

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

ENTERED ON DOCKET
DATE 7-31-97

CHARLES KEITH BICKFORD,)
)
Plaintiff.)
)
vs.)
)
JUDGE CLIFFORD E. HOPPER,)
)
et al.,)
Defendants.)

No. 97-C-54-K ✓

FILED

JUL 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983 and was granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(b)(2) on April 25, 1997. However, Plaintiff did not submit the requisite number of Marshal forms. Although the Clerk of the Court attempted to notify Plaintiff of the deficiency, the mail was returned on May 9, 1997, marked, "forwarding order expired." The Court is now in receipt of a letter from Plaintiff, construed as a notice of change of address, identifying Plaintiff's new address as: Charles Keith Bickford, #247459, Cimarron Correctional Center, 3700 South Kings Highway, Cushing OK 74023.

Additionally, Plaintiff has filed a motion to deny revocation of a release order (#3), alleging Public Defender Damon Cantrell "did not remove himself from this action," and therefore "should be removed." Even liberally construing Plaintiff's motion, the Court is unable to determine the basis of Plaintiff's motion. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991). The Court denies Plaintiff's motion (#3) at this time for failure to

comply with Fed. R. Civ. P. 7 (b)(1).¹

In this pro se civil rights action, Plaintiff alleges that Judge Clifford E.Hopper failed to "uphold his oath of office" by harassing, humiliating and coercing Plaintiff to plead guilty; that Public Defender Damon Cantrell failed to "uphold his oath of office" by failing to provide effective representation; and that Probation Officer Maurice K. Majors failed to "uphold his oath of office" by coercing and humiliating Plaintiff and submitting a false "pre-sentence investigation report to get [Plaintiff] convicted." (#1 at p.2.) Therefore Plaintiff requests "\$1,000 for each day while in the custody and control of the Oklahoma Department of Corrections."

ANALYSIS

In determining whether a civil rights damage claim should be treated as one controlled by the habeas corpus statutes, the court must focus on the nature of the claim rather than the form of relief requested. Hanson v. Heckel, 791 F.2d 93, 95 (7th Cir. 1986). Plaintiff's allegations of imprisonment based upon prejudice and bias of the trial court, ineffective assistance of counsel, and falsified presentence reports challenge the fact of the conviction entered against him. Where a state prisoner challenges the fact or duration of his confinement, his sole federal remedy is a writ of habeas corpus. Preiser v. Rodriguez, 93 S.Ct. 1827, 1836-37, 1841 (1973). A habeas petitioner must exhaust state remedies. Rose v. Lundy, 102 S.Ct. 1198, 1202 (1982). The exhaustion requirement in federal habeas actions "is rooted in considerations of federal-state comity." Preiser, 93 S.Ct. at 1837. "The

¹Rule 7, "Motions and Other Papers," subsection (b), provides as follows:
(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." Id., 93 S.Ct. at 1837-38. Because Plaintiff's claims are inextricably linked to the constitutionality of his trial and conviction, they fall within the core of habeas corpus. See Crump v. Lane, 807 F.2d 1394, 1401 (7th Cir. 1986). Therefore, exhaustion of state remedies is required before presenting the claim to this Court. Although Plaintiff in this case seeks damages rather than release from confinement, the exhaustion requirement still applies and the petition should be dismissed.

Assuming *arguendo* that Plaintiff's claims could proceed under 42 U.S.C. § 1983 and not be treated as an action in habeas, the complaint is nonetheless deficient and should be dismissed. Under Heck v. Humphrey, 114 S.Ct. 2364, 2372 (1994), to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render the conviction or sentence invalid, a prisoner must demonstrate "that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by federal court's issuance of writ of habeas corpus." Plaintiff has not made such a demonstration to this Court and therefore the petition should be dismissed.

Since the Court has already determined Plaintiff has failed to satisfy the exhaustion requirement, it is not necessary to address whether Plaintiff's civil rights complaint, filed in forma pauperis, would overcome the frivolity screening required under The Prison Litigation Reform Act of 1996, Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996), "Screening" (now codified at 28 U.S.C. § 1915A).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Plaintiff's civil rights complaint is **treated** as a petition for writ of habeas corpus and **dismissed without prejudice** for failure to exhaust available state remedies.

(2) Plaintiff's motion to deny revocation of release order (#3) is **denied as moot**.

SO ORDERED THIS 29 day of July, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

ENTERED ON DOCKET
7-31-97

DORCAS LUKENBILL,)
)
Plaintiff,)
)
vs.)
)
BENEFICIAL OKLAHOMA, INC.;)
CHARLES GROOM and)
DEBBIE OSBORNE,)
)
Defendants.)

Case No. 96-CV-0148K

1048-KV

FILED

JUL 30 1997

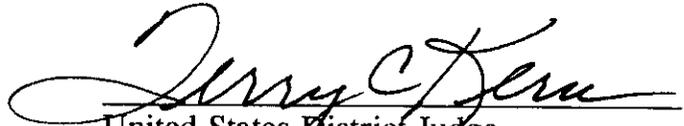
Phil Lombardi, Clerk
U.S. DISTRICT COURT

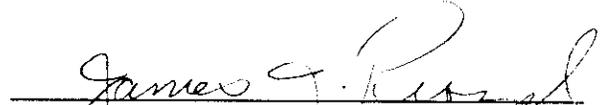
JUDGMENT OF DISMISSAL WITH PREJUDICE

This cause came on for hearing on this 29 day of July, 1997, upon the Joint Application of the parties for Judgment of Dismissal With Prejudice. The Court finds that the parties hereto have heretofore settled all of their claims and causes of action, one against the other, and that all claims and causes of action herein asserted are now rendered moot and that by reason thereof, the Plaintiff's claims against the Defendants should be dismissed with prejudice. Further, the claims of Counterclaimant, Debi Osborn, against Plaintiff, Dorcas Lukenbill, should be dismissed with prejudice.

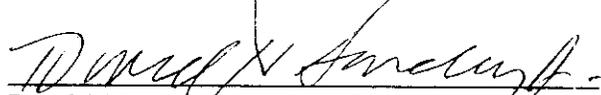
NOW, THEREFORE, BE IT ORDERED, ADJUDGED AND DECREED by the Court that the parties hereto have heretofore settled all of their claims and causes of action, one against the other, and that all claims and causes of action herein asserted are now rendered moot and that by reason thereof, the Joint Application of the parties to dismiss all claims and causes of action herein be and the same is hereby sustained and the claims

and causes of action of the Plaintiff against the Defendants be and the same are hereby dismissed with prejudice and the claims of Counterclaimant, Debi Osborn, against Plaintiff, Dorcas Lukenbill, be and the same are hereby dismissed with prejudice and all parties are dismissed with prejudice.


United States District Judge


James L. Proszek, OBA #10443
Attorney for Plaintiff, Dorcas Lukenbill


David H. Sanders, OBA #7892
Attorney for Defendant and Counter-claimant, Debi Osborn


David H. Sanders, Jr., OBA #7891
Attorney for Defendant, Charles Groom

FILED ON...
7-31-97

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

ABRAHAM CALAMEASE, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 CASH AMERICA, INC. OF)
 OKLAHOMA, et al.,)
)
 Defendants.)

FILED
JUL 30 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-295-K

STIPULATION OF PARTIAL DISMISSAL

COME NOW the parties hereto and stipulate to the dismissal of the claim of Plaintiffs Rodney E. Hatfield, Kevin B. Smith and James E. Garcia against Defendants in the above styled and numbered cause.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

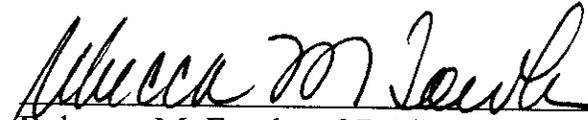
By:



Steven R. Hickman, OBA#4172
1700 Southwest Blvd.
P.O. Box 799
Tulsa, OK 74101-0799
918/584-4724
Attorneys for Plaintiffs

DOERNER, SAUNDERS, DANIEL & ANDERSON

By:

A handwritten signature in black ink, appearing to read "Rebecca M. Fowler", written over a horizontal line.

Rebecca M. Fowler, OBA#13682

320 S. Boston, Suite 500

Tulsa, OK 74103

918/582-1211

Attorneys for Defendants

INDEXED ON BOOKLET
7-30-97

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

FILED

JUL 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA

Plaintiff,

vs.

WAYNE LINTNER

Defendant.

Civil No.: 97-CV-380-K ✓

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of July 29, 1997 and the affidavit of plaintiff, that the defendant, Wayne Lintner 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 on July 30, 1997

PHIL LOMBARDI,
Clerk, U.S. District Court

S. Schwebke

SR

2-30-97

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

DEBBIE S. HAMILTON,)
)
Plaintiff,)
)
vs.) Case No. 96-C-850-K)
)
J.C. PENNEY LIFE INSURANCE)
COMPANY, a foreign insurance)
company, and FIRST USA BANK,)
a foreign banking corporation, SOMAR)
TELECOMMUNICATIONS, INC., a)
foreign corporation, and APAC)
TELESERVICES, INC., a foreign)
corporation.)
)
Defendants.)

FILED
JUL 29 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties hereto stipulate that this case be and is hereby dismissed with prejudice to the bringing of another action.

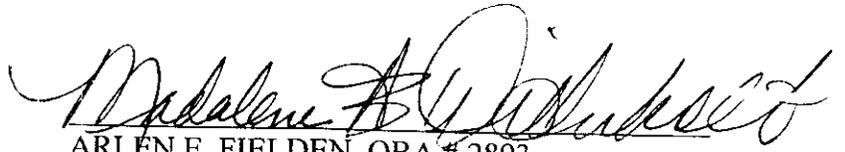
DEBBIE S. HAMILTON

BY:


DONALD B. BOLT, III, OBA #
ROGER R. WILLIAMS, OBA #
WILLIAMS & BOLT
1605 S. Denver
Tulsa, Oklahoma 74119-4249

ATTORNEYS FOR PLAINTIFF

CF



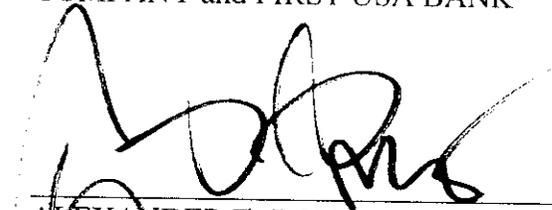
ARLEN E. FIELDEN, OBA # 2893

MADALENE A.B. WITTERHOLT, OBA #

- Of the Firm -

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(405) 272-5258 FAX

ATTORNEYS FOR JCPENNEY LIFE INSURANCE
COMPANY and FIRST USA BANK



ALEXANDER D. BONO, OBA #

TIMOTHY D. KATSIFF

BLANK, ROME, COMISKY & MCCAULEY

Four Penn Center Plaza

Philadelphia, Pennsylvania 19103-2599

ATTORNEYS FOR SOMAR
TELECOMMUNICATIONS, INC.

522

COPY

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

F I L E D

JUL 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-133-B ✓

VIRGINIA MCELROY,)

Plaintiff,)

vs.)

ROSS-MARTIN COMPANY, INC.,)

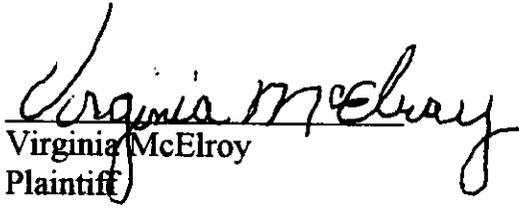
Defendant.)

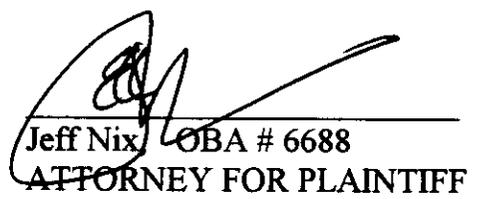
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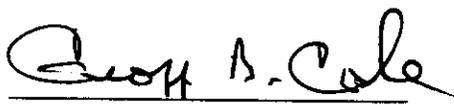
JUL 29 1997

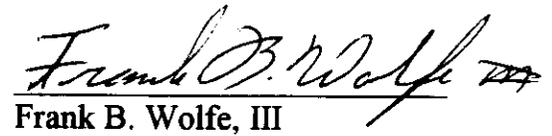
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Virginia McElroy and Defendant, Ross-Martin Company, Inc., and dismisses the above-captioned case with prejudice to the refileing of same.


Virginia McElroy
Plaintiff


Jeff Nix OBA # 6688
ATTORNEY FOR PLAINTIFF
Armstrong, Nix & Lowe
1401 South Cheyenne
Tulsa, Oklahoma 74119
(918) 742-4486


Geoffrey B. Cole, President
Ross-Martin Company, Inc.


Frank B. Wolfe, III
Nicholas, Wolfe, Stamper,
Nally, Fallis & Robertson, Inc.
124 East 4th St., Suite 400
Tulsa, OK 74103-5010
(918) 584-5182

8

clj

FILED

JUL 25 1997 *plw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

TRIPLE S OPERATING COMPANY,)
an unincorporated association,)
)
Plaintiff,)
)
v.)
)
SAFEWAY, INC, a Delaware corporation,)
a/k/a SAFEWAY STORES, INCORPORATED,)
)
Defendant.)

Case No. 96-CV-920-B

RECEIVED ON DECK

JUL 29 1997

ORDER

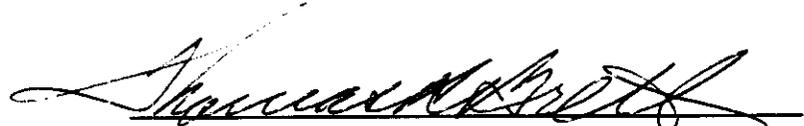
The Court has received the Stipulation and Joint Motion for Dismissal filed by Plaintiff, Triple S Operating Company ("Plaintiff"), and Defendant, Safeway, Inc. ("Defendant") on July 24th, 1997.

The Court makes the following findings:

1. The Plaintiff and the Defendant are the only parties in this case.
2. The Plaintiff and the Defendant have resolved, by mutual agreement, all of the issues presented by this case. Such mutual agreement is embodied in that certain Settlement Agreement dated June 3, 1997 ("Settlement Agreement"), by and among Homeland Stores, Inc., the Plaintiff and the Defendant.
3. Each of the Plaintiff and the Defendant hereby stipulate to the dismissal with prejudice of their claims, such dismissal to be effective on the entry of an order by the Court of an

order dismissing all of their claims with prejudice.

IT IS THEREFORE ORDERED that all of the claims of each of the Plaintiff and the Defendant in this case are hereby dismissed with prejudice.


UNITED STATES DISTRICT COURT JUDGE

participate in any of the alleged incidents at either Dick Conner Correctional Center or Oklahoma State Penitentiary. Defendants, Lanny Weaver, Ron Champion, and Charles Arnold were not involved with any of the alleged incidents at Oklahoma State Penitentiary. The Plaintiff's action is hereby dismissed against Larry Fields in his individual capacity and remains in his official capacity as Director of Oklahoma State Penitentiary. Further, the Plaintiff's action regarding any incident at Oklahoma State Penitentiary at McAlester, Oklahoma, is hereby dismissed against the Defendants Larry Weaver, Ron Champion and Charles Arnold, and remains against said Defendants only regarding the alleged Dick Conner Correctional Center incidents. Bennett v. Passic, 545 F.2d 1260, 1262-63 (10th Cir. 1976).

Plaintiff is authorized to amend his complaint to allege exhaustion of administrative remedies. The Court has subject matter jurisdiction thereof.

Following a review of the file, including Report of Review of Factual Basis of Claims Asserted in Civil Rights Complaint, and the issues therein, the Court concludes issues of fact remain so, except as stated above, Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgment is hereby overruled.

The Defendants are hereby directed to file their answers to Plaintiffs' complaint within fifteen (15) days.

IT IS HEREBY SO ORDERED this 28th day of July, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 25 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENERGY DYNAMICS, INC., a Kansas Corporation,
)
)
)
 Plaintiff,
)
)
 v.)
)
 MIDWEST GAS STORAGE, INC.,
)
 an Indiana Corporation, d/b/a:
)
 MIDWEST GAS SERVICES, INC.,
)
 MIDWEST GAS SERVICES, CO.,
)
)
 MIDWEST GAS SERVICES COMPANY,
)
 an Illinois Corporation, d/b/a:
)
 MIDWEST GAS SERVICES, INC.
)
 MIDWEST GAS SERVICES, CO.,
)
)
 DANIEL J. O'MALLEY, and
)
 GREGORY J. FRIEDRICH,
)
)
 Defendants.)

Case No: 96-C-706-C

ENTERED ON DOCKET
DATE JUL 29 1997

REPORT AND RECOMMENDATION

This report and recommendation pertains to Plaintiff's Motion to Enforce the Settlement Agreement and Motion for Joinder of MidWest Energy Holding Corp. as Defendant (Docket #28). Upon referral from the district court, a hearing was held on July 23, 1997, and oral arguments were heard. United States Magistrate Judge Frank H. McCarthy, who conducted the settlement conference in which settlement was reached, appeared as the court's witness pursuant to Local Rule 16.3(F) and was questioned by counsel for the parties and the court. The court granted plaintiff's oral hearsay objection to the Affidavit of Daniel L. O'Malley (which was attached to Defendants' Brief in Response to Plaintiff's Motion to Enforce Settlement Agreement

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Amended - 7/29/97

(Docket #33)), as Mr. O'Malley was not present in court and subject to cross-examination by plaintiff's counsel.¹

FINDINGS OF FACT

1. Energy Dynamics, MidWest Gas Storage, Inc., MidWest Gas Services Company, Daniel J. O'Malley and Gregory J. Friedrich entered into a Settlement Agreement at a settlement conference before Magistrate Judge Frank H. McCarthy on May 28, 1997, which was a follow-up conference to one held on April 30, 1997.

2. The parties agreed that MidWest Energy Holding Corp., which is controlled by Daniel J. O'Malley, would be bound by the Settlement Agreement.

3. There was a meeting of the minds as to all essential material provisions of the Settlement Agreement, although not as to all the details necessary for its implementation. The Magistrate's notes as to the essential provisions are attached as "Exhibit A" to this judgment.

4. The terms of the Settlement Agreement are as follows:

a) Plaintiff is to receive judgment against MidWest Gas Storage, Inc., and MidWest Energy Holding Corp. in the amount of \$391,491.13, plus accrued interest through October 11, 1996 in the amount of \$12,402.74 plus interest accruing thereafter in the amount of \$64.36 per day, which is the same amount as was previously entered against MidWest Gas Services Company (see Docket #6).

b) All parties are to bear their own attorneys fees and costs.

¹ Defense counsel conceded that the affidavit was hearsay, and that no hearsay exception applied.

c) To secure the judgment, plaintiff is to receive ownership of the amount of gas in the ground owned by MidWest Gas Storage, Inc., valued as of May 28, 1997, in the amount of the judgment.

d) Plaintiff is to receive from Defendant MidWest Gas Storage, Inc., a UCC-1 covering all its personal property, such as office equipment and equipment needed to operate the gas storage business, but excluding any gas in the ground. Since MidWest Gas Storage, Inc., has been represented by defendants to be the only entity with personal property, the UCC-1 only applies to it.

e) Daniel L. O'Malley is to pay \$25,000 to plaintiff upon closing, which is to occur within a reasonable time.

f) Daniel L. O'Malley, and entities controlled by him, promise to use settlement or judgment proceeds obtained in MidWest Gas Storage, Inc. v. Panhandle Eastern Corp. and Panhandle Eastern Pipeline Co., Case No. A-152,977, in the District Court of Jefferson County, Texas, the Fifty Eighth Judicial District (the "Panhandle Eastern Litigation") to pay off the judgment in favor of plaintiff. This promise to pay should be reduced to a separate writing signed by Daniel L. O'Malley on behalf of himself and MidWest Gas Storage, Inc., and delivered to plaintiff and not filed or recorded. Any payment made pursuant to the promise to pay and the \$25,000 to be paid by O'Malley at closing will be credited against the judgment and will also constitute payment for a proportional amount of the gas assigned to plaintiff by virtue of paragraph 4(c), which shall then revert to the defendant corporation which owned and assigned the gas to plaintiff in the proportion paid for. The purpose

of this provision is to prevent double recovery by the plaintiff.

g) Plaintiff agrees not to execute on the judgment until June 1, 1998 and agrees not to execute on the judgment until five years thereafter, so long as monthly payments are made on the principle and interest accrued on the judgment to that date, plus interest on the accrued amount, which shall be calculated from June 1, 1998 based on the Chase Manhattan prime interest rate in effect on that date, amortized over the five year period.

h) Defendant agrees to periodically advise plaintiff as to the status of the Panhandle Eastern Litigation. This only requires advice of key developments in the case, including the close of discovery, dispositive motion filings, pretrial and trial dates, trial verdict, the filing of an appeal, appeal disposition, disposition upon remand, and settlement.

i) Friedrich and O'Malley will be dismissed with prejudice from this lawsuit and released from all claims brought or which could have been brought in it, once the \$25,000 is paid at closing and other obligations are honored, including the conveyance of ownership of gas, delivery of the UCC-1, and delivery of the promise to pay any applicable Panhandle Eastern Litigation proceeds.

5. All parties to this case are to honor and perform the terms of the Settlement Agreement in good faith.

6. The Settlement Agreement is to be closed within a reasonable time, which the court preliminarily determines is by August 5, 1997. The closing is therefore scheduled for 10:30 a.m. on that date, to take place in Judge Wagner's

Chambers. If counsel secures the principals' original signatures on all the necessary closing documents prior to the hearing, the presence of the principals will not be required.

CONCLUSIONS OF LAW

1. A settlement agreement is an enforceable contract between the parties if it sets forth the essential terms of the settlement. In re Sav-A-Stop, Inc., 124 B.R. 356, 358 (Bankr. M.D. Fla. 1991). Settlement agreements are highly favored by courts for public policy reasons of efficiency and mutual benefit of compromise. Id. However, "[t]o be judicially enforceable . . . a settlement agreement . . . must be sufficiently specific as to be capable of implementation [C]ourts will not attempt to enforce a settlement agreement that is too vague or ambiguous in its meaning or effect." United Mine Workers v. Consolidation Coal Co., 666 F.2d 806, 809-10 (3d Cir. 1981) (citations omitted).

2. A dispute concerning the existence or terms of a settlement agreement is a question of fact. TCBY Systems, Inc. v. EGB Associates, Inc., 2 F.3d 288, 291 (8th Cir. 1993). The fact that "the parties left insubstantial matters for later negotiation, . . . does not vitiate the validity of the agreement reached," Trnka v. Elanco Products Co., Div. of Eli Lilly & Co., 709 F.2d 1223, 1226 n. 2 (8th Cir. 1983), nor does the fact that the agreement had to be reduced to writing, if the parties agreed to all material terms. Worthy v. McKesson Corp., 756 F.2d 1370, 1373 (8th Cir. 1985).

3. A settlement agreement is construed in the same manner as a contract to determine how it should be enforced. Republic Resources Corp. v. ISI Petroleum West Caddo Drilling Program 1981, 836 F.2d 462, 465 (10th Cir. 1987). Whether it is a valid contract between the parties is determined by reference to state substantive law governing contracts generally. White Farm Equipment Co. v. Kupcho, 792 F.2d 526, 529 (5th Cir. 1986). Thus a challenge to a settlement agreement based on indefiniteness of a term turns on the applicable state contract law. Id. Federal courts have the inherent power to enforce settlement agreements entered into by the parties in a pending case, to determine compliance with procedural prerequisites, and to determine when if ever, a party may repudiate a contractually binding settlement agreement. Id.

4. Under Oklahoma law, an oral contract is only enforceable if it is so clear, cogent, and forcible as to leave no reasonable doubt as to its terms. Holt v. Alexander, 207 Okla. 140, 248 P.2d 228, 230 (1952). Like any other promise-based obligation, a settlement agreement is governed by contract law principles. Shawnee Hosp. Authority v. Dow Constr., Inc., 812 P.2d 1351, 1353 (Okla. 1990). Mistake is an affirmative defense to the enforcement of a contract. Albert & Harlow, Inc. v. Fitzgerald, 389 P.2d 994, 996-97 (Okla. 1964). A unilateral mistake is insufficient to invalidate an agreement, but a mutual mistake will impeach it. L.E. Smith Const. Co. v. Bearden Plumbing & Heating Co., 372 P.2d 229, 232 (Okla. 1962).

5. The court in In re Sav-A-Stop, Inc., 124 B.R. at 359, concluded that the parties had reached an enforceable settlement agreement concerning payment for

customer and employee lists, even though there was no specific schedule for the actions of the parties included. The court noted that a contract is not lacking in effect merely because it leaves something to a future agreement. Id. The agreement to agree is enforceable if it is sufficiently specific to be capable of implementation and the essential elements are set out, even if all the details of the future agreement are not included. Id. The court concluded that not every contingency or element of an agreement must be set forth to have an enforceable agreement, as long as the amount of settlement and the obligations of the parties is clearly included. Id. The court relied on Don L. Tullis & Associates, Inc. v. Benge, 473 So.2d 1384, 1386 (Fla. Dist. Ct. App. 1985), where a settlement agreement was enforced, even though it did not define a term used to compute the amount of settlement. The Tullis court found the term was not essential, and it was acceptable to resolve the matter by later agreement. Id.

6. The parties agreed to the essential material terms of the Settlement Agreement and it is sufficiently specific as to be capable of implementation.

RECOMMENDATION

As all parties agreed to the essential material terms of the Settlement Agreement and it is sufficiently specific as to be capable of implementation, it is recommended that a form of judgment consistent with this report and recommendation be entered for plaintiff enforcing the Settlement Agreement. In order to timely implement the Settlement Agreement, the time to file objections to this Report and Recommendation is shortened to July 31, 1997. The court clerk is

directed to fax a copy of this Report and Recommendation to all counsel of record immediately upon filing.

Dated this 25th day of July, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:\orders\energy.sag

5-29-97

Remaining

Judg & NOTE from 2 Co's

Best
Horts

{ Security interest of Storage
Security interest in lawsuit
OR SOMETHING

{ WILL GIVE UCC
DOESN'T WANT
THIS TO UCC
ENRON RE:
LIENS ON REAL
ESTATE

Jewelry int in apt #400,000 gas

\$25,000 cash at closing

{ - Release of individuals
- }

- Advised
OF PROBLEMS
OF LITIGATION



RECORDED ON BOOKLET
7-29-97

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

CHERRY COMMUNICATIONS, INC.,)
an Illinois corporation,)

Plaintiff,)

vs.)

WORLDCOM, INC., a Georgia corporation,)
WORLDCOM NETWORK SERVICES,)
INC., a Delaware corporation; and)
DIGITAL COMMUNICATIONS OF)
AMERICA, INC., an Oklahoma corporation,)

Defendants.)

vs.)

THE MANAGEMENT NETWORK GROUP, INC.,)
a Kansas corporation; and MICKEY WOO,)
an individual,)

Third-Party Defendants.)

FILED
IN OPEN COURT

JUN 28 1997

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

Case No. 96-C-1102 K ✓

ORDER

This matter comes before the Court upon the parties' Joint Motion for Administrative Closing Order filed on July 28, 1997. Upon due consideration and for good cause shown, the Court finds that the motion should be and is hereby GRANTED.

IT IS THEREFORE ORDERED that: (1) the jury in this action should be and hereby is released; (2) this action should be and hereby is administratively closed, to be reopened upon the default of any party under their settlement agreement, and (3) this action shall be reopened and dismissed with prejudice upon joint motion of the parties.

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Entered this 28 day of July, 1997.


HON. TERRY C. KERN
CHIEF JUDGE OF THE DISTRICT COURT

F I L E D

JUL 25 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

LEROY R. SMITH,

Plaintiff,

v.

JOHN J. CALLAHAN,
Commissioner of Social Security,¹

Defendant.

Case No: 96-C-399-W

ENTERED ON DOCKET

JUL 28 1997

DATE _____

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed July 25, 1997.

Dated this 25th day of July, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

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

F I L E D

LEROY R. SMITH,

Plaintiff,

v.

JOHN J. CALLAHAN,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

JUL 25 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-399-W

ENTERED ON DOCKET

DATE JUL 28 1997

ORDER

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

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

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

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

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for lifting over ten pounds frequently and twenty pounds occasionally. The ALJ concluded that the claimant was unable to perform his past relevant work as a truck

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

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

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

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

driver or welder. The ALJ found that the claimant was 53 years old, which is defined as closely approaching advanced age, had an 11th grade education, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. Based on the Social Security regulations, the ALJ concluded that, considering the claimant's residual functional capacity, age, education, and work experience, he was not disabled. Having determined that claimant had the residual functional capacity to perform light work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ put undue weight on the fact that claimant declined hospitalization and consultation due to his financial situation.
- (2) The ALJ disregarded the testimony of the vocational expert that claimant cannot work.

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

Claimant contends that he has been unable to work since November 14, 1993, because of heart problems, high blood pressure, and numbness in his left side (TR 118). On November 16, 1993, his doctor, Dr. Phillip Washburn, reported that he was seen for an episode of dizziness and a "black-out." (TR 145). Claimant told the doctor he had had a history of intermittent chest pain with exertion over the past 2 to 3 years (TR 145). He admitted that he had gained approximately forty pounds over the past year and was smoking three packs of cigarettes daily, down from four

packs (TR 145). He had not had paroxysmal nocturnal dyspnea, pedal edema, orthopnea, or a history of claudication (TR 145). The doctor found no murmurs, rubs, or gallops, but a telephone electrocardiogram revealed an acute myocardial infarction with no mention of location (TR 145). The claimant declined hospitalization due to lack of insurance and because he had no further pain (TR 145). He was instructed to stay home and rest and was prescribed Cardizem CD, Nitrodur patch, one aspirin a day, and sublingual Nitroglycerin spray (TR 145).

On November 19, 1993, claimant denied he had had any further chest pain and again declined hospitalization. A repeat EKG showed an acute anterior myocardial infarction (TR 144). Blood work was drawn and he was instructed to continue his previously prescribed regime. He returned to Dr. Washburn on November 24, 1993, and reported no chest pain (TR 144). The doctor said he was asymptomatic and doing well (TR 144). Blood work showed his triglycerides to be elevated at 432 (TR 144). A grade II/VI holosystolic murmur was heard which had not been heard before, but the claimant stated that he had had the murmur most of his life (TR 144).

On December 1, 1993, the claimant reported no chest pain, but his blood pressure was slightly elevated, and he admitted that he had increased the use of salt in his diet and was drinking approximately twenty cups of coffee a day (TR 143). He was told to decrease his caffeine intake slowly and substitute decaffeinated coffee and to continue the medications previously prescribed (TR 143).

On December 14, 1993, claimant's blood pressure was 140/92, and the doctor noted that he was doing very well, although any type of physical exertion caused

shortness of breath (TR 143). He denied any paroxysmal nocturnal dyspnea, pedal edema, or orthopnea, and the dyspnea with exertion resolved very quickly with rest (TR 143). He told the doctor that he was thinking about changing jobs (TR 143). He had cut back his coffee intake, but was still consuming a "massive amount of caffeine" from coffee (TR 143). His Cardizem CD was increased and other medications were continued (TR 142). The doctor discussed treatment options and recommended evaluation by a cardiologist and an angiogram, but "[b]ecause of his lack of insurance, and from talking with some of his friends who have had bad outcomes," claimant refused to follow these recommendations (TR 142).

On December 28, 1993, the claimant told his doctor he was able to walk one mile without chest pain and had not used his sublingual nitroglycerin (TR 142). He said that he wanted to return to work (TR 142). An EKG done at the time showed an acute anterior myocardial infarction (TR 142). However, on February 1, 1994, he reported three to four episodes of chest pain a week, usually associated with exertion and relieved by rest (TR 142). He said he was using the sublingual nitroglycerin at times, and it quickly stopped his symptoms (TR 142). The doctor stated that his case was difficult, because he refused consultation and could not afford medications (TR 142). The sublingual nitroglycerin was increased (TR 142).

On April 1, 1994, claimant's blood pressure was 152/90, and he denied having any chest pain and had been fairly active with no problems (TR 141). He reported that the nitroglycerin patches made him weak and tired (TR 141). His doctor switched use of the patches to evenings only, and he was to use the sublingual

nitroglycerin for any chest pain at all (TR 141). On May 19, 1994, his blood pressure was 142/92 and he complained of chest pain with heavy exertion or when he did not use the patches (TR 141). His Cardizem was increased because of his continued chest pain with exertion and blood pressure not being well controlled (TR 141). His blood pressure reading on May 23, 1994, was 130/72 (TR 141).

Claimant was evaluated by Dr. Jerry First, a cardiovascular specialist, on May 12, 1994. The claimant discussed his complaints of chest pain, numbness in the left arm, dizziness, shortness of breath, and right knee pain (TR 160-161). His height was 66 inches and his weight was 250 pounds, which was 94 pounds over his ideal weight of 166 (TR 162). He admitted that he smoked a half a pack of cigarettes each day and drank three to four cups of decaffeinated coffee (TR 162). His blood pressure was 130/75, and his heart had a regular rhythm with no gallops or extrasystole (TR 162). A mitral insufficiency murmur was present (TR 162). Peripheral pulses were intact in the upper extremities and neck with no bruits (TR 162).

Dr. First reported that claimant had a full range of motion in his extremities with mild pain in flexion in the right knee, but no swelling, cyanosis or clubbing (TR 162). Trace edema was present in both ankles (TR 162). Claimant walked with a mild limp secondary to pain in his right knee (TR 162). An EKG showed an old anterior myocardial infarction with peri-infarction block (TR 162). An exercise tolerance test was performed, and claimant was able to exercise for one minute and twenty-two seconds "stopping because of shortness of breath and pain in his right knee." (TR

162, 165). He had no chest pain during the test or recovery, and there were no significant EKG changes to suggest myocardial ischemia (TR 162, 165). The doctor's impression was:

- (1) Chest pain compatible with myocardial ischemia without significant changes on exercise tolerance test for a limited amount of exercise.
- (2) Left arm numbness of uncertain etiology, possibly secondary to cervical disk.
- (3) Dyspnea on exertion and paroxysmal nocturnal dyspnea, questionably secondary to cardiomyopathy or exogenous obesity.
- (4) Right knee pain possibly secondary to degenerative arthritis.
- (5) Marked exogenous obesity.

(TR 162).

On April 31, 1994, a residual functional capacity assessment was completed and showed that claimant could occasionally lift twenty pounds and frequently lift ten pounds and stand, walk, and sit for a total of six hours in an eight-hour day (TR 96-103).

Claimant saw Dr. Washburn on August 22, 1994 to discuss tests done on August 15, 1994 (TR 186). He complained of pain radiating down his left arm for two or three weeks which was not associated with chest pain or shortness of breath but with weakness of his grip (TR 86). However, x-rays of his cervical spine were negative, and examination revealed no sensory deficit, although there was questionable weakness in the left grip strength which could not be "duplicated on repeat exams" (TR 186). There was no evidence of thenar muscle atrophy, and the left thenar muscle group was "very, very large" as compared to the right (TR 186). There was full range of motion of the cervical spine, no spasms, and no discomfort

(TR 186). The doctor said the physical examination was completely normal (TR 186). An EMG and further workup were declined (TR 186).

Claimant was examined by Dr. Terence Williams on November 7, 1994, for a disability rating (TR 155-158). He weighed 233½ pounds, his height was 66 inches, and his blood pressure was 130/90 (TR 156). The doctor heard radiation of a cardiac murmur into the neck vessels, but no actual bruit was noted (TR 156). Auscultation of his lungs revealed decreased breath sounds and fine crackles disbursed throughout the lungs (TR 156). His heart had a regular rate and rhythm with a systolic ejection murmur at the left sternal border (TR 156). He had decreased range of motion in his spine, and there was grinding and crepitance in the cervical region and the shoulders, which also demonstrated decreased range of motion (TR 157). He had normal motion of the right elbow, wrist, fingers, and hips, with decreased range of motion of both knees and grinding and crepitance underneath the kneecaps (TR 157). A chest x-ray revealed no active infiltrate, but did show some air trapping (TR 157). An electrocardiogram showed an inferior wall injury pattern, but the rest of the evaluation was unremarkable (TR 157).

Dr. Williams concluded that claimant was seriously impaired by reason of these medical conditions, including difficulties with progressive angina due to underlying coronary artery disease, progressive shortness of breath at night in a supine position, inability to sleep without three pillows, which is known as orthopnea, significant dyspnea on exertion, frequent angina requiring use of nitroglycerin medication, despite high doses of cardiac medications, chronic obstructive pulmonary disease in

the form of chronic bronchitis and/or emphysema caused by a significant pack-year history of smoking, and problems with the right shoulder and right leg from degenerative joint disease (TR 157).

Dr. Williams concluded that claimant's coronary artery disease was extensive, given the fact that he had had an inferior wall myocardial infarction, was a heavy smoker, was overweight, had high blood pressure, had a family history of coronary artery disease, and most likely had elevated cholesterol (TR 157). Because of his limited education and past work as a truck driver for 32 years and his functional capacity limitations, the doctor concluded that he was "100 percent permanently and totally disabled from a physical basis" (TR 157). Coupled with the fact that he was 52 years of age, had less than a high school education, and had only worked as a truck driver, the doctor also found him "100 percent permanently and totally disabled economically" (TR 158). The doctor found that he had not worked for a year and stated "I do not believe that he will ever be able to be gainfully employed. It would be nice to be able to obtain an echocardiogram, a stress test and pulmonary function tests to better ascertain his condition. However, Mr. Smith has no insurance and no income." (TR 158).

At a hearing on March 24, 1995, claimant testified that he smokes one pack of cigarettes a day and had been unable to totally quit smoking (TR 57). He said he had cracked his skull and hurt his right shoulder and leg in a truck wreck in 1975, and the injuries were just about the same as they had been since that time (TR 57). He stated that his knee "comes out of place" if he walks very much and his shoulder pops

and throbs with pain, which has gotten worse over the years (TR 58). He testified that his right knee swells whenever he twists it or walks more than a block and that he sometimes uses a cane (TR 59). He testified that since the heart attack in 1993 he had been told not to lift or strain (TR 60).

Claimant testified that his left arm and hand swell and get numb and he gets dizzy and short of breath when he does anything (TR 60). He claimed that he can only walk one block before he develops chest pain and dizziness, and can only stand for 15 to 20 minutes before his knee starts bothering him (TR 64). He said that lifting any weight causes chest pain and dizziness and bothers his left arm (TR 65). He stated that he does not help with housework because of his shoulders, but can care for himself (TR 65). He said he cannot mow the yard, but can drive to the post office (TR 64).

There is no merit to claimant's contention that the ALJ put undue weight on the fact that he had declined hospitalization and consultation concerning his condition. The failure to follow prescribed treatment is a legitimate consideration in evaluating the validity of an alleged impairment. Decker v. Chater, 86 F.3d 953, 955 (10th Cir. 1996); Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). The ALJ properly considered the failure to obtain treatment:

It was Dr. First's opinion that the claimant's shortness of breath on exertion and paroxysmal nighttime shortness of breath could be secondary to cardiomyopathy or exogenous obesity. The claimant's continued tobacco usage combined with his being overweight and general state of deconditioning would have to be considered

[T]he record reflects that he refused hospitalization, refused an evaluation by a cardiologist and refused an angiogram. These refusals were apparently partly based on lack of funds and/or insurance and because some of his friends had not had good outcomes. The claimant continues his high risk lifestyle and has not undergone definitive testing to ascertain the extent of permanent damage to his heart, if any, and the prognosis. If the claimant were in the constant and disabling painful condition he describes, it is reasonable to assume that he would exhaust every means possible to obtain relief of that pain. There are public facilities available to those who do not have insurance or who are unable to pay for medical care. However, the issue is not the existence of pain, but whether the pain experienced by the claimant is of sufficient severity as to preclude him from engaging in all types of work activity. The Administrative Law Judge is not minimizing the discomfort that the claimant experiences. However, an individual does not have to be entirely pain free in order to have the residual functional capacity to perform substantial gainful activity.

(TR 37-38).

However, the ALJ also based his decision on other substantial evidence. He noted that, while Dr. Williams found decreased range of motion in claimant's spine, he did not indicate the degree of restriction, and Dr. First found a full range of motion of all extremities with only mild pain on flexion of the right knee (TR 37). The ALJ pointed out that the record did not indicate that claimant ever discussed shoulder or knee pain with Dr. Washburn (TR 37). The ALJ noted that, at the time claimant alleged reduced grip strength in his left hand to Dr. Washburn, he was found to have full range of motion of his cervical spine and x-rays of the cervical spine were negative (TR 37). The ALJ also noted that clinical findings did not substantiate the existence of a condition that would cause claimant's face to swell and go numb or the reduced grip strength in his left hand that he reported to Dr. Washburn (TR 37).

The ALJ also relied on the fact that Dr. Williams's assessment of 100 percent disability was admittedly unsupported by diagnostic testing, laboratory reports, or clinical findings, and, as such, had little probative weight (TR 38). He pointed out that Dr. Williams' evaluation was based on a one-time visit and a chest x-ray and EKG only (TR 38). "Dr. Williams stated that it would be nice to obtain an echocardiogram, a stress test, and pulmonary function tests to better ascertain the claimant's condition. Therefore, while Dr. Williams's report has been considered, little weight is given to the conclusions contained therein." (TR 38).

Finally, the ALJ relied on the vocational expert's testimony:

[t]he vocational expert was presented a series of facts based upon the claimant's condition as it is outlined in the record and in this decision. The vocational expert was also familiar with the claimant's past work history. Based upon these facts and the past work history, the vocational expert was asked if there were other jobs in the national economy that the claimant could perform. The vocational expert testified that, based on an individual with the claimant's vocational background and residual functional capacity, there were multiple light jobs in the national economy that such an individual could perform. Examples of such jobs included: light delivery driver . . . [assembly work and] machine operator.

There is no merit to claimant's second contention that the ALJ disregarded the testimony of the vocational expert that he could not work. It was only when claimant's attorney asked the vocational expert to assume that claimant's testimony as to his physical condition was credible that she found that he could not do the jobs of light delivery driver, assembler, and machine operator (TR 70-71).

There was substantial evidence to support a conclusion that claimant's allegations of disabling pain were not credible. It has been recognized that "some

claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d 508, 517 (10th Cir. 1987). Credibility determinations are generally binding upon review. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988).

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

Dated this 24th day of July, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

JUL 25 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

COLORADO INTERSTATE GAS
COMPANY, a Delaware Corporation,

Plaintiff,

v.

Case No. 97-CV-422-BU(W)

CONTINENTAL HYDROCARBONS,
INC., an Oklahoma corporation,
and CONTINENTAL HYDRO-
CARBONS L.L.C., an Oklahoma limited
liability company,

Defendants.

ENTERED ON DOCKET
DATE JUL 28 1997

ADMINISTRATIVE CLOSING ORDER

Plaintiff Colorado Interstate Gas Company and Defendants Continental Hydrocarbons, Inc. and Continental Hydrocarbons L.L.C. have jointly moved the Court to stay all further proceedings in this action until such time as Plaintiff notifies the Court that a final judgment has been entered in the case of *Colorado Interstate Gas Company v. C&L Processors, et al.*, No. 93CV1894 (District Court, El Paso County, Colorado 80903) or until the parties agree to otherwise lift the stay. For good cause shown, and with the concurrence of all parties, the Court finds this action should be administratively closed under Local Rule 41.0, subject to the terms set out below.

IT IS THEREFORE ORDERED that the parties' Joint Motion is granted and that this action be, and is, administratively closed, pursuant to Local Rule 41.0. This action may be reopened at such time as Plaintiff notifies the Court that a final judgment as to Continental Hydrocarbons, Inc. and/or Continental Hydrocarbons L.L.C. has been entered in the *Colorado Interstate Gas Company v. C&L Processors, et al.* case or upon

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agreement by the parties to otherwise reopen this action. Should this action be reopened, Defendants shall have period of thirty (30) days after the case is reopened within which to file an answer to Plaintiff's Complaint. The Status Hearing/Case Management Conference scheduled for July 31, 1997 is stricken, to be rescheduled, if necessary, after the case is reopened. Finally, the parties have agreed, and the Court hereby orders, that this Administrative Closing Order shall not be construed as a dismissal of this lawsuit, so as to cause the running of any applicable statute of limitations on Plaintiff's claims set out in its Complaint. The running of any such statute of limitations is hereby tolled as to such claims during the pendency of this administrative closing.

IT IS ORDERED this 25th day of July, 1997.



THE HONORABLE MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE



M. Benjamin Singletary
Gable Gotwals Mock Schwabe
Kihle Gaberino
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James W. Rusher, Esq.
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 25 1997

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

CONNIE L. MURDOCK,

Plaintiff,

vs.

HAMBLETON LAGRECA CHEVROLET,
GEO, OLDS, INC., d/b/a
MID-WAY CHEVROLET, GEO,
OLDS, INC.,

Defendant.

Case No. 97-CV-110-BU

ENTERED ON DOCKET

DATE JUL 28 1997

ORDER OF DISMISSAL WITH PREJUDICE

For good cause shown and upon stipulation of counsel, the above styled case is ordered dismissed with prejudice.

DATED this 25th day of July, 1997.

Michael Bannock
United States District Judge

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ENTERED ON BOOKS
DATE 7-28-97

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

CRAIG W. HUNTLEY,)
)
 Plaintiff,)
)
 vs.)
)
 BALL-FOSTER GLASS CONTAINER CO)
)
 Defendant.)

No. 97-C-448-K

FILED

JUL 28 1997 *PD*

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 25 day of July, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

GLORIA BOMAR, an individual,)
and)
ROCHELLE WARD, an individual,)
)
Plaintiffs,)
)
vs.)
)
ASBURY UNITED METHODIST CHURCH,)
an Oklahoma Church,)
and)
WILLIAM CLAXTON, an individual,)
)
Defendants.)

ENTERED ON DOCKET

DATE 7-25-97

FILED

JUL 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

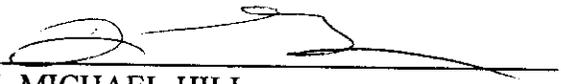
NO. 96-CV-701-H

STIPULATION OF DISMISSAL

Come now the parties and stipulate to the dismissal of the above styled and numbered cause with prejudice by Rochelle Ward against Asbury United Methodist Church.



ALLEN J. AUTREY
WESLEY E. JOHNSON
Attorneys for Plaintiffs



W. MICHAEL HILL
ROGER N. BUTLER, JR.
Attorneys for Defendant, Asbury
United Methodist Church

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

SHARON RUTHERFORD,)
)
Plaintiff,)
)
vs.) Case No. 97-CV-0129-H)
)
STATE OF OKLAHOMA, ex rel)
OKLAHOMA DEPARTMENT OF)
CORRECTIONS, CITY OF)
SAPULPA, ELMER GRISHAM,)
an Individual)
)
Defendants.)

FILED
JUL 24 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE 7-25-97

DISMISSAL

COMES NOW, the Plaintiff, Sharon Rutherford, and dismisses her claims against the Defendants, STATE OF OKLAHOMA, ex rel KLAHOMA DEPARTMENT OF CORRECTIONS, CITY OF SAPULPA and ELMER GRISHAM.

Respectfully submitted;

By Sharon Womack Doty
Sharon Womack Doty. OBA #14462
400 Beacon Building
406 South Boulder
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(918) 592-1383
Attorney for Plaintiff

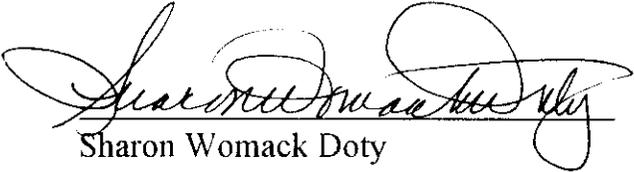
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CERTIFICATE OF MAILING

I, the undersigned attorney, hereby certify that on the 24th day of July, 1997, a true and correct copy of the foregoing document was mailed via U.S. Mail, postage prepaid to the following:

John Lieber
ELLER & DIETRICH
2727 E. 21st
Tulsa, OK 74114


Sharon Womack Doty

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUL 24 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JERRY C. NOEL,
SS# 051-70-0786,

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of the Social Security Administration,

Defendant.

No. 95-C-1127-E

ENTERED ON DOCKET
JUL 25 1997
DATE _____

JUDGMENT

In accord with the Order filed July 21, 1997, the Court hereby enters judgment in favor of the Defendant, John J. Callahan, Acting Commissioner of the Social Security Administration, and against the Plaintiff, Jerry Noel. Plaintiff shall take nothing of his claim. Costs and attorney fees may be awarded upon proper application.

Dated this 24th day of July 1997.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

SHARON J. THARP, as Personal)
Representative of the Estate)
of LARRY C. THARP, Deceased,)
)
Plaintiff,)
)
vs.) Case No. 96-CV-810-C ✓
)
PETROMAN INC. TEXACO REFINING)
AND MARKETING INC.,)
and TEXACO, INC.,)
)
Defendants.)

ENTERED ON DOCKET

~~DATE JUL 25 1997~~

FILED

JUL 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Stipulation of Dismissal with Prejudice

The parties hereby stipulate that this action is hereby dismissed with prejudice. Each party to bear her/its own attorneys' fees and costs.

ELLER & DETRICH

By Shanann Pinkham Passley
Shanann Pinkham Passley, OBA # 13603
2727 East 21st Street
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GABLE & GOTWALS

By J. Daniel Morgan
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Telephone: 588-7882

ATTORNEYS FOR DEFENDANTS

212

20

clt

F I L E D

JUL 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

In Re:)
HOME-STAKE PRODUCTION COMPANY)
SECURITIES LITIGATION.)

Case No. 73-C-382-E

ENTERED ON DOCKET

J U D G M E N T

DATE JUL 25 1997

In accord with the Findings of Fact and Conclusions of Law filed this date on the award and allocation of attorneys fees, the Court hereby enters judgment, awarding an attorney fee in the amount of \$5,858,507 plus 30% of all interest accrued on the \$17,500,000 settlement amount to the date of its distribution. The fee is to be allocated as follows: each firm is awarded its unpaid hours; in addition, 50% of the remaining \$4,111, 412.00 is awarded to all firms that existed as of September 30, 1993 on a pro rata basis; the remaining 50% of the \$4,111,412 plus 30% of all interest accrued on the \$17,500,000 settlement amount to the date of its distribution is awarded to the Committee. This results in an award of \$796,808.10 to BSLW, \$378,898.55 to DSDA, \$371,774.52 to GSY, \$1,571,315.35 to C&D, \$228,212.48 to William H. Hinkle, and \$455,792 to WSN. The Committee is also awarded \$2,055,706 plus 30% of all interest accrued on the \$17,500,000 settlement amount to the date of its distribution, to be allocated among the Committee members by agreement among themselves.

IT IS SO ORDERED THIS 24TH DAY OF JULY, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

JUL 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

In Re:)
))
HOME-STAKE PRODUCTION COMPANY)
SECURITIES LITIGATION.)

Case No. 73-C-382-E

ENTERED ON DOCKET

DATE JUL 25 1997

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These Findings of Fact and Conclusions of Law relate to the applications for attorneys' fees with respect to the Sixth Partial Settlement submitted by the Plaintiffs' Committee of Counsel and to the objections of three law firms formerly involved in this litigation to the Committee's proposed allocation of such fees.

The Court, upon consideration of the evidence presented at a hearing taking place on March 11 through 14, 1997, together with all pleadings, and the parties' proposed Findings of Fact and Conclusions of Law, including briefs submitted post-trial, enters its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Home-Stake Production Company Securities Litigation commenced on March 30, 1973 with the filing of the complaint in the *Anixter* class action by the San Francisco law firm now known as Broad, Schulz, Larson & Wineberg ("BSLW"). As initially filed, the *Anixter* action was brought against Home-Stake Production Company ("Home-Stake"), most of its wholly-owned

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Program Operating Corporation ("POC") subsidiaries, several of Home-Stake's officers and directors and one of its outside accountants, Norman C. Cross, Jr. ("Cross").

2. In the spring of 1974, the *Anixter* complaint was amended to add as defendants the remaining Home-Stake POC subsidiaries and numerous additional Home-Stake professional advisers, including firms of lawyers, accountants and petroleum geologists, which had, in one way or another, participated in the offering of the nine annual oil and gas drilling programs sponsored by Home-Stake and its POC's to the investors who constituted members of the class on behalf of which the *Anixter* action was brought.

3. During the latter part of 1973 and the first half of 1974, numerous individual actions were filed against Home-Stake and the other defendants named in *Anixter* by three other firms -- Gilbert, Segall and Young of New York ("GSY"), Doerner, Stuart, Saunders, Daniel & Langenkamp of Tulsa (the predecessor of Doerner, Saunders, Daniel and Anderson) (referred to collectively herein as "DSDA") and Caplin & Drysdale of Washington, D.C. ("C&D"). All those actions were consolidated in the District Court for the Northern District of Oklahoma in early 1974 by the Judicial Panel on Multi-District Litigation in MDL No. 153 and captioned *In Re Home-Stake Production Company Securities Litigation* (the "Home-Stake litigation"). In 1975, three additional class actions, *Luce*, *Robertson* and *Helmer* were filed against two of Home-Stake's former accounting firms, and a Tulsa bank, and were made a part of the consolidated Home-Stake litigation.

4. After limited discovery directed at class certification issues and extensive motions practice, it was determined that the *Anixter* action would proceed as a class action on behalf of nine separate classes of investors in each of Home-Stake's nine annual drilling programs from 1964 through 1972.

5. During the pendency of the class certification proceedings in this case in 1976, BSLW, GSY, DSDA and C&D entered into an agreement to form a committee of counsel to jointly prosecute the Home-Stake litigation (the "Co-Counsel Agreement"). The four firms agreed (i) to apportion the work to be performed in the Home-Stake litigation among them and each firm undertook "to perform its fair share of the work," (ii) to be responsible, on behalf of their respective clients, for one-fourth of the out-of-pocket expenses and costs to be incurred in prosecuting the class actions, and (iii) that attorneys' fees would be as awarded by the court presiding over the Home-Stake litigation.

6. In accordance with the Co-Counsel Agreement and upon the joint application of the four firms, the trial judge authorized the creation of the Plaintiffs' Committee of Counsel (the "Committee") to represent the classes in the Home-Stake litigation and appointed a partner of each of the four firms as a member of the Committee. The initial members of the Committee were William A. Wineberg, Jr. of BSLW, Harold F. McGuire of GSY, R. Dobie Langenkamp of DSDA and Peter Van N. Lockwood of C&D.

7. During the course of the Home-Stake litigation, and in accordance with the Co-Counsel Agreement, both DSDA and GSY substituted partners in their firms for members of the Committee who had left their firms or otherwise withdrawn from the litigation.

8. From 1976 through mid-1979, the members of the Committee and their firms conducted discovery relating to the Home-Stake litigation, including taking the depositions of all non-expert witnesses. In addition, Judge Boldt was replaced, due to illness, by Judge H. Dale Cook as the presiding judge in the Home-Stake litigation in 1978.

THE FIRST PARTIAL SETTLEMENT AND FEE APPLICATION (1973-1981).

9. After completion of non-expert discovery in late 1979, the Committee began settlement negotiations with numerous defendants in the Home-Stake litigation which concluded with the execution and approval of the First Partial Settlement agreement. Following notice to all nine classes in the *Anixter* case, the settlement was approved by Judge Cook on October 8, 1982.

10. Home-Stake and its nine POC subsidiaries were parties to the First Partial Settlement as a result of the confirmation of the Plan of Reorganization filed on their behalf in the concurrently pending Chapter X proceedings involving those corporations. Work done by the four firms in those reorganization proceedings was not subject to the Co-Counsel Agreement, was compensated separately by the Bankruptcy Court and is not involved in the pending dispute. DSDA applied for and received a bonus of \$50,000 in the reorganization proceedings for successfully preventing the transfer of some \$3.8 million of Home-Stake assets out of the jurisdiction in 1973.

11. The Committee also filed a joint application for the award of fees and expenses out of the First Partial Settlement. That application utilized the lodestar method then applicable to class action fee awards in the Tenth Circuit and sought fees for each of the four firms based on the number of hours devoted to the Home-Stake litigation from inception in 1973 through September 30, 1981. In a departure from normal practice under the lodestar method, the Committee requested that its time be valued at then-current (rather than historical) hourly rates to

reflect delay in payment and inflation during the period covered by the application. Pursuant to the application, Judge Cook awarded the requested fees to the four firms in October of 1982.

THE SECOND PARTIAL SETTLEMENT AND FEE APPLICATION (1981-1984).

12. During the implementation of the First Partial Settlement, three additional defendants commenced settlement negotiations with the Committee which resulted in the execution of two agreements filed in November and December of 1983 which, together, comprise the Second Partial Settlement of the Home-Stake litigation. Following notice to all nine classes, the Second Partial Settlement was approved by Judge Cook on June 27, 1984.

13. In connection with the Second Partial Settlement, the Committee filed a joint fee application seeking an award of fees based on (i) the value of time expended by each firm on the Home-Stake litigation from October 1, 1981 through December 31, 1983 (excluding time for which compensation was awarded in 1983 pursuant to the Committee's supplemental fee application), and (ii) an "incremental component" based on 25,759 "active partner hours" of the four firms from inception through December 31, 1983, which were "at risk" during that period.

14. From the beginning of 1984 through the end of 1986, the Home-Stake litigation was relatively inactive pending the setting by Judge Cook of a schedule for final pretrial proceedings and a trial date. As of that period, the firms of the members of the Committee had been fully compensated for their work in the Home-Stake litigation through the end of 1983.

THE DEPARTURE OF GILBERT, SEGALL AND YOUNG (1986).

15. In early June of 1986, Elihu Inselbuch announced to GSY and to the other members of the Committee his decision to leave GSY at the end of the month. Upon learning of Mr. Inselbuch's resignation, Peter Lockwood of C&D instituted discussions with Mr. Inselbuch which led to Mr. Inselbuch's joining C&D in its New York office effective July 1, 1986. Prior to his joining C&D, Mr. Inselbuch had agreed with GSY upon the identification of his clients and matters which he would take with him. Those clients and matters did not include the Home-Stake litigation which was the responsibility of Mr. Ralph Kelley, another GSY partner who was principally a tax lawyer.

THE LIABILITY TRIAL (1988).

16. On December 30, 1986, Judge Manuel Real was designated by the Multi-District Panel to replace Judge Cook as the presiding judge in the Home-Stake litigation. During 1987 and early 1988, substantial pretrial activities took place, including extensive motions practice which led to the award of summary judgment in favor of defendant McKee, Atkins & Schuler. Judge Real established a bifurcated trial schedule in which issues of liability and statutes of limitations would be tried first and damages would be tried later if necessary. The first phase of trial began in June of 1988 and culminated in liability verdicts against all but one of the defendants in early September of 1988. GSY did, at the request of the Committee, assist in a minor way in the trial preparation of the class representatives for the 1964, 1965 and 1966 Program classes who were clients of the firm.

17. Since September 1988, GSY has played no further role in prosecuting the Home-Stake litigation.

THE DEPARTURE OF DOERNER, SAUNDERS, DANIEL & ANDERSON (1989).

18. After the liability trial, on April 1, 1989, Mr. Hinkle voluntarily withdrew as a partner from DSDA. With the Committee's full approval and for the benefit of the Plaintiffs' classes, Hinkle was substituted for DSDA as Plaintiffs' attorney. DSDA did not "abandon" the case, or the classes. Hinkle was the only DSDA attorney with any involvement or knowledge of the case, and his departure left Doerner with no one able to take his place. Hinkle and DSDA reduced their withdrawal and substitution agreement to writing, and agreed that DSDA would receive all future "bonus fees based on services rendered by DSDA prior to April 1, 1989. Moreover, DSDA agreed to provide Hinkle with \$50,000 for expenses in the case. DSDA honored that agreement, to the extent it was requested to do so.

19. Since April 1, 1989, DSDA has played no further role in prosecuting the Home-Stake litigation.

THE DAMAGES TRIAL, TAX REFUND LITIGATION AND THIRD PARTIAL SETTLEMENT AND FEE APPLICATION (1989-1990).

20. Trial on damages took place in May of 1989 and judgments were entered in favor of the plaintiff classes in November of 1989. In the meantime, the Committee collected over \$4,000,000 through successful litigation of the assigned Home-Stake tax refund claims, as well as nominal settlement payments from other defendants. The Committee sought approval of those settlements, collectively referred to as the Third Partial Settlement, in December of 1989.

21. The Committee's prior fee applications had been based on the lodestar method. At a scheduling hearing, Judge Real suggested utilization of a common-fund percentage-of-recovery method, which was becoming increasingly prevalent in class action litigation. After further consideration and research into the legal standards then currently applicable to common fund fee awards in the Tenth Circuit, the Committee filed such a fee application.

22. After notice to all nine classes and a hearing, Judge Real on January 26, 1990, entered a final judgment (the "1990 Fee Judgment") decreeing that the Committee would be entitled to (i) 30 percent of any new funds collected for the plaintiff classes then or in the future, and (ii) up to an additional 20 percent of such new funds to the extent necessary to bring total fees paid by any given class for all recoveries on its behalf up to 30 percent. The 1990 Fee Judgment then provided that the foregoing formula would apply to the approximately \$4,275,000 (plus accrued interest) recovered on behalf of the classes since the Second Partial Settlement. Finally, the 1990 Fee Judgment provided that the Committee would be responsible for allocating the resulting fee award among its members and their present and former firms and partners, with any disputes arising therefrom to be resolved by the Court.

THE FOURTH PARTIAL SETTLEMENT AND FEE APPLICATION (1991).

23. In 1991, the Fourth Partial Settlement, resolving the separate class action against McKee, Atkins & Schuler (the *Robertson* action) on behalf of the 1968 Program class, was entered into and approved and the *Robertson* action was thereupon dismissed.

24. In connection with the Fourth Partial Settlement, the Committee applied for fees based on the 1990 Fee Judgment. Judge Real awarded fees of \$1,422,677 in September of 1991.

As was done in the Third Partial Settlement, the Committee proposed to allocate the fees based upon the remaining unpaid time reported by all five firms as of September 30, 1991. No one objected to the Committee's proposed allocation and the fees were distributed accordingly.

LAMPF, PLEVA, ANIXTER I AND II, SECTION 27A, ANIXTER III AND IV (1991-1993).

25. Shortly after the Fourth Partial Settlement was executed (but before it was approved), the Tenth Circuit, in reliance on the intervening Supreme Court decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), reversed the November 1989 judgments as time-barred, including both the judgments under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, and under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). *Anixter v. Home-Stake Production Co.*, 939 F.2d 1420 ("*Anixter I*"), on rehearing, 947 F.2d 897 (10th Cir. 1991) ("*Anixter II*"). In addition, the garnishment judgments obtained by the Committee against the insurers of certain defendants in 1990 were also reversed by the Tenth Circuit.

26. Faced with disaster, the Committee joined forces with other interested parties and helped secure, in late 1991, the passage of Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1, which legislatively overruled the retroactive application of the *Lampf Pleva* decision with respect to pending Section 10(b) actions. Based on the new statute, the Committee sought certiorari. In early 1992, the Supreme Court vacated and remanded *Anixter I* and *II* for reconsideration in light of Section 27A. *Dennler v. Trippet*, 503 U.S. 978, amended, 503 U.S. 1003 (1992). On remand the Tenth Circuit reinstated the 1989 judgments based on Section

10(b) but remanded the case for reconsideration of (i) the statute of limitations defense of one appellant and (ii) the issue of prejudgment interest with respect to all appellants, *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 ("*Anixter III*"), *on rehearing*, 977 F.2d 1549 (10th Cir. 1992) ("*Anixter IV*"), *cert. denied*, 113 S.Ct. 1841 (1993).

THE FIFTH PARTIAL SETTLEMENT AND FEE APPLICATION (1993).

27. On June 29, 1993, the Committee and the remaining active defendants and their insurers entered into the Fifth Partial Settlement, settling the claims of the 1971 and 1972 Program classes. Following notice to the affected classes, the Fifth Partial Settlement was approved by this Court on September 17, 1993. Defendants Kothe & Eagleton, Elmer M. Kunkel, and Cross & Company were dismissed, as were all claims of the 1971 and 1972 classes against the Estate of Norman C. Cross, Jr.

28. In connection with the Fifth Partial Settlement, the Committee again applied for fees based on the 1990 Fee Judgment. This Court awarded fees of \$3,313,076. As it did with the Third and Fourth Partial Settlements, the Committee proposed to allocate the total fee award based upon the remaining unpaid time of the five firms as of September 30, 1993.

No one objected to the Committee's proposed allocation and the fees were distributed in accordance with that allocation.

CENTRAL BANK (1994).

29. Following the Fifth Partial Settlement, the Committee and the sole remaining defendant, Cross, litigated the remanded prejudgment issue before this Court. In March of 1994,

this Court entered findings of fact and conclusions of law upholding the award of prejudgment interest made previously by Judge Real.

30. On April 19, 1994, the Supreme Court decided *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S.Ct. 1439 (1994), in which it ruled that no cause of action existed for aiding and abetting another's violation of Section 10(b). Cross promptly filed a motion to alter or amend the Section 10(b) judgments against him in favor of the 1969 and 1970 Program classes.

THE DISSOLUTION OF BROAD, SCHULZ, LARSON & WINEBERG (1994).

31. Effective August 31, 1994, BSLW voted to dissolve the partnership and cease doing business. Mr. Wineberg's newly formed firm Wineberg, Simmonds & Narita ("WSN") was substituted for BSLW and took over BSLW's role in the continued prosecution of the Home-Stake litigation thereafter.

32. The BSLW Partnership Agreement provides a mechanism for the discharge of the firm's professional responsibilities to its clients as well as a procedure by which the firm's interest in a particular case could be purchased. The Partnership Agreement contemplates that BSLW would receive the benefit of its legal services completed prior to dissolution and that the partner who takes the work after dissolution would receive payment from the client for the post-dissolution work.

33. Paragraph 13.2 of the BSLW Partnership Agreement provides:

In advance of the effective date of the termination of the partnership, the partners shall assign every uncompleted professional service to one or another of the partners on such terms as shall be agreeable to the clients involved and the partners

to whom such matters are assigned, and the rendition of professional services from the effective date of that termination shall thereafter be by such former partner and other law firms, if any, with which they may respectively become affiliated.

[CX 69 at 49].

34. BSLW admits that it assigned the Home-Stake case to Mr. Wineberg pursuant to Paragraph 13.2 of the BSLW Partnership Agreement. There is, however, no suggestion of an assignment of the firm's entitlement to the benefit of legal services completed prior to dissolution. Rather the assignment is simply the referral of a task such that clients are adequately serviced upon dissolution.

35. Following its dissolution, neither BSLW nor any of its other former partners made any contribution of either work or expense advances to the continued prosecution of the case.

ANIXTER V (1994-1996).

36. In March 1995, this Court denied Cross's motion to alter or amend the judgments based on the *Central Bank* decision. Thereupon Cross appealed yet again to the Tenth Circuit. On January 29, 1996, the Tenth Circuit reversed the judgments in favor of the 1969 and 1970 classes against Cross based on the decision in *Central Bank* and remanded the case to this Court for retrial on liability. *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215 (10th Cir. 1996) ("*Anixter V*").

PREPARATION FOR A NEW LIABILITY TRIAL, CONTINENTAL'S DENIAL OF COVERAGE AND THE SIXTH PARTIAL SETTLEMENT AND FEE APPLICATION (1996).

37. Commencing in the spring of 1996, the Committee and Cross began preparation for the retrial. As a result of the passage of time since the original trial, the Committee had to engage and prepare a new accounting expert — a witness whose testimony was critical to plaintiffs' ability to prevail on retrial — as well as a new petroleum engineering expert. Cross not only replaced his accounting expert, he employed three new accounting experts in his place who took a substantially different approach to defending Cross's work from what had occurred in the 1988 trial. He also hired new experts in petroleum engineering and investment advice. In addition, he also added a firm of nationally recognized trial counsel to his trial team.

38. Many witnesses from the prior trial were deceased or otherwise unavailable. In addition, because the only defendant at the retrial would be Cross, much of the evidence from the prior trial would not be admissible. The need to narrow the issues on retrial also resulted in a substantial number of motions in limine being filed by the parties.

39. The *Central Bank* and *Anixter V* decisions eliminated aiding-and-abetting liability as a basis for recovery. Coupled with the prior reversal of plaintiffs' Section 11 claims against Cross on statute of limitations grounds in *Anixter I*, plaintiffs were left with claims of primary violation of Section 10(b) as their sole potential source of recovery against Cross.

40. Since the retrial was limited to Cross's primary liability, plaintiffs faced the difficult issues of whether or not plaintiffs could prove reliance upon the financial statements certified by Cross and whether Cross's statements were misstatements or omissions.

41. If a jury did find liability, there was a substantial chance that it would have found that Cross was *deliberately* fraudulent thus triggering the fraud exclusion in Cross' insurance policies.

42. Following *Anixter V*, Cross's insurer Continental Casualty Company retained three additional law firms -- Wachtell, Lipton, Rosen & Katz in New York; Ross, Dixon & Masback in Washington, D.C.; and Gable, Gotwals, Mock & Schwabe in Tulsa -- to formulate and pursue new coverage defenses.

43. On the eve of trial, Continental Casualty appeared, denied coverage for any judgment plaintiffs could obtain against Cross, and urged that the retrial be postponed while the parties litigated its coverage defense. After additional motions practice directed at the impact of the insurer's position on the retrial and a two-day pretrial conference before the Court, which included extensive motions in limine arguments and rulings and objections to designations of evidence, the Committee negotiated the Sixth Partial Settlement, agreeing to settle the remaining claims of the 1969 and 1970 classes against Cross for \$17.5 million. Neither Cross nor Continental had offered any amount in settlement of the claims of the 1969 and 1970 classes until October 1996. Following documentation of the settlement, dissemination of the notice to the two affected classes and a hearing, this Court approved the Sixth Partial Settlement on December 30, 1996.

44. In connection with the Sixth Partial Settlement, on December 9, 1996, the Committee applied for fees based on the 1990 Fee Judgment. In its Application, the Committee requested a total fee award of \$5,858,507 (plus accrued interest thereon while in escrow). The

amount and other relevant information concerning the Committee's fee application was contained in the notice of proposed settlement sent to the 1969 and 1970 Program classes in advance of the settlement approval hearing. No class member or anyone else filed an objection to the amount of the requested fee.

THE FEE ALLOCATION DISPUTE.

45. In advance of the settlement approval hearing on December 30, 1996, the Committee members agreed among themselves on a proposed allocation of the requested fee and notified BSLW, DSDA and GSY of the proposed allocation by letters dated 12/10/96. Under the Committee's proposed allocation, GSY, DSDA, and BSLW would be paid their remaining unpaid time, as was done in the prior allocations made by the Committee with respect to the fees awarded under the 1990 Fee Judgment in connection with the Third, Fourth and Fifth Partial Settlements.

46. As of the end of 1993, from prior settlements, BSLW had received \$4,792,478; DSDA had received \$2,857,106; and GSY had received \$2,829,852 in attorneys' fees. Of these amounts, \$912,759 was paid to DSDA and \$242,812 was paid to GSY at various times following their withdrawal from the Home-Stake litigation. Of the almost \$4,800,000 paid to BSLW as attorneys' fees prior to 1994, approximately \$1,000,000 was in excess of its hourly rates in effect when the work was performed. Similarly, of the approximately \$2,830,000 paid to GSY as of that date, over \$640,000 of that amount was in excess of its historical rates. Although the portion of the more than \$2,850,000 of fees paid to DSDA prior to 1994 in excess of its historical rates is

not readily determinable, it was undoubtedly somewhere in the range of the premiums paid BSLW and GSY.

47. From October 1, 1993, when all of the then-unpaid time of all attorneys in the Home-Stake litigation was very nearly paid in full from the fees awarded pursuant to the Fifth Partial Settlement, through November 30, 1996, the members of the Committee and their respective firms have expended \$1,584,935 in attorney and legal assistant time pursuing the remaining claims of the 1969 and 1970 Classes against Cross. Almost all of that time (approximately \$1,550,000) was incurred after the Supreme Court's decision in *Central Bank* (on April 19, 1994), which rendered the jury instructions in the first trial erroneous and imperiled the judgment against Cross, and over \$1,280,000 of that time was expended in preparing for trial against Cross and negotiating and documenting the settlement after the Tenth Circuit reversed and remanded the Section 10(b) claims against Cross in *Anixter V* on January 29, 1996.

48. From October 1, 1993, through November 18, 1996, the members of the Committee collectively advanced over \$663,000 in out-of-pocket costs in preparation for the retrial.

49. Much of the work of the objectors in this litigation was done prior to 1984 and related to defendants, witnesses, claims or issues that were no longer in the case in 1996. In addition, a large amount of the work done in preparation for and conducting the trial in 1988 was, as a result of subsequent settlements or unappealed judgments, no longer relevant to the claims and issues to be litigated against the one remaining defendant in the 1996 retrial.

50. As of the date of the Sixth Partial Settlement, the unpaid time of BSLW, DSDA and GSY was \$157,722, \$10,847 and \$3,244, respectively. BLSW was the only Objector with unpaid time incurred after September 30, 1993, and of that \$111,639 of time, only \$50,909 was incurred after April 19, 1994, when *Central Bank* significantly increased the risk. None of the Objectors participated in any way in the post-*Anixter V* retrial preparation or the negotiation and consummation of the Sixth Partial Settlement.

51. The remaining out-of-pocket damages of the 1969 and 1970 classes were computed at \$6,014,978 and \$4,804,705, respectively. Prejudgment interest increased their potential claims to \$24,994,234 and \$22,617,102, respectively. The terms of the Fifth Partial Settlement required the Committee to look to Cross's insurance coverage as the sole source of recovery. If the Committee were able to establish both liability and coverage, there was potential "each claim" coverage for the 1969 class of approximately \$22,000,000, but only \$500,000 for the 1970 class due to applicable policy limits. While each policy also provided coverage for "post-judgment interest," it remained to be determined whether the policies covered *all* post-judgment interest, as the Committee claimed, and whether the classes would be entitled to post-judgment interest from 1989, or only from entry of any new judgment against Cross after trial in 1996.

52. Given the substantial issues regarding Cross's potential liability, the insurer's coverage defenses (including the fraud exclusion), and the serious question of entitlement to post-judgment interest from the date of the original judgment because it had been reversed in its entirety, the \$17,500,000 settlement is an excellent result for both classes.

53. As set out above, this Court has previously entered the 1990 Fee Judgment which, *inter alia*, established an incentive formula for awarding fees to the Committee out of any recoveries accomplished thereafter in the Home-Stake litigation. The Court has previously applied that formula in awarding fees to the Committee out of recoveries effected for the 1968, 1971 and 1972 classes in the Fourth and Fifth Partial Settlements.

54. Although this Court does not consider itself bound by the 1990 Fee Judgment in determining the amount of a fair and reasonable attorneys' fee award in connection with the pending Sixth Partial Settlement, the Court finds that the application of the formula used in the 1990 Fee Judgment and in the fee awards in the Fourth and Fifth Partial Settlements will also produce a fair and reasonable attorneys' fee award in connection with the Sixth Partial Settlement. The Court expressly finds, however, that the 1990 fee judgment provides no basis nor guidance for allocation of the fee to be awarded.

55. This Court finds that this formula should be applied to the New Fund of \$17,500,000, plus accrued interest, arising out of the Sixth Partial Settlement which was approved by this Court in the Settlement Approval Order dated December 30, 1996. Based on the Affidavit of William H. Hinkle attached as Exhibit A to the Application previously filed by the Committee, the Court finds that the fees to be awarded the Committee are \$5,858,507 plus 30% of all interest accrued on the \$17,500,000 settlement amount to the date of its distribution.

56. This Court finds that unreimbursed, out-of-pocket costs and expenses aggregating \$666,031.73 were reasonably and properly incurred by the Committee from October 1, 1993 through November 18, 1996. These costs and expenses have previously been ordered reimbursed

to counsel out of the New Fund now on hand (and out of the additional funds held by the Committee for this purpose pursuant to this Court's Order Approving Plan of Distribution of Partial Settlement Fund, entered September 17, 1993 in connection with the Fifth Partial Settlement). In addition, any costs and expenses that have been incurred by the Committee since November 18, 1996 or that will be incurred hereafter in consummation of the settlement and distribution of the settlement proceeds up to a total not to exceed \$73,968.27 shall, as stated in the Notice of Hearing, also be reimbursed to the Committee. All such costs and expenses shall be allocated and charged to the 1969 and 1970 Program classes in proportion to their respective recoveries in the Sixth Partial Settlement. Additionally, the funds held by the Committee on behalf of the 1969 and 1970 Program classes as part of the Fifth Partial Settlement inclusive of accrued interest should be applied in partial discharge of the 1969 and 1970 Program classes' cost and expense obligations hereunder in proportion to the agreed amounts set forth in the Stipulation of Settlement approved in connection with the Fifth Partial Settlement.

57. The Court has considered the facts presented by the Objectors in support of their respective requests for a substantial share in any fees to be awarded in connection with the Sixth Partial Settlement based on their participation in the Home-Stake litigation in prior years. The Court understands that the objectors base their request on two contentions: 1) that the objectors' work "formed the basis" for the settlement achieved here; and 2) that part of the fees rest on money recovered for the benefit of the 1969 and 1970 classes before the end of 1983. In that regard, the Court has taken into account the facts that:

- (i) None of the Objectors participated in the negotiation or consummation of the Sixth Partial Settlement or in the retrial preparation that led to it;
- (ii) All the Objectors had been almost completely paid in full for their prior work in the Home-Stake litigation as of the end of September 1993 (including receiving substantial premiums over their historic hourly rates for such work);
- (iii) All the work done by BSLW after September 30, 1993, occurred prior to the reversal of the prior judgments in *Anixter V* and did not contribute substantially to the accomplishment of the Sixth Partial Settlement; and
- (iv) Absent the willingness of Committee members C&D, WSN and Mr. Hinkle to do the substantial work and advance over \$660,000 of expenses of preparing to retry the case against Cross in 1996 and then negotiating the Sixth Partial Settlement — all of which was at substantial risk of being uncompensated and unreimbursed — there would be no funds to pay Objectors even for their remaining modest unpaid time.

On the other hand the Court has also considered the contribution of the objecting firms. The objecting firms participated in:

- (i) The completion of all discovery of fact against the Cross Defendants;
- (ii) Creation of a trial record against those defendants which would materially aid the 1996 settlement efforts;
- (iii) The acquisition of liability judgements against the Cross Defendants, which though subsequently reversed, established the predicate for convincing those

defendants, and their insurance carriers, of the likelihood that Plaintiff's Judgments would be obtained again in 1996;

(iv) Acquisition of the 1989 Judgement, which permitted the 1996 Committee to dramatically increase exposure against Cross's insurance through tacking of "post judgment interest" all the way back to 1989;

(v) The acquisition of a stream of recoveries over several "partial settlements", which made possible the funding of the case for over fifteen years, and which ultimately allowed the 1989-1996 efforts against the Cross Defendants to occur.

58. In light of all the foregoing facts, specifically, both that the effort of Plaintiff's Committee of Counsel was extraordinary and that none of the objecting firms abandoned this litigation or did anything else improper when it made the decision to leave the departing member of the firm on the Committee and not seek to add any committee member, the Court finds that neither the Committee's proposal nor the objectors' proposals present a desirable solution to this problem. In attempting to fashion an equitable solution that recognizes both the efforts over time of the objectors and the extraordinary effort of the present Committee which resulted in this fee, the Court finds first that the outstanding time of all firms should be paid. Accordingly, BSLW is entitled to a fee allocation of \$157,722, DSDA to a fee allocation of \$10,847 GSY to a fee allocation of \$3,244, C&D to a fee allocation of 962,333, William H Hinkle to a fee allocation of \$157,157, and WS&N to a fee allocation of 455,792. Payment for outstanding time adds up to \$1,747,095 of the \$5,858,507 award, leaving \$4,111,412 plus 30% of all interest accrued on the \$17,500,000 settlement amount to the date of its distribution to be distributed.

59. With respect to the amount remaining to be allocated, the Court finds that 50% of the \$4,111,412 should be allocated among all firms on a pro rata basis as of September 30, 1993. Thus BSLW is entitled to an additional allocation of \$639,086.10 , DSDA to an additional allocation of \$368,051.55, GSY to an additional allocation of \$368,530.52 , C&D to an additional allocation of \$608,982.35, and William H. Hinkle to an additional allocation of \$71,055.48. The remaining 50% of the 4,111,412, plus 30% of all interest accrued on the \$17,500,000 settlement amount to the date of its distribution shall be awarded to the Committee to distribute among its members pursuant to their agreement.

60. If any Conclusion of Law is deemed to be a finding of fact, it is hereby incorporated in these Findings of Fact by this reference.

CONCLUSIONS OF LAW

1. Pursuant to and in compliance with Rule 23 of the Federal Rules of Civil Procedure, this Court hereby finds and concludes that due and adequate notice was directed to all persons and entities who are members of the 1969 and 1970 *Anixter* Classes, advising them of the Application which is the subject of these Findings of Fact and Conclusions of Law, and of their right to object to any part of the Application; and a full and fair opportunity was afforded to all persons and entities who are members of the 1969 and 1970 *Anixter* Classes to be heard with respect to the Application.

2. Fees may properly be awarded on a percentage-of-recovery basis. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988); *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994). In doing so, the Court must articulate specific reasons for the award in order that there is an adequate basis to review the reasonableness of the percentage. The Court has therefore reviewed the proposed award, which was calculated pursuant to the 1990 Fee Judgment, under traditional factors as articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In so doing, the Court has concluded that it is reasonable to accord more weight in this case to the excellent results obtained by the Committee for the members of the 1969 and 1970 classes; the novelty and difficulty of the legal and factual issues faced by counsel following reversal and remand of the remaining claims against the defendant Cross in *Anixter V*; the substantial investment of attorney time and costs by the current members of the Committee in preparing the case for a second trial against Cross; the skill of counsel and the concentrated effort devoted by them in preparing for the retrial and settling with Cross and Continental; and the fact that the proposed percentage recovery is similar to awards in other comparable cases and the same percentage that has already been paid by the 1968, 1971 and 1972 classes in this litigation pursuant to judgments awarding fees in connection with the Fourth and Fifth Partial Settlements.

3. Based upon the matters heard by this Court on December 30, 1996, and March 11-14, 1996, all pleadings, papers and other documents on file in this litigation, and the Findings of Fact hereinabove set forth, and upon review of the requested award under the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*, *supra*, this Court hereby approves the Application, awards attorneys' fees, costs and expenses as set forth in Findings of Fact Nos. 54-56

above, and concludes that the fees, expenses and costs so awarded are in all respects fair and reasonable.

4. The sixth partial settlement in this case created a common fund from which an award of attorneys' fees is appropriate. Where such a settlement is obtained in a class action suit under Rule 23 of the Federal Rules of Civil Procedure, it is appropriate to award attorneys' fees to attorneys who provided legal services which had the effect of tending to create, increase, protect or preserve a fund. *Gottlieb v. Barry*, 43 F.3d 474, 482, 489 (10th Cir. 1994); *In re Prudential Sec. Inc. Ltd. Partnership Litig.*, 911 F.Supp. 135, 140 (S.D.N.Y. 1996). Both the Committee and the objectors' contributed to the creation of the sixth partial settlement and conferred a benefit on the Classes. The Court thus concludes that all firms should receive an allocation, over and above their unpaid time, of the total attorneys' fees to be awarded.

5. The Court has broad discretion in determining the allocation of attorneys' fees between firms which have contributed to the establishment of the common fund. *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 309 (1st Cir. 1995). The overall award of attorneys' fees, as well as the allocation of fees among participating counsel, in a common fund case, must be fair and reasonable. *Gottlieb*, 43 F.3d at 482-489; *In re Thirteen Appeals*, 56 F.3d at 305, 309.

6. Where several law firms participated jointly in recovering a common fund for the benefit of the class, the Court should reach an overall reasonable fee award for all counsel based on a fair percentage of the fund. The Court will distribute the overall award among participating counsel based on the reasonable efforts and relative contributions and responsibilities of the firms

which led to the creation of the fund. *Howes v. Atkins*, 668 F.Supp. 1021, 1025 (E.D. Ky. 1987); *Gottlieb*, 43 F.3d at 488-89. In this case, it is difficult, if not impossible, to determine the "reasonable efforts and relative contributions" of the firms, due in part to duration of these proceedings and the different times that each objecting firm withdrew. The Court, finds however that it is fair and reasonable to award each firm its unpaid hours; to award 50% of the remaining \$4,111,412.00 to all firms that existed as of September 30, 1993 on a pro rata basis; and to award the remaining 50% of the \$4,111,412 plus 30% of all interest accrued on the \$17,500,000 settlement amount to the date of its distribution to the Committee. This results in an award of \$796,808.10 to BSLW, \$378,898.55 to DSDA, \$371,774.52 to GSY, \$1,571,315.35 to C&D, \$228,212.48 to William H. Hinkle, and \$455,792 to WSN. The Committee is also awarded \$2,055,706 plus 30% of all interest accrued on the \$17,500,000 settlement amount to the date of its distribution, to be allocated among the Committee members by agreement among themselves.

7. If any Finding of Fact herein is deemed to be a conclusion of law, it is hereby incorporated in these Conclusions of Law by this reference.

IT IS SO ORDERED THIS 24TH DAY OF JULY, 1997.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

JOHN W. UMOREN,)
)
 Plaintiff,)
)
 vs.)
)
 LINDA PAINE, Medical Director,)
)
 Defendant.)

FILED

JUL 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-492-BU

ENTERED ON DOCKET

DATE JUL 25 1997

ORDER

On May 22, 1997, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983 and a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), as amended by The Prison Litigation Reform Act, Pub.L.No. 104-134, 110 Stat. 1321 (1996). The Court granted leave to proceed in forma pauperis and the Plaintiff was directed to pay an initial partial filing fee of \$3.33 on or before July 3, 1997, or his case would be dismissed. Plaintiff has failed to comply with the order.

Upon review of the record, the Court finds that Plaintiff has not paid the initial partial filing fee as directed. Accordingly, Plaintiff's complaint is hereby **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F).

IT IS SO ORDERED.

This _____ day of _____, 1997.



MICHAEL BURRAGE
United States District Judge

(4)

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

STATE FARM FIRE AND CASUALTY)
COMPANY,)

Plaintiff,)

vs.)

VALORIE BARRETT and ANTHONY BARRETT,)

Defendants,)

and)

VALORIE BARRETT,)

Third Party Plaintiff,)

v.)

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

Third Party Defendants.)

Case No. 95-C-237-Bu(J) ✓

ENTERED ON DOCKET
DATE JUL 25 1997

FILED

JUL 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT & RECOMMENDATION

On May 30, 1997, Defendants filed a Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b). [Doc. No. 193-1]. Plaintiff's response was filed on June 17, 1997. By minute order dated May 30, 1997, the District Court referred the Motion to the undersigned Magistrate Judge. The Magistrate Judge recommends that the District Court **DENY** Defendants' Motion.

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Defendants argue that due to the Oklahoma Supreme Court decision in First Bank of Turley v. Fidelity and Deposit Insurance Co. of Maryland, 928 P.2d 298 (Okla. 1996), Oklahoma does not recognize that an insurance company may assert “comparative bad faith” of the insured as a defense. Based on Turley, Defendants argue that an insurance company does not have a cause of action for bad faith against an insured, that the trial court erred in permitting the jury to consider whether Defendants had breached the “implied covenant of good faith and fair dealing,” and that Defendants’ Motion for Relief should therefore be granted.

Standard: Fed. R. Civ. P. 60(b)

A grant of relief pursuant to Fed. R. Civ. P. 60(b) is discretionary, and is warranted only in exceptional circumstances. See Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., 909 F.2d 1437, 1440 (10th Cir. 1990). Defendants request relief under Fed. R. Civ. P. 60(b) asserting that a change in the law justifies such relief.

In L.C. Collins v. City of Wichita, Kansas, 254 F.2d 837 (10th Cir. 1958), in determining whether a grant of relief pursuant to Fed. R. Civ. P. 60(b) was permissible due to a change in the law, the Tenth Circuit Court of Appeals concluded that it was not.

It is quite clear that in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice. A change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies such relief.

* * * *

Litigation must end some time, and the fact that a court may have made a mistake in the law when entering

judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside.

Id. at 839 (citations omitted).

Defendants rely on Adams v. Merrill Lynch, 888 F.2d 696 (10th Cir. 1989) as supporting their argument that a change in law justifies relief pursuant to Fed. R. Civ. P. 60(b). In Adams the Tenth Circuit, in affirming a district court's decision to grant relief pursuant to Fed. R. Civ. P. 60(b) noted that "a change in relevant case law by the United States Supreme Court warrants relief under Fed. R. Civ. P. 60(b)(6)." Id. at 702. Adams provides no analysis, but relies on Pierce v. Cook & Co., 518 F.2d 720, 722-24 (10th Cir. 1975).

In Pierce, the Tenth Circuit referenced its prior decision in Collins (a change in the law is not an "extraordinary circumstance" which justifies relief), but noted that

Collins differs from the instant case in that there the decisional change came in an unrelated case. Here it came in a case arising out of the same accident as that in which the plaintiffs now before us were injured. The question is whether we have here an extraordinary situation justifying Rule 60(b)(6) relief.

Id. at 723. The Tenth Circuit seemed primarily concerned with insuring that the mere filing of a lawsuit in federal court as opposed to state court did not dictate a different result for causes of action arising out of the same incident.

We are concerned with an action in which federal jurisdiction depends on diversity. In diversity jurisdiction cases the results in federal court should be substantially the same as those in state court litigation arising out of the same transaction or occurrence.

Id. The Tenth Circuit's ruling in Pierce was summarized by the court in Van Skiver v. United States, 952 F.2d 1241 (10th Cir. 1991).

Rule 60(b)(6) has been described by this court as a "grand reservoir of equitable power to do justice in a particular case." The kind of legal error that provides the extraordinary circumstances justifying relief under Rule 60(b)(6) is illustrated by Pierce. In that case, this court granted relief under 60(b)(6) when there had been a post-judgment change in the law "arising out of the same accident as that in which the plaintiffs . . . were injured." However, when the post-judgment change in the law did not arise in a related case, we have held that "[a] change in the law or in the judicial view of an established rule of law" does not justify relief under Rule 60(b)(6).

Id. at 1244 (citations omitted). Consequently, the circumstances under which a change in the law justifies a motion for relief under Fed. R. Civ. P. 60(b) appear limited.^{1/} See also Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1491 n.9 (10th Cir. 1994) (a change in United States Supreme Court law warrants relief under Fed. R. Civ. P. 60(b), but an intervening decision of a state supreme court or a change in law on validity of state statute, caused by an intervening United States Supreme Court decision does not). Therefore, within the Tenth Circuit, the situation presented by Defendants does not justify any action by the court pursuant to Fed. R. Civ. P. 60(b).^{2/}

^{1/} Defendants additionally cite Wilson v. Al McCord, Inc., 858 F.2d 1469 (10th Cir. 1988). In Robinson v. Volkswagen of America, Inc., 803 F.2d 572, 574 (10th Cir. 1986), the Tenth Circuit Court of Appeals explained the difference between Collins and situations presented to the Court in Wilson (*i.e.* whether or not "final judgment" had been entered). The situation presented to this Court, in this case, resembles Collins rather than Wilson.

^{2/} Defendants assert that a Notice of Appeal was timely filed with the Tenth Circuit. Although this may be true, the docket sheet for this case within this district indicates that the Tenth Circuit

(continued...)

Intervening Oklahoma Law

Even if the District Court could act under Fed. R. Civ. P. 60(b), the Magistrate Judge concludes that the "intervening law" referenced by Defendants requires no further action by the court.

Defendants assert that Oklahoma law has changed and that a cause of action for bad faith against an insured by an insurance company does not exist. Defendants therefore assert that the jury verdict was improper.

In First Bank of Turley v. Fidelity and Deposit Insurance Company of Maryland, 928 P.2d 298 (Okla. 1996), the Oklahoma Supreme Court stated that

we reject the notion that the insured's responsibility to provide its insurer adequate notice of facts relating to insurance coverage can be translated into an actionable tort or into a contributory-fault defense concept for comparison with the fault of the insurer. We hence hold that an insured's misperformance of its contractual duty is neither a "free-standing" ex contractu breach nor a civil harm actionable in tort as an incident of the insurer/insured status.

Id. (footnotes omitted). In a footnote to this section, the Oklahoma court noted that "We are not asked to answer, and express no opinion on, whether an insured's active wrongdoing (malfeasance)--such as pressing a claim for self-authored loss from arson--would constitute a tort committed against the insurer or call for a comparison of the insured's contributory fault in a bad-faith action against the insurer." Id. at 308 n.39. Defendants do not address this language in the Turley opinion.

^{2/} (...continued)
dismissed the appeal. See Docket entry dated March 31, 1997 [Doc. No. 186-1].

In this case, Plaintiff alleges that Defendants own actions caused the damage to their residence. Therefore, the cause of action asserted by Plaintiff is exactly the type upon which the Oklahoma Supreme Court "expressed no opinion" in its holding in Turley. In addition, the jury found for the Plaintiff on two causes of action -- breach of the implied covenant of good faith, and intentional and material misrepresentations concerning their financial condition at the time of the fire. Each of these causes of action were separately submitted to the jury, and Plaintiff asserts that either of these causes of actions is sufficient to sustain the jury verdict. Defendants do not address how or why the cause of action for intentional and material misrepresentations is no longer "good law."

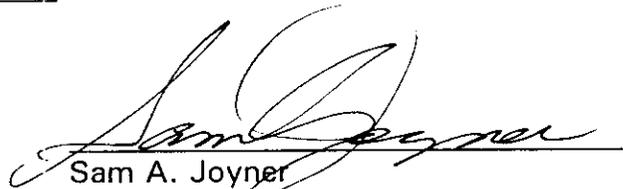
The magistrate judge recommends that the District Court **DENY** Defendants' Motion for Relief under Fed. R. Civ. P. 60(b).

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **DENY** Defendants' Motion for Relief from Judgment Pursuant to Rule 60(b).

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

IT IS SO ORDERED THIS 24 day of July 1997

A handwritten signature in black ink, appearing to read "Sam A. Joyner", written over a horizontal line.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONNIE L. MURDOCK,
Plaintiff,

vs.

HAMBLETON LAGRECA CHEVROLET,
GEO, OLDS, INC., d/b/a
MID-WAY CHEVROLET, GEO,
OLDS, INC.,

Defendant.

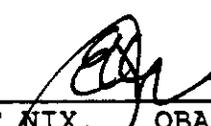
Case No. 97-CV-110-BU

ENTERED ON DOCKET

DATE JUL 25 1997

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

COME NOW, the Plaintiff and Defendant by and through their attorneys and advise the Court that they have reached a mutually satisfactory settlement of the above claim. The parties further request the Court to enter an order dismissing the above action with prejudice to the filing of a future action.



JEFF NIX, OBA #6688
1401 S. Cheyenne
Tulsa, OK 74119-3440
(918) 742-4486

ATTORNEY FOR PLAINTIFF
CONNIE L. MURDOCK



BRUCE V. WINSTON, OBA #09778
301 N.W. 63rd, Suite 400
Oklahoma City, OK 73118
(405) 843-8855

ATTORNEY FOR DEFENDANT
HAMBLETON LAGRECA CHEVROLET, GEO,
OLDS, INC., d/b/a MID-WAY CHEVROLET
GEO, OLDS, INC.

further notice. Petitioner has not responded to the order to show cause. The undersigned magistrate judge recommends that Petitioner's petition be dismissed without prejudice.

RECOMMENDATION

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

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

SO ORDERED THIS 23 day of July 1997.


Sam A. Joyner
United States Magistrate Judge

FILED

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

JUL 22 1997

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

TERRI L. DARNELL,
Plaintiff,

v.

K O MANUFACTURING, INC.,
Defendant.

Case No. 96-C-753-H /

ENTERED ON DOCKET
DATE JUL 22 1997

ORDER

This matter comes before the Court on Defendant's Motion for Sanctions filed on June 10, 1997. (Docket #25.) On February 11, 1997, the Court entered an order regarding Plaintiff's counsel Jeff Nix's Motion to Withdraw as Counsel. (Docket #15.) That order directed Plaintiff either to arrange for other counsel, and have counsel enter an appearance, or to file a statement indicating her intention to proceed pro se. On April 2, 1997, Magistrate Judge John L. Wagner ordered Plaintiff to indicate her election as to representation, and to answer Defendant's discovery. After application by Plaintiff for an extension of time in which to make arrangements for her legal representation, on May 8, 1997, the Court allowed Plaintiff thirty days to have substitute counsel enter an appearance or to advise the Court of her decision to represent herself. (Docket #19.) Plaintiff has failed to do so. Furthermore, Plaintiff has failed to respond to Defendant's discovery requests as compelled by Magistrate Judge Wagner's order of April 2, 1997.

Accordingly, the Court finds that Defendant's uncontested Motion for Sanctions is granted. Plaintiff's Complaint is hereby dismissed without prejudice to the refiling of same at Plaintiff's cost. This matter is stricken from the docket.

IT IS SO ORDERED.

This 21st day of July, 1997.


Sven Erik Holmes
United States District Judge

30

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

F I L E D

JUL 22 1997

PHILLIP EUGENE GARDNER,)
)
Petitioner,)
)
v.)
)
RON CHAMPION,)
)
Respondent.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-C-148-K

ENTERED ON DOCKET

DATE JUL 24 1997

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1), Respondent's Motion to Dismiss for Failure to Exhaust State Remedies (Docket #3), Petitioner's Reply to Respondent's Motion to Dismiss for Failure to Exhaust State Remedies (Docket #5), and Petitioner's Motion to Expedite Cause (Docket #6).

Petitioner was convicted on February 9, 1989, in Tulsa County District Court of seven counts of robbery with a dangerous weapon, one count of robbery by force, and one count of assault and battery with a dangerous weapon in Case Nos. CF-88-5288, CF-88-5302, and CF-88-4392. He was sentenced to sixty years on each robbery charge and ten years on the assault and battery charge, with the sentences to be served concurrently. He did not appeal the conviction. He claims that he desired to appeal, but his attorney advised him that there were no grounds upon which an appeal could be based.

Petitioner filed an application for post-conviction relief raising the ground that his sentences were disproportionate to the sentences given other criminal defendants

for the same crime in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. In its September 3, 1996 order denying petitioner's appeal for post-conviction relief, the Tulsa County District Court found that petitioner's plea of guilty had been voluntarily and knowingly made and that he had been advised of his appeal rights, but had taken no steps to perfect a timely direct appeal or given any reason for his failure to do so. Thus, the court found that he had waived all issues that could have been raised on appeal and denied his application (See Exhibit "A" to Respondent's Brief in Support of Motion to Dismiss for Failure to Exhaust State Remedies, Docket #4).

Petitioner filed a "petition in error" in the Oklahoma Court of Criminal Appeals on September 27, 1996, in which he alleged that the district court had erred in denying his appeal for post-conviction relief and gave as grounds for not raising the issue on appeal that his attorney had failed to perfect an appeal after being requested to do so. (See Exhibit "B" to Response Brief in Support of Motion to Dismiss for Failure to Exhaust State Remedies, Docket #4). The Oklahoma Court of Criminal Appeals on January 28, 1997 affirmed the district court's denial of post-conviction relief, finding that the claim raised by petitioner that he was denied an appeal of his conviction through ineffective assistance of counsel had not been sufficiently presented to the district court in his post-conviction pleadings and thus had not been preserved for its consideration. (See Exhibit "C" to Response Brief in Support of Motion to Dismiss for Failure to Exhaust State Remedies, Docket #4). The court also suggested that, without a sufficient reason for petitioner's delay in seeking relief on

the issue, the doctrine of laches would seem to prevent him from raising the claim of being illegally denied a direct appeal and cited Thomas v. State, 903 P.2d 328, 330-332 (Okla. Crim. App. 1995).

Petitioner raises two claims in his petition for a writ of habeas corpus. The first is that his sentences are disproportionate to sentences given other criminal defendants for the same crime and should be modified to the minimum sentence allowable. He admits that he pled guilty to the crimes, but states that he had been drinking heavily on the date of the alleged crimes, and the court was informed of this fact when it accepted petitioner's plea. He also states that he had no prior convictions and that he injured no one during the crimes, except in one of the robberies, but the victim's injuries in that case were not severe. Petitioner's second claim is that he asked his attorney to file an appeal after he was sentenced because his sentences were disproportionate to those given other defendants for the same crime, and his attorney did not file an appeal.

It is well established that federal courts should ordinarily refrain from considering habeas claims until a state prisoner exhausts available state remedies. Picard v. Connor, 404 U.S. 270, 275 (1971). Habeas petitions containing both exhausted and unexhausted claims should be dismissed. Rose v. Lundy, 455 U.S. 509, 510 (1982). The exhaustion requirement is satisfied when a state appellate court has had the opportunity to rule on the same claim presented in federal court, or when the petitioner has no available state avenue of redress. Miranda v. Cooper, 967 F.2d 392, 398 (10th Cir.), cert. denied, 506 U.S. 924 (1992). The rationale for

the "fair presentation" requirement is that the state courts should be given the opportunity to address federal claims in the first instance since "state courts will enforce the federal constitution as fully and fairly as a federal court." *Id.* at 398.

In Coleman v. Thompson, 501 U.S. 722, 731 (1991), the Supreme Court observed: "[t]his Court has long held that a state prisoner's federal habeas petition should be dismissed if the petitioner has not exhausted available state remedies as to any of his federal claims. This exhaustion rule is also grounded in principles of comity; in a federal system, the states should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." (citations omitted).

In Coleman, the Supreme Court held that, if a petitioner could show cause for his failure to appeal at all and prejudice resulting from the failure, his habeas claim could be considered in spite of his procedural default. The Court in Keeney v. Tamayo-Reyes, 504 U.S. 1, 9-10 (1992), emphasized that the state "must afford the petitioner a full and fair hearing on his federal claim," because the full factual development in state court "advances comity by allowing a coordinate jurisdiction to correct its own errors," "serves the interest of judicial economy," and "channels the resolution of the claim to the most appropriate forum." (emphasis added).

A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted available state remedies. Clonce v. Presley, 640 F.2d 271, 273 (10th Cir. 1981). A court will not excuse a failure to exhaust state remedies in a 28 U.S.C. § 2254 action unless it is affirmatively shown that resort to them would be useless. Lewis v. State of N.M., 423 F.2d 1048 (10th Cir. 1970).

This court notes that matters relating to sentencing, service of sentence, and allowance of any credits are governed by state law and do not raise federal constitutional questions. Harris v. Dept. of Corrections, 426 F.Supp. 350, 351 (W.D. Okla. 1977); Hill v. Page, 454 F.2d 679 (10th Cir. 1971); Burns v. Crouse, 339 F.2d 883 (10th Cir. 1964), cert. denied, 380 U.S. 295 (1965); Handley v. Page, 279 F.Supp. 878 (W.D. Okla.), aff'd, 398 F.2d 351 (10th Cir. 1968), cert. denied, 394 U.S. 935 (1969).

However, the Supreme Court held in Kimmelman v. Morris, 477 U.S. 365 (1986), that an ineffective assistance of counsel claim, which raises a constitutional question, may be brought for the first time collaterally. Therefore, petitioner's procedural default in failing to file a direct appeal does not preclude review of this ground by the court. If petitioner establishes that he received ineffective assistance from his attorney, he may be able to show cause excusing his procedural default at the state level.

The Oklahoma Court of Criminal Appeals suggested that the doctrine of laches might preclude petitioner from raising his claim of ineffective assistance of counsel. It is true that in Thomas, 903 P.2d at 332, the Oklahoma court found the doctrine applicable to federal habeas corpus actions, noting that several federal circuit courts had utilized Rule 9(a) of the Rules Governing Section 2254 Cases and found habeas corpus claims barred by laches. However, the court stated "we wish to emphasize that the applicability of the doctrine of laches necessarily turns on the facts of each particular case." Id. In that case, the petitioner failed to state any reason for his

failure to raise his habeas corpus claims for fifteen years. The Oklahoma court has not determined whether petitioner's claim of ineffective assistance of counsel constitutes sufficient justification for his failure to raise his claims for seven years and precludes the application of the doctrine of laches to this particular case.

While petitioner offers evidence that he filed a "motion for evidentiary hearing" in his criminal cases on August 29, 1996, stating that his attorney had failed to file an appeal when requested to do so, there is no evidence that the Tulsa County District Court considered the motion and ruled on it (Exhibit "A" to Petitioner's Reply, Docket #5). There is therefore no evidence that the state court has given a full, fair hearing to petitioner's claim of ineffective assistance of counsel.

While Oklahoma generally bars collateral review of ineffective assistance claims not raised on direct appeal, there are exceptions to this rule. See Paxton v. State, 910 P.2d 1059, 1061 (Okla. Crim. App. 1996) (noting exceptions to rule that claims not raised on direct appeal are waived); Pickens v. State, 910 P.2d 1063, 1069 (Okla. Crim. App. 1996) (stating that for ineffective assistance of counsel claims raised for the first time in post-conviction proceedings, the court will "review each case on its individual merits, examining each specific proposition in connection with the specific facts of each case as the need arises").

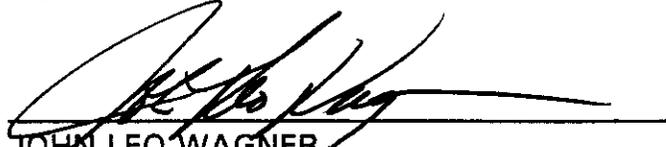
While petitioner has attempted to persuade the Oklahoma Court of Criminal Appeals to consider his ineffective assistance of counsel claim, it has failed to do so, in spite of the fact that it has been presented as the cause of petitioner's failure to appeal. Petitioner failed to follow proper procedural requirements to seek district

court consideration of the claim when he filed a "motion for evidentiary hearing" in his criminal cases. The proper procedure for petitioner to follow is to file a petition for post-conviction relief in the Tulsa County District Court to raise his claim of ineffective assistance of appellate counsel. The District Court must decide if the doctrine of laches precludes petitioner from raising his claim and, if not, whether he was denied an appeal through no fault of his own. If he was, the District Court will recommend an appeal out of time to the Court of Appeals under Rule 2.1(E), as the courts did in Lozoya v. State, 932 P.2d 22 (Okla. Crim. App. 1996) and Young v. State, 902 P.2d 1089 (Okla. Crim. App. 1994). If the District Court refuses to consider petitioner's petition, he can bring his claim to federal court and show he has exhausted his state remedies and has no available state avenue of redress.

Petitioner's Motion to Expedite Cause (Docket #6) is granted by the court's action in issuing this report and recommendation. Respondent's Motion to Dismiss for Failure to Exhaust State Remedies (Docket #3) should be granted and petitioner's Petition for a Writ of Habeas Corpus (Docket #1), which is a mixed petition, should be denied without prejudice to refiling once the state court has reviewed the claim of ineffective assistance of counsel.

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 21st day of July, 1997.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:\r&r\gardner.rr

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

24th day of July, 1997.

C. Fortello, Deputy Clerk

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

FILED

JUL 23 1997

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

ROSEMARY SLOAN,
Plaintiff,

v.

HATHAWAY CORPORATION,
Defendant.

Case No. 97-CV-443-H

ENTERED ON DOCKET
DATE JUL 24 1997

ORDER OF DISMISSAL

The parties to the action, by their counsel, have advised the Court that they have agreed that this case be dismissed with prejudice, each bearing their own costs and fees.

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE, and stricken from the docket.

IT IS SO ORDERED.

This 23rd day of July, 1997.



Sven Erik Holmes
United States District Judge

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

ENTERED ON BOOKS
7-24-97

DORCAS LUKENBILL,)
)
Plaintiff,)
)
v.)
)
BENEFICIAL OKLAHOMA, INC.;)
CHARLES GROOM and)
DEBBIE OSBORNE,)
)
Defendants.)

Case No. 96-CV-1048K

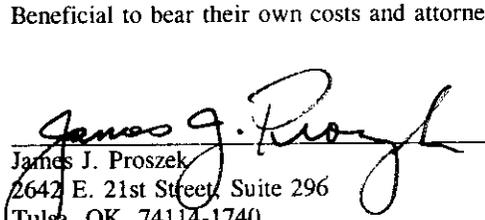
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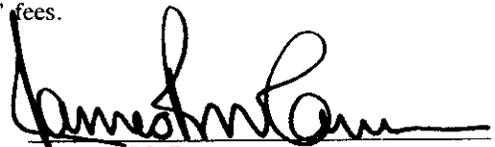
JUL 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL WITH PREJUDICE

Dorcias Lukenbill, Beneficial Oklahoma, Inc., Debi Osborn, and Charles Groom, by and through their counsel, pursuant to Fed. R. Civ. P. 41(a)(1), hereby stipulate to dismiss with prejudice to any subsequent refileing all claims and causes of action of the Plaintiff in the above-captioned matter against Defendant Beneficial Oklahoma, Inc., only, with Plaintiff and Defendant Beneficial to bear their own costs and attorneys' fees.


James J. Proszek
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Dorcias Lukenbill

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Attorneys for Defendants,
Charles Groom and Debi Osborn

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

DORCAS LUKENBILL,)

Plaintiff,)

v.)

Case No. 96-CV-1048K

BENEFICIAL OKLAHOMA, INC.;)

CHARLES GROOM and)

DEBBIE OSBORNE,)

Defendants.)

DISMISSAL WITH PREJUDICE

Dorcac Lukenbill, Beneficial Oklahoma, Inc., Debi Osborn, and Charles Groom, by and through their counsel, pursuant to Fed. R. Civ. P. 41(a)(1), hereby stipulate to dismiss with prejudice to any subsequent refiling all claims and causes of action of the Plaintiff in the above-captioned matter against Defendant Beneficial Oklahoma, Inc., only, with Plaintiff and Defendant Beneficial to bear their own costs and attorneys' fees.

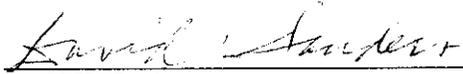
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Attorneys for Defendants,
Charles Groom and Debi Osborn

LM

FILED ON BOOKET

7-24-97

FILED

JUL 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICHARD STUTSMAN,)
)
Plaintiff,)
)
v.)
)
CLARENDON NATIONAL)
INSURANCE COMPANY,)
)
Defendant(s).)

Case No. 96-C-683-K(W)

DISMISSAL WITH PREJUDICE

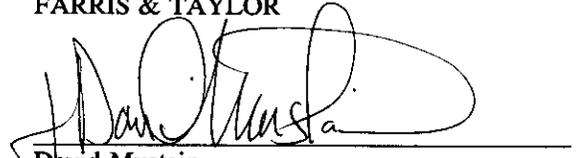
COMES NOW the Plaintiff, Richard Stutsman, and dismisses the above cause of
action with prejudice to his right to bring a further cause of action.

Dated this 23rd day of July, 1997.

PLAINTIFF


Richard Stutsman

FELDMAN, FRANDEN, WOODARD,
FARRIS & TAYLOR


David Mustain
Attorney for Plaintiff

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cb

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7-24-97

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

FILED

JUL 23 1997

Phil Lombardi, Clerk U.S. DISTRICT COURT

INTERNATIONAL MARINE & GAMING, INC., a Delaware corporation, Plaintiff,

vs.

Case No. 95 C 626 K

HELVETIA FINANCE, S.A.B.V.I., a British Islands corporation, HELVETIA FINANCE, S.A., a Swiss corporation, BURLINGAME AND FRENCH, a California partnership; DAISY BURLINGAME, an individual, ELLIE FRENCH, an individual, JACK E. STOOKEY, an individual, ANDRE MOERLEN, an individual, and CARL L. GODFREY, an individual, and THE AUSTIN COMPANY, an Ohio corporation, Defendants.

STIPULATION OF DISMISSAL

I, Jack E. Stookey, hereby stipulate to the dismissal of this action.

Dated this 18 day of July 1997.

Handwritten signature of Jack E. Stookey

Jack E. Stookey

STATE OF Oklahoma)) ss. COUNTY OF Oklahoma)

SUBSCRIBED and SWORN TO before me this 18th day of July 1997.

Handwritten signature of Notary Public

My commission expires: 7-30-2000

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0701

CERTIFICATE OF MAILING

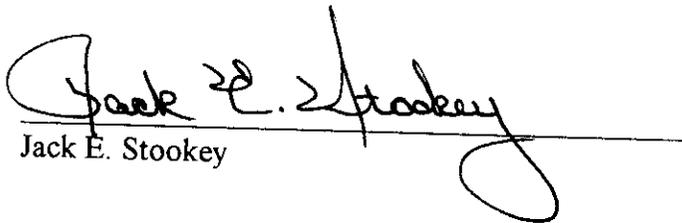
This is to certify that a true and correct copy of the foregoing instrument was deposited in the U.S. Mail this 23rd day of June, 1997, addressed to the following, with postage thereon fully prepaid:

Harlan S. Pinkerton
Stewart & Elder
1012 Atlas Life Bldg.
415 South Boston Ave.
Tulsa, OK 74103-5066

A. T. Elder, Jr.
Stewart & Elder
1329 Classen Dr.
P.O. Box 2056
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Jack L. Brown
Jones, Givens, Gotcher & Bogan, P.C.
15 East 5th Street, Suite 3800
Tulsa, OK 74103

Carl L. Godfrey
c/o Richard Sax
2192 Palomar
Airport Road, 2nd Floor
Carlsbad, CA 92008


Jack E. Stookey

7-24-97

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JUL 23 1997

THOMAS E. WOLFE,)
)
 Petitioner,)
)
 v.)
)
 RON WARD, warden, and the ATTORNEY)
 GENERAL of the STATE OF OKLAHOMA,)
)
 Respondent.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-840-K(J) ✓

REPORT AND RECOMMENDATION

Petitioner, Thomas E. Wolfe, filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on September 12, 1996. Petitioner, currently confined in the Oklahoma State Penitentiary in McAlester, Oklahoma, challenges his prior convictions in Tulsa County. By minute order dated December 31, 1996, the District Court referred the case for further proceedings consistent with the Magistrate Judge's jurisdiction. On November 4, 1996, Respondent filed a Motion to Dismiss, asserting that the District Court should dismiss Petitioner's petition because it was a "mixed petition." For the reasons discussed below, the United States Magistrate Judge recommends that the Motion to Dismiss be **DENIED**.

I. PROCEDURAL BACKGROUND

Plaintiff was convicted on July 6, 1993, and sentenced to four 20 year sentences and two ten year sentences, to run concurrently. Petitioner filed an Application for Post-Conviction Relief on June 11, 1996 in the Tulsa County District Court. Petitioner asserted that he was denied effective assistance of counsel because

his attorney did not object to "the illegal manner in which Petitioner was convicted and did not fully advise Petitioner of his legal rights." See Petitioner's Application for Post-Conviction Relief, attached to Respondent's Brief in Support of Motion to Dismiss, Tulsa County District Court, filed June 11, 1996 [Doc. No. 5-1]. Petitioner asserted that he had a low reading and writing ability and did not understand the proceedings, that he was not competent to sign the guilty plea, that the charges against him were cumulative, that no factual basis existed for the guilty plea, that he was subjected to double jeopardy, that all of his charges stemmed from the "same transaction or impulse," and that he was improperly fined and sentenced.

On June 24, 1996, the Tulsa County District Court entered an Order denying Petitioner's Application for Post-Conviction Relief. See Petitioner's Petition for a Writ of Habeas Corpus, [Doc. No. 1-1]. Petitioner appealed the decision to the Court of Criminal Appeals of the State of Oklahoma. On August 27, 1996, the Court of Criminal Appeals affirmed the decision of the trial court denying post-conviction relief. The Court of Criminal Appeals noted that Petitioner raised the issues of ineffective assistance of counsel, lack of competence, stacked or cumulative charges, lack of factual basis for a guilty plea, double jeopardy, sentencing to six charges which occurred from the same impulse, and double jeopardy. The Court agreed with the District Court's evaluation of Petitioner's claim of ineffective assistance of counsel. With respect to the remaining issues, the Court concluded that Petitioner did not assert sufficient reasons for his failure to directly appeal the issues. The Court of Criminal

Appeals affirmed the District Court of Tulsa County's decision denying Petitioner's Application for Post-Conviction Relief.

Petitioner filed this Petition for a Writ of Habeas Corpus on September 12, 1996. In the action before this Court, Petitioner asserts "ineffective assistance of counsel." In the "facts supporting his claim" of ineffective assistance of counsel, Petitioner argues that he has a low reading ability, that there was insufficient evidence to support a conviction, that his counsel did not object to "illegalities," and that counsel coerced Petitioner into pleading guilty to charges. Petitioner also asserts, as additional issues in his Petition, that he was not competent to enter into a guilty plea, that Petitioner was convicted of stacked and cumulative charges, that no factual basis exists for the entry of the guilty plea, that Petitioner was subjected to double jeopardy, and that the state court failed to sufficiently address all of the issues.

Respondent filed a Motion to Dismiss for Filing a Mixed Petition on November 4, 1996. [Doc. No. 5-1]. Respondent asserts that Petitioner has filed a mixed petition raising exhausted and unexhausted claims and that the Court should therefore dismiss Petitioner's Petition. Specifically, Respondent notes that Petitioner has asserted "ineffective assistance of counsel" claims. Respondent acknowledges that the majority of Petitioner's ineffective assistance of counsel claims were presented to the state court. However, Respondent asserts that Petitioner is raising a new issue by asserting that he was coerced by his counsel into entering a guilty plea. Respondent argues that the Court should dismiss Petitioner's claim as a mixed petition because

Petitioner has included this new issue which is not exhausted along with his "exhausted" claims.

II. ANALYSIS

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal

petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

The general rule that a federal court should dismiss a "mixed" petition has a narrow exception. The "futility exception" provides that a mixed petition should not be dismissed "if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." Duckworth v. Serrano, 454 U.S. 1, 3 (1981). The Tenth Circuit has stated that a "rigorously enforced" exhaustion policy is necessary to serve the end of protecting and promoting the state's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982).

However, in Harris v. Champion, 48 F.3d 1127 (10th Cir. 1995), the Tenth Circuit Court of Appeals noted that

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

Id. at 1131 n.3 (citations omitted). The Tenth Circuit referenced the Supreme Court decision in Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). The Coleman court observed that

This rule [that a state court must articulate in its order its reliance on a procedural bar] does not apply if the petitioner failed to exhaust state remedies and the court to which the

petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

Coleman, 501 U.S. at 735 n.1. The majority opinion in Coleman, authored by Justice O'Connor, cites Harris v. Reed, 489 U.S. 255 (1988) (O'Connor, J., concurring). In Harris, Justice O'Connor noted that

I do not read the Court's opinion as addressing or altering the well-settled rule that the lower federal courts, and this Court, may properly inquire into the availability of state remedies in determining whether claims presented in a petition for federal habeas corpus have been properly exhausted in the state courts. . . . [I]n determining whether a remedy for a particular constitutional claim is "available," the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim.

* * *

[W]e have held that where a federal habeas petitioner raises a claim which has never been presented in any state forum, a federal court may properly determine whether the claim has been procedurally defaulted under state law, such that a remedy in state court is "unavailable" within the meaning of § 2254(c).

* * *

Moreover, dismissing such petitions for failure to exhaust state court remedies would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him.

* * *

In sum, it is simply impossible to "require a state court to be explicit in its reliance on a procedural default," where a claim raised on federal habeas has never been presented to the state courts at all. In such a context, federal courts quite properly look to, and apply, state procedural default

rules in making the congressionally mandated determination whether adequate remedies are available in state court.

Id. at 268-270 (citations omitted).

The purpose of the requirement that claims must first be presented to state court before they are raised in federal court is to permit the state court the opportunity to address the issue before it is addressed by the federal court. Raising an "ineffective assistance of counsel" claim is insufficient to apprise a state court that a petitioner is claiming that his counsel coerced him into accepting a guilty plea. Therefore, Petitioner's claim has not been "exhausted." However, if Petitioner's claim is procedurally barred under state law, the Court should deny Respondent's Motion to Dismiss and apply state procedural default rules in determining whether requiring Petitioner to exhaust his state remedies is futile.

Oklahoma has consistently declined to review claims which were not raised in the first request for post-conviction relief.

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

22 O.S. 1991, § 1086.

In this case, Petitioner did not directly appeal his convictions. In addition, Petitioner did not present, in his first post-conviction application, the coercion issue

which Petitioner now requests this Court to consider. If Petitioner chose to present this claim to the state court (or if the district court dismissed this Petition and required Petitioner to present his claims to the state district court), Petitioner's action would constitute his second post-conviction request for relief. Petitioner has therefore procedurally defaulted his claims, and requiring him to present his claims in state court would be "futile." Consequently, the magistrate judge recommends that this Court should not dismiss Petitioner's petition and require Petitioner to first present his "unexhausted" claims to the state court. However, because consideration of the "unexhausted" issues is proper only if this Court finds that the state court, if presented with the issues, would not address the issues on the merits due to Petitioner's procedural default, this Court should not consider the issues Petitioner raises unless Petitioner shows cause and prejudice for the default, or demonstrates that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 501 U.S. 722, 749-50.¹⁷

RECOMMENDATION

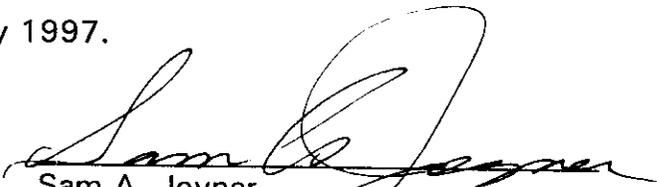
The United States Magistrate Judge recommends that the District Court **DENY** Respondent's Motion to Dismiss and order Petitioner to submit a brief explaining why the coercion issue raised in his Petition for a Writ of Habeas Corpus meets the cause

¹⁷ The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. A petitioner is additionally required to establish prejudice, which requires showing " 'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The alternative is proof of a "fundamental miscarriage of justice," which requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

and prejudice standard, as discussed above. Respondent should be ordered to respond to all issues raised in the Petition for a Writ of Habeas Corpus and in the brief addressing the cause and prejudice standard, within thirty days of the filing of the brief. Petitioner should be required to file his reply within twenty days.

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

Dated this 23 day of July 1997.


Sam A. Joyner
United States Magistrate Judge

ENTERED ON DOCKET
7-24-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RODNEY KEITH DICK,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY FIELDS, DAVID MILLER, JOHN)
 MIDDLETON, HOWARD RAY, TROY)
 ALEXANDER, and One Unknown Defendant)
 referred to as JOHN DOE, all sued in their)
 official and individual capacities,)
)
 Defendants.)

Case No. 96-C-1178-K(J) ✓

F I L E D

JUL 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT & RECOMMENDATION

Plaintiff filed a civil rights complaint pursuant to § 1983, which is file-stamped December 23, 1996. By minute order dated December 23, 1996, the case was referred to the undersigned magistrate judge for all further proceedings consistent with his jurisdiction. Defendants David Miller, John Middleton, Howard Ray, Troy Alexander, and James Crafton (a.k.a. John Doe) filed a Motion to Dismiss Plaintiff's action on January 14, 1997.

Facts and Background

Plaintiff generally alleges that he was improperly exposed to and forced to work with friable asbestos materials while he was a prisoner housed by the Department of Corrections. Plaintiff asserts that on December 14, 1994, he was transferred to a recently constructed facility in Vinita, Oklahoma. Plaintiff contends that he was taken to and housed in an "older" building which had several signs indicating that the

building had been condemned due to asbestos contamination. Plaintiff notes that he was forced to help clean dust and debris in the building, After several requests for a transfer, Plaintiff states that he was finally transferred on December 23, 1994. Plaintiff contends that Defendants intentionally and maliciously exposed him to asbestos for nine days.

Motion to Dismiss

Failure to Exhaust Administrative Remedies

Defendants assert that the Prison Litigation Reform Act ("PLRA") was enacted on April 26, 1996, and requires a prisoner to first exhaust any available administrative remedies before filing a lawsuit in court. Plaintiff notes that the PLRA was not passed until approximately 18 months after Plaintiff was exposed to asbestos. In addition, Plaintiff asserts that the "effective date" provision of the administrative remedies referred to by Plaintiff is April 21, 1995, or four months after Plaintiff's asbestos exposure. Defendants filed no reply to Plaintiff's response brief.

Defendants attach two excerpts from the "Policy and Operations Manual" for the "Inmate/Offender Grievance Process." Both excerpts provide an effective date of April 21, 1995. Plaintiff was exposed to asbestos in December 1994. Defendants do not explain or provide any information to the Court as to the administrative procedure which was in effect when Plaintiff was exposed to asbestos. Plaintiff additionally argues that the grievance procedure required that an inmate submit the grievance within 15 calendar days of the incident. Plaintiff notes that the incident occurred in December of 1994, but the procedure which requires him to submit a grievance within

fifteen days was not enacted until four months after the incident. Plaintiff therefore asserts that compliance with the grievance procedure is impossible. Plaintiff's argument seems well taken, and Defendants do not respond to it.

Defendants appear to be requesting the Court to require a prisoner to comply with an administrative procedure which was not in effect at the time of the incident about which the prisoner is complaining. In addition, under the circumstances of this case, compliance with the administrative procedure seems impossible. Defendants do not address Plaintiff's arguments that the administrative procedure was not in effect at the time of the incident, and that Plaintiff could therefore not have fulfilled the fifteen day requirement. Based on the information thus far provided by Defendants, the magistrate judge concludes that Plaintiff has not failed to exhaust his administrative remedies, and recommends that the District Court deny Defendants' Motion to Dismiss for failure to exhaust.

Statute of Limitations

Defendants note that Plaintiff claims he was exposed to asbestos from December 14, 1994 until December 23, 1994. Defendants assert that the applicable statute of limitations is the Oklahoma two year statute of limitations which is applicable to tort claims. Defendants therefore assert that because Plaintiff did not file his claim until December 23, 1996, Plaintiff's claim is barred by the statute of limitations.

Plaintiff asserts that Federal Rule of Appellate Procedure 25 permits him to claim the date on which he mailed his complaint as the date of filing. Plaintiff is correct that

the Federal Rule of Appellate Procedure has such a provision. However, the appellate rules do not apply to actions proceeding in district court. The Court directs Plaintiff to the Federal Rules of Civil Procedure. No such provision is contained within the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure contemplate filing as equivalent to filing with the court clerk. Fed. R. Civ. P. 5(e)

Defendant is correct that the Oklahoma two year statute of limitations governs this proceeding. "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The Tenth Circuit has held, with respect to § 1983 actions, that the "most analogous statute of limitations in Oklahoma is the two-year provision on claims for 'injury to the rights of another, not arising on contract, and not hereinafter enumerated.'" Maeve v. Grubbs, 841 F.2d 1512, 1524 (1988), referring to 12 O.S. § 95(3). Consequently, Plaintiff's claim, to be timely, must be filed within two years "after the cause of action accrued." See 12 O.S. 1991, § 95.

Defendants' argument assumes that Plaintiff's cause of action is untimely if it is filed on December 23, 1997. Plaintiff claims he was improperly exposed to asbestos from December 14, 1997 until December 23, 1997. Oklahoma has concluded that the day of injury is not included in determining the two year limitation period. See Camps v. Taylor, 892 P.2d 633 (Okla. 1995) ("The ancient rule was that in computing a period of time from the occurrence of a given event, the day the event occurred was included. The great weight of modern authority, however, excludes the

day the event happens.") (citations omitted). The last day of Plaintiff's alleged exposure was December 23, 1994. Therefore, Plaintiff is "timely" as long as Plaintiff filed his claim by December 23, 1996.^{1/} Plaintiff's Petition is file-stamped December 23, 1996. The magistrate judge therefore recommends that the District Court deny Defendants' Motion to Dismiss Plaintiff's claim based on the statute of limitations.

Qualified Immunity

Plaintiff has sued each of the Defendants in their official and individual capacities. Defendants assert that each of them acted in their official capacity as public officials employed by the Department of Corrections and that they should be entitled to the protections afforded by qualified immunity.

Under the doctrine of qualified immunity, a Defendant cannot be held personally liable unless Plaintiff can establish that the Defendant's actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). See also Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir.1988). When the qualified immunity defense is raised in a motion for summary judgment, Plaintiff must show (1) that the defendant's conduct violates the law as it now exists, and (2) that the law was clearly established at the time of the alleged unlawful

^{1/} The court treats Plaintiff's claim as a "continuing tort" for the purpose of determining whether the statute of limitations bars the claim. Neither party discusses, and the court does not decide, whether portions of Plaintiff's claim may be barred. (For example, to the extent Plaintiff was injured by exposure to asbestos from December 14 until December 22, 1994, can Plaintiff claim damages for such injury when Plaintiff did not file until December 23, 1996, or is Plaintiff limited to damages beginning December 23, 1994?) In addition, the court does not address the extent to which the "discovery rule" may apply to Plaintiff's cause of action.

conduct. Cummins v. Campbell, 44 F.3d 847, 850 (10th Cir.1994); Albright v. Rodriguez, 51 F.3d 1531, 1534 (10th Cir.1995). If Plaintiff fails to carry either part of this burden, Defendant is entitled to qualified immunity. Id. at 1535; Thompson v. City of Lawrence, 58 F.3d 1511, 1515 (10th Cir.1995).

"The key to the [qualified immunity] inquiry is the objective reasonableness of the official's conduct in light of the legal rules that were clearly established at the time the action was taken." Laidley v. McClain, 914 F.2d 1386, 1394 (10th Cir.1990). It is not sufficient that the right at issue be clearly established at a general level. The inquiry must be more particularized -- was the right clearly established under the particular factual situation presented by the case at hand? See Anderson v. Creighton, 483 U.S. 635 (1987). For the law to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992).

In Helling v. McKinney, 509 U.S. 25 (1993), the Supreme Court concluded "[t]hat the Eighth Amendment protects against future harm to inmates is not a novel proposition." Id. at 33.

We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.

Id. In Powell v. M.C. Lennon, 914 F.2d 1459, 1464 (11th Cir. 1990), the Eleventh Circuit relying on the Supreme Court decision in Estelle, concluded that failing to

remove a prisoner from an area after learning of asbestos contamination constituted deliberate indifference. In McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1990), the Ninth Circuit noted,

If making inmates breathe stagnant air is cruel and unusual punishment, it must be even more so to force inmates to breathe air containing levels of known human carcinogens sufficient to pose an unreasonable risk of harm to human health. It is hard to imagine that our society would tolerate exposing inmates to dangerous levels of any other Group A carcinogens, like benzene, asbestos, or arsenic.

Id. at 1507. The court in McKinney relied, in part, on the Tenth Circuit decision in Ramos v. Lamm, 639 F.2d 559, 567-72 (10th Cir. 1980). See also Gonyer v. McDonald, 874 F. Supp. 464, 466 (D. Mass. 1995) (“[A] prisoner may bring an Eighth Amendment claim that environmental hazards in a prison, such as exposed asbestos, pose an unreasonable risk of serious damage to future health.”).

The magistrate judge concludes that sufficient legal authority existed, at the time Plaintiff claims he was intentionally exposed to asbestos, to place officials on notice that the Eighth Amendment protects prisoners from exposure to environmentally hazardous materials, such as asbestos, which could pose an unreasonable risk of harm to a prisoner’s health. The magistrate judge recommends that the District Court deny Plaintiff’s Motion to Dismiss based on qualified immunity.

Eleventh Amendment Immunity

Defendants assert that a suit against a prison official in his official capacity is actually a lawsuit against the State of Oklahoma. Defendants note that under the

Eleventh Amendment the State of Oklahoma is immune from suit, and therefore the lawsuits against Defendants in their official capacity should be dismissed.

"A State is not a person within the meaning of § 1983." Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989). Thus, although "[s]ection 1983 provides a federal forum to remedy many deprivations of civil liberties, . . . it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." Id. at 66. Moreover, "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (citations omitted). See also Eastwood v. Dep't of Corrections of State of Okla., 846 F.2d 627 (10th Cir. 1988) (suit against the Department of Corrections barred by the Eleventh Amendment which prohibits suits in federal court against a state by its own citizens or by citizens of another state).

The State of Oklahoma has not expressly waived its Eleventh Amendment immunity. See Nichols v. Department of Corrections, 631 P.2d 746, 750-51 (Okla. 1981). Therefore, the State is immune from suit by the Plaintiff in federal court. Plaintiff has sued numerous prison officials "in their official capacity." To the extent that a suit against a prison official in his official capacity constitutes a suit against the State, Plaintiff is prohibited from bringing such an action in federal court. Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State

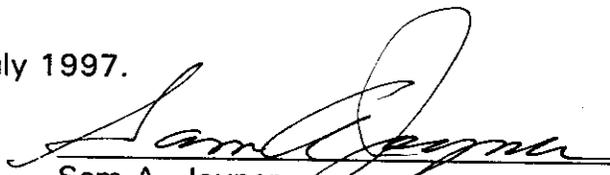
itself.”). The undersigned magistrate judge recommends that the District Court dismiss all claims against the Defendants acting in “their official capacity.” Such a dismissal does not preclude Plaintiff from continuing this action against such officials in “their personal capacity,” and does not preclude the filing of this action by Plaintiff in State court.

RECOMMENDATION

The undersigned magistrate judge recommends that Defendants’ Motion to Dismiss be **DENIED** in part and **GRANTED** in part. With respect to Defendants’ claims based on exhaustion, the statute of limitations, and qualified immunity, the magistrate judge recommends that Defendants’ Motion be **denied**. With respect to Defendants’ claims based on Eleventh Amendment immunity, the magistrate judge recommends that Defendants’ Motion be **granted**, and that all claims against Defendants in their “official capacity” be dismissed.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 23 day of July 1997.


Sam A. Joyner
United States Magistrate Judge

7-24-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RODNEY KEITH DICK,

Plaintiff,

vs.

LARRY FIELDS, DAVID MILLER, JOHN
MIDDLETON, HOWARD RAY, TROY
ALEXANDER, and One Unknown Defendant
referred to as JOHN DOE, all sued in their
official and individual capacities,

Defendants.

Case No. 96-C-1178-K(J) ✓

F I L E D

JUL 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT & RECOMMENDATION

Plaintiff filed a civil rights complaint pursuant to § 1983, which is file-stamped December 23, 1996. By minute order dated December 23, 1996, the case was referred to the undersigned magistrate judge for all further proceedings consistent with his jurisdiction. Defendant Larry Fields filed a Motion to Dismiss Plaintiff's action on January 29, 1997.^{1/}

Facts and Background

Plaintiff generally alleges that he was improperly exposed to and forced to work with friable asbestos materials while he was a prisoner housed by the Department of Corrections. Plaintiff asserts that on December 14, 1994, he was transferred to a recently constructed facility in Vinita, Oklahoma. Plaintiff contends that he was taken

^{1/} The remaining Defendants filed a separate Motion to Dismiss on January 14, 1997. That Motion is dealt with in a separate Report and Recommendation.

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to and housed in an "older" building which had several signs indicating that the building had been condemned due to asbestos contamination. Plaintiff notes that he was forced to help clean dust and debris in the building, After several requests for a transfer, Plaintiff states that he was finally transferred on December 23, 1994. Plaintiff contends that Defendants intentionally and maliciously exposed him to asbestos for nine days.

Motion to Dismiss

Improper Service

Defendant asserts that a part-time clerk at the Department of Corrections signed the "green card" for the Summons and Complaint. According to Defendant, the clerk was not authorized to accept service of process for Defendant. Defendant therefore asserts that he has not been properly served and requests that the Court dismiss the action. Plaintiff argues that the clerk worked for the Department of Corrections and that the clerk is presumed to have authority to accept service for Defendant unless Defendant can establish otherwise.

Plaintiff has sued Defendant in his official and individual capacity. The Court separately addresses whether service is proper with respect to Plaintiff's cause of action against Defendant in his official and in his individual capacity.

Official Capacity

Plaintiff has initially sued Defendant in his official capacity. In accordance with the Federal Rules of Civil Procedure, service on a "corporation or association" is made in the manner prescribed for individuals by subdivision

(e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant

Fed. R. Civ. P. 4(h). Plaintiff served Defendant, in his official capacity, by certified mail. The return receipt was signed by Kelly Gardner. Defendant states that Kelly Gardner is not authorized to accept service of process. Plaintiff asserts that Defendant has not established the identity (by affidavit or otherwise) of the individual who signed the green card, and has not established that this person lacks authority to accept service for Defendant in his official capacity. Plaintiff is correct. Plaintiff has filed a proof of service indicating that a copy of the summons and complaint was mailed to Defendant, at his place of business, and signed for by an individual working at that business. Defendant has the burden of proof to establish that service is improper, and Defendant has not met that burden.

However, assuming service is effective, it is effective only with respect to Plaintiff's suit against Defendant "in his official capacity." A lawsuit against an individual in his official capacity is the equivalent of a lawsuit against the "state" and is therefore prohibited by the doctrine of immunity. See Eastwood v. Dep't of Corrections of State of Okla., 846 F.2d 627 (10th Cir. 1988) (suit against the Department of Corrections barred by the Eleventh Amendment which prohibits suits in federal court against a state by its own citizens or by citizens of another state).

The State of Oklahoma has not expressly waived its Eleventh Amendment immunity. See Nichols v. Department of Corrections, 631 P.2d 746, 750-51 (Okla. 1981). Therefore, the State is immune from suit by the Plaintiff in federal court. To the extent that a suit against a prison official in his official capacity constitutes a suit against the State, Plaintiff is prohibited from bringing such an action in federal court. Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989) (“[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. As such, it is no different from a suit against the State itself.”).

Personal Capacity

Plaintiff has additionally sued Plaintiff in his personal capacity. Pursuant to Fed. R. Civ. P. 4, service on an individual “from whom a waiver has not been obtained and filed,” is effected

pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or . . . by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e). Therefore, to constitute effective service, Plaintiff must either comply with state law, or serve Defendant Fields personally, or deliver a copy of the complaint to Defendant Fields’ house. Plaintiff did not deliver a copy of the complaint

to Defendant personally or leave a copy at Defendant's house. Therefore, to be effective, Plaintiff must have complied with state law.

Oklahoma provides that service by mail shall be by "mailing a copy of the summons and petition by certified mail, return receipt requested and delivery restricted to the addressee." 12 O.S. 1991, § 2004(C)(2). Plaintiff did not restrict delivery to Defendant Fields, and therefore the certified mail "green card" was signed by an employee of the Department of Corrections. Plaintiff states that the Oklahoma statutes provide that the return receipt is presumed to have been signed by somebody authorized to receive the certified mail. Plaintiff is correct that that language does appear in the Oklahoma statute. However, the reference in the statute is to service on a corporation, and, in this instance Plaintiff is attempting to serve Defendant Fields "in his personal capacity," not in his "official capacity."

In the case of an entity described in division (3) of subparagraph c of paragraph 1 of this subsection, [domestic or foreign corporation of . . . partnership] acceptance or refusal by any officer or by any employee of the registered office or principal place of business who is authorized to or who regularly receives certified mail shall constitute acceptance or refusal by the party addressed. A return receipt signed at such registered office or principal place of business shall be presumed to have been signed by an employee authorized to receive certified mail.

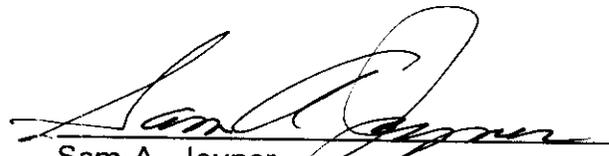
12 O.S. 1991, § 2004(C)(2)(c). Consequently, Plaintiff's attempted service is not effective with respect to Plaintiff's cause of action against Defendant Fields in his personal capacity.

RECOMMENDATION

The undersigned magistrate judge recommends that Defendant's Motion to Dismiss Defendant Fields be **GRANTED**. Plaintiff has sued Defendant Fields in his official and personal capacity. Service against Defendant Fields in his personal capacity has not been made pursuant to the Federal Rules of Civil Procedure and is therefore ineffective. Assuming service against Defendant Fields in his "official capacity" is sufficient, Plaintiff is prohibited from bringing such a cause of action in federal court pursuant to the restrictions of the Eleventh Amendment. The magistrate judge therefore recommends that Defendant's Motion to Dismiss be **GRANTED**, and that Plaintiff's cause of action against Defendant Fields be **DISMISSED**.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. *See, e.g., Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991).

Dated this 23 day of July 1997.


Sam A. Joyner
United States Magistrate Judge

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

JUL 23 1997
PL

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOSEPH KENNETH RAY, II,)
)
 Plaintiff,)
)
 vs.)
)
 McCURTAIN COUNTY JAIL, et al.,)
)
 Defendant.)

No. 97-CV-130-Bu(J) /

ENTERED ON DOCKET
JUL 24 1997
DATE _____

REPORT & RECOMMENDATION

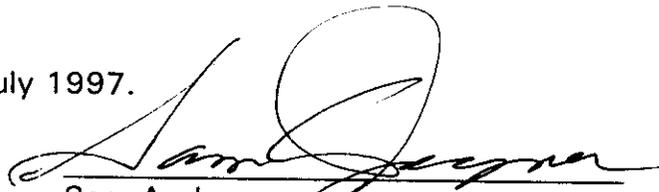
Plaintiff filed this action on February 11, 1997. Plaintiff did not pay the initial filing fee or file a motion to proceed *in forma pauperis*. By Order dated March 7, 1997, Plaintiff was directed to pay the appropriate filing fee or file an application to proceed *in forma pauperis*. The March 7, 1997 Order was returned, "addressee unknown," on March 17, 1997. On April 8, 1997, the Order was again mailed to Plaintiff's updated address. As of June 13, 1997, Plaintiff had still not paid the initial filing fee and had still not filed a motion to proceed *in forma pauperis*. The court issued an Order to Show Cause on June 13, 1997. The Order directed Plaintiff to show cause for his failure to pay the appropriate filing fee. Plaintiff was additionally cautioned that a failure to pay the appropriate fee could result in the dismissal of this action without further notice. Plaintiff has not responded to the Order to Show Cause. The undersigned Magistrate Judge recommends that the District Court dismiss this action without prejudice due to Plaintiff's failure to pay the appropriate filing fee.

RECOMMENDATION

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

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 23 day of July 1997.



Sam A. Joyner
United States Magistrate Judge

15
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 21 1997

FEDERAL DEPOSIT INSURANCE CORPORATION,)
)
Plaintiff,)
)
v.)
)
LOUIS B. GRANT, JR., *et al.*,)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 92-CV-1043-H(J)

ENTERED ON DOCKET

DATE JUL 23 1997

REPORT AND RECOMMENDATION

The following motions have been referred to the undersigned for report and recommendation:^{1/}

1. "Motion to Dismiss or, In the Alternative, Motion for Summary Judgment . . . of Defendants Louis W. Grant, Jr. and Charles B. Grant" [Doc. No. 75];^{2/}
2. "Motion for Summary Judgment of Defendants, Gollust and Tierney" [Doc. No. 76];^{3/}
3. "Motion for Summary Judgment of Defendants J. Lawrence Mills, Jr., Edward Jacoby and W.R. Hagstrom" [Doc. No. 78];^{4/} and
4. "Motion for Summary Judgment of Defendant Rod L. Reppe" [Doc. No. 80].^{5/}

^{1/} See 28 U.S.C. § 636; Fed. R. Civ. P. 72; and N.D. LR 72.1.

^{2/} See Doc. Nos. 75, 88, 89, 94, 225, 228, 269, 280, 296, 312 & 315.

^{3/} See Doc. Nos. 76, 77, 88-90, 97, 113, 117, 198, 201, 227, 278, 294, 296, 313, 315 & 316.

^{4/} See Doc. Nos. 78, 79, 88-90, 93, 198, 226, 279, 282, 296, 312, 314 & 315.

^{5/} See Doc. Nos. 80, 81, 88-90, 198.

Messrs. Gollust, Grant, Hagstrom, Jacoby, Mills, Reppe and Tierney (hereinafter referred to as the Defendants) argue that Plaintiff's claims against them must be dismissed because (1) the applicable statute of limitations bars Plaintiff's claims, (2) Plaintiff is estopped from asserting its current accrual argument in connection with the applicable statute of limitations, and/or (3) various loans identified by Plaintiff for the first time in its November 11, 1993 court-ordered Disclosure Report cannot be asserted in this case. For the reasons discussed below, the undersigned recommends that Defendants' motions be **DENIED**.

I. **INTRODUCTION**

Defendants were inside officers and/or directors of Sooner Federal Savings and Loan Association ("Sooner Federal"), a federally chartered, federally insured depository institution. Defendants have previously been referred to in this litigation as the non-group I/inside directors. Plaintiff seeks to hold Defendants liable for loans approved, made and/or supervised by Defendants. Plaintiff alleges that by making, approving and/or supervising the loans, Defendants (1) were negligent, (2) breached their contract with Sooner Federal to serve as prudent officers and directors, and/or (3) breached their fiduciary duty to Sooner Federal. See Second Amended Complaint, Counts I, II and III, Doc. No. 35. Defendants argue that under all of the theories of liability asserted by Plaintiff, a claim based on a bank officer's or director's making, approving and/or supervising a loan accrues when the bank disburses the loan proceeds (i.e., when the loan is made). Under Defendants' accrual theory, most, if not all, of Plaintiff's claims would be barred by the applicable statute of limitations.

A. **FIRREA's APPLICATION**

By late 1989, Sooner Federal was in trouble and on November 16, 1989, the Department of the Treasury's Office of Thrift Supervision ("OTS") appointed the Federal Deposit Insurance Corporation ("FDIC")^{6/} as conservator for Sooner Federal pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. §§ 1441a(b), 1464(d)(2) and 1821(c)(6). See Exhibit D, Doc. No. 315. Pursuant to 12 U.S.C. § 1821(d)(2)(A)(i), the FDIC steps into the shoes of a failed, federally insured depository institution and thereby obtains those rights of the

^{6/} The OTS originally appointed the Resolution Trust Corporation ("RTC") as Sooner Federal's conservator. However, pursuant to the Resolution Trust Corporation Completion Act, 12 U.S.C. § 1441a(m)(1) and (2), the RTC ceased to exist after December 31, 1995. As of January 1, 1996, all assets and liabilities of the RTC were transferred to the FDIC as manager of the FSLIC Resolution Fund. See 12 U.S.C. § 1821a(a)(1). The FDIC has previously been substituted for the RTC as the Plaintiff in this action. A reference to the FDIC shall also be a reference to the RTC for that period of time when the RTC was in control of this litigation.

institution which existed prior to the conservatorship. O'Melveny & Myers v. FDIC, 512 U.S. 797(1994).

Ordinarily, the statute of limitations applicable to an action for money damages brought by the United States or one of its agencies is 28 U.S.C. § 2415. With FIRREA, Congress sought to strengthen the enforcement powers of Federal regulators of depository institutions. Consequently, FIRREA provides the FDIC with a special statute of limitations in its role as conservator of a failed depository institution. This special statute expands the limitations periods in § 2415. See 12 U.S.C. § 1821(d)(14). The applicable portion of FIRREA's special statute of limitations provides as follows:

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the [FDIC/RTC] as conservator or receiver shall be --

- (i) in the case of any contract claim, the longer of --
 - (I) the 6-year period beginning on the date the claim accrues; or
 - (II) the period applicable under State law; and
- (ii) in the case of any tort claim . . . , the longer of --
 - (I) the 3-year period beginning on the date the claim accrues; or
 - (II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of --

- (i) the date of the appointment of the [FDIC/RTC] as conservator or receiver; or
- (ii) the date on which the cause of action accrues.

12 U.S.C. § 1821(d)(14).

The shortest limitations period in § 1821(d)(14) is three years from the date the FDIC/RTC is appointed as conservator. Plaintiff became Sooner Federal's conservator on November 16, 1989 and this lawsuit was filed less than three years later on November 13, 1992. Thus, all of Plaintiff's claims are timely under FIRREA's extended statute of limitations.

Plaintiff must, however, pass one more hurdle for its claims to be considered timely. Plaintiff obtains the benefit of FIRREA's extended statute of limitations only if Plaintiff's claims were timely under state law on the date Plaintiff was appointed as conservator.^{7/} In other words, Plaintiff has the benefit of § 1821(d)(14)'s longer statute of limitations only if its claims against Defendants were timely under Oklahoma law on November 16, 1989, the date Plaintiff was appointed as Sooner Federal's conservator. The parties agree that this is the law. Because they each have different views as to when Plaintiff's claims "accrue" under Oklahoma law, the parties disagree on the issue of whether Plaintiff's claims would have been timely under Oklahoma law on November 16, 1989. Thus, Defendants' motions present the following central issue: What statute of limitations does Oklahoma apply to Plaintiff's negligence, breach of contract and breach of fiduciary duty claims and when do those claims "accrue" for purposes of the applicable Oklahoma statute of limitations?

^{7/} FDIC v. Regier Carr & Monroe, 996 F.2d 222, 225-26 (10th Cir.1993) (holding that FIRREA's longer limitations periods cannot be applied retroactively to revive claims that are already barred by a state statute of limitations before the FDIC is appointed); FDIC v. Thayer Ins. Agency, Inc., 780 F. Supp. 745 (D. Kan. 1991); FDIC v. Farris, 738 F. Supp. 444 (W.D. Okla. 1989); FDIC v. Cocke, 7 F.3d 396 (4th Cir. 1993), cert. denied 513 U.S. 807 (1994); Randolph v. RTC, 995 F.2d 611, 619 (5th Cir.1993), cert. denied 510 U.S. 1191 (1994); FDIC v. Shrader & York, 991 F.2d 216, 220 (5th Cir.1993), cert. denied 512 U.S. 1219 (1994); FDIC v. McSweeney, 976 F.2d 532, 534 (9th Cir.1992), cert. denied 508 U.S. 950 (1993); RTC v. Artley, 28 F.3d 1099 (11th Cir. 1994); RTC v. Krantz, 757 F. Supp. 915, 921 (N.D. Ill. 1991) (reasoning that a literal reading of § 1821(d)(14) would allow the FDIC to "revive claims relating to acts done during the Great Depression" by merely taking over a depository institution); FDIC v. Howse, 736 F. Supp. 1437, 1447 (S.D. Tex. 1990) (holding that the period provided in § 1821(d)(14) begins to run when the FDIC is appointed, as long as the state limitations period has not already expired).

**B. EFFECT OF THE UNITED SUPREME COURT'S HOLDINGS IN
ATHERTON AND O'MELVENY**

During the course of this litigation, the United States Supreme Court has decided two cases which dramatically impact cases brought by the FDIC. See O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994); and Atherton v. FDIC, --- U.S. ---, 117 S. Ct. 666 (1997). Both of these cases reinforce the holding in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938) that there is no general federal common law.^{8/} Ordinarily, the States have the authority to regulate activity within their borders. Federal common law rules are acceptable only when there is a "significant conflict between some federal policy or interest and the use of state law." O'Melveny, 114 S. Ct. at 2055. Both Atherton and O'Melveny establish, however, that the remote possibility that a federal corporation, such as a savings and loan, might wind up in a federal receivership or conservatorship does not provide a basis for creating special federal common law rules. In O'Melveny, the Court made it clear that the FDIC steps into the shoes of an insolvent savings and loan to work out the savings and loans' claims under state law, "except where some provision in the extensive framework of FIRREA provides otherwise." O'Melveny, 114 S. Ct. at 2054. Thus, the FDIC's claims in this case are governed by Oklahoma law, not by general federal common law, unless Oklahoma law conflicts with FIRREA or some other federal statutory provision.

C. PLAINTIFF'S ABANDONMENT OF LOAN CLAIMS

In its Second Amended Complaint, Plaintiff identifies 35 loans which it alleges were improperly approved, made and/or supervised by Defendants. See Doc. No. 35, ¶ 38. Throughout the course of litigation, however, Plaintiff has abandoned several of these loan claims. See Doc. Nos. 269 and 315. The following table identifies (1) the remaining loan claims being asserted by Plaintiff, (2) the Defendant against whom each loan claim is being asserted, and (3) the date each loan was made.

^{8/} As discussed here, "federal common law" is a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." Atherton, 117 S. Ct. at 670.

Loan	Date of Loan	Grant, C.	Grant, L.	Jacoby	Mills	Hagstrom	Gollust	Tierney	Reppe
Tandem -- Cushing	06-28-82 10-27-83 12-28-84	X	X	X	X	X			
Northtown Investors I*	08-24-82	X	X	X	X	X			
FHSC -- Intrapark	07-10-84	X	X	X	X	X			
Mager/OPI -- Rolling Hills I	09-13-84	X	X	X	X	X			
Tandem -- Reppe	12-04-84	X	X	X	X	X			
Tandem -- Cherry Street	06-10-85			X	X	X	X	X	X
Northtown Investors II*	10-31-86			X	X	X	X	X	X
Three Years Before FDIC's Appointment as Conservator (11/16/86)									
FHSC -- Hunter's Hills	05-13-87			X	X	X			X
Mager/OPI -- Rolling Hills II	11-05-87			X	X	X			X
Two Years Before FDIC's Appointment as Conservator (11/16/87)									
FDIC Appointed as Conservator (11/16/89)									

- * Defendants allege that the two Northtown Investors loans are not properly part of this lawsuit because Plaintiff did not list these loans in its original or amended complaints. Defendants allege that they first became aware that Plaintiff would seek to hold them liable for the Northtown Investors loans when Plaintiff listed them in its November 11, 1993 court-ordered Disclosure Report. [Doc. No. 311]. This issue will be discussed in section IV, *infra*.

D. HISTORY OF DEFENDANTS' MOTIONS

This case was filed and assigned to Judge Thomas R. Brett in November 1992. Defendants' statute of limitations motions were filed in January 1994. Shortly after Defendants' motions were filed, this case was transferred to Judge Lee R. West in the Western District of Oklahoma, due to the recusal of all judges in this district. See 1/25/94 Minute Order by Judge Brett. In August 1994, after Judge Terry C. Kern's recent appointment to the Northern District of Oklahoma, the case was transferred back to the Northern District and assigned to Judge Kern. [Doc. No. 222].

1. Original Briefs: The Adverse Domination Doctrine

In their original statute of limitations briefs, the parties focused primarily on the doctrine of adverse domination. Under the adverse domination doctrine, the statute of limitations on a corporation's claim against its officers and/or directors is equitably tolled while the corporation's board of directors is controlled by culpable directors. The underlying premise of the adverse domination doctrine is that a corporation acts through its board of directors and a board of directors controlled by culpable directors will not cause the corporation to bring a lawsuit against themselves. See RTC v. Thomas, 837 F. Supp. 354, 358 (D. Kan. 1993). The parties focused on the adverse domination doctrine because at the time they filed their original briefs, the "principal controlling precedent" was the Tenth Circuits pre-FIRREA decision in Farmers & Merchants Nat'l Bank v. Bryan, 902 F.2d 1520 (10th Cir. 1990).

In Bryan, the FDIC sued former officers and directors of a national bank for making imprudent loans. The officers and directors argued that the statute of limitations had run on several of the loan claims being asserted by the FDIC. The FDIC argued that its loan claims were not barred by the applicable statute of limitations because defendants had adversely dominated the bank's board of directors and such domination acted to equitably toll the statute of limitations for as long as defendants controlled the bank's board of directors. To resolve the issues on appeal, the Tenth Circuit began by holding that the determination of when the FDIC's claims accrued for purposes of the applicable statute of limitations^{9/} and whether the applicable statute of limitations was equitably tolled were questions to be answered by looking to federal common law, not state law. Bryan, 902 F.2d at 1522.

Applying federal common law, the Court in Bryan held that "a cause of action on an improper loan accrues at the time the loan is made." Bryan, 902 F.2d at 1522

^{9/} The applicable statute of limitations was Oklahoma's three-year statute of limitations found at 12 Okla. Stat. § 95, which the Court borrowed in the absence of a specific federal statute of limitations. Bryan, 902 F.2d at 1522.

(citing Corsicana Nat'l Bank of Corsicana v. Johnson, 251 U.S. 68, 86 (1919)). The Court also held that federal common law recognized the doctrine of adverse domination as an equitable doctrine which could be used by the FDIC to toll the statute of limitations. Id. From the chart in section I(C), *supra*, it is clear that if, as Bryan held, Plaintiff's loan claims accrue on the date the loans were made, most of Plaintiff's loans claims in this case would be barred by the statute of limitations, unless the statute of limitations was tolled by the adverse domination doctrine. So, in their original briefs, Plaintiff and Defendants spent most of their time arguing about whether or not the doctrine of adverse domination applies in this case and, if it does, what level of domination by the culpable directors Plaintiff is required to prove.

By the time Judge Kern received the case in the late summer of 1994, the United States Supreme Court had rendered its decision in O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994). In September 1994, Judge Kern ordered the parties to file supplemental briefs to discuss the affect of O'Melveny on the statute of limitations issues raised by the parties. Again, the parties' briefs focused on the adverse domination doctrine, arguing whether or not O'Melveny affected the Tenth Circuit's decision in Bryan to adopt the doctrine of adverse domination as part of the federal common law. Plaintiff argued that O'Melveny left Bryan undisturbed. Defendants argued that O'Melveny required the Court to look to Oklahoma law, not federal common law, and Oklahoma law did not recognize the doctrine of adverse domination.

As discussed above, the Supreme Court in O'Melveny, and later in Atherton, greatly restricted the instances in which federal courts are permitted to create rules of decision under federal common law. Judge Kern found that the Supreme Court's decision in O'Melveny undermined the Tenth Circuit's conclusion in Bryan that application of the adverse domination doctrine would be controlled by federal common law, not state law. Judge Kern ordered the parties to address the need to certify questions regarding the adverse domination doctrine to the Oklahoma Supreme Court because Oklahoma had not squarely addressed the adverse domination doctrine. [Doc. No. 229]. After receiving the parties' briefs, Judge Kern entered an order in December 1994 certifying to the Oklahoma Supreme Court questions of law relating to the adverse domination doctrine. [Doc. No. 240]. The Oklahoma Supreme Court was asked to decide whether Oklahoma law recognized the adverse domination doctrine and, if so, whether the doctrine would "delay accrual or toll the statute of limitations on [Plaintiff's claims] against corporate officers and directors while the wronged corporation is controlled by a majority of culpable directors and officers." [Doc. No. 240].

The Oklahoma Supreme Court answered the certified questions relating to the adverse domination doctrine in late June 1995. [Doc. Nos. 245 and 246]. The Oklahoma Supreme Court held that the doctrine of adverse domination is part of Oklahoma's common law, but that the doctrine only tolls the statute of limitations in

those situations "involving fraudulent conduct exercised while the wronged corporation is controlled by a majority of culpable directors and officers." [Doc. No. 246]. See RTC v. Grant, 901 P.2d 807 (Okla. 1995). In this case, Plaintiff has not alleged fraud on the part of Defendants. Therefore, Plaintiff concedes that the adverse domination doctrine does not apply to this case.

2. **Supplemental Briefs: "Accrual" of the Statute of Limitations Under Oklahoma Law**

In Bryan, the Tenth Circuit also held that the question of when a cause of action against an officer and/or director of a national bank "accrues" is a question of federal common law. The Tenth Circuit's accrual holding is no longer correct in light of O'Melveny and Atherton. See Section I(B), *supra*. As is the question of tolling by the adverse domination doctrine, the question of when a cause of action accrues is governed by state law, not federal common law. At the time Judge Kern certified questions to the Oklahoma Supreme Court, neither the parties nor the Court focused on the accrual issue or the incorrectness of Bryan's accrual holding in light of O'Melveny. Thus, the questions certified to the Oklahoma Supreme Court focused only on the adverse domination doctrine.

While the certified questions were pending, this case was dormant from December 1994 to October 1995. During this lull, the case was reassigned to Judge Sven Erik Holmes in March 1995. Judge Holmes ordered the parties to file a joint status report and in October 1995, all motions were referred to the undersigned for report and recommendation. [Doc. No. 249]. The undersigned held a status conference in December 1995.

At the December 1995 status conference, Plaintiff sought leave to file supplemental briefs in connection with Defendants' statute of limitation motions. For the first time, Plaintiff wanted an opportunity to brief the issue which had been ignored when questions relating to the adverse domination doctrine were certified to the Oklahoma Supreme Court. That is, Plaintiff wanted an opportunity to brief Oklahoma law regarding accrual of its negligence, contract and breach of fiduciary duty claims. Plaintiff wanted an opportunity to demonstrate that under Oklahoma law, its loan claims did not accrue for purposes of the Oklahoma statute of limitations when the loans were made, but when Sooner Federal suffered harm caused by Defendants' negligence. It is Plaintiff's position that Sooner Federal was not harmed, and, therefore, its claims did not accrue on each loan until the loan at issue suffered an "event of default." The undersigned permitted briefing on the accrual issue and that briefing was filed in April 1996.

Oral argument on Defendants' statute of limitations motions was heard in October 1996. At oral argument, Defendants argued that even under Plaintiff's

accrual theory, all of the loans at issue in this case suffered an "event of default" more than three years prior to the date the FDIC was appointed as Sooner Federal's conservator. Thus, Defendants argued that even under Plaintiff's accrual theory, all of Plaintiff's claims would be barred by the Oklahoma statute of limitations. To isolate the facts relating to "events of default" on each loan, the undersigned ordered the parties to file briefs indicating where in the record the Court could find the facts which established when each loan went into default. These "default" briefs were filed in November 1996. No additional briefing has been filed since that time, and Defendants' statute of limitations motions are finally at issue.

II. EFFECT OF FDIC'S INCONSISTENT POSITIONS

Defendants argue that Plaintiff has done a dramatic flip flop on the accrual issue. That is, Defendants argue that before the Oklahoma Supreme Court decided the adverse domination issue against Plaintiff, Plaintiff agreed with Defendants' assertion that the loan claims in this case accrued when the loans were made. It was not until after the Oklahoma Supreme Court answered the adverse domination questions that Plaintiff advanced its current argument that under Oklahoma law its loan claims did not accrue when the loans were made, but when Sooner Federal suffered harm as a result of Defendants' actions (i.e., when the loans defaulted). Defendants accuse Plaintiff of keeping its accrual arguments in its hip pocket until Plaintiff saw how the Oklahoma Supreme Court would rule on the adverse domination doctrine. Defendants also argue that in light of Plaintiff's current accrual position, the certified questions to the Oklahoma Supreme Court were a waste of time and Judge Kern would never have certified questions if he had known Plaintiff would assert the accrual position it is now asserting. Based on their view of Plaintiff's conduct, Defendants argue that Plaintiff is estopped from making its current accrual arguments.

The doctrine of judicial estoppel bars a party from adopting inconsistent positions in the same or related litigation. United States v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986). In non-diversity cases, such as this, the Tenth Circuit has rejected the doctrine of judicial estoppel. See Osborn v. Durant Bank & Trust Co., 24 F.3d 1199 (10th Cir. 1994); 49.01 Acres of Land, 802 F.2d at 390. The Tenth Circuit has reasoned that it is better to resolve cases on their merits. Courts should not decide cases on inaccurate or wrong propositions of law as a means of punishing a party. Any public policy against allowing parties to take inconsistent positions can be vindicated through avenues that do not discourage the determination of cases on their merits (e.g., sanctions). 49.01 Acres of Land, 802 F.2d at 390. Thus, in this Circuit Plaintiff is not judicially estopped from presenting its current accrual arguments. See also RTC v. Gregor, 872 F. Supp. 1140, 1153 (E.D.N.Y. 1994) (rejecting the precise argument advanced by Defendants here).

The undersigned has reviewed the file and is convinced that in this case Plaintiff did not intentionally withhold its current accrual argument until after the Oklahoma Supreme Court's answers to the adverse domination questions. As discussed above, when Defendants' original statute of limitations motions were filed, the Tenth Circuit's decision in Bryan was the principal controlling authority. Bryan focused on the doctrine of adverse domination. So, the parties and the Court focused on the adverse domination doctrine. When it became clear that the United States Supreme Court's decision in Q'Melveny undermined the Tenth Circuit's holding in Bryan, and the focus switched from federal common law to state law, the parties and the Court were still focused on the adverse domination doctrine. No one focused on the fact that Q'Melveny also undermined the Tenth Circuit's holding in Bryan that accrual was a matter of federal common law. It was not until after the Oklahoma Supreme Court rendered its decision that Plaintiff focused on the fact that accrual would also be governed by state law and not federal common law. It may be true that it was the defeat in the Oklahoma Supreme Court that caused Plaintiff to focus on the accrual issue. While that fact may merit an award of fees and costs to compensate for any resulting delay, it cannot prevent the Court from considering Plaintiff's arguments to determine the correct legal principles to be applied in this case.

III. THE NORTHTOWN INVESTORS LOANS ARE PROPERLY IN THIS LAWSUIT

Plaintiff filed its original Complaint on November 13, 1992. [Doc. No. 1]. Plaintiff filed its First Amended Complaint on February 12, 1993. [Doc. No. 24]. Plaintiff filed its Second Amended Complaint on June 1, 1993. [Doc. No. 35].^{10/} In these complaints, Plaintiff listed 35 loans which it considered to have been imprudently authorized, made and/or supervised by Defendants. Plaintiff expressly stated that the list of 35 loans was a non-exhaustive list of "example" loans. [Doc. No. 1, ¶ 28; Doc. No. 24, ¶ 31; and Doc. No. 35, ¶ 38]. Neither the Northtown Investors I nor the Northtown Investors II loans were listed in either the original, first amended or second amended complaints.

Early on in this case, the parties had several case management conferences before Magistrate Judge John L. Wagner. Because this case is a document intensive case and because a majority of the documents relevant to this case are in Plaintiff's possession, Magistrate Judge Wagner ordered Plaintiff to prepare and file a disclosure report. [Doc. No. 60 and 6/25/93 Minute]. The disclosure report was designed to reduce the amount of discovery that would otherwise be necessary. Plaintiff served

^{10/} The First Amended and Second Amended Complaints are identical to the original Complaint in all material respects. The amended complaints simply add parties whose tolling agreements with Plaintiff had expired.

its court-ordered Disclosure Report on November 11, 1993. [Doc. No. 311].^{11/} The Northtown Investors loans, along with several other loans which Plaintiff has since abandoned, appeared for the first time in Plaintiff's Disclosure Report. [Doc. No. 311, § IV(18)].

Defendants argue that they cannot be held liable for the Northtown Investors loans. In support of their argument, Defendants advance two propositions. First, Defendants argue that the Second Amended Complaint violates Fed. R. Civ. P. 8(a)(2) because it fails to give Defendants reasonable notice that they may be held liable in connection with the Northtown Investors loans. Second, Defendants argue that the addition of the Northtown Investors loans in the Disclosure Report is a "*de facto*" amendment of the Second Amended Complaint (i.e., a Third Amended Complaint). If the Disclosure Report is treated as an amendment to the Second Amended Complaint, Defendants argue that any claims relating to the Northtown Investors loans would be barred by the applicable statute of limitations because the newly added claims would not "relate back" under Fed. R. Civ. P. 15(c).

Plaintiff responds by arguing that its Second Amended Complaint satisfies Rule 8(a)(2)'s notice pleading requirement and it is not required to list specific loans in a complaint. In the alternative, Plaintiff argues that if the Second Amended Complaint fails to comply with Rule 8(a)(2), then the Disclosure Report should be treated as an amendment to the Second Amended Complaint and that amendment will "relate back" to the original Complaint under Rule 15(c).

The procedural posture of the parties' positions is not clear from their briefs. In order to clarify the appropriate standards to be applied, the undersigned will treat Defendants' pleadings on this issue as a motion to dismiss any claims based on the Northtown Investors loans for failure to properly state a claim under Fed. R. Civ. P. 8. The undersigned will treat Plaintiff's pleadings on this issue as a response to Defendants' motion to dismiss, and, in the alternative, a request for leave to amend. So characterized, the undersigned finds that loan claims based on the Northtown Investors loans are not properly pled in the Second Amended Complaint and recommends that Defendants' motion to dismiss those claims for failure to comply with Fed. R. Civ. P. 8 be granted. However, the undersigned further recommends that Plaintiff be granted leave to amend its Second Amended Complaint to add claims based on the Northtown Investors loans. The undersigned also finds that any amendment adding claims based on the Northtown Investors loans will relate back to date of the the original Complaint under Fed. R. Civ. P. 15. Thus, the undersigned

^{11/} The November 11, 1993 Disclosure Report was not filed by the parties until November 12, 1996. It was filed so that it could be considered as part of the record on Defendants' motions for summary judgment.

ultimately recommends that claims based on the Northtown Investors loans be recognized as properly plead in this lawsuit.

A. DEFENDANTS' MOTION TO DISMISS AND RULE 8'S PLEADING STANDARD

"The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48 (1957). Pursuant to Fed. R. Civ. P. 8, a complaint need only "contain a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e)(1).

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms attached to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and define more narrowly the disputed facts and issues.

Conley, 355 U.S. at 47-48 (footnotes omitted). See also New Home Appliance Center, Inc. v. Thompson, 250 F.2d 881, 883-84 (10th Cir. 1957) (holding that a complaint need only contain a generalized statement of facts from which a defendant can formulate an answer).

The touchstone of Rule 8's notice pleading regime is fair notice. Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383, 1386 (10th Cir. 1980). The job of a complaint is to provide the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests, without requiring plaintiff to have developed every theory and fact before the complaint is filed. Id.; Evans v. McDonalds Corp., 936 F.2d 1087, 1091 (10th Cir. 1991). While this rule applies to all cases, the amount of detail which must be pled to provide the opposing party with fair notice of a claim changes from case to case. Mountain View, at 1386-87.

For example, a complaint for conversion or to recover on a note, can be stated in half a page. On the other hand a

complaint dealing with a more complex matter, as in an antitrust action, and action to enjoin enforcement of an unconstitutional statute, an interpleader suit, or a stockholder's action will be more extended and may require more particularity [to put a defendant on notice].

Id. at 1387 (citing 2A James Wm. Moore et al., Moore's Federal Practice ¶ 8.13 (2d ed. 1979)).

In Mountain View, Plaintiff alleged not much more than that 13 defendants violated the antitrust laws when they sold their products. Plaintiff simply recited statutory language and gave no specifics as to the offending defendants, the injured parties, or the products involved. The Tenth Circuit found such a complaint to be in violation of Rule 8 as it did not provide the defendants with fair notice of plaintiff's antitrust claims. Mountain View, 630 F.2d at 1387-88. In reaching this conclusion, the Tenth Circuit cited with approval the following language from a Second Circuit opinion written by Judge Friendly: "A mere allegation that defendants violated the antitrust laws as to a particular plaintiff and commodity no more complies with Rule 8 than an allegation which says only that a defendant made an undescribed contract with the plaintiff and breached it, or that a defendant owns a car and injured plaintiff by driving it negligently." Id. at 1387 (citing Klebanow v. New York Produce Exchange, 344 F.2d 294, 299 (2d Cir. 1965)).

Based on the authorities discussed above, the undersigned finds that Plaintiff should be required to list in its complaint the specific loan transactions for which Plaintiff intends to hold Defendants liable. Without specifying the individual loans at issue, Plaintiff's complaint alleges nothing more than (1) Defendants had the authority to make, approve or supervise unspecified loans, and (2) Defendants injured Sooner Federal by improperly making, approving and/or supervising unspecified loans. A pleading failing to allege specific loan transactions is not materially different from a pleading alleging that defendant owns a car and injured plaintiff by driving it negligently. In Mountain View, the Tenth Circuit held that such vague pleading violates Rule 8.

Plaintiff originally brought this action against 15 defendants. These defendants served on Sooner Federal's board or were officers at different and overlapping times during a ten year period. Plaintiff alleged that Defendants engaged in wrongful conduct for a period of six years, between 1982 and 1988. During this six year period, Sooner Federal made many loans. A complaint which does not at least allege which loans are at issue does not provide Defendants with fair notice of the claims being asserted against them. Without knowing which loan transactions are at issue, Defendants cannot be expected to prepare an adequate responsive pleading. Requiring Plaintiff to list the loan transactions at issue provides Defendants with fair notice and

it does not require Plaintiff to plead with great factual specificity. Thus, an appropriate balance between Rule 8's fair notice and "short and plain statement" requirements is achieved.^{12/} The undersigned finds, therefore, that regarding claims based on the Northtown Investors loans, Plaintiff's Second Amended Complaint fails to comply with Fed. R. Civ. P. 8.

B. PLAINTIFF'S MOTION FOR LEAVE TO AMEND

It is clear from the transcripts of the case management conferences held by Magistrate Judge Wagner that the parties and the Court expected the November 1993 Disclosure Report to be a comprehensive statement by Plaintiffs of all claims being asserted against Defendants. In many respects, the Disclosure Report is like a one-sided pre-trial order. It appears as if the parties' and Magistrate Judge Wagner's intent was that the Disclosure Report, like a pre-trial order, control the subsequent course of Plaintiff's case. See, e.g., Fed. R. Civ. P. 16(e). Plaintiffs were to review the documents in its possession and identify the loans on which it would seek to hold Defendants liable. For each loan identified, Plaintiff was to (1) identify the phase, time period or aspect of the loan each Defendant was involved with; (2) identify the underlying theory of liability; (3) summarize its expert's opinion and methodology regarding damages; (4) prepare a list of fact witness as to each loan; and (5) produce copies of all exhibits supporting Plaintiff's claim with respect to each loan. It is not surprising that such a comprehensive Disclosure Report might contain new information that was not present in the original Complaint.

Amendments are to be freely allowed when justice so requires. Fed. R. Civ. P. 15(a). "Justice" ordinarily requires that leave to amend be granted unless the party seeking to amend is guilty of delay, bad faith, dilatory motive or unless the amendment would be futile or unduly prejudicial to the opposing party. Foman v. Davis, 371 U.S. 178, 182 (1962). The Disclosure Report was served by Plaintiff less than one year after the lawsuit was filed and at a time when no discovery had taken place. The case was essentially on hold, pending preparation and service of the Disclosure Report by Plaintiff. At the time the Disclosure Report was ordered by the Court and served by Plaintiff, there is no evidence that Plaintiff was guilty of delay, bad faith or dilatory motive. Defendants have known for the past three and one half years that Plaintiff was seeking to hold them liable for the Northtown Investors loans. The undersigned finds, therefore, that justice requires and no prejudice would result from the Second Amended Complaint being amended to include the Northtown Investors loans in ¶ 38.

^{12/} Three United States District Courts within the Tenth Circuit have also determined that the FDIC is required to identify in its complaint the loan transactions on which it is attempting to hold officers and directors of depository institutions liable. See RTC v. Hess, 820 F. Supp. 1359 (D. Utah 1993); RTC v. Thomas, 837 F. Supp. 354 (D. Kan. 1993); and FDIC v. Wise, 758 F. Supp. 1414 (D. Colo. 1991).

1. Relation Back

Defendants argue that amendment of the Second Amended Complaint should not be permitted because an amendment would be futile. See Foman, 371 U.S. at 182 (holding that leave to amend may be denied if amendment would be futile). Defendants argue that the amendment would be futile because the newly added claims (i.e., claims based on the Northtown Investors loans) would not "relate back" under Fed. R. Civ. P. 15(c). Without relation back, Defendants argue that the newly added claims would be barred by the applicable statute of limitations and it is futile to allow an amendment to add claims which are barred by the statute of limitations. The undersigned does not agree and finds that the amendment adding the Northtown Investors claims does relate back to the date the original Complaint was filed.

Under the Federal Rules of Civil Procedure, an amendment to a complaint will relate back to the date of the original complaint when the claim asserted in the amended pleading arises "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). The theory behind this rule is that "once litigation involving particular conduct or a given transaction has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of . . . claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading." 6A Charles A. Wright et al., Federal Practice and Procedure: Civil 2d § 1496 (1990). Because the purpose of a statute of limitations is to prevent the assertion of stale claims, its purpose is not violated by allowing, after the statute has run, the addition of claims arising out of conduct, transactions or occurrences which are already a part of active litigation. See FDIC v. Conner, 20 F.3d 1376, 1385 (5th Cir. 1994).

The Fifth Circuit, addressing the precise issue presented by Plaintiff's motion for leave to amend, held that under Fed. R. Civ. P. 15(c) newly-added loan claims relate back. FDIC v. Conner, 20 F.3d 1376 (5th Cir. 1994). The undersigned finds the Fifth Circuit's analysis persuasive and recommends its application to this case. In Conner, the FDIC sought leave to file an amendment which added allegations that defendants' wrongful conduct caused the bank to suffer losses in connection with several loans made by defendants, but not identified in the original complaint. The defendants opposed the motion for leave to amend, arguing that the amendment would be futile. The defendants argued that the amendment would not relate back under Rule 15(c) and any claims based on the new loans would, therefore, be barred by the statute of limitations.

The Fifth Circuit rejected defendants argument with the following language:

In the present case, we hold that the amended complaint should relate back to the date of the original complaint. The damage allegedly caused by the loans that the FDIC seeks to include in this case arose out of the same conduct as the damage caused by the twenty-one loans listed in the original complaint. The conduct identified in the original complaint that allegedly caused the defendants to approve the loans listed in that pleading also allegedly caused the defendants to approve the loans that the FDIC seeks to include in this case through the amended complaint. The FDIC's amendment thus seeks to identify additional sources of damages that were caused by the same pattern of conduct identified in the original complaint.

Conner, 20 F.3d at 1386. The rationale for the Fifth Circuit's holding applies with equal force to this case.^{13/}

Rule 15(c) allows relation back when the claims asserted in the amendment arise out of the same "conduct, transaction or occurrence." Fed. R. Civ. P. 15(c). The disjunctive phrasing of these three terms makes it clear that the new claim need not arise out of the same transaction or occurrence as the original claims. As long as the new claim arises out of the same "conduct" as the original claims, the new claim will relate back under Rule 15(c). In its original and amended complaints, Plaintiff identified conduct that allegedly caused or contributed to Defendants' improper approval and/or supervision of the 35 loans listed in those complaints. This same conduct also allegedly caused Defendants to improperly approve and/or supervise the Northtown Investors loans. See Second Amended Complaint, Doc. No. 35. By adding the Northtown Investors loans, Plaintiff is merely seeking to identify an additional source of damage caused by the same pattern of conduct identified in the original, first amended and second amended complaints. The undersigned recommends, therefore, that Plaintiff's motion for leave to amend ¶ 38 of the Second Amended Complaint to add the Northtown Investors loans be granted.^{14/}

^{13/} Defendants cited RTC v. Norris, 830 F. Supp. 351 (S.D. Tex. 1993) in support of their argument that the newly added loans in Plaintiff's Disclosure Report do not relate back under Fed. R. Civ. P. 15(c). Norris does provide some support for Defendants' argument. The Southern District of Texas is, however, in the Fifth Circuit. Thus, Norris' holding was overruled by the Fifth Circuit's holding in Conner. Conner was decided by the Fifth Circuit after Defendants filed their briefs.

^{14/} In their Answers to Plaintiff's Second Amended Complaint, Defendants all responded to ¶ 38 (i.e.,
(continued...))

Claims based on the Northtown Investors loans will be treated as if they were in the original complaint (i.e., they will relate back). The Northtown Investors loans are, therefore, timely under FIRREA's extended statute of limitations. The issue still remains, however, whether they, along with all the other loan claims being asserted by Plaintiffs, were timely under Oklahoma law when the RTC was appointed on November 16, 1989. See discussion in section I(A), *supra*, and section IV, *infra*.

IV. WERE PLAINTIFF'S CLAIMS TIMELY UNDER OKLAHOMA LAW WHEN THE FDIC WAS APPOINTED ON NOVEMBER 16, 1989?

Whether an action is barred by the applicable statute of limitations is a question of fact to be determined by considering the evidence in each case. MBA Commercial Construction, Inc. v. Roy J. Hannaford Co., Inc., 818 P.2d 469, 472 (Okla. 1991); American Ins. Union v. Jones, 274 P. 478, 479 (Okla. 1929). The party asserting the statute of limitations as a defense has the burden to present evidence reasonably tending to establish the time bar. Id. Trinity Broadcasting Corp. v. Leeco Oil Co., 692 P.2d 1364, 1367 (Okla. 1984). Thus, summary judgment on a statute of limitations defense is appropriate only when there is no genuine issue of material fact as to when the statute of limitations began to run (i.e., when the cause of action accrued) or the running of the limitations period. See Fed. R. Civ. P. 56.

Oklahoma law provides as follows:

Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

2. Within three (3) years: An action upon a contract express or implied not in writing
3. Within two (2) years: [A]n action for injury to the rights of another, not arising on contract, and not hereinafter enumerated

^{14/} (...continued)

the paragraph listing specific loans) with general denials. No specifics were alleged by Defendants in connection with any of the loans listed in ¶ 38. Thus, Defendants' current Answers are sufficient and no further pleading is required in light of the amendment recommended by this Report and Recommendation, unless Defendants desire to supplement their general denials with regard to the Northtown Investors loans.

10. An action for relief, not hereinbefore provided for, can only be brought within five (5) years after the cause of action shall have accrued.

12 Okla. Stat. § 95. Under this statute, Plaintiff's negligence claims would be subject to a two year statute of limitations and Plaintiff's oral contract claims would be subject to a three year statute of limitations. It is not clear, however, what limitations period would apply to Plaintiff's breach of fiduciary duty claims. All of these limitations periods begin to run from the date the cause of action "shall have accrued." The remainder of this Report and Recommendation will discuss when each of Plaintiff's causes of action accrued.

A. ACCUAL OF PLAINTIFF'S NEGLIGENCE CLAIMS

Under Oklahoma law,

[t]he limitations periods in [12 Okla. Stat. § 95 begin] to run from the time the elements of a cause of action arise. The elements of a cause of action arise, that is, the cause of action accrues when a litigant first could have maintained his action to a successful conclusion.

The three elements of actionable negligence are: (1) the existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) a violation of that duty; and (3) injury proximately resulting therefrom. The substantive right to damages vests when these three elements are present.

. . .

In order for a litigant to maintain a negligence action to a successful conclusion, the litigant must [be able to] allege injury or damages that are certain and not speculative. Thus, the summary judgment [motions] herein must be supported by evidence that establishes the time injuries or damages that are certain and not speculative were sustained by [Sooner Federal]. . . . At that time the alleged

negligence action accrued and the time limitations in §95(3) began to run.

MBA Commercial, 818 P.2d at 473-74 (internal citations omitted). See also Marshall v. Fenton, Fenton, Smith, Reneau and Moon, P.C., 899 P.2d 621, 623-24 (Okla. 1995); and Stephens v. General Motors Corp., 905 P.2d 797, 799 (Okla. 1995).

In this case, the ultimate question is this: At what point did it become definite and certain that Sooner Federal would suffer damage as a result of Defendants' negligence? See, e.g., Wynn v. Estate of Holmes, 815 P.2d 1231, 1233 (Okla. App. 1991). In other words, a plaintiff does not have to sustain damages for the statute of limitations to begin running. Rather, the important moment in time is the moment it becomes a certainty that a plaintiff will be damaged, even if the damage will not occur for some time in the future. The requirement that damages be certain and not speculative is best illustrated by two Oklahoma Supreme Court flood cases. See Murdock v. City of Blackwell, 176 P.2d 1002 (Okla. 1946) and City of Stillwater v. Robertson, 136 P.2d 923 (Okla. 1943).

In Robertson, the City of Stillwater built a dam in 1926 to create a lake that would provide a municipal water supply. In 1933, the City increased the height of the dam by two feet to impound more water for the City. After the dam was raised, the lake level dropped, instead of rose, because of several dry years. It was not until the spring of 1941 that abundant rains filled the lake and Plaintiff's property was flooded. Plaintiff sued the City for trespass to recover for damage done to his property. The City argued that plaintiff's claim was barred by a two year statute of limitations. The issue before the court was when did plaintiff's claim accrue -- in 1933 when the dam was raised or in 1941 when plaintiff's property was eventually flooded? As with a negligence claim, the Court held that a claim for trespass to real property caused by an improvement accrues at the moment it appears that injury to the property is certain to occur.^{15/} Robertson, 136 P.2d at 924; Murdock, 176 P.2d at 1009. The Court held that, at the time the dam was raised, injury to plaintiff's property was certain to occur. It was obvious to everyone that once the dam was raised two feet, the lake level would rise two feet and overflow plaintiff's property. Robertson, 136 P.2d at 924. In other words, "it was a matter of mathematical calculation and therefore certain that plaintiff's land lying below the level of the water in the new lake would be overflowed." Murdock, 176 P.2d at 1009. Plaintiff's claim accrued, therefore, at the time the dam was raised, not when his property was flooded.

^{15/} An action for trespass to real property and an action for negligence are both subject to the same statute of limitations. See 12 Okla. Stat. § 95(3).

The plaintiffs in Murdock owned a parcel of farmland. The south side of plaintiffs' farmland was a natural basin or depression which could not drain on its own. In 1908, the owner of the farmland constructed a 10 inch drain that ran 3,065 feet from the center of the basin toward the Chickaskia River. The drain emptied into a small ditch which was about six to eight feet deep. The ditch emptied into the Chickaskia River and the system worked well for 28 years. In 1936, the City of Blackwell dammed the Chickaskia River to form a reservoir to be used as a municipal water source. The Chickaskia River flooded in 1942 and flood waters filled plaintiffs' basin. When the Chickaskia River returned to normal, the flood waters trapped in plaintiffs' basin did not drain away. The evidence established that from 1937 to 1943, after the dam was constructed, silt and mud had settled in, around and over the ditch into which the plaintiff's drain emptied. The silt and mud eventually filled the ditch so full that plaintiffs' drain outlet could no longer be found. Murdock, 176 P.2d at 1004-1010.

The plaintiffs in Murdock sued the City of Blackwell and the City argued that plaintiffs' claim was barred by the statute of limitations. Relying on Robertson, the City argued that plaintiffs' claim accrued when the dam was built in 1936, not when plaintiffs' basin was flooded in 1942. The Court disagreed, holding as follows:

It cannot be said that it was obvious when the dam was completed that would occur. No one could tell, or know, that would occur or where or to what extent silt or mud would settle at and around the outlet of plaintiffs' drainage tile. No one knew what had happened until the City lowered the level of the lake so as to expose the accumulated silt and mud.

...

It does not appear as a certainty that plaintiffs' damages were obvious at the time the dam was constructed. In any event, it would, under the rules stated in the decisions above cited, be a question of fact for the jury and not one for the court. We cannot say as a matter of law that plaintiffs' action was barred by the statute of limitations.

Murdock, 176 P.2d at 1009-1010.

The parties seem to agree that a negligence claim in Oklahoma accrues when damage caused by the alleged negligent acts is certain to occur. In the context of negligent lending by an officer and/or director of a depository institution, the parties take different positions on when damage to a depository institution is certain to occur.

Defendants argue that damage to a depository institution is always certain to occur at the time a loan is made (i.e., when the institution parts with its money). Plaintiff argues that damage to a depository institution is certain only when it becomes clear that the borrower will not repay the loan. Plaintiff argues that the first time it became certain that Sooner Federal would not be repaid on the loans at issue was "when the collateral was foreclosed or some other disposition was made." [Doc. No. 269, p. 9].

The undersigned declines to adopt either of the absolutist positions advanced by the parties. The undersigned declines to find that as a matter of law a depository institution is always or never injured by an officer's or director's negligence at the time a loan is made or foreclosed. When damage to a depository institution becomes certain and not speculative is a question to be answered by looking at the facts of each loan transaction. There are no bright lines. In some instances, damages may be certain at the time a loan is made. In other instances, the fact that the depository institution will be damaged may not become certain until the loan has to be restructured and/or foreclosed. For the loans at issue, the undersigned has reviewed all the materials submitted by the parties and finds that there are genuine issues of material fact as to when the damage alleged by Plaintiff first became certain and not speculative. Summary judgment is, therefore, not appropriate on Plaintiff's negligence claims.

Defendants argue that the entire theory underlying Plaintiff's negligence claims is that the collateral received by Sooner Federal in exchange for the loans at issue was not as valuable or tangible as it should have been (i.e., the loans were under-collateralized). Defendants argue that "accrual at the time a loan is made" is the only accrual rule that can be applied to such a theory. Defendants argue that a depository institution is injured immediately when it parts with funds to make a loan and it receives collateral worth less than it should be worth using proper loan underwriting standards. Defendants argue that this damage can be measured by looking at the "difference in value between what [Sooner Federal] has paid (the loan amount) and what it has received (a promise of repayment by a non-creditworthy borrower)." [Doc. No. 278, pp. 14-15].

Although there are no cases directly on point in Oklahoma, the undersigned does not believe that Sooner Federal would have been able to sue a director under Oklahoma law the moment that director made an allegedly under-collateralized loan. As discussed above, a negligence claim in Oklahoma becomes actionable only when damages are certain to occur as a result of the alleged negligence. When a depository institution's director approves and/or makes a loan to a borrower and that borrower is timely repaying the loan, the undersigned believes that an Oklahoma court would not permit the depository institution to sue the director for negligence in connection with the loan. It may be true that the depository institution has an insecure collateral position. It may also be true, however, that, despite its insecure collateral position,

the depository institution will be repaid in full on the loan. How is the depository institution damaged if the loan is timely and fully repaid? Thus, it seems entirely speculative, and not certain, that a depository institution has suffered damages on a loan that is being timely repaid. Under Oklahoma law, the depository institution's negligence claims against the director would not, therefore, accrue at the time the loan was made. See FDIC v. Stahl, 89 F.3d 1510, 1522 (11th Cir. 1996) (applying Florida's statute of limitations, which is very similar to Oklahoma's, and holding that negligence action accrues when loan defaults, not when the loan is made).

Defendants attempt to demonstrate that even if Sooner Federal is repaid in full on an under-collateralized loan, it suffers some damage. For example, Defendants argue that because a loan is under-collateralized that loan should command a higher interest rate, which Sooner Federal would have charged but for the negligence of Defendants. Defendants also argue that, but for their alleged negligence in disbursing certain loan proceeds, Sooner Federal would have had more capital available to loan on transactions that were less risky and more profitable. Defendants also argue that negligent lending causes an increase in a depository institution's reserves, which makes less capital available for lending. Defendants point to all of this and argue that; as a whole, negligent lending produces an immediate detriment to a depository institution and causes an immediate profits decline. [Doc. No. 278, pp. 14-15]. While all of this may be true, there is no record evidence to support any of Defendants' assertions. In other words, there is no evidence in the current record that any of the above-described residual damages occurred in this case or that they were proximately caused by Defendants' negligence. Defendants may present evidence on these issues at trial in an attempt to convince the jury that damage to Sooner Federal was indeed immediate and certain at the time the loans at issue were made. Defendants are not, however, entitled to summary judgment on these issues based on the record before the Court.

Defendants' limitation of Plaintiff's negligence claims to under-collateralization of loans is also unduly restrictive. In ¶ 37 of the Second Amended Complaint, Plaintiff identifies at least 17 types of negligent conduct which it alleges caused damage to Sooner Federal. Only one out of the list of 17 deals with the making of under-collateralized loans.^{16/} Much of the other conduct alleged in ¶ 37 to have been negligent could not have occurred until after a particular loan was made. For example, ¶ 37(l) alleges that Defendants "[a]llowed [Sooner Federal] to forego periodic inspections and evaluations of collateral." Paragraph 37(l) alleges that Defendants "[f]ailed to monitor the use of loan proceeds." Paragraph 37(o) alleges that

^{16/} In ¶ 37(h), Plaintiff alleges that Defendants "[a]llowed loans to be made without collateral, or without collateral of sufficient value or without performing any significant evaluation of collateral accepted." [Doc. No. 35, ¶ 37(h)].

Defendants "[a]llowed renewal of loans with no reduction in principal and with past-due interest capitalized." Paragraph 37(p) alleges that Defendants "[a]llowed release of collateral for inadequate consideration and failed to aggressively pursue collateral when default occurred." All of this conduct is conduct which occurs after a loan is initially made. In other words, a loan may have been properly collateralized when made and Defendants could have been negligent for failing to conduct periodic inspections of the collateral or for inappropriately releasing the collateral at a later date. It makes no sense to apply to this type of conduct an accrual rule that focuses on when the original loan was made.

To date, discovery has not progressed with respect to Plaintiff's claims against Defendants. Thus, it is not clear from the record before the Court what negligent conduct alleged in ¶ 37 of the Second Amended Complaint is or is not applicable to each loan left in this case. Nevertheless, the thrust of Plaintiff's negligence claims is really that in the early 1980's Sooner Federal shifted from residential mortgage lending to commercial lending and Defendants were negligent in the planning, installation, execution and supervision of Sooner Federal's overall commercial lending program. [Doc. No. 31, §§ IV and VIII]. In other words, it may be that the damage resulting from a particular loan was proximately caused by negligent acts which occurred after the loan was made.

Defendants cite several cases for the proposition that it is "black letter law" that a depository institution's claim for negligence in connection with a loan made, approved and/or supervised by one of its directors accrues at the time the loan is made. The undersigned will not distinguish every case cited by Defendants. Oklahoma law governs the viability of Plaintiff's claims. To the extent that the cases cited by Defendants rely on non-Oklahoma law or law not in accord with Oklahoma's statute of limitations' jurisprudence, Defendants' reliance on those cases is misplaced. See Stahl, 89 F.3d at 1522.

Defendants rely on Corsicana Nat. Bank of Corsicana v. Johnson, 251 U.S. 68 (1919). In Corsicana, a bank brought an action in February 1910 against one of its directors to hold him liable for making a loan in violation of § 5200, Rev. Stat. See 12 U.S.C. § 84. Section 5200 prohibits a bank from loaning more than 10% of the value of its capital stock to any one entity. A director violates § 5200 only if he knowingly or intentionally makes a loan in excess of § 5200's limits. At all relevant times, the value of the bank's capital stock was \$200,000.00. Thus, the largest loan permitted to one entity under § 5200 was \$20,000.00. On June 10, 1907, defendant, as a director of the bank, approved what was determined to be a single loan of \$30,000.00 to a single entity. Id. at 70-74. Section 5239, Rev. Stat., provides that a director who violates § 5200 becomes personally liable to the bank in his individual capacity for any loan made in excess of the limits in § 5200. See 12 U.S.C. § 93. Under §§ 5200 and 5239, the bank is not required to await the maturity

of the loan. The director must immediately take the loan off the bank's hands and restore to the bank the money lent in violation of § 5200. Id. at 71, 86-87. Defendant argued that the bank's cause of action accrued at the time he made the loan and it was, therefore, barred by Texas' two year statute of limitations. The Supreme Court agreed, holding that the cause of action accrued when the bank, acting through defendant, "parted with the money loaned, and receiving in return only negotiable paper that it could not lawfully accept because the transaction was prohibited by section 5200, Rev. Stat." Id. at 86.

Corsicana is consistent with Oklahoma law. In Oklahoma, a limitations period begins to run only when all of the elements of a cause of action arise. The only elements of a § 5200 violation are (1) the making of a loan in excess of 10% of the value of the bank's capital stock, (2) to a single entity, (3) with knowledge or intent. When these elements arise, the director must take the loan off the bank's hands and reimburse the bank for the amount of the improperly made loan. All of the elements of the offense/claim arise at the time the loan is made. Corsicana does not establish that as a matter of law damage to a depository institution caused by the negligence of one of the institution's directors in approving, making and/or supervising a loan is always certain to occur at the time the loan is made.^{17/}

Defendants also rely on a series of cases from the Fifth Circuit Court of Appeals. See FDIC v. Dawson, 4 F.3d 1303, 1308 (5th Cir. 1993), cert. denied 512 U.S. 1205 (1994); RTC v. Seale, 13 F.3d 850, 852 (5th Cir. 1994); and FDIC v. Henderson, 61 F.3d 421, 424 n.6 (5th Cir. 1995) (citing and relying on Seale). Dawson, Seale and Henderson were all applying Texas law. The Texas cases and authorities cited by the Fifth Circuit in Dawson, Seale and Henderson state a view of Texas accrual law which is significantly distinct from the law of accrual in Oklahoma. The authorities cited by the Fifth Circuit suggest that a cause of action for negligence accrues at the time the negligent act is committed, not at the time damages resulting from that negligent act become certain. Using this rule, the courts in Dawson, Seale and Henderson found the negligent act to have occurred at the time the loans at issue in those cases were made. The claims were, therefore, barred. As discussed above, Oklahoma's accrual jurisprudence is significantly different from the accrual rules cited in the cases relied on by Dawson, Seale and Henderson. Oklahoma's negligence statute of limitations begins to run not when the negligent act was committed, but when damages attributable to the negligent act are certain to occur. Thus, the Dawson, Seale and Henderson cases do not support Defendants' position. Many of the other cases cited

^{17/} Farmers & Merchants National Bank v. Bryan, 902 F.2d 1520 (10th Cir. 1990) was discussed above. The Court in Bryan held that "[i]n general, a cause of action on an improper loan accrues at the time the loan is made." Id. at 1522. The Court was applying federal common law and not Oklahoma law. The Court also cited and relied on Corsicana for its holding. Thus, to the extent Corsicana is distinguishable, Bryan is distinguishable.

by Defendants are also based on interpretations of state accrual law that is distinctly different from Oklahoma's law of accrual.

The undersigned has reviewed the entire record submitted by the parties. The undersigned is convinced that there are material factual issues as to what negligent acts caused harm to Sooner Federal for a particular loan, when those acts occurred, and when harm caused by those acts was certain to occur and not speculative. Summary Judgment on Plaintiff's negligence claims is, therefore, not appropriate.

**B. ACCRUAL OF PLAINTIFF'S BREACH OF CONTRACT AND
BREACH OF FIDUCIARY DUTY CLAIMS**

1. Breach of Contract Claims

Plaintiff alleges in its Second Amended Complaint that "Defendants contracted with [Sooner Federal] to serve as officers of the Institution, for which they received salaries and/or compensation." [Doc. No. 35, ¶ 43]. Plaintiff alleges further that the acts and omissions described in the Second Amended Complaint constitute breaches of Defendants' contracts with Sooner Federal. *Id.* at ¶ 44. Plaintiff has not presented any evidence of a written contract between Sooner Federal and Defendants. The undersigned assumes, therefore, that Plaintiff's contract claim is based on an oral contract.

In Great Plains Federal Savings and Loan Ass'n v. Dabney, 846 P.2d 1088 (Okla. 1993), a savings and loan sued an attorney and his law firm for breach of an oral contract. The savings and loan alleged that pursuant to an oral contract, the attorney agreed to search the records of the Grady County Clerk for a nine year period to identify any documents affecting a particular title. The attorney also agreed to prepare a written title opinion. Plaintiff alleged that the attorney failed to find a mortgage in the county clerk's records that affected the title at issue and, therefore, failed to timely address the affect of that mortgage in his title opinion. The attorney filed a motion to dismiss, arguing that the action sounded in tort for malpractice and not contract and was barred by the two-year tort statute of limitations. *Id.* at 1089-91.

The Court in Dabney began by recognizing that "a party may bring a claim based in both tort and contract against a professional and that such action may arise from the same set of facts." Dabney, 846 P.2d at 1092. However, if the alleged contract "merely incorporates by reference or by implication a general standard of skill or care [to] which a defendant would be bound independent of the contract[,] a tort case is presented governed by the tort limitation period." *Id.* If however, the alleged contract spells "out the performance promised by defendant and defendant commits to the performance without reference to and irrespective of any general standard, a contract

theory would be viable, regardless of any negligence on the part of the professional defendant." Id. "In other words, professional malpractice suits are controlled by the two-year tort limitation unless there is shown an express agreement by the defendant to do more than use ordinary care in the treatment or representation of plaintiff." Id. at 1097 (Summers, J., concurring specially).^{18/} See also Flint Ridge Development Co., Inc. v. Benham-Blair and Affiliates, Inc., 775 P.2d 797, 799-800 (Okla. 1989) (applying same standard to action against an architectural and engineering firm). Using this standard, the Court held that the savings and loan's claim sounded in contract because the attorney agreed to do more than act as a reasonable attorney in providing a title opinion. Specifically, the attorney agreed to search the county clerk's records for a nine year period and the savings and loan is entitled to sue the attorney for breach of this promise-based obligation. Id. at 1092.

In FDIC v. Regier Carr & Monroe, 996 F.2d 222 (10th Cir. 1993), the Territory Savings & Loan Association of Seminole, Oklahoma brought an action against an outside auditor who had been hired to provide services to the savings and loan. The savings and loan eventually sued the auditor for breach of contract. The savings and loan argued that the auditor breached the contract by failing to timely advise the savings and loan's board of directors about mismanagement by the savings and loan's president. After suit was filed, the FDIC was appointed as the savings and loan's receiver. The auditor argued that the claim sounded in tort for malpractice and was barred by the two-year tort statute of limitations. The Tenth Circuit cited Dabney for the proposition that "if the alleged contract of employment merely incorporates by reference or by implication a general standard of skill or care which a defendant would be bound independent of the contract a tort case is presented governed by the tort limitation period." Id. at 224. Using the Dabney standard, the Tenth Circuit concluded that the savings and loan's action sounded in tort. The Court reviewed the letter from the savings and loan that actually engaged the services of the auditor. The Court concluded that the letter simply incorporated by reference generally accepted auditing standards and proposed nothing beyond the general standard of care for certified public accountants. In other words, the letter required the auditor to do nothing beyond what the normal duty of care would require of a certified public accountant. Id.

Plaintiff has alleged no specifics in connection with the alleged contract between Sooner Federal and Defendants. Plaintiff's pleadings make it reasonably clear, however, that the breach alleged amounts to nothing other than Defendants' breach of their obligation to diligently and honestly administer Sooner Federal's affairs. In

^{18/} Plaintiff argues that Dabney is not entitled to precedential value because it is a plurality opinion. Plaintiff is incorrect. On the point just discussed, Dabney is a 5 to 3 decision, with one Justice not participating.

other words, there is no evidence in the record that would support a finding that there was an express agreement by Defendants to do more than use ordinary care in managing Sooner Federal's affairs. Thus, under Dabney and Regier the contract action being asserted by Plaintiff would sound in tort and be subject to the two year tort statute of limitations. The accrual of these claims would, therefore, be subject to the analysis in section IV(A), *supra*.

Plaintiff attempts to distinguish Dabney and Regier by arguing that those cases apply only to professional malpractice claims against doctors, lawyers, accountants, architects and engineers. While there is some language in these case which may restrict their holdings to professional malpractice cases, Plaintiff has not provided any reason why the Court should not consider a director of a depository institution to be a "professional" or why this action against such a director should not be viewed as a malpractice action. In any event, the undersigned finds no material difference between the type of contract claim asserted by the FDIC in this case and the type of contract claim asserted by the FDIC in Regier.

2. Breach of Fiduciary Duty Claims

Plaintiff has also alleged that Defendants were fiduciaries of Sooner Federal and Defendants violated their fiduciary duties to Sooner Federal. [Doc. No. 35, ¶¶24-35]. In all cases, the existence or non-existence of a fiduciary duty depends on the factual circumstances surrounding the parties' relationship and transactions. First Nat'l Bank and Trust Co. of Vinita v. Kissee, 859 P.2d 502, 510-11 (Okla. 1993). A fiduciary relationship includes all legal relationships "such as guardian and ward, attorney and client, principal and agent and the like" Lowrance v. Patton, 710 P.2d 108, 111 (Okla. 1985). Fiduciary relationships are not, however, limited to specific legal relationships. The relationship may be legal, "moral, social, domestic or merely personal." Id. at 111-12. Under Oklahoma law, a fiduciary relationship arises anytime the facts and circumstances surrounding a relationship would allow a reasonably prudent person to repose confidence and trust in another person. Id. at 111; In re Estate of Beal, 769 P.2d 150, 155 (Okla. 1989); Panama Processes, S.A. v. Cities Service Co., 796 P.2d 276, 290 (Okla. 1990); Quinlan v. Koch Oil Co., 25 F.3d 936, 942 (10th Cir. 1994) (interpreting Oklahoma law). "[A] fiduciary relationship springs from an attitude of trust and confidence and is based on some form of agreement, either express or implied, from which it can be said the minds have been met to create a mutual obligation." Quinlan, 25 F.3d at 942 (emphasis original) (quoting from Lowrance, 710 P.2d at 112).

While the existence of a fiduciary relationship is normally a question of fact, it is well settled that as a matter of law in Oklahoma, the relationship between a director and his corporation is a fiduciary relationship. Directors of a corporation owe fiduciary duties to the corporation. Wilson v. Harlow, 860 P.2d 793, 797-98 (Okla. 1993)

(citing Pepper v. Litton, 308 U.S. 295, 306 (1939)); Warren v. Century Bankcorporation, Inc., 741 P.2d 846, 849 (Okla. 1987); McKee v. Interstate Oil & Gas Co., 188 P. 109, 112 (Okla. 1920). "The general rule is that officers and directors in control of a corporation occupy toward the corporation and its stockholders, in respect of the business or property of the corporation, a fiduciary relation somewhat in the nature of a trusteeship" Adams v. Mid-West Chevrolet Corp., 179 P.2d 147, 156 (Okla. 1947). See, e.g., 6 Okla. Stat. § 712.1(B) (permitting bylaws of a bank to limit the liability of directors for breaches of their fiduciary duties under certain circumstances).

In RTC v. Greer, 911 P.2d 257 (Okla. 1996), defendant, Mr. Armstrong, Mr. Massey and others purchased several oil and gas leases with a \$450,000.00 loan from People's National Bank ("PNB"). The leases and the \$450,000.00 note were eventually assigned by defendant, Mr. Armstrong, Mr. Massey and the others to Mega II Energy and Investment Corporation ("Mega II"). Mega II was a corporation formed by defendant and others. Mega II then borrowed \$225,000.00 from PNB to purchase more leases. Mega II was unable to timely repay the PNB loans. So, Mega II sold some of its leases for \$1.5 million and paid off its \$670,000.00+ debt to PNB. Of the excess sale proceeds, \$300,000 was loaned by Mega II to Mr. Armstrong and Mr. Massey. During this time period, Anchor Savings Association ("Anchor") loaned money to Standard Systems Program ("Standard"). The Standard loan was secured by individual promissory notes from Standard's limited partners, one of whom was Mega II. Mega II eventually defaulted on the Standard promissory note and quit making payments to Anchor. Anchor filed a lawsuit against defendant, as a director of Mega II, for breach of his common law fiduciary obligations. After suit was filed, Anchor was taken over by the RTC. Anchor argued that defendant breached his fiduciary obligation to Mega II by approving and/or allowing Mega II to make \$300,000.00 loans to Mr. Armstrong and Mr. Massey at a time when Mega II could not pay its other debts (i.e., a form of imprudent lending). Id. at 259-261.

The Oklahoma Supreme Court ultimately held that Anchor, as a creditor of Mega II, could not sue defendant for breach of his fiduciary duties to Mega II. The Court held that such an action belongs to the corporation alone, not to the corporation's creditors. As a Mega II creditor, Anchor was not permitted to press a claim based on defendant's breach of his common law fiduciary duties to Mega II. Greer, 911 P.2d at 264-65. Prior to reaching this conclusion, the Court discussed which statute of limitations would be applicable to Anchor's claim. The Court held that Anchor's breach of fiduciary duty claim "lies either in contract imposed by law or in trust created by operation of law. The former is promise-based; the later is rested on a relational duty created by the ancient rules of chancery jurisprudence." Id. at 262. The Court then cited several cases to illustrate these two categories.

The second category of fiduciary duty claims mentioned in Greer (i.e., the trust prong) deals with the imposition of a constructive trust which arises by operation of law, and is not applicable in this case. The first category of fiduciary duty claims mentioned in Greer (i.e., the implied contract prong) is applicable in this case. As an example of a claim based on the implied contract prong of fiduciary obligations, the Court cited Hughes v. Reed, 46 F.2d 435 (10th Cir. 1931). In Hughes, the receiver of the First National Bank of Sapulpa brought an action against the bank's former directors. The receiver alleged that the directors failed to faithfully and diligently discharge their duties as directors by, among other things, making improvident loans, failing to heed warnings of the comptroller and failing to actively supervise and direct the bank's affairs. Hughes, 46 F.2d at 437. The directors answered, arguing that the receiver's claims were barred by the statute of limitations. The Tenth Circuit framed the issue as follows: Is the receiver's claim an action upon an express or implied contract not in writing or an action for injury to the rights of another, not arising on contract. See 12 Okla. Stat. §§ 95(2) and 95(3).

With the following language, the Court held that the receiver's claim in Hughes was an action based on an implied contract:

The assumption of the duties of directorship in any corporation is an agreement honestly and diligently to direct the business of the corporation. [The National Bank Act] requires that each director of a national bank take an oath that he will, 'so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of [the National Bank Act].' 12 U.S.C.A. § 73. By the relationship, fortified by the oath, [a director] agrees with the stockholders and creditors that he will honestly and diligently administer the bank's affairs. The [receiver's complaint] alleges facts which, if true, are a breach of that agreement. It has been expressly held that the liability of a director is ex contractu [i.e., from or out of a contract].

Hughes, 46 F.2d at 440-41.

Defendants attempt to distinguish Hughes by arguing that the depository institution in Hughes was a national bank and pursuant to 12 U.S.C. § 73, a director of a national bank is required to take an oath. Sooner Federal is a federal savings and loan, not a national bank, and there is no oath provision for directors of federal savings

and loans.^{19/} The undersigned finds this argument unpersuasive. The Court in Hughes held that it is the relationship between a director and the depository institution which gives rise to the implied by law agreement. As the Tenth Circuit stated, an oath simply fortifies an agreement which is already implied by law due to the position of trust, confidence, and dominance held by a director of a depository institution. Plaintiff's breach of fiduciary duty claim is, therefore, premised on a contract implied by law. In Oklahoma, an action to enforce an unwritten implied by law contract is governed by a three year statute of limitations. 12 Okla. Stat. § 95(2); Greer, 911 P.2d at 262; Hughes, 46 F.2d at 440-41 (adopting Oklahoma's three year statute of limitations for breach of fiduciary duty claims); and ESLIC v. Burdette, 696 F. Supp. 1196, 1200-1201 (E.D. Tenn. 1988) (holding that breach of fiduciary duty claims are quasi-contractual).

Defendants also argue that the Dabney rule applies to Plaintiff's fiduciary duty claims. See Section IV(B)(1), *supra*. That is, Defendants argue Plaintiff's breach of fiduciary duty claims do nothing other than seek to hold Defendants liable for breaches of the duty to exercise ordinary care. Under Dabney, Defendants argue that such an action must always sound in tort. The undersigned does not agree. Initially, there was absolutely no mention of a fiduciary relationship or fiduciary duties in Dabney or any of the cases cited by Defendants as applying the Dabney rule. The plaintiffs in those cases were not asserting a breach of fiduciary duty claim. More importantly, both Greer, an Oklahoma Supreme Court case, and Quinlan, a Tenth Circuit case, were decided after Dabney. Both Greer and Quinlan describe breach of fiduciary duty claims as being based on agreements implied by law due to the relationship of trust, confidence and dominance held by directors of depository institutions. This is distinctively contract, and not tort, language. Had the Oklahoma Supreme Court intended for the Dabney rule to apply to breach of fiduciary duty claims, it certainly could have applied the rule to the fiduciary duty claims in Greer.

The two year statute of limitations in 12 Okla. Stat. § 95 provides that an action "for injury to the rights of another, not arising on contract, and not hereinafter enumerated" may be brought within two years from the date the cause of action accrues. 12 Okla. Stat. § 95(3). From its own terms, this provision extends to, but not beyond, personal torts. Claims not based on personal torts are not covered by § 95(3) unless they do not arise on contract and are not included in other subsections of § 95. Thus, § 95(3) is not applicable to breach of fiduciary duty claims because under Oklahoma law fiduciary duty claims arise in part out of an implied by law contract. See, e.g., Lee Houston & Assoc., Ltd. v. Racine, 806 P.2d 848, 854 (Alaska 1991) (interpreting a statute of limitations very similar to Oklahoma's).

^{19/} Plaintiff agrees with Defendants that there is no oath involved here. In its pleadings, Plaintiff states that its claims are not premised on any oath taken by Defendants. See Doc. No. 88, p. 25 n. 5.

While a statute of limitations defense is a valid defense, it is one generally disfavored by the courts. Therefore, any doubts as to which of two statutes is applicable in a given case should be resolved in favor of applying the statute containing the longer limitations period. Williams v. Lee Way Motor Freight, Inc., 688 P.2d 1294 (Okla. 1984); Hughes, 46 F.2d at 440 (citing several state cases); Racine, 806 P.2d at 854-55. The briefing in this case and the relevant authorities on the issue of what statute of limitations to apply to breach of fiduciary duty claims certainly create some doubts as to which statute of limitations (i.e., the two year tort statute or the three year oral contract statute) should apply. FDIC v. Former Officers and Directors of Metropolitan Bank, 884 F.2d 1304, 1307 (9th Cir. 1989), cert. denied 496 U.S. 936 (1990) (reviewing the authorities and finding substantial doubt as to how a breach of fiduciary duty claim should be characterized). The undersigned has, therefore, applied the longer statute of limitations.

The choice of a three year versus a two year statute of limitations for breach of fiduciary duty claims also does not in any way violate or undermine the purposes sought to be served by statutes of limitation. "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witness have died or disappeared, and evidence has been lost." Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945). This case is not like the personal injury action. "Actions like the present one involving economic loss are often based largely on documentary evidence not unaided recollections which quickly grow stale." Racine, 806 P.2d at 855. For all of the foregoing reasons, the undersigned finds that Plaintiff's breach of fiduciary duty claims are governed by the three year statute of limitations found at 12 Okla. Stat. § 95(2).

From a review of the authorities in Oklahoma, it appears that the four elements of an actionable breach of fiduciary duty claim are: (1) the existence of a fiduciary relationship, (2) a duty arising out of the fiduciary relationship, (3) a breach of the duty, and (4) damages proximately caused by the breach of duty. Damages are an essential element of a breach of fiduciary duty claim. As discussed earlier in section IV(A), *supra*, limitation periods in Oklahoma do not begin to run until all of the elements of a cause of action arise. As with a negligence claim, a breach of fiduciary duty claim will not, therefore, accrue for statute of limitations purposes until damages are certain to occur and are not merely speculative. The analysis in section IV(A), *supra*, is applicable to Plaintiff's breach of fiduciary duty claims. As with Plaintiff's negligence claims, the undersigned is convinced that there are material factual issues as to what breaches of fiduciary duty caused harm to Sooner Federal for a particular loan, when those acts occurred, and when the harm caused by those acts was certain

to occur and not speculative. Summary Judgment on Plaintiff's breach of fiduciary duty claims is, therefore, not appropriate.^{20/}

CONCLUSION

The Northtown Investors loans are properly in this lawsuit. Plaintiff is not estopped from making its current accrual arguments. In Oklahoma, Plaintiff's negligence and contract claims are subject to the two year statute of limitations in 12 Okla. Stat. § 95(3). Plaintiff's breach of fiduciary duty claims are subject to the three year statute of limitations in 12 Okla. Stat. § 95(2). In Oklahoma, the statute of limitations on Plaintiff's negligence claims and breach of fiduciary duty claims began to run once it became certain and not speculative that Sooner Federal would suffer damages as a result of Defendants' negligence and/or breaches of fiduciary duty. The undersigned is convinced that material questions of fact exist as to what breaches of duty caused harm to Sooner Federal for a particular loan, when those breaches occurred, and when the harm caused by those breaches was certain to occur. Therefore, the undersigned recommends that Defendants' motions for summary judgment be **DENIED**.

TIME FOR OBJECTIONS

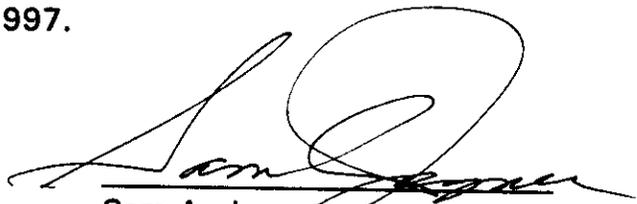
If the parties so desire, they may file with the District Judge assigned to this case, within 10 days from the date they are served with a copy of this Report and Recommendation, objections to the undersigned's recommended disposition of Defendants' motions. See 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b).

Dated this 21 day of July 1997.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 23rd day of July, 1997.

C. Cortez, Deputy Clerk



Sam A. Joyner
United States Magistrate Judge

^{20/} The undersigned wishes to make it clear that this Report and Recommendation in no way addresses the validity of Plaintiff's breach of fiduciary duty claims under Oklahoma law. The only issue presented by Defendants' motions was what statute of limitations to apply to a properly stated claim for breach of fiduciary duty.

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

ENTERED ON DOCKET
DATE JUL 23 1997

FILED
JUL 22 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE: MID-STATES AIRCRAFT)
ENGINES, INC.,)
)
Debtor.)
)
PATRICK J. MALLOY, III, TRUSTEE,)
)
Appellant,)
)
vs.)
)
BANK IV OKLAHOMA, N.A.,)
)
Appellee.)

Case No. 95-CV-880-E
Magistrate Judge Sam A. Joyner

STIPULATION OF DISMISSAL WITH PREJUDICE

The Appellant, Patrick J. Malloy, III, Trustee (the "Trustee"), and the Appellee, Boatmen's National Bank of Oklahoma, f/k/a BANK IV Oklahoma, N.A. ("Boatmen's"), hereby file this stipulation of dismissal with prejudice pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure. The parties have settled their controversy and the Trustee hereby dismisses both appeals filed herein from Orders of the United States Bankruptcy Court for the Northern District of Oklahoma in Adversary Proceeding No. 95-0072-C, including the appeal initiated by the Notice of Appeal filed in the Adversary Proceeding on September 5, 1995 and the Notice of Appeal filed in the Adversary Proceeding on October 28, 1996.

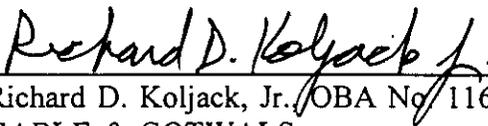
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*Attorneys for Appellee,
Boatmen's National Bank of Oklahoma,
f/k/a BANK IV Oklahoma*

7-23-97

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

F I L E D

THE BAKER TRUSTS)
PARTNERSHIP, an Oklahoma)
General Partnership,)

JUL 22 1997

Plaintiff,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

v.)

Case No: 95-C-682-W

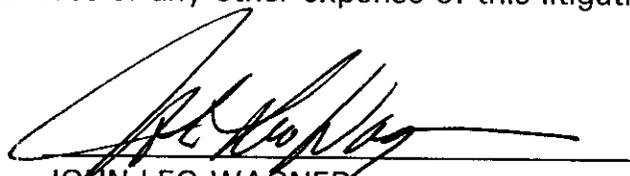
UNITED STATES OF AMERICA,)

Defendant.)

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(ii), and in accordance with the joint Stipulation of Dismissal filed July 15, 1997, the parties stipulate to the dismissal of plaintiff's complaint against defendant with prejudice to refiling.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-entitled cause of action is dismissed with prejudice. Each party shall bear its respective costs, including attorneys' fees or any other expense of this litigation.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\orders\baker.2

SAC
7/21/97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 22 1997

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

RENDA HARTMAN,

Plaintiff,

v.

Case No. 96 CV 1137-BU

WINDSHIELDS AMERICA, INC.,

a Delaware corporation, and

GLOBE GLASS, SIGN & MIRROR, CO.,

An Illinois corporation,

Defendants.

ENTERED ON DOCKET

DATE 7-23-97

ORDER OF DISMISSAL

NOW before the Court is the Stipulation of Dismissal of the parties to this action, advising that this matter has been compromised and settled. Upon review of such Stipulation of Dismissal, this Court finds that an Order of Dismissal should be entered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter be, and hereby is, dismissed with prejudice pursuant to the Stipulation of Dismissal submitted by the parties to this action.

DONE this 22 day of July, 1997.


UNITED STATES DISTRICT JUDGE

Randall J. Snapp, OBA #11169
CROWE & DUNLEVY
321 South Boston, Suite 500
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rm

FILED

JUL 22 1997

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HAROLD DUCKWORTH,

Plaintiff,

vs.

SNOW'S FURNITURE FUNCTION,
INC., an Oklahoma
corporation, and OAKTREE
FURNITURE DELIVERY, INC.,
an Oklahoma corporation,

Defendants.

No. 97 CV 0301 BU

ENTERED ON DOCKET
DATE 7-23-97

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 22nd day of July, 1997, upon a Joint Stipulation for Order of Dismissal filed herein by plaintiff, Harold Duckworth, by and through his attorney of record, Kathy Evans Borchardt; and the defendant, Snow's Furniture Function Inc., by and through its attorney of record, Jim Lloyd; and OakTree Furniture Delivery, Inc., by and through its attorney of record, John W. Klenda; the Court finds, that the above entitled cause should be and is hereby dismissed with prejudice to the bringing of any future action thereon.

Michael Bunge
UNITED STATES DISTRICT JUDGE

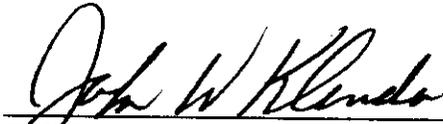
APPROVED AS TO FORM AND CONTENT:



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OakTree Furniture
Delivery, Inc.
1430 S. Quaker
Tulsa, OK 74120
(918) 582-6111

FILED ON DOCKET
7-23-97

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

JUL 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff(s),)
)
 vs.)
)
 DANA ELAINE HARRIS-BAKER,)
)
 Defendant(s).)

Case No. 96-C-1112-K ✓

REPORT & RECOMMENDATION

On this May 29, 1997, the Court heard argument on Defendant's Motion to vacate default judgment. Plaintiff United States of America appeared by and through attorney Loretta F. Radford. Defendant Dana Elaine Harris-Baker appeared in person and represented herself *pro se*.

Procedural History

Plaintiff filed a Complaint on December 4, 1996 [Doc. No. 1-1], asserting that Defendant had defaulted on a student loan. Plaintiff requested \$839.14 for the principal amount of the loan, \$87.00 for administrative costs, \$524.63 for accrued interest, \$120.00 for filing fees, and post-judgment interest.

Defendant did not file an Answer, and on March 14, 1997, Plaintiff requested the entry of a default judgment against the Defendant. On March 18, 1997, a default judgment against the Defendant was entered by the Court. Plaintiff was awarded \$839.14 in principal, \$524.63 in accrued interest, \$87 in administrative charges, \$120.00 in filing fees, and post-judgment interest of 5.67%.

11

Defendant wrote a letter to the Court on March 27, 1997. Defendant stated that the original note application stated that if the individual signing was a minor, the note was not enforceable. Defendant noted that she was seventeen at the time she completed the application. Defendant suggests that because she was a minor at the time she applied for the loan, the Court should not permit the Plaintiff to enforce the loan.

The District Court acknowledged the Defendant's letter, and treated the letter as a "Motion to Vacate Default Judgment." The District Court directed Plaintiff to respond to Defendant's Motion. In addition, by minute order dated May 14, 1997, the District Court referred the Motion to Vacate Default Judgment to the United States Magistrate Judge for Report and Recommendation.

Standard: Motion to Vacate Judgment

Fed. R. Civ. P. 55(c) provides that "for good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c). Fed. R. Civ. P. 60(b) permits a court to grant relief from a judgment for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud . . . misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Therefore, to justify the setting aside of a default judgment, Defendant must establish either good cause, or meet one of the reasons delineated in Fed. R. Civ. P. 60(b).

The Higher Education Act of 1965

Defendant does not specifically address why the Court should set aside the default judgment. However, Defendant does raise two arguments to support her contention that the loan is not enforceable. First, Defendant argues that because she was a minor at the time she signed the loan documents, the agreement was void under state law and should likewise be considered void under federal law. Second, Defendant contends that the statute of limitations had run before the federal government passed statutes which changed the limitations period on collecting loans, and the government should not be permitted to resurrect stale claims.

The courts which have previously addressed those arguments have determined that the federal government can apply the statutes retroactively, and can resurrect stale loans.

The Higher Education Act of 1965 provides that:

Notwithstanding any provision of State law to the contrary--

* * *

(2) in collecting any obligation arising from a loan made under part B of this subchapter, a guaranty agency or the Secretary shall not be subject to a defense raised by any borrower based on a claim of infancy.

20 U.S.C.A. § 1091a(b). Numerous courts have held that this statute can be applied by the United States retroactively. See, e.g., U.S. v. Glockson, 999 F.2d 896, 897 (11th Cir. 1993) (“Congress intended the HETA [Higher Education Technical Amendments of 1991] amendments to apply retroactively to all student loan collection actions.”). Retroactive application of the statute would preclude Plaintiff from raising a defense based on infancy. In addition, several courts have determined that the statute “resurrects” otherwise stale claims. See U.S. v. Phillips, 20 F.3d 1005 (9th Cir. 1994) (“Congress . . . revived all actions which otherwise would have been time-barred”); U.S. v. Hodges, 999 F.2d 341, 341-342 (8th Cir. 1993) (permitting government to bring action on defaulted loan; default occurred in 1969, loan was assigned in 1983, and would have been time-barred under the applicable statute of limitations).

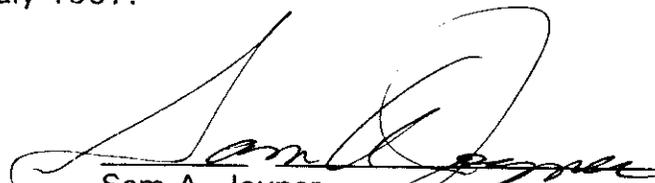
Therefore, under the statute and pursuant to case law, Defendant is not permitted to raise a defense to the enforcement of the loan based on her assertion that she was a minor at the time she entered into the agreement. Furthermore, although the applicable statute of limitations may have run prior to the passage of the statute (20 U.S.C. § 1091a), the statute provides that no statute of limitations shall “terminate the period within which suit may be filed. . . .” 20 U.S.C. § 1091a. The courts have additionally held that otherwise stale claims may be “resurrected.” For these reasons, the United States Magistrate Judge recommends that the District Court **deny** Defendant’s Motion to Vacate.

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court DENY Defendant's Motion to Vacate Judgment [Doc. No. 0-1].

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 22nd day of July 1997.



Sam A. Joyner
United States Magistrate Judge

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

RECORDED ON DOCKET
7-23-97

FILED

JUL 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELINDA J. CRAMER,
and ELIZABETH R. CRAMER,

Plaintiffs,

v.

JOHN L. CALLAHAN,
COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION,¹

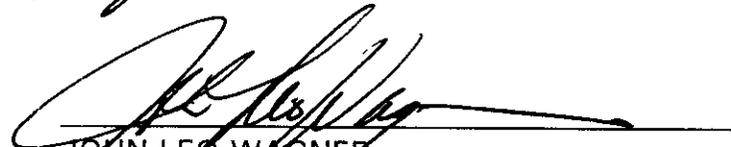
Defendant.

Case No: 96-C-95-W

JUDGMENT

Judgment is entered in favor of Melinda J. Cramer and Elizabeth R. Cramer pursuant to this court's Order filed July 15, 1997, remanding case to the Commissioner for further development in the form of subpoenas issued to obtain the Department of Human Services and Oklahoma Bureau of Investigation records and consideration of them by the ALJ in determining whether the stepsons were entitled to survivors' benefits.

Dated this 21st day of July, 1997.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

RECORDED ON DOCKET
7-23-97

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

FILED

MELINDA J. CRAMER,
and ELIZABETH R. CRAMER,

Plaintiffs,

v.

JOHN J. CALLAHAN,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

JUL 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-95-W ✓

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Commissioner of Social Security ("Commissioner") denying her claim to exclude the deceased wage earner's second wife and her children from receiving survivors' benefits under Title II.

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

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that the deceased wage earner's second wife and her children were entitled to receive survivors' benefits.

Plaintiff filed an application for wife and child survivor benefits on July 6, 1993 (TR 27). She was awarded benefits, but they were reduced due to the fact that the Social Security Administration approved the application of a second wife and her two children to also receive survivor benefits (TR 44-45, 53-54).

The evidence in the record shows that plaintiff and the deceased, John Cramer ("John"), were married on April 14, 1989 (TR 65). They were divorced on March 30, 1993, but the decree was not filed until June 28, 1993 (TR 62-64). Of this marriage one child was born, Elizabeth R. Cramer, and John was ordered to pay child support (TR 63, 66). John and Deborah Ann Smith ("Debbie") were married in Arkansas on April 12, 1993, but returned to Oklahoma to live (TR 68). Debbie had been divorced from David S. Smith on September 27, 1991, and he had been ordered to pay child support for the two sons born of the marriage, Christopher and Nathaniel (TR 69-73).

Plaintiff claims that in the middle of May, 1993, John and Debbie separated, and Debbie applied for and received financial aid through the Department of Human Services for her two children. Debbie admitted at the hearing before the ALJ that this was true, but testified that she and her sons moved back with John the first week of June, 1993 and lived in a trailer in Locust Grove until he was shot and killed on June 26, 1996 (TR 67, 123, 124). She also admitted that the Oklahoma Department of Human Services garnished her ex-husband, David Smith's, wages to collect child

support payments for the two children while she was drawing aid in May and June of 1993 (TR 127-128).

Plaintiff claimed at the hearing that John came to her on May 14, 1993 and said his marriage to Debbie was a mistake and he wanted to get it annulled and return to his original family (TR 101). On June 3, 1993, she went to the trailer where he was living alone and picked up his belongings and saw no woman's belongings there (TR 103). He got his belongings from her on June 6, 1993 and told her he was going to come home (TR 104). He was shot and killed three weeks later (TR 104).

Betty Phillips, John's mother, provided a written statement in the record which said: "Christopher and Nathaniel Smith were my son's stepsons. They were living together at the time of my son's death." (TR 60).

Plaintiff claims that the failure of the ALJ to consider the issue of the stepsons' eligibility for assistance and to issue a subpoena for Department of Human Services and Oklahoma State Bureau of Investigation records resulted in his failure to develop the record fully and fairly and led to an erroneous conclusion. She alleges that the evidence she sought to subpoena was not available to her by any other method other than to have the ALJ subpoena them. She claims that repeated requests were made for the subpoena, because the records contain evidence that supports her testimony that John neither lived with, nor supported, his stepchildren, a prerequisite to receiving survivor benefits. Plaintiff cites 20 C.F.R. § 404.357, which states:

You may be eligible for benefits as the insured's stepchild if, after your birth, your natural or adopting parent married the insured. The marriage between the insured and your parent must be a valid marriage under

State law If the insured is not alive when you apply, you must have been his or her stepchild for at least 9 months immediately preceding the day the insured died. This 9-month requirement will not have to be met if the marriage between the insured and your parent lasted less than 9 months under the conditions described in § 404.335(a)(2).

Section 404.335(a)(2) states:

You may be entitled to benefits as the widow or widower of a person who was fully insured when he or she died. You are entitled to these benefits if --

(a)(2) Your relationship to the insured as a wife or husband did not last 9 months before the insured died, but at the time of your marriage the insured was reasonably expected to live for 9 months, and --

(i) The death of the insured was accidental. The death is accidental if it was caused by an event that the insured did not expect; it was the result of bodily injuries received from violent and external causes; and as a direct result of these injuries, death occurred not later than 3 months after the day on which the bodily injuries were received.²

²Neither plaintiff nor defendant cite the relevant regulations which apply to the main dispute in this case. The regulations include:

§404.360 When a child is dependent upon the insured person.

One of the requirements for entitlement to child's benefits is that you be dependent upon the insured. The evidence you need to prove your dependency is determined by how you are related to the insured. To prove your dependency you may be asked to show that at a specific time you lived with the insured, that you received contributions for your support from the insured, or that the insured provided at least one-half of your support

§ 404.363 When a stepchild is dependent.

If you are the insured's stepchild, as defined in § 404.357, you are considered dependent upon him or her if you were either living with or receiving at least one-half of your support from him or her at one of these times -- (a) When you applied; (b)

When the insured died; or (c) If the insured had a period of disability that lasted until his or her death or entitlement to disability or old-age benefits, at the beginning of the period of disability or at the time the insured became entitled to benefits.

§ 404.366 "Contributions for support," "one-half support," and "living with" the insured defined--determining first month of entitlement.

To be eligible for child's or parent's benefits, and in certain Government pension offset cases, you must be dependent upon the insured person at a particular time or be assumed dependent upon him or her

(a) "Contributions for support." The insured makes a contribution for your support if the following conditions are met:

(1) The insured gives some of his or her own cash or goods to help support you. Support includes food, shelter, routine medical care, and other ordinary and customary items needed for your maintenance

(2) Contributions must be made regularly and must be large enough to meet an important part of your ordinary living costs. Ordinary living costs are the costs for your food, shelter, routine medical care, and similar necessities Although the insured's contributions must be made on a regular basis, temporary interruptions caused by circumstances beyond the insured person's control, such as illness or unemployment, will be disregarded unless during this interruption someone else takes over responsibility for supporting you on a permanent basis.

(b) "One-half support." The insured person provides one-half of your support if he or she makes regular contributions for your ordinary living costs; the amount of these contributions equals or exceeds one-half of your ordinary living costs; and any income (from sources other than the insured person) you have available for support purposes is one-half or less of your ordinary living costs. We will consider any income which is available to you for your support whether or not that income is actually used for your ordinary living costs. Ordinary living costs are the costs for your food, shelter, routine medical care, and similar necessities. A contribution may be in cash, goods, or services. The insured is not providing at least one-half of your support unless he or she

The ALJ has a duty to fully and fairly develop the record. Baker v. Bowen, 886 F.2d 289, 291 (10th Cir. 1989); Jordan v. Heckler, 835 F.2d 1314, 1315 (10th Cir. 1987). This duty requires him to obtain medical records and other relevant evidence where such evidence is necessary to a fair determination of the claim. Milton v. Schweiker, 669 F.2d 554, 556 (8th Cir. 1982) (ALJ's duty to develop record "includes gathering evidence so that a just determination of disability may be made"; remanding and ordering ALJ to obtain pro se claimant's medical and employment records); Williams v. Mathews, 427 F.Supp. 63, 66 (S.D.N.Y. 1976) (remanding where ALJ failed to subpoena employment records from uncooperative employer and then held against claimant for lack of evidence); McBride v. Heckler, 619 F.Supp. 1554, 1557-58 (D.N.J. 1985) (reversing denial of surviving child's benefits to pro se claimant where ALJ made no effort to secure employment records of deceased parent).

The ALJ relied on testimony of Debbie and the letter written by John's mother to make his determination that the marriage of John and Debbie was a valid one and

has done so for a reasonable period of time. Ordinarily, we consider a reasonable period to be the 12-month period immediately preceding the time when the one-half support requirement must be met

(c) "Living with" the insured. You are living with the insured if you ordinarily live in the same home with the insured and he or she is exercising, or has the right to exercise, parental control and authority over your activities.

therefore by implication that Debbie and her sons were entitled to survivors' benefits. While counsel for plaintiff attempted to raise a second separate issue of whether Debbie's sons were living with, and supported by, John at the time of his death, as required to be eligible for benefits, the ALJ did not mention the issue in his opinion (TR 13-15, 89-90). Plaintiff's testimony contradicted the evidence relied on by the ALJ, but he decided not to subpoena and review the materials which plaintiff claimed would support her testimony.

Plaintiff claims that the Department of Human Services' records would show that the children were receiving AFDC benefits from the State of Oklahoma based on the fact that their father, David Smith, was not providing the child support which he was required to under law, would reveal statements made by John as to his support of the family during the short period of time John and Debbie lived together after his divorce from plaintiff, and would reveal addresses for Debbie during her short marriage to John which were not the same as his address. Plaintiff contends that the Oklahoma State Bureau of Investigation records will reveal that any reconciliation of John and Debbie occurred within days before his death and not weeks, as she testified.

In this case, the ALJ had the authority to issue a subpoena to the Department of Human Services and the Oklahoma Bureau of Investigation on his own motion. See 20 C.F.R. § 404.950(d) (1993). It appears that the records would have been reasonably necessary for a full and fair hearing in this case. The ALJ's failure to subpoena the records warrants remand because plaintiff can "demonstrate prejudice

or unfairness in the administrative proceedings" as a result. See Hall v. Secretary of Health, Educ. & Welfare, 602 F.2d 1372, 1378 (9th Cir. 1979). She has expressly asserted that the records would support her position.

While defendant's brief contends "plaintiff never requested such assistance [in issuing the subpoenas] during the administrative proceedings in this case," this is a false statement. The subpoenas were requested several times during the hearing (TR 90, 91, 135), and the ALJ assured counsel that "[y]ou've indicated the additional matters you want me to look at, of course, and we'll consider evidence in all of that regard." (TR 92).

The ALJ failed to fully develop the record and to consider the issue of whether the stepchildren were living with, and supported by, John at the time of his death, as required to be entitled to survivor benefits as his stepchildren. This case is remanded for further development in the form of subpoenas issued to obtain the Department of Human Services and Oklahoma Bureau of Investigation records and consideration of them by the ALJ in determining whether the stepsons were entitled to survivors' benefits.

Dated this 15th day of July, 1997.


JOAN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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SEARCHED ON DOCKET
7-23-97

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

FILED

JUL 22 1997

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

MONTE G. STEPHENS,)
)
 Plaintiff,)
)
 v.)
)
 JOHN J. CALLAHAN, Acting)
 Commissioner of the Social Security)
 Administration,)
)
 Defendant.)

CASE NO. 96-cv-235-M ✓

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 22nd day of JULY, 1997.

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

ENTERED ON DOCKET

7-23-97

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

FILED

JUL 22 1997

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

MONTE G. STEPHENS

446-56-9914

Plaintiff,

vs.

Case No. 96-CV-235-M

JOHN J. CALLAHAN¹,
Acting Commissioner Social Security
Administration,

Defendant,

ORDER

Plaintiff, Monte G. Stephens, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

Plaintiff was born June 26, 1951 and was 41 years old at the time of the hearing. He has a 12th grade education. In the past he has worked as a furnace worker, loader, security guard, and laborer. He has also worked as a church janitor and as an envelope loader. Plaintiff claims to be unable to work as a result of emotional, and mental problems. The ALJ determined that although Plaintiff was

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.

² Plaintiff's October 9, 1992 application for disability benefits was denied December 29, 1992 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 11, 1994. By decision dated February 23, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on January 26, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

unable to perform his past relevant work, he was capable of performing work at all exertional levels but was limited by moderate depression and limitations on social interaction. Based on the testimony of a vocational expert, the ALJ determined that there are jobs available which Plaintiff could perform. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

A psychiatric examination of Plaintiff was performed by Dr. Goodman on December 15, 1992, in connection with a previous application for benefits. Dr. Goodman diagnosed alcohol abuse and dependency, severe, continuous, currently in remission with Alcoholics Anonymous treatment; personality disorder, not otherwise specified, with passive aggressive and narcissistic traits. He reported that Plaintiff showed no evidence of any significant mood disturbance, psychotic illness or neurotic process. He could see no reason why Plaintiff could not do at least moderately complicated work activities as long as he remained sober. [R. 202-3].

After Dr. Goodman's evaluation, Plaintiff was admitted to Parkside from June 29, 1993 to July 12, 1993, when he was discharged to Parkside's partial hospitalization program where he remained until November 1993. Following his discharge from Parkside Partial Hospitalization, Plaintiff received treatment from Associated Centers for Therapy (ACT). ACT records cover November 1993 to February 1995 and consist of notes made by Plaintiff's therapist, case manager, and a medical doctor who periodically evaluated Plaintiff for the purpose of administering

medication. At the time the ALJ rendered the decision in this case, the record before the ALJ only included Dr. Goodman's consultative exam [R. 201-204], and 49 pages of treatment notes and reports generated by Parkside personnel covering roughly a 5 month time-frame [R. 205-254]. The ACT records were not before the ALJ.

Plaintiff submitted the ACT records to the Appeals Council, as permitted by the relevant regulations. 20 C.F.R. § 404.970(b). The Appeals Council denied review of the case, stating:

The Appeals Council has also considered the contentions raised in your representative's letter dated March 27, 1995, as well as the additional evidence from Associated Centers for Therapy, Inc., dated November 10, 1993 through February 15, 1995 and from Jill Glenn, M.S. dated March 21, 1995, but concluded that neither the contentions nor the additional evidence provides a basis for changing the Administrative Law Judge's decision.

[R. 5]. The Appeals Council decision apparently entailed an examination of the merits of the entire record, including the new evidence, and necessarily embodies its conclusion that the additional evidence fails to provide a basis for changing the ALJ's decision. See 20 C.F.R. § 404.970(b); *Ramirez v. Shalala*, 8 F.3d 1449, 1459 (9th Cir. 1993). The Tenth Circuit has ruled that such "new evidence becomes part of the administrative record to be considered when evaluating the Secretary's decision for substantial evidence." *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994).

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine

that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Pursuant to *O'Dell* this court is required to review the ACT treatment records and to determine whether, even considering the new evidence, the ALJ's decision is supported by substantial evidence.

The court is troubled that consideration of the ACT records will necessarily involve some degree of speculation as to how the ALJ would have weighed these records had they been available for the original hearing. In a similar situation, the Eighth Circuit has stated that it "consider[s] this to be a peculiar task for a reviewing court." *Riley v. Shalala*, 18 F.3d 619, 622 (8th Cir. 1994).

In *Riley*, the claimant submitted two additional doctors' reports to the Appeals Council as new evidence, the Appeals Council summarized the content of the reports and gave reasons why those reports did not affect the Appeals Council's conclusion that the ALJ's decision was in accord with the weight of the evidence. In the present case, the new evidence submitted to the Appeals Council constitutes the majority of

the medical record both in terms of time span and page volume, and they cover the precise time-frame at issue. This court considers itself to be in a more peculiar position than the *Riley* Court. In *Riley*, the Appeals Council had at least given some reasons for its conclusion, in this case there is no such explanation. This is certainly at odds with the oft-stated requirement that the Social Security Administration discuss the evidence before it and explain the reasons for any unfavorable decision. 42 U.S.C. § 405(b).

42 U.S.C. § 405(b) directs the Commissioner of Social Security to:

make findings of fact, and decisions as to the rights of any individual applying for a payment Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. [emphasis supplied].

In *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996), the Court explained:

By Congressional design, as well as by administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive.")

In this case, contrary to the statutory mandate that any unfavorable decision shall contain a discussion of the evidence, the ACT records are not discussed by anyone representing the Commissioner. This method of handling new evidence does not appear to be contrary to any regulation promulgated by the Commissioner. The

court notes, however, that the Congressional grant of authority to the Commissioner to make rules and regulations and to establish procedures is limited to those which are not inconsistent with the statutes. 42 U.S.C. § 405(a). Any procedure adopted by the Commissioner which permits the Appeals Council to receive such a volume of relevant, new evidence and affirm denial of benefits without any discussion of the evidence is inconsistent with the §405(b) requirement that an unfavorable decision contain a discussion of the evidence and a statement of the reasons upon which the denial is based. Without a doubt, a denial decision issued by an ALJ containing such an absence of discussion and explanation would be remanded for the reason that "[s]uch a bare conclusion is beyond meaningful judicial review." *Clifton*, 79 F.3d at 1009. However, this court is constrained to follow the dictates of *O'Dell*, 44 F.3d 855, which requires the court to consider the new evidence to determine whether it outweighs the evidence that was before the ALJ when he made his decision, without regard to the absence of any agency analysis of that evidence.

O'Dell was an appeal from denial of a Social Security disability application. After the ALJ issued a denial decision, the claimant requested review by the Appeals Council and, like this case, new relevant evidence was submitted to the Appeals Council. The Appeals Council decided that the new evidence did not provide a basis for changing the ALJ's decision and denied review. The district court refused to consider the new evidence which was not before the ALJ. The Tenth Circuit held that the new evidence submitted to the Appeals Council pursuant to 20 C.F.R. § 404.970(b) becomes part of the administrative record to be considered by the court

when evaluating the Commissioner's decision for substantial evidence. *Id.*, at 859. The Tenth Circuit then proceeded to evaluate the new evidence and concluded that it did not "undermine" the denial decision. *Id.*

The *O'Dell* opinion does not indicate whether the Appeals Council provided any analysis of the new evidence. It merely states: "The Appeals Council decided that the new evidence did not provide a basis for changing the ALJ's decision and denied review." *Id.*, at 857. *O'Dell* did not directly address the issue which concerns this court. Instead the court focused its attention on the question of whether the new evidence should be considered when evaluating the Commissioner's decision. However, the *O'Dell* opinion did mention the Seventh Circuit's holding in *Eads v. Sec. of Dept. of Health & Human Servs.*, 983 F.2d 815, 817-18 (7th Cir. 1993), that appellate review for substantial evidence is restricted to the evidence before the ALJ. *O'Dell* also noted *Eads* concern for preserving the court's role as a reviewing court rather than factfinder. *O'Dell*, at 858. Since the Tenth Circuit mentioned *Eads* and rejected its rationale, it is apparent that the Tenth Circuit has considered the court's proper role with regard to new evidence.³ Therefore, despite the fact that this court regards the lack of analysis by the Appeals Council to be contrary to § 405(b), and despite the fact that consideration of the new evidence submitted to the Appeals

³ The Tenth Circuit has reversed and remanded at least one unpublished case because the Appeals Council failed to say that it considered additional evidence. *Lawson v. Chater*, 83 F.3d 432 (Table), 1996 WL 195124 (10th Cir. (Okla.)). There, the Appeals Council stated only that "[i]n reaching this conclusion [to deny review], the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action."

Council forces the court to adopt the role of a factfinder, rather than a reviewing court, fidelity to *O'Dell* requires the court to proceed in that manner.

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to follow the treating physician rule; (2) failed to properly develop the record; (3) failed to properly evaluate Plaintiff's credibility; (4) failed to properly interpret the vocational expert's testimony; and (5) included contradictory findings within his decision.⁴

I. TREATING PHYSICIAN RULE

It is well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's

⁴ Relying on *James v. Chater*, 96 F.3d 1341 (10th Cir. 1996), the Commissioner argues that Plaintiff failed to preserve his right to judicial review with respect to some of these issues as he did not first present them to the Appeals Council. *James* is not applicable to this case.

In *James* the Tenth Circuit announced a **prospective** rule. *Id.*, 96 F.3d at 1341 [emphasis supplied]. Henceforth, issues not brought to the attention of the Appeals Council on administrative review may, **given sufficient notice to the claimant**, be deemed waived on subsequent judicial review. *Id.* at 1344. [emphasis supplied]. The *James* opinion was issued on September 19, 1996, 19 months **after** the ALJ's February 23, 1995 decision and 8 months **after** the Appeals Council Action. To apply *James* to the instant case would be to give the rule retroactive application, contrary to the express language in *James*.

Furthermore, the Court notes that the Court in *James* was unmistakably concerned that claimants be given notice that issues not raised may be deemed waived. The Court has examined the Notice of Decision which explains Plaintiff's administrative appeal rights and notes that it does not inform Plaintiff that failure to raise issues before the Appeals Council could result in a waiver.

physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ. *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984).

Plaintiff alleges that the ALJ failed to adhere to this rule. Plaintiff points to a letter dated March 21, 1995 from his therapist at ACT which indicates that she had been seeing him on an out patient basis since December 20, 1995 and "[I] support his need for disability assistance. He has great difficulty with depression even though on medication. The records enclosed well support his lack of ability to work to support himself." [R. 270]. The Commissioner argues that the ACT letter is from a counselor and is not an acceptable form of evidence to support a finding of disability, citing 20 C.F.R. § 404.1527.

The record does not contain an opinion by any treating *physician* concerning Plaintiff's alleged inability to perform work functions. However, the ALJ and the court are not prohibited from considering the opinions of non-physician health care providers by the regulation cited by the Commissioner, 20 C.F.R. § 404.1527. Section 404.1527 refers to medical and treating sources, rather than physicians. However, the weight accorded an opinion will depend on a number of factors, including: length of treatment relationship, nature and extent of treatment relationship, the existence of relevant evidence to support the opinion, the consistency of the opinion with the record as a whole, and the area of expertise or specialty of the treating source. Since the ACT counselor's opinion was not before the ALJ, this court will conduct the analysis.

The court finds that although the therapist's letter states that Plaintiff is unable to work due to great difficulty with depression, that opinion is not supported by her treatment notes. While the ACT records report that Plaintiff occasionally has racing thoughts [R. 302, 290-91, 286], he is usually described as being only mildly, slightly, or somewhat depressed. [R. 297, 294, 285, 281, 277, 277, 275]. The records also describe sleep problems, irrational thoughts [R. 297] and occasional periods of increased depression [R. 277], but these problems are infrequently noted. It is often noted that Plaintiff was alert, coherent, relevant, oriented, and goal oriented, and he was encouraged to keep busy with activities. [R. 275, 277, 278, 280, 281, 282, 284, 286, 289]. On balance, these records do not support the therapist's opinion that Plaintiff was unable to work, nor do they undermine the ALJ's decision.

Plaintiff also argues that the decision should be reversed because the ALJ ignored reports from Parkside. This contention is without merit. The ALJ discussed Plaintiff's Parkside admission, the treatment notes and discharge diagnosis. Based on the evidence of record, the ALJ found that Plaintiff's ability to perform the mental demands of basic work-related activities is limited by *moderate* depression and moderate restrictions on social interaction. [R. 16] This finding comports with the record as a whole as Plaintiff was described as having mild, slight, and some depression. The records also reflect that he volunteered part-time at a church, and no problems related to the volunteer work were discussed in the treatment records. [R. 281, 285, 290, 291, 293].

II. FAILURE TO DEVELOP THE RECORD

Plaintiff states that the ALJ failed to develop the record but does not present a cogent argument related to this claim. The Court finds no support in the record for this claim.

III. CREDIBILITY

Plaintiff argues that the case should be reversed for the ALJ's failure to explain his credibility determination. The Court finds that the ALJ adequately explained his credibility determination at page 16 of the record. Further, consideration of the ACT records do not undermine the ALJ's determination.

IV. VOCATIONAL EXPERT

Plaintiff complains that the ALJ did not pose a proper hypothetical to the vocational expert at the hearing. Specifically, Plaintiff asserts that the ALJ erred in describing his depression to the vocational expert as "moderate," and therefore the ALJ's conclusion based on the vocational expert's testimony does not constitute substantial evidence. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Commissioner's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

In support of his argument, Plaintiff points to the psychological report dated July 12, 1993, generated by George Patterson, Ph.D. [R. 214-215]. In that report

Dr. Patterson related the results of several psychological tests which were performed "to aid in diagnosis and treatment planning." According to the report, the test "findings indicated a diagnosis on Axis I of Bipolar Disorder, Depressed, Severe without Psychotic Features." [R. 215]. Relying on the "Depressed, Severe" diagnosis, Plaintiff asserts that ALJ's hypothetical to the vocational expert was wrong. According to Plaintiff, the records from ACT showed that his depression continued at a rather severe level. The Court finds that, aside from the single entry on the psychological report, there is no other reference to Plaintiff's depression being severe. As previously discussed, his depression was described as mild and slight. The Court finds that the ALJ's hypothetical questioning to the vocational expert is supported by substantial evidence.

V. CONTRADICTORY FINDINGS

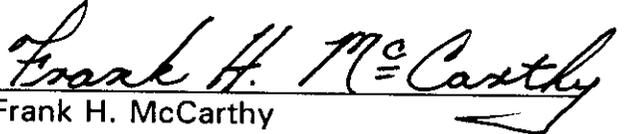
The ALJ found that Plaintiff could not return to his past relevant work as a furnace worker, loader, security guard, laborer, custodian, and envelope loader. [R. 18]. However, based upon the testimony of the vocational expert, the ALJ found that there were a number of jobs within the national economy that Plaintiff could perform given his residual functional capacity, such as janitor, presser, dishwasher, machine operator, and hand packager. [R. 19]. Plaintiff states that work as an envelope loader (stuffer) is among the most simple and repetitious jobs in the economy, he argues that the finding of an inability to return to this work is incongruent with the finding of an ability to perform other simple activity in the national economy.

The Court agrees that the findings are somewhat incongruent. However, the record, viewed as a whole, does support the ALJ's finding that Plaintiff retains the ability to perform some work in the national economy. Accordingly, the Court declines to reverse the case.

CONCLUSION

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision. The Court has considered the new evidence submitted to the Appeals Council and concludes that consideration of that evidence does not require a change in the outcome. The ALJ's determination remains supported by substantial evidence. The decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 22nd day of July, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

JUL 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DENNIS DEITRICH,)
)
Plaintiff,)
)
vs.)
)
MARVIN T. RUNYON,)
)
Postmaster General, and THE UNITED)
STATES POSTAL SERVICE,)
)
Defendant.)

No. 96-C-215-B ✓

FILED ON DOCKET

JUL 22 1997

ORDER

Before the Court is the motion for summary judgment filed by defendant Marvin T. Runyon, Postmaster General (hereinafter, the "USPS") (Docket No. 20). The USPS asserts that it is entitled to summary judgment on plaintiff Dennis Deitrich's ("Deitrich") claim under the Rehabilitation Act, 229 U.S.C. §791 *et seq.*, because Deitrich cannot establish that he was discriminated against based on handicap.

Further, the USPS urges that Deitrich has failed to exhaust his administrative remedies, and because this issue is a matter of jurisdiction, the Court should revisit the question.¹ The Court disagrees that this is a jurisdictional matter. *See below.* However, at the pretrial conference on May 2, 1997, the parties informed the Court that they would submit a joint stipulation of facts pertinent to the issue of exhaustion to enable the Court to address the issue prior to trial. *Stipulation of Facts*

¹Early in the case, the USPS presented the issue of failure to exhaust administrative remedies by motion to dismiss which was converted to a summary judgment motion. On September 16, 1996, the Court ruled that two issues of fact precluded summary judgment: (1) whether Deitrich initiated contact with an EEO counselor within 45 days of the alleged discriminatory act; and (2) whether Deitrich's mailing of an EEO complaint to an incorrect address constituted substantial compliance under 29 C.F.R. §1614.106(b). *Order dated September 16, 1996 (Docket No. 14).*

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(Docket No. 32). Accordingly, the Court determines the issue of administrative exhaustion to be before the Court by way of cross-motions for summary judgment and takes under consideration the earlier summary judgment briefs and exhibits on this issue (Docket Nos. 6, 7, 9, 10, 13), as well as the Stipulation of Facts and its exhibits (Docket No. 32).

A. Background

Deitrich applied, tested, and was eventually rated eligible and placed on the USPS registers for positions of Clerk Carrier, Mail Handler/Mail Processor and Markup Clerk Automated (*i.e.*, Clerk-Typist/Clerk Stenographer) in Tulsa, and Clerk-Carrier for the Broken Arrow Area, which includes Broken Arrow, Jenks and Bixby. *Ex. 4 to Plaintiff's Response; Ex. 8 to USPS Reply at ¶15.* The USPS granted Deitrich a 10-Point Veteran Preference for these positions based on the fact that Deitrich had been classified by the Department of Veteran Affairs ("VA") on February 4, 1993 with a disability rating of 50%. *Exs. 4 and 7 to Plaintiff's Response; Ex. 1 to USPS' Summary Judgment Motion.* In classifying Deitrich with a 50% disability the VA made the following pertinent findings:

VA examination shows his right knee feels weak at time. He states his left knee also hurts because he relies on it much more. There is mild diffuse swelling of the right knee and some medial laxity. Working with his arms causes shortness of breath. He states he is unable to carry more than two arm loads of things from the car before he has to use his Proventil Inhaler. He is unable to walk more than 1000 feet without stopping to breath and rest because of knee pain. . . . There is no indication of moderate left knee impairment or flexion limited to 30 degrees or less or extension limited to 15 degrees, or more.

Id.

On July 7, 1993, the USPS contacted Deitrich for consideration as a transitional employee city carrier in Tulsa, a noncareer position. Deitrich did not respond to the notice and was removed from the Tulsa city carrier register pursuant to Section 265.831.b of the Personnel

Operations Handbook. *Defendant's Undisputed Fact 6.*

On July 20, 1993, the USPS selected Deitrich for a mail handler position in Tulsa, subject to a pre-employment physical assessment by a USPS medical officer. *Defendant's Undisputed Fact 1.* Pursuant to these requirements, Deitrich underwent and passed a Strength and Stamina Test on July 22, 1993 in which he was required to lift and carry two 70-pound sacks, one at a time, 15 feet, load them on a hand truck, push the hand truck to where there are some 40, 50 and 60-pound sacks piled on the floor, load the 40, 50 and 60-pound sacks onto the hand truck, and then unload the hand truck and return it to its original location. *Ex. 3 to Plaintiff's Response.* Also, on that same date, Deitrich underwent a physical examination by Dr. G.W. Kelly, a contract physician, who noted the following abnormalities: (1) color-blindness, (2) a 1969 medial meniscectomy and collateral ligament repair, (3) a 50% service connected disability related to right knee chondromalacia, (4) a 1981 hernia repair, (5) bronchial asthma, and (6) mild high frequency hearing loss in left ear. *Ex. 1 to Defendant's Summary Judgment Motion.*

The results of Dr. Kelly's medical examination and Deitrich's VA medical records were reviewed by Dr. Perry Taaca, a USPS medical officer, on August 19, 1993. *Ex. 1 to Defendant's Summary Judgment Motion.* Dr. Taaca concluded that Deitrich's "medical records reveal current knee & lung disabling conditions which would prevent applicant from performing strenuous requirements of a mail handler"; *i.e.* the VA medical records establish that Deitrich "cannot walk over 1000 feet without having to stop because of knee pain & shortness of breath." *Ex. 1 to Defendant's Summary Judgment Motion.*

The USPS advised Deitrich by letter dated September 13, 1993 that he had been "tentatively found to be medically unable to perform the position of mail handler." *Stipulation of*

Facts, ¶1. The letter also advised that this finding would be reviewed by the Office of Personal Management ("OPM") because Deitrich was a disabled veteran with a disability rating of greater than thirty (30) percent. *Stipulation of Facts*, ¶2. The USPS' determination that Deitrich was not medical qualified for the position of mail handler was affirmed by the OPM on October 29, 1993. *Defendant's Undisputed Fact No. 4*.

In addition to the position of mail handler in Tulsa, Deitrich was listed on two hiring worksheets for two different clerk positions at the Broken Arrow Post Office: one in July 1993 and another in September of 1993. Deitrich claims that he was selected for both positions, although placed in neither. The USPS contends that he was not selected for any position because he was not considered available during the pendency of the automatic appeal of medical unsuitability for the mail handler position. The availability of other positions on the applicable registers during the period of Deitrich's eligibility is also in dispute.

Deitrich received the OPM letter affirming the USPS determination of medical unsuitability on or about November 1, 1993. Neither the USPS letter finding Deitrich to be medically unfit for the mail handler position nor the OPM letter affirming this finding informed Deitrich that he must contact the Equal Employment Opportunity ("EEO") counselor at the Tulsa USPS within 45 days if he wished to pursue a claim. *Exs. 1 and 2 to Stipulation of Facts*. Deitrich attests that he was unaware of any right to contact the EEO until his VA vocational rehabilitation counselor informed him, and Deitrich contacted the USPS EEO Tulsa office within a week of being so informed. *Deitrich Affidavit* ¶¶15 and 16.

The following facts are undisputed. *See Stipulation of Facts*. On or about January 24, 1994, an EEO counselor forwarded Deitrich an EEO Request for Counseling form which Deitrich

completed and returned. Deitrich met with Linda Daniels, an EEO counselor, on or about February 14, 1994 to discuss his claim. The EEO was unable to resolve Deitrich's claim on an informal basis and so advised Deitrich in a final interview on May 9, 1993.² At that time, the EEO also provided Deitrich with a PS Form 2565, EEO Complaint of Discrimination in the Postal Service "Form 2565"), and told him that he must file it within 15 days if he wished to file a formal complaint. On May 18, 1994, Deitrich contacted the EEO office and requested another Form 2565 as he had misplaced the one provided him on May 9, 1993. The EEO office mailed Deitrich the duplicate form that day with a letter advising Deitrich that he only had 15 days from May 9, 1993 to file the formal complaint and "therefore, it is most important that you complete and mail the PS 2565 prior to the expiration date to Manager, EEO Unit, PO Box 26006, Oklahoma City, Ok 73125-0006." *Ex. 6 to Stipulation of Facts*. Deitrich completed the Form 2565 and mailed it to the Office of Federal Operations ("OFO") on or about May 19, 1994. Upon receiving the formal complaint, the OFO wrote Deitrich on June 13, 1994 returning the Form 2565 and instructing him to contact an EEO counselor within 45 days. Deitrich sent the returned form back and wrote the OFO that he had been instructed to send the formal complaint to their office. He did not receive further instructions from the OFO.

After hearing nothing from the OFO for several weeks, Deitrich contacted his congressman, Tim Hutchinson, for help, and through his assistance was able to determine from Jacqueline R. Bradley ("Bradley"), the District Director for the EEO Dallas District Office, that Deitrich's Form 2565 had been sent to the wrong office. Bradley instructed that the Form 2565

² Deitrich testifies that he was never informed by the vocational rehabilitation counselor or by the EEO counselor prior to or during the informal administrative proceedings that there was a 45 day deadline or that he had missed any deadline for contacting the USPS EEO counselor. *Deitrich Affidavit* ¶¶ 14, 15 and 18.

was to be sent to Mr. Ed Pitts at the Oklahoma City EEO office. In a letter to Bradley dated September 20, 1995, Deitrich wrote

I appreciate your response to Congressman Hutchinson on my behalf. Please send me the Form 2565 that I must forward to Mr. Pitts. The original seems to have been lost somewhere.

Ms. Daniel gave me the Washington D.C. address to mail the form 2565 to originally.

I would appreciate settling the matter as soon as possible, as it has dragged on much too long.

Thank you for your assistance in this matter.

Ex. 13 to Stipulation of Facts. On September 29, 1995, Dwight Lewis, the Chief Administrative Judge in the EEO Dallas office, responded that he was enclosing a Form 2565 for Deitrich to file his appeal and the "address is listed on the reverse side of the form." *Ex. 14 to Stipulation of Facts.* What Lewis enclosed, however, was a Form 573, Notice of Appeal, which instructed to send the appeal to the same OFO Washington address to which Deitrich had sent his original Form 2565. *Ex. 15 to Stipulation of Facts.* On October 12, 1995, Deitrich sent the completed Form 573 with a letter to Mr. Pitts in the EEO Oklahoma City office which states:

I hope you can help me. Here is the form 2565? I was supposed to get from Ms. Bradley. As you can see, it is not the correct paper but it may substitute. If not, please send me the correct form(s).

Exs. 16 and 17 to Stipulation of Facts. On October 20, 1995, Mr. Pitts responded by returning the Form 573 and enclosing another Form 2565. *Ex. 18 to Stipulation of Facts.* On or about November 1, 1995, the USPS received a completed Form 2565 from Deitrich dated October 30, 1995. *Ex. 9 to Stipulation of Facts.* On December 19, 1995, the USPS rejected the formal complaint as having been untimely filed; *i.e.* not filed within fifteen (15) days of his final EEO interview as required by 29 C.F.R. §1614.106(b). Deitrich then timely filed this civil action.

B. Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court stated:

[t]he plain language of Rule 56© 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 sufficient to raise a "genuine issue of material fact."

Anderson, 477 U.S. at 247-48.

The 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 v. Zenith*, 475 U.S. 574, 585 (1986).

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 must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party.

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

C. Exhaustion of Administrative Remedies

Pursuant to Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a(a)(1), the “remedies, procedures and rights” set forth in 42 U.S.C. §2000e-16b apply to person with handicap discrimination claims. *Johnson v. Orr*, 747 F.2d 1352, 1356 (10th Cir. 1984). In enacting 29 U.S.C. §794a(a)(1), “it is evident that Congress intended to invoke . . . the requirement that a claimant exhaust administrative remedies before filing suit [under the Rehabilitation Act] in federal court.” *Id.* at 1356-57 (quoting *Smith v. United States Postal Service*, 742 F.2d 257, 261 (6th Cir. 1984)).

The pertinent regulations enacted pursuant to 42 U.S.C. §2000e-16b are set forth in 29 C.F.R. §1614. The first step in pursuing an administrative remedy with the USPS is to contact an EEO counselor within forty-five (45) days of the alleged discriminatory act. 29 C.F.R. §1614.105(a)(1). If the matter is not resolved at the informal stage of the administrative process, the complainant may file a formal complaint of discrimination with the USPS within fifteen (15) days of the date of his final interview with the EEO counselor. 29 C.F.R. §§1614.105(d) and 1614.106(b).

The USPS asserts that Deitrich failed to meet both deadlines and that such failure deprives this Court of jurisdiction, citing *Khader v. Aspin*, 1 F.3d 968, 970-71 (10th Cir. 1993); *Knopp v. Magaw*, 9 F.3d 1478, 1479 (10th Cir. 1993); *Williams v. Rice*, 983 F.2d 177, 180 (10th Cir. 1993); and *Sampson v. Civiletti*, 632 F.2d 860, 862 (10th Cir. 1980). *See also Johnson v. Orr*, 747 F.2d 1352 (10th Cir. 1984). Although the cited Tenth Circuit cases support the proposition that exhaustion of administrative remedies is a jurisdictional prerequisite to suit under 42 U.S.C. §2000e-16 (and thus under the Rehabilitation Act), these decisions have been called into question

by other Tenth Circuit cases³ and by the U.S. Supreme Court in *Irwin v. Department of Veteran Affairs*, 498 U.S. 89 (1990).

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), the Supreme Court held that “filing a timely charge of discrimination with the EEO is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.” However, the Tenth Circuit cases cited above ignored *Zipes*, relying instead on an earlier Supreme Court decision, *Brown v. General Services Administration*, 425 U.S. 820 (1976). These cases interpret *Brown* as directing that §2000e-16 requires timely exhaustion of administrative remedies as a jurisdictional prerequisite to suit in federal employment discrimination cases.

This confusion should have been cleared up with the Supreme Court ruling in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990) on this very issue.⁴ It was in fact the stated purpose of the decision to resolve the “Circuit conflict over whether late-filed claims are jurisdictionally barred” in federal employment discrimination suits. *Id.* at 92. Rejecting the Fifth

³ A few months before the Tenth Circuit handed down *Johnson v. Orr*, 747 F.2d 1352, 1356 (10th Cir. 1984) in which the court held that timely exhaustion of administration remedies is a jurisdictional prerequisite to suit under §2000e-16, the Tenth Circuit in *Martinez v. Orr*, 738 F.2d 1107, 1109-10 (10th Cir. 1984) relied on *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) in holding that limitations periods contained in §2000e-16(c) are subject to equitable tolling. In a recent case, *Jones v. Runyon*, 91 F.3d 1398, 1400 n.1 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1243 (1997), the Tenth Circuit discusses the split in its own cases and that of the other circuits on this issue, although the court did not cite *Martinez*. The *Jones* court recognized that contrary to the majority of circuit courts “even after *Zipes* our court has referred to the requirement of an EEOC filing (as opposed to a mere requirement of a timely filing) as a jurisdictional requirement,” citing *Knopp, Khader, Johnson, Hill v. Ibarra*, 954 F.2d 1516, 1522 (10th Cir. 1992) and *Harbison v. Goldschmidt*, 693 F.2d 115, 118 (10th Cir. 1982). *Id.* The *Jones* court recognized only one Tenth Circuit case in opposition, *United States v. Woods*, 888 F.2d 653, 654 (10th Cir. 1989), *cert. denied*, 494 U.S. 1006 (1990)(dicta contained in a parenthetical characterizing *Zipes* as standing for the proposition that “exhaustion of administrative remedies is not [a] jurisdictional prerequisite to [a] Title VII suit but [is] merely [a] condition precedent subject to waiver and estoppel”).

⁴The *Irwin* decision was overlooked by the Tenth Circuit in *Khader, Knopp, and Williams*; the *Johnson* and *Sampson* cases predate the decision. Ironically, the *Irwin* court counts the Tenth Circuit as one of four circuits (10th, 11th, D.C. and 6th circuits) which had held that time limits under §2000e-16(c) were not jurisdictional, citing *Martinez*.

Circuit's holding that failure to comply with the 30-day time limit for filing a Title VII action allotted under §2000e-16(c) operates as an absolute jurisdictional bar, the *Irwin* Court expressly held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants [recognized in *Zipes*] should also apply to suits against the United States." *Id.* at 95-96. In so holding, the Supreme Court clearly rejected the view that compliance with the filing deadline under §2000e-16(c) is jurisdictional.⁵

Courts since *Irwin* have logically extended this holding and concluded that principles of equitable tolling apply to regulatory, as well as statutory filing deadlines. *Johnson v. Runyon*, 47 F.3d 911, 917 (7th Cir. 1995), *aff'd* 108 F.3d 1369 (2d Cir.1997); *Dillard v. Runyon*, 928 F.Supp. 1316, 1323 (S.D.N.Y. 1996); *Wojik v. Postmaster General*, 814 F.Supp. 8 (S.D.N.Y.1993). This view is consistent with the very regulations upon which the USPS relies in arguing a jurisdictional bar of Deitrich's claim; 29 C.F.R. §1614.604, entitled "Filing and computation of time," expressly states that "[t]he time limits in this part [1614] are subject to waiver, estoppel and equitable tolling." Thus, failure to meet a regulatory deadline, as with statutory deadlines, "is not fatal to a plaintiff's case if that plaintiff can establish a basis for tolling the deadline." *Dillard*, 928 F.Supp. at 1324.

In light of the above, the Court reads *Irwin* to stand for the proposition that the regulatory and statutory deadlines governing a plaintiff's claim against a governmental agency, including a

⁵To complicate matters, some courts have continued to consider the administrative timing requirements to be jurisdictional, although (after *Irwin*) subject to equitable tolling. See *Dillard v. Runyon*, 928 F.Supp. at 1325; *Willis v. United States*, 879 F.Supp. 889, 891-92 (C.D.Ill.1994), *aff'd* 65 F.3d 171 (7th Cir. 1995). These court reason that "[i]f a claimant has not met the filing requirements, either directly or with the aid of equitable tolling, there is no waiver of sovereign immunity, and accordingly, no subject matter jurisdiction." *Dillard*, 928 F.Supp. at 1325. Whether viewed in this light or as "statutes of limitations," it is clear that the regulatory timing requirements at issue here are subject to equitable tolling.

claim under the Rehabilitation Act, are not jurisdictional, but rather operate as “statutes of limitations” which are subject to waiver, estoppel and equitable tolling. *Accord, Johnson v. Runyon*, 47 F.3d 911, 917 (7th Cir. 1995) (failure to meet EEO 45-day deadline not jurisdictional bar to Rehabilitation Act claim against the USPS).

The relevant inquiry here, therefore, is whether Deitrich is entitled to tolling of (1) the 45-day deadline to contact an EEO counselor to initiate informal proceedings⁶ and (2) the 15-day deadline for filing a formal complaint of discrimination. 29 C.F.R. §§1614.105(a)(2) and (c) and 106(b).

(1) Section 1614.105(a)(1) states that “[a]n aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory” As noted above, this regulatory deadline is subject to waiver, estoppel and equitable tolling. In addition to these common law grounds, §1614.105(a)(2) provides supplemental grounds for relief from this 45-day deadline:

The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

29 C.F.R. §1614.105(a)(2); *Janneh v. Runyon*, 932 F.Supp. 412, 416 (N.D.N.Y.1996), *aff'd* 108 F.3d 329 (2d Cir. 1997)(“Plaintiff’s failure to contact an EEO counselor within the 45 day

⁶The Stipulation of Facts does not resolve the disputed issue of whether Deitrich contacted an EEO counselor within the 45-day period for such notification. Thus, the same fact question the Court recognized as precluding summary judgment in the USPS’ earlier motion remains. However, because the Court finds that Deitrich is entitled to tolling of the 45-day requirement, the fact question is not a material one to defeat summary adjudication on this issue.

period may be excused, however, if he can show that he qualified for a regulatory [29 C.F.R. §1614.105(a)(2)] or equitable exception to the timeliness requirement"). Given the remedial purpose of the Rehabilitation Act and the incorporation of "shall", the Court liberally construes this exception to the 45-day "statute of limitations." *Johnson*, 47 F.3d at 917.

It is stipulated that (1) the USPS notified Deitrich by letter dated September 13, 1993 that he had been "tentatively found to be medically unable to perform the position of mail handler"; (2) because Deitrich was a disabled veteran with a disability greater than 30 percent, this suitability finding was automatically reviewed by the Office of Personnel Management ("OPM"); (3) Deitrich received a letter from the OPM on or about November 1, 1993 affirming the USPS' determination and concluding that his "medical condition presents an unacceptable safety and health risk and is likely to adversely affect [his] ability to perform the full range of duties required for the position [of mail handler]"; (4) on or about January 24, 1994, an EEO counselor forwarded Deitrich an EEO Request for Counseling form which Deitrich completed and returned; and (5) Deitrich met with Linda Daniels, an EEO counselor, on or about February 14, 1994 to discuss his claim. *Stipulations of Facts* ¶¶1-5.

Whether or not he contacted an EEO counselor within the 45-day period, Deitrich argues that the USPS has waived and is estopped from raising a limitations bar, and the USPS was required under §1614.105(a)(2) to extend the deadline. Deitrich attests that he was unaware of any right to contact the EEO until his vocational rehabilitation counselor informed him and that he exercised due diligence by calling the USPS EEO Tulsa office within a week of being so informed. *Deitrich Affidavit* ¶¶15 and 16. Deitrich also testifies that he was not informed by the vocational rehabilitation counselor or anyone from the EEO office prior to or during the informal

administrative proceeding that he had missed any deadline.⁷ *Deitrich Affidavit* ¶¶ 15, 16, 18-20.

The USPS contends that Deitrich was on notice of the deadline to contact an EEO counselor when he received the September 13, 1993 letter from the USPS finding him medically unsuitable for the position of mail handler and certainly no later than November 1, 1993 when he received the OPM letter affirming that finding. The USPS also asserts that Deitrich was on constructive notice of the 45-day deadline because he had visited the Tulsa Post Office on more than one occasion where EEO posters on how to file an EEO complaint were prominently displayed. Finally, the USPS argues that the acceptance and investigation of an EEO complaint by the agency does not constitute a waiver of the agency's objection to the timeliness of that complaint.

The Court need not decide the question of waiver because the Court finds that Deitrich did not have actual or constructive notice of the 45-day requirement.⁸ It is undisputed that Deitrich did not receive actual notice. Neither the USPS letter finding Deitrich medically unsuitable for the position of mail handler nor the OPM affirmance instructed Deitrich in any way concerning any further administrative challenge of this finding (other than the OPM informing Deitrich that he could send any additional specific medical documentation to the OPM for further consideration), let alone inform him of the 45-day deadline for filing an EEO complaint. The

⁷ Deitrich attests that he first learned of a 45-day time period within which to make an initial contact with an EEO counselor when he received a letter from Office of Federal Operations ("OFO") on June 13, 1994 in response to its receipt of Deitrich's formal complaint. At that point, Deitrich had not only contacted but completed informal counseling with the EEO counselor and had filed the formal EEO Complaint of Discrimination in the Postal Service. *Deitrich Affidavit* ¶ 24.

⁸ Some courts have held that "the mere receipt and investigation of a complaint does not waive objection to a complainant's failure to comply with the original filing time limit when the later investigation does not result in an administrative finding of discrimination." *Boyd v. United States Postal Service*, 752 F.2d 410, 414 (9th Cir.1985); *Saltz v. Lehman*, 672 F.2d 207, 208 (D.C.Cir.1982); *Oaxaca v. Roscoe*, 641 F.2d 386, 389-90 (5th Cir.1981).

USPS' argument that Deitrich was however on constructive notice due to the presence of EEO posters in the Tulsa Post Office is wholly unpersuasive. "The presence or absence of posted notices does not, standing alone, determine whether the limitations period should be tolled." *Cano v. United States Postal Service*, 755 F.2d 221, 222-23 (1st Cir.1985); *Johnson*, 47 F.3d at 918. Deitrich was not an employee of the USPS; he was an applicant. The fact that he visited the Tulsa office "on more than one occasion" to apply for a position is clearly insufficient to put him on notice of his right to file an employment discrimination claim. As noted by the Seventh Circuit in *Johnson*,

The analysis of whether notices were "reasonably geared" to inform applicants of their rights must take into account the fact that applicants, by definition, have not yet been subjected to the possibility of employment discrimination. When they enter a facility to secure an employment application, the last thing on their minds is what recourse, if any, they might have if the Service illegally discriminates in hiring; their immediate concern is with where and how to obtain an application and how to fill it out properly. Therefore, it is unlikely that an applicant will even think to read or observe such notices even if they are posted in the front lobby.

Johnson, 47 F.3d at 919. Thus, the Court concludes that under both the common law of equitable tolling and the exception set forth in 29 C.F.R. §1614.105(a)(2), Dietrich's initial EEO contact was not untimely as he was not notified or otherwise aware of the 45-day time limit.

(2) The Court also concludes that Deitrich substantially complied with the filing requirement under 29 C.F.R. §1614.106(b), or alternatively, he is entitled to an equitable tolling which renders his formal complaint timely filed. *Early v. Bankers Life and Casualty Co.*, 959 F.2d 75, 79-81 (7th Cir.1992)(plaintiff entitled to finding of substantial compliance or alternatively, equitable tolling when he timely filled out an Intake Questionnaire containing all the information that a formal EEO charge would have contained); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir.1994)(three principal, though not exclusive,

situations for equitable tolling: “(1) where the defendant has actively misled the plaintiff respecting the plaintiff’s cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum”(emphasis added); *Winbush v. State of Iowa*, 66 F.3d 1471, 1477-78 (8th Cir.1995)(substantial compliance with filing requirements of 42 U.S.C. §2000e-5(f)(1) can excuse strict compliance with Title VII’s procedural requirements). It is undisputed that Deitrich mailed his original Form 2565 on May 19, 1993, within fifteen (15) days of his May 9, 1993 final EEO interview. Although Deitrich mailed the form to the wrong office, there is ample evidence that he was acting with “utmost diligence, pursuing his claim first through administrative channels and ultimately to this court,” however mistaken and misdirected that pursuit may have been. *Martinez v. Orr*, 738 F.2d 1107, 1112 (10th Cir.1984); *Wojik*, 814 F.Supp. at 9 (“when a party does all it can to comply with a time limit, its efforts may be deemed sufficient”).

The USPS correctly notes that the Notice of Right to File Individual Complaint, Form 2579-A, given to Deitrich in the May 9, 1993 final interview and the May 18, 1993 letter from Linda Daniels attached to the duplicate Form 2565 requested by Deitrich instruct that he is to mail his Form 2565 to the EEO office in Oklahoma City, Oklahoma, *Exs. 5 and 6 to Stipulation of Facts*. Deitrich explains that he sent the completed form to the OFO because when he called Daniels to request another 2565 form, she told him to send the completed complaint to the address on the back of the form. *Deitrich Affidavit* ¶22. The only address which appears on the back of Form 2565 is that of the OFO in Washington, D.C. *Ex. 7 to Stipulation of Facts*. Deitrich’s initial mistake was then compounded by the OFO’s perplexing response directing

Deitrich to initiate contact with an EEO counselor at the facility where the alleged discrimination occurred within 45 days of the discrimination, rather than directing him to send the Form 2565 to the EEO office in Oklahoma City. *Ex. 8 to Stipulation of Facts.*

Whatever may be said about the events which transpired after Deitrich replied to the OFO that he had been instructed to send Form 2565 to their office, it is not that Deitrich sat on his rights. When weeks passed and he heard nothing from the OFO, Deitrich employed the help of his congressman “to find out what was happening with my formal complaint.” *Deitrich Affidavit* ¶26. Over a year of communication between the EEO and Congressman Hutchinson and Deitrich was required before the proper form was filed in the proper place. To hold that Deitrich’s arduous journey through this procedural quagmire constitutes a failure to exhaust his administrative remedies would render the defense meaningless. The Court finds that Deitrich substantially complied with the 15-day filing requirement under §1614.106(b), or alternatively, he is entitled to an equitable tolling of the filing period which renders his complaint timely.

D. Rehabilitation Claim

To establish his claim under the Rehabilitation Act, 29 U.S.C. §791 *et seq.*, Deitrich must show that (1) he is a disabled person; (2) he was otherwise qualified apart from his handicap; *i.e.*, with or without reasonable accommodation, he could perform the job’s essential functions; and (3) the USPS refused to hire him under circumstances which give rise to an inference that he was not hired based solely on his disability. *Williams v. White*, 79 F.3d 1003, 1005 (10th Cir. 1996). A handicapped person is defined as one who “(I) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment.” 29 U.S.C. §706(8)(B); *Welsh v. City*

of Tulsa, 977 F.2d 1415, 1417 (10th Cir. 1992). Major life activities are defined as “functions, such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 20 C.F.R. §1614.203.

The USPS argues that Deitrich cannot establish that he is “disabled” under the statute simply because the USPS declared him medically unsuitable for the position of mail handler. That, however, is not Deitrich’s position or the evidence in this case. Deitrich relies on the determination by the VA that Deitrich had a 50% disability due to his knee and asthma problems as evidence of his disability, as did the USPS in finding Deitrich medically unfit for the position of mail handler. Dr. Taaca determined that Deitrich was not medically qualified to perform the essential functions of the mail handler position based on his review of Deitrich’s VA medical records and the results of Dr. Kelly’s physical medical examination of Deitrich. In support of this determination, Dr. Taaca specifically relied on a finding by the VA (resulting in the VA classification of Deitrich as having a 50% disability) - that Deitrich “cannot walk over 1000 feet without having to stop because of knee pain & shortness of breath.” *Ex. 1 to Defendant’s Summary Judgment Motion*. The irony of the parties’ positions on summary judgment is that Deitrich argues that although he is “handicapped” as evidenced by the VA’s determination that he has a 50% disability based on knee and asthma problems which disability substantially limits his walking and breathing, he was able to perform the tasks of mail handler which he proved by passing the USPS Strength and Stamina Test. The USPS, on the other hand, claims that Deitrich was denied the mail handler position because of the severity of his knee and asthma problems (based on same VA finding which resulted in its determination that Deitrich was 50% disabled), but Deitrich is not handicapped or disabled.

The Court finds that there is ample evidence in the record to raise a genuine issue of material fact as to whether Deitrich is handicapped, as defined by 29 U.S.C §706(8)(B) and 20 C.F.R. §1614.203.

The USPS also assert that Deitrich cannot establish that the USPS discriminated against him based on handicap. Deitrich argues that there is at least an inference of discrimination based on the USPS' determination of medical unsuitability for the mail handler position although he passed the required Strength and Stamina Test, as well the USPS' failure to place him in any position for which he was determined eligible, although he was placed on at least two hiring worksheets in Broken Arrow and various registers for positions in Tulsa, Broken Arrow, Bixby and Jenks.

Upon review of the record, the Court finds that there are genuine issues of material fact as to Deitrich's eligibility for and the availability of positions at the USPS (during the period of his eligibility) to defeat summary judgment.

E. Conclusion

Based on the above, the Court concludes the following: (1) this Court has jurisdiction over Deitrich's Rehabilitation Act claim; (2) the Court grants summary judgment to Deitrich and against the USPS on the defense of failure to exhaust administrative remedies; and (3) the Court denies the USPS summary judgment on the merits of Deitrich's handicap discrimination claim.

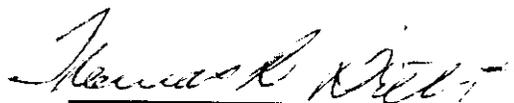
Accordingly, the Court enters the following trial schedule:

Discovery deadline	September 26, 1997
Exchange of witnesses	September 5, 1997
Pretrial conference	October 3, 1997 at 9:30 a.m.
Exchange pre-marked exhibits and Agreed Pretrial Order	October 6, 1997
Suggested voir dire and proposed jury instructions	October 14, 1997

Jury trial

October 20, 1997 at 9:30 a.m.

ORDERED this 21st day of July, 1997.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett".

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

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

FILED

JUL 21 1997 *ml*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES S. BISHOP, d/b/a ESSENCE OF LIFE,)
)
Plaintiff,)
)
vs.)
)
EQUINOX INTERNATIONAL CORPORATION,)
)
Defendant.)

Case No. 96-C-006-E /

ENTERED ON DOCKET
DATE JUL 22 1997

JUDGMENT

In accord with the Findings of Fact and Conclusions of Law this date granting Plaintiff's request for injunctive relief and attorneys fees, the Court hereby enters judgment in favor of the Plaintiff, James E. Bishop, and against the Defendant, Equinox International Corp. Costs and attorney fees will be awarded upon proper application.

DATED this 21st day of July, 1997.

James O. Ellison

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

JAMES E. BISHOP, d/b/a
Essence of Life,

Plaintiff,

vs.

EQUINOX INTERNATIONAL CORP.,
a Nevada corporation,

Defendant.

No. 96-C-6-E ✓

ENTERED ON DOCKET
DATE JUL 22 1997

FILED
JUL 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

The Court upon consideration of the evidence presented at trial, together with all pleadings, and the parties' proposed Findings of Fact and Conclusions of Law including briefs submitted post-trial, enters its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, James S. Bishop, d/b/a Essence of Life, brings this action against Equinox International Corporation, Defendant, for federal and common-law trademark infringement, federal and common-law unfair competition, and violation of the Oklahoma Deceptive Trade Practices Act.
2. Plaintiff owns federal "registration number 1,504,568" and common-law rights in and to the "Essence of Life" trademark used in conjunction with mineral electrolyte solutions in both liquid and capsule form.
3. The Defendant markets and sells a liquid mineral complex

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named "Essence of Life Liquid Mineral Complex" which complex is one among nineteen products in its Equinox Master Formula's line of products.

4. The Defendant has filed a counter-claim against Plaintiff for cancellation of Plaintiff's United States trademark registration number 1,504,568. The Defendant's counterclaim urges that:

- (1) Plaintiff is not using, nor did he ever use, his registered mark on one or more of the goods recited in the registration in interstate commerce; and
- (2) in the event the registered mark was used in interstate commerce, such use has been abandoned; and
- (3) that with knowledge of such non-use or abandonment the Plaintiff fraudulently signed a declaration attesting that the mark was in use in interstate commerce on all goods cited in the registration and that such attestation was an intentional and knowing misrepresentation of the facts and constituted a false declaration to the U.S. Patent and Trademark Office amounting to a fraudulent attempt to maintain Plaintiff's registration.

5. Plaintiff commenced selling a product under the name "Essence of Life" in 1985. The product was a mineral electrolyte solution in both liquid and capsule form. Plaintiff filed a trademark application on February 5, 1988 in the U.S. Patent and Trademark Office (PTO),

serial number 73/709,508. The application claimed a date of first use of October 1, 1985, for "mineral electrolyte solution in liquid and capsule form" in International Class No. 5. Publication for the purpose of opposition was made in the Official Gazette of the United States Patent and Trademark Office on June 28, 1988. Federal Trademark Registration No. 1,504,568 was issued on September 20, 1988.

6. Upon receipt of the Federal Trademark Registration Plaintiff placed a ® on each of his labels and has continued to do so to the present.
7. In 1994, prior to September 20, 1994, Plaintiff filed a "Section 8 and 15" Affidavit of Continuing Use as provided by Title 15 U.S.C. §§1058 and 1065. The Affidavit was accepted by the Patent and Trademark Office on October 23, 1995.
8. Plaintiff's product bearing the trademark "Essence of Life" is sold for use in humans, plants and animals.
9. From 1985 until 1986 Plaintiff sold his product wholesale to vendors who then sold the product directly to the public. In 1986 until the end of 1989, Bishop sold his product wholesale to distributors who then distributed the product to vendors who sold directly to the public. From the end of 1989 to mid-1991, Plaintiff sold his products primarily to wholesale vendors who would sell directly to the public. From the end of 1989 until 1991

Plaintiff had only one distributor, Sun West, who continued to channel products to the public through its vendors. The Plaintiff began in mid-1991 selling the product directly to the public on a retail basis from his office in his home in Jenks, Oklahoma.

10. Defendant Equinox was organized in 1991 and sells over 400 products which are health-related through a network of independent sales representatives throughout the United States and Mexico. It employs over 300 people with gross sales for 1996 just under \$195 million dollars.
11. The Defendant sells a liquid mineral complex under the name Equinox Master Formula Essence of Life Liquid Mineral Complex. It sells wholesale to its independent sales representatives who then sell retail to the public.
12. The Defendant's expert, Mr. Howard, testified as an expert in marketing and consumer behavior and in consumer decision making.
13. Dr. Howard testified that because of the significant differences in the means of distribution of Equinox's Master Formula Essence of Life Liquid Mineral Complex and Plaintiff's Essence of Life products, there was a minimum likelihood of consumer confusion between the two products.
14. Regardless of the difference in size of their operations Plaintiff's being a marginal or small-scale operation and

Defendant being a well-financed, sophisticated distribution system, the fact that Plaintiff's mineral electrolyte solution in liquid and capsule form designated "Essence of Life" is positioned against a liquid mineral complex which Defendant calls "Essence of Life Liquid Mineral Complex" does create a likelihood of confusion since both marks use identical language to sell a nearly identical product.

15. In January 1995 the Plaintiff became aware the Defendant Equinox was using an "Essence of Life" mark for its product that was called "Liquid Mineral Complex."
16. Plaintiff's attorney, James R. Head, on February 22, 1995 demanded that Defendant cease and desist from the use of his registered "Essence of Life" trademark.
17. Defendant's attorney, Jeffrey Van Hoosear, by letter dated June 1, 1995, advised Plaintiff that Equinox would cease and desist from use of the trademark "Essence of Life".
18. Defendant did not honor its cease and desist commitment but in fact continued to use the trademark "Essence of Life".
19. Defendant's failure to honor its attorneys' cease and desist commitment constituted a trademark infringement which was deliberate or willful.
20. The report received by the investigator of the Defendant was not sufficient to justify a theory of abandonment but

was sufficient to persuade Defendant of the economic weakness of the Plaintiff.

21. The Court finds that this is an exceptional case which entitles Plaintiff to attorneys' fees.
22. Although Plaintiff's use has been that of a small-scale or modest operation there has been no factual establishment by the evidence of any abandonment of Plaintiff's trademark. The evidence failed to develop non-use of the trademark by Plaintiff for any significant period of time nor proof of any intent to abandon Plaintiff's trademark.
23. The evidence fails to establish that Plaintiff suffered any lost sales, damage to good will or any actual damage of any kind.
24. Any Finding of Fact which should more appropriately be considered as a Conclusion of Law will be considered as such.

CONCLUSIONS OF LAW

1. The Lanham Trademark Act, 15 U.S.C. §1051 et. seq. and 28 U.S.C. §1337(a) confer jurisdiction on this Court over Plaintiff's causes of action for trademark infringement and unfair competition.
2. This Court has jurisdiction over Plaintiff's cause of action under the Oklahoma Deceptive Trade Practices Act, O.S. 78 §51 et seq. (1981) by reason of principles of pendant jurisdiction. 28 U.S.C. §1338(b).

3. 15 U.S.C. §1127 defines "use in commerce" as the "bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a mark. ... A mark shall be deemed to be abandoned ... when its use has been discontinued with intent not to resume such use ... Nonuse for three consecutive years shall be prima facie evidence of abandonment."
4. Plaintiff within five years after the issuance of his federal trademark registration, filed his Affidavit of Continued Use. The five year Affidavit of Continued Use was accepted by the PTO. Plaintiff's United States Trademark Registration No. 1,504,568 is now incontestible. 15 U.S.C. §1065, 37 C.F.R. §2.167. Beer Nuts, Inc. v. Clover Club Foods Co., 805 F.2d 920, 925 (10th Cir. 1986).
5. Restatement of Torts §729 (1938) includes the following factors in considering the likelihood of confusion:
 - (a) the degree of similarity between the respective designations, including a comparison of:
 - (i) the overall impression created by the designations as they are used in marketing the respective goods or services in identifying the respective businesses;
 - (ii) the pronunciation of the designations;
 - (iii) the translation of any foreign words contained in the designations;
 - (iv) the verbal translation of any pictures, illustrations, or designs contained in the designations;
 - (v) the suggestions, connotations, or meanings of the designations;
 - (b) the degree of similarity in the marketing methods

and channels of distribution used for the respective goods or services;

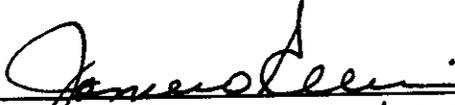
- (c) the characteristics of the prospective purchasers of the goods or services and the degree of care they are likely to exercise in making purchasing decisions;
 - (d) the degree of distinctiveness of the other's designation;
 - (e) when the goods, services, or business of the actor differ in kind from those of the other, the likelihood that the actor's prospective purchasers would expect a person in the position of the other to expand its marketing or sponsorship into the product, service, or business market of the actor;
 - (f) when the actor and the other sell their goods or services or carry on their businesses in different geographic markets, the extent to which the other's designation is identified with the other in the geographic market of the actor.
6. Plaintiff must prove that he has been damaged by actual consumer confusion or deception in order to recover damages. Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513 (10th Cir. 1987).
7. Here Plaintiff's claim for damages fails because there has been no credible evidence of actual consumer confusion or deception, nor proof of any lost sales or loss of goodwill. Barr v. Sasser, 24 USPQ2d 1942, 1946 (N.D. Okla. 1992) citing Shell Oil Co. v. Commercial Petroleum, 928 F.2d 104, 108 (4th Cir. 1991).
8. It would be inappropriate to award Plaintiff Defendant's profits where Plaintiff's mark is weak and it is clear that Defendant did not benefit from the Plaintiff's relatively obscure mark. Lindy Pen Company v. Bic Pen

- Company Corp., 982 F.2d 1400 (9th Cir. 1993).
9. There must be an actual showing of consumer confusion in order to grant a profits award based upon a theory of unjust enrichment. George Basch Co., Inc. v. Blue Coral, Inc., 968 F.2d 1532, 1538 (2nd Cir. 1992).
 10. Plaintiff has not established entitlement to any actual damage and is therefore not entitled to any portion of Defendant's profits. V.I.P. Foods, Inc. v. Vulcan Pet., Inc., 210 USPQ 662, 668 (N.D. Okla. 1980).
 11. The Court in exceptional cases may award reasonable attorney fees to the prevailing party. 15 U.S.C. §1117(a). An exceptional case has been defined within the Tenth Circuit as being "One in which the trademark infringement can be characterized as 'malicious', 'fraudulent', 'deliberate' or 'willful.'" Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513, 528 (10th Cir. 1987). The Court finds that exceptional circumstances in this case warrant an award of reasonable attorney fees.
 12. In considering the issue of injunction the Court must balance the equities and in so doing the Court will allow the Defendant to market its available supply of articles marked with the trademark of "Essence of Life Liquid Mineral Complex". No further marking will be made on Defendant's product subsequent to this date. W.E. Bassett Co. v. Revlon, Inc., 354 F.2d 868 (2nd Cir. 1966). The Defendant Equinox International Corporation

is enjoined from further distribution of its products carrying the mark "Essence of Life Liquid Mineral Complex".

13. Any Conclusion of Law which more appropriately constitute Findings of Fact shall be treated as such.

ORDERED this 21st day of July, 1997.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JERRY C. NOEL,)
SS# 051-70-0786,)

Plaintiff,)

v.)

JOHN J. CALLAHAN, Acting Commissioner)
of the Social Security Administration,)

Defendant.)

No. 95-C-1127-E ✓

ENTERED ON DOCKET
DATE JUL 22 1997

ORDER

Plaintiff, Jerry C. Noel, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{1/} Plaintiff asserts that the Administrative Law Judge erred in concluding that plaintiff has the residual functional capacity of performing light work and in concluding that there were a significant number of jobs that plaintiff could perform. For the reasons discussed below, the Court **affirms** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Jerry Noel was born January 5, 1946, and completed the 6th grade. He was determined by the administrative law judge to be illiterate. His relevant work

^{1/} Plaintiff filed an application for disability and supplemental security insurance benefits on March 13, 1989. [R. at 51-63]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge John M. Slater (hereafter, "ALJ") was held December 18, 1989. [R. at 8-22]. By order dated February 14, 1990, the ALJ determined that Plaintiff was not disabled. [R. at 8-22]. Plaintiff appealed the ALJ's decision to the Appeals Council. On February 13, 1991 the Appeals Council denied Plaintiff's request for review. [R. at 3-7]. The United States Court of Appeals for the Tenth Circuit reversed and remanded the case by order dated July 1, 1993. (R. At 237-243). A supplemental hearing was held on September 27, 1994. On June 29, 1995, the ALJ again determined that Plaintiff was not disabled and this decision was affirmed by the Appeals Council on September 20, 1995. (R. At 152-157).

1/9

experience includes migrant farm work, handiwork, and work as a gofer and digging ditches for a plumber. Noel seeks Supplemental Security Income alleging an inability to work since November, 1985 due to a herniated disk resulting from trying to lift a cast iron sink. Noel underwent chemonucleolysis to dissolve the disc, but asserts that his condition has not improved, but grown worse. Noel claims to have pain and weakness in his back and legs, requiring a cane for walking, and resulting in inability to stand longer than 20 minutes at a time, or sit longer than 45 minutes at a time. He also has pain radiating into his shoulders.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{2/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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

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

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

42 U.S.C. § 423(d)(2)(A).

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

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{3/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ (in the second opinion) found that Noel has not engaged in substantial gainful activity since February 27, 1989, that he does not have an impairment or combination of impairments listed in the regulations. The ALJ further concluded that plaintiff's testimony regarding pain is only credible to the extent it is consistent with the ability to perform the full range of light work, that he was

^{3/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

incapable of performing his past relevant work, but has the residual functional capacity to perform the full range of light work. The ALJ found Noel to be not disabled at the fifth sequential step.

IV. REVIEW

The primary issue here is whether the evidence was sufficient to support the conclusion of the ALJ that plaintiff has the residual functional capacity to perform the full range of light work and could perform a significant number of alternative jobs.

With respect to the RFC determination, plaintiff asserts that the ALJ erred in failing to order a consultative medical examination, in failing to consider the fact that he relied on a cane for walking, and in discounting his own testimony regarding completely disabling pain. The law of this Circuit is well-settled that a consultative medical examination is not necessary in determining RFC. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988). Moreover, the objective medical evidence, along with the credibility finding of the ALJ and the testimony of the vocational expert provide substantial evidence in support of the conclusion that Noel was capable of sedentary work.

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 18th day of July 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUANITA A. MINNICK,)
(SSN: 449-66-8920))

Plaintiff,)

v.)

JOHN J. CALLAHAN, Acting Commissioner)
of the Social Security Administration,)

Defendant.)

JUL 21 1997 *SP*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-CV-485-J ✓

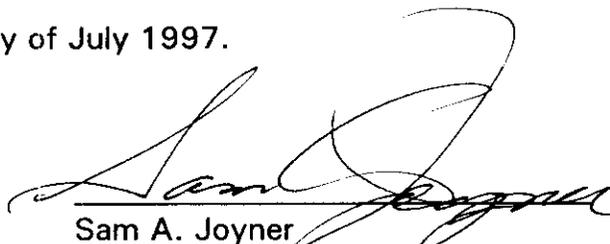
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DATE 7/22/97

JUDGMENT

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

It is so ordered this 21 day of July 1997.



Sam A. Joyner
United States Magistrate Judge

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

JUANITA A. MINNICK,)
(SSN: 449-66-8920))
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN, Acting Commissioner)
of the Social Security Administration,)
)
Defendant.)

JUL 21 1997 SAC

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-CV-485-J ✓

ENTERED ON DOCKET

DATE 7/22/97

ORDER^{1/}

Now before the Court is Plaintiff's appeal of the Acting Commissioner's decision denying Plaintiff Disability Insurance Benefits under the Social Security Act. The Administrative Law Judge ("ALJ"), James D. Jordan, found that Plaintiff failed to establish that the onset date of her disability was prior to January 1, 1992, the date when Plaintiff's insured status under the Social Security Act expired.

Plaintiff argues that the ALJ (1) failed to properly apply Social Security Ruling 83-20 (1983), and (2) failed to properly evaluate the credibility of Plaintiff and witnesses testifying on her behalf. After reviewing the record as a whole, the Court finds that the ALJ's decision is supported by substantial evidence. Consequently, the Acting Commissioner's denial of benefits is **AFFIRMED**.

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

13

I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

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

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

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

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

The standard of review to be applied by this Court to the Commissioner's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a

^{2/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 416.910 and 416.972. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 416.925. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 416.920; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

reasonable mind will accept as adequate to support the ALJ's ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

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

II. DISCUSSION

Plaintiff's insured status under the Social Security Act expired December 31, 1991. Plaintiff must, therefore, establish that she became disabled prior to January 1, 1992. Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990) (the relevant analysis is whether the claimant was actually *disabled* prior to the expiration of her insured status); Henrie v. DHS, 13 F.3d 359, 360 (10th Cir. 1993).

Plaintiff alleges that she had a stroke in November 1990. Plaintiff admits, however, that she did not see a doctor or go to the hospital when she had her stroke. Plaintiff did not see a doctor until April 1993, almost two and one half years after the date she alleges she suffered a stroke. In fact, there are no medical records from July 1979 to April 1993, and Plaintiff admits that there are no medical records for the period she alleges to have suffered a stroke. [Doc. No. 7, p. 2 and *R.* at 69].

The medical records that are in the file are in conflict as to the date of Plaintiff's stroke. Plaintiff filed her application for disability benefits on February 16, 1994. After she filed her application for disability benefits, Plaintiff was referred by the Social Security Administration to David Dean, M.D., for a consultative examination on April 4, 1994. [*R.* at 246-55]. Plaintiff told Dr. Dean that she suffered a stroke in November 1990. However, nine months before Plaintiff filed her application for disability benefits, Plaintiff saw Robert Sonnenschein, M.D., on May 26, 1993. Plaintiff told Dr. Sonnenschein that she had suffered a neurologic event approximately

one year earlier. [R. at 207-209, 212-214]. This would place Plaintiff's stroke in late 1992, after her insured status had expired, not in late 1990 as she alleges.

Neither doctor Dean nor Dr. Sonnenschein rendered an opinion regarding the date of Plaintiff's stroke. Both doctors simply accepted Plaintiff's statement as to the date of the stroke as true. Thus, even the evidence in the medical records that are available is nothing other than Plaintiff's subjective statements regarding when her stroke occurred. The only other evidence in the record establishing that Plaintiff's stroke occurred in November 1990 is subjective testimony at the hearing before the ALJ from Plaintiff, her husband, her three children, and a friend of one of Plaintiff's sons. [R. at 35, 45, and 54-69].

Subjective testimony is insufficient by itself to establish disability. There must be some objective, medical evidence which establishes the existence of an impairment. 42 U.S.C. § 423(d)(5)(A).^{3/} See also 20 C.F.R. § 404.1528(a); Flint v. Sullivan, 951

^{3/} Section 423(d) of the Social Security Act defines "disability." Section 423(d)(5)(A) provides that

[a]n individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require. An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability.

42 U.S.C. § 423(d)(5)(A) (emphasis added).

F.2d 264, 267 (10th Cir. 1991); Luna v. Bowen, 834 F.2d 161, 162-65 (10th Cir. 1988); Gossett v. Bowen, 862 F.2d 802, 806 (10th Cir. 1988); Gatson v. Bowen, 838 F.2d 442, 447 (10th Cir. 1988); Hutson v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988); and Hunt v. Shalala, 91-7142, 1993 WL 318837 (10th Cir. Aug. 19, 1993). Thus, Plaintiff has failed to comply with the Social Security Act's requirements for proving a disability.

Plaintiff argues that Social Security Ruling 83-20 ("SSR 83-20") "creates a presumption in favor of the claimant regarding the onset date of disability." [Doc. No. 7, p. 2]. Plaintiff argues that the date she alleges as the onset date "should be used if it is consistent with the evidence available." Id. Plaintiff mischaracterizes SSR 83-20. See Titles II and XVI: Onset of Disability, SSR 83-20, 1983 WL 31249 (Social Security Administration 1983). SSR 83-20 does recognize that "[t]he starting point in determining the date of onset of disability is the individual's statement as to when disability began." 1993 WL 31249 at *2. SSR 83-20 goes on, however, to state that "[t]he medical evidence serves as the primary element in the onset determination," and "the established onset date . . . can never be inconsistent with the medical evidence of record." Id. at *3-4. "The impact of lay evidence on the decision of onset will be limited to the degree it is not contrary to the medical evidence of record." Id. at *3.

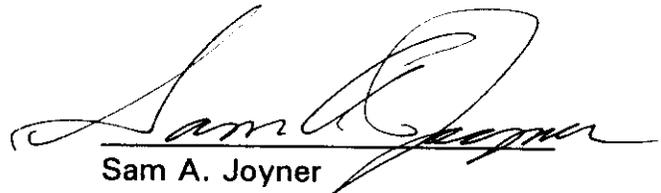
SSR 83-20 does not, as Plaintiff argues, establish a presumption in favor of Plaintiff in the absence of any medical evidence to support Plaintiff's alleged onset date. As does 42 U.S.C. § 423(d)(5)(A), SSR 83-20 requires that an onset date be established by medical evidence and not by subjective testimony alone. There is no

other evidence in this record regarding the onset date of the stroke, other than Plaintiff's and her friend's and relatives' subjective statements. This is simply not enough under § 423(d)(5)(A) or SSR 83-20 to prove the onset of a disabling condition.

For the foregoing reasons, the Acting Commissioner's denial of benefits is **AFFIRMED**.

IT IS SO ORDERED.

Dated this 21 day of July 1997.

A handwritten signature in cursive script, appearing to read "Sam A. Joyner", written over a horizontal line.

Sam A. Joyner
United States Magistrate Judge

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

FILED

JUL 21 1997

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

ANTHONY WAYNE MOORE,

Plaintiff,

vs.

CLARENDON AMERICA INSURANCE
COMPANY, a foreign insurance
corporation,

Defendant.

Case No. 97-CV-116-K ✓

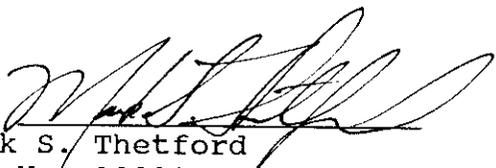
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7-21-97

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Comes now the Plaintiff, Anthony Wayne Moore, and the Defendant, Clarendon America Insurance Company and stipulates that this case shall be dismissed without prejudice.

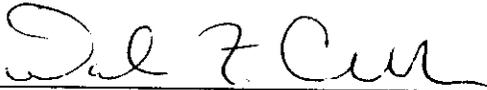
Respectfully submitted,

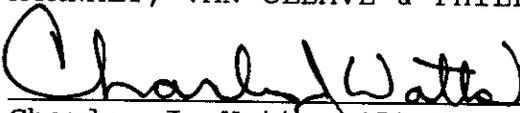
STIPE LAW FIRM

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Attorneys for Defendants

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F I L E D

JUL 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JEANNIE JAMES,)
)
Plaintiff,)
)
vs.)
)
JOE FERMO, M.D.,)
)
Defendant.)

Case No. 96-CV-631-C ✓

JUDGMENT

This matter came before the Court for consideration of the motion for summary judgment filed by defendant Joe Fermo, M.D. on plaintiff's cause of action brought pursuant to Title 42 U.S.C. § 1983. The issues having been duly considered and a decision having been rendered in accordance with the order filed simultaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for the defendant Joe Fermo and against the plaintiff Jeannie James.

IT IS SO ORDERED this 15th day of July, 1997.


 H. DALE COOK
 Senior U.S. District Judge

that her involuntary detention was in deliberate indifference to the requirements of Oklahoma statutory law. Plaintiff contends that she was taken to Eastern State Hospital solely to set an example to other patients that they must do exactly what they were told to do at GLMHC. Plaintiff further contends that Dr. Fermo admitted plaintiff to Eastern State Hospital knowing she did not qualify for emergency detention, and was admitted without the proper procedure and documentation required under the state Act.

It is undisputed that between May 2, 1995 and July 11, 1995, plaintiff was receiving counseling and treatment as an out-patient at GLMHC, having been referred by her primary care physician Dr. Serratt. Plaintiff was suffering from severe depression and feelings of hopelessness associated with battered woman's syndrome. Plaintiff was receiving counseling in an effort to remove herself from her home in which her husband was physically and mentally abusive toward her. Plaintiff admits that her husband had abused her to the extent that she was knocked unconscious. Plaintiff's medical history was included within the papers received and reviewed by Dr. Fermo upon her arrival to Eastern State. Dr. Fermo was advised that plaintiff had suffered from severe depression and had been subject to an abusive home environment. Additionally, Dr. Fermo had before him the "Licensed Mental Health Professional's Statement" prepared by Dr. DeLong which indicated that plaintiff was in need of further evaluation. At 5:00 P.M. on July 11, 1995 Dr. Fermo conducted a physical and mental evaluation of plaintiff prior to her admission to Eastern State Hospital. Plaintiff was admitted to the hospital at 8:20 P.M. on that same date. Dr. Fermo and Dr. K.W. Southern, the senior staff psychiatrist at Eastern State Hospital, executed a "Notice of Certification" to the Mayes County District Court on July 12, 1995. The "Notice of Certification" advised the court that plaintiff was taken into custody and in their opinion she was in need of emergency evaluation. Additionally,

Dr. Southern prepared and executed the "Petition for Protective Custody and Treatment" on July 12, 1995, and it was filed with the Mayes County District Court on July 14, 1995.

Title 43A O.S. § 5-209 provides that a copy of the statement of the licensed mental health professional and the petition shall constitute authority for a state hospital to admit and detain a person in protective custody for a period not exceeding 72 hours. Upon issuance by the state court of an order of detention, the 72 hour maximum retention can be extended by the court. Title 43A O.S. § 5-211. The temporary detention cannot be extended beyond a period of 28 days. Title 43 O.S. § 5-209. The statute requires the petition to be filed on the same day as the date of emergency detention and examination, or if the office of the court clerk is not open for business, as soon thereafter as the office is open. Title 43A O.S. § 5-209.

Plaintiff's medical records indicate that plaintiff was evaluated by Dr. Fermo at 5:00 P.M. The office of the court clerk would have been closed at the time that the evaluation was completed. Dr. Southern executed the petition on the following day, July 12, 1995 and filed the petition on July 14, 1995. Under the circumstance, Dr. Fermo was in substantial compliance with the requirements of Oklahoma law. The petition requested an extension of the 72 hour maximum emergency detention allowed by state law. The Mayes County Court granted the requested extension and set a detention hearing for July 18, 1975. At the conclusion of the detention hearing, plaintiff was released. Plaintiff seeks to hold Dr. Fermo liable under § 1983 for her eight days of involuntary detention at Eastern State Hospital.

When a state employee raises the defense of qualified immunity, the plaintiff bears the burden of demonstrating both that the defendant's conduct violated a constitutional right and that the law on

the issue was clearly established. Williams v. City and County of Denver, 99 F.2d 1009, 1020 (10th Cir.1996). In resolving the issue of qualified immunity, the Court must determine from the face of the complaint whether the plaintiff has established a constitutional violation by the defendant. Id. at 1021 fn.13. The existence of a constitutional violation requires assessing whether the defendant's conduct shocks the conscience. In this regard, plaintiff contends that Dr. Fermo determined that plaintiff was not in need of detention or treatment but nevertheless involuntarily admitted plaintiff in the hospital.

The Court finds that such allegations do not raise to the level of a constitutional deprivation. Viewing the facts in a light most favorable to the plaintiff, at best such allegations raise issues of negligence rather than reckless or outrageous conduct. Even if the decision of Dr. Fermo, in admitting plaintiff to the hospital, did not meet the technical requirements for emergency detention, such conduct does not meet the reckless intent and conscience-shocking standard as established in Collins v. City of Harker Heights, 503 U.S. 115 (1992).

Moreover, plaintiff has failed to make the requisite showing that Dr. Fermo's actions were in violation of clearly established law. Merely alleging a violation of the procedural requirements of a state regulatory scheme is not sufficient to establish that such action is in violation of the requisite standard of "clearly established law". The Tenth Circuit has stated that in order for law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. Williams, 99 F.2d at 1020. Plaintiff has cited no case with respect to her claim against Dr. Fermo that would establish that his conduct was contrary to clearly established law on the date of the alleged occurrence here at issue. It is the finding and conclusion of the Court that Dr. Joe Fermo is

entitled to the defense of qualified immunity from suit.

IT IS THEREFORE THE ORDER OF THE COURT that the motion to dismiss filed by defendant Dr. Joe Fermo is hereby GRANTED.

IT IS SO ORDERED this 15th day of July, 1997.

A handwritten signature in cursive script, reading "H. Dale Cook". The signature is written in black ink and is positioned above the printed name of the judge.

H. DALE COOK
Senior United States District Judge