

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

FILED
SEP 17 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

KABALA OIL & GAS, L.L.C.,)
)
Plaintiff,)
)
v.)
)
EXXON CORPORATION,)
)
Defendant.)

Case No. 97-CV-664B (M)

ENTERED ON DOCKET

DATE SEP 18 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Kabala Oil & Gas, L.L.C., and Defendant, Exxon Corporation, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, stipulate to the dismissal of the referenced litigation with prejudice. Each party shall bear its own costs and attorneys' fees.

Dated this 16th day of September, 1998.

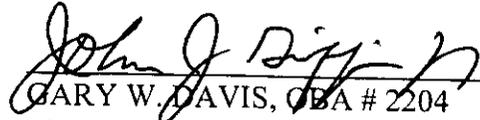
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MICHAEL S. LAIRD
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JOHN J. GRIFFIN, JR.
DIRECT LINE (405) 235-7718
DIRECT FAX (405) 272-5225

September 16, 1998

Phil Lombardi, Clerk
United States District Court
Northern District of Oklahoma
411 U.S. Courthouse
333 W. 4th Street
Tulsa, OK 74103

RECEIVED

SEP 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

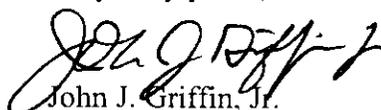
RE: *Kabala Oil & Gas v. Exxon Corporation*
USDC Northern District, Case No. 97-CV-664B(M)

Dear Mr. Lombardi:

Enclosed please find the original and five copies of a Stipulation of Dismissal with Prejudice in the referenced litigation. We would appreciate your filing the original Stipulation of Dismissal with Prejudice and returning the file-stamped copies to the undersigned in the postage prepaid envelope which is enclosed for this purpose.

Thank you for your assistance.

Very truly yours,


John J. Griffin, Jr.

For the Firm

Encls.

cc: Terry J. Barker
Joe F. Barker

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

ENTERED ON DOCKET
DATE 9-18-98

THE ROCKLAND CORPORATION, an)
Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
HEALTH FOODS ASSOCIATES, INC. d/b/a)
Akin's Natural Foods, an Oklahoma corporation,)
)
Defendant.)
)
)
)

Case No. 98-CV-0395H (M) ✓

FILED

SEP 17 1998 *gk*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, Plaintiff The Rockland Corporation hereby dismisses with prejudice its claim against Defendant Health Foods Associates, Inc.

Also pursuant to Rule 41(a)(1) Defendant Health Foods Associates, Inc. hereby dismisses without prejudice its counterclaims against The Rockland Corporation.

DOERNER, SAUNDERS, DANIEL &
ANDERSON, L.L.P.

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Attorneys for Plaintiff
The Rockland Corporation

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Attorneys for Defendant
Health Foods Associates, Inc.

CH

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALICE F. GIBSON,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

Defendant.

Case No. 98-CV-419-EA ✓

ENTERED ON DOCKET

DATE SEP 18 1998

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 16th day of September 1998.

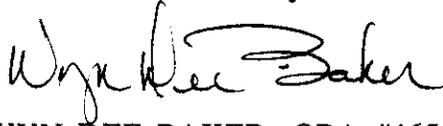
Claire V Eagan

CLAIRE V. EAGAN
United States Magistrate Judge

8

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Wyn Dee Baker". The signature is written in black ink and is positioned above the typed name.

WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

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

F I L E D

SEP 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HERMAN E. THOMPSON,
444-46-2181

Plaintiff,

vs.

Case No. 97-CV-579-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET
DATE SEP 17 1998

ORDER

Plaintiff, Herman E. Thompson, was awarded Supplemental Security Income benefits on his October 20, 1992, application for disability benefits. He seeks judicial review of the decision of the Commissioner of the Social Security Administration denying his request to re-open his 1991 application for Social Security disability benefits. 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.

It is well-established that federal courts have no jurisdiction to review the refusal to reopen Plaintiff's previous claims for disability benefits. *See Califano v. Sanders*, 430 U.S. 99, 107-08, 97 S.Ct. 980, 985-86, 51 L.Ed.2d 192 (1977). The decision not to reopen a previously adjudicated claim for benefits is not a final decision reviewable under 42 U.S.C. § 405(g). *Brown v. Sullivan*, 912 F.2d 1194, 1196 (10th Cir. 1990) (federal courts have no jurisdiction to review the Commissioner's refusal to reopen a claim for benefits). However, in *Califano*, the Court left open a narrow basis

(15)

for federal court jurisdiction in those rare instances where the decision not to reopen is challenged on constitutional grounds. To prevent this "narrow" basis for jurisdiction from becoming the rule instead of the exception, the Plaintiff must present a colorable constitutional claim to confer jurisdiction on the court.

In the instant case Plaintiff asserts that the refusal to reopen his case is a constitutional denial of due process and equal protection. As the Court understand's the argument, Plaintiff contends that he was deprived of the due process requirements of notice and an opportunity to be heard because "the medical evidence from 1991 establishes that Mr. Thompson had a long history of alcohol abuse and was drinking heavily [at the time his 1991 claim was denied on reconsideration]." [Dkt. 11, p.4]. Since Plaintiff did not have legal assistance he claims he was incapable of pursuing his claim further. Consequently, the notice of denial and instructions for pursuing the claim further were ineffective, thus denying him a meaningful opportunity to present his claim. Plaintiff also argues that the evidence of his heavy drinking was sufficient to trigger application of SSR 91-5p which addresses mental incapacity and good cause for missing the deadline to request review. In addition, he argues that the ALJ erroneously required him to provide new and material evidence to justify the reopening of his 1991 application. The Court finds that under the facts of this case, a constitutional claim is not presented and therefore the Court does not have jurisdiction to review the Commissioner's decision not to reopen the 1991 application.

Plaintiff pursued his February 26, 1991, application for benefits without assistance of counsel. The application was denied initially on August 21, 1991.

Plaintiff filed a timely request for reconsideration, again without assistance of counsel, on October 16, 1991. [R. 267]. On reconsideration Plaintiff's claim was denied on January 16, 1992. [R. 289]. The reconsideration notice advised Plaintiff of the availability, upon request made within 60 days, of a hearing before an administrative law judge. The notice also advised of the possibility of losing benefits if Plaintiff filed a new application instead of filing an appeal. Plaintiff did not file an appeal within the 60-day time frame, nor did he attempt to file an appeal out of time or request an extension of time in which to file an appeal.

Instead, again without assistance of counsel, Plaintiff contacted the Social Security Administration by telephone on October 20, 1992, to initiate another application for benefits. [R. 292]. The signed application for benefits was filed on December 2, 1992. [R. 293]. That application was denied initially on March 17, 1993. [R. 308]. Sometime between the time the 1992 application was denied and May 3, 1993, Plaintiff obtained the assistance of counsel as evidenced by the Social Security form appointing attorney Paul F. McTighe, Jr. as his representative. [R. 35]. With the assistance of attorney McTighe, Plaintiff pursued his claim through reconsideration, a hearing before an ALJ, and an appeal to the Appeals Council.

Even though Plaintiff was assisted by counsel since May 1993, no written or oral request for reopening of Plaintiff's prior claim was made up to the point of his 1994 hearing before the ALJ, and no such request was made at the hearing. The June 3, 1994, ALJ decision outlined the history of Plaintiff's previous application for benefits and stated:

The Administrative Law Judge has reviewed [the 1991] application and the basis for it solely for the purpose of determining if there is any basis for reopening. The Administrative Law Judge finds that there is no basis under the good cause standard or any other standard for reopening the prior denial determination of January 16, 1992, on the claimant's application of February 26, 1991. Consideration of the medical evidence will commence January 17, 1992, the day after the date the claimant was denied benefits.

[R. 431]. Attorney McTighe appealed the ALJ's decision to the Appeals Council, extensively outlining the errors the ALJ committed in his analysis. However, nowhere in counsel's letter to the Appeals Council is there any objection to the refusal to reopen the earlier claim. [R. 446-448]. The Appeals Council remanded the case to the ALJ to conduct another hearing. [R. 450-51].

On remand Plaintiff's counsel was invited to submit additional evidence to be considered in support of his claim. [R. 452]. A hearing was held on September 13, 1995. At the onset of the hearing, the ALJ read the Appeals Council's remand into the record and clarified that in compliance with the Appeals Council remand, "the Administrative Law Judge will offer the claimant an opportunity for hearing, take any further action needed to complete the administrative record, and issue a new decision." [R. 104-05]. The ALJ also specifically noted: "Now, this is an SSI application with protective filing date of October 20 of 1992. So for most purposes, I'll be interested in knowing what's happened since October of 1992." [R. 106]. At several points in the ALJ's questioning of Plaintiff he specified that he was seeking information since October 1992. [R. 106, 107, 109, 110]. Despite the ALJ's clearly

expressed intention to limit his consideration of the case to Plaintiff's condition as it existed since October, 1992, Plaintiff's counsel did not raise the issue of reopening the earlier application. On September 18, 1995, the ALJ issued a decision finding Plaintiff disabled since the October 20, 1992, protective filing date of his current application for benefits. [R. 18-21]. The ALJ specifically stated:

The Administrative Law Judge has not found new and material evidence on which to base reopening of the claimant's prior applications filed August 21, 1989, and February 26, 1991 under 20 CFR 416.1488 and 416.1489.

[R. 19].

The first time Plaintiff or his counsel made any mention of reopening the 1991 claim was in a November 22, 1995, letter to the Appeals Council. [R. 10-14]. Nowhere within that letter is the argument articulated that Plaintiff was incapable of comprehending his rights with respect to appealing the denial of his 1991 claim. Now, however, on appeal Plaintiff argues that the ALJ committed constitutional error by failing to consider the issue. Plaintiff also argues that the Commissioner committed legal error by concluding his 1991 application was administratively final without following SSR 91-5p and making a determination of whether or not good cause existed to extend the time for Plaintiff to request a hearing on that application.

The Tenth Circuit has not ruled whether notice of denial of disability benefits to an unrepresented claimant who cannot comprehend it because of mental impairment is constitutionally deficient. However, in an unpublished opinion, *Devereaux v. Chater*, 1996 WL 98956 (10th Cir.(Colo.)), the Court implicitly acknowledged that such a

claim could rise to a constitutional violation, but found that the evidence of the claimant's incompetency was insufficient to make the claim "colorable" because there was no contemporaneous medical evidence demonstrating the claimant's mental incompetence. *Id.* at *3-4. This Court likewise finds that the evidence of Plaintiff's incompetency at the time of the January 16, 1992, reconsideration denial is insufficient to support a colorable constitutional claim.

The record contains no contemporaneous medical records addressing his mental status as of January 1992, and the months following. The closest record is a consultative physical examination performed August 6, 1991, in which the examiner noted Plaintiff's long history of alcohol habituation, but found him to be alert and oriented with normal speech and thought patterns on examination. [R. 398]. The next most relevant information is a psychological consultative examination performed June 2, 1993. That examiner reported that Plaintiff showed some symptoms of depression, but not enough for a full-fledged diagnosis; fair adjustment; and that Plaintiff is capable of handling his own funds. [R. 414-15]. These medical records would not support a finding that Plaintiff was incapable of comprehending and acting upon the notice sent to him in January, 1992. Moreover, the actions Plaintiff took on his own behalf in filing his 1991 application, seeking reconsideration, obtaining a protective filing date, filing the 1992 application and obtaining a lawyer tend to demonstrate he retained the capacity to pursue his appeal. The Court also notes that Plaintiff was no stranger to

the appeals process, having pursued a 1989 application through a hearing before an ALJ.¹

Since Plaintiff has not presented a "colorable" constitutional claim, in accordance with *Califano* and its progeny, the Court concludes it lacks jurisdiction to review the Commissioner's decision not to reopen the 1991 claim.

Further, even if the Court were to find that Plaintiff's evidence was sufficient to make this claim "colorable," and therefore sufficient for jurisdictional purposes, the Court finds that it fails on the merits. *See Devereaux*, 1996 WL 98956 at *4. SSR 91-5p addresses mental incapacity and good cause for missing the deadline to request review. The ruling begins with an outline of the relevant regulations, including the provision that a claimant can request that the time-frame for seeking further review be extended if the claimant can show good cause for missing the deadline. Notably, the regulations require that the request for an extension of time be in writing and give the reasons why the request for review was not filed timely. 20 C.F.R. § 416.1409(b). SSR 91-5p discusses the manner of giving proper consideration to a claim that mental incapacity to understand the procedures constitutes good cause to extend the deadline. However, the ruling presupposes that a request to extend the time frame has been submitted. In the present case, no request to extend the time frame to pursue an appeal of the reconsideration denial of the 1991 application was ever

¹ Plaintiff's 1989 application was filed and pursued through reconsideration pro se. After reconsideration he obtained an attorney.

presented. The Court finds that the ALJ cannot be faulted for failing to properly consider a request that was never made.

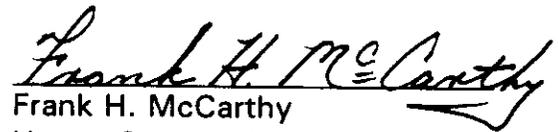
Plaintiff also contends that the ALJ erroneously required the submission of new and material evidence to justify reopening of the 1991 application. 20 C.F.R. § 416.1488(a) provides that a determination may be reopened "within 12 months of the date of the notice of the *initial* determination, for any reason." [emphasis supplied]. The *initial* determination of the 1991 application was made on August 21, 1991. [R. 264]. Plaintiff's current application was protectively filed on October 20, 1992, which is not "within 12 months of the initial determination." Therefore, § 416.1488(a) is not applicable. Rather, § 416.1488(b) applies. According to that section, a determination may be reopened within two years of the date of the notice of the initial determination if the Commissioner finds good cause to reopen. 20 C.F.R. § 416.1489 specifies the reasons for finding good cause to reopen a determination, as follows:

- (a) We will find that there is good cause to reopen a determination or decision if—
 - (1) New and material evidence is furnished;
 - (2) A clerical error was made; or
 - (3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

Since Plaintiff plainly did not meet the 12 month requirement, and since submission of new and material evidence is among the reasons specifically listed, the Court finds that Plaintiff's contention that the ALJ failed to follow applicable regulations is wholly without merit.

For the reasons outlined above, the Court concludes it lacks jurisdiction to review the Commissioner's decision not to reopen Plaintiff's 1991 application for benefits. The case is DISMISSED for lack of subject matter jurisdiction.

SO ORDERED this 16th Day of September, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

8/31/98

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

FOUR-D ENERGY, INC., an)
Oklahoma Corporation,)
)
Plaintiff,)
)
vs.)
)
UNION PACIFIC RAILROAD)
COMPANY, a Utah corporation;)
and RALPH ROSS CONSTRUCTION)
CO., INC., a purported corporate entity.)
)
Defendants.)

ENTERED ON DOCKET

DATE SEP 17 1998

Case No. 98-CV-0002H (M)
Mayes Co. Dist. Ct. No. CJ-97-427

FILED
SEP 15 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

COMES NOW the Court and, after hearing testimony and reviewing exhibits provided on behalf of UNION PACIFIC RAILROAD COMPANY on this the 24th day of August, 1998, enters the following order:

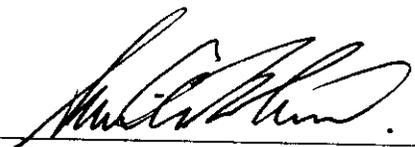
1. Default Judgment is entered against RALPH ROSS CONSTRUCTION CO., INC. and in favor of UNION PACIFIC RAILROAD COMPANY.
2. UNION PACIFIC RAILROAD COMPANY achieved proper service upon RALPH ROSS CONSTRUCTION CO., INC. prior to the hearing on August 24, 1998.
3. No representative from RALPH ROSS CONSTRUCTION CO., INC. attended the hearing on August 24, 1998.

4. Based upon the evidence and testimony presented, the Court finds that UNION PACIFIC RAILROAD COMPANY has incurred \$225,000 in damages due to the actions of RALPH ROSS CONSTRUCTION CO., INC.

5. Based upon the evidence and testimony presented, the Court finds that UNION PACIFIC RAILROAD COMPANY has suffered \$6,805.75 in attorneys' fees and costs due to the actions of RALPH ROSS CONSTRUCTION CO., INC.

WHEREFORE, based upon the evidence and testimony presented before the Court, the Court enters Judgment against RALPH ROSS CONSTRUCTION CO., INC. And in favor of UNION PACIFIC RAILROAD COMPANY in the amount of \$231,805.75, plus interest at the rate of 5.271% until paid.

Dated this 14TH day of SEPTEMBER, 1998.



HONORABLE SVEN ERIK HOLMES
U.S. District Judge.

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

IN RE:

DAVID CLARENCE FISHER and TUYET
FISHER,

Debtor,

SALLIE MAE LOAN SERVICING
CENTER,

Appellant,

vs.

DAVID CLARENCE FISHER and TUYET
FISHER aka Tuyet Anh Nguyen-Fisher
aka Ann Fisher,

Appellee.

FILED

SEP 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE SEP 17 1998

Case No. 97-CV-1109-H(M) ✓

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. The appeal has been fully briefed and arguments were heard on March 18, 1998.

Sallie Mae Loan Servicing Center ("Sallie Mae") appeals from the order of the Bankruptcy Court, Stephen J. Covey, J., discharging a substantial portion of debtor's student loan balance. Sallie Mae contends that the Bankruptcy Court applied the wrong test to determine that the indebtedness was dischargeable. According to Sallie Mae, the subject indebtedness is a Health Education Assistance Loan ("HEAL loan"), which is dischargeable in bankruptcy only upon a showing that to deny discharge would be unconscionable. 42 U.S.C. § 292(f)(g); 42 U.S.C. § 254o(d)(3). Sallie Mae further contends that regardless of whether the HEAL loan unconscionable standard

or the bankruptcy 11 U.S.C. § 523(a)(8)(A) undue hardship standard applies, the case should be reversed because debtors offered no proof that the loan had been in repayment for 7 years.

JURISDICTION AND STANDARD OF REVIEW

The district court has jurisdiction over this appeal under 28 U.S.C. § 158. The Bankruptcy Court's legal conclusions are subject to *de novo* review. *Phillips v. White (In re White)*, 25 F.3d 931, 933 (10th Cir. 1994). The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988).

PROCEDURAL HISTORY AND FACTS

Debtors filed an adversary complaint to determine the dischargeability of student loans owed to Sallie Mae totaling \$112,446.58. The docket for the adversary case reflects that Sallie Mae failed to answer the complaint, default was entered against Sallie Mae and then vacated on Sallie Mae's motion. [Dkt. 1]. On September 11, 1996, the Bankruptcy Court conducted an expedited trial on the adversary complaint. The docket reflects that Sallie Mae had not filed an answer by the time the matter was tried.

The Court began the hearing with the following statement of the matter at issue:

We have got Mr. Stainer for the Plaintiffs, the debtors, asking that these college loans be declared dischargeable on the basis of undue hardship.

And Mr. Jack Smith is here for Sallie Mae Servicing Center, right?

[R. 22, p. 2]. At the outset, the Court clearly stated it would determine dischargeability based on the undue hardship standard. Counsel for Sallie Mae did not object to the standard or otherwise attempt to correct the Court's statement of the issue.

The debtors testified at the hearing. Sallie Mae did not cross-examine either witness [R. 22, p. 12; 15] nor did it offer any evidence. At the conclusion of the debtors' evidence, the Court asked debtors' counsel for argument: "Tell me what your final argument would be about undue hardship." [R. 22, p. 19]. Likewise, the Court asked counsel for Sallie Mae for his argument. Counsel for Sallie Mae did not argue that an unconscionable standard should be applied to the decision concerning discharge. Instead, Sallie Mae stated its position that the monthly obligation to service the debt should be cut in half to require payments of \$600 a month. [R. 22, p. 22-25].

At the conclusion of the trial the Court announced its decision, as follows:

I think what I will do is not to give them three years or five years [to pay] because that makes it too high. I would make it a definite amount payable over ten years, starting in six months. Give her six months to locate one. Then at the end of six months pay \$300 a month for ten years. That comes up to \$36,000, which I think you should pay on your education. I think you could pay that much and I think you could make the effort and still get the best break you will ever get in your life, the best break you will ever get in your life you are getting. . . . And this would be a non-dischargeable debt which you will pay \$300 a month. Now she can make \$300 a month at minimum wage, I

know that. She knows that. I think she will do much better down through the years and that this is not going to be an undue hardship. I am going on the basis of not what is a certainty, beyond a reasonable doubt, just what is more probably true than not true.

[R. 22, p. 25-26]. The Bankruptcy Court directed counsel to prepare the order. The order states, in relevant part:

[I]t is the finding and Order of this court that the obligation owed plaintiff by the defendant, David Clarence Fisher, is a Health Education Assistance Loan (HEAL) but that to deny discharge in its entirety would be unconscionable and therefore the obligation owed should be partially discharged but should not be discharged in its entirety and hence, orders that the defendant commence payments to plaintiff within six (6) months of the date of this Order in the sum of \$300.00 per month and continuing for ten (10) years, . . .

[R. 16].

DISCUSSION

It is a fundamental principle of appellate review that the failure to raise an issue with the trial court precludes review except for the "most manifest error." *Rademacher v. Colorado Ass'n of Soil Conservation Districts Medical Ben. Plan*, 11 F.3d 1567, 1572 (10th Cir. 1993). Manifest error is found only in the most unusual circumstances, not present here. *See Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993) (listing unusual circumstances where issues raised for first time on appeal were considered).

The issues Sallie Mae asserts on appeal were not raised with the Bankruptcy Court. The transcript discloses that there was no evidence introduced suggesting that

the loan in question was a HEAL loan; no argument concerning what standard should apply to the determination of whether the loan was dischargeable; and no evidence or argument concerning the length of time the loan had been in repayment. Instead of raising these points, Sallie Mae tried the case on its position that debtors could pay half of the loan at \$600 a month. Sallie Mae's failure to raise these issues precludes review.

However, the Court finds that the findings and holding memorialized in the Bankruptcy Court's Order filed December 18, 1996, are clearly erroneous. A finding of fact is clearly erroneous if it is without factual support in the record, or if there is factual support, after a review of the entire record the appellate court is left with a definite and firm conviction that a mistake has been committed. *In re: Hamilton Creek Metropolitan District*, 143 F.3d 1381, 1384 (10th Cir. 1998).

The Order prepared by counsel¹ and signed by the Bankruptcy Court is grossly inaccurate. It does not correctly state the Bankruptcy Court's findings or the legal test it applied, as evidenced by review of the transcript. Although Mr. Fisher is a doctor of optometry, there was no pleading filed, no evidence submitted, and no argument made suggesting that the student loan in question is a HEAL loan or that an "unconscionable" standard should apply. Yet, the Order contains those findings. The Order also incorrectly recites that defendant is to commence payments to plaintiff even though it is the debtor who is the plaintiff and it is debtor/plaintiff who is required to

¹ It is not clear from the hearing transcript which attorney was directed to prepare the order.

make payments to the defendant. The order entered does not reflect the true findings or holding of the Bankruptcy Court, and is not supported by the record. However, the decision as announced at the conclusion of the September 11, 1996, bankruptcy hearing, that discharging all but \$300 a month for 10 years would not impose an undue hardship on debtors, is supported by the evidence and is not clearly erroneous.

On appeal the district court may modify a Bankruptcy judge's order. However, findings of fact may not be set aside unless clearly erroneous. Bankr. Rule 8013. The undersigned United States Magistrate Judge RECOMMENDS that in accordance with its power under Bankr. Rule 8013, the court MODIFY the Bankruptcy Court's order to conform to the decision announced at the conclusion of the bankruptcy hearing as reflected at pages 25-26 of the hearing transcript.

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that the Bankruptcy Court Order filed December 18, 1996, be MODIFIED, as follows:

It is the finding and Order of the Court that it would be an undue hardship to deny partial discharge of the obligation owed by Debtor David Clarence Fisher to Sallie Mae Loan Servicing Center. Accordingly, the Court orders that David Clarence Fisher make monthly payments to Sallie Mae Loan Servicing Center in the amount of \$300.00 per month, continuing for 120 months, until the amount of \$36,000 shall have been paid. Once the foregoing amount is satisfied, the remaining balance shall be deemed discharged.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within

the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 16th Day of September, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

17th Day of September, 1998.
C. Portillo, Deputy Clerk

DATE 9-16-98

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

SPIRITBANK, N.A.

Plaintiff,

vs.

THE CENTRAL OKLAHOMA HOUSING
DEVELOPMENT AUTHORITY, ORLIE
BOEHLER, RON FRAZE, and EASTERN
DEVELOPMENT, INC.

Defendant.

Civil No.: 98-CV-440-K(E)

FILED

SEP 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of September 16, 1998 and the affidavit of Kenneth E. Wagner, that the defendant, Central Oklahoma Housing Development Authority 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 September 16, 1998

PHIL LOMBARDI,

Clerk, U.S. District Court



S. Schwebke

FILED

SEP 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

CHRISTINE ROWLAND, and)
TAMARA ROWLAND, a minor,)
by and through her parent)
and guardian,)
CHRISTINE ROWLAND,)

Plaintiffs,)

vs.)

DILLARD'S, INC.,)
a Delaware Corporation,)

Defendant.)

ENTERED ON DOCKET

DATE SEP 16 1998

No. 97-CV-917-B(M)

W 97-4403

ORDER

The Court has before it for decision Plaintiffs' Motion to Remand (Docket # 32) and the Court, being fully advised, finds the same shall be granted.

This case as initially removed stated claims for in excess of the jurisdictional amount of \$75,000. Thereafter, the Court entered orders excluding the testimony of certain witnesses not timely endorsed by plaintiffs and granting summary judgment as to plaintiffs' claim for false imprisonment. The effect of these rulings precludes plaintiff from recovering the jurisdictional amount required to maintain an action in federal court.

Defendant urges the Court must retain the action because jurisdiction is determined at the time of removal from the face of the pleadings and/ or removal notice.

Defendant urges once jurisdiction has attached, it cannot be subsequently divested by subsequent rulings of the Court which alter plaintiffs' potential recovery. In support of this position, defendant cites to a 1963 Fifth Circuit decision, *Reisman v. New Hampshire Fire Ins. Co.*, 312 F.2d 17 (5th Cir. Ct. App. 1963) and a 1973 South Carolina district court decision, *Cannon V. United Insurance Company of America*, 352 F. Supp. 1212 (D.Ct. S. Car. 1973).

These cases predate the revision of 28 U.S.C. §1447(c), effective in November, 1988 which addresses and is entitled "Procedure after removal generally." The revised statute provides:

"If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal."(emphasis added)

The effect of this amendment was addressed by the district court for the Northern District of Alabama in *Bailey v. Wal-Mart Stores, Inc.*, 981 F. Supp.1415 (1997).¹ The *Bailey* decision involves a removed action in which plaintiff orally amended her complaint, disclaiming any entitlement to judgment in any amount up to one dollar short of the jurisdictional amount. In that case, the court had also sustained a motion for partial summary judgment eliminating one of plaintiff's claims and plaintiff's pursuit of punitive

¹The Court notes an absence of appellate authority on this issue and attributes this to the nonreviewable nature of remand orders based upon lack of subject matter jurisdiction. 28 U.S.C. §1447(d).

damages. The court remanded three days before trial, finding the amendment to §§ 1447(c) and (e) for the first time provided the federal courts grounds on which to remand beyond the original determination of jurisdiction at the time of removal. Section (c) deals with subject matter jurisdiction while §(e) deals with the effect of joinder of additional defendants whose joinder defeat diversity.

This result recognizes the fundamental doctrine that federal district courts are courts of limited jurisdiction and that the parties rights in removed actions regarding choice of forum are not on equal footing. Uncertainties are to be resolved in favor of remand. *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Remand is granted. The Court further grants costs and expenses, including attorneys fees incurred in connection with removal to be awarded to defendant upon proper application to be made within ten days of the date of this order; the Court reserves jurisdiction only as to the issue of costs and expenses. As to all other issues, the Court hereby orders the Court Clerk to remand the case to the District Court in and for Tulsa County.

DATED THIS 15th DAY OF SEPTEMBER, 1998.


THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

JOHN ARTHUR OLDEN CHATMAN,)

Plaintiff,)

vs.)

MADDEN INVESTMENT FUND, INC.,)
a Florida corporation, registered and doing)
business in Oklahoma as a franchise of)
SUBWAY SANDWICHES,)

Defendant.)

ENTERED ON DOCKET

DATE SEP 16 1998

Case No. 97-CIV-1086H-M

FILED

SEP 15 1998

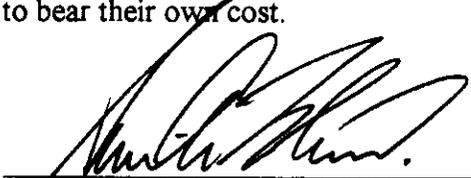
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

Pursuant to the Stipulation for Dismissal with Prejudice filed on the 8TH day of

SEPTEMBER, 1998,

IT IS HEREBY ORDERED that Plaintiff's Petition against Madden Investment Fund, Inc.
be and hereby is dismissed with prejudice each party to bear their own cost.



Judge

Date: 9/14/98

9-1-98

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

FILED

SEP 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONNIE SMITH,

Plaintiff,

vs.

SHERRY LABORATORIES,

Defendant.

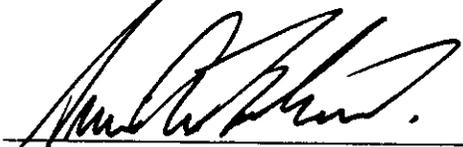
Case No. 98-CV-0353H(M)

ENTERED ON DOCKET
SEP 16 1998
DATE _____

ORDER

NOW on this 20th day of August, 1998, the Court, having read the parties' briefs and hearing argument, FINDS and ORDERS as follows:

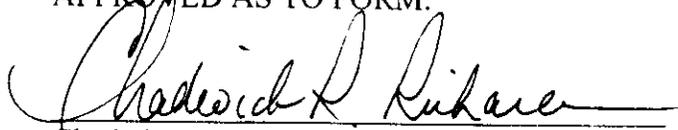
1. As to Plaintiff's claim of sexual battery, the Court orders the claim be dismissed because claim is barred by the statute of limitations pursuant to Okla. Stat. tit. 12, § 95(4).
2. As to Plaintiff's sexual harassment claim(s) under Title VII of the Civil Rights Act, the Court orders the Plaintiff to provide the Court and Defendant additional factual evidence regarding her mental adjudication or institutionalization in support of her request for equitable tolling of the statute of limitations by September 3, 1998. The Defendant has until September 10, 1998 to respond to any additional fact evidence presented by the Plaintiff.



JUDGE OF THE DISTRICT COURT

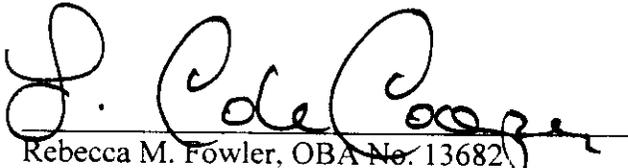
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APPROVED AS TO FORM:



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Richardson & Ward
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Tulsa, Oklahoma 74136-3414

Attorneys for Plaintiff



Rebecca M. Fowler, OBA No. 13682
Kristen L. Brightmire, OBA No. 14239
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Tulsa, Oklahoma 74103
(918) 582-1211
(918) 591-5360

Attorneys for Defendant

9-1-98

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

MIKE McCARTY AND PAT McCARTY,)

Plaintiffs,)

vs.)

THE CITY OF BARTLESVILLE,)
STEVEN L. BROWN, JANICE T.)
LINVILLE, ROBERT E. METZINGER,)
ROBERT NEWMAN and TIM SHIVELY,)

Defendants.)

ENTERED ON DOCKET

DATE SEP 16 1998

Case No. 98-CV-0181H(M)

FILED

SEP 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes on for hearing on the various Motions to Dismiss filed by the Defendants.

After having read the briefs and after having heard the arguments of counsel, the Court enters the following order:

1. The Motion to Dismiss filed by the City of Bartlesville is sustained. The Court orders that the City of Bartlesville be dismissed from this case without prejudice.
2. The Motion to Dismiss for failure to state a claim for conspiracy under 42 U.S. §§ 1985 and 1986 is sustained.
3. The Motion to Dismiss for failure to state a claim for wrongful deprivation of a property interest without due process of law is sustained. The Court finds that its previous decision in *Wattley v. City of Bartlesville, Oklahoma*, 932 F.Supp 1300 (N.D. Okla. 1996) is controlling on this issue.

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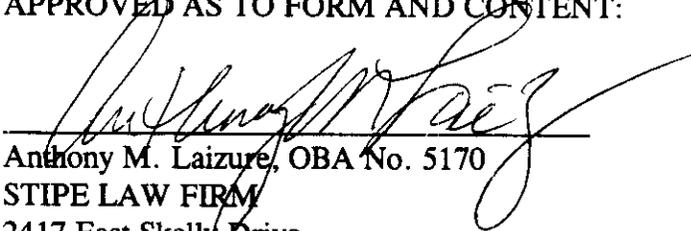
4. After considering the Defendants' Motion to Dismiss for failure to state a claim for deprivation of a liberty interest and Defendants' Motion to Dismiss based upon the assertion of qualified immunity, the Court ordered Plaintiffs to file a First Amended Complaint on or before September 8, 1998.
5. Defendants have twenty (20) days after the filing of the First Amended Complaint in which to answer or file a motion to dismiss.

IT IS SO ORDERED this 14th day of September, 1998.

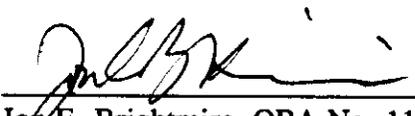


JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM AND CONTENT:



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

FILED

SEP 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL CLAYTON TUCKER,)
)
Plaintiff,)
)
vs.)
)
AT&T WIRELESS SERVICES,)
)
Defendant.)

Case No. 97CV878 H (W) ✓

ENTERED ON DOCKET
SEP 16 1998

DATE _____

ORDER

Now on the 21st day of August, 1998, Defendant's Motion for Summary Judgment came on for hearing before the Court. Jonathan Sutton and Brian Danker appeared on Plaintiff's behalf; James A. Kirk and Thomas J. Daniel IV appeared on Defendant's behalf. Upon reviewing the briefs and evidence submitted by the parties, and after hearing the argument of counsel, the Court finds as follows:

1. While there is some evidence of a frayed supervisor/employee relationship, there is nothing in the record, as conceded by counsel for the Plaintiff, that Defendant's actions toward the Plaintiff were based on racial animus.

2. There is no evidence in the record that the Defendant's stated reasons for terminating the Plaintiff are pretextual in nature, i.e., not worthy of belief.

3. Plaintiff questioned his supervisor in front of a lower level employee during the course of an investigation of that lower level employee, despite having been repeatedly warned against such behavior. This is not disputed by the Plaintiff. Such behavior would have likely resulted in immediate discharge in many workplaces throughout the United States. Title VII endeavors to

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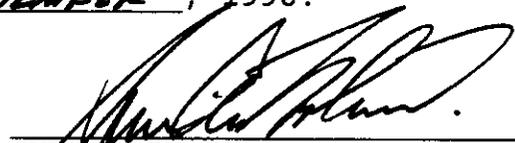
create equal protection for all citizens and were Plaintiff not subject to ramifications, including discharge, for such behavior, this would create a protection around a protected class which would distinguish the Plaintiff's rights from those enjoyed by other at will employees.

4. Plaintiff's claim for discriminatory discharge also fails because Plaintiff has not satisfied one of the elements of a prima facie case as set forth in Murray v. City of Sapulpa, 45 F.3d 1417 (10th Cir. 1995), namely that the Plaintiff's position must have remained open or been filled by a non-class member. The uncontroverted evidence here is that Plaintiff's duties were assumed on an interim basis by another minority employee, Mr. Eric Gahagan. Mr. Gahagan was eventually offered Plaintiff's former position on a permanent basis, an offer which he declined.

5. Plaintiff further concedes, through counsel, that his position was eliminated in March of 1998. Accordingly, Plaintiff's front-pay damages would have been restricted to the time period up to March of 1998.

IT IS THEREFORE ORDERED that, for the above-stated reasons, the Motion for Summary Judgment of AT&T Wireless Services of Tulsa, Inc. is hereby granted.

Dated this 14TH day of SEPTEMBER, 1998.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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

DUANE DESANE DOBBS,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION,)
)
Respondent.)

ENTERED ON DOCKET
DATE SEP 15 1998

Case No. 96-CV-735-H

FILED

SEP 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

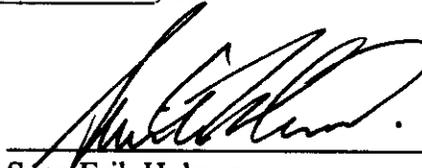
JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

IT IS SO ORDERED.

This 14TH day of SEPTEMBER, 1998.



Sven Erik Holmes
United States District Judge

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

FILED

SEP 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DUANE DESANE DOBBS,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION,)
)
Respondent.)

Case No. 96-CV-735-H ✓

ENTERED ON DOCKET
DATE SEP 16 1998

ORDER

Petitioner, a state inmate appearing *pro se*, filed a 28 U.S.C. § 2254 petition for writ of habeas corpus on August 12, 1996. He claims his due process rights were violated at a disciplinary hearing, conducted March 8, 1995, at Jess Dunn Correctional Center. For the reasons discussed below, the Court finds the petition should be denied.

As a preliminary matter, the Court will consider Petitioner's request for entry of default (#14). Petitioner alleges that because Respondent failed to file a timely response to the petition as required by the Court's September 30, 1997 Order, he is entitled to entry of default. However, a review of the record reveals that Respondent requested and was granted an extension of time within which to file his response. Respondent filed his response on November 17, 1997, one day before the deadline imposed by the Court's Order granting a twenty day extension of time. The Court concludes Petitioner is not entitled to entry of default and his motion should be denied.

BACKGROUND

On March 6, 1995, Petitioner received notice from Jess Dunn Correctional Center officials that he had been charged with Battery after another inmate had been stabbed numerous time with a pair of scissors on February 18, 1995. At the March 8, 1995, disciplinary hearing, Petitioner was

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found guilty based on the strength of confidential witness statements. As a result of the misconduct finding, Petitioner lost 365 earned credits, spent 30 days in disciplinary segregation and was fined \$15.00.

Petitioner appealed the misconduct within the Department of Corrections ("DOC"). On March 28, 1995, a rehearing and reinvestigation were ordered because a reliability statement was not attached to the confidential witness statements. On April 12, 1995, a second disciplinary hearing was held before a different disciplinary hearing officer. Petitioner was again found guilty of Battery based upon the confidential witness statements as supported by a reliability statement. This finding of misconduct was affirmed by DOC officials on administrative appeal.

Thereafter, Petitioner sought relief in the state courts by filing a petition for writ of habeas corpus in Osage County District Court. That court rejected Petitioner's due process claims on the merits. Petitioner appealed to the Oklahoma Court of Criminal Appeals where the state district court's denial of relief was affirmed on May 21, 1996 (#16, Ex. A).

In the instant federal habeas corpus action, Petitioner presents one claim for this Court's review: "Petitioner was denied due process and equal protection under the 14th Amendment when the administrative hearing's procedures failed to provide petitioner with a fair adversarial testing process, which resulted in a loss of earned time credits and being moved to a higher security level." (#1). Petitioner asserts he was denied due process and equal protection because (a) he did not receive an incident report containing an in-depth description of the incident thereby preventing him from preparing a proper defense, (b) the disciplinary hearing panel consisted of only one person, and (c) no physical evidence was documented or presented and a confidential witness statement was the only evidence presented at the disciplinary hearing.

ANALYSIS

Respondent concedes and this Court finds that Petitioner has exhausted state remedies as required by 28 U.S.C. § 2254(b) and (c). Thus, this Court may proceed to consider Petitioner's claims under § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In this case, Petitioner has presented his due process challenge to the state courts of Oklahoma where his claims were rejected on the merits. Therefore, pursuant to § 2254(d), this Court cannot grant the requested writ of habeas corpus unless the state courts' adjudication of the claims resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

The United States Supreme Court has held that an inmate in a disciplinary hearing enjoys only the most basic due process rights: (1) the right to receive written notice of the charges at least twenty-four hours before the hearing; (2) the opportunity to call witnesses and present evidence at the hearing, when doing so does not interfere with the security and order of the institution; and (3) the right to receive a written statement by the fact finder as to the evidence relied upon and the reason for any action taken. Wolff v. McDonnell, 418 U.S. 539, 564-66 (1974); see also Mitchell v. Maynard, 80 F.3d 1433, 1445 (10th Cir.1996). In addition, due process considerations are

satisfied if the outcome of the disciplinary hearing is supported by "some evidence." Superintendent v. Hill, 472 U.S. 445, 455 (1985).

In this case, the record provided by the parties indicates Petitioner received written notice of the charge against him on March 6, 1995, more than twenty-four hours before the March 8, 1995 hearing (#16, Ex. B, Offense Report, receipt acknowledged by Petitioner, 3/6/95); Petitioner had the opportunity to call witnesses and present evidence at the hearing (#16, Ex. B, Investigating Officer's report indicating witnesses requested by Petitioner chose not to submit a statement on behalf of Petitioner); and Petitioner received a written statement by the factfinder describing the evidence relied upon and the reasons for the action taken (#16, Ex. B, "Disciplinary Hearing Actions," report of disposition of charge). The Court finds these records demonstrate that the due process standards enunciated in Wolff were satisfied. In addition, after reviewing the documents, the Court finds that the offense report contained a sufficiently detailed description of the incident¹ to allow Petitioner to prepare his defense.

As to Petitioner's claim that his due process rights were violated because only one disciplinary hearing officer served on his review panel, the Court has been unable to find any authority supporting Petitioner's argument. Of course, the hearing officer must be impartial, see Edwards v. Balisok, 520 U.S. 641 (1997), but there is no separate requirement, provided either by DOC policy or by law, that a disciplinary review panel must consist of more than one member.

¹The Offense Report identifies the offense charged as "Battery (participating in an activity that directly results in the intentional injury of another person) and provides the following description of the incident:

On [02-18-95 at approx. 6:05 p.m.], I'M Dobbs #152205 did commit upon the person of another inmate (Jimmy Scott #95999) by stabbing him numerous times in the hands, left chest and abdominal areas of his body with a sharpened instrument (a pair of black handled scissors). This matter has been under investigation since 02-18-95 by this special investigator supervisor of JDCC.

Furthermore, the Supreme Court has held that prison officials are sufficiently impartial to conduct prison disciplinary hearings. See Wolff, 418 U.S. at 570-71. The Court finds this claim to be without merit.

In his reply to Respondent's response, Petitioner objects to the submission of the confidential informant's statement under seal for the Court's *in camera* review. Petitioner complains that submission under seal "would again denie [sic] petitioner the constitutional right to face and question the witness against him, as well to see all the evedince [sic] used against him, to vael [sic] a finding of guilty! Petitioner states he has never been given the chanch [sic] to prove he was ennocent [sic] of all charges, because pititioner [sic] did not have access [sic] to these witness." (#18). However, an inmate does not have an absolute right to access confidential informant testimony because it is necessary to balance due process rights of the inmate against the administrative needs of the prison, specifically, the need to encourage and protect confidential informants and the need to preserve order. See McKinney v. Meese, 831 F.2d 728, 731-32 (7th Cir. 1987). Therefore, it is permissible to allow the confidential informant statements to remain confidential if providing the full statement to the accused would legitimately jeopardize the security of the institution and/or the informants. In this case, the Court finds that disclosure of the confidential information would be inappropriate.

Nonetheless, where the disciplinary outcome is based on a confidential informant's statement, some indication of reliability is required in order to protect an inmate's interest in a fair hearing. See Sanchez v. Miller, 792 F.2d 694, 701 (7th Cir. 1986). The Tenth Circuit Court of Appeals has held that a confidential informant's statement satisfies the "some evidence" standard as long as there are sufficient indicia of reliability to satisfy due process. Taylor v. Wallace, 931 F.2d 698, 701-02 (10th Cir. 1991) (citing with approval the indicia identified in Mendoza v. Miller, 779 F.2d 1287, 1293

(7th Cir. 1985), including (1) the oath of the investigating officer as to the truth of his report containing confidential information and his appearance before the disciplinary committee; (2) corroborating testimony; (3) a statement on the record by the chairman of the disciplinary committee that he had firsthand knowledge of the sources of information and considered them reliable on the basis of their past record of reliability; or (4) *in camera* review of material documenting the investigator's assessment of the credibility of the confidential informant). In the instant case, the confidential informant's statement as well as the statement of reliability were provided by Respondent for the Court's *in camera* review (#19). Having completed its *in camera* review, the Court finds that sufficient indicia of reliability exist to satisfy the requirements of due process. Consequently, Petitioner's challenge to the evidence produced at the disciplinary hearing fails.

CONCLUSION

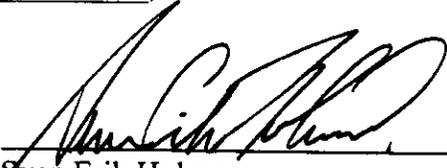
After reviewing the record presented by the parties, the Court concludes that the due process afforded Petitioner at his disciplinary hearing comported with the requirements enunciated by the United States Supreme Court in Wolff v. McDonnell, 418 U.S. 539, 564-66 (1974), and Superintendent v. Hill, 472 U.S. 445, 455 (1985). In addition, the confidential informant's statement considered by the disciplinary hearing officer is supported by sufficient indicia of reliability to satisfy due process. Therefore, the petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's request for entry of default (#14) is **denied**.
2. The petition for writ of habeas corpus is **denied**.

IT IS SO ORDERED.

This 14th day of SEPTEMBER, 1998.



Sven Erik Holmes
United States District Judge

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

TIMOTHY LYNN BRITT,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

ENTERED ON DOCKET

DATE **SEP 16 1998**

Case No. 97-CV-212-H (M) ✓

FILED

SEP 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed without prejudice to refile same, for failure to exhaust state remedies.

IT IS SO ORDERED.

This 14TH day of SEPTEMBER, 1998.


Sven Erik Holmes
United States District Judge

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

FILED
SEP 15 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

TIMOTHY LYNN BRITT,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL,)
)
 Respondent.)

Case No. 97-CV-212-H (M) ✓

ENTERED ON DOCKET

DATE SEP 15 1998

ORDER

Petitioner, a state inmate appearing *pro se*, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. On June 9, 1997, after receiving leave of Court, Petitioner filed his amended petition (Docket #9). He challenges the revocation of 552 days of earned credits, punishment imposed by the Oklahoma Department of Corrections ("DOC") following his entry of a plea of guilty to the misconduct charge of escape. Respondent has filed a response to the amended petition (#13). Petitioner has filed a reply to Respondent's response (#14). Petitioner has also filed a motion for temporary restraining order and for preliminary injunction (#16), four (4) motions to submit *amicus curiae* evidence (#s 17, 18, 19 and 20), and a motion to supplement the motion for temporary restraining order and/or to enter new evidence (#21).

For the reasons discussed below, the Court finds this action should be dismissed without prejudice for failure to exhaust state remedies. As a result, Plaintiff's pending motions have been rendered moot.

BACKGROUND

On July 26, 1994, Petitioner entered a plea of *nolo contendere* to Assault and Battery With a Dangerous Weapon in Tulsa County District Court, Case No. CF-93-5975. He was sentenced to

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six (6) years imprisonment (#9, Ex. A). In May, 1995, DOC assigned Petitioner to the Salvation Army Halfway House located in Muskogee, Oklahoma.

On September 25, 1995, the Muskogee County District Attorney filed an Information in the state district court charging Petitioner with Escape from Penal Institution, in violation of Okla. Stat. tit. 21, § 443 (#9, Ex. E). Also on September 25, 1995, Petitioner received an offense report from DOC charging him with the misconduct of Escape (#9, Ex. F). After being presented with the offense report, Petitioner signed the report acknowledging receipt and indicated he wished to enter a plea of guilty to the charge (#9, Ex. F).¹ On September 26, 1995, the DOC disciplinary board accepted Petitioner's plea of guilty, entered a finding of guilty, and revoked all of Petitioner's earned credits, totaling 552 days (#9, Ex. G).

On August 8, 1996, the Muskogee County District Attorney filed a motion to dismiss the Information charging Petitioner with Escape. The state's motion was granted and the criminal charge against Petitioner was dismissed (#9, Ex. H). Petitioner claims the charge was dismissed because he had not been "unaccounted for" for a 24-hour period as required by statute.

After dismissal of the criminal charge, Petitioner wrote a letter to Jim Rabon, DOC's Coordinator of Sentence Administration and Offender Records, requesting that the misconduct be vacated and that all revoked earned credits and prior security level classification be restored. On November 5, 1996, Mr. Rabon responded that the action taken against Petitioner by DOC was appropriate. (#9, Ex. I).

¹When presented with the offense report by DOC Officer Barbie, Petitioner maintains he checked the guilty plea box on the offense report only because Officer Barbie "approached the Petitioner and launched a verbal attack slamming the metal table where the Petitioner was seated . . . Petitioner, fully afraid for his life, signed and initialed the misconduct report where officer Barbie had ordered him to sign and initial." (#9, "Statement of Case" at 2).

Petitioner filed his original petition for writ of habeas corpus in this Court on March 7, 1997. Respondent moved to dismiss this action arguing that it was duplicative of another habeas corpus action filed by Petitioner in this Court, Case No. 96-CV-990-BU, wherein Petitioner challenged his conviction in Tulsa County District Court Case No. CV-93-5975. After denying Respondent's motion to dismiss, the Court granted Petitioner leave to file an amended petition. In his amended petition, filed June 9, 1997, Petitioner raises one claim: that DOC unlawfully and without requisite underlying authority charged, found Petitioner guilty of, and imposed punishment for the alleged misconduct of Escape, in violation of Petitioner's right to due process and the equal protection of the law (see #9, attached Brief in Support at 1). Petitioner also asserts that his "state court remedies are either non-existent [sic] and/or inapplicable in this instant case" (#9, attached Brief in Support at 13). In her response, Respondent argues that Petitioner has not exhausted available state remedies but because Petitioner received all the due process required by Wolff v. McDonnell, 418 U.S. 539, 568 (1974), the petition should be denied (#13). Petitioner replies that under Oklahoma law, he has no available state remedy since it would be futile to pursue his claim in the state courts and that his petition does not challenge due process² but instead challenges DOC's "authority [i.e. jurisdiction] to have even so much as 'charged' this Petitioner with the specific rule infraction of 16-1/Escape from the custody of the DOC" (#14 at 3).

²The Court notes that in his claim of error, identified as "Ground One," Petitioner specifically states that DOC's actions were "contrary to, and in violation of, this Petitioner's right(s) to both the due process, and the equal protection of the law, clause(s) of the Fourteenth Amendment of the United States Constitution." (#9, attached Brief in Support at 1).

ANALYSIS

The United States 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); see also 28 U.S.C. § 2254(b),(c). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the state's highest Court. 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). 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).

After carefully reviewing the record in this case, the Court concludes that Petitioner has not fairly presented his claim to the Oklahoma Court of Criminal Appeals and has not exhausted his state remedies. Although Petitioner claims he is not challenging the due process afforded during his disciplinary proceeding, the gist of his pleadings is that his entry of a plea of guilty was involuntary and that, as a result of the guilty plea, he was denied the opportunity to participate in the disciplinary hearing. See #9, Statement of the Case at 2. The Court finds Petitioner's claims in fact implicate a due process violation. See Cunningham v. Wingo, 443 F.2d 195 (6th Cir. 1971). Therefore, contrary to Petitioner's assertions, he does have an available state remedy which must be exhausted before this Court can consider his claim. Petitioner can seek a due process review of the disciplinary hearing and subsequent revocation of his good time credits through a state writ of mandamus, "regardless of whether he would be entitled to immediate release if the credits were restored." Canady v. Reynolds, 880 P.2d 391, 396 (Okla. Crim. App. 1994) (discussing scope of mandamus

and habeas corpus); see also Waldon v. Evans, 861 P.2d 311, 313 (Okla. Crim. App. 1993) (holding that a writ of mandamus must lie against appropriate prison officials when a prisoner's minimum due process rights have been violated where prisoner would not be entitled to immediate release). In addition, in his motion for temporary restraining order filed November 24, 1997, Petitioner asserts for the first time that even if he served the 552 days revoked as a result of the escape misconduct, he would have been entitled to immediate release as of November 21, 1997. (#16 at 3). Should Petitioner be entitled to immediate release, as he claims, then clearly he has an available state remedy, a state petition for writ of habeas corpus. Canady, 880 P.2d at 396-97.

Therefore, the Court concludes that if Petitioner can demonstrate that he would be entitled to immediate release if his challenge to the misconduct finding or to any other aspect of the administration of his sentence by DOC were successful, then he should file, in the state district court located in the county of his incarceration, a petition for writ of habeas corpus. Id. Even at the time Petitioner claimed he was not entitled to immediate release, he would nonetheless have had an available state remedy, the writ of mandamus, whereby he could challenge the procedural due process afforded him during his disciplinary proceedings. See id.; Waldon, 861 P.2d at 313 (distinguishing between due process review to be provided by the state courts and appellate review of disciplinary decisions which is not to be provided by the courts). Should the state district court deny the relief requested, Petitioner must appeal the denial to the Oklahoma Court of Criminal Appeals. If the appellate court affirms the state district court's denial of relief, Petitioner may then return to this Court having exhausted his state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The petition for a writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state judicial remedies.
2. Petitioner's motions for temporary restraining order and for preliminary injunction (#16), to submit *amicus curiae* evidence (#s 17, 18, 19 and 20), and to supplement the motion for temporary restraining order and/or to enter new evidence (#21) are **denied as moot**.

IT IS SO ORDERED.

This 14TH day of SEPTEMBER, 1998.



Sven Erik Holmes
United States District Judge

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

F I L E D

SEP 14 1998

B.N. SPRADLING, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 CITY OF TULSA, OKLAHOMA,)
 a municipal corporation,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-552-E

ENTERED ON DOCKET
SEP 16 1998
DATE _____

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, City of Tulsa, Oklahoma, and against the Plaintiffs, certain present or former District Chiefs of Tulsa's Fire Department. Plaintiffs shall take nothing of their claim.

DATED, THIS 14th DAY OF SEPTEMBER, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

"duties test." 29 C.F.R. §§ 541.1, 541.2., and 541.3. By stipulation, the parties agree that plaintiffs meet the 'duties test' and are compensated in an amount exceeding \$250 per week. The issue before the Court is whether they meet the "salary basis test" for exemption.

The Department of Labor regulations provide that an employee is considered to be paid "on a salary basis" if she "regularly receives each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of her compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed." 29 C.F.R. §541.118(a).

Plaintiffs urge entitlement to overtime because their pay is "subject to reduction" for reasons inconsistent with payment on a salary basis. Defendant claims plaintiffs are exempt because there is neither an actual practice of making deductions nor an employment policy which creates a likelihood that such deductions would be made. The record in this case sustains Defendants' position on both points.

These issues were previously addressed by this Court, and affirmed by the Court of Appeals in Spradling v. City of Tulsa, 95 F.3d 1492 (10th Cir. 1996) (Spradling I). In that case, the issues were resolved in favor of the District Chiefs. The District Chiefs here urge that application of the doctrine of collateral estoppel and res judicata dictate the same result. Defendant asserts that the applicable law has changed pursuant to the mandate of the United States Supreme Court in Auer v. Robbins, 519 U.S. _____, 117 S.Ct. 905 (1997), rendering application of either res judicata or collateral estoppel inappropriate.

The Supreme Court in Auer resolved a split among the Circuits of the meaning of "subject to" as the phrase was used in the salary basis test. Police sergeants for the City of St. Louis

had sued for overtime compensation pursuant to FLSA. The City claimed an exemption by reason of 29 U.S.C. §213(a)(1). Applying the salary basis test was the sergeants' pay "subject to" disciplinary deductions? The Court relied upon the interpretation of the Secretary of Labor as reflected in an amicus brief.

The Secretary of Labor, in an amicus brief filed at the request of the Court, interprets the salary-basis test to deny exempt status when employees are covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.' That standard is met, the Secretary says, if there is either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions. The Secretary's approach rejects a wooden requirement of actual deductions, but in their absence it requires a clear and particularized policy—one that 'effectively communicates' that deductions will be made in specified circumstances. *Auer v. Robbins*, ___ U.S. ___, 117 S.Ct. 905, 911, 137 L.Ed.2d 79 (1997).

The facts in Auer established that the City had a police manual which listed a variety of rule violations and which set forth the range of penalties for each violation. All department employees were nominally covered by the manual and "some of the specified penalties involve disciplinary deductions in pay." Id.

The Court, following the Secretary of Labor's interpretation, stated:

Under the Secretary's view, that is not enough to render petitioners' pay 'subject to' disciplinary deductions within the meaning of the salary-basis test. This is so because the manual does not 'effectively communicate' that pay deductions are an anticipated form of punishment for employees *in petitioners' category*, since it is perfectly possible to give full effect to every aspect of the manual without drawing any inference of that sort. If the statement of available penalties applied solely to petitioners, matters would be different; but since it applies both to petitioners and to employees who are unquestionably not paid on a salary basis, the expressed availability of disciplinary deductions may have reference only to the latter. No clear inference can be drawn as to the likelihood of a sanction's being applied to employees such as petitioners. Id. At 911-912.

Consideration of the Stipulations of the parties together with the rationale of the Court in Auer requires the conclusion that there has been a change of law previously applied in this Circuit.

The standard applied in Carpenter v. City and County of Denver, Colorado, 82 F.3d 353 (10th Cir. 1996) was the same as that applied in Spradling I under similar factual circumstances. The Supreme Court vacated Carpenter and remanded it for further consideration in light of Auer.

On remand, the Court of Appeals stated that:

[W]e cannot conclude the record before us supports the result we previously reached under the Court's present application of the Secretary's interpretation of the regulations. Like Auer, this case involves a departmental manual which does not, as the court noted, 'effectively communicate' that pay deductions are an anticipated form of punishment for employees in petitioners' category, since it is perfectly possible to give full effect to every aspect of the manual without drawing any inference of that sort.

The record does not contain evidence of disciplinary or other deductions in pay either as an actual practice or 'an employment policy that creates a significant likelihood' of such deductions. Moreover, although there were two cases of alleged deductions, the Court specifically recognized that such one time deductions under unusual circumstances will not oust exempt status and may be remedied under 29 C.F.R. §541.118(a)(6).

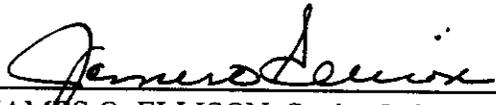
Carpenter v. City and County of Denver, Colorado, 115 F.3d 765 (10th Cir. 1997).

Plaintiffs here cannot make a better case than plaintiffs in Carpenter. Auer changed the law in the Tenth Circuit and hence changes the result reached in Spradling I.

Defendant's Motion for Summary Judgment is granted.

Plaintiff's Motion for Partial Summary Judgment is denied.

Dated this 14th day of September, 1998.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE SEP 16 1998

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

FRANK MAX MILLER, an)
individual,)
)
Plaintiff,)
)
vs.)
)
BOARD OF COUNTY)
COMMISSIONERS OF THE)
COUNTY OF ROGERS, STATE)
OF OKLAHOMA, a political)
subdivision of the State of)
Oklahoma, DON MORGAN,)
individually and as an officer)
and employee of Rogers County,)
State of Oklahoma, JERRY,)
PRATHER, in his official capacity)
as Sheriff of Rogers County, State of)
Oklahoma, DON BORDWINE,)
individually and as an officer and)
employee of Rogers County, State of)
Oklahoma, YUBA HEAT TRANSFER,)
a division of CONNELL LIMITED)
PARTNERSHIP, a Delaware)
Limited Partnership, LUKE HELM,)
individually and as an employee of)
Yuba Heat Transfer, a division of)
CONNELL LIMITED PARTNERSHIP,)
a Delaware Limited Partnership,)
and STAND-BY OF OKLAHOMA,)
INC., a Colorado corporation,)
)
Defendants.)

FILED

SEP 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 97-CV 990 C (J)

JURY TRIAL DEMANDED

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiff Frank Max Miller and Defendants Board of County Commissioners of Rogers
County, State of Oklahoma, Don Morgan, Jerry Prather, in his official capacity as Sheriff of
Rogers County, State of Oklahoma, Don Bordwine, Yuba Heat Transfer, a division of Connell

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Limited Partnership, a Delaware Limited Partnership, Luke Helm, and Stand-By of Oklahoma, Inc., hereby stipulate to the dismissal without prejudice of Defendant Board of County Commissioners of Rogers County, State of Oklahoma, and Defendant Jerry Prather, in his official capacity as Sheriff of Rogers County, State of Oklahoma.



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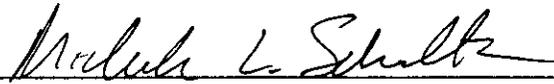
ATTORNEYS FOR DEFENDANT
YUBA HEAT TRANSFER AND LUKE HELM



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COUNTY, STATE OF OKLAHOMA, DON
MORGAN, DON BORDWINE, AND JERRY
PRATHER

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COUNTY, STATE OF OKLAHOMA, DON
MORGAN, DON BORDWINE, AND JERRY
PRATHER

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

FILED

SEP 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT D. LOWRANCE
PLAINTIFF,

v.

No. 98 CV 0222H(M)

UNITED STATES OF AMERICA,
DEFENDANT.

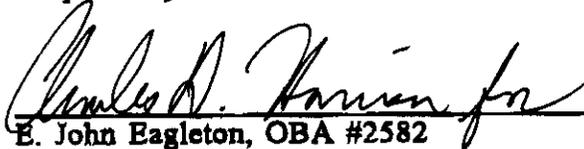
ENTERED ON DOCKET
DATE SEP 15 1998

AGREED STIPULATION OF DISMISSAL

It is hereby stipulated and agreed, by and between the parties of the above captioned action, pursuant to the Bankruptcy Court's approval of the Joint Motion to Approve Settlement, to dismiss the subject proceedings with prejudice. Each party shall bear its respective costs, including attorneys' fees or any other expenses.

EXECUTED this 14th day of September, 1998.

Respectfully submitted,


E. John Eagleton, OBA #2582

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 9/11/98

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ATTORNEY FOR DEFENDANT

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CT

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

FILED

SEP 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHY LOWRANCE,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

No. 98-CV-0223-H (J) ✓

ENTERED ON DOCKET

DATE SEP 15 1998

AGREED STIPULATION OF DISMISSAL

It is hereby stipulated and agreed, by and between the parties of the above captioned action, pursuant to the Bankruptcy Court's approval of the Joint Motion to Approve Settlement, to dismiss the subject proceedings with prejudice. Each party shall bear its respective costs, including attorneys' fees or any other expenses.

EXECUTED this 14th day of September, 1998.

Respectfully submitted,

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9/16/98

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ATTORNEY FOR DEFENDANT

g

clj

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

FILED

SEP 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KHALDOUN JAAFARI,)

Plaintiff,)

v.)

H.N.T.B. CORP.,)

Defendant.)

Case No. 97-CV-930-H (M)

ENTERED ON DOCKET
SEP 15 1998
DATE _____

STIPULATION OF DISMISSAL OF ACTION

Plaintiff Khaldoun Jaafari and Defendant H.N.T.B. Corp. hereby stipulate, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, that the above-entitled action shall be dismissed with prejudice, each party to bear his own costs.

Dated this 14th day of September, 1998.

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AND


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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BRENT A. REMY,
SSN: 441-70-6807

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

FILED

SEP 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

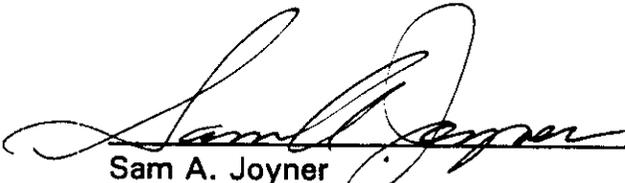
No. 97-C-⁹⁰⁵319-J ✓

ENTERED ON DOCKET
SEP 15 1998
DATE _____

JUDGMENT

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

It is so ordered this ^{11th}~~17~~ day of September 1998.


Sam A. Joyner
United States Magistrate Judge

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(10)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRENT A. REMY,
SSN: 441-70-6807

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

905-J
No. 97-C-319-J

ENTERED ON DOCKET

SEP 15 1998

DATE _____

ORDER^{2/}

Plaintiff, Brent A. Remy, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred because (1) the record does not contain substantial evidence to support the ALJ's residual functional capacity assessment, (2) the ALJ's Step Four findings were incomplete, (3) the ALJ failed to obtain appropriate testimony from the

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

^{2/} 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.

^{3/} Administrative Law Judge Tela L. Gatewood (hereafter "ALJ") concluded that Plaintiff was not disabled on September 26, 1995. [R. at 10]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on July 29, 1997. [R. at 5].

vocational expert.^{4/} For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born July 17, 1961. [R. at 29]. Plaintiff did not complete the tenth grade, but obtained his GED in 1993. [R. at 29].

Plaintiff testified that he had his first seizure in May 1993. Plaintiff testified that he had anywhere from two to twenty seizures per month and that his most recent "major" seizure was three weeks prior to the hearing. [R. at 36]. Plaintiff additionally testified that he has "minor" seizures every day. [R. at 37]. Plaintiff takes Tegretol for his seizures.

Plaintiff additionally testified that he has migraine headaches which sometimes last from a few hours to a few days. Plaintiff takes Lortab for his headaches which sometimes but not always helps. [R. at 38].

An August 25, 1993 letter by one of Plaintiff's doctors notes that Plaintiff has idiopathic seizure disorder characterized by dizziness, loss of consciousness and his arms turning blue. The doctor noted that Plaintiff was on Dilantin, and that most seizure patients usually achieve good control with medication. Plaintiff's doctor noted that his prognosis for control was good to excellent. [R. at 25].

^{4/} Defendant devotes several pages of argument to the Listings. Defendant asserts that Plaintiff has argued, as an error on appeal, the failure of the ALJ to appropriately address the Listings for disabilities involving seizure disorders. Plaintiff has not appealed the decision of the Commissioner with respect to this issue. Defendant does not specifically address Plaintiff's arguments regarding Step Four or treating physicians.

Plaintiff complained of headaches during numerous visits to his doctors.^{5/} [R. at 126-135, 151, 157]. Plaintiff additionally complained of seizures.^{6/} [R. at 130, 151, 153, 157].

Don R. Hess, M.D., wrote on November 14, 1993, that Plaintiff complained of numerous seizures and was seeing a neurologist. He additionally noted that Plaintiff was apparently unable to work due to his uncontrolled seizure activity. [R. at 150].

Jorge A. Gonzalez, M.D., wrote that Plaintiff was his patient, and that Plaintiff had a history of seizures. The doctor noted that although his seizures are "better controlled, he is not appropriate for work which requires commuting or the use of electrical or power tools or sharp objects." [R. at 195]. "At the present time, he should be considered temporarily but totally disabled secondary to his very pronounced seizure disorder." [R. at 195].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

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

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

^{5/} Complaints of headaches were made on July 9, 1993, August 23, 1993, September 24, 1993, November 9, 1993, June 23, 1994, and September 20, 1994.

^{6/} Plaintiff complained of seizures on August 23, 1993, September 24, 1993, Defendant 21, 1993, April 6, 1994, May 10, 1994, June 23, 1994, and November 8, 1994.

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 has established a five-step process for the evaluation of social security claims.^{7/} See 20 C.F.R. § 404.1520.

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

^{7/} 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).

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^{8/} 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

The ALJ concluded at Step Four of the sequential evaluation that Plaintiff was not disabled. The ALJ noted that Plaintiff's prognosis was reported as "excellent" by Plaintiff's doctor. The ALJ observed that in weighing the medical opinions, special

^{8/} 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."

attention had been given to the C.F.R. and to the length of treatment relationship, area of specialty, consistency of opinions, and other relevant factors. The ALJ does not provide any analysis of these factors but merely lists the factors. The ALJ additionally noted that the record lacked findings one would expect to support a degree of pain that is disabling. The ALJ concluded that Plaintiff could not return to his past work as a carpenter, farm worker, plumber's helper or oil field floor hand, but that Plaintiff could return to his past relevant work as an egg gatherer, poultry assembler and draftsman.

IV. REVIEW

SUBSTANTIAL EVIDENCE: RESIDUAL FUNCTIONAL CAPACITY

Plaintiff asserts that the record does not contain substantial evidence to support the ALJ's conclusion that Plaintiff can perform his past relevant work as egg gatherer or draftsman. Plaintiff asserts that the ALJ failed to properly evaluate his complaints of pain related to his headaches, and the effect his seizures had on his ability to work. Plaintiff refers to Luna and Kepler.

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

maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

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

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

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

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

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments,

as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91.

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

Id. at 391. The Court specifically noted that the ALJ should consider such factors as:

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

Id. at 391. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

The ALJ noted the factors for consideration in determining Plaintiff's credibility. However, the ALJ provides no analysis with respect to those factors.^{9/} The ALJ

^{9/} The sole factor analyzed by the ALJ is whether or not Plaintiff experienced side effects from his medication for epilepsy. The record does not indicate whether or not Plaintiff's epilepsy was under control,

merely notes that to the extent Plaintiff's testimony indicates he could not engage in substantial gainful activity it is not credible or it is exaggerated. In accordance with Kepler and Luna this is simply insufficient. On remand, the ALJ should examine the factors provided in those cases, or any other additional factors the ALJ deems relevant, and provide the analysis for those factors.

Plaintiff additionally asserts that the ALJ improperly ignored medical evidence and the findings of disability by Plaintiff's treating physicians. Two of Plaintiff's doctors suggest that Plaintiff is currently incapable of working. One of Plaintiff's doctors notes that Plaintiff's condition has an "excellent to good" chance of being controlled.

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

and the ALJ does not discuss the medications which Plaintiff takes for his headaches.

Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

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

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

The ALJ notes merely that in "weighing medical opinions," careful consideration was given to the length of treatment, the frequency of examination, the extent of the treatment relationship, areas of specialty, and other relevant factors. In accordance with the applicable regulations and statutes, these are certainly good factors for consideration. However, the ALJ does not provide the reasons, in her opinion, to support why she determined which medical opinions she would follow or discount. On remand, the ALJ should provide the appropriate analysis with respect to the opinions of the treating physicians.

STEP FOUR

Plaintiff asserts that the ALJ concluded this case at Step Four but failed to make the required Step Four findings. Plaintiff asserts that this error requires reversal of the decision of the ALJ.

The ALJ determined that Plaintiff could perform his past relevant work as an egg gatherer, poultry assembler, and draftsman. [R. at 17]. The ALJ does not indicate the specific demands of Plaintiff's past relevant work, and does not indicate that Plaintiff is capable of meeting those demands.

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

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

.....

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

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

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

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

In this case, the ALJ's opinion does not contain the requisite Step Four findings. On remand, the ALJ should make the appropriate findings at Step Four. In the alternative, the ALJ may proceed to Step Five.

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

Dated this 11 day of September 1998.


Sam A. Joyner
United States Magistrate Judge

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

MANUFACTURED HOUSING)
ASSOCIATION OF OKLAHOMA;)
JOHN L. HAYNES; and BYRON)
GIBSON INVESTMENT CO., d/b/a)
DESIGNER HOMES,)
)
Plaintiffs,)
)
vs.)
)
CITY OF JAY, OKLAHOMA, a)
municipal corporation, et al.,)
)
Defendants.)

FILED

SEP 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-269-BU ✓

ENTERED ON DOCKET

DATE SEP 15 1998

JUDGMENT

This action came on for trial before the Court sitting without a jury, and the issues having been duly tried as to Defendant, City of Jay, Oklahoma, and the Court having duly rendered its decision, and Defendant, City of Jay, Oklahoma Planning and Zoning Board, and Defendants, Bill Roberts, Ron Rogers, Lefty Melton, Melvina Shotpouch, Wayne Dunham, Dale Denney, Dan Price, Mark Goeller, and Leroy Hendren, all individuals sued in their official capacities as Mayor, Councilpersons, and Board Members, having been previously dismissed by order of the Court,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of City of Jay, Oklahoma and against Plaintiffs, Manufactured Housing Association of Oklahoma, John L. Haynes, and Byron Gibson Investment Co. d/b/a Designer Homes, and that Defendant, City of Jay, Oklahoma, is entitled to recover of

Plaintiffs, Manufactured Housing Association of Oklahoma, John L. Haynes and Byron Gibson Investment Co., d/b/a Designer Homes, its costs of action.

DATED at Tulsa, Oklahoma, this 14th day of September, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

MANUFACTURED HOUSING)
ASSOCIATION OF OKLAHOMA;)
JOHN L. HAYNES; and BYRON)
GIBSON INVESTMENT CO., d/b/a)
DESIGNER HOMES,)

Plaintiffs,)

vs.)

CITY OF JAY, OKLAHOMA, a)
municipal corporation, et al.,)

Defendants.)

FILED

SEP 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-269-BU

ENTERED ON DOCKET

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ORDER

This matter came on for trial before the Court sitting without a jury. Having heard the testimony and having examined the exhibits offered and received into evidence, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff, Manufactured Housing Association of Oklahoma ("MHA"), is a trade association incorporated under the laws of the State of Oklahoma. The membership of MHA is comprised of persons and entities who manufacture, sell and/or finance the sale of manufactured housing.

2. Plaintiff, John L. Haynes ("Haynes"), is an individual who owns property in the City of Jay, Oklahoma.

3. Plaintiff, Byron Gibson Investment Co. d/b/a Designer Homes ("Gibson"), sells and delivers manufactured housing to the public in the City of Jay, Oklahoma.

4. Defendant, City of Jay, Oklahoma ("City"), is a

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municipality existing by the laws of the State of Oklahoma.

5. Prior to April 1996, the City adopted and maintained ordinances (the "Old Ordinances") which included regulations and restrictions with regard to planning, zoning and building.

6. Citizens expressed to the City's leaders a desire for updating the Old Ordinances. They had a concern regarding manufactured housing. Specific concerns included preservation of property values, deterioration of manufactured housing units and the perception of manufactured housing as undesirable for a number of reasons, including the fact that the manufacturing housing units often became rental units.

7. To assure that the Old Ordinances were properly evaluated and revisions implemented, the City adopted a resolution, Resolution 1996-1, which instituted a moratorium ("Moratorium") for a six-month period on the submission of applications to the planning and zoning board (the "Board") to locate manufactured housing in the City.

8. The Board is a volunteer advisory body with no decision-making authority. It makes recommendations to the City Council in regard to matters submitted to it.

9. The City Council adopted Resolution 1996-1 on April 8, 1996.

10. Resolution 1996-1 was amended on April 22, 1996 to add an exclusion to the Moratorium for the submission of applications to the Board for "any HUD or Federally approved multiple unit manufactured housing."

11. Haynes' site-built home burned to the ground on February 29, 1996.

12. Haynes owned approximately eight acres of land within the City of Jay, Oklahoma.

13. On June 6, 1996, Haynes applied to have a portion of his property re-zoned from residential (R-1) to commercial.

14. Haynes' request to re-zone his property to commercial was initially presented to the Board on June 24, 1996. Haynes attended that meeting and the Board decided to move forward on Haynes' application by having Haynes provide an Abstracter's Certificate of property owners within 300 feet of the property to the City Clerk and then publishing notice as to a public hearing.

15. On July 15, 1996, Haynes entered into a contract with Gibson to purchase a double-wide manufactured house. It was a HUD or Federally approved manufactured housing unit.

16. On July 24, 1996, while Haynes' re-zoning application was pending, Haynes submitted an application to locate the double-wide manufactured house on his property.

17. Haynes attended the next Board meeting which was on July 29, 1996. At that meeting, the Board tabled Haynes' application to place the double-wide manufactured house on his property until information could be obtained from a suitable source as to whether a residence could be placed in a commercially zoned district.

18. The next Board meeting was held on August 13, 1996. It was attended by Haynes. One of Haynes' neighbors objected to Haynes' location of a manufactured house on his property. At the

meeting, the Board inquired as to whether Haynes' land was going to be a subdivision. Haynes indicated that he was not calling it a subdivision and stated that the property would have a private drive. The Chairman of the Board believed that the property fell under the requirements of a subdivision. No motion to approve Haynes' application was made, so it was deemed denied by the Board.

19. In the same August 13, 1996 meeting, the Board voted to recommend to the City Council to re-adopt the original Resolution 1996-1 pending revision of the Old Ordinances. The original Resolution 1996-1 did not contain an exclusion for HUD or Federally approved multiple unit or double-wide manufactured housing.

20. On August 16, 1996, Haynes executed a document indicating he wished to appeal the decision of the Board denying his application. This document, signed by Haynes, was addressed to and directed to the Board.

21. On August 26, 1996, the next Board meeting, Haynes' appeal was considered. Haynes attended the meeting. In addition to the previously discussed concerns, one of the Board members identified another defect in Haynes' application, namely, that there was no city sewer hook-up available on his property as required by the City's ordinances. No motion was made to approve Haynes' appeal, so it was deemed denied and further consideration of the application was postponed until after the Moratorium was lifted.

22. Haynes did not appeal the action of the Board to the City Council or any other body. No further action was taken by Haynes

regarding his application.

23. The City did not make a final determination as to Haynes' application.

24. On September 3, 1996, the City Council re-adopted Resolution 1996-1 in its original form.

25. On September 2, 1997, and September 9, 1997, the City adopted new ordinances (the "New Ordinances") and lifted the Moratorium instituted by Resolution 1996-1.

26. Haynes has not made any application for placement of his double-wide manufactured house pursuant to the New Ordinances.

Conclusions of Law

27. Any finding of fact stated above which could be properly characterized as a conclusion of law is incorporated herein.

28. This is an action alleging claims arising under the Constitution and laws of the United States. This Court, therefore, has subject matter jurisdiction over the instant action pursuant to 28 U.S.C. § 1331.

29. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b).

30. Haynes seeks damages against the City under 42 U.S.C. § 1983, alleging that the Moratorium, as applied, constituted an unlawful taking of private property in violation of the Fifth Amendment. A claim under the Fifth Amendment for a regulatory taking is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."

Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). A "final decision" requires not only an initial rejection of a particular development proposal, but a definitive action by local authorities indicating with some specificity what level of development will be permitted on the property in question. Id. at 193-94.

31. Haynes' failure to seek review from the City Council of the Board's denial of his application to place a double-wide manufactured home on his property renders his takings claim unripe. The City Council had the authority to make a final determination regarding Haynes' application. Because Haynes did not appeal the decision of the Board to the City Council, the City Council did not have the opportunity to address Haynes' application. Any action taken in regard to the application was therefore not final.

32. Haynes maintains that he need not be required to seek review because § 1983 does not require a litigant to first exhaust administrative remedies. This argument was rejected in Williamson. "The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable." Williamson, 473 U.S. at 192. Whereas exhaustion generally refers to the requirement that a litigant resort to available administrative or judicial procedures prior to filing a federal lawsuit, the finality requirement seeks to ensure that the issues are flushed out to permit meaningful judicial review.

Bateman v. City of West Bountiful, 89 F.3d 704, 707 (10th Cir. 1996). Consequently, even though Haynes may not have been required to exhaust his available administrative remedies prior to filing a § 1983 action, he was required to obtain a final decision from the City Council which he failed to do in this case. Because Haynes failed to obtain a final decision, his takings claim under the Fifth Amendment must be dismissed for lack of subject matter jurisdiction.

33. The Williamson ripeness test applies with equal force to Haynes' other § 1983 claims in regard to the Moratorium as applied to him. These claims include violation of equal protection, substantive due process, procedural due process, the Commerce Clause and the Contract Clause.

34. In order to prevail on his equal protection claim, Haynes must show that he was treated differently than similarly situated persons and that this different treatment lacked a rational basis. Landmark Land Co. of Oklahoma, Inc. v. Buchanan, 874 F.2d 717, 722 (10th Cir. 1989). Before a final decision by the City Council, the Court cannot make this determination. Id.

35. In regard to the substantive due process claim, the Court cannot properly evaluate whether property was taken and whether the City's position was arbitrary until final action has been taken by the City Council. Landmark Land Co., 874 F.2d at 722. Likewise, the Court cannot decide whether procedural due process has been violated. Taylor Investment, Ltd. v. Upper Darby Township, 983 F.2d 1285, 1292-93 (3rd Cir.), cert. denied, 510 U.S. 914 (1993).

36. As to the Contract Clause claim, the Court cannot determine the extent of the purported impairment of contractual relationship until the City has arrived at a final decision. Amwest Investments, Ltd. v. City of Aurora, Colo., 701 F. Supp. 1508, 1514 (D.Colo. 1988). The Court likewise cannot determine if the City has burdened interstate commerce in violation of the Commerce Clause.

37. Because these § 1983 claims in regard to the Moratorium as applied to Haynes are unripe, they must be dismissed for lack of subject matter jurisdiction.

38. The above-discussed § 1983 claims are not only unripe as to the Moratorium as applied to Haynes but also as to the New Ordinances promulgated by the City. Haynes never has complied with the procedures in the New Ordinances for the placement of the double-wide manufactured house on his property. The New Ordinances, as applied to Hayes, are therefore premature. Consequently, the § 1983 claims must be dismissed for lack of subject matter jurisdiction.

39. Gibson seeks damages under § 1983, alleging that the Moratorium and New Ordinances as applied to him violate the Commerce Clause and Contract Clause. The Court likewise finds that these claims are unripe. Until a final determination by the City has been made as to Haynes' application, the Court cannot make a determination of Gibson's claims.

40. Haynes, Gibson and MHA additionally seek a declaratory judgment that the Moratorium and the New Ordinances are preempted

by the National Manufactured Housing Construction and Safety Standards Act ("NMHCSSA"), 42 U.S.C. § 5401, et seq.

The doctrine of federal preemption is rooted in the Supremacy Clause and activated by congressional intent. Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996), cert. denied, 117 S.Ct. 2497 (1997). Congress may either expressly define the extent to which state law is to be preempted by a federal statute, or implicitly preempt state law by regulating comprehensively so as to preclude state law from occupying any part of the regulated field. Id. Even where Congress has not entirely regulated a specific area, state law will be nullified to the extent it directly conflicts with federal law or hinders achievement of congressional objectives. Id.

Congress included an express preemption clause in the NMHCSSA which provides:

Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

42 U.S.C. § 5403(d).

Haynes, Gibson and MHA failed to present any evidence as to how the Moratorium and the New Ordinances impose safety or construction standards on manufactured homes which differ from the federal standards in the NMHCSSA. The Court notes that the New Ordinances specifically adopt the NMHCSSA. Upon review, the Court

concludes that the New Ordinances are not in conflict with the NMHCSSA, and therefore, are not preempted by the NMHCSSA. As to the Moratorium, the Court also finds that it does not conflict with the Act. The Moratorium does not impose any requirements relating to safety or construction upon manufactured homes. It only precludes the submission of applications for "placement" of manufactured homes in the City of Jay, Oklahoma. Consequently, the Court finds that the Moratorium is not preempted by NMHCSSA. See, Nederland, 101 F.3d at 1100 (ordinance regulating the placement and installation of trailer coaches not preempted by NMHCSSA). Thus, the City is entitled to judgment on the federal preemption claim.

41. As to the Old Ordinances, the Court finds that any claims challenging such ordinances are moot. Although the New Ordinances were adopted after the filing of the complaint, "[a] controversy must exist at all stages of proceedings, not merely at the time the complaint is filed." National Advertising Co. v. City and County of Denver, 912 F.2d 405, 411 (10th Cir. 1990) (citations omitted). Moreover the Court finds that no case or controversy exists between the parties since Haynes never applied for placement of his manufactured house under the Old Ordinances and Gibson testified that he had no problem under the Old Ordinances.

42. To the extent Haynes, Gibson and MHA facially attack the constitutionality of the New Ordinances under the Commerce Clause, the Substantive Due Process Clause and the Contract Clause and seek an injunction against enforcement of the New Ordinances, the Court finds that those claims are without merit.

43. The dormant Commerce Clause confines the states' power to burden interstate commerce. Oregon Waste Sys., Inc. v. Dep't of Environmental Quality of State of Oregon, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994); Blue Circle Cement, Inc. v. Board of County Com'rs of County of Rogers, 27 F.3d 1499, 1511 (10th Cir. 1994). The first step in analyzing the constitutionality of legislation under the dormant Commerce Clause is to determine "whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect." Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979). The Supreme Court has defined "discrimination" in this context to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste Systems, 511 U.S. at 99. If a restriction on commerce is discriminatory, it is virtually per se invalid. Id. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Id. (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970)).

The Court finds that the Moratorium and New Ordinances do not affirmatively discriminate against interstate commerce. The Moratorium and New Ordinances operate evenhandedly because they do not distinguish between out-of-state manufacturers and dealers and

in-state manufacturers and dealers. The regulations apply equally. The Court thus finds that the Moratorium and New Ordinances are subject to the Pike balancing test. The Court therefore must scrutinize (1) the nature of the putative benefits advanced by the Moratorium and New Ordinances; (2) the burden the Moratorium and New Ordinances impose on interstate commerce; (3) whether the burden is "clearly excessive in relation to" the local benefits; and (4) whether the local interests can be promoted as well with a lesser impact on interstate commerce. Pike, 397 U.S. at 142. The burden is on Haynes, Gibson and MHA to show that the incidental burden on interstate commerce is excessive compared to the local interest. Blue Circle, 27 F.3d at 1511.

The Court finds that Haynes, Gibson and MHA have not produced sufficient evidence that the Moratorium and New Ordinances burden interstate commerce at all. Any losses suffered by out-of-state manufacturers and dealers would also occur to in-state manufacturers and dealers. Haynes, Gibson and MHA have not shown that whatever mode of housing is built in lieu of the manufactured homes will be provided by in-state suppliers. Even if Haynes, Gibson and MHA had demonstrated that the Moratorium and New Ordinances impose a burden on interstate commerce, they have failed to discharge their burden of showing that the burden on interstate commerce is clearly excessive in relation to the putative local benefits of compatibility of housing and preservation of property values. Further, Haynes, Gibson and MHA have not presented evidence of any measures that would have a lesser impact on interest commerce than

the Moratorium and New Ordinances.

Because Haynes, Gibson and MHA have not demonstrated that incidental burden, if any, that the Moratorium and New Ordinances impose on interstate commerce is clearly excessive compared to the local interests, the Court, similar to the rulings in Nederland and Colorado Manufactured Housing Ass'n v. City of Salida, Colo., 977 F.Supp. 1080, 1085 (D. Colo. 1997), finds that the City is entitled to judgment on the Commerce Clause claim.

44. As stated by the court in City of Salida, "[t]he enactment of zoning ordinances is a legitimate police power of local governments." City of Salida, 977 F. Supp. at 1084. Hence, to prevail on a Substantive Due Process Clause claim, Haynes, Gibson and MHA must demonstrate that the Moratorium and New Ordinances are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." City of Salida, 977 F. Supp. at 1085 (quoting Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926)). Stated otherwise, a zoning ordinance will not violate the substantive due process clause, unless there is no rational basis for the ordinance. Id. (citing Nederland, 101 F.3d at 1106).

Under the New Ordinances, manufactured homes are treated differently than site-built homes and are automatically excluded from certain areas in which site-built homes are permitted. The evidence presented at trial established that the objectives of the New Ordinances included compatibility of housing and the preservation of property values.

Haynes, Gibson and MHA maintain that there is nothing inherently different about manufactured housing which justifies different treatment. The issue, however, is not whether there is anything inherently different about manufactured housing, but whether there is a public perception in the City that such difference exists. City of Salida, 977 F. Supp at 1085. Local governments are empowered to respond appropriately to perceived needs relating to government functions, e.g. stability within the community and property values. Id. The question is not whether the public perception is rational, but whether the government, in exercising its police power to enact ordinances, has responded in a rational way to a perceived need for segregation of manufactured housing. Id.

The evidence established that there was a public perception concerning compatibility and property devaluation and that the City enacted the New Ordinances in response to the public perception. The Court finds that the restrictions on the location of manufactured homes in the New Ordinances bears a rational relationship to the public perception. The Court finds that the New Ordinances are not arbitrary or unreasonable.

As to the Moratorium, the evidence established that it was instituted to assure that the Old Ordinances were properly evaluated and revisions implemented. The Court concludes that this was a legitimate interest for the City to pursue and the Moratorium was rationally related to achieving that interest. The Court finds that the Moratorium was not arbitrary or unreasonable. Consequently, the

Court, similar to the rulings in Nederland and City of Salida, finds that the City is entitled to judgment on the Substantive Due Process claim.

45. The Contract Clause provides, in relevant part, that "no State shall ... pass any ... Law impairing the Obligation of Contracts" U.S. Const. art. I, § 10, cl. 1. "Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State `to safeguard the vital interests of its people.'" Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 410, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983).

The threshold step in an analysis under the Contract Clause is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." Energy Reserves, at 411. If the Court finds that the regulation does constitute a substantial impairment, the next step is to examine the state's justification for its action. Id. The regulation must have a "legitimate public purpose." Id. If a legitimate public purpose exists, the final step is to determine whether the means chosen to achieve that goal are reasonable. U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 22-23, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). A law that works substantial impairment of contractual relations must be specifically tailored to meet the societal ill it is supposedly designed to ameliorate. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 243, 98 S.Ct. 2716, 2721, 57 L.Ed.2d 727 (1978).

The Court is satisfied that the New Ordinances do not violate

the Contract Clause. Assuming without deciding that the New Ordinances substantially impair contractual relationships, the Court is persuaded that the Contract Clause claim fails under the last two steps of the Contract Clause analysis. The Court finds that the objectives of the New Ordinances, compatibility of housing and preservation of property values, to be legitimate public goals and further finds the New Ordinances to be a reasonable means of achieving these goals. Accordingly, the City is entitled to judgment on the Contract Clause claim.

46. In summary, the Court finds that the § 1983 claims of Haynes and Gibson as to the Moratorium and the New Ordinances as applied to them are premature and are therefore **DISMISSED** for lack of subject matter jurisdiction. The Court additionally finds that the claims, if any, as to the Old Ordinances are moot and do not raise a case or controversy and are therefore **DISMISSED**. The Court finds that the parties' § 1983 claim that the Moratorium and New Ordinances are preempted by federal law is without merit and the City is entitled to judgment on that claims. Furthermore, the Court finds that the parties' § 1983 claims that the New Ordinances are facially unconstitutional under the Commerce Clause, Substantive Due Process Clause and Contract Clause are without merit and the City is entitled to judgment on those claims.

47. Judgment in favor of the City shall issue forthwith.

ENTERED this 14th day of September, 1998


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 1 1 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TIMOTHY LYNN BRITT,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL, Warden,)
)
Respondent.)

Case No. 96-CV-990-BU (J) ✓

ENTERED ON DOCKET

DATE SEP 14 1998

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 11th day of September, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

MACK BRALY, an individual,)
et al.,)
)
Plaintiffs,)
)
vs.)
)
INTERNET & WEB SERVICES)
CORPORATION, a California)
corporation, et al.,)
)
Defendants.)

Case No. 98-CV-593 BU(E)

ENTERED ON DOCKET
DATE SEP 14 1998

FILED

SEP 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**NOTICE OF DISMISSAL WITHOUT PREJUDICE AS TO
KENNAN E. KAEDER, ERNIE BRUSALIS AND BOB LINDEN**

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the Plaintiffs hereby dismiss without prejudice all its claims in this action as to Defendants, Kennan E. Kaeder, Ernie Brusalis, and Bob Linden only, reserving all its rights and maintaining the subject action against the remaining Defendants.

Respectfully submitted,

HARRIS, McMAHAN & PETERS, P.C.



Stephen Q. Peters, OBA #11469
R. Lynn Thompson, OBA #13207
1924 South Utica, Suite 700
Tulsa, Oklahoma 74104
(918) 743-6201

Attorneys for Plaintiffs

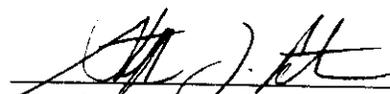
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CERTIFICATE OF MAILING

I hereby certify that on the 17th day of September, 1998, the above and foregoing Notice of Dismissal was placed in the U.S. mail with proper postage thereon prepaid, to:

Kennan E. Kaeder, Esq.
110 West "C" Street
Suite 1904
San Diego, CA 92101



Stephen Q. Peters

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 11 1998
FBI Dept. of Justice
U.S. DISTRICT COURT

4 TERRI LYNN WELCH and
ROBERT M. WELCH,)

5 Plaintiffs,)

6 v.)

7 MEDICAL ENGINEERING)
8 CORPORATION, a Delaware)
corporation; SURGITEK, INC.,)
9 a Wisconsin corporation and a)
subsidiary of BRISTOL-MYERS)
10 SQUIBB & COMPANY, a)
Delaware corporation, et al.,)

11 Defendants.)
12

CASE NO. 93-C1077 B ✓

**STIPULATION AND ORDER TO DISMISS
DEFENDANT APPLIED SILICONE
CORPORATION (ONLY) WITH PREJUDICE**

ENTERED ON DOCKET
DATE SEP 14 1998

13 The plaintiffs in this action. TERRI LYNN WELCH and ROBERT M. WELCH, and their
14 counsel, hereby stipulate with the defendant, APPLIED SILICONE CORPORATION, and their
15 counsel, to dismiss this action against defendant APPLIED SILICONE CORPORATION, only,
16 with prejudice. The dismissal is based on a lack of factual basis for which to hold defendant
17 APPLIED SILICONE in this lawsuit any further. The parties stipulate for dismissal with
18 prejudice, and each party will bear its own costs incurred to date.

19 SO STIPULATED.

20 DATED: August 17, 1998

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON

21 By: Robert S. Niemann

Robert S. Niemann

22 Attorneys for Defendant APPLIED SILICONE CORP.
23

24 DATED: 8-21, 1998

RICHARDSON & WARD

25 By: Keith Ward

Keith Ward

26 Attorneys for Plaintiffs TERRY LYNN WELCH
27 and ROBERT WELCH

28 IT IS SO ORDERED.

DATED: 9-11, 1998

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

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

SEP 11 1998 *P*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOBEL INSURANCE COMPANY, a Texas)
 Corporation,)
)
 Plaintiff,)
)
 vs.)
)
 PETRO ENERGY TRANSPORT, CO., an)
 Oklahoma Corporation,)
)
 Defendant.)

Case No. 97-CV-1079-K(J)

REPORT AND RECOMMENDATION

Plaintiff filed a Motion to Dismiss on January 14, 1998. [Doc. No. 5-1]. The Motion was referred by the District Court for Report and Recommendation by minute order dated March 20, 1998. The parties presented oral argument to the Court on August 21, 1998.

Plaintiff filed a declaratory judgment action requesting the determination of the rights and liabilities between the parties with respect to an insurance contract. Nobel Insurance Company ("Nobel") asserts that it has performed all of its contractual duties and obligations pursuant to the insurance contract between the parties. Plaintiff asserts that Defendant made demand to Plaintiff for payment of approximately 19 million dollars based on asserted breaches by Plaintiff of the insurance contract.

The Court has thoroughly considered the arguments and the case law referenced by the parties. The Court recommends that the District Court **DENY** Defendant's Motion to Dismiss. [Doc. No. 2-1].

I. FACTUAL BACKGROUND

The underlying basis of the current lawsuit can be traced to a 1995 accident involving William and Mary Henderson. Petro Energy Transport, Co. ("Petro") notes that the Hendersons sued Petro based on an automobile accident which occurred between a vehicle owned by the Hendersons and a truck operated by Petro. Nobel was Petro's insurer. The Hendersons sued both Petro and Nobel in Oklahoma state court.

Pursuant to the policy, Nobel provided a defense for Petro. According to Petro, the policy required Nobel to defend and indemnify Petro against any action that alleged bodily injury and property damage. Petro acknowledges that the limit of the policy was five million dollars. According to Petro, Nobel tried the state court action to a jury and a judgment of \$24 million dollars was entered against Petro and Nobel. Petro asserts that Nobel then settled with the Hendersons for the policy limit of five million dollars and obtained a full release of all claims against Nobel but obtained no release for Petro. Petro additionally asserts that Nobel never attempted to settle prior to the entry of the \$24 million dollar judgment.

Petro asserts that it made a formal demand to Nobel for the balance of the 24 million dollar judgment because Nobel breached its "duty to give, in good faith, equal consideration to the interests of Petro in determining whether to settle within policy limits." *Petro's Brief [Doc. No. 5-1] at 2.* Petro informed Nobel that if the dispute between Petro and Nobel was not settled by October 27, 1997, Petro would sue Nobel. No settlement was reached between Petro and Nobel, and Petro filed a lawsuit

in Oklahoma state court on December 3, 1997, against Nobel and the law firms that represented Petro in the Henderson state court action. Petro asserts that in the state court action against Nobel, Petro has alleged that Nobel breached the duty to settle, the implied covenant of good faith and fair dealing, and the duty to appeal. Petro requests actual and punitive damages. Petro asserts that Nobel abandoned Petro, withdrew from the Henderson state court lawsuit, and left Petro with a \$19 million dollar judgment against it.

Petro requests that the District Court dismiss this action because the case presents no live controversy and declaratory judgment is therefore unavailable, and because the action does not further the purpose of the Declaratory Judgment Act. Petro additionally requests that the Court exercise its discretion and dismiss this action.

Nobel elaborates on additional facts. Nobel states that after the entry of judgment against Petro and Nobel, Nobel hired additional counsel – John H. Tucker, of Rhodes, Hieronymus, Jones, Tucker & Gable. According to Nobel, Tucker was successful in negotiating a settlement with the Hendersons on behalf of both Petro and Nobel in exchange for payment, by Nobel, of the policy limits plus interest. Nobel notes that the settlement was contingent upon review by the Hendersons of Petro's financial records to verify Petro's claim that Petro was virtually insolvent.

Nobel asserts that Petro's personal attorney met with the Hendersons' attorney and during this meeting began to "scheme with the Hendersons' attorneys to set up Nobel." *Nobel's Brief [Doc. No. 9-1] at 3.* Nobel claims that it informed Petro that the

Hendersons were willing to settle in exchange for payment by Nobel of the policy limits plus interest. Nobel's attorney wrote to Petro's attorney stating that Nobel understood that Petro was planning to "concoct a lawsuit" against Nobel and the law firms which represented Nobel. Nobel's attorney wrote that Petro's counsel sole "job" was to inform the Hendersons of Petro's lack of finances thereby securing the settlement and full release of Petro and Nobel. According to Nobel's attorney, due to the actions of Petro's counsel, the Hendersons no longer believed Petro was insolvent and refused to grant a release to Petro.

Nobel notes that the Hendersons' attorney demanded payment from Nobel to the full extent of the policy. Nobel's attorney wrote to Petro's attorney that Nobel would pay the policy limit to the Hendersons, and that upon payment, Petro would be responsible for obtaining counsel to pursue and complete any appeal of the Henderson trial court action.

According to Nobel, it paid to the Hendersons \$5,237,757.49 for a full release of Nobel and a partial release of Petro.^{1/}

On April 4, 1997, the Hendersons filed an Involuntary Petition placing Petro into an involuntary bankruptcy proceeding in the Western District of Oklahoma. According to Nobel, by letter dated April 23, 1997, Kenneth Stohner, Petro's attorney, wrote to John Tucker, Nobel's attorney. Stohner stated that he had been engaged to represent Petro and that Crowe & Dunlevy had been retained to handle the appeal of the

^{1/} Petro was released for the amount of the judgment paid on Petro's behalf by Nobel.

Henderson state court action. On June 18, 1997, Stohner wrote that Petro could not continue the appeal due to a lack of financial resources. In addition, Stohner "offered" Nobel the opportunity to remedy its past mistakes by assuming responsibility for the appeal. Absent Nobel assuming the appeal, Stohner wrote that Petro would dismiss it.

According to Nobel, Petro entered into an agreement with the Hendersons on October 6, 1997 to settle the Henderson state court judgment for a certain sum in addition to an assignment to the Hendersons of 52% of any claim which Petro might have against Nobel and Nobel's attorneys. Pursuant to the agreement, Petro was required to hire attorneys and pursue all claims that Petro had against Nobel and Nobel's attorneys. In addition, the Hendersons and Petro agreed to mutually take any action necessary to dismiss the involuntary bankruptcy proceeding.

Nobel asserts that Petro voluntarily dismissed the appeal of the Henderson state court action on October 13, 1997.

Nobel states that it was unable to file a declaratory judgment action due to the involuntary bankruptcy proceeding involving Petro. On October 31, 1997, Nobel filed, in the bankruptcy proceeding, a motion for relief from automatic stay. Nobel requested relief from the automatic stay to permit Nobel to pursue its declaratory judgment action. Petro filed an objection to Nobel's request. Nobel asserts that Petro did not request a hearing on Nobel's motion for relief from the stay which Nobel maintains entitled Nobel to an order granting relief from the stay but prohibited Nobel from seeking the order for thirty days.

According to Nobel, Petro filed a lawsuit in the District Court of Jackson County on December 3, 1997. Petro sued Nobel, and Nobel's attorneys.

On December 5, 1997, Nobel filed a request for an Order granting Nobel's motion for relief from stay in the Bankruptcy Court. In addition, on December 5, 1997, Petro filed an "amended response" to Nobel's motion for relief from stay noting that Petro had filed a state court action which rendered Nobel's motion moot. The Bankruptcy Court granted Nobel's motion for relief from stay on December 8, 1997. Nobel filed its Declaratory Judgment action in this Court on December 8, 1997.

The Hendersons filed a motion to dismiss the involuntary bankruptcy petition against Petro. Nobel objected to that motion on December 22, 1997. Nobel asserts that the Hendersons have improperly failed to disclose their agreement with Petro.

Petro claims that Nobel failed to represent Petro's interest when Nobel negotiated the settlement with the Hendersons. Petro asserts that the settlement "negotiated" by Nobel gave the Hendersons an absolute right to refuse to settle with Petro after examining Petro's financials. Petro asserts that this failure on the part of Nobel and Nobel's counsel constitutes a portion of the state court action.

Petro states that Nobel had repeated warnings over a period of months that Petro had a "claim" against Nobel and yet Nobel waited until October 27, 1997, to file a motion requesting relief from the Bankruptcy Court stay in order to pursue the declaratory judgment action. Petro claims that it delayed filing its state court action for a period of time hoping that Nobel would negotiate with Petro and therefore obviate the need for a state court action.

According to Nobel, Nobel did not immediately file a motion for an exception from the bankruptcy stay because Nobel had no reason to file a declaratory judgment action against Petro while the involuntary bankruptcy proceeding was pending. Nobel claims that it only decided to seek relief from the bankruptcy stay after receiving notice that Petro might voluntarily dismiss its appeal.

A chronology of pertinent events follows:

- October 6, 1997 -- Petro and the Hendersons enter a settlement agreement. Petro is to pursue the bad faith claims against Nobel and the attorneys with 52% of the recovery assigned to the Hendersons. Both parties agree to work to dismiss the involuntary bankruptcy proceeding.
- October 10, 1997 -- Petro sends a written demand to Nobel, the Niemeyer Firm, and the Rhodes Firm for the balance due on \$25 million dollar judgment. Petro threatens "appropriate legal action" if payment is not received by October 27, 1997.
- October 31, 1997 -- Nobel filed a Motion for Relief from Stay in the Petro Bankruptcy proceeding.
- December 3, 1997 -- Petro filed an action in state court against Nobel, the Niemeyer Firm, and the Rhodes Firm.
- December 5, 1997 -- the Bankruptcy Court granted Nobel's motion for relief from the stay.
- December 8, 1997 -- Nobel filed this declaratory judgment action in federal court.

II. DISCUSSION

Petro requests that the District Court grant Petro's Motion to Dismiss because Nobel does not present a "live" controversy and because the "purpose" of the Declaratory Judgment Act is not furthered by Nobel's action. In the alternative, Petro argues that the District Court should exercise its discretion and grant the Motion to

Dismiss because the exact issues in this lawsuit will be determined in a pending state court litigation. Petro additionally asserts that pursuant to the dictates of the "Anti-Injunction Act" the Court is required to dismiss the action in favor of the state court proceeding.

A. DECLARATORY JUDGMENT ACTION – "LIVE" CONTROVERSY

Petro asserts that Nobel is only seeking a "stamp of approval on past conduct" and therefore the declaratory judgment action does not present a "live case or controversy." According to Petro, no case or controversy exists unless the plaintiff can demonstrate a good chance of being injured by the defendant in the future.

Petro predominantly relies on employment cases in which an employee pursues a declaratory judgment action against an employer but also leaves employment with the employer. The courts have concluded that in such a situation the employee cannot demonstrate a good chance of future injury and therefore the declaratory judgment action does not present a case or controversy. However, the employer/employee situation is not the type of situation presented in this action.

The "live controversy" requirement stems from Article III's "case and controversy"^{2/} requirement that "federal courts adjudicate only cases and controversies [and] decline to exercise jurisdiction where the award of any requested relief would be moot -- *i.e.* where the controversy is no longer live and ongoing." Cox v. Phelps

^{2/} The Declaratory Judgment Act provides that "in a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

Dodge Corp., 43 F.3d 1345 (10th Cir. 1994), *citing* Lewis v. Continental Bank Corp., 494 U.S. 471 (1990).

Petro claimed, at the time Nobel filed this declaratory judgment action, that Nobel had violated its duty of good faith and fair dealing, and had requested demand from Nobel of approximately \$19 million dollars. Nobel is requesting declaratory judgment with respect to the rights and obligations of the parties under an insurance contract. Nobel is confronted with a demand from Petro for approximately \$19 million dollars and has requested that this Court determine the rights of the parties pursuant to the insurance contract. This obviously presents a "case or controversy" and meets the "live" action requirement which is Petro's focus.

The key language from Petro's cases focuses on employer/employee declaratory judgment actions in which the employee no longer works for the employer. In such a case, the courts have determined that no justiciable controversy exists. The employer is not subject to potential future action because the employee is no longer employed. In addition, the employee is not requesting damages for past action in the declaratory judgment action. Consequently, such a case does not prevent a case or controversy for decision by the courts. The present situation, however, is in stark contrast to that type of case.

The Magistrate Judge recommends that the District Court deny Petro's Motion to Dismiss under the guise that Nobel has failed to raise a "case or controversy."

B. PURPOSE OF DECLARATORY JUDGMENT ACT

Petro's next argument is premised on Graceland College for Professional Development & Life-Long Learning, Inc. v. Intellectual Equities, Inc., 942 F. Supp. 1404, 1406 (D. Kan. 1996). Petro notes that in Graceland the court stated that a party is entitled to declaratory judgment where either: "(1) the controversy has ripened to a point where one of the parties could invoke a coercive remedy (*i.e.* a suit for damages or an injunction) but has not done so; and (2) although the controversy is real and immediate, it has not ripened to such a point, and it would be unfair or inefficient to require the parties to wait for a decision." Id. at 1406.

Petro misconstrues Graceland. The introductory language, just prior to the language quoted by Petro states "[e]ssentially, two related but distinct fact situations are contemplated" Id. Graceland does not purport to limit declaratory judgments to only those two types of situations as suggested by Petro.

In addition, Graceland is counter to Petro's first argument that a declaratory judgment action cannot exist for "past actions," but is available only for "future actions." Graceland provides, "[a] declaratory judgment is available where a party desires a declaration of the legal effect of a proposed or past course of action." Id. (emphasis added).

C. COLLATERAL ESTOPPEL: BANKRUPTCY COURT

Nobel asserts that Petro is collaterally estopped from arguing that this action should not proceed in federal district court. Nobel filed a Motion for Relief from Stay in the Bankruptcy Court for the Western District of Oklahoma on October 31, 1997.

Nobel requested relief from the automatic stay to permit Nobel to file a declaratory judgment action regarding whether or not Nobel had fulfilled its contractual duties to Petro. See Nobel's Brief, [Doc. No. 9-1], Exhibit R. Nobel submitted a brief in support of its motion. See Nobel's Brief, [Doc. No. 9-1], Exhibit S. Nobel asserted that the proposed declaratory judgment action was outside the scope of the automatic stay, and that if the stay was applicable, good cause existed for the Bankruptcy Court to grant relief to Nobel from the stay.

Petro filed a response to the motion. Petro admitted that it had requested payment from Nobel of approximately \$19 million and that Petro had threatened to sue Nobel. Petro denied that the controversy was outside of the automatic stay.

Petro filed an action in state court against Nobel and Nobel's attorneys on December 3, 1997. On December 5, 1997, Nobel filed a request for entry of an order in the Bankruptcy Court. Petro filed an "amended response" explaining that Petro had filed an action in state court rendering Nobel's request for relief from the automatic stay moot.

On December 5, 1997, the Bankruptcy Court entered an Order granting relief from the stay. The Court noted that Petro had not requested a hearing as required by the local rules although notice had been given to all parties. The Court concluded that the motion of Nobel should be granted. The automatic stay was modified to "allow the Non-Party, Nobel Insurance Corporation, to pursue a declaratory judgment action to determine whether Nobel Insurance Company has performed all of its duties and

obligations under the contract of insurance with the Debtor, Petro Energy Transport Co." See Nobel's Brief, [Doc. No. 9-1], Exhibit R (Order of the Bankruptcy Court).

Nobel asserts that Petro had the opportunity to litigate the issue currently before this Court but failed to do so and should not be given a second opportunity to re-litigate the issues. Nobel additionally notes that the lawsuit in this Court has been filed pursuant to an order granting Nobel's request but that the lawsuit pending in state court has "no such court ordered approval." See Nobel's Brief, [Doc. No.], at 14.

The Bankruptcy Court determined and was presented the issue of whether or not Nobel should be permitted to file a declaratory judgment against Petro given the bankruptcy and automatic stay issues. Nobel has been permitted to file such an action. The issue before this Court is whether that action should be dismissed due to a previously filed and pending state action which may include all of the issues presented in this Court. Nothing suggests that the same issues were presented to the Bankruptcy Court (and decided) that are currently before this Court. Nothing suggests that Petro was required to litigate in the Bankruptcy Court the issue of whether a federal declaratory action would be proper pursuant to the Declaratory Judgment Act given the nature of the pending state court proceeding. The Court concludes that application of collateral estoppel and *res judicata* principles would be improper and recommends that the District Court not apply such principles to preclude Petro from asserting its Motion to Dismiss. Regardless, the decision of whether or not to retain a declaratory judgment action is discretionary with the Court. Therefore, even if Petro

were precluded from relitigating this issue due to collateral estoppel principles, the District Court would still have the discretion to dismiss or retain this action.

D. DISCRETION TO EXERCISE JURISDICTION

"But the existence of a 'case' in the constitutional sense does not confer upon a litigant an absolute right to judgment. 'The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so.'" Kunkel v. Continental Casualty Co., 869 F.2d 1296 (10th Cir. 1989). The federal courts have broad discretion over whether or not to exercise jurisdiction in a declaratory judgment action. This Court has the discretion to retain jurisdiction and deny Defendant's Motion to Dismiss. This Court may sustain Defendant's Motion to Dismiss or stay this proceeding while the state action is pending. Neither course of action constitutes error.

The breadth of that discretion is described in detail by the U.S. Supreme Court in Wilton v. Seven Falls Co., 515 U.S. 277 (1995). Factually, Wilton is much like the case at bar. Petitioner underwriters refused to defend or indemnify respondents under liability insurance policies in litigation between respondents and other parties over ownership and operation of certain oil and gas properties. After a verdict was entered against respondents and they notified petitioners that they intended to file a state court suit on the policies, petitioners sought a declaratory judgment in federal court that their policies did not cover respondents' liability. Respondents filed their state court suit and moved to dismiss or, in the alternative, to stay the petitioners' action.

The District Court entered a stay on the ground that the state suit encompassed the same coverage issues raised in the federal action, and the Court of Appeals affirmed.

Legally, the Wilton Court was asked to resolve a conflict among the circuits in which some circuits had held that a district court may not stay or dismiss a declaratory judgment action in favor of parallel state litigation absent "exceptional circumstances." Other circuits imposed the broader discretionary standard established in Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942).^{3/} The Court endorsed the broader discretion of the Brillhart Court with language that provides direction in resolving the case at bar.

Brillhart makes clear that district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. Although Brillhart did not set out an exclusive list of factors governing the district court's exercise for this discretion, it did provide some useful guidance in that regard. The Court indicated, for example, that in deciding whether to enter a stay, a district court should examine 'the scope of the pending state court proceeding and the nature of the defenses open there.' This inquiry, in turn, entails consideration of 'whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.' Other cases, the Court noted, might shed light on additional factors governing a district court's decision to stay or to dismiss a declaratory judgment action at the outset. But Brillhart indicated that, at least where another suit involving the same parties and presenting opportunity for ventilation of the same state law issues is pending in state court, a district court might be indulging in '[g]ratuitous

^{3/} See Wilton, 515 U.S. at 281 (citing courts on both sides of the split).

interference,' if it permitted the federal declaratory action to proceed.

Wilton, 515 U.S. at 282-83 (citations omitted, emphasis added).

If the Court in Wilton has modified the discretionary standard established in Brillhart in any way, it has been to place even greater discretion in the district court. Justice O'Connor's opinion is replete with references to the discretion in the district court to accept or deny declaratory relief.

Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. On its face, the statute provides that a court 'may declare the rights and other legal relations of any interested party seeking such declaration.' The statute's textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface.

* * * *

We believe it more consistent with the statute to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp.

Wilton, 515 U.S. at 287-88, 289 (citations omitted).

In Wilton the court sustained the district court's stay of the declaratory judgment action. There is every reason to believe that if the district court had refused the stay after proper consideration of Brillhart and other factors, that discretionary action would have been sustained as well.

Other factors to consider were articulated by the Tenth Circuit in St. Paul Fire and Marine Insurance Company v. Runyon, 53 F.3d 1167 (10th Cir. 1995). After three years of discussions concerning the denial of coverage, Runyon informed St. Paul that if St. Paul would not assume the defense he would sue for breach of contract and bad faith in state court on February 18, 1994. On February 17, 1994, St. Paul brought a declaratory judgment action against Runyon. The district court declined to exercise jurisdiction over the declaratory judgment action, finding that all of the issues in the declaratory judgment action would be resolved in the state court action, that St. Paul had filed the federal action for "procedural fencing," and that the declaratory judgment action was likely to create friction between the federal and state courts. The Tenth Circuit Court of Appeals affirmed. The court first affirmed that the standard of review is an abuse of discretion and concluded,

[T]he court should weigh various factors to determine whether or not to hear a declaratory judgment action. Such factors may include:

[1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to res judicata"; [4] whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

Runyon, 53 F.3d at 1169 (citations omitted, emphasis added).

In ARW Exploration v. Acquire et al., 947 F.2d 450, 451 (10th Cir. 1991), the court provided additional factors for consideration while concluding that the district court abused its discretion in declining to exercise declaratory judgment.

'A federal court generally should not entertain a declaratory judgment action over which it has jurisdiction if the same fact-dependent issues are likely to be decided in another pending proceeding.' Id. at 1276. However, jurisdiction should not be refused merely because another remedy is available. Rather, the court must decide whether the controversy can better be settled in a pending action, *i.e.*, 'whether there is such a plain, adequate and speedy remedy afforded in the pending state court action, that a declaratory judgment action will serve no useful purpose.' Franklin Life Ins. Co. v. Johnson, 157 F.2d 653, 657 (10th Cir.1946). Relevant considerations include the scope of the pending action, the nature of the available defenses in the action, whether all parties' claims can satisfactorily be adjudicated in that proceeding, and whether necessary parties have been joined.

Id. at 454.

Application of these factors to the case at bar requires an analysis of the issues pending in the state court action and the progress of that court in resolving those issues. Petro's complaint was filed in Jackson County on December 3, 1997. Petro alleged five causes of action:

- a. Nobel breached its duty to settle prior to judgment;
- b. Nobel breached the implied covenant of good faith and fair dealing by refusing to settle the claim within the policy limits prior to judgment;
- c. Nobel breached its duty to defend by failing to prosecute an appeal after judgment;
- d. The Niemeyer law firm breached a fiduciary duty owed to Petro and had a conflict of interest during the trial of the Henderson case;

- e. The Rhodes law firm erred by "not making a recommendation or insisting that Nobel continue its duty to Petro by prosecuting an appeal on behalf of Petro."

A scheduling order was entered in the Jackson County case on April 28, 1998. The established discovery deadline is February 22, 1999, with dispositive motions to be filed by March 8, 1999. No dispositive motions have yet been filed. Petro's motion to amend its petition has been granted, but no amended petition on behalf of Petro has been filed. Collateral disputes over the recusal of the judge originally assigned, disqualification of counsel, and attempts to name counsel as a third party defendant appear to be resolved. Real party in interest deficiencies or champerty claims (based on the Henderson's 52% interest in any judgment rendered against Nobel or the attorneys) are threatened. According to Nobel, "Numerous depositions remain to be taken in Oklahoma, Texas and New Mexico" and "the parties in the State Court action are miles away from water, and the desert is getting bigger."

By contrast, the declaratory relief requested in this declaratory judgment action relates only to the third of the above listed five claims in the Jackson County suit. The declaratory judgment asks this court to interpret the insurance contract to determine whether Nobel breached its duty to defend when it paid the policy limits after judgment and did not prosecute the appeal of the Jackson county judgment. It involves only two of the many parties to the Jackson county action. Most importantly, Nobel's Motion for Summary Judgment is fully briefed and has been at issue and ready for decision in this Court since July 28, 1998. By comparison, the Jackson County suit still awaits the filing of a first Amended Complaint.

When the guidelines suggested by the above cited United States Supreme Court and Tenth Circuit authority are applied to this case, the prescription by ARW Exploration is especially applicable. This court must decide "whether there is such a plain, adequate and speedy remedy afforded in the pending state court action, that a declaratory judgment action will serve no useful purpose." ARW Exploration, 947 F.2d at 454 (citing Franklin Life Ins. Co. v. Johnson, 157 F.2d 653 (10th Cir. 1946)). Without doubt, the speed with which legal issues are resolved is a large factor in evaluating whether the declaratory judgment action would serve a useful purpose. The old saw "justice delayed is justice denied" has been with us a long time, for good reason. This Court can resolve this one legal issue more quickly than the state court. In this age of convoluted, multi-party lawsuits with no end, the quick, efficient, and fair resolution of legal disputes is a rare gem. If this Court can make that happen, it should do so.

A Fifth Circuit opinion used similar reasoning, emphasizing the judicial economy created by allowing the declaratory proceeding in federal court to proceed. In Travelers Insurance Co. v. Louisiana Farm Bureau Federation Inc., et al., 996 F.2d 774, 779 (5th Cir. 1993), the court found that the district court abused its discretion in dismissing an insurers' suit for declaratory judgment, even though the parallel state action had been filed two years prior to dismissal of the federal action. The court noted that the state action had not proceeded quickly, but the federal case "proceeded to and was ripe for summary judgment." The court reviewed a list of factors similar to those set forth for the Tenth Circuit in Runyon and concluded,

The judicial economy factor, the last factor, overwhelmingly supports retention of the case. As explained in part II-A of this opinion, the parties here have completed discovery and have resolved all the material fact issues. All that remains in this case is the resolution of one, solitary, legal question on which the district court has already been thoroughly briefed. The district court simply needs to make a decision. However, as has been noted repeatedly, if this case were dismissed, the state court, duplicating the work already done in the federal court, would have to "start from scratch." Its resolution of this case would necessarily be significantly delayed.

Id. at 779.

A review of the all the factors listed in Runyon points the same direction. This action would settle one of the five issues raised in the Jackson county action. It would certainly clarify the legal relations of the parties. This action would narrow the issues between Nobel and Petro and resolve one thorny legal question for the benefit of the Jackson County court and the parties. The Jackson County court can then focus on Petro's claims for breach of duty to settle, breach of good faith, and the claims against the attorneys. Two courts working in tandem to most efficiently resolve legal disputes does not cause friction or violate traditional principles of comity and federalism.

The Tenth Circuit Court of Appeals used similar reasoning in a case arising from this district. In Kunkel v. Continental Casualty Co., 866 F.2d 1269 (10th Cir. 1989), the court approved the district judge's exercise of jurisdiction in a declaratory judgment action even though the issue of the existence of coverage remained dependent upon the outcome of a collateral action involving charges against an accountant of

securities law violations. With language particularly applicable to this case the court found:

That the district court's construction of Kunkel's policy limits clarifies the parties' legal relations and affords relief from the uncertainty surrounding Continental's obligations is beyond doubt. Whether the declaration will expedite a resolution of the underlying dispute is less clear. But it certainly eliminates a factor which served only to undermine Continental's duty to assess the Home-Stake litigation and engage in good faith settlement negotiations.

* * * *

A federal court generally should not entertain a declaratory judgment action over which it has jurisdiction if the same fact-dependent issues are likely to be decided in another pending proceeding. See Brillhart v. Excess Ins. Co., 316 U.S. 491, 495, 62 S. Ct. 1173, 1175-76, 86 L. Ed. 1620 (1942); Western Casualty and Surety Co. v. Teel, 391 F.2d 764, 766 (10th Cir.1968). But nothing in the Declaratory Judgment Act prohibits a court from deciding a purely legal question of contract interpretation which arises in the context of a justiciable controversy presenting other factual issues.

Id. at 1275.

Nobel and Petro accuse each other of "procedural fencing" and engaging in a "race to res judicata." Both appear to be correct. Nobel argues that it was the "first to file" because Nobel sought to invoke federal jurisdiction first when Nobel filed the motion for relief from stay in the Bankruptcy Court to permit it to file its Complaint for Declaratory Judgment. However, Nobel's motion for relief from stay which was filed October 31, 1997, was arguably in response to the October 10, 1997 letter in which Petro threatened litigation against Nobel and others if no response was received by October 27, 1997. Petro filed the action first, in state court, on December 3, 1997,

but Petro's action was arguably in response to Nobel's obvious intent to request declaratory relief in federal court (as evidenced by the Complaint which Nobel attached to the motion for relief from stay which Nobel filed in the Bankruptcy Court) and the fact relief from the stay was imminent. Curiously, Petro filed an objection to the motion for relief from the stay in Bankruptcy Court on November 19, 1997, asserting that the stay prohibited the declaratory action, but did not advise the Bankruptcy Court that on October 6, 1997, Petro signed an agreement (with the Hendersons) that both parties would do what they could to insure that the bankruptcy proceeding was dismissed and that protection of the bankruptcy court was no longer necessary. Nobel filed this declaratory judgment action on December 8, 1997. Regardless, the filings of the two actions are days apart and does not suggest that the Court should refuse jurisdiction because of procedural fencing.

In summation, the question of whether to exercise declaratory jurisdiction in this case is within the discretion of this District Court. The Court may proceed or may abstain. Neither course of action constitutes error. For the reasons outlined above, the undersigned recommends that the District Court deny Defendant's motion to dismiss and that this action be retained in this Court.

E. THE ANTI-INJUNCTION ACT

One question remains. Petro argues that even if the Declaratory Judgment Act and cases thereunder provide discretion to retain or abstain, the Anti-Injunction Act takes that discretion away and prohibits retention of this proceedings. The Anti-Injunction act states:

A court of the United States may not grant an injunction to stay proceedings in State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

22 U.S.C. § 2283.

Petro also relies upon Supreme Court case law which has held, without reference to the Anti-Injunction Act, that in those situations where an injunction is not proper, declaratory relief should ordinarily be denied as well. In Samuels v. Mackell, 401 U.S. 66 (1970), the United States Supreme Court held:

in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, a declaratory relief should ordinarily be denied as well.

Samuels, 401 U.S. at 72-73 (citations omitted).^{4/} The criminal context of Samuels, its reference to considerations of "the same equitable principles," and its clear statement "[w]e do not mean to suggest that a declaratory judgment should never be issued in cases of this type if it has been concluded that injunctive relief would be improper," make the case of little assistance to Petro's position.

The Fifth Circuit has examined Samuels and the effect of the Anti-Injunction Act in conjunction with a declaratory judgment action. In Texas Employers' Insurance Association v. Jackson, 862 F.2d 491, 505 (5th Cir. 1988), the Fifth Circuit noted

^{4/} The Tenth Circuit Court of Appeals cited Samuels in Chandler v. O'Bryan, 445 F.2d 1045 (10th Cir. 1971). Chandler involved a state civil action and a subsequent federal declaratory injunction action. The Tenth Circuit notes only that "where an injunction is improper under § 2283, declaratory relief should not be given." Id. at 1058.

that in many cases "[a] federal declaratory judgment will, of course, be res judicata" of a parallel state suit, "thus resolving it as surely as an injunction, and in any event the declaratory judgment can itself be enforced by injunction under 28 U.S.C. § 2202 pursuant to the 'protect or effectuate' exception to section 2283." The Fifth Circuit concluded that when the practical effect of a federal declaratory judgment is to defeat a state court case against the federal declaratory plaintiff, the issuance of the declaratory judgment contravenes the Anti-Injunction Act. The Fifth Circuit Court of Appeals summarized the effect of the Anti-Injunction Act on a federal declaratory suit.

[A]s a general rule, the district court may not consider the merits of the declaratory judgment action when (1) a declaratory defendant has previously filed a cause of action in state court against the declaratory plaintiff, (2) the state case involves the same issues as those involved in the federal case, and (3) the district court is prohibited from enjoining the state proceedings under the Anti-Injunction Act.

Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n, Inc., 996 F.2d 774, 776. See also Thiokol Chem. Corp. v. Burlington Indus., 448 F.2d 1328, 1332 (3rd Cir. 1971) ("Normally, the policy that precludes federal injunctions against state actions is also applied to prohibit declaratory judgments which, though not enjoining the state proceeding, would decide and preempt the matter pending there.").

As noted by Plaintiff, several circuits^{5/} emphasize the "first to file" rule. When a state action is filed first, the Anti-Injunction Act would, in those circuits, prohibit the

^{5/} Both parties seem to agree that the Tenth Circuit has not addressed this issue. As noted above, the Tenth Circuit has cited Samuels in a case addressing a prior state court civil action and a subsequent federal declaratory judgment action.

federal court from proceeding. Nobel argues that it was the "first to file" because Nobel sought to invoke federal jurisdiction first, when Nobel filed the motion for relief from stay in the Bankruptcy Court. However, Nobel's motion for relief from stay which was filed October 31, 1997, was arguably in response to the October 10, 1997 letter from Petro which threatened litigation against Nobel and others if no response was received by October 27, 1997. Petro filed the first action, in state court, on December 3, 1997, but Petro's action was arguably in response to the motion for relief from stay filed by Nobel in the Bankruptcy Court. Nobel filed this declaratory judgment action on December 8, 1997. Regardless, the filings of the two actions are days apart. The Court concludes that under circumstances present in this case, following a strict "first to file" rule serves no purpose.

Absent the "first to file" rule, the circuits have focused predominantly on the same type of considerations the courts have addressed in determining whether or not to retain a declaratory judgment action. The Fifth Circuit has most often considered the impact of the Anti-Injunction Act on a request for federal declaratory relief. In that circuit the hard rule suggested by Jackson has been softened in later cases. In Royal Insurance Co. of America v. Quinn-L Capital Corp., 3 F.3d 877 (5th Cir. 1993), the court explained:

the parties characterized Jackson as a new type of abstention. We agree with this characterization, as no language in the Act [The Anti-Injunction Act] or the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1982), specifically commands the result in Jackson. As we recently recognized, our decision in Jackson was based upon principles of federalism and comity. Travelers Ins. Co.

v. Louisiana Farm Bureau Fed'n, 996 F.2d 774, 776 (5th Cir.1993).

In Jackson, the federal suit offended principles of comity and federalism because the plaintiff sought an overruling of a state court decision on LHWCA preemption.

* * * *

We conclude, however, that federal courts need not abstain from declaratory judgment actions under Jackson where the federal suit is filed substantially prior to any state suits, significant proceedings have taken place in the federal suit, and the federal suit has neither the purpose nor the effect of overturning a previous state court ruling. We recently characterized the rule in Jackson as applying only where "a declaratory defendant has previously filed a cause of action in state court against the declaratory plaintiff." Travelers, 996 F.2d at 776 (emphasis added). Even where the state court suit is filed first, a class of exceptions to the Jackson rule exists.

Id. at 886 (footnotes omitted).^{6/}

The Royal court finds the only possible interference which might occur is the potential for a race to judgment which the Royal court does not find objectionable.

A race to judgment often is condoned. See Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15, 103 S. Ct. 927, 936, 74 L. Ed. 2d 765 (1983) (approving of parallel proceedings in all but exceptional circumstances); PPG Indus. v. Continental Oil Co., 478 F.2d 674, 677 (5th Cir.1973) (citing Kline v. Burke Constr. Co., 260 U.S. 226, 230, 43 S. Ct. 79, 81, 67 L. Ed. 226 (1922)).

Id., n.9.

^{6/} See Travelers, 996 F.2d 774 (5th Cir. 1993), discussed above at page 19, (a Fifth Circuit case in which the court found that the district court abused its discretion in dismissing the insurer's lawsuit for declaratory judgment even though the state action had been filed first).

In this case, Plaintiff has filed a motion for summary judgment which is currently at issue and awaiting action by the Court. Therefore, significant proceedings have taken place in this proceeding. In addition, action by this Court will not overturn a prior state court ruling. The Court concludes that these factors support the retention of this action.

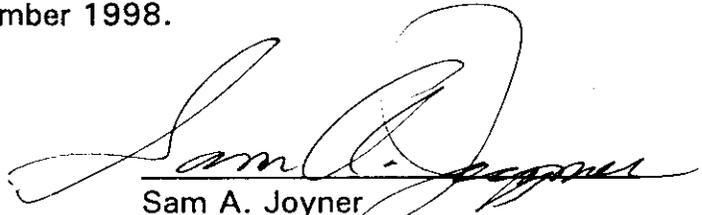
IV. RECOMMENDATION

The United States Magistrate Judge recommends that Defendant's Motion to Dismiss be **DENIED**.

V. OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 11th day of September 1998.



Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 14 Day of September, 1998.
A. Schuckee

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**

NORTHERN DISTRICT OF OKLAHOMA

SEP 10 1998

FLOYD L. WALKER and)
VIRGINIA G. WALKER,)
)
Plaintiffs,)
)
vs.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-672-BU

ENTERED ON DOCKET
DATE SEP 11 1998

AMENDED JUDGMENT

This matter came before the Court upon the parties' cross-motions for summary judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiffs, Floyd L. Walker and Virginia G. Walker, and against Defendant, The United States of America, in the amount of \$42,944.22 (which sum represents the self-employment tax overpayments and accrued, statutory interest through and including July 24, 1998), and statutory, post-judgment interest on such amount accruing subsequent to July 24, 1998.

DATED at Tulsa, Oklahoma this 9th day of September, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TIMOTHY LYNN BRITT,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL, Warden,)
)
Respondent.)

Case No. 96-CV-990-BU (J) ✓

ENTERED ON DOCKET
SEP 11 1998
DATE _____

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge entered on August 12, 1998, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that the petition for writ of habeas corpus be denied. Neither party has filed an objection to the Report and the deadline for filing objections has passed.

Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed and this petition for writ of habeas corpus denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #18) is **adopted and affirmed**. The petition for writ of habeas corpus is **denied**.

SO ORDERED THIS 9^m day of September, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

psychologically he cannot do the same level of work that he was doing previously. [R. 360].

On July 13, 1994, Plaintiff presented to Parkside to obtain medication, Pamelor, for depression. [R. 411]. He was prescribed the requested medication. The Parkside progress notes indicate that he was not able to make it in for his assessment on August 4, 1994, because he had gotten a job. On August 10, 1994, he was seen by Dr. Speer at Parkside who recorded:

PT STABLE ON PAMELOR. NO DEPRESSION. SLEEP AND APPETITE OK. NO SHI. AFFECT EUTHYMIC. FOS COHERENT. THOUGHTS RELEVANT. MEDS PER MR. RTC 2 WEEKS.

[R. 413]. The notes from August 25, 1994, reflect that Plaintiff had not called to set an appointment for an assessment due to working 120 hours in the past 2 weeks, but that he would call on Monday so a time could be scheduled. *Id.* The final note, dated September 6, 1994, records that Plaintiff did not call to set up an appointment. *Id.*

The record also contains medical records generated by the Oklahoma Department of Corrections which cover the relevant time frame. Notes dated February 1, 1992, state that Plaintiff denies symptoms of anxiety or depression at this time. The physician noted that given his past history, he may have difficulty controlling his impulses and emotions, particularly while intoxicated, but that he was currently stable. Pamelor was discontinued because of non-availability, and the anti-depressant Tofranil was prescribed [Dkt. 323]. On May 29, 1992, medical personnel recorded that he denied any problems other than he needs his Tofranil and Motrin. He was evaluated

on June 17, 1992, by a Dr. Williams, who found Plaintiff to be "a bit sullen, but reasonable enough" and without thought or affect disorder. [R. 317-18]. On December 30, 1992, Dr. Williams recorded that Plaintiff's mental status exam was unremarkable and that he was stable on meds. [R. 314]. On March 30, 1993, Dr. Williams conducted a mental status exam and reported: "excellent hygiene and appearance. Good contact. Full range of affect. No thought disorder." He was stable on meds and compliant. [R. 313]. On June 2, 1993, his mental status exam was unchanged. There was no thought or affect disorder. [R. 312]. He was still stable on September 1, 1993. *Id.*

The ALJ relied on Dr. Goodman's evaluation which showed that Plaintiff had an antisocial personality disorder with borderline features to conclude that Plaintiff is capable of performing work, provided there is little contact with others. [R. 21]. The court finds that the ALJ's conclusion is supported by substantial evidence in the record.

Plaintiff also claims that the ALJ's decision should be reversed because the ALJ failed to link the findings recorded on the Psychiatric Review Technique Form ("PRT") to the evidence he considered in reaching the conclusions recorded on the PRT. The ALJ stated that Plaintiff's activities of daily living show only a slight limitation; his social functioning restricted to a moderate degree; there is no more than a seldom limitation of his concentration; and there is no psychiatric or psychological evidence showing decompensation. [R. 21]. Although Plaintiff complains that the ALJ failed to discuss the evidence related to these findings, the fact is, aside from Plaintiff's

testimony which the ALJ found was not credible, there was no evidence to discuss that was relevant to this issue and also within the time-frame under consideration. On the record before it, the Court finds no error in the ALJ's completion of the PRT or his narrative discussion of his PRT findings.

The Court rejects Plaintiff's argument that Dr. Passmore's January, 1992 notation that Plaintiff's adjustment was "fair" constitutes a finding of disability pursuant to the holding in *Cruse v. U.S. Department of Health and Human Services*, 49 F.3d 614 (10th Cir. 1995). In *Cruse* the Court was critical of the use of a particular form known as the "Medical Assessment of Ability To Do Work-Related Activities (Mental)" form to evaluate a claimant's mental capacity. Completion of the form requires the evaluation of a claimant's abilities in various categories using the terms unlimited/very good, good, fair, and poor or none, which terms have specialized meanings defined on the form. The Court focused in particular on the term "fair" as it is defined on the form. While describing a functional ability as "fair"⁴ might seem to imply that there was no disabling impairment, on the form "fair" was defined to mean: "Ability to function in this area is seriously limited but not precluded." The Court found that so defined, the use of "fair" on the form was evidence of disability. *Cruse*, at 618. The *Cruse* case does not stand for the proposition which Plaintiff seems to advance, that any use of the term "fair" is evidence of disability. Irrespective of the meaning Dr. Passmore attached to his use of the term "fair," the Court finds

⁴ Fair used in this sense means: "sufficient but not ample; adequate" as in a "fair" understanding of the work. *Webster's Ninth New Collegiate Dictionary* 445.

that the ALJ's analysis of Plaintiff's mental condition is supported by substantial evidence in the record viewed as a whole.

CREDIBILITY FINDING

There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of his pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

HYPOTHETICAL QUESTIONING

Plaintiff claims that the hypothetical question posed to the vocational expert was incomplete in that it failed to include all of his limitations. *Hargis v. Sullivan*, 945 F.2d 1482, 1292 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's decision." 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).

The ALJ noted that although Plaintiff's back was shown to have a restricted range of motion, it was found to be without spasms. His reduced sensory capacity did not prevent him from using his hands in a normal fashion, the claim of reduced strength is not supported on physical examination,⁵ and there is no physical finding which would limit the ability to sit, stand, or walk. [R. 21; 364-65]. The ALJ limited Plaintiff's RFC to light work⁶ subject to only simple repetitive jobs which require little contact with the public or co-workers. [R. 74]. The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence. In particular, the Court notes that although the medical records generated by the Department of Corrections document frequent visits for renewal of Plaintiff's prescription for anti-depressants and treatment for rashes and occasional cold and flu symptoms, there is no documentation of any complaints or objective findings that would even arguably foreclose the performance of light work. Accordingly, the Court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the vocational expert's testimony in his decision were proper and in accordance with established legal standards.

⁵ The consultative examiner noted that Plaintiff's grip strength is markedly weaker on the left as compared to the right, but she could not tell if Plaintiff was exerting full effort. [R. 365].

⁶ Light work is work which involves: "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." 20 C.F.R. § 404.1567(b).

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. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 9th day of September, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED

SEP 09 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL L. KIRKLAND,
SSN: 512-44-6692,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security
Administration,

Defendant.

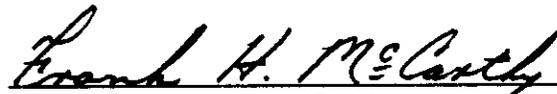
CASE NO. 97-CV-642-M

ENTERED ON DOCKET

DATE SEP 11 1998

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 9th day of sept, 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

16

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

F I L E D

MICHAEL L. KIRKLAND,
512-44-6692

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-642-M ✓

SEP 09 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
SEP 11 1998
DATE _____

ORDER

Plaintiff, Michael L. Kirkland, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying his Social Security Supplemental Security Income ("SSI") application and dismissing his application for disability ("SSD") benefits. 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 filed applications for benefits under both Social Security disability benefit programs. Title XVI, known as Supplemental Security Income ("SSI") is a disability benefit program available to persons of a certain income level who meet the disability requirements, irrespective of whether they are insured. Title II ("SSD") is a disability benefit program available to persons who meet the disability requirements and who are insured by reason having paid premiums. Plaintiff was last insured for SSD benefits on September 30, 1990. Consequently, to receive SSD benefits he was

(15)

required to establish that he was disabled on or before that date. *Henrie v. United States Department of Health & Human Services*, 13 F.3d 359, 360 (10th Cir. 1993).

Plaintiff previously sought SSD benefits in a 1991 application, which was denied. The applications under review were filed December 23, 1993, and November 29, 1993 (protectively filed). The denial of these applications was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held April 11, 1995. The ALJ noted the June 12, 1992, denial of SSD benefits; found that there was no good cause under 20 C.F.R. § 404.989 to reopen that determination; and issued an order dismissing Plaintiff's application for SSD benefits on August 24, 1995. [R. 29-30] He also issued a decision denying Plaintiff's application for SSI benefits. [R. 18-26]. The Appeals Council affirmed the ALJ's decisions on May 7, 1997. 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.

Plaintiff was born August 22, 1948, and was 47 years old at the time of the hearing. He has a 10th grade education and a General Equivalency Diploma. He formerly worked as a cook, construction laborer, vulcanizer at a tire shop, doing landscaping, machine shop work, and at a gas station. He claims to be unable to work as a result of depression, nervousness, stress, and pain in his back, hips and neck. After conducting a hearing on Plaintiff's SSI application, the ALJ determined that although Plaintiff is unable to perform his former work, he has the residual functional capacity ("RFC") to perform a full range of light work, subject to doing only simple repetitive jobs requiring little contact with the public and coworkers. Relying on

vocational expert testimony, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. 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).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence because the ALJ: (1) erroneously applied res judicata to dismiss his Title II, application; (2) erroneously evaluated his mental impairments; (3) made an unsupported credibility finding; and (4) based the denial on an incomplete hypothetical question.

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). Even if the Court

would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992). Applying these standards, the Court affirms the Commissioner's decision.

DISMISSAL OF SSD APPLICATION¹

Contending that his constitutional right to due process was violated, Plaintiff seeks judicial review of the Commissioner's refusal to reopen his prior SSD application which was denied at the reconsideration level of review on June 12, 1992. Plaintiff did not seek further review of this determination despite being advised of his right to a hearing and the possible effects of failing to seek review, so there was no hearing before an ALJ. [R. 123-124]. The denial of Plaintiff's prior SSD application thus became final and, in accordance with the Commissioner's regulations, Plaintiff lost his right to further review of this determination. 20 C.F.R. § 404.987(a). In connection with Plaintiff's current SSD application, the Commissioner examined the evidence and determined there was no basis under 20 C.F.R. §§ 404.988 and 404.989 to reopen the earlier application

The law is well-established that federal courts generally have no jurisdiction to review the refusal to reopen a previous claim for disability benefits. *See Califano v. Sanders*, 430 U.S. 99, 107-08, 97 S.Ct. 980, 985-86, 51 L.Ed.2d 192 (1977). The decision not to reopen a previously adjudicated claim for benefits is not a final decision

¹ Although Plaintiff commented on the briefing page limitation, he did not request an enlargement.

reviewable under 42 U.S.C. § 405(g). *Brown v. Sullivan*, 912 F.2d 1194, 1196 (10th Cir. 1990); *Nelson v. Secretary of Health & Human Services*, 927 F.2d 1109 (10th Cir. 1990). However, in *Califano*, the Court left open a narrow basis for federal court jurisdiction in those rare instances where the decision not to reopen is challenged on constitutional grounds. To prevent this "narrow" basis for jurisdiction from becoming the rule instead of the exception, the Plaintiff must present a colorable constitutional claim to confer jurisdiction on the court.

In his attempt to articulate a colorable constitutional claim, Plaintiff contends 42 U.S.C. § 405(h) prohibits application of res judicata when no hearing was held on the prior application and that Plaintiff's constitutional right to due process prohibits using res judicata to bar reopening where no hearing was held on the prior application. [Dkt. 11, p. 2]. 42 U.S.C. § 405(h) provides, in relevant part:

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.² . . .

Contrary to Plaintiff's contention, § 405(h) does not address the application of res judicata by the Commissioner. Rather, it strictly limits any attempt to expand the

² 42 U.S.C. § 405(g) contains the provisions for judicial review to which §405(h) refers:

An individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. . . .

court's jurisdiction which is limited by § 405(g) to review of a final decision of the Commissioner. *See Califano*, 97 S.Ct. 987 (Stewart J., and Burger, C.J., concurring).

There is some question as to whether the Court has jurisdiction to review the application of res judicata. Some courts have held that administrative res judicata may not be applied to bar subsequent litigation of an agency decision unless the agency has made a decision using a procedure substantially similar to that employed by the courts. *Delamater v. Schweiker*, 721 F.2d 50, 53-54 (2d. Cir. 1983) (in proceeding to terminate benefits, Secretary was not bound by earlier decision to grant benefits because grant of benefits was a non-adjudicative administrative decision; i.e. there was no hearing); *Aversa v. Sec. of Health & Human Serv.*, 672 F.Supp. 775 (D.N.J. 1987) (res judicata improperly applied where determination denying benefits was not adjudicative in nature and waiver of hearing was not knowing and voluntary because of misleading notice). In *Brown v. Sullivan*, 912 F.2d 1194, 1196 (10th Cir. 1990), the Tenth Circuit plainly stated:

Neither the district court nor this court has jurisdiction to review the Secretary's refusal to reopen a claim for disability benefits or determination such claim is res judicata. . . . The Secretary's decision not to reopen a previously adjudicated claim for benefits is discretionary and, therefore, is not a final decision reviewable under 42 U.S.C. § 405(g). [citations omitted].

Despite the Tenth Circuit's statement concerning the court's limited jurisdiction, in *Tucker v. Sullivan*, 779 F.Supp. 1290, 1295 (D.Kan. 1991), the District Court of Kansas, Theis, J., citing *McGowen v. Harris*, 666 F.2d 60, 66 (4th Cir. 1981), remarked that the district court has jurisdiction "to determine whether res judicata has

been properly applied." *Accord, Shelby v. Shalala*, 1993 WL 390408 n. 3 (D. Kan.).

Whether administrative res judicata can be properly applied to a claim denied without a hearing, and whether this court has jurisdiction under any circumstances to review the application of res judicata are not questions this court need address. Those issues are not presented by the facts of this case. The ALJ's use of the term res judicata was unfortunate because, although that term was used by the ALJ to dismiss Plaintiff's request for hearing, it is clear that the ALJ did not actually rely on res judicata to bar the reopening of Plaintiff's earlier claim. The ALJ actually enforced the waiver provision of § 404.987(a) which provides that Plaintiff lost his right to further review when he failed to timely seek that review.

The Commissioner considered the evidence and decided that there was no basis to reopen under the regulations. 20 C.F.R. § 404.989. [R. 29-30]. Because Plaintiff received adequate notice³ of the possible effect of his failure to seek further review of the denial of his prior SSD application [R. 123-124], the Court finds that Plaintiff has failed to present a colorable constitutional claim. *See Yeazel v. Apfel*, 148 F.3d 910 (8th Cir. 1998) (claimant could not challenge use of res judicata on grounds there was no hearing when claimant did not receive hearing solely because he elected not to pursue one). Therefore, the Court finds it lacks subject matter jurisdiction to review the Commissioner's decision not to reopen Plaintiff's prior SSD determination.

³ Plaintiff does not contend that his mental condition prevented him from comprehending the notice.

EVALUATION OF MENTAL IMPAIRMENT

Plaintiff claims that the record supports his contention that his long-standing mental impairments preclude his ability to work. In support of this proposition, Plaintiff has cited excerpts of mental evaluations dating back to 1981. The 1981 records were consultative examinations performed in conjunction with the denial of a 1980 application for benefits. They are so remote in time from the current application so as to be of no practical use in making a determination on Plaintiff's current application.

On January 21, 1992, a psychiatric consultative examination of Plaintiff was performed by Ronald C. Passmore, M.D. Dr. Passmore found that Plaintiff had a history of long-standing depression which responds when treated. Plaintiff exhibited some evidence of anxiety and some evidence of having an antisocial personality in the sense that he has been convicted and had gone to prison three times. Dr. Passmore found Plaintiff's adjustment to be fair. [R. 302].

Another psychiatric consultative examination was performed on February 28, 1994, by Thomas A. Goodman, M.D., in conjunction with Plaintiff's current application. On examination Dr. Goodman found Plaintiff to be in no particular distress and found no reason to believe that he has any kind of seizure disorder at the present time. [R. 359]. He diagnosed Plaintiff as having minimal brain damage, by history, without any current confirmation. The principal diagnosis was antisocial personality disorder with borderline features, currently untreated. Dr. Goodman commented that although Plaintiff was not particularly well educated, he saw no reason why

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

SEP 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM E. SPARKS and)
PATTY S. SPARKS and all others)
similarly situated,)
)
Plaintiffs,)
)
vs.)
)
BANCOKLAHOMA MORTGAGE CORP.,)
)
Defendant.)

Case No. 97-CV-588-BU ✓

ENTERED ON DOCKET
DATE SEP 11 1998

ORDER

On August 11, 1998, the United States Magistrate Judge issued a Report and Recommendation, wherein he recommended this Court deny Defendant's Motion to Dismiss. In the Report and Recommendation, the Magistrate Judge found that Plaintiffs, in the Complaint in Class Action, had successfully pled the existence of an enterprise so as to state a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq. Specifically, the Magistrate Judge found that Plaintiffs had successfully pled an enterprise (comprised of Defendant, BancOklahoma Mortgage Corp., Defendant's parent corporation, Bank of Oklahoma, N.A. ("BOK"), and BOK's parent corporation, BOK Financial Corporation ("BOK Financial")) separate and distinct from Defendant, the "person" charged with the RICO violation.¹

¹The Complaint in Class Action filed by Plaintiffs allege RICO violations under 18 U.S.C. § 1962(c) which provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs

This matter now comes before the Court upon Defendant's timely objection to the Report and Recommendation, to which Plaintiffs have responded. In the objection, Defendant contends that the Magistrate Judge erred in finding that the allegations of Plaintiffs' Complaint in Class Action satisfy the requirement that the enterprise be separate and distinct from the RICO person being charged. Defendant argues that the Magistrate Judge's finding is contrary to the great weight of authorities.

The Court, pursuant to 28 U.S.C. § 636(b)(1), has conducted a de novo review of the matter to which Defendant has made an objection. Having done so, the Court declines to follow the Magistrate Judge's recommendation. The Court finds that Plaintiffs have failed to sufficiently plead the existence of an enterprise distinct from the RICO person. In Brannon v. Boatmen's First Nat. Bank of Oklahoma, ___ F.3d ___, 1998 WL 546610 (10th Cir. August 25, 1998), the Tenth Circuit held that a parent-subsidary corporate relationship standing alone is not enough to invoke RICO liability. In order to properly plead a RICO enterprise, the Tenth Circuit stated that a plaintiff must allege that the subsidiary corporation ("person") was engaged in the conduct of its parent corporation's affairs ("enterprise's affairs"), not just its own affairs. Id. at *4. It is insufficient, according to the Tenth

through a pattern of racketeering activity....

18 U.S.C. § 1962(c). For purposes of § 1962(c), the defendant "person" must be an entity distinct from the alleged "enterprise." Board of County Comm'rs. v. Liberty Group, 965 F.2d 879, 885 & n. 4 (10th Cir. 1992).

Circuit, for the plaintiff merely to allege that the "defendant corporation accused of racketeering is a subsidiary and therefore automatically conducts the affairs of its parent." Id. at *5. The Tenth Circuit stated that the plaintiff's allegations must show the subsidiary corporation used the parent corporation "as the instrument of [its] criminality" and that the parent corporation (the alleged enterprise) "somehow made it easier to commit or conceal the fraud of which the plaintiff complains.'" Id. at *4.

The allegations of Plaintiff's Complaint in Class Action are similar to the allegations in the Brannon case. Like the Tenth Circuit, the Court finds the allegations that (1) BOK and BOK Financial delegated responsibility for the servicing the mortgages at issue to Defendant; (2) the income of Defendant, including the income derived from unlawful practices at issue, was upstreamed to BOK and BOK Financial; (3) the income of Defendant was reported on the financial statements issued by BOK and BOK Financial and raised the capital in public securities markets on the basis of those financial statements; and (4) the capital thus raised was used to fund the operations of the entire corporate group, do nothing more than define a legitimate corporate and financial relationship between Defendant, BOK and BOK Financial. In addition, like the Tenth Circuit, the Court finds no allegations of any activity on the part of BOK and BOK Financial which might reasonably be understood to implicate them in the scheme attributed to Defendant. The allegation that BOK and BOK Financial delegated responsibility of servicing the mortgages to Defendant does not show that

Defendant was engaged in BOK and BOK Financial's affairs. Rather, it suggests that the servicing of mortgages was Defendant's affair. The allegations that income from Defendant, including that from unlawful practices, was upstreamed to BOK and BOK Financial establishes nothing more than that BOK and BOK Financial benefitted financially from the success of its subsidiary--a fact unrelated to the RICO liability. The Court finds that the allegations in the Complaint in Class Action provide no indication how the relationship between Defendant, BOK and BOK Financial allowed Defendant to perpetrate and conceal the alleged racketeering activity (mail fraud).

In their response, Plaintiffs contend that the allegation in the Complaint in Class Action which sets forth that BOK and BOK Financial provided guidance and instruction to Defendant in the servicing of mortgages presents a different case than Brannon. This Court disagrees. The general allegation pleaded in the Complaint in Class Action does not show that Defendant was conducting the affairs of BOK and BOK Financial rather than its own affairs. This allegation also does not implicate BOK and BOK Financial in the mail fraud scheme attributed to Defendant. Further, this allegation does not demonstrate any activity by BOK and BOK Financial which somehow made it easier to commit or conceal the alleged mail fraud. The Court therefore finds that Plaintiffs have failed to state a claim under RICO.

Because Plaintiffs have failed to properly allege a RICO claim, the Court finds that Plaintiffs' RICO claim must be

dismissed. While "leave [to amend] shall be freely given when justice so requires" under Rule 15(a), Fed.R.Civ.P., the Court finds that Plaintiffs should not be permitted to amend their Complaint. Plaintiffs attempted to allege three enterprises in their Complaint in Class Action.² The Court opines that a further amendment would not cure the deficiencies. Furthermore, Plaintiffs, like the plaintiffs in Brannon, failed to file any motion or any request in their briefing for leave to amend their Complaint in Class Action pursuant to Rule 15(a).

With the dismissal of the RICO claim, the Court must address the issue raised in Defendant's dismissal motion of whether Plaintiffs' state law claims, which may, in part, rely upon the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2609, are sufficient to confer federal jurisdiction on the Court.³ Upon review, the Court concludes that the state law claims are not sufficient to confer federal jurisdiction.

Federal courts are courts of limited jurisdiction; they must have a statutory basis for their jurisdiction. Morris v. City of Hobart, 39 F.3d 1105, 1111 (10th Cir. 1994), cert. denied, 514 U.S.

²In the Report and Recommendation, the Magistrate Judge addressed all three of the enterprises alleged by Plaintiffs and found only one of those enterprises sufficient to state a RICO enterprise. Plaintiffs failed to timely object to the findings of the Magistrate Judge as to the other two enterprises which were found to be insufficient.

³The Magistrate Judge did not make a finding on this issue in light of the recommendation on the RICO claim. The Court finds it unnecessary to remand the issue to the Magistrate Judge for such a finding as the issue has been fully briefed by the parties and it requires a legal determination.

1109 (1995). Plaintiffs have invoked 28 U.S.C. § 1331, more commonly referred to as "federal question" jurisdiction, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." The Supreme Court has stated that a case "arises under" federal law for § 1331 purposes only when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief depends on resolution of a substantial question of federal law." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

The circuit courts are split as to whether Section 10 of RESPA provides for a private cause of action. Compare, State of Louisiana v. Litton Mortg. Co., 50 F.3d 1298 (5th Cir. 1995) (no private remedy exists under Section 10 of RESPA); Allison v. Liberty Savings, 695 F.2d 1086 (7th Cir. 1982) (no private remedy exists under Section 10 of RESPA); Vega v. First Federal Savings & Loan Ass'n of Detroit, 622 F.2d 918 (6th Cir. 1980) (private remedy exists under Section 10 of RESPA). The Court, however, finds the decisions of Fifth and Seventh Circuits persuasive and concludes that no private right of action exists under Section 10 of RESPA. Therefore, the Court finds that Plaintiffs' claims are not created by federal law.

Defendant maintains that the Court's determination that no private cause of action exists for violation of Section 10 of RESPA forecloses federal question jurisdiction. Defendant points to the

decision of Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). In that case, the Supreme Court addressed the question of whether, in the absence of a federal cause of action created by a private remedy for violation of a federal statute, federal question jurisdiction may nevertheless be exerted over a state claim incorporating that federal statute. The Supreme Court concluded that if Congress did not create a private remedy for violation of the federal statute, interpretation or application of that federal statute in order to determine the merits of a state claim is insufficient to confer federal question jurisdiction. Id. at 811-13. Specifically, the Supreme Court stated: "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim arising under the Constitution, laws or treaties of the United States.'" Id. at 817 (citing 28 U.S.C. § 1331).

This case falls within the dictate of Merrell Dow. Plaintiffs' Complaint in Class Action alleges violation of Section 10 of RESPA as an element of the state law claims and no private federal cause of action exists for such violation. Nevertheless, Plaintiffs claim that federal question jurisdiction exists based upon Franchise Tax Bd.'s recognition of such jurisdiction when "some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state law claims." Franchise Tax Bd., 463 U.S. at 13. Plaintiffs maintain that violation of

RESPA is a necessary element of their state law claims.

The Tenth Circuit has not determined whether Merrell Dow eliminated the alternative basis for invoking § 1331 jurisdiction set forth in Franchise Tax Bd. The Court, however, notes that the Tenth Circuit, in Morris v. City of Hobart, 39 F.3d 1105, 1111 (10th Cir. 1994), specifically discussed the alternative basis for jurisdiction under § 1331. The Court will therefore address it in the context of the instant case.

In determining whether a case turns on a question of federal law, the district court is to (1) focus on whether Congress evidenced an intent to provide a federal forum; and (2) consider principles of federalism. Morris, 39 F.3d at 1111-12. Upon review, the Court finds no suggestion in RESPA that Congress intended to confer federal jurisdiction over Plaintiffs' claims. Moreover, the Court further finds that a federal forum is not necessary given the nature of the claims asserted by Plaintiffs. The state law claims asserted by Plaintiffs are claims traditionally reserved for the state courts. The fact that the state law claims may require reference to federal law is not enough to confer federal jurisdiction. Merrell Dow, 478 U.S. at 808-812.

In addition, the Court finds that the nature of the federal interest at issue does not warrant the exercise of jurisdiction under § 1331. Plaintiffs are free to pursue their claims in state court. State courts routinely interpret and apply federal law and the Court can see no reason why the state court would not be suited to interpret and apply Section 10 of RESPA as in regard to

Plaintiffs' claims.

Because the RICO claim has been dismissed and no other basis for original jurisdiction exists, the Court, pursuant to 28 U.S.C. § 1367, declines to exercise supplemental jurisdiction over the state law claims and finds that such claims should be dismissed without prejudice to re-filing in state court.

Based upon the foregoing, the Magistrate Judge's Report and Recommendation (Docket Entry #20) is **OVERRULED**. Defendant's Motion to Dismiss (Docket Entry #3) is **GRANTED**. Plaintiffs' RICO claim is **DISMISSED WITH PREJUDICE** and Plaintiffs' state law claims are **DISMISSED WITHOUT PREJUDICE** to re-filing in state court.

ENTERED this 9th day of September, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

KIMBERLY BOYD, individually and as the
personal representative of the Estates
of BRIAN R. BOYD, Deceased, and ZAKARY
R. BOYD, a Deceased Minor, and KIMBERLY
BOYD, the natural mother and next friend
of LEVI R. BOYD, a minor,

Plaintiff,

vs.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
a Delaware corporation,

Defendant.

FILED

SEP 10 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CIV-135BU(M)

ENTERED ON DOCKET

SEP 11 1998

**JOURNAL ENTRY OF JUDGMENT
UPON SETTLEMENT OF CASE**

Now on this 9th day of September, 1998 this matter comes on before the undersigned, the Plaintiffs appearing in person and by their attorney Jon Wallis and the Defendant appearing by its attorney A. Camp Bonds, Jr.

The Court is advised that the parties have resolved this case by settlement, subject to court approval of the settlement of the claims of the minor children.

The total settlement is for the sum of \$335,000. Out of that sum the Plaintiffs' attorneys are entitled to the sum of \$117,250, which the Court finds to be a reasonable fee for the services rendered in this cause.

The remaining balance of the settlement of \$217,750 which includes the resolution of three causes of action is to be divided as follows:

Claim of Levi Boyd for his injuries	\$ 7,000.00
Claim of Kimberly Boyd for death of Zakary Boyd	150,000.00
Claims for the death of Brian Boyd:	
Kimberly	54,750.00
Levi	3,000.00
Hanna	3,000.00
Total	\$ <u>217,750.00</u>

The Court finds that the proposed settlement is fair and reasonable and that it should be approved.

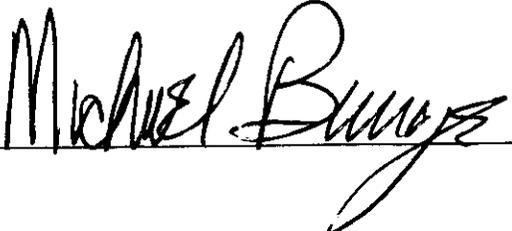
The Court further finds that there are medical liens in this case that must be satisfied before distribution of the settlement. Kimberly Boyd has agreed that all of the liens shall be paid out of her portion of the settlement. The attorneys for Plaintiffs have advised the Court and the Court finds that the medical liens do not exceed the amount of Kimberly Boyd's settlement proceeds. The attorneys for Plaintiffs have agreed to place Kimberly Boyd's settlement proceeds in their trust account and satisfy all liens out of those proceeds before releasing the funds to Kimberly Boyd.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the settlement is approved and the Court hereby enters judgment in the sum of \$ 335,000.00 in favor of the Plaintiffs and against the Defendant Burlington Northern and Santa Fe Railway Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' attorneys shall receive \$ 117,250.00 of said sum, that Kimberly Boyd shall receive \$204,750.00, Levi Boyd shall receive \$10,000.00, and Hanna Boyd shall receive \$3,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Kimberly Boyd's portion of the proceeds shall be retained by Plaintiffs' attorneys who shall be responsible for making sure that all valid liens in this case are satisfied before releasing the proceeds to Kimberly Boyd.

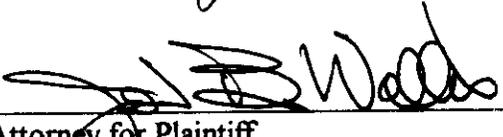
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the proceeds to be awarded to Hanna Boyd, a minor and Levi Boyd, a minor are to be placed in an interest bearing account at First National Bank & Trust of Miami. Said funds are not to be spent except upon order of this Court approving the expenditure. The proceeds awarded to Hanna in this order shall be distributed to her along with all accumulated interest upon her attaining the age of 18 years. The proceeds awarded to Levi in this order shall be distributed to him along with all accumulated interest upon him attaining the age of 18 years.



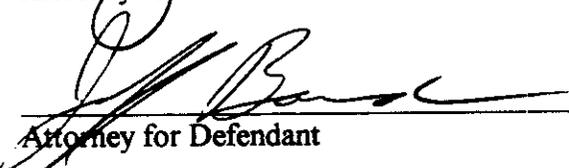
Approved as to form:



Plaintiff



Attorney for Plaintiff



Attorney for Defendant

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

FILED

SEP 10 1998

Richard A. Ford, Clerk
U.S. DISTRICT COURT

GARY BURTON,

Plaintiff,

vs.

TOYOTA MOTOR SALES, U.S.A., INC.,
ex rel. LEXUS MANUFACTURERS,

Defendant.

Case No. 97-CV-651-B(W)

DATE SEP 11 1998

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the stipulation of the parties herein, the above styled and numbered cause is hereby ordered dismissed with prejudice to the bringing of a further action thereon.

It is further ordered that the July 29, 1998 order of Magistrate Claire V. Eagan awarding costs to the defendant in the amount of \$1,770 is hereby vacated and held for naught.

IT IS SO ORDERED this 10th day of Sept, 1998.

for James R. Brett
Thomas R. Brett, United States District Judge

Richard A. Ford
Richard A. Ford, Attorney for Plaintiff

James A. Jennings, III
James A. Jennings, III, Attorney for Defendant

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

F I L E D

SEP 10 1998

HOMEWARD BOUND, INC.)
et al.,)
)
 Plaintiffs,)
)
vs.)
)
THE HISSOM MEMORIAL CENTER,)
et al.,)
)
 Defendants.)

FILED
CLERK
U.S. DISTRICT COURT

Case No. 85-C-437-E

ENTERED ON DOCKET

DATE 9/11/98

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on August 7, 1998, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees and expenses in the amount of \$28,341.94.

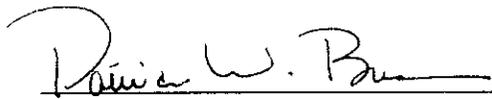
IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$28,341.94, and a judgment in the amount of \$28,341.94 is hereby granted on this day.

The contested time and expenses will be heard at the hearing scheduled to be held on

Sept 29, 1998, at 10:00 A.m.

ORDERED this 9th day of September, 1998.

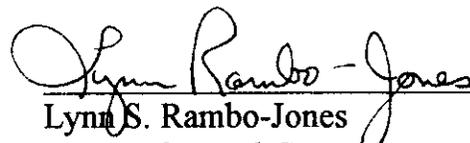

HONORABLE JAMES O. ELLISON
United States District Court


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ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS