT/
THIRD PARTY PLAINTIFF
IMPERIAL UNDERGROUND
SPRINKLER COMPANY,
A Kansas corporation

BY:



STEVEN V. BUCKMAN, OBA #10745

AMY E. BRADLEY, OBA #16480

525 South Main Street

Suite 660

Tulsa, Oklahoma 74103

ATTORNEY FOR

PARKFORD MANAGEMENT, INC.

A Texas Corporation, d/b/a

Chardonnay Apartments

BY:



DAN S. FOLLUO, OBA #11303
STUART C. SULLIVAN, OBA #15711
7134 South Yale
Tulsa, Oklahoma 74136

ATTORNEY FOR THIRD PARTY
DEFENDANT/THIRD PARTY
PLAINTIFF, BUSHMASTERS, INC.
an Oklahoma corporation

By: _____

MARK W. DIXON, OBA #2378

B. JACK SMITH, OBA# 8317

1437 South Boulder, Suite 900

Tulsa, Oklahoma 74119

ATTORNEYS FOR THIRD-PARTY
DEFENDANTS, JOHN A.
DEWBERRY, d/b/a JDI SALES

CERTIFICATE OF MAILING

I, Tom H. Gudgel mailed on the 13th day of March, 1997 the above Joint Stipulation of Dismissal With Prejudice, with proper postage prepaid to:

Mr. Dan S. Folluo
SECRET, HILL & FULLUO
Suite 900
7134 South Yale
Tulsa, Oklahoma 74136-6342

Mr. Mark W. Dixon
Mr. B. Jack Smith
1437 South Boulder, Suite 900
Tulsa, Oklahoma 74119

Mr. Steven V. Buckman
Suite 660
525 South Main
Tulsa, Oklahoma 74103

Mr. Michael J. Edwards
EDWARDS & LANDERS
3030 Mid-Continent Tower
401 S. Boston
Tulsa, Oklahoma 74103-4016


Tom H. Gudgel

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

EVA S. BLAIR,)
)
Plaintiff,)
)
v.)
)
FORD MOTOR COMPANY,)
)
Defendant.)

No. 96-C-324E

FILED

MAR 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MAR 14 1997

STIPULATION FOR DISMISSAL WITH PREJUDICE

The plaintiff Eva S. Blair and the defendant Ford Motor Company hereby stipulate that the above-captioned cause has been settled and that it may be dismissed with prejudice, each party to bear her/its own costs.

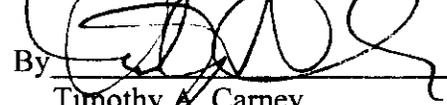
NICHOLS, WOLFE, STAMPER,
NALLY, FALLIS & ROBERTSON, INC.

By 

David E. O'Melia
Old City Hall Building
124 East Fourth Street
Tulsa, Oklahoma
(918) 584-5182

ATTORNEYS FOR PLAINTIFF

GABLE GOTWALS MOCK SCHWABE

By 

Timothy A. Carney
2000 Bank IV Center
15 West 6th Street
Tulsa, Oklahoma 74119
(918) 582-9201

SP

25

clj

BERKOWITZ, FELDMILLER, STANTON,
BRANDT, WILLIAMS & STUEVE LLP

By W. Perry Brandt

W. Perry Brandt

Two brush Creek Boulevard

Suite 550

Kansas City, Missouri 64112

(816) 561-7007

ATTORNEYS FOR DEFENDANT

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

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

Plaintiffs,

v.

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

Defendants.

FILED

MAR 12 1997

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

ENTERED ON DOCKET
DATE MAR 14 1997

No. 96-C-0244H

ORDER

Pursuant to the Stipulation of Dismissal filed herein, and for good cause shown;

IT IS HEREBY ORDERED that: (a) the claims asserted herein by the Plaintiffs against the Defendants, C.P. Hoover and Maxine Hoover, are hereby dismissed with prejudice pursuant to Fed.R.Civ.P. 41(a)(1)(ii); (b) the claims asserted herein by Defendants C.P. Hoover and Maxine Hoover, against the Plaintiffs are hereby dismissed with prejudice pursuant to Fed.R.Civ.P. 41(a)(1)(ii); and (c) Plaintiffs and Defendants, C.P. Hoover and Maxine Hoover, to bear their own attorneys fees and costs.

IT IS FURTHER ORDERED that the Plaintiffs are not dismissing any other claims they may have against any other parties and entities, including, but not limited to, the Estate of Robert E. Lee.

DATED this 11TH day of MARCH, 1997.
~~October, 1996.~~



Sven Erik Holmes
United States District Judge

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

3-14-97

EARL L. GORDON,)
)
 Plaintiff,)
)
 vs.)
)
 CLEAR CHANNEL)
 TELEVISION, INC.)
)
 Defendant,)

Case No. 96-C-421K

FILED

MAR 13 1997

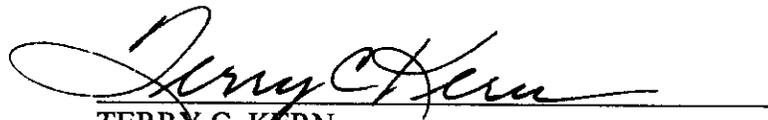
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER GRANTING APPLICATION TO DISMISS WITH PREJUDICE

NOW on this 12 day of March, 1997, the Joint Application to Dismiss With Prejudice, with the Court retaining jurisdiction to enforce and interpret the Settlement Agreement, comes on for hearing before the undersigned judge. After reviewing the Joint Application, the Court finds the Joint Application to Dismiss With Prejudice should be granted.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that this action shall be dismissed with prejudice to the re-filing of any claims by either party, each party to bear their own attorney fees and costs.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Court shall retain jurisdiction in this matter to enforce and interpret the Settlement Agreement, if necessary.



TERRY C. KERN
UNITED STATES DISTRICT COURT

160

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

ENTERED ON DOCKET
3-14-97

PLYMOUTH RESOURCES, INC.;)
EDWIN KRONFELD, Trustee of the)
Edwin Kronfeld Declaration of)
Trust Dated May 25, 1990; LYDIA)
B. KRONFELD, Trustee of the)
Lydia B. Kronfeld Declaration)
of Trust Dated May 25, 1990;)
JOHN G. ARTHUR; and RUSSELL)
KERR HUNT, JR.,)
Plaintiffs,)
vs.)
APACHE CORPORATION,)
Defendant.)

FILED

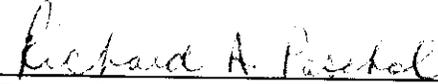
MAR 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-1025-K

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiffs and the Defendant and pursuant to Fed. R. Civ. P. 41(a)(1) stipulate to the dismissal of the above entitled case without prejudice, with each and every party to bear its own costs and fees herein.


Richard A. Paschal
3700 First Place Tower
15 East 5th Street, Suite 3700
Tulsa, Oklahoma 74103-4344
ATTORNEY FOR PLAINTIFFS


R. Kevin Layton, OBA #11900
Boesche, McDermott & Eskridge
100 West 5th Street, Suite 800
Tulsa, Oklahoma 74103-4216
(918) 583-1777
ATTORNEY FOR DEFENDANT

RECEIVED ON BOOKLET
MAR 3-14-97

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

F I L E D

MAR 13 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EMORY Z. SCOTT)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF BROKEN ARROW)
)
 Defendant.)

CASE NO: 96-CV-574K ✓

ORDER

Pursuant to the parties' stipulation that all issues in the above-styled case have been resolved, it is therefore ordered by this Court that this case be DISMISSED WITH PREJUDICE save and except lawful collection proceedings which may be necessary on the Judgment entered by this Court against Defendant City of Broken Arrow.

DATED this 12th day of March, 1997.

Terry Kern

THE HONORABLE TERRY KERN
UNITED STATES DISTRICT JUDGE

23

APPROVED AS TO FORM:

Beth Anne Guyton

Michael R. Vanderburg, OBA #9180
Beth Anne Guyton, OBA #15138
Assistant City Attorney
CITY OF BROKEN ARROW
220 South First Street
P. O. Box 610
Broken Arrow, Oklahoma 74013-0610
(918) 259-8341

Attorney for Defendant City of Broken Arrow

Jeff Nix

Jeff Nix, OBA #6688
2121 South Columbia, Suite 710
Tulsa, Oklahoma, 74114-3521
(918) 742-4486

Attorney for Plaintiff

APPROVED AS TO FORM:

Beth Anne Guyton

Michael R. Vanderburg, OBA #9180

Beth Anne Guyton, OBA #15138

Assistant City Attorney

CITY OF BROKEN ARROW

220 South First Street

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Attorney for Defendant City of Broken Arrow

Jeff Nix

Jeff Nix, OBA #6688

2121 South Columbia, Suite 710

Tulsa, Oklahoma, 74114-3521

(918) 742-4486

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 13 1997

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

LOREN BEESLEY,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER, Commissioner,)
 Social Security Administration,)
)
 Defendant.)

Civil Action No. 95-C-891-M

ENTERED ON DOCKET

DATE 3/14/97

ORDER

On December 11, 1996, this Court reversed and remanded this case to the Commissioner for further proceedings, and entered Judgment in favor of the plaintiff.

Pursuant to plaintiff's application for attorneys fees pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(d), filed on February 25, 1997, the parties have stipulated that an award in the amount of \$2,442.50 for attorney fees and \$120.00 costs, totalling \$2,562.50, for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees and costs under the Equal Access To Justice Act in the amount of \$2,562.50. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 13 day of March, 1997.

S/Frank H. McCarthy
U.S. Magistrate

FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

It is so ORDERED THIS 12 day of March, 1997.

S/Frank H. McCarthy
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

5AC
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
3-13-97

TRACY S. HARRIS,)
)
Plaintiff,)
)
v.)
)
INDEPENDENT SCHOOL DISTRICT)
NO. 5 OF TULSA COUNTY,)
a/k/a JENKS PUBLIC SCHOOLS,)
an Oklahoma political subdivision,)
ANN FRAZIER and)
JUDY McCARTER, individuals,)
)
Defendants.)

Case No. 97-CV-80-K

FILED

MAR 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL

The parties hereto -- specifically, TRACY S. HARRIS, Plaintiff, and the Defendant INDEPENDENT SCHOOL DISTRICT NO. 5 OF TULSA COUNTY, a/k/a JENKS PUBLIC SCHOOLS, an Oklahoma political subdivision -- hereby stipulate to the dismissal of this case with prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

Defendants ANN FRAZIER and JUDY McCARTER have not filed answers in this case, and Plaintiff hereby dismisses with prejudice Defendants Frazier and McCarter pursuant to Fed. R. Civ. P. 41(a)(1)(i).

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

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

JF

KEVIN P. LEGGETT, OBA No. 15030
2211 E. Skelly Drive
Tulsa, OK 74105
(918) 492-4423

By Mark A. Wall

Attorneys for Plaintiff
TRACY S. HARRIS

J. DOUGLAS MANN, OBA No. 5663
ANDREA R. KUNKEL, OBA No. ~~22896~~

By Andrea R. Kunkel

ROSENSTEIN, FIST & RINGOLD
525 South Main, Ste. 700
Tulsa, Oklahoma 74103
(918) 585-9211

Attorneys for Defendant
INDEPENDENT SCHOOL DISTRICT NO. 5 OF
TULSA COUNTY, a/k/a JENKS PUBLIC
SCHOOLS, an Oklahoma political subdivision

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

MAR 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA)
)
) Plaintiff,)
 vs)
))
) ROYCE D. BARNETT,)
))
) Defendant.)

96CV-767B

ENTERED ON CLERK'S
MAR 13 1997

PAYMENT AGREEMENT

Plaintiff, the United States of America, having obtained its judgment herein, and the defendant, having consented to this Payment Agreement, hereby agree as follows:

1. Plaintiff's consent to this Payment Agreement is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that he will willingly and truly honor and comply with the Payment Agreement entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 7th day of March, 1997, the defendant shall tender to the United States a check or money order payable to the "U. S. Department of Justice", in the amount of \$150.00 and a like sum on or before the 7th day of each following month until the entire amount of the Judgment, together with costs and accrued post judgment interest, is paid in full.

MW
13-11

(9)

(b) The defendant shall mail each monthly installment payment to: United States Attorney's Office, Debt Collection Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U. S. Rule, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. §1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in his financial situation or ability to pay, and of any change in his employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth in (b) above.

(e) The defendant shall provide the United States with current, accurate evidence of his assets, income and expenditures (including, but not limited to, his Federal income tax returns) within fifteen (15) days of the date of a request for such evidence by the United States Attorney.

2. Default under the terms of this Payment Agreement will entitle the United States to execute on the judgment without notice to the defendant.

3. The defendant has the right of prepayment of this debt without penalty.

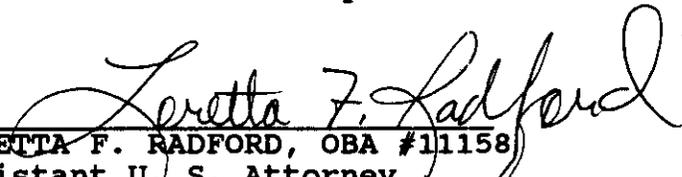
4. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or,

should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.


United States District Judge

APPROVED AS TO FORM:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant U. S. Attorney
Attorney for Plaintiff


ROYCE D. BARNETT, Debtor

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CIVIL ACTION NO. 96-CV-731-B

ONE PARCEL OF REAL PROPERTY)
KNOWN AS:)

8228 TWELVE OAKS CIRCLE)
UNIT 312)
NAPLES, COLLIER COUNTY,)
FLORIDA, AND ALL)
APPURTENANCES AND)
IMPROVEMENTS THEREON,)

and)

ONE 1993 JEEP GRAND CHEROKEE,)
VIN 1J4GX58S5PC622318,)

and)

ONE 1994 JEEP WRANGLER SPORT,)
VIN 1J4FY29S4RP439073,)

Defendants.)

RECORDED
MAR 13 1997

JUDGMENT OF FORFEITURE

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

The verified Complaint for Forfeiture In Rem was filed in this action on the 12th day of August 1996, alleging that the defendant real and personal properties, to-wit:

15

REAL PROPERTY:

Unit 312, of TWELVE OAKS I, a Condominium according to the Declaration of Condominium recorded April 22, 1991, at O. R. Book 1609, Pages 1388 through 1469, inclusive, of the Public Records of Collier County, Florida, and all appurtenances and improvements thereon, a/k/a 8228 Twelve Oaks Circle, Unit 312, Naples, Collier County, Florida:

Subject to the Declaration of Unified Control and Cross Easements Respecting Property as recorded in O. R. Book 1610, Page 2203, Public Records of Collier County, Florida.

Subject to easements, restrictions, and reservations of record, if any, and taxes for the current year,

VEHICLES:

ONE 1993 JEEP GRAND CHEROKEE,
VIN 1J4GX58S5PC622318,

ONE 1994 JEEP WRANGLER SPORT,
VIN 1J4FY29S4RP439073,

are subject to forfeiture pursuant to 18 U.S.C. § 981, because there is probable cause to believe they are properties involved in transactions or attempted transactions in violation of 18 U.S.C. §§ 1956 or 1957, or properties traceable thereto, and/or because they are properties which constitute or are derived from proceeds traceable to a violation of § 1343 affecting a financial institution.

Warrants of Arrest and Notices In Rem were issued by the Honorable Thomas R. Brett, United States Judge for the Northern District of Oklahoma on the 15th day of August, 1996, providing that the United States Marshal for the Northern District of Oklahoma publish Notice of Arrest and Seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in the district in which this action is pending and providing that the United States Marshals Service for the Middle District of Florida publish Notice of Arrest and Seizure once a week for three consecutive weeks in the Naples Daily News, Naples, Collier County, Florida, the county in which the defendant real property is located, and further providing that the United States Marshals Service personally post on the defendant real property and serve on all known potential owners of the defendant real property, pursuant to the "Good" decision, a Notice of Potential Seizure and Arrest of Property, along with a copy of the Complaint for Forfeiture In Rem and Warrant of Arrest and Notice In Rem; the Warrant also provided for service on Guy Carlton, Tax Collector of Collier County, Florida, and Barnett Bank, and that immediately upon the arrest and seizure of the defendant properties the United States Marshals Service take custody of the defendant real and personal properties and retain the same in its possession until the further order of this Court.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrants of Arrest and Notices In Rem on the defendant real and personal

properties and on Joseph A. Isnardi, Jr., and Carol Ann Isnardi personally in the Northern District of Oklahoma, and on Guy Carlton, Tax Collector of Collier County, Florida, and Barnett Bank, as follows:

Real Property Located at: Posted:
8228 Twelve Oaks Circ,e September 26, 1996
Unit 312, Naples, Collier
County, Florida, and All
Appurtenances and Improvements Served:
Thereon. November 25, 1996
In the Middle District of Florida

1993 Jeep Grand Cherokee Served:
VIN 1J4GX58SD5PC622318 October 10, 1996
In the Northern District of Oklahoma

1994 Jeep Wrangler Sport, Served:
VIN 1J4FY29S4RP439073 October 2, 1996
In the Middle District of Florida

JOSEPH A. ISNARDI, a/k/a Served:
JOSEPH A. ISNARDI, JR. August 16, 1997
In the Northern District of Oklahoma

CAROL A. ISNARDI, a/k/a Served:
CAROL ANN ISNARDI August 16, 1966
In the Northern District of Oklahoma

GUY CARLTON, Served:
Tax Collector of Collier County, Florida September 26, 1966
In the Middle District of Florida

BARNETT BANK Served:
by serving: Linda C. Thompson September 30, 1996
Assistant Vice President; In the Middle District of Florida;

and Joseph A. Isnardi, Jr., Carol Ann Isnardi, and Guy Carlton, Tax Collector of Collier County, Florida, are the only known potential

claimants to the defendant real and/or personal properties who executed and filed claims, answers, stipulations for forfeiture, or other defensive pleadings, as follows:

- 1) Joseph A. Isnardi, Jr., and Carol Ann Isnardi filed a Claim for Property or Restitution and Right to Defend by Owner of Property on August 23, 1996.
- 2) Joseph A. Isnardi, Jr., and Carol Ann Isnardi filed a Claim and Answer on September 3, 1996.
- 3) Plaintiff, United States of America, and Claimants Joseph A. Isnardi, Jr. and Carol Ann Isnardi entered into a Stipulation on October 22, 1996, for forfeiture of the condominium and the 1993 Jeep Grand Cherokee and for dismissal and release of the 1994 Jeep Wrangler Sport to the Joseph A. Isnardi, Jr. and Carol Ann Isnardi.
- 4) Joseph A. Isnardi, Jr., and Carol Ann Isnardi executed a Quit-Claim Deed, conveying the defendant real property to the United States of America on October 22, 1996. This Quit-Claim Deed was recorded in the land records of Collier County, Florida, on December 23, 1996, in Book 2263 at Page 2349, as Document No. 2130860.
- 5) Guy Carlton, Tax Collector for Collier County, Florida, by and through his attorney, Vincent Murphy, entered into a Stipulation for Payment of Ad Valorem Taxes with the plaintiff, providing for the payment of \$1,685.45 in ad valorem taxes through the end of February, 1997, plus 1/365th per day (\$4.617) from the end of February, 1997, until entry of judgment of forfeiture to the plaintiff, and that such payment shall constitute payment in full of all taxes due and owing upon the property as of the date of entry of the judgment of forfeiture.

USMS 285s reflecting service upon the defendant real and personal properties and the known potential claimants set forth above are on file herein.

All persons or entities interested in the defendant properties were required to file their claims herein within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No persons or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer, or other response or defense herein, except Joseph A. Isnardi, Jr., and Carol Ann Isnardi, who entered into a stipulation for forfeiture of the condominium, and the Jeep Grand Cherokee, and Guy Carlton, Tax Collector of Collier County, Florida, who entered into a stipulation for payment of ad valorem taxes on the defendant real property.

That no other claims in respect to the defendant real and personal properties have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant real and personal properties, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant real and personal properties above

described, and all persons and/or entities interested therein, except Joseph A. Isnardi, Jr., Carol Ann Isnardi, and Guy Carlton, Tax Collector for the Middle District of Florida.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed, on October 31, and November 7 and 14, 1996, and in the Naples Daily News, Naples, Collier County, Florida, the county in which the defendant real property is located, on December 16, 23, and 30, 1996.

No claims as to the defendant real and/or personal property, other than those set forth above, have been filed with the Clerk of the Court, and no other persons or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer, or other response or defense herein, and the time for presenting claims and answers, or other pleadings has expired; and, therefore, upon information and belief, default exists as to the defendant real and personal properties, and all persons and/or entities interested therein, except those who have heretofore filed claims and/or stipulations providing for the forfeiture of certain defendant properties and payment of ad valorem taxes to the Tax Collector of Collier County, Florida, as set forth above.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that pursuant to the stipulation entered into between the plaintiff and claimants Joseph A. Isnardi, Jr., and Carol Ann

Isnardi the 1994 Jeep Wrangler Sport be dismissed from this action and be returned to Joseph A. Isnardi, Jr., and Carol Ann Isnardi.

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

REAL PROPERTY:

Unit 312, of TWELVE OAKS I, a Condominium according to the Declaration of Condominium recorded April 22, 1991, at O. R. Book 1609, Pages 1388 through 1469, inclusive, of the Public Records of Collier County, Florida, and all appurtenances and improvements thereon, a/k/a 8228 Twelve Oaks Circle, Unit 312, Naples, Collier County, Florida:

Subject to the Declaration of Unified Control and Cross Easements Respecting Property as recorded in O. R. Book 1610, Page 2203, Public Records of Collier County, Florida.

Subject to easements, restrictions, and reservations of record, if any, and taxes for the current year.

VEHICLES:

ONE 1993 JEEP GRAND CHEROKEE,
VIN 1J4GX58S5PC622318,

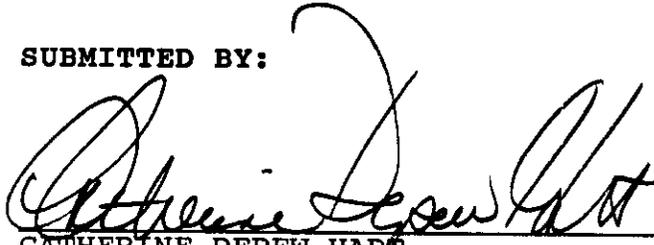
and that said property be, and it is, forfeited to the United States of America for disposition according to law, in the following priority:

- a) First, from the sale proceeds of the real and personal property, payment to the United States of America for all expenses of forfeiture of the defendant real and personal property, including, but not limited to, expenses of seizure, maintenance, and custody, advertising, and sale.
- b) Second, to Guy Carlton, Tax Collector of Collier County, Florida, the sum of \$1,685.45, for ad valorem taxes due and owing on the defendant real property through the end of February, 1997, plus 1/365th per day (\$4.617) from the end of February, 1997, until entry of Judgment of Forfeiture.
- c) Third, the remaining proceeds of the sale of the defendant real property, with all buildings, appurtenances, and improvements thereon, and of the sale of the 1993 Jeep Grand Cherokee shall be retained by the United States Marshals Service for disposition according to law, and pursuant to the further Order of this Court.



THOMAS R. BRETT, Senior Judge of the
United States District Court for the
Northern District of Oklahoma

SUBMITTED BY:

A handwritten signature in cursive script, appearing to read "Catherine DePew Hart", written over a horizontal line.

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\ISNARDI\05884

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OSAGE NATION TAX COMMISSION,)
a governmental agency of the)
Osage Nation, and)
GEORGE SHANNON,)
Tax Administrator of the Osage)
Nation Tax Commission,)

Plaintiffs,)

v.)

UNITED STATES OF AMERICA,)
BRUCE BABBITT,)
Secretary of the Department of)
Interior,)
ADA DEER,)
Assistant Secretary of the)
Department of Interior for Indian)
Affairs,)

DENNIS SPRINGWATER,)
Acting Area Director of the)
Bureau of Indian Affairs for the)
Muskogee Area,)

GORDON JACKSON,)
Agency Superintendent, Osage)
Agency, Bureau of Indian Affairs,)

MARK CHAMBERLAIN,)
Policeman, Osage Agency, Bureau of)
Indian Affairs,)

PAUL MAYS, JR., and JESSE DAVIS,)
Defendants.)

FILED

MAR 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil No. 95-C-1190-B

ENTERED CASE LOG
DATE: MAR 13 1997

ORDER

This matter comes on before the Court upon the stipulations of the plaintiffs and the federal defendants and the Court being fully advised on the premises ORDER, ADJUDGES and DECREES that all claims asserted herein by the plaintiffs, except for the plaintiffs' claim

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for declaratory relief, against the United States of America are hereby dismissed with prejudice.

DATED this 12th day of Mar 1996.



THOMAS R. BRET
United States District Judge

APPROVED AS TO FORM AND CONTENT:



CHADWICK SMITH
Attorney for Plaintiffs
P.O. Box 9192
Tulsa, Oklahoma 74157-0192
(918) 596-5550



PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

REGISTERED ON DOCKET
DATE 3-13-97

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

TRACY S. HARRIS,)
)
 Plaintiff,)
)
 vs.)
)
 INDEPENDENT SCHOOL DIST. et al)
)
 Defendants.)

No. 97-C-80-K

FILED

MAR 11 1997

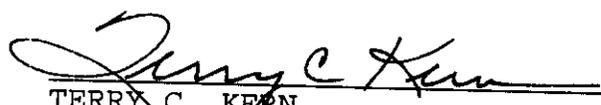
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 6 day of March, 1997.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

3

DATE 3-13-97

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

FILED

MAR 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILLY R. JONES,)
)
Plaintiff,)
)
vs.)
)
JOHN PICKLE COMPANY, INC.,)
)
Defendants.)

No. 96-C-975-K

ORDER

This case came on for a case management conference before the Court on March 3, 1997 at 9:50 a.m. For failure of Plaintiff or his counsel to appear for the scheduled conference, the case is hereby DISMISSED WITHOUT PREJUDICE.

ORDERED this 6th day of March, 1997.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

3

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

REGINALD C. WILLIAMS,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF OKLAHOMA,)
)
 Respondent.)

MAR 12 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
Case No. 96-C-995-BU ✓
ENTERED ON DOCKET
DATE MAR 13 1997

ORDER

On February 5, 1997, United States Magistrate Judge Frank H. McCarthy issued a Report and Recommendation, wherein he recommended that Petitioner's habeas corpus petition be dismissed unless Petitioner filed an amended habeas corpus petition on or before March 5, 1997, naming the proper party as respondent. In the Report and Recommendation, Magistrate Judge McCarthy advised Petitioner that any objections to the Report and Recommendation must be filed within ten (10) days of being served with a copy of the Report and Recommendation.

From a review of the record, it appears that Magistrate Judge McCarthy's Report and Recommendation was mailed to Petitioner's last known address and that it was returned to the post office marked "Return to Sender." It also appears that Petitioner has failed to notify the Court of his change of address.

Upon review of Report and Recommendation, the Court agrees with Magistrate Judge McCarthy's recommendation and adopts the Report and Recommendation in its entirety. With no amended habeas corpus petition naming the proper party as respondent being filed by March 5, 1997, the Court finds that Petitioner's habeas corpus

petition should be dismissed.

Accordingly, the Court **AFFIRMS** Magistrate Judge McCarthy's Report and Recommendation (Docket Entry #9), **GRANTS** Respondent's Motion to Dismiss (Docket Entry #7) and **DISMISSES WITHOUT PREJUDICE** the Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket Entry #5) and the Petition for Writ of Habeas Corpus Relief for Illegal Incarceration and Detention of Petitioner (Docket Entry #1).

ENTERED this 12^r day of March, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROSEMARY M HERNANDEZ,)
)
 Plaintiff,)
)
 v.)
)
 CINTAS CORPORATION,)
)
 Defendant,)

Case No. 96-C-856-E

ENTERED ON MAR 12 1997

MAR 12 1997

ORDER

Rule 41(b) of the Federal Rules of Civil Procedure provides as follows:

(b) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

In the action herein, notice pursuant to Rule 41(b) was mailed to pro se plaintiff or to the parties, at their last address of record with the Court, on February 6, 1997. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 11th day of March, 19 97.

United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID K. ULLRICH aka DAVID)
 KEITH ULLRICH; CINDY A.)
 ULLRICH fka CINDY A. BORDWIN;)
 UNKNOWN SPOUSE IF ANY OF)
 CINDY A. ULLRICH fka CINDY A.)
 BORDWIN; CITY OF BROKEN)
 ARROW, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

MAR 11 1997 *Lo*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RECORDED & INDEXED

MAR 12 1997

Civil Case No. 95-CV 999C ✓

ORDER

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

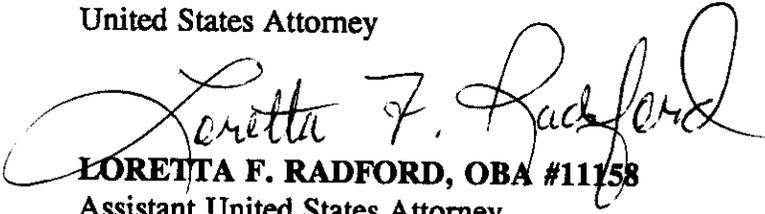
Dated this 10th day of March, 1997.

[Signature]
UNITED STATES DISTRICT JUDGE

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APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

333 W. 4th St., Ste. 3460

Tulsa, Oklahoma 74103

(918) 581-7463

LFR/esf

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

FILED

MAR 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Walter Edward, Kostich, Junior)
)
 Plaintiff,)
)
 vs.)
)
 MICKEY WILSON, *et al.*,)
)
 Defendants.)

Case No. 96-CV-1170-B ✓

ENTERED ON DOCKET

DATE MAR 12 1997

JUDGMENT

In accordance with the hearing on the Applications for Assessment of Attorney's Fees filed by Defendants Lonnie D. Eck and Gregory Frizzell, held March 5, 1997, the Court hereby enters judgment in favor of Defendant Lonnie D. Eck and against Plaintiff Walter Edward, Kostich, Junior in the amount of \$3,660.00, plus post-judgment interest at the rate of 5.67% percent per annum, said interest to accrue from March 6, 1997.

Further, the Court hereby enters judgment in favor of Defendant Gregory Frizzell, in his official capacity as General Counsel of the Oklahoma Tax Commission, State of Oklahoma, and against Plaintiff Walter Edward, Kostich, Junior in the amount of \$430.00, plus post-judgment interest at the rate of 5.67% percent per annum, said interest to accrue from March 6, 1997.

IT IS SO ORDERED this 11th day of March, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

MAR 08 1997

LC

Phil Lombardi, Clerk
U.S. DISTRICT COURT
OKLAHOMA

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

ROSENHECK & CO., INC., an)
Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA ex rel)
INTERNAL REVENUE SERVICE and)
WALTER E. KOSTICH JR.,)
)
Defendants.)

Case No. 97-CV-28-B ✓

ENTERED ON DOCKET
MAR 12 1997

ORDER

In keeping with the Order Granting Request for Sanctions filed this date, Judgment is hereby granted in favor of the Plaintiff, Rosenheck & Co., Inc., in the amount of One Thousand One Hundred Ninety-Four Dollars (\$1,194.00), plus interest from this date at the rate of 5.67% per annum against the Defendant, Walter E. Kostich, Jr.

IT IS SO ORDERED this 12th day of March, 1997.

Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAR 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROSENHECK & CO., INC., an)
Oklahoma corporation,)

Plaintiff,)

v.)

UNITED STATES OF AMERICA EX)
REL INTERNAL REVENUE SERVICE)
and WALTER E. KOSTICH, JR.,)

Defendants.)

Case No. 97-C-0028-B

MAR 12 1997

ORDER GRANTING REQUEST FOR SANCTIONS

THIS MATTER comes on before this Court this 27th day of February, 1997, upon this Court's Order to show cause why sanctions should not be imposed on Defendant Walter E. Kostich, Jr. issued pursuant to Rule 11(c)(1)(B) of the Fed. R. Civ. P. and Plaintiff's Response to Kostich's Refusal for Fraud by Affidavit, Request for Sanctions and Brief in Support filed herein on February 7, 1997. Plaintiff appears personally through its representative, Dr. Ira Spector, and through its attorneys, John M. Hickey, Esq. and Eric C. Lyon, Esq. of Barber & Bartz. The Defendant, Walter E. Kostich, Jr., aka Walter Edward Kostich, Junior ("Kostich") appeared personally.

THE COURT FINDS that the Defendant has been duly served with summons and the Complaint in accordance with Rule 4 of the Fed. R. Civ. P. and is a proper party to this case.

THE COURT FURTHER FINDS that, in response to the Complaint, Defendant Kostich filed herein on January 31, 1997, a Refusal for Fraud by Affidavit, to which Plaintiff filed its Response described above. Subsequently, on February 18, 1997, Defendant Kostich filed two additional pleadings entitled Refusal for Fraud by Affidavit, one in response to this Court's Order of February 4, 1997, to show cause why Defendant should not be sanctioned and the second to Plaintiff's Response to the initial Refusal for Fraud by Affidavit.

THIS COURT FURTHER FINDS that the pleadings entitled Refusal for Fraud by Affidavit filed herein by Defendant Kostich are frivolous, incomprehensible, and spurious.

THE COURT FURTHER FINDS that the Plaintiff was forced, unnecessarily, to file its Response to Defendant's initial Refusal for Fraud.

THE COURT FURTHER FINDS that, upon determining that the pleadings filed herein by Defendant Kostich were frivolous, this Court took testimony and received evidence in support of Plaintiff's request for sanctions.

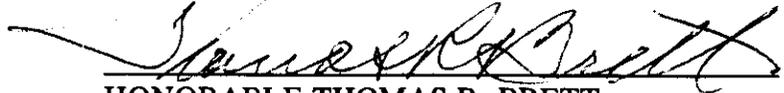
THE COURT FURTHER FINDS that, upon consideration of the evidence and the testimony of the witnesses, the Plaintiff has expended the sum of \$1194 in responding to the frivolous pleadings filed herein by Defendant Kostich as well as preparing for and attending the show cause hearing.

THE COURT FURTHER FINDS that Plaintiff should be granted a judgment against Defendant Kostich for the attorney fees so expended as a sanction for violation of Rule 11 of the Fed. R. Civ. P. to deter repetition of such conduct on the part of Defendant Kostich.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, Walter E. Kostich, Jr., aka Walter Edward Kostich, Junior, is a proper party to this case, having been properly served herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff is granted a judgment against the Defendant Walter E. Kostich, Jr., aka Walter Edward Kostich, Junior, in the amount of \$1194 for the reasons and upon the grounds set forth above.

DATED THIS 11th day of Mar, 1997.



HONORABLE THOMAS R. BRETT
Senior ~~CHIEF~~ JUDGE
UNITED STATES DISTRICT COURT

John M. Hickey, OBA # 11100
Eric C. Lyon, OBA 16680
BARBER & BARTZ
One Ten Occidental Place
110 West Seventh Street, Suite 200
Tulsa, Oklahoma 74119-1018
(918) 599-7755 and (918) 599-7756 FAX
Attorneys for Rosenheck & Co., Inc.

192-90

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF THE STATE OF OKLAHOMA

MAX LEE RISHELL, Curator of the)
person and estate of KATHLEEN LACEY,)
an Incapacitated Person,)

Plaintiff,)

and)

MARRIOTT CORPORATION, as Plan)
Fiduciary of the Marriott Corporation)
Multi-Med Health Plan,)

vs.)

Intervening Plaintiff,)

JANE PHILLIPS EPISCOPAL)
MEMORIAL MEDICAL CENTER; JANE)
PHILLIPS EPISCOPAL HOSPITAL;)
INC.; formerly JANE G. PHILLIPS)
MEMORIAL HOSPITAL, INC., d/b/a)
OKLAHOMA MEDICAL COLLECTION)
SERVICES; and)
CHARLES WELLSHEAR, M.D.,)

Defendants.)

FILED
MAR 07 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. C-94-636-H ✓

EDD 3/11/97

ORDER DISMISSING DEFENDANT HOSPITAL WITH PREJUDICE

NOW on this 7th day of March, 1997, comes on for hearing the Joint Motion of the Plaintiff, Max Lee Rishell, Curator of the person and estate of Kathleen Lacey, ("Plaintiff") and the Defendant, Jane Phillips Hospital ("Hospital"), for an Order dismissing DEFENDANT, JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER; JANE PHILLIPS EPISCOPAL HOSPITAL; INC.; formerly JANE G.

PHILLIPS MEMORIAL HOSPITAL, INC., d/b/a OKLAHOMA MEDICAL COLLECTION SERVICES ("Hospital"). The parties seek an order of dismissal with prejudice as to Defendant Hospital only. In support of this Motion, the parties state a compromise settlement was agreed to between these two parties, and was approved by order of this Court entered March 4, 1997. As part of the agreement, Plaintiff and Defendant Hospital have agreed to bear their own costs of this action. The Court, being fully advised in the premises herein, finds such order should issue.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Hospital only is dismissed, with prejudice as to the refiling of this cause of action, with each party to bear their own costs of this action.

IT IS SO ORDERED.


ERIK SVEN HOLMES
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 07 1997

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

LARRY PATRICK,

Plaintiff,

v.

STATE FARM FIRE AND CASUALTY
COMPANY,

Defendant.

Case No. 96-CV-800-H

FILED ON DOCKET
MAR 11 1997

ORDER

This matter comes before the Court on Defendant's motion to dismiss (Docket # 3); Defendant's motion for order releasing credit information (Docket # 8); Defendant's motion to disqualify Plaintiff's attorneys (Docket #10); Defendant's motion for summary judgment or partial summary judgment (Docket # 13); and Defendant's motion appealing a decision by the Magistrate Judge in this case (Docket # 33). The Court will address each of these motions below.

I.

The Court held a hearing in this case on February 7, 1997. At that hearing, counsel for Plaintiff conceded that Plaintiff's claim for breach of contract on the homeowner's policy is time-barred by Okla. Stat. tit. 36, § 4803(G), which requires that any lawsuit for recovery on a claim under a standard fire insurance policy must be filed within one year after the loss. In this case, the fire that destroyed Plaintiff's property occurred on April 8, 1992, but this suit was not filed until June 2, 1993, more than one year after the fire. Therefore, Plaintiff's cause of action on the homeowner's policy is time-barred. In addition, this same motion was granted by Judge Ellison when this case was first filed, 93-C-585-E ("Patrick I"), and that ruling is res judicata in this case. Accordingly, Defendant's motion to dismiss is granted.

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II.

Defendant moves for an order authorizing release of credit information pertaining to Plaintiff Larry Patrick. In deposition testimony, Plaintiff admitted to using a false social security number in order to obtain credit cards. Defendant seeks Plaintiff's credit history associated with the fictitious social security number on the grounds that such information reflects Plaintiff's financial condition at the time of the fire, which is probative of whether the fire was arson or accidental. In accordance with the hearing held on February 7, Defendant's motion is granted as modified: for purposes of this action only, any consumer reporting agency, as defined in 15 U.S.C. § 1681a(f), is ordered to release to Defendant, by and through its attorneys and designated agents, any and all credit reports, files as defined in 15 U.S.C. § 1681a(g), and/or consumer reports, as defined in 15 U.S.C. § 1681a(d), maintained, held, stored, collected, or otherwise within their power to produce, relating to Social Security Number 440-75-1363, only through March 9, 1993.

III.

Defendant also moves for disqualification of Plaintiff's attorneys. This same motion was filed in Patrick I, and was denied by Judge Kern. At the hearing on February 7, counsel for Defendant conceded that this ruling is res judicata and thus bars renewal of the motion. Accordingly, this motion is denied.

IV.

Defendant moves for summary judgment on Plaintiff's breach of contract claim on the business insurance policy. In the alternative, Defendant contends it is entitled to partial summary judgment on Plaintiff's bad faith and punitive damages claims, arising under both the homeowner's and the business insurance policies.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947

(1987), and “the moving party is entitled to judgment as a matter of law,” Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court held that

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

477 U.S. at 322.

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

Summary judgment is only appropriate where “there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Id. at 250. As the Supreme Court held, “[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 (“there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” (citations omitted)).

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

light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 392 (10th Cir. 1991).

Defendant argues that it is entitled to partial summary judgment on Plaintiff's claims for bad faith and punitive damages arising from Defendant's denial of Plaintiff's claims under both the homeowner's and the business insurance policies. Under Oklahoma law, an insurer has an implied duty to deal fairly and act in good faith with its insured, and violation of this duty gives rise to a tort. Timberlake Constr. Co. v. U.S. Fidelity and Guar. Co., 71 F.3d 335, 343 (10th Cir. 1995). However, an insurer does not breach the duty of good faith by refusing to pay a claim if there is a legitimate dispute as to coverage or the amount of the claim, and the insurer's position is reasonable and legitimate. Id. In order to pursue a claim of bad faith when the insurer has a legitimate defense to coverage, the insured must produce sufficient evidence tending to show bad faith. Id. In this case, Defendant had a legitimate dispute as to coverage, and Plaintiff has failed to produce evidence of bad faith. Therefore, Defendant's motion for partial summary judgment on the bad faith and punitive damages claims is granted.

Defendant also argues that it is entitled to summary judgment on Plaintiff's breach of contract claim arising from the business policy, contending that Plaintiff lied on his claim forms about the value of the property destroyed in the fire. The Court concludes that genuine issues of material fact exist as to Plaintiff's veracity on the claim forms. Thus, Defendant's motion for summary judgment on the breach of contract claim is denied.

V.

Finally, Defendant appeals Magistrate Judge McCarthy's order (Docket # 32) denying Defendant's motion for discovery of privileged materials. Defendant's motion sought an order finding that Plaintiff waived the attorney-client privilege with respect to communications with his former lawyer, Greg Meier, and/or other attorneys of Plaintiff's counsel's law firm, formerly called Richardson, Meier & Stoops, now The Richardson Law Firm.

Plaintiff's former attorney, Greg Meier, was the attorney who handled Plaintiff's case when it was first filed (Patrick I). Subsequently, Mr. Meier's association with Plaintiff's counsel's law firm was terminated, and state court litigation developed between the attorneys involved. Plaintiff signed an affidavit which was filed the state suit, alleging that Meier represented Plaintiff poorly. In the affidavit, Plaintiff stated that he engaged Mr. Meier to represent him, and recounted the objectives of that representation. Furthermore, Plaintiff stated his opinion that Mr. Meier was inattentive to his case, and that this inattention cause him damage. The affidavit did not reveal any confidential attorney-client communications, and the attorney-client privilege was not waived. Accordingly, Defendant's motion to rescind Magistrate Judge McCarthy's order denying discovery of privileged materials is denied.

VI.

In summary, Defendant's motion to dismiss Plaintiff's breach of contract claim on the homeowner's policy (Docket # 3) is granted. Defendant's motion for order authorizing release of credit information (Docket # 8) is granted. Defendant's motion to disqualify counsel (Docket # 10) is denied. Defendant's motion for partial summary judgment (Docket # 13) is granted with respect to the claims for bad faith and punitive damages; however, Defendant's motion for summary judgment on Plaintiff's breach of contract claim on the business policy (Docket # 13) is denied. Defendant's appeal from the Magistrate Judge's ruling on discovery of privileged materials (Docket # 33) is denied. Plaintiff's motion for continuance of time to respond to Defendant's motion for summary judgment (Docket # 19) and motion to file a supplemental response to Defendant's motion to disqualify Plaintiff's counsel (Docket # 30) are dismissed as moot.

IT IS SO ORDERED.

This 7th day of March, 1997.



Sven Erik Holmes
United States District Judge

on the evidence adduced at trial in Plaintiffs' case-in-chief and in Defendants' case-in-chief the Court concludes that this argument must fail.

The pretrial order in this case contains only one specific basis for a claim that the PPM was a public registration statement: that BeneFund made various offerings of securities as part of a "single plan of financing" and, as a result, the financing scheme involved offers to more investors than are allowed by law for a private offering. Pretrial Order ¶ 6, p. 36.

Plaintiffs, however, do not contend that the evidence adduced at trial supported this assertion, but rather sought to introduce other evidence not identified in the pretrial order. The Court reluctantly permitted the introduction of such evidence until certain relevant facts had been established, including: Defendant BeneFund intended to comply with the legal requirements for a private offering and retained experienced counsel for that purpose; such counsel was assisted by corporate counsel, who was himself experienced in securities law; and both attorneys believed, and so testified at trial, that BeneFund intended for the financing to be a private offering. More importantly, the chief accuser offered by Plaintiffs, Mr. Mark Loeber, who testified at trial in the case-in-chief of both Plaintiffs and Defendants, established two critical points: first, as the only agent of BeneFund who dealt with Plaintiffs, Mr. Loeber was aware at all times of the restrictions attendant to a private offering and intended at all times to comply with such restrictions; and second, as the only agent of BeneFund who dealt with Plaintiffs, Mr. Loeber believed his dealings with Plaintiffs were accomplished in full compliance with the restrictions necessary for a private offering. Therefore, assuming arguendo that BeneFund failed to satisfy the requirements for a private offering, it did so only as a result of transactions unrelated to Plaintiffs and not part of this lawsuit.

Plaintiffs seek to call Mr. Loeber to testify in rebuttal with respect to the allegedly improper handling of other investor transactions in which Mr. Loeber was not personally involved. Putting aside the reliability of such testimony, to permit such testimony in effect

requires that the Court abandon altogether the terms of the pretrial order on this issue. This the Court is not prepared to do. Plaintiffs were given wide latitude to present evidence to dispute the uncontroverted intent of Defendants and their agents. Instead, the evidence, in large part from Mr. Loeber himself, establishes a consistent effort by Mr. Loeber and others to comply with the law regarding private offerings. The evidence further establishes that, at least with respect to Plaintiffs, this effort to comply with the law was successful. Therefore, the Court holds that it is improper to call Mr. Loeber in rebuttal to address issues clearly outside the pretrial order in this case. Based on the evidence adduced at trial, the facts in this case are controlled by the Supreme Court's opinion in Gustafson. Accordingly, Defendants' motion to dismiss Plaintiffs' claims under section 12(2) of the Securities Act of 1933 and section 408 of the Oklahoma Securities Act is hereby granted and any additional testimony by Mr. Loeber on this point is not relevant to any issues remaining in the case.

IT IS SO ORDERED.

This 7TH day of March, 1997.


Sven Erik Holmes
United States District Judge

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

FILED

MAR 6 1997

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

BOSS EINSTEIN-BURNS,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF OKLAHOMA/ODHS, +C)
 (abbreviated: DHS, et al.),)
)
 Defendant.)

Case No. 97-C-91-BU

ENTERED ON DOCKET

DATE MAR 11 1997

ORDER

On February 11, 1997, this Court ordered Plaintiff, Boss Einstein-Burns, to cure certain deficiencies in his application for leave to file an action without payment of fees, costs or security and his affidavit of financial status by February 25, 1997, or the Court would dismiss this action without prejudice. It appears from the record that Plaintiff has not cured the deficiencies as ordered.

Accordingly, the above-entitled action is hereby **DISMISSED WITHOUT PREJUDICE.**

ENTERED this 5th day of ~~February~~ ^{March}, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 6 1997

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MARY J. GUSTAFSON,)
)
Defendant.)

Case No. 96-C-903-BU

ENTERED ON DOCKET

DATE MAR 11 1997

ORDER

On January 23, 1997, Plaintiff, United States of America, filed a Request for Entry of Default and an Application for Entry of Default Judgment against Defendant, Mary J. Gustafson. The Clerk of the Court entered default against Defendant on January 24, 1997. On February 7, 1997, Defendant filed a response to Plaintiff's Application for Entry of Default Judgment and filed a Motion to Dismiss Action, or in Lieu Thereof to Quash Service of Summons. After reviewing Defendant's motion, the Court advised the parties that it was also treating Defendant's motion as a motion to set aside the entry of default by the Court Clerk pursuant to Rule 55(c), Fed.R.Civ.P., and directed Plaintiff to respond to the motions by February 18, 1997. To date, Plaintiff has not responded to the motions. Pursuant to Local Rule 7.1(C), the Court deems the motions confessed.

As it appears from the uncontroverted record that Plaintiff did not properly effect service of process upon Defendant, the Court

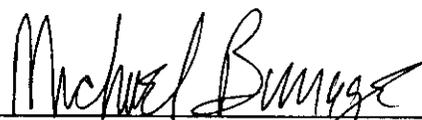
1. **GRANTS** Defendant's Motion to Set Aside Entry of Default (Docket Entry #7-3) and **VACATES** the Clerk's Entry of Default (Docket Entry #5);

2. **DENIES** Plaintiff's Application for Entry of Default Judgment (Docket Entry # 3);

3. **GRANTS** Defendant's Motion to Dismiss Action (Docket Entry #7-1) and **DISMISSES WITHOUT PREJUDICE** the above-entitled action; and

4. **DECLARES MOOT** Defendant's Motion to Quash Service of Summons (Docket Entry #7-2).

ENTERED this 5^m day of ~~February~~^{March}, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 07 1997

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

LANCASTER COLONY CORPORATION,
a Delaware corporation,

Plaintiff,

vs.

LONNIE JOHNSON, ERMA REED;
AMANDA LOU JOHNSON, the heir of Robert
L. Johnson; and AVERY ROGERS and
LACY ROGERS, the heirs of Peggy L. Johnson,

Defendants

Case No. 96-C-685-H

ENTERED ON DOCKET

MAR 11 1997

ORDER

NOW on this 4TH day of MARCH, 1997, the Court having considered Plaintiff, Lancaster Colony Corporation's Application for Disbursement of Attorneys' Fees hereby GRANTS Plaintiff's Application and Orders the Clerk of the United States District Court, Northern District of Oklahoma to disburse, from the funds totaling \$6,827.26 previously deposited in court's Treasury Registry to the credit of this case, the sum of \$798.50 as attorney's fees and costs to counsel for Lancaster:

Pray, Walker, Jackman, Williamson & Marlar,
900 ONEOK Plaza,
Tulsa, Oklahoma 74103.

Further, the court directs the clerk to maintain the balance of the funds (\$6,028.76) in the Treasury Registry account of this court until further order of the court.


SVEN ERIK HOLMES, U.S. DISTRICT JUDGE

604700
\$6,827.26
✓ M

FILED

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

MAR 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BETHESDA BOYS RANCH, et.al.,

Plaintiff,

vs.

Case No. 96-CV-655-C

ATLANTIC RICHFIELD COMPANY; CHEVRON
USA, INC.; UNION OIL COMPANY OF
CALIFORNIA; TEXACO, INC.; UPLANDS
RESOURCES, INC.; FAIR OIL COMPANY;
GEMINI OIL COMPANY; TRITON PRODUCING
CO.; PRODUCERS OIL COMPANY; SHARP
FINANCE CORPORATION; THOMPSON OIL & GAS
COMPANY; FELL OIL & GAS COMPANY;
REDDY OIL & GAS CORPORATION; COUNTRY
INVESTMENTS, INC.; FAIR OIL LTD.;
PIONEER CORPORATION; RESOURCES OPERATIONS,
INC.; ENERGY LEASE SERVICES, INC.; HYPERION
ENERGY, L.P.; HYPERION RESOURCES, INC.;
ADVANCE ENERGY SYSTEMS, INC.; HELMCO, LTD.;
CRASCO OIL CO.; RAMEY OIL CORPORATION;
WESTERN PETROLEUM CO. INC.; SUNBEAM
PETROLEUM COMPANY; QUARTET OIL COMPANY;
LAYTON OIL COMPANY; THE BRADLEY PRODUCING
COMPANY; RAMEY-SHARP; KEENER OIL CO.; GLENN
POOL PRODUCERS ASSOCIATION COMPANY, INC.;
AND JOHN DOES 1 through 82,

Defendants.

ENTERED FOR RECORD
MAR 11 1997

ORDER

Before the Court are the motions to remand or in the alternative to abstain filed by plaintiffs and by defendants Reddy Oil and Gas Corporation, Ramey Oil Corporation and Western Petroleum Company. For the reasons set forth below the motions to abstain and remand are hereby granted.

This lawsuit was originally commenced in the District Court for Creek County,

Oklahoma on August 24, 1995. Plaintiff brought this action against 28 named defendants, including Texaco as current and former oil and gas operators in an area known as the Glenn Pool Oilfield. Plaintiffs seek to hold the defendants jointly and severally liable for damages allegedly resulting from pollution of the groundwater underlying the 55 contiguous sections of land which comprise the Glenn Pool Oilfield in relation to the defendants' oil production activities.

On April 12, 1987, eight years prior to the commencement of this action, Texaco sought relief under Chapter 11 of the United States Bankruptcy Code in the United States District Court for the Southern District of New York. On March 23, 1988, Texaco's plan of reorganization was confirmed. On October 9, 1991, the United States Bankruptcy Court issued the final decree in the Texaco Bankruptcy. Pursuant to the Confirmation Order of the bankruptcy court, Texaco was discharged from any and all claims and liabilities that arose prior to entry of the order, regardless of whether a proof of claim was filed or deemed filed, such claim was allowed, or the holder of such claim had accepted the plan of reorganization. Furthermore, the Confirmation Order permanently enjoined the commencement of any action, the employment of process, or any act to collect, recover or offset any debt discharged therein.

In Plaintiffs' Response to Texaco's First Request for Admissions, the plaintiffs admitted that they were seeking damages against Texaco for pollution of the groundwater allegedly occurring prior to March 23, 1988, the date of issuance of the Confirmation Order in the Texaco Bankruptcy. On July 18, 1996, within thirty days of receipt of plaintiffs' response pleading, Texaco filed its Notice of Removal to this Court under the provisions

of 28 U.S.C. § 1452(a) and 28 U.S.C. § 1334(b). Texaco and other defendants request the Court to retain jurisdiction by asserting that plaintiffs' action implicates substantive rights created by the federal bankruptcy laws and is a matter affecting the Texaco Confirmation Order because it allegedly attacks the integrity of a federal judgment.

In their Second Amended Petition filed on February 8, 1996, plaintiffs raise state law claims against the defendants and seek to recover the cost of cleanup and damages for the alleged groundwater pollution. The amended petition does not provide a date from which the alleged injuries and damages commenced. However, the plaintiffs are seeking damages against numerous current and historic operators for oil production activities spanning several decades. Certain defendants argue that the Court should retain jurisdiction over all defendants because plaintiffs are seeking joint and several liability against the defendants as a group. These defendants contend that partial remand of the case as to all defendants except Texaco would cause prejudice because they may have viable cross claims against Texaco for contribution and indemnity.

Most of the cases cited by the parties involve opinions issued by various bankruptcy courts and address the propriety of the bankruptcy court assuming jurisdiction to either reopen a final judgment previously issued in that forum or to remove and transfer a state action from one forum to another federal forum where the bankruptcy proceeding is active. Additionally there are few reported cases which address removal of a state action to a forum different from where a final bankruptcy proceeding was held.

After considering the parties' briefs, arguments and relevant law the Court finds as follows. Texaco timely removed this action under the provisions of 28 U.S.C. § 1452(a)

and 28 U.S.C. § 1334(b) within thirty days in which it knew or reasonable should have known that the state action was removable. This action which involves all state law claims is a non-core proceeding in that it "relates to" a nonforum bankruptcy proceeding in which the administration of the estate has been finalized and a judgment entered. Contrary to Texaco's assertions, the claims raised by the plaintiffs do not involve a core proceeding as defined under 28 U.S.C. § 157(I), as that provision addresses whether a particular "debt" is dischargeable in bankruptcy rather than whether claims are barred due to the entry of a confirmation order.

A state court has the authority and responsibility to enforce the provisions of a final judgment entered by a United States Bankruptcy Court. The judgment is entitled to full faith and credit recognition by any court, whether state or federal. In the event the state court would take any action which Texaco believes violates the Confirmation Order, Texaco can promptly petition for injunctive relief with the Bankruptcy Court for the Southern District of New York. See e.g., Chicago, Milwaukee, St. Paul & Pacific RR v. Heartland Partners, 6 F.3d 1184 (7th Cir. 1993).

This action should be remanded as to all defendants, including Texaco due to the issues of joint and several liability. Regardless of the manner in which liability was plead, the proper allocation of liability must be determined by the evidence offered and applicable law rather than by the wording in the petition. Apportionment of liability between joint tortfeasors in which liability may be partially discharged, does not raise questions within the exclusive jurisdiction of the federal courts. Such issues can be briefed and resolved in state court. The wording of the petition is not a sufficient basis for this Court to retain an

action which could not have originally been brought in federal court.

The Court finds and concludes that this action should be remanded under 28 U.S.C. § 1334(2), which states:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Additionally, the Court finds and concludes that this action should be remanded under 28 U.S.C. § 1452(b) for equitable reasons.¹ This action was active in the state court for one year prior to removal. The administration of the bankruptcy estate is closed and a federal judgment entered, accordingly there is no potential for an adverse effect on the bankruptcy estate. Any forum, whether state or federal, has the authority and duty to give full faith and credit to a final judgment. No federal question is raised by recognition, enforcement, or interpretation of a federal judgment. All substantive claims raised herein are state law claims more appropriately adjudicated by a state court. Not all defendants consented to the removal to federal court. The action could not have originally been brought in federal court absent entry of the Confirmation Order which effects only one of

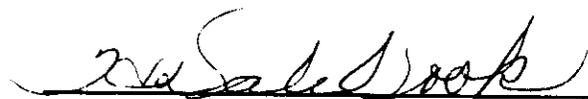
¹ Equitable considerations include: Whether there will be duplication of judicial resources. Whether there will be an uneconomical use of judicial resources. What the effect of remand would have on the administration of the bankruptcy estate. Whether the case concerns questions of state law better addressed by the state court. Whether comity requires a remand. Whether there would be any prejudice to those parties involuntarily removed. Whether remand would lessen the possibility of inconsistent results. What is the expertise of the originating court. See, River Cement Co. v. Bangert Bros. Const. Co., 852 F.Supp. 25, 27 (D.C.Colo.1994).

28 defendants.

Though there is some disagreement as to whether mandatory abstention applies to cases removed under § 1452, Paul v. Chemical Bank, 57 B.R. 8 (Bankr. S.D.N.Y.1985), it is clear that the provisions for mandatory abstention are strong factors suggesting equitable remand under § 1452(b). Section 1334(c) expresses a strong congressional desire that federal courts should not rush in to usurp jurisdiction from the state courts in non-core proceedings. Since the dispute involves purely state law claims, only one of 28 defendants have any basis for federal jurisdiction, and the action otherwise could not have originated in federal court, this Court will defer to the state court where this action originated to adjudicate the state law claims.

ACCORDINGLY, IT IS THE ORDER OF THE COURT that the motions to remand or alternative to abstain filed by the plaintiffs and by defendants Reddy Oil and Gas Corporation, Ramsey Oil Corporation and Western Petroleum Company is hereby GRANTED.

IT IS SO ORDERED this 6 day of March, 1997.



H. DALE COOK
Senior, United States District Judge

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

FILED

MAR - 7 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKY R. VITELA,

Petitioner,

vs.

RON WARD,

Respondent.

Case No. 97-C-149-B

ENTERED ON FILE
MAR 11 1997

ORDER DISMISSING WITHOUT PREJUDICE

Petitioner has filed a motion to proceed in forma pauperis and an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted in Atoka County, Oklahoma, located within the territorial jurisdiction of the Eastern District of Oklahoma. Petitioner is currently incarcerated in McAlester, Oklahoma, also located within the territorial jurisdiction of the Eastern District of Oklahoma.

This Court lacks jurisdiction and venue as Petitioner's place of conviction and incarceration are not within the territorial jurisdiction of the Northern District of Oklahoma. See Herd v. Champion, 1994 WL 4482 (10th Cir. Feb. 16, 1994), (citing Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973); 28 U.S.C. § 2241 (d)).

Petitioner's application for a writ of habeas corpus is dismissed without prejudice to refiling in the proper district.

IT IS SO ORDERED this 7 day of March, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. * See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Milton L. HERD, Petitioner-Appellant,
v.
Ron CHAMPION; Attorney General of the State of Oklahoma, Respondents-Appellees.

No. 93-636.

United States Court of Appeals,
Tenth Circuit.

Feb. 16, 1994.

ORDER AND JUDGMENT [FN1]

Before TACHA, BRORBY and EBEL, Circuit Judges.

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Herd, a state inmate and pro se litigant, appeals the dismissal of his habeas petition.

Mr. Herd was convicted in a state court located in the Eastern District of Oklahoma. He was incarcerated in a state facility located in the Northern District of Oklahoma. For reasons known only to Mr. Herd, he chose to file this habeas action in the Western District of Oklahoma.

The district court dismissed the habeas petition without prejudice for refileing in the proper district.

We review the district court's conclusion of law de novo. *Martin v. Kaiser*, 907 F.2d 931, 933 (10th Cir.1990).

Mr. Herd attempts to appeal this decision and asks for permission to proceed in forma pauperis. In his brief on the merits, Mr. Herd argues the merits of his petition rather than the action of the district court, which did not address the merits.

We grant Mr. Herd permission to proceed in forma pauperis because we must address the merits to rule upon this motion.

We AFFIRM the decision of the district court. The district court lacked both subject matter jurisdiction and proper venue. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494-01 (1973).

FN1. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

END OF DOCUMENT

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

FILED

MAR 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORIX CREDIT ALLIANCE, INC.,)
)
Plaintiff,)
)
v.)
)
CHASE R BALES,)
)
Defendant.))

Case No. 96-CV-1169-E

ENTERED
MAR 11 1997

ADMINISTRATIVE CLOSING ORDER

The defendant having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 45 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 5th day of March, 1997.

United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR - 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

JIMMIE L. CARR; MARSHAL K. CARR;)
ASSOCIATES NATIONAL MORTGAGE)
CORPORATION; CHARLES F. CURRY)
COMPANY; TULSA MUNICIPAL)
EMPLOYEES FEDERAL CREDIT)
UNION; COUNTY TREASURER, Osage)
County, Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Osage County,)
Oklahoma,)

Defendants.)

ENTERED ON CLERK'S FILE
MAR 11 1997

Civil Case No. 96 C 0209B

ORDER

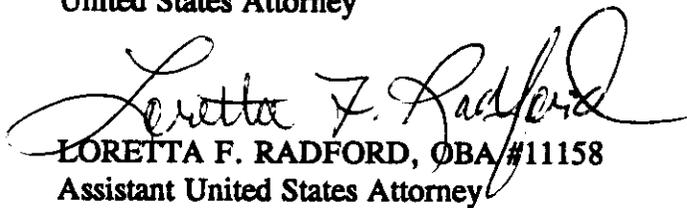
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that the Clerk's Entry of Default entered herein on the 22nd day of January, 1997 and the Judgment of Foreclosure entered herein on the 27th day of January, 1997, are vacated.

Dated this 5th day of Mar, 1997.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney

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

LFR:flv

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

FILED

MAR - 6 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JESSE WOODWARD and
MARJIE WOODWARD,

Plaintiffs,)

vs.)

Case No 96-CV-443-B

JERRY O'NEAL and PATRICIA O'NEAL;)
UNITED STATES OF AMERICA, Ex Rel.;)
INTERNAL REVENUE SERVICE; and)
STATE OF OKLAHOMA, Ex Rel. OKLAHOMA)
TAX COMMISSION)

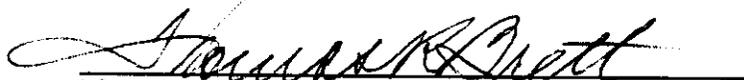
Defendant.)

ENTERED ON RECORD
MAR 11 1997

ORDER REMANDING CASE

Now on this 6th day of March, 1997, the Court having been presented with the Joint Application of the Plaintiffs and the Defendants, United States of America and State of Oklahoma to remand this action to the District Court of Creek County, Oklahoma, and the Court finding that the parties have resolved all questions of federal law by settlement and that this Court no longer retains subject matter jurisdiction, this case should be remanded as requested by the parties.

IT IS THEREFORE ORDERED that this matter is remanded to the District Court of Creek County Oklahoma, Case No. CJ 96-237.


Thomas Brett,
United States District Judge

11

APPROVED AS TO FORM AND CONTENT:

MOH

Mark O. Thurston, OBA #9008
Attorney for Plaintiffs
5514 S. Lewis, Suite 101
Tulsa, OK 74105
(918) 744-0666

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(202) 514-0079

Kim D. Ashley
Assistant General Counsel
Oklahoma Tax Commission
P. O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141

APPROVED AS TO FORM AND CONTENT:

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Oklahoma City, Oklahoma 73152-3248
(405) 521-3141 *CIV 96-4370, N.D. Okla.*
Woodward v. Okla.

ENTERED ON DOCKET
DATE 3-11-97

FILED

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

MAR 04 1997

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

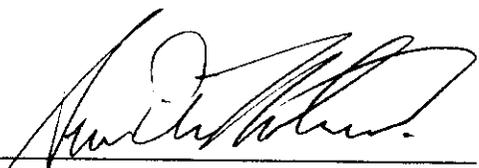
BERYL SIMPSON, and individual)
)
 Plaintiff,)
)
 v.)
)
 KATHY KOEHN, an individual,)
 FRANCES L. WARD, an individual)
 and ACTION BONDING COMPANY, an)
 OKLAHOMA SOLE PROPRIETORSHIP)
)
 Defendants.)

Case No. 96 CV 1103-H

ORDER DISMISSING COMPLAINT

Now on this 3RD day of ~~February~~ ^{MARCH}, 1997 it appearing to the court that the Defendants filed their motion to dismiss on January 29, 1997, and it further appearing that the Plaintiff has failed to timely respond thereto in accordance with the federal Rules of Civil procedure and local rules,

IT IS, THEREFORE ORDERED that Plaintiff's complaint is dismissed without prejudice pursuant to local rule 7.1, C.



JUDGE OF THE DISTRICT COURT

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

FILED
MAR 05 1997
T.M.E. Lombardi, Clerk
U.S. DISTRICT COURT

LOUIS ARECES, Personal Representative of the
Estate of MARCELO ARECES, Deceased,

Plaintiff,

vs.

THE ENSTROM HELICOPTER CORPORATION;
AVCO CORPORATION, d/b/a TEXTRON LYCOMING;
DANA CORPORATION;
GERALD J. HAIL, d/b/a DOBIES HELIPORT; and
ROBERT E. RICHARDSON, an individual,

Defendants.

CIVIL ACTION

Case No. 95 C 1222K

6-11-97 ON DOCKET

3-11-97

ORDER OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, upon Plaintiff's application to dismiss his action against Defendant Robert E. Richardson without prejudice, the Court finds that Defendant Richardson has no objection to the dismissal without prejudice, and hereby orders that Plaintiff's action against Defendant Richardson be dismissed without prejudice.

Dated this 4th day of March, 1997.


TERRY C. KERN, U.S. DISTRICT COURT JUDGE

ENTERED ON BOOK
DATE 3-11-97

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

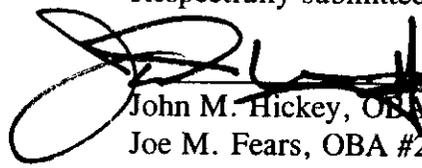
ROYAL EQUIPMENT, INC., a)
Delaware corporation,)
Plaintiff,)
vs.)
CYPRESS EQUIPMENT FUND, LTD.,)
a Florida limited partnership,)
Defendant.)

Case No. 96-CV-801-K

STIPULATION OF DISMISSAL

COME NOW the Plaintiff, Royal Equipment, Inc., by and through its attorneys, Barber & Bartz, and the Defendant, Cypress Equipment Fund, Ltd., by and through its attorneys, Riggs, Abney, Neal, Turpen, Orbison & Lewis, and pursuant to Rule 41(a)(1)(ii), hereby dismiss the above captioned and numbered action with prejudice.

Respectfully submitted,



John M. Hickey, OBA #11100
Joe M. Fears, OBA #2850
BARBER & BARTZ
One Ten Occidental Place
110 West Seventh Street, Suite 200
Tulsa, Oklahoma 74119-1018
(918) 599-7755 and (918) 599-7756 FAX

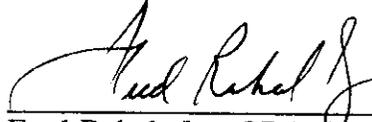
and

John E. Dowdell, OBA #2460
Roger K. Eldredge, OBA #15003
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103-4023
(918) 583-7571

Attorneys for Plaintiff, Royal Equipment, Inc.,
a Delaware corporation

ROYAL EQUIPMENT, INC. vs. CYPRESS EQUIPMENT FUND, LTD.
United States District Court
Northern District of Oklahoma
Case No. 96-CV-801-K

Stipulation of Dismissal



Fred Rahal, Jr., OBA #7378
Riggs, Abney, Neal, Turpen, Orbison & Lewis
502 West Sixth Street
Tulsa, Oklahoma 74119-1010
(918) 587-3161

and

Ben I. Hamburg, CSB No. 90257
Freeland, Cooper, LeHocky & Hamburg
150 Spear Street, Suite 1800
San Francisco, California 94105
(415) 541-0200

Attorneys for Defendant, Cypress Equipment
Fund, Ltd.

2893-03

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JOHNIE STUBBLEFIELD,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,^{1/}

Defendant.

MAR - 7 1997 SAC

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 94-C-992-J ✓

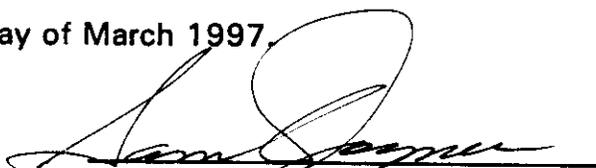
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DATE 3/11/97

ORDER REMANDING CASE TO ALJ

Pursuant to the mandate of the United States Court of Appeals for the Tenth Circuit, the above-referenced matter is **REMANDED** to the appropriate Administrative Law Judge for further proceedings consistent with the Court of Appeals' Order and Judgment entered on January 7, 1997.

It is so ordered this 3 day of March 1997.



Sam A. Joyner
United States Magistrate Judge

^{1/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

18