



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

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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OKLA

BANK OF OKLAHOMA, N.A.,  
a national banking association,

Plaintiff,

vs.

TELEPHONE COMPANY OF CENTRAL  
FLORIDA, INC., a Florida corporation and  
ELDER N. RIPPER, III, and ANDREA  
WELCH, individuals,

Defendants.

Case No.

99-0202-R

NOTICE OF REMOVAL OF CIVIL ACTION

Pursuant to 28 U.S.C. §1452(a) and Bankruptcy Rule 9027, Defendants Telephone Company of Central Florida, Inc., Elder N. Ripper, III, and Andrea Welch hereby remove this action from the United States District Court for the Northern District of Oklahoma, where it was filed as Case No. 99-CV-668-E(E), to the United States Bankruptcy Court for the Northern District of Oklahoma. As grounds for removal, Defendants state as follows:

- 1) Plaintiff filed its Complaint on August 12, 1999, in the United States District Court for the Northern District of Oklahoma.
- 2) Copies of all process and pleadings served upon Defendants in the federal district court action are collectively attached hereto as Exhibit "A" and incorporated herein by reference. Service was had on Defendants no earlier than August 20, 1999.
- 3) On May 26, 1998, Defendant Telephone Company of Central Florida, Inc., filed in the United States Bankruptcy Court for the Middle District of Florida, Orlando

Division, its Petition for Voluntary Bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code. On June 9, 1999, the Bankruptcy Court entered its order confirming the debtor's plan of reorganization, as amended, pursuant to 11 U.S.C. §1129. The court's order, together with Debtor's Plan as Amended, is attached hereto as Exhibit "B" and is incorporated herein by reference. An integral part of that order provides:

The Debtor, the Reorganized Debtor, Phoenix, the Creditors' Trust Trustee and the agents, general partners, employees and professionals of the Debtor, the Reorganized Debtor, Phoenix, and the Creditors' Trust Trustee, including accountants and legal counsel (acting in such capacity) shall have no liability to any entity for any act taken or omitted to be taken in connection with or related to the formulation, preparation, dissemination, implementation, confirmation or consummation of the Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document relating to, arising out of or in connection with the Plan or the Creditors' Trust, or any act omission, transaction, event or other occurrence taking place between the Petition Date and the Effective Date, or with respect to the professionals of the Debtor, taking place before the Petition Date which is any way relating to the reorganization case, and any other property of the Debtor, the business operations of the Debtor, the Plan, the Plan documents or any of the transactions contemplated thereby unless the liability of any entity that would otherwise result from any such act or omission was the result of gross negligence or willful misconduct. The Confirmation Order shall enjoin the prosecution by any Person or Entity, whether directly, indirectly, derivatively or otherwise, of any such Claim, obligation, suit judgment, damage, right, remedy, cause of action, charge cost, Debt, indebtedness, or Liability which arose or accrued during such periods or was or could have been asserted against any of the listed parties, except as otherwise provided in the Plan, the Plan documents or the Confirmation Order. Each of the listed parties shall have the right to individually seek enforcement of this provision. This exculpation from liability provision is an integral part of the Plan and is essential to its implementation.

- 4) Defendants Elder N. Ripper, III, and Andrea Welch are agents and/or employees of the Debtor, as contemplated by the above order.

5) Plaintiff's Complaint is grounded upon transactions which allegedly took place in relation to Chapter 11 proceedings, and while those Chapter 11 proceedings were in progress.

6) The bankruptcy court's order directs:

that, notwithstanding the entry of this Confirmation Order and the occurrence of the Effective Date, until this case is closed, this Court shall retain the fullest and most extensive jurisdiction of this case that is permitted under applicable law, including that necessary to ensure that the purposes and intent of the Plan are carried out. Without limiting the generality of the foregoing, after Confirmation of the Plan and until this case is closed, this Court shall retain jurisdiction of this case as set forth in Article X of the Plan.

7) Article X of the Plan provides:

Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court shall retain the fullest and most expansive jurisdiction that is permitted under applicable law to issue any order or process to carry out the provisions of the Plan, including but not limited to, determine all claims, enforce all obligations established in the Plan and the Confirmation Order, adjudicate any adversary proceeding or contested matter pending on the Confirmation Date or contemplated in the Plan, determine any application for allowance of compensation pursuant to §§330, 331 or 503(b), to enforce and interpret the Plan and the Creditors' Trust Agreement and to resolve any dispute and questions of any kind arising in connection with any act arising out of or contemplated by the Plan and the rights created herein or in the Confirmation Order.

8) Jurisdiction of Plaintiff's claim properly lies with the Bankruptcy Court under 28 U.S.C. §1334. Venue most properly lies with the Bankruptcy Court for the Middle District of Florida, and Defendants anticipate filing a Motion for Change of Venue within five (5) days of this Notice. *See In Re Hakim*, 212 B.R. 632, 639 (N.D. CA. 1997).

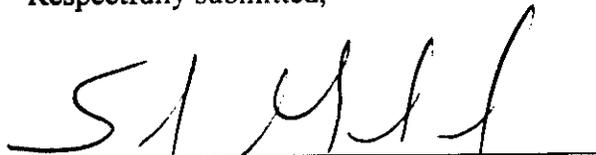
9) Pursuant to Bankruptcy Rule 9027, Defendants state that the removed proceeding is a core proceeding pursuant to 28 U.S.C. §§157(b)(2)(B), (I), and (O).

- 10) Plaintiff's action is a civil action initiated after commencement of the case under the code. This notice of removal is timely filed pursuant to Bankruptcy Rule 9027(a)(3) in that it is being filed within thirty (30) days of either the receipt of a copy of the initial pleading setting forth the claim sought to be removed, or receipt of the summons.
- 11) As required by 28 U.S.C. §1446(d), written notice of the filing of this Notice of Removal is being given this day to Plaintiff, through its counsel of record, and a copy of this Notice of Removal is being filed this day with the Clerk of the United States District Court for the Northern District of Oklahoma.

WHEREFORE, Defendants request that this Court assume jurisdiction over this controversy, and that this matter proceed in the United States Bankruptcy Court for the Northern District of Oklahoma from this day forward.

Dated this 9<sup>th</sup> day of September, 1999.

Respectfully submitted,



Maynard I. Ungerman, OBA #9157

Stephen J. Greubel, OBA #10653

LAW OFFICES OF MAYNARD I. UNGERMAN

1323 East 71<sup>st</sup> Street, Suite 300

Tulsa, Oklahoma 74136

(918) 495-0550

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 9<sup>th</sup> day of September, 1999, a true and correct copy of the foregoing and all attachments referenced therein was hand delivered to the offices of Frederic Dorwart, J. Michael Medina, and Matthew J. Browne, Suite 100, 124 East Fourth Street, Tulsa, Oklahoma 74103, counsel for Plaintiff.

  
\_\_\_\_\_  
Stephen J. Greubel

ATTACHMENT

" A "

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

FILED

AUG 12 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BANK OF OKLAHOMA, N.A.,  
a national banking  
association'

PLAINTIFF

v.

TELEPHONE COMPANY OF CENTRAL  
FLORIDA, INC., a Florida  
corporation and ELDER N.  
RIPPER, III. and ANDREA  
WELCH, individuals,

DEFENDANTS

99CV0668E (E)  
NO.

COMPLAINT

Comes now Bank of Oklahoma, N.A. ("Bok") and for its complaint against the defendants Telephone Company of Central Florida, Inc. ("TCCF"), Elder N. Ripper III ("Ripper") and Andrea Welch ("Welch"), states as follows:

(1) Bank of Oklahoma N.A. is a national banking association authorized under the authority of the Comptroller of the Currency of the United States, with its principal place of business in Tulsa, Oklahoma.

(2) TCCF is a Florida corporation with its principal place of business in Lake Mary, Florida.

(3) Ripper is a resident and citizen of the State of Florida. At all times relevant to matters set forth in this complaint, Ripper served as president of TCCF.

(4) Welch is a resident and citizen of the State of Florida. At all times relevant to matter set forth in this complaint, Welch

served as chief operating officer of TCCF.

(5) The amount in controversy exceeds \$75,000.

(6) This Court has jurisdiction by virtue of 28 USC §1332(a).

(7) Venue is properly laid in this Court under 28 USC §1391(a).

(8) TCCF maintained an account with BOK at all times relevant to the matters set forth in this complaint.

(9) On or around November 30, 1998, BOK mistakenly credited to TCCF's account at least \$254,988.72, funds which belonged to another BOK customer totally unrelated to TCCF ("the Funds").

(10) The defendants were fully aware at all times that the Funds had been mistakenly deposited into TCCF's account at BOK and thus were erroneously credited to TCCF.

(11) The defendants, despite knowing that the Funds did not belong to TCCF and knowing that TCCF was insolvent, withdrew the Funds from the account and used the Funds in the operation of TCCF. The defendants' actions constituted either willful misconduct or gross negligence. Further, the defendants' actions violated the depository agreement between TCCF and BOK.

(12) BOK first became aware of the mistaken deposit on May 24, 1999. BOK immediately requested that TCCF return the Funds for proper crediting to the Funds' lawful owner. TCCF has refused to return the Funds.

(13) WHEREFORE, BOK hereby prays that (i) judgment be entered against each of the defendants, jointly and severally, in the amount of at least \$254,988.72 in favor of BOK; (ii) prejudgment interest be awarded BOK from and after November 30, 1998; (iii)

post-judgment interest, as provided by law, be awarded BOk; (iv) attorney fees and costs be awarded BOk; and (v) all other relief which may be adjudged just and proper be awarded BOk.



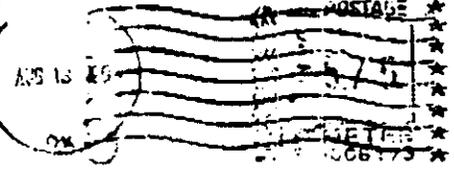
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Frederic Dorwart, OBA #2436  
J. Michael Medina, OBA #6113  
Matthew J. Browne, OBA #14682  
Suite 100, 124 E. Fourth St.  
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Attorneys for plaintiff Bank of  
Oklahoma, N.A.

MATTHEW J. BROWNE  
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OLD CITY HALL  
124 EAST FOURTH STREET  
TULSA, OKLAHOMA 74103-5010

Z 252 660 938



MAIL

*Return Receipt Requested*

Elder N. Ripper  
3599 W. Lake Mary Blvd, Ste E.  
Lake Mary, Florida 32746

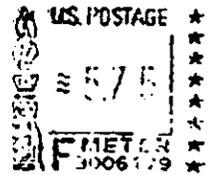
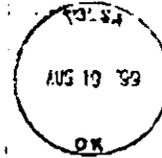
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MATTHEW J. BROWNE  
ERIC DORWART, LAWYERS  
OLD CITY HALL  
124 EAST FOURTH STREET  
TULSA, OKLAHOMA 74103-5010

CERTIFIED

Z 252 660 940



MAIL

*Return Receipt Requested*

*Restricted*

Andrea Welch  
792 Keeneland Pike  
Lake Mary, Florida 32746

*AD / RCT*  
*8-23-99*  
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*46014*

ATTACHMENT

" B "

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

**FILED**

JUN 9 1999

CLERK, U.S. BANKRUPTCY  
ORLANDO DIVISION

In re:

TELEPHONE COMPANY OF  
CENTRAL FLORIDA, INC.

CASE NO. 98-04587-6B1

Debtor.  
\_\_\_\_\_ /

ORDER CONFIRMING DEBTOR'S PLAN OF  
REORGANIZATION, AS AMENDED, PURSUANT TO 11 U.S.C. § 1129,

The Telephone Company of Central Florida, Inc., as debtor and debtor in possession ("the Debtor"), having filed with this Court its Disclosure Statement and Amended Disclosure Statement, Plan of Reorganization ("the Plan") and First Amendment to Debtor's Plan of Reorganization ("the First Amendments"), Second Amendments to Plan ("the Second Amendments"), the Court finds and orders as follows:

1. On May 26, 1998 ("the Petition Date), the Debtor commenced this case by filing a voluntary chapter 11 bankruptcy petition. This Court has jurisdiction over the Debtor, the Debtor's Chapter 11 case, all of the Debtor's assets wherever located, all Claims against and Equity Interests in the Debtor, and all Creditors of and Holders of Equity Interests in the Debtor pursuant to 28 U.S.C. § 1334(d). Confirmation of the Plan is a "core proceeding" pursuant to 28 U.S.C. §§ 157 (b)(2)(A), (L) and (O).

2. All capitalized terms used in the Confirmation Order but not defined herein shall have the meaning ascribed to such terms in the Plan.

3. On January 26, 1999, the Debtor also filed with this Court its Plan and Disclosure Statement, each dated January 26, 1999, and mailed copies of such documents to certain parties as required by the Local Rules and to parties filing a written request for copies of same.

4. This Court held a hearing on March 23, 1999 at 10:00 a.m. to consider approval of the Disclosure Statement and to consider any written objections thereto. On April 20, 1999, this Court entered its Order (i) Approving Disclosure Statement; (ii) Scheduling Confirmation Hearing; (iii) Establishing Confirmation, Compensation and Administrative Claims Hearing Procedures; and (iv) Fixing Time for Filing Acceptances and Rejections of Plan (the "Disclosure Statement Order"). The Disclosure Statement Order approved the Debtor's Disclosure Statement as meeting the "adequate information" standards required by Section 1125 of the Bankruptcy Code, subject to the Debtor incorporating additional information in the Disclosure Statement as announced on the record at the March 23, 1999 hearing. On March 30, 1999, the Debtor filed its Amended Disclosure Statement and on April 30, 1999, the Debtor filed its First Amendments. On May 18, 1999, the Debtor filed its Second Amendments in open court in which it struck its First Amendments.

5. Commencing on April 30, 1999, pursuant to the Disclosure Statement Order, copies of the Amended Disclosure Statement, the Plan, the First Amendments and the Ballots were mailed by the Debtor to all Holders of Claims in Classes I-IV to all Holders of Class and Equity Interests and to certain other Creditors and parties in interest. Appropriate affidavits and certificates have been filed in the record regarding such service.

6. In the Disclosure Statement Order, the Court fixed: (a) May 11, 1999 as the last date for the filing of the Ballots accepting or rejecting the Plan and as the last date for the filing of written objections of confirmation of the Plan; (b) May 7, 1999 as the last date for filing claims for administrative expenses, including, but not limited to, fee applications for professionals; (c) May 14, 1999 as the last date for filing the Confirmation Affidavit as required by the Local Rules; (d) May 11, 1999 as the last to file and serve objections to the Debtor's Plan; and (e) May 18, 1999 as the date for the Confirmation Hearing.

7. On May 14, 1999, in accordance with the Amended Disclosure Statement Order and the Local Rules, the Debtor filed with this Court the Confirmation Affidavit of Elder N. Ripper, III, the president of the Debtor.

8. The Court held a hearing on May 18, 1999 at 10:00 a.m. (the "Confirmation Hearing") to consider Confirmation of the Plan in accordance with 11

U.S.C. § 1129. The Court reconvened and concluded the Confirmation Hearing on May 20, 1999 based upon the filing of the Second Amendments.

9. At the Confirmation Hearing, the Debtor and its counsel Nicholas B. Bangos and Peter N. Hill appeared.

10. The following Objections to the Plan, as amended, were filed: BellSouth, the United States Trustee and the Unsecured Creditors Committee, Sprint Florida and Telscape USA, Inc. ("Telscape").

11. The Plan classifies Claims and Equity Interests into five (5) separate Classes. The following Classes are treated as unimpaired under the Plan:

(a) Class I (Priority Non-Tax Claims)

12. Since the Claims included in Class I are not impaired by the Plan, the Holders thereof are conclusively presumed to have accepted the Plan and are not entitled to vote on the Plan pursuant to § 1126(f) of the Bankruptcy Code.

13. The following Classes of Claims and Equity Interests are treated as impaired under the Plan:

(a) Class II Secured claims of Ray Valdez, Seminole County Tax Collector

(b) Class III Unsecured claims in excess of \$1,000.00

(c) Class IV Unsecured claims equal to or less than \$1,000.00

14. The only Classes voting on the Plan are Classes II, III and IV. The Court finds that the Creditors in Class II, III and IV have overwhelmingly accepted the Plan in the requisite number and amount required under Section 1126 of the Bankruptcy Code. Class II had one creditor who voted in favor of the Plan. Of the claims in Class III who were entitled to vote 99.75% voted to accept the Plan. Of the Claims in Class IV entitled to vote 97.5% voted to accept the Plan.

15. At the Confirmation Hearing, counsel for the Debtor advised the Court and all parties of various aspects of the Plan and the events leading up to the formulation of the Plan, including, for example, the Debtor's extensive efforts to obtain a new financing, the feasibility of the Plan, the absence of any meaningful alternative to the transactions contemplated by the Plan, the Debtor's current financial condition, the likely effect of liquidation upon the Creditors, Holders of Equity Interests and other interested parties, and the means for implementing the treatment of and distributions to Creditors and Holders of Allowed Administrative Claims, Priority Tax Claims, Priority Claims and Unsecured Claims pursuant to the Plan. The Court finds that these statements were made in open Court and in the presence of numerous Creditors, none of whom objected to these statements of the underlying facts, notwithstanding ample opportunity to do so. The Court further finds that the statements and comments of counsel for the Debtor in support of the Plan were un rebutted. The Debtor's counsel's statements were supported by and

consistent with the entire record of the Chapter 11 case over which this Court has presided from the outset.

16. In further support of Confirmation of the Plan, at the Confirmation Hearing, counsel for the Debtor proffered (without objection) the testimony of Mr. Ripper, regarding the feasibility of the Plan and the further performance of the Debtor. In addition, Mr. Ripper, himself, testified. Although Mr. Ripper was present in the Courtroom, no party objected to the proffer of his testimony. BellSouth had an opportunity to cross-examine Mr. Ripper. In particular, the unrebutted testimony and proffered testimony of Mr. Ripper established that the Debtor and the Reorganized Debtor have the ability and economic wherewithal to perform its financial and other obligations, if any, on and after the Effective Date. The Court hereby accepts the proffered testimony of Mr. Ripper and his testimony and finds that such testimony supports the feasibility of the Plan under Section 1129(a)(11) of the Bankruptcy Code.

17. The Plan, the statements of counsel, the proffered testimony, testimony and the entire record reveal that the transactions contemplated by the Plan and the Stock Purchase Agreement will provide a significant benefit to all Creditors and Holders of Equity Interests and will provide for payments to be made on account of Allowed Administrative Claims, Priority Claims, Priority Tax Claims, Secured Claims, and Unsecured Claims.

18. The Court finds that, absent the transactions contemplated by the Plan, only two alternatives remain: the dismissal of the Debtor's Chapter 11 case or the conversion of the Debtor's Chapter 11 case under Chapter 7. The Court finds that only through the Plan will the Unsecured Creditors of the Debtor realize anything of meaningful economic value. Moreover, the Court finds that any further delays of the Confirmation Hearing or of confirmation will jeopardize the viability of the Debtor and therefore the realization of a return by Unsecured Creditors.

19. The Court hereby finds that the Debtor and Phoenix International Industries, Inc. ("Phoenix") have each acted in good faith in connection with the formulation and negotiation of the Plan and the various documents and agreements related thereto, and the negotiation, execution and implementation of the Letter of Intent Agreement ("LOI") and the other Plan Documents to which they are a party. Without limiting the foregoing, the LOI has been negotiated in good faith, at arm's-length, and not be any means forbidden by law.

20. The Court hereby finds that the Debtor's execution of the LOI was and continues to be appropriate and in the best interests of the Debtor, its Creditors, the Holders of Equity Interests and the Estate. The offer of Phoenix, as set forth in the LOI, is not only the highest and best offer but also no other prospective purchasers bid or offered to purchase the Debtor or its assets although a reasonable opportunity upon sufficient notice to all interested parties was provided.

21. The Court finds that the Plan and this Confirmation Order, including without limitation the related provisions of Article IX of the Plan, as amended in the Second Amendments and clarified at the Confirmation Hearing, and the discharge, limitation of liability, and other related provision of Articles V(F) and IX of the Plan, are binding upon any and all Unsecured Creditors and Holders of Equity Interests except Sprint Florida and the prepetition claim of BellSouth as hereinafter set forth and that any and all Unsecured Creditors and Holders of Equity Interests received sufficient and proper notice, actual or constructive, of the Plan and this Confirmation.

22. With respect to Sprint Florida's prepetition claim as set forth in Article IX of the Plan, as amended, the Reorganized Debtor and Sprint Florida have entered into a new contract in which the Reorganized Debtor has agreed to pay the outstanding balance owed to Sprint Florida by the Debtor prior to the Petition Date commencing thirty (30) days after the Effective Date. Until such time, the Debtor shall continue to pay Sprint Florida \$12,500 weekly in accordance with the Court's Second Preliminary Order on Sprint-Florida, Inc.'s (i) Motion for Relief From the Automatic Stay, and, in the Alternative, Adequate Protection and/or Adequate Assurance of Payment and (ii) Motion to Shorten Time Within Which to Assume or Reject Executory Contract, entered on September 21, 1998 (Doc. No. 124).

23. The Court further finds that all of the discharge, limitation of liability, and other related provisions of the Plan, including those set forth in Articles (V)(F) and IX

of the Plan, as amended, are fair, equitable, reasonable and proper, are in the best interests of the Debtor's Estate and Creditors and Holders of Equity Interests, and are a necessary and material condition precedent to Phoenix's willingness to close the transactions contemplated by the LOI and the Plan.

24. The Court finds that the Debtor has entered into and agreed to consummate a compromise with the Telscape USA, Inc. ("Telscape") and MSN Communications, Inc. and American Digital Networks, Inc. ("the Telscape Group Settlement"). The Court specifically acknowledges and approves the terms of the settlement between the Debtor, on the one hand, and the Telscape Group, on the other hand, pursuant to which the Telscape Group shall be withdraw its objection to confirmation of the Debtor's Plan and be deemed to have an Allowed Administrative Expense Claim in the amount of \$42,500.00 and Telscape and MSN shall be released form any claim under bankruptcy law or nonbankruptcy law the Debtor or American Digital Networks, Inc. ("ADNI") has or had from the beginning or time until the entry of this Order and TCCF and ADNI shall be released from any claim under bankruptcy law or nonbankruptcy law that Telscape or MSN has or had against the Debtor and ADNI from the beginning of time until the entry of this Order.

25. Given (i) the risks, costs and delays that would result from continued litigation with the with the Telscape Group, (ii) the impact upon the Debtor's ability to confirm and consummate the plan by virtue of the Telscape unsecured claim of

approximately \$1.9 million (approximately \$1.4 million of which is asserted as a postpetition claim), the Debtor's compromise and settlement with the Telscape Group under the Telscape Settlement Agreement is fair, equitable and reasonable and is in the best interests of the Debtors's Estate and Creditors and Holders of Equity Interests.

26. The Court finds that the Debtor has entered into and agreed to consummate a compromise with Utilicore Corporation ("Utilicore"). Under the compromise, the Debtor will assign its unbilled accounts receivables generated under the Debtor's agreement with Utilicore and Utilicore will waive its asserted postpetition claim against the Debtor of \$621,629.30. Given the risks, costs and delays and impact on confirmation of the Debtor's Plan that would result from continued litigation with Utilicore, the Debtor's compromise and settlement with the Utilicore is fair, equitable and reasonable and is in the best interests of the Debtors's Estate and Creditors and Holders of Equity Interests. Prior to the Effective Date the Debtor shall file proof of the posting of the bond contemplated by the agreement with BellSouth.

27. The Court finds that the Debtor has entered into and agreed to consummate a compromise with BellSouth on its Motion for the Allowance and Payment of Administrative Expense. On April 16, 1999, BellSouth filed its motion and requested the award and payment of \$828,791.81 ("BellSouth's Postpetition Claim") for services arising after the Petition Date. On May 13, 1999, the BellSouth and the Debtor announced in open court a settlement in which they agreed to a post-petition claim of

\$437,500 for which the Debtor agreed to post a bond in the face amount of the agreed post-petition claim of BellSouth. BellSouth's sole recourse on account of BellSouth's Postpetition Claim shall be the bond. In exchange, the Debtor agreed to compromise its claim against BellSouth for billing disputes between the Petition Date and May 7, 1999 relating solely to excess charges associated with 1FB lines and for the imposition of common block charges for services the Debtor did not receive. No other component of the Debtor's claim against BellSouth for postpetition damages was compromised. Given the risks, costs and delays and impact on confirmation of the Debtor's Plan that would result from continued litigation with the with BellSouth, the Debtor's compromise and settlement with BellSouth is fair, equitable and reasonable and is in the best interests of the Debtors's Estate and Creditors and Holders of Equity Interests.

28. The Court also finds that, pursuant to 11 U.S.C § 1123(b)(3) and Bankruptcy Rule 9019(a), the Debtor has demonstrated that each of the other compromises and settlements reflected or referenced in the Plan, or announced by the Debtor's counsel at the Confirmation Hearing, is fair, equitable, reasonable and proper and is in the best interests of the Debtor's Estate and Creditors and Holders of Equity Interests.

29. On March 18, 1999, the Debtor filed a Complaint against BellSouth under 28 U.S.C § 157(b)(2)(C), seeking monetary damages for BellSouth's breach of the Agreement Between BellSouth Telecommunications, Inc. and the Telephone Company

of Central Florida Regarding the Sale of BST's Telecommunications Services to Reseller for the Purpose of Resale ("the Agreement") based upon the filing of a proof of claim by BellSouth on August 17, 1998 in the amount of \$388,098.76 ("BellSouth's Prepetition Claim"). *See, Telephone Company of Central Florida, Inc. v. BellSouth Telecommunications, Inc., Adversary No. 99-65.*

30. BellSouth's Prepetition Claim represents sums claimed to be due under the Agreement from the Debtor prior to the Petition Date. The Court finds and concludes the Agreement is an executory contract under 11 U.S.C. § 365.

31. With respect to BellSouth's Prepetition Claim, the Court has retained jurisdiction in the Plan under Article X to, among other things, issue any order, determine all claims and adjudicate any adversary proceeding or contested matter pending on the Confirmation Date. Additionally, in the Second Amendments, the Debtor amended the Plan to provide that Article III's treatment of executory contracts would not apply to BellSouth and the Agreement. Instead, the Second Amendments provided in Article IX § F of the Plan that until the entry of a final order in Adversary Proceeding No. 99-65, the Debtor shall not assume or reject the Agreement.

32. In connection with BellSouth's Postpetition Claim, the Court determined with the agreement of BellSouth and the Debtor that the Court would convene an evidentiary hearing on May 13, 1999 to determine only the amount of BellSouth's Postpetition Claim prior to the Confirmation Hearing, based upon BellSouth's

representation that it needed approximately 180 days to prepare for a trial on the Debtor's counterclaims, the Court's inability to accommodate a resolution of all issues associated with the Debtor's Counterclaims and BellSouth's claims prior to the Confirmation Hearing and the Debtor's deteriorating cash flow position.

33. The Debtor contends, with respect to BellSouth's Prepetition Claim, that it is not in default and that its prepetition billing disputes alone, without regard to its counterclaims, exceed BellSouth's Prepetition Claim. BellSouth offered no evidence to the contrary. According to the Debtor, until the resolution of the Debtor's counterclaims, the Court cannot enter an order approving the assumption of the Agreement under 11 U.S.C. § 365(b). Moreover, the two bases for petitioning the Florida Public Service Commission ("the PSC") were to (a) negotiate and arbitrate a new interconnection agreement in accordance with 47 U.S.C. § 252 and (b) to obtain a determination by the PSC whether BellSouth had breached the Agreement by not providing ESSX services in accordance with the Agreement.

34. On May 4, 1999, the Court entered its Order Dissolving Injunction and Establishing Adequate Protection ("the Adequate Protection Order"). In the Adequate Protection Order, the Court required, among other things, the Debtor to pay BellSouth \$30,000.00 by wire transfer every Friday until further order of this Court.

35. Mr. Ripper testified that the Debtor's presence in bankruptcy inhibited, if not virtually eliminated, the Debtor's ability to increase revenues or borrow money. Mr.

Ripper also testified that the Debtor's cash flow situation was approaching a perilous state and that the Debtor would not survive without confirmation of the Plan, the six (6) month delay requested by BellSouth to adjudicate the Debtor's counterclaims against BellSouth. However, according to Mr. Ripper, the transactions contemplated by the Plan will enable the Debtor, as the Reorganized Debtor, to make any payments required to be made under 11 U.S.C. § 365(b), in the event BellSouth's Prepetition Claim exceeds the Debtor's counterclaims, including billing disputes, and will enable the Debtor to obtain new capital and increase revenues. Accordingly, the Court finds that based upon the retention of jurisdiction provision in Article X of the Plan, the agreement of BellSouth and the Debtor to resolve all claims in Adversary Proceeding No. 99-65 after the Confirmation hearing, the possibility of the approval by the PSC of a new interconnection agreement under 47 U.S.C. § 252 prior to the entry of a final order in Adversary Proceeding No. 99-65, the Debtor's ability to provide adequate assurance of payment pending a resolution of Adversary Proceeding No. 99-65 and the Debtor's current financial condition, the Court finds that Article X § F of the Second Amendments is approved and the Court will not enter an order authorizing or requiring the assumption or rejection of the Agreement until the Court has entered a Final Order on the Debtor's counterclaims against BellSouth in Adversary Proceeding No. 99-65.

36. With respect to the requirements of 11 U.S.C. § 1129(a) as applicable to the Plan, the Court finds as follows:

a. Copies of the Plan, the Amended Disclosure Statement, the First Amendments, the Ballot and the Amended Disclosure Statement Order were mailed to all appropriate Creditors and Holders of Equity Interests of the Debtor and parties in interest as shown on the Court's service list for this case, in accordance with this Court's orders. The Court hereby expressly finds that (i) timely and proper notice of the Confirmation Hearing and the time fixed for filing objections to and Ballots on the Plan was given to all appropriate Creditors and Holders of Equity Interests of the Debtor and all parties in interest, (ii) such notice was adequate and sufficient to notify all appropriate Creditors and Holders of Equity Interests of the Debtor and all parties in interest of the Confirmation Hearing and the objection and voting deadlines as to the Plan, and (iii) such notice complied in all respects with the procedural orders of this Court, the Bankruptcy Code, the Bankruptcy Rules, including without limitation Bankruptcy Rules 2002, 3018, 3019 and 9006, and the Local Rules, and otherwise satisfied the requirements of due process.

b. The Debtor has acted in good faith and complied in all respects with Section 1125 of the Bankruptcy Code, Bankruptcy Rules 3017, 3018, and 3019, all procedural orders of this Court, all other applicable provisions of the Bankruptcy Code and all other applicable laws, rules and regulations.

c. The Plan, as amended, complies with each of the applicable provisions of Title 11 of the United States Code, including, without limitation, the

provisions of 11 U.S.C. §§ 1122 and 1123.

d. As required by Section 1129(a)(2) of the Bankruptcy Code, the Debtor, as the proponent of the Plan, has complied with the applicable provisions of Title 11 of the United States Code. Without limiting the generality of the foregoing and by way of example, the Debtor has complied with the disclosure and solicitation requirements of Sections 1125 and 1126 of the Bankruptcy Code. Further, the Court expressly finds that the Amended Disclosure Statement and the Plan, as amended, contain adequate information for purposes of 11 U.S.C. §1125, and that no further disclosure is required by the Debtor in connection with the Plan.

e. The Plan, as amended, has been proposed in good faith and not by any means forbidden by law.

f. The identify and affiliations of all persons who are to serve as directors or officers of the Reorganized Debtor or a successor to the Debtor under the Plan on the Effective Date have been fully disclosed, and the appointment of such persons to such offices, or their continuance therein, is equitable and is consistent with the interests of the Creditors and Holders of Equity Interests and with public policy.

g. The identify of, and the nature of any compensation for, any insiders that will be employed or retained by the Reorganized Debtor have been disclosed.

h. The Debtor has not proposed any rate change in the Plan over

which any governmental regulatory commission now has, or will have after Confirmation of the Plan, jurisdiction over any rates of the Debtor or the Reorganized Debtor.

i. With respect to each impaired Class of Claims or Equity Interests, each Holder of a Claim or Equity Interest of such Class (i) has accepted the Plan or (ii) will receive or retain under the Plan on account of such Claim or Equity Interest property of a value, as of the Effective Date of the Plan, that is not less than the amount that such Holder would so receive or retain if the Debtor were liquidated under Chapter 7 of Title 11 of the United States Code on such date.

j. Except to the extent that the Holder of a particular Claim has agreed to a different treatment of such Claim, the Plan, as amended, provides that, with respect to a Claim of a kind specified in 11 U.S.C. § 507(a)(1) or § 507(a)(2), on the 10<sup>th</sup> day after the Effective Date of the Plan, the Holder of such Claim will receive on account of such Claim cash equal to the Allowed Amount of such Claim.

k. Except to the extent that the Holder of a particular Claim has agreed to a different treatment of such Claim, the Plan provides that, with respect to a Claim of a kind specified in 11 U.S.C. §§ 507(a)(3)-(7), on the 10<sup>th</sup> day after the Effective Date of the Plan, the Holder of such Claim will receive on account of such Claim cash equal to the Allowed Amount of such Claim.

l. Except to the extent that the Holder of a particular Claim has agreed

to a different treatment of such Claim, the Plan provides that, with respect to a Claim of a kind specified in 11 U.S.C. §§ 507(a)(8), on the 10<sup>th</sup> day after the Effective Date of the Plan, the Holder of such Claim will receive on account of such Claim deferred cash payments, over a period not exceeding six years after the date of assessment of such Claim, of a value, as of the Effective Date, equal to the Allowed Amount of such Claim.

m. All impaired Classes of Claims have accepted the Plan, determined without including any acceptance of the Plan by any insider holding a Claim or Equity Interest of such Class.

n. Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor, the Reorganized Debtor, or any successor thereof under the Plan. The Debtor has demonstrated the likelihood that it and the Reorganized Debtor will be able to meet their respective financial and other obligations under the Plan. Accordingly, the Plan is feasible.

o. All fees payable under 28 U.S.C. § 1930 through the Effective Date, including as to any funds disbursed by the Debtor to the Creditors Trust Trustee, shall be paid by the Debtor on the 10<sup>th</sup> day after the Effective Date of the Plan.

p. The Debtor has no "retiree benefits" (as such term is defined in Section 1114 of the Bankruptcy Code) payable pursuant to 11 U.S.C. §1114.

q. The Court finds that the Second Amendments, including, without

limitation, to the Plan as to the Creditors Trust, and to Article III and IX of the Plan, and the Plan, as so modified, meet the requirements of Sections 1122 and 1123 of the Bankruptcy Code, and no further or additional solicitation is appropriate or necessary.

r. With respect to Confirmation of the Plan, all other requirements of 11 U.S.C. §1129 have been met.

The Court having made the above findings, it is, accordingly:

ORDERED, ADJUDGED AND DECREED that the findings of fact set forth above in this Confirmation Order be, and the same hereby are, ratified and adopted as findings of this Court and are incorporated herein. It is further

ORDERED, ADJUDGED AND DECREED that to the extent any of the findings of fact set forth above are deemed to be conclusions of law, then such findings of fact are hereby confirmed as conclusions of law. It is further

ORDERED, ADJUDGED AND DECREED that the Plan (as modified herein and on the record at the Confirmation Hearing) be, and the same hereby is, confirmed in all respects. It is further

ORDERED, ADJUDGED AND DECREED that the Debtor is authorized and directed to take all such steps as may be necessary to effectuate and implement the Plan, including, without limitation, the execution and delivery of all instruments of transfer and other documents (both before and after the Closing) necessary to consummate the LOI and the transactions contemplated thereby and the various other documents, agreements,

and instruments contemplated by the Plan and the various settlements, agreements and compromises referenced therein, including without limitation the Telscape Group Settlement Agreement, Utilicore and BellSouth. It is further

ORDERED, ADJUDGED AND DECREED that the Debtor and/or the Reorganized Debtor, as the case may be, and their directors, officers and agents are hereby authorized to enter into, execute, deliver, file and/or implement the documents and instruments substantially consistent therewith or incidental thereto and any amendments, supplements or modifications to such documents as may be appropriate, and to take such other steps and perform such other acts as may be necessary to implement and effectuate the documents, the Plan, all other related instruments and documents and this Confirmation Order, and to satisfy other conditions precedent to the implementation and effectiveness of the Plan. It is further

ORDERED, ADJUDGED AND DECREED that the form and substance of the LOI and the transactions contemplated thereby are hereby approved in all respects. After the date of entry of this Confirmation Order, the Debtor and Phoenix may modify or amend the LOI filed with this Court as they deem necessary to consummate the Closing thereunder without further Court approval; provided, however, that no such modification or amendment shall change the treatment proposed to any Class of Creditors or Equity Interests under the Plan. It is further

ORDERED, ADJUDGED AND DECREED that, on the Effective Date, the

Reorganized Debtor shall be revested with all of the assets free and clear of any and all Liens, Debts, obligations, Claims, Liabilities, Equity Interests, and all other interests of every kind and nature except BellSouth's Prepetition Claim and Sprint Florida's prepetition claim as set forth in Article IX of the Plan, as amended. It is further

ORDERED, ADJUDGED AND DECREED that, on the Effective Date, all of the Existing and Outstanding Common Voting Stock and Nonvoting Stock shall be deemed cancelled, annulled, extinguished and surrendered without any further action by any party and shall no longer be of any force and effect. It is further

ORDERED, ADJUDGED AND DECREED that the Board of Directors of the Debtor shall take such action as may be necessary to cause the charter of the Debtor to be amended and restated to contain the provisions required (a) under the Bankruptcy Code with respect to the Reorganized Debtor Common Stock; (b) by the Plan, the LOI or this Confirmation Order. Such charter, as amended and restated in accordance herewith and with the Plan, be, and the same hereby is, approved. It is further

ORDERED, ADJUDGED AND DECREED that the issuance of the Reorganized Debtor Common Stock to Phoenix under the Plan satisfies the requirements of Section 1145(a)(1) of the Bankruptcy Code and is, therefore, exempt from registration under federal and state securities laws. The Reorganized Debtor Common Stock may be freely transferred and all resales and subsequent transactions for the Reorganized Debtor Common Stock are exempt from registration under federal and state securities laws

unless the holder is an "underwriter" with respect to such securities. It is further

ORDERED, ADJUDGED AND DECREED that, pursuant to Section 1146(c) of the Bankruptcy Code, the making or delivery of an instrument or instruments of transfer, any or all of which include the revesting, transfer and/or the sale of any real or personal property or any direct or indirect interest therein, including without limitation, (a) any transfers hereafter made in consummation of, or heretofore made in anticipation of the Confirmation and consummation of, the Plan, and (b) all documents shall not be taxed under any law imposing any recording, registration or stamp tax or fee or any similar tax or fee, including any applicable transfer taxes or fees and mortgage recording taxes or fees. It is further

ORDERED, ADJUDGED AND DECREED that George E. Mills, Jr. be, and hereby is, appointed as the Creditors Trust Trustee. It is further

ORDERED, ADJUDGED AND DECREED that the Creditors Trust Assets shall vest in the Creditors Trust free and clear of any and all Liens, Debts, Obligations, Claims, Liabilities, Equity Interests, and all other interests of every kind and nature with the exception of 10% of the net proceeds (after costs, attorney's fees and BellSouth offsets) of the Debtor's claims against BellSouth which have been assigned to Creditors Trust and shall be vested in the Creditors Trust upon the entry of a final order in Adversary Proceeding 99-65. It is further

ORDERED, ADJUDGED AND DECREED that the acceptance by the Creditors

Trust Trustee of the Creditors Trust Agreement shall establish the Creditors Trust in accordance with the terms of the Plan. The form and substance of the Creditors Trust Agreement attached as Exhibit A to this Order is hereby approved in all respects. After the date of the entry of this Confirmation Order, the Debtor and the Creditors Trust Trustee may modify or amend the Creditors Trust Agreement filed with this Court as they deem necessary without further Court approval; provided, however, that no such modification or amendment shall change the treatment proposed to any Class of Creditors or Equity Interests under the Plan. It is further

ORDERED, ADJUDGED AND DECREED that, to the extent necessary to effectuate the Plan, the Creditors Trust Agreement or this Confirmation Order, George E. Mills, Jr. in his capacity as Creditors Trust Trustee, is hereby authorized and empowered to execute any instruments or documents necessary to create or implement the Creditors Trust in the name and place of the Debtor. It is further

ORDERED, ADJUDGED AND DECREED that any and all funds or assets in the Creditors Trust shall be held in an irrevocable trust for distribution to the Holders of Allowed Unsecured Claims in Class III. Such distributions shall be made in accordance with the procedures and priority set forth in Article V of the Plan and the terms of the Creditors Trust Agreement. Once funds or assets are deposited into the Creditors Trust, they shall no longer be Property of the Debtor or the Reorganized Debtor or any other Person or Entity (including Phoenix) and none of the Debtor, the Reorganized Debtor or

any other Person or Entity shall have any claim to said funds or assets. All funds or assets in the Creditors Trust shall (a) be held in trust as set forth above, (b) not be Property of the Estate in this or any subsequent proceeding in which the Debtor or its successors or assigns may be a debtor under the Bankruptcy Code, and (c) be protected from, and not be subject to, the Claims of any Creditors of, or Holders of Equity Interests in, the Debtor or the claims of any creditor of the Reorganized Debtor. It is further

ORDERED, ADJUDGED AND DECREED that all Unsecured Claims, including BellSouth's Prepetition Claim, provided the Agreement with BellSouth has not been assumed or BellSouth's Prepetition Claim has not been offset against an award of damages against BellSouth in Adversary Proceeding No. 99-65 or other suit or cause of action, to the extent it is not paid in accordance with the assumption of the agreement or setoff against the damage award in favor of the Debtor. Class III Claims shall be and hereby are automatically channeled, transferred and attached solely and exclusively to the Creditors Trust, and the sole and exclusive right and remedy available to Unsecured Creditors and Class III Claims shall be the entitlement, in accordance with the Plan and the Creditors Trust Agreement, to assert Unsecured Claims and Class III Claims respectively, solely and exclusively against the Creditors Trust. It is further

ORDERED, ADJUDGED AND DECREED that, the transfer to, vesting in and assumption by the Creditors Trust the assets transferred to the Unsecured Creditor's Trust, as contemplated in the Plan and the Creditors Trust Agreement, shall, discharge,

release and extinguish all obligations and Liabilities of the Debtor and the Reorganized Debtor for and in respect of all Unsecured Claims and Class III Claims, except BellSouth's Prepetition Claim to the extent said claim is paid by the Reorganized Debtor if and when it assumes the Agreement of said claims otherwise setoff against an award of damages against BellSouth in favor of the Debtor. It is further

ORDERED, ADJUDGED AND DECREED, that the discharge provisions contained in Article IX of the Plan, as amended by the Second Amendments, shall not operate to discharge Phoenix from any obligation to make payments to the Creditors Trust in accordance with Article V of the Plan and the Order on debtor's Motion to Approve Agreement with Phoenix. It is further

ORDERED, ADJUDGED AND DECREED that the Debtor, the Reorganized Debtor and Phoenix shall be discharged on the Effective Date from any and all Claims, Debts, Liens, encumbrances, contract rights, rights of setoff, or Liabilities of any nature (whether contingent, fixed, liquidated, unliquidated, matured, unmatured or disputed) that arose from any acts or conduct of the Debtor occurring prior to the Effective Date, except Sprint Florida's prepetition claim and BellSouth's Prepetition Claim. It is further

ORDERED, ADJUDGED AND DECREED that the Plan and its provisions shall be and hereby are binding upon the Debtor, the Debtor's Estate, the Reorganized Debtor, any Entity acquiring Property under the Plan, all Creditors and all equity security holders

of the Debtor, whether or not the Claim or Equity Interest of such Creditors or equity security holders is impaired under the Plan and whether or not such Creditors or equity security holders have accepted the Plan, all creditors of Phoenix, all other parties in interest, and the respective successors and assigns of each of the foregoing. It is further

ORDERED, ADJUDGED AND DECREED that, except as otherwise expressly provided in the Plan or in this Confirmation Order, as of the Effective Date, the provisions of Article V(F) and IX of the Plan relating to discharge and limitation of liability shall apply and are hereby incorporated by referenced. It is further

ORDERED, ADJUDGED AND DECREED that any unexpired lease or executory contract with the exception of the Agreement with BellSouth, that has not been expressly assumed by the Debtor with this Court's approval on or prior to the date of entry of this Confirmation Order shall, as of the date hereof (subject to the occurrence of the Effective Date), be deemed to have been rejected by the Debtor. With the exception of the Agreement with BellSouth, this Confirmation Order shall constitute an order of this Court approving and authorizing the rejection of each such lease and contract, pursuant to Sections 365 and 1123(b)(2) of the Bankruptcy Code, as of the Effective Date. It is further

ORDERED, ADJUDGED AND DECREED that, unless otherwise ordered by this Court, and except as to any late-filed Claims and Claims resulting from the rejection of executory contracts or unexpired leases, if any, all objections to Unsecured Claims and

Class III Claims shall be filed with this Court on or before thirty (30) days following the Effective Date of the Plan (unless such period is extended by this Court upon proper motion). Objections to late-filed Claims and Claims resulting from the rejection of executory contracts or unexpired leases shall be filed on the later of (a) thirty (30) days following the entry of this order or (b) the date sixty (60) days after the Debtor, the Creditors Trust Trustee or other party in interest receives actual notice of the filing of such Claim. It is further

ORDERED, ADJUDGED AND DECREED that any Claim for damages other than by BellSouth arising by reason of the rejection of any executory contract or unexpired lease must be filed with this Court on or before the Bar Date for rejection damage Claims and served upon the Debtor and/or the Creditors Trust Trustee (as the case may be) or such Claim shall be forever barred and unenforceable against the Debtor, the Reorganized Debtor, or the Creditors Trust Trustee. Such Claims, once fixed and liquidated by this Court and determined to be Allowed Claims shall be Class III Allowed Claims. Any such Claims that become Disputed Claims shall be Class III Disputed Claims for purposes of administration of the Creditors Trust. The Plan is hereby deemed to constitute adequate and sufficient notice to Persons or Entities which may assert a Claim for damages from the rejection of an executory contract or unexpired lease of the Bar Date for filing a Claim in connection therewith. It is further

ORDERED, ADJUDGED AND DECREED that the Debtor's compromise and

settlement with the Telscape Group under the Telscape Group Settlement Agreement is hereby approved and the parties are authorized and directed to perform in accordance with its terms and conditions. It is further

ORDERED, ADJUDGED AND DECREED that the Debtor's compromise and settlement with Utilicore is hereby approved and the parties are authorized and directed to perform in accordance with its terms and conditions. It is further

ORDERED, ADJUDGED AND DECREED that the Debtor's compromise and settlement with BellSouth on account of its Postpetition Claim is hereby approved and the parties are authorized and directed to perform in accordance with its terms and conditions. It is further

ORDERED, ADJUDGED AND DECREED that all settlements, agreements and compromises provided for under the Plan or announced on the record at the Confirmation Hearing, including with the Telscape Group, BellSouth on account of its Postpetition Claim, Utilicore Corp. and all transactions, documents, instruments, and agreements referred to therein, contemplated thereunder or executed and delivered therewith, and any amendments or modifications thereto in substantial conformity therewith, are hereby approved, and the Debtor and the other parties thereto are authorized and directed to enter into them and to perform thereunder according to their respective terms. It is further

ORDERED, ADJUDGED AND DECREED, that the objections to confirmation

of the Plan by BellSouth, the United States Trustee, the Unsecured Creditors Committee, Sprint Florida and Telscape are overruled.

ORDERED, ADJUDGED AND DECREED that the Plan is confirmed in its entirety as if set forth in haec verba. The inclusion of decretal paragraphs in this Confirmation Order referring to specific provisions of the Plan or authorizing specific action by the Debtor shall not be construed to imply non-approval of other provisions or non-authorization of other actions. It is further

ORDERED, ADJUDGED AND DECREED that the failure to reference or discuss any particular provision of the Plan in this Confirmation Order shall have no effect on the validity, binding effect and enforceability of such provision and such provision shall have the same validity, binding effect and enforceability as every other provision of the Plan. It is further

ORDERED, ADJUDGED AND DECREED that, on the Effective Date of the Plan, the Debtor shall pay all quarterly fees due and owing to the United States Trustee through the Effective Date, including as to any funds disbursed by the Debtor to the Creditors Trust Trustee. It is further

ORDERED, ADJUDGED AND DECREED that, notwithstanding the entry of this Confirmation Order and the occurrence of the Effective Date, until this case is closed, this Court shall retain the fullest and most extensive jurisdiction of this case that is permitted under applicable law, including that necessary to ensure that the purposes and

intent of the Plan are carried out. Without limiting the generality of the foregoing, after Confirmation of the Plan and until this case is closed, this Court shall retain jurisdiction of this case as set forth in Article X of the Plan. It is further

ORDERED ADJUDGED AND DECREED that Confirmation of the Plan and entry of this Confirmation Order is not intended to and shall not be deemed to have any res judicata or other effect which would preclude or inhibit prosecution of any claims, including, but not limited to, the Debtor's counterclaims against BellSouth, following Confirmation of the Plan. It is further

ORDERED, ADJUDGED AND DECREED that a copy of this Confirmation Order shall be furnished to the parties set forth on the attached services list. Notice of the entry of this Confirmation Order shall be adequate if served by the Debtor on all Creditors, Holders of Equity Interests, and parties in interest in this case in accordance with Bankruptcy Rule 2002(f)(7).

DONE and ORDERED at Orlando, Florida this 9<sup>th</sup> day of ~~May~~ <sup>June</sup>, 1999.

  
\_\_\_\_\_  
ARTHUR B. BRISKMAN  
United States Bankruptcy Judge

I CERTIFY that a copy of the foregoing was sent by United States mail, first class to each person listed below this 9<sup>th</sup> day of ~~May~~ <sup>June</sup>, 1999.

  
\_\_\_\_\_  
Deputy Clerk

Copies furnished to:

Nicholas B. Bangos, Esq., Wolff, Hill, McFarlin & Herron, P.A., 1851 W. Colonial Drive, Orlando, FL 32804

United States trustee, 135 W. Central Blvd., Suite 620, Orlando, FL 32801

All creditors and interested parties (to be served by counsel for the Debtor)

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

In Re:

TELEPHONE COMPANY OF CENTRAL  
FLORIDA, INC.,

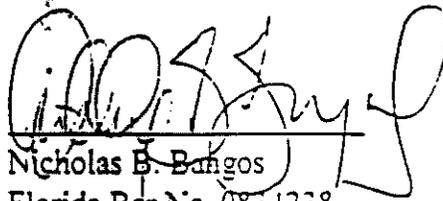
CASE NO. 98-04587-6B1

Debtor.

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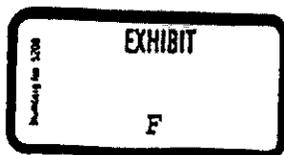
DEBTOR'S PLAN OF REORGANIZATION

Dated January 25, 1999



Nicholas B. Bangos  
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Wolff, Hill, McFarlin & Herron, P.A.  
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Attorneys for the Debtor-in-Possession



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The Telephone Company of Central Florida, A Florida corporation, the above-named Debtor and Debtor-in-Possession, has filed this Plan pursuant to Section 1121 of the Bankruptcy Code. Reference is made to the Debtor's Disclosure Statement distributed contemporaneously with the Plan for a discussion of the Debtor's business history, a summary of significant events that occurred during the pendency of the chapter 11 case and a summary of the Plan and certain related matters, including procedures for voting on the Plan. All Holders of Claims against and Equity Interests in the Debtor entitled to vote on the Plan are encouraged to read the Plan and the Disclosure Statement in their entirety before voting to accept or reject the Plan.

## ARTICLE I -- DEFINITIONS - INTERPRETATION

A. Definitions. For purposes of this Plan, the following definitions shall apply unless the context clearly requires otherwise:

Administrative Claim means any Claim for the payment of an Administrative Expense.

Administrative Claims Bar Date means, the last day established by the Bankruptcy Court for filing an application, request or motion for an Administrative Claim.

Administrative Expense means (a) any cost or expense of administration of the Chapter 11 Case that is allowed under §§ 503(b) or 507(a)(1) of the Bankruptcy Code, to the extent the party claiming any such cost or expense files an application, request or motion seeking such cost or expense in the Chapter 11 Case on or before the applicable Administrative Claims Bar Date, including (i) any actual and necessary costs and expenses of preserving the estate or operating the business of the Debtor in Possession (including wages, salaries, or commissions for services rendered) incurred after the Petition Date, (ii) any post petition cost, indebtedness or contractual obligation duly and validly incurred or assumed after by the Debtor in Possession in the ordinary course of its business, (iii) any claim granted administrative priority status by a Final Order of the Bankruptcy Court, and (iv) compensation or reimbursement of expenses of professionals awarded or allowed pursuant to an order of the Bankruptcy Court under § 330(a) or 331 of the Bankruptcy Code, 28 U.S.C. §§ 1911-30; and (v) any and all other costs or expenses of administration of the Chapter 11 Case that are allowed by a Final Order of the Bankruptcy Court; provided, however, that notwithstanding anything to the contrary contained herein, when used in the Plan, the term "Administrative Expense shall not include any Priority Tax Claim any transferred claim, any Disallowed Claim, or unless otherwise expressly provided in the Plan, any of the Claims in Classes I through IV".

Allowed when used with respect to a Claim or Interest, shall mean a Claim or Interest (a) proof of which was filed with the Bankruptcy Court on or before the Bar Date, and (i) as to which no objection has been filed by the Objection Deadline, unless such Claim or Interest is to be determined in a forum other than the Bankruptcy Court, in which case such Claim or Interest shall not become allowed until determined by Final Order of such other forum and allowed by Final Order of the Bankruptcy Court; or (ii) as to which an objection was filed by the Objection Deadline, to the extent allowed by a Final Order; (b) allowed by a Final Order; or (c) listed in the Debtor's schedules filed in connection with this Chapter 11 Case and not identified as contingent, unliquidated, or disputed.

Ballot means the ballot accompanying the Disclosure Statement upon which Holders of Impaired Claims or Impaired Equity Interests entitled to vote on the Plan shall indicate their acceptance or rejection of the Plan in accordance with the voting instructions.

Bankruptcy Code shall mean 11 U.S.C. §101 et seq., and any amendments thereto.

Bankruptcy Court shall mean the United States Bankruptcy Court, Middle District of Florida, Orlando Division, and any court having competent jurisdiction to hear appeals or certiorari proceedings therefrom.

Bankruptcy Rules mean the Federal Rules of Bankruptcy Procedure ("F.R.B.P."), as amended, and as supplemented by the Local Rules of Practice and Procedure of the Bankruptcy Court, as amended ("The Local Rules").

Bar Date shall mean either September 21, 1998 for non-governmental units and November 22, 1998 for governmental units, the dates fixed by order of the Bankruptcy Court by which proofs of Claim or Interest must be filed against the Debtor.

Business Day shall mean any day except Saturday, Sunday, or any legal holiday.

Chapter 11 Case shall mean the Chapter 11 reorganization case of the Debtor pending in the Bankruptcy Court, Case No. 98-04587-6B1 under the caption *In re Telephone Company of Central Florida, Inc.*

Claim shall mean, as defined in §101(5) of the Bankruptcy Code: (a) any right to payment from the Debtor, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable; secured or unsecured; or (b) any right to an equitable remedy for breach of performance if

such breach gives rise to a right of payment from the Debtor, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Class means a group of Claims of Interests substantially similar to each other as classified under this Plan.

Confirmation Date shall mean the date of entry of the Confirmation Order.

Confirmation Order shall mean the order entered by the Bankruptcy Court confirming the Plan.

Creditors' Trust shall mean the trust created by the Plan to receive funds and make distributions pursuant to the Plan.

Creditors' Trust Agreement means the trust agreement specifying the rights and obligations of the Creditors' Trust and the Creditors' Trust Trustee to be executed by the Debtor and the Creditors' Trust Trustee on the Effective Date.

Creditors' Trust Assets shall mean (a) the reserved funds to be deposited pursuant to the Plan by Phoenix and the proceeds of any Avoidance Claims set forth in Article V of the Plan and the Creditors' Trust Expenses; (b) any net income earned by the Creditors' Trust through the investment of the assets comprising the Creditors' Trust pursuant to the terms of the Creditors' Trust Agreement.

Creditors' Trust Expenses means all costs, taxes and expenses of or imposed on the Creditors' Trust including compensation of the trustee of the Creditors' Trust (to be established by agreement between Phoenix and the Debtor on or before the date of the Confirmation Hearing), employee compensation, insurance premiums, legal, accounting and other professional fees and expenses, overhead, disbursements, and expenses relating to the resolution of Class III Unsecured Claims and the prosecution of causes of action but excluding payments to Holders of Allowed III Claims on account of such Claims.

Debt has the meaning ascribed to such term under § 101(12) of the Bankruptcy Code.

Debtor means Telephone Company of Central Florida, Inc.

Debtor in Possession means Telephone Company of Central Florida, Inc. as Debtor in possession in the Chapter 11 Case.

Disallowed when used with respect to a Claim or Interest, shall mean a Claim or Interest to the extent 10 days has expired since it has been disallowed by order of the Bankruptcy Court, unless proper application for a stay of such order has been made within such 10 day period, in which case the Claim or Interest shall be disallowed 30 days after entry of the order disallowing such Claim or Interest, unless prior to the expiration of such period, a stay is obtained with respect to the order disallowing the Claim or Interest.

Disclosure Statement means the disclosure statement of the same date as this Plan that was filed by the Debtor and approved by the Bankruptcy Court pursuant to Bankruptcy Code Section 1125 and any amendments thereto, including all exhibits.

Disputed Claim means any Claim other than a Disallowed Claim that has not been Allowed by an order of the Bankruptcy Court and as to which (a) a Proof of Claim has been filed with the Bankruptcy Court or is deemed filed under applicable law or order of the Bankruptcy Court, and (b) an objection has been or may be timely filed or deemed filed under applicable law and any such objection has not been (i) withdrawn, (ii) overruled or denied by an order of the Bankruptcy Court, or (iii) granted by an order of the Bankruptcy Court. In addition to the foregoing, a Disputed Claim shall also mean a Claim that has not been Allowed by an order of the Bankruptcy Court, whether or not an objection has been or may be timely filed, if (a) the amount of Claim specified in the Proof of Claim exceeds the amount of any corresponding Claim scheduled in the Debtor's schedules, (b) the classification of the Claim specified in the Proof of Claim differs from the classification of any corresponding Claim scheduled in the Debtor's schedules or set forth in the Plan, (c) any corresponding Claim has been scheduled in the Debtor's schedules as disputed, contingent or unliquidated, (d) no corresponding Claim has been scheduled in the Debtor's Schedules, or (e) such claim is reflected as unliquidated or contingent in the Proof of Claim filed with respect thereof. To the extent an objection relates to the allowance of only a part of the Claim, such Claim shall be a Disputed Claim only to the extent of the objection. To the extent that the amount of the Claim specified in the Proof of Claim exceeds the amount of any corresponding Claim scheduled in the Debtor's schedules, such Claim shall be a Disputed Claim only to the extent of the amount specified in the Proof of Claim which is in excess of the amount of the Claim as scheduled.

Distribution Date when used with respect to each Claim or Interest shall mean the date on which distributions to the Holder of the Claim will be made in accordance with the Plan.

Effective Date shall mean: (a) if no stay of the Confirmation Order is in effect, then the date which a Business Day selected by the Debtor which is not more than thirty (30) days following the date of the Confirmation Order; or (b) if a stay of the Confirmation Order is in effect, then the date which is a Business Day selected by the Debtor which is not more than thirty (30) days following the date the stay is vacated or any appeal, rehearing, remand or petition for certiorari is resolved in a manner that does not reverse or materially modify the Confirmation Order.

Entity has the meaning ascribed to such term in § 101(15) of the Bankruptcy Code.

Equity Interest means the interests in the Debtor held by Holders of existing common stock, including any and all options, warrants or similar instruments for the acquisition of shares of existing common stock of the Debtor.

Final Order means (a) an order, judgment, ruling or other decree issued and entered by the Bankruptcy Court or by any state or other federal court as may have jurisdiction over any proceeding in connection with the Chapter 11 Case for the purpose of such proceeding, which order, judgment, ruling or other decree has not been reversed, vacated, stayed, modified or amended and to which (i) no appeal or petition for review, reargument, rehearing, reconsideration or certiorari has been taken and is pending and the time for filing such appeal or petition for review, reargument, rehearing, reconsideration or certiorari has expired, or (ii) such appeal or petition has been heard and dismissed or resolved and the time to further appeal or petition has expired with no further appeal or petition pending; or (b) a stipulation or other agreement entered into which has the effect of any such aforesaid order, judgment, ruling or other decree with like finality.

Governmental Authority means any agency, board, executive, court, commission, department, legislature, tribunal, instrumentality or administration of the United States, a foreign country or the States of Florida or any other State, provincial, territorial, municipal, local or other governmental Entity in the United States or the Public Utilities Commission of any State or a foreign country.

Holder means (a) as to any Claim, (i) the owner or holder of such Claim as such is reflected on the Proof of Claim filed with respect to such Claim, or (ii) if no Proof of Claim has been filed with respect to such Claim, the owner or holder of such Claim as shown on the schedules or books and records of the Debtor or as otherwise determined by order of the Bankruptcy Court, or (iii) if the owner or holder of such Claim has transferred the Claim to a third party and advised the Debtor or the Reorganized Debtor or Trustee of the Creditors

Trust in writing of such transfer and provided sufficient written evidence of such transfer, the transferee; and (b) as to any Equity Interest, the record owner or holder of such Equity Interest as shown on the stock register maintained by the Debtor or the Transfer Agent or as otherwise determined by the Bankruptcy Court.

Impaired means, when used with reference to a Claim or Equity Interest, a Claim or equity Interest that is impaired within the meaning of § 1124 of the Bankruptcy Code.

Initial Distribution Date when used with respect to each Claim or Interest shall mean as soon as practicable after the latest of (a) the Effective Date; (b) the date that all contested Claims or interests in any class or classes that are designated to participate pro rata in a distribution are either Allowed or Disallowed; (c) the liquidation of the Debtor's litigation claims; or (d) the date on which the distribution to the holder of the Claim would have been made in the absence of the Plan.

Liabilities means any and all liabilities, obligations, judgments, damages, charges, costs, Debts, and indebtedness of any and every kind and nature whatsoever, whether heretofore, now or hereafter owing, arising, due, payable, direct or indirect, absolute or contingent, liquidated or unliquidated, known or unknown, foreseen and unforeseen, in law, equity or otherwise, of or relating to the Debtor or any affiliate, subsidiary, predecessor, successor or assign thereof, or otherwise based in whole or in part upon any act or omission, transaction, event or other occurrence taking place prior to the Effective Date in any way relating to the Debtor or any affiliate, subsidiary, predecessor, successor or assign thereof, of any assets of the Debtor, the business or operations of the Debtor, the Chapter 11 Case, or the Plan, including any liabilities, obligations, judgments, damages, charges, costs, Debts, and indebtedness based in whole or in part upon any Claim of or relating to successor liability, transferee liability, or other similar theory; provided, however, that, when used in the Plan, the term "liabilities" shall not include any obligation of the Reorganized Debtor, Phoenix or the Trustee of the Creditors' Trust.

Objection Deadline means the date by which objections to Claims and Interests must be filed with the Bankruptcy Court; to wit, 30 days after the Confirmation Date, unless otherwise extended by the Bankruptcy Court.

Person means any person, individual, corporation, association, partnership, limited liability company, joint venture, trust, organization, business, government, governmental agency or political subdivision thereof, or any other entity or institution of any type whatsoever, including any "person" as such term is defined in § 101(41) of the Bankruptcy Code.

Petition Date shall mean May 26, 1998, the date on which the petition for relief was filed in the Debtor's Chapter 11 case.

Phoenix means Phoenix International Industries, Inc.

Plan shall mean this Chapter 11 plan of reorganization, as amended in accordance with the terms hereof or modified in accordance with the Bankruptcy Code.

Priority Non-Tax Claim shall mean a Claim entitled to priority pursuant to §§ 507(a)(3), 507(a)(4), 507(a)(5) or 507(a)(6) of the Bankruptcy Code.

Priority Tax Claim shall mean a Claim entitled to priority pursuant to § 507(a)(8) of the Bankruptcy Code.

Proof of Claim means a proof of claim filed with the Bankruptcy Court with respect to the Debtor pursuant to F.R.B.P. 3001, 3002, or 3003.

Pro Rata Share means, with respect to any distribution to the Holder of an Allowed Claim in a particular Class, a fraction, the numerator of which shall be the amount of such Holder's Allowed Claim and the denominator of which shall be the sum of all Allowed Claims and Reserved Claims in such Class, in each case determined as of the applicable Distribution Date.

Reorganized Debtor means the Telephone Company of Central Florida, Inc. on and after the Effective Date as reorganized pursuant to this Plan.

Reserved Claim means all Disputed Claims as of the applicable determination date in the full amounts listed in the Debtor's schedules, unless a Proof of Claim was timely filed with respect to any such Claim, in which case in the face amount of such proof of Claim, or unless any such Claim has been estimated by the Bankruptcy Court for the purpose of allowance pursuant to § 502(c) of the Bankruptcy Code, in which case in such estimated amount. Unless any order of the Bankruptcy Court estimating a Claim provides otherwise, the amount so estimated shall apply both for voting purposes and for purposes of computing reserved Claims. As used in the Plan, the term "Reserved Claims" shall not include any Disallowed Claims.

Unimpaired Claim means a Claim that is not impaired within the meaning of § 1124 of the Bankruptcy Code.

Unsecured Claim means a Claim other than an Administrative Expense, a Priority Non-Tax Claim, a Priority Tax Claim, or a Secured Claim.

B. Bankruptcy Code Definitions. Definitions in the Bankruptcy Code and Bankruptcy Rules shall be applicable to the Plan unless otherwise defined in the Plan. The rules of construction in Bankruptcy Code §102 shall apply to the Plan.

C. Interpretation. Unless otherwise specified, all section, article and exhibit references in the Plan are to the respective section in, article of, or exhibit to, the Plan, as the same may be amended, waived, or modified from time to time. The headings in the Plan are for convenience of reference only and shall not limit or otherwise affect the provisions hereof. Words denoting the singular number shall include the plural number and vice versa, and words denoting one gender shall include the other gender. As to contested matters, adversary proceedings, and other actions or threatened actions, this Plan and the Disclosure Statement shall not be construed as a stipulation or admission, but rather, as a statement made in settlement negotiations. Any capitalized term used in the Plan that is not defined in the Plan but that is defined in the Bankruptcy Code or in the Bankruptcy Rules shall have the meaning ascribed to that term in the Bankruptcy Code or the Bankruptcy Rules, as the case may be (with the Bankruptcy Code or the Bankruptcy Rules, as the case may be, controlling in the case of a conflict or ambiguity).

## ARTICLE II -- TREATMENT AND CLASSIFICATION OF CLAIMS AND INTERESTS

Claims against and Interests in the Debtor will be classified and treated as follows except to the extent otherwise agreed.

A. General Rules of Classification. Generally, a Claim or Interest is classified in a particular Class only to the extent the Claim or Interest qualifies within the description of the Class, and is classified in another Class or Classes to the extent any remainder of the Claim qualifies within the description of such other Class. If a Claim qualifies for inclusion in a more specifically defined Class, then the Claim shall be included only in the more specifically defined Class. Notwithstanding anything contained herein to the contrary, if a Claim is not allowed, then the Debtor is not bound by an classification made or implied herein.

B. Unimpaired.

Class I-Allowed Non-Tax Priority Claims. This class consists of Claims that are entitled to priority in accordance with § 507(a) of the Bankruptcy Code, other than

Administrative Claims and Priority Tax Claims. These Claims include Unsecured Claims for accrued employee wages, salaries, commissions, and other compensation earned within ninety (90) days before the Petition Date, to the extent of \$4,000.00 per employee. The Debtor is not aware of any significant Claims in this Class. Holders of such Claims shall receive on account of such Claims, cash equal to the amount of such Allowed Claims within thirty (30) days after the Effective Date.

C. Impaired. The following Claims and Interests are impaired:

Class II-Allowed Secured Claim of Ray Valdez, Seminole County Tax Collector. This Claim is based upon outstanding intangible property taxes. The Claim will be treated as a secured claim on the Debtor's interest in property and the Holder shall receive deferred cash payments over a period of twelve (12) months, with interest at the rate of eighteen percent per annum (18%). Payments on account of this Claim shall commence within thirty (30) days after the Effective Date.

Class III - Allowed General Unsecured Claims (in excess of \$1,000.00). The holders of Allowed General Unsecured Claims, whose claims arose from direct obligations or contracts with the Debtor, shall receive pro rata distributions through this Plan and the Creditors' Trust. Holders of Claims in this class shall receive a pro rata distribution of \$500,000. Upon the entry of the Confirmation Order, the Reorganized Debtor shall deposit \$100,000 in the Creditors' Trust and Holders of Allowed Unsecured Claims shall receive a pro rata distribution on the Initial Distribution Date. Every six (6) months thereafter for a period of two years from the anniversary of the Confirmation Date, the Reorganized Debtor shall Deposit \$100,000.00 in the Creditors' Trust to be distributed in four (4) consecutive pro rata distributions to Holders of Allowed Unsecured Claims in accordance with the provision of the Creditors' Trust.

Class IV- Unsecured Claims for less than \$1,000.00 ("Administrative Convenience Claims"). The Holders of Allowed Unsecured Claims whose Allowed Unsecured Claim does not exceed \$1,000.00 will receive a payment on such Claim in full satisfaction of such Allowed Unsecured Claim no later than sixty (60) days from the Effective Date of the Plan.

Class V -- Interest of Holders of Allowed Equity Interests. The Holders of Allowed Interest will have their Interests in the Debtor canceled and surrendered to the Reorganized Debtor.

D. Allowed Priority Tax Claims. Each holder of an Allowed Priority Tax Claim against the Debtors shall receive on account of such Claim, the amount of such

holder's Allowed Claim in accordance with § 1129(a)(9)(C) of the Bankruptcy Code in twelve (12) semi-annual installments, beginning with a payment of \$25,000.00 to be paid upon the entry of the Confirmation Order. Holders of Allowed Priority Tax Claims shall receive interest at the rate of eight percent per annum (8%).

E. Allowed Administrative Claims. Each holder of an Allowed Administrative Expense against the Debtors shall receive on account of such Claim, the amount of such Holder's Allowed Expense in one cash payment on the Initial Distribution Date, or shall receive such other treatment as agreed upon in writing by the Debtor and such Holder. All fees and charges assessed against the estate under Chapter 123, Title 28 United States Code, U.S.C. §§ 1911-1930, through the Confirmation Date, as determined by the Bankruptcy Court in the Confirmation Order, shall be paid on or before the Initial Distribution Date. The Creditors' Trust shall be responsible for any such fees and charges arising or accruing after the Confirmation Date from Distributions made by the Creditors' Trust under the Plan.

F. Impairment/Classification Controversies. If there is a controversy regarding the classification or impairment of a Claim or Interest, then such controversy shall be determined by the Bankruptcy Court after notice and a hearing.

### ARTICLE III -- EXECUTORY CONTRACTS AND UNEXPIRED LEASES

If the Bankruptcy Court has not previously entered an order approving assumption, rejection and/or assignment of leases and contracts, then the Confirmation Order shall constitute an order of the Bankruptcy Court approving all such assumptions, assignments, and rejections of executory contracts and unexpired leases as of the Petition Date, unless there is pending before the Bankruptcy Court on the Confirmation Date a motion to assume such executory contract or unexpired lease.

If an executory contract or unexpired lease is rejected, then the other party to the agreement may file a Claim for damages incurred by reason of rejection within such time as the Bankruptcy Court may allow or be forever barred. Such Claim shall be served upon the Debtor and the Creditors' Trust Trustee (as the case may be). In the case of rejection of employment agreements and leases of real property, damages are limited under the Bankruptcy Code. Such claims shall be deemed to be Class III claims for purposes of administration of the Creditors' Trust. The Plan shall constitute adequate and sufficient notice to Persons or Entities which may assert a Claim for damages from the rejection of an executory contract or unexpired lease of the Bar Date for filing a Claim in connection therewith.

To the extent any indemnification obligation of the Debtor (whether pursuant to its charter or by-laws, pursuant to agreement or to law) existing as of the Petition Date to any current or former, officer, director or employee of the Debtor constitutes an executory contract, the Debtor shall be deemed to have rejected such contract immediately before the Petition Date pursuant to § 365 of the Bankruptcy Code.

**ARTICLE IV – ACCEPTANCE OR REJECTION OF  
PLAN: EFFECT OF REJECTION BY ONE OR MORE CLASSES**

A. **Classes Entitled to Vote.** Each impaired Class of Claims or Interests shall be entitled to vote separately to accept or reject the Plan. An unimpaired Class of Claims or Interests shall not be entitled to vote to accept or reject the Plan.

B. **Class Acceptance Requirement.** A Class of Claims shall have accepted the Plan if it is accepted by at least two thirds in amount and more than one-half in number of the Allowed Claims of such Class that had voted on the Plan. A Class of Interests shall have accepted the plan if it is accepted by at least two thirds in amount of the Allowed Interests of such Class that had voted on the Plan. If any ballot is executed and timely filed by the Holder of an Allowed Claim or Interest but does not indicate acceptance or rejection of the Plan, then the ballot shall be deemed to be an acceptance.

C. **Cramdown.** If any impaired Class of Claims or Interests shall fail to accept the Plan in accordance with Bankruptcy Code §1129(a), then the Debtors reserve the right to request that the Bankruptcy Court confirm the Plan in accordance with Bankruptcy Code §1129(b).

**ARTICLE V – MEANS FOR IMPLEMENTATION OF PLAN**

A. **Continued Corporate Existence.** The Debtor shall continue to exist as the Reorganized Debtor, doing business under the name the Telephone Company of Central Florida, Inc. Its officers and directors shall be as follows:

Gerard Haryman, Chairman of the Board of Directors  
Elder N. Ripper, III, Board of Directors and President  
Andrea Welch, Board of Directors and Secretary

The Debtor will continue to exist after the effective date as a separate corporation in accordance with the laws of the state of Florida and pursuant to its By-Laws and Charter.

1. **By Laws and Charter.** The By-Laws and Charter of the Reorganized Debtor will be amended, as necessary, to include provisions required (a) under the Bankruptcy Code with respect to the Reorganized Debtor Common stock and (b) the provisions of the Debtor's Plan. Consistent with Section 1123(a)(6) of the Bankruptcy Code, the Reorganized Debtor's Charter shall, among other things, prohibit the issuance of nonvoting equity securities as part of the reorganization. The By-laws of the Debtor shall be amended as necessary and as requested by Phoenix to satisfy the provisions of the Plan. The Confirmation Order shall include appropriate language approving the Reorganized Debtor's Charter and the amended By-laws. The Reorganized Debtor's Charter and the amended By-laws shall be the Charter and By-laws governing the Reorganized Debtor on and after the Effective Date.

2. **Post-Effective Date Operations.** The property of the Debtor's estate will revert in the Debtor on the Effective Date. The Debtor will be allowed to operate its business and may use, acquire, and dispose of property free of any restrictions of the Bankruptcy Code. All property of the Debtor will be free and clear of all Claims in Interest, except as specifically provided in the plan.

3. **Recapitalization of the Reorganized Debtor.** On (or as soon as practicable following) the Effective Date, (a) all of the Equity Interests shall be deemed canceled, annulled, extinguished and surrendered without any further action by any party and shall no longer be of any force and effect, (b) the Reorganized Debtor Charter, which shall authorize the Reorganized Debtor Common Stock, shall be filed with the Office of the Secretary of State of Florida, (c) such shares of the Reorganized Debtor Common Stock as determined by Phoenix shall be issued for distribution to Phoenix.

B. **Means for Implementing Plan.** Phoenix has agreed to purchase 100% of the issued, outstanding, common voting stock of the Debtor. Phoenix proposes to pay no more than \$570,000 at Confirmation towards Holders of Administrative Expenses. Phoenix will also pay \$25,000.00 to claims entitled to Allowed Priority Tax Claims on the Effective Date and pay the balance of such Claims in accordance with 11 U.S.C. § 1129(a)(9)(C) by making semi-annual deferred cash payments. The Debtor estimates that the Holders of Allowed Tax Claims aggregate less than \$300,000.00. The Reorganized Debtor will also deposit \$100,000 into the Creditors' Trust upon the entry of the Confirmation Order and be obligated to make four (4) \$100,000 payments to the Creditors' Trust every six (6) months thereafter for two years. Holders of Allowed Unsecured Claims will be entitled to a pro rata distribution on account of such trust funds. In addition, to the extent any funds are recovered on account of any adversary proceeding pending to recover avoidance claims on the Confirmation Date or contemplated to be brought by the Unsecured Creditors' Committee in accordance with the Plan, if any, such funds shall be deposited in the

Creditors' Trust and distributed to Holders of Allowed Unsecured Claims on a pro rata basis.

C. The Creditors' Trust. On the Effective Date, the Debtor and the Trustee of the Creditors' Trust shall enter into an the Creditors' Trust Agreement. The Creditors' Trust Agreement shall also be in a form approved by the Bankruptcy Court. The Creditors' Trust Agreement shall establish the Creditors' Trust which shall be a distinct legal entity from the Debtor, the reorganized Debtor and Phoenix, each of which shall have no liability whatsoever for any obligations of the Creditors' Trust pursuant to the Plan, the Creditors' Trust or otherwise, and may qualify as a Qualified Settlement Fund pursuant to Internal Revenue Code § 468B. The Confirmation Order shall also contain appropriate language assigning and transferring Creditors' Trust assets to the Creditors' Trust and shall further provide that such assignment and transfer shall be effective without further action. Thereafter, neither the Debtor nor the Reorganized Debtor, but only Phoenix, shall have any further obligation to contribute any funds or assets to the Creditors' Trust or the Creditors' Trustee.

Any and all funds or assets in the Creditors' Trust shall be held in an irrevocable trust for distribution to the Holders of Allowed Unsecured Claims. Such distributions shall be made in accordance with the procedures set forth in the Article VI of the Plan and the terms of the Creditors' Trust Agreement and the Confirmation Order shall contain appropriate language to that effect. Once funds or assets are placed into the Creditors' Trust, they shall no longer be property of the Debtor, the Reorganized Debtor or any other Person or Entity (including Phoenix) and none of the Debtor, the Reorganized Debtor shall have claim to any such funds or assets. The Confirmation Order shall declare and provide that all funds or assets placed in the Creditors' Trust (including the Creditors' Trust assets) shall be (a) held in trust as set forth above, (b) not be property of the estate in this or any subsequent proceeding in which the Debtor or its successors or assigns may be a Debtor under the Bankruptcy Code, and (c) be protected from, and not be subject to, the Claims of any Creditors of, Holders of Equity Interests in, the Debtor or the Claims of any Creditor of the Reorganized Debtor or of Phoenix.

On the Effective Date, all Class III Allowed Unsecured Claims shall be channeled, transferred and attached solely and exclusively to the Creditors' Trust, and the sole exclusive right and remedy available to Class III Unsecured Claims shall be the entitlement, in accordance with the Plan and the Creditors' Trust Agreement, to assert Claims solely and exclusively against the Creditors' Trust and the Creditors' Trust Assets. The transfer to, vesting in and assumption by the Creditors' Trust of the Creditors' Trust Assets, as contemplated in the Plan and the Creditors' Trust Agreement shall, as of the Effective Date, discharge, release and extinguish all obligations and Liabilities of the Debtor and the Reorganized Debtor for and in respect of all Unsecured Claims. The Creditors' Trust shall

assume sole responsibility and liability for Class III Unsecured Claims and such Claims shall be paid from the Creditors' Trust Assets. The Confirmation Order shall contain appropriate language incorporating the foregoing and permanently enjoining any Holder of any Claim from taking any action in violation of Article IX of the Plan. The Confirmation Order will act as a full and complete discharge of all Claims, Debts, Liabilities and/or Interests arising from, relating to or in connection with all Claims, except to the extent that the Creditors' Trust Agreement provides a mechanism for the resolution of the payment thereof.

The Trustee of the Creditors' Trust shall have the power to hire and appoint persons and entities to assist the trustee in carrying out the provisions of the Plan and the Creditors' Trust Agreement and shall be entitled to compensation as approved by the Bankruptcy Court.

The Creditors' Trust shall terminate on the first Business Day following the completion of the payments set forth in the Plan and the duties as set forth in the Creditors' Trust Agreement.

D. Revesting of Assets. The property of the estate of the Debtor shall revert in the Debtor on the Effective Date, except as otherwise provided in the Plan, in order to permit the liquidation of additional assets as set forth in the Plan. As of the Effective Date, all property of the Debtor shall be free and clear of all Claims and Interests, except as specifically provided in the Plan.

E. Avoidance Actions. Allegations have been made by parties other than the Debtor that within one (1) year before the Petition Date, the Debtor made distributions of approximately \$1,000,000.00 to insiders of the Debtor and that these distributions are avoidable pursuant to 11 U.S.C. § 547(b) ("Avoidance Actions or Avoidance Claims"). The Debtor believes these distributions are not avoidable because the Debtor was not insolvent when the distributions complained of were made. However, based upon the nature of the allegations and the size of the distributions, the Debtor believes it is in the best interest of the Creditors of the Debtor to assign this cause of action to the Unsecured Creditors' Committee for investigation and prosecution. To the extent any recovery is received on account of the distributions, the funds received will be transferred to the Creditors' Trust and distributed to Creditors with Allowed Unsecured Claims in accordance with the provisions of the Trust and the Plan. The Debtor is not aware of any other avoidance actions in favor of the Debtor.

F. Limitations of Liability. The Debtor, the Reorganized Debtor, Phoenix and the Trustee for the Creditors' Trust and the agents, directors, officers, employees and professionals of the Debtor and Reorganized Debtor, Phoenix and the Creditors' Trust, including accountants and legal counsel (acting in such capacity) shall have no liability to

any entity for any act taken or omitted to be taken in connection with or related to the formulation, preparation, dissemination, implementation, confirmation or consummation of the initial Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document relating to, rising out of or in connection with the Plan, unless the liability of any entity that would otherwise result from any such act or omission was the result of gross negligence or willful misconduct.

**G. Securities Laws.** Pursuant to Section 1125(e) of the Bankruptcy Code, the transmittal of Plan solicitation packages (including Disclosure Statement and the Plan), the Debtor's solicitation of acceptances of the Plan, and the issuance and distribution of Reorganized Debtor Common Stock and any other securities pursuant to the Plan, and the Reorganized Debtor's and any other person's participation in such activities are not and will not be governed by or subject to any otherwise applicable law, rule or regulation governing the solicitation of acceptance or rejection of a plan of reorganization or the offer, issuance, sale or purchase of securities.

The issue of the stock in the Reorganized Debtor to Phoenix in accordance with the Plan may be exempt from registration under the Securities Act of 1933, as amended, by §1145(a)(1) of the Bankruptcy Code to the extent that it is in exchange for a claim against or an interest in the Debtor, or principally in such exchange and partly for cash or property. Section 1145(a)(1) does not, however, apply to subsequent sales of securities by persons who are "underwriters" as that term is defined in §1145(b)(1). Section 1145(b)(1) provides that, for purposes of §2(11) of the Securities Act, the term "underwriter" means, in addition to those persons who perform traditional underwriting activities, any person directly or indirectly controlling or controlled by the issuer of the securities, or any person under direct or indirect common control with such issuer. By defining the term "underwriter" to include affiliates of the issuer, subsequent sales by such affiliates of securities issued under a plan or reorganization are subject to the registration requirements of the Securities Act, unless another exemption for registration is available to the person who desires to effect such sale.

**H. Section 1146 Exemption.** Pursuant to Section 1146(c) of the Bankruptcy Code, the issuance, transfer or exchange of any security or the making or delivery of any instrument or transfer pursuant to, in implementation of or as contemplated by the Plan or any other document, or the revesting, transfer or sale of any real or personal property of, by or in the Debtor or the Reorganized Debtor pursuant to, in implementation of or as contemplated by the Plan or any other document, shall not be subject to or taxed under law imposing a stamp tax, transfer tax or similar tax or fee.

## ARTICLE VI – PROVISIONS GOVERNING DISTRIBUTION

A. Pro Rata Distribution. Unless otherwise provided in the Plan, for any Class of Claims or Interests that is impaired, the Holders of such Claims or Interests shall receive a Pro Rata Share of the property to be distributed to the Class under the Plan. If, and when, Distributed Claims or Interests in any such Class become Disallowed Claims or Interest, the Pro Rata Share to which each holder of an Allowed Claim or Interest in such Class is entitled, shall increase commensurately. Accordingly, the Trustee of the Creditors' Trust, in its sole discretion, shall have the right to make or direct the making of subsequent interim distributions to the Holders of Allowed Claims or Interests in such Class to reflect any increases in the Pro Rata Share. In any event, as soon as practicable after all Contested Claims or Interests in any Class receiving Pro Rata Shares have become either Allowed or Disallowed, an initial distribution shall be made to the Holders of Allowed Claims or Interests in such Class to account for any final adjustment in the Pro Rata Share of such Holders.

B. Cash Payments. Cash payments made pursuant to the Plan or the Creditors' Trust shall be in U.S. funds, by check drawn against a domestic bank, or by wire transfer from a domestic bank.

C. Delivery of Distributions. Distributions and deliveries to Holders of Allowed Claims and Interest shall be made at the addresses set forth on the proofs of Claim or Interest filed by such Holders (or at the last known addresses of such holders if no proof of Claim or Interest is filed or if the Debtor or the Trustee for the Creditors' Trust has been notified of a change of address). If any distribution to a Holder is returned as undeliverable, then no further distributions to such Holder shall be made unless and until the Trustee for the Creditors' Trust is notified of the Holder's then-current address, at which time all missed distributions shall be made to such Holder, without interest. All Claims for undeliverable distributions shall be made on or before the first anniversary of the Distribution Date. After such date, all unclaimed property shall revert to the Creditors' Trust, and the claim of any Holder with respect to such property shall be discharged and forever barred.

D. Time Bar to Cash Payments. Checks issued by the Debtors or the Creditors' Trust in respect of Allowed Claims shall be null and void if not cashed within ninety (90) days of the date of issuance thereof. Requests for reissuance of any checks shall be made directly to the Trustee of the Creditors' Trust by the Holder of the Allowed Claim with respect to which such check originally was issued. Any Claim in respect of such a voided check shall be made on or before the later of the first anniversary of the Distribution Date or ninety (90) days after the date of issuance of such check. After such date, all Claims in respect of void checks shall be discharged and forever barred.

**E. Transfer of Claim.** In the event that the Holder of any Claim shall transfer such Claim on or after the Effective Date, it shall immediately notify advise the Debtor, Reorganized Debtor or the Trustee of the Creditors' Trust, as the case may be, in writing of such transfer and provide sufficient written evidence of the transfer. The Reorganized Debtor or the Trustee of the Creditors' Trust, as the case may be, shall be entitled to assume that no transfer of any Claim has been made by any Holder unless and until the Reorganized Debtor or the Trustee of the Creditors' Trust, as the case may be, shall have received written notice to the contrary. Each transferee of any Claim shall take such Claim subject to the provisions of the Plan and to any request made, waiver, or consent given or other action taken hereunder and, except as otherwise expressly provided in such notice, the Reorganized Debtor or the Trustee of the Creditors' Trust, as the case may be, shall be entitled to assume conclusively that the transferee named in such notice shall be thereafter vested with all rights and powers of the transferor under the Plan.

**F. Class III Disputed Claims.** Each Holder of an Allowed Class III Unsecured Claims shall receive, on the Initial Distribution Date, or any other Distribution Date as the case may be, a cash distribution in the amount of such Allowed Unsecured Claim provided, however, if such Holder's Unsecured Claim has been bifurcated into an Allowed Unsecured Claim and a Disputed Claim because the amount of Claim specified on such Holder's Proof of Claim exceeded the amount of the corresponding Claim scheduled in the Debtor's Schedules, then such Holder's Disputed Claim shall be deemed an Allowed Unsecured Claim for distribution purposes on such Initial Distribution Date, or any other Distribution Date as the case may be, unless the Creditors' Trust Trustee files an objection to such Disputed Claim prior to the Initial Distribution Date, or other Distribution Date. At such time that such Disputed Claim becomes an Allowed Claim, the Holder of such Allowed Claim shall receive the distribution to which such Holder is then entitled under the Plan.

## **ARTICLE VII -- PROCEDURES FOR RESOLVING AND TREATING CONTESTED CLAIMS**

**A. Objection Deadline.** Unless extended by the Bankruptcy Court, the Debtor shall file any objections to Claims or Interest no later than thirty (30) days after the Confirmation Date.

**B. Prosecution of Objections.** The Debtor and the Reorganized Debtor shall have authority to file objections, litigate to judgment, settle, or withdraw objections to Disputed Claims or Interests. All professional fees and expenses incurred by the Debtor or the Creditors' Trust from and after the Confirmation Date shall be paid as provided in Article II hereof.

C. **No Distributions Pending Allowances.** No payments or distributions shall be made with respect to any Disputed Claim or Interest unless and until all objections to such Claim or Interest are resolved and such Claim becomes an Allowed Claim or Interest.

D. **Escrow of Allocated Distributions.** The Trustee for the Creditors' Trust shall withhold from the property to be distributed under the Plan, and shall place in escrow, amounts sufficient to be distributed on account of Contested Claims. As to any Contested Claim, upon a request for estimation by the Debtor or the Trustee for the Creditors' Trust, the Bankruptcy Court shall determine what amount is sufficient to withhold in escrow pending Disallowance of the Claim. The Debtor or Trustee for the Creditors' Trust shall also place in escrow any dividends, payments, or other distributions made on account of, as well as any obligations arising from, the property withheld in escrow pursuant hereto, to the extent such property continues to be withheld in escrow at the time such distributions are made or such obligations arise. If practicable, the Trustee for the Creditors' Trust may invest any cash it has withheld in escrow in a manner that will yield a reasonable net return, taking into account the safety of the investment.

E. **Distributions After Allowance.** Payments and distributions from escrow to each holder of a Disputed Claim, to the extent that such Claim ultimately becomes an Allowed Claim, shall be made in accordance with the provisions of the Plan governing the class of Claims to which the respective holder belongs. As soon as practicable after the date that the order or judgment of the Bankruptcy Court allowing such Claim becomes a Final Order, any property in escrow that would have been distributed prior to the date on which a Disputed Claim became an Allowed Claim shall be distributed, together with any dividends, payments, or other distributions made on account of, as well as any obligations arising from, the property from the date such distributions would have been due had such Claim then been an Allowed Claim to the date such distributions are made.

F. **Distributions After Disallowance.** If any property withheld in escrow remains after all objections to Disputed Claims of a particular Class have been resolved, then such remaining property, to the extent attributable to the Disputed Claims, shall be distributed as soon as practicable in accordance with the provisions of the Plan governing the class of Claims or Interests to which the Disallowed Claim or Interest belongs.

#### **ARTICLE VIII -- TRUSTEE FEES**

All fees payable under 28 U.S.C §1930, as determined by the Court at the hearing on confirmation of the Plan, will be paid on or before the Effective Date.

**ARTICLE IX - DISCHARGE, LIMITATION OF  
LIABILITY, GENERAL INJUNCTION AND CAUSES OF ACTION**

A. **Discharge of Claims and Termination of Equity Interests.** Except as otherwise expressly provided in the Plan or the Confirmation Order, the Confirmation Order shall operate as a discharge, pursuant to Section 1141(d) of the Bankruptcy Code, to the fullest extent permitted by applicable law, as of the Effective Date, of any and all Debts or Claims of any nature whatsoever against, and any Equity Interests in the Debtor or the Reorganized Debtor that arose at any time prior to the Effective Date, including any and all Claims for principal and interest, whether accrued before, on, or after the Petition Date. Without limiting the generality of the foregoing, on the Effective Date, the Debtor and the Reorganized Debtor, and their respective successors or assigns, shall be discharged from any Debt or Claim that arose prior to the Effective Date and from any and Debts and Claims of the kind specified in Section 502(g), 502(h), or 502(i) of the Bankruptcy Code, whether or not (a) a Proof of Claim based on such Debt or Claim was filed pursuant to Section 501 of the Bankruptcy Code, (b) a Claim based on such Debt is an Allowed Claim pursuant to Section 502 of the Bankruptcy Code, or (c) the Holder of a Claim based on such Debt has voted to accept the Plan. As of the Effective Date, except as otherwise expressly provided in the Plan or Confirmation Order, all Persons and Entities, including all Holders of a Claim or Equity Interest, shall be forever precluded and permanently enjoined to the fullest extent permitted by applicable law from asserting directly or indirectly against the Debtor, the Reorganized Debtor, the Creditors' Trust, or any of their respective successors and assigns, or the properties of any of them, any other or further Claims, Debts, rights, causes of action, remedies, liabilities or Equity Interests based upon any act, omission, document, instrument, transaction or other activity of any kind or nature that occurred prior to the Effective Date or that occurs in connection with implementation of the Plan, and the Confirmation Order shall contain appropriate injunctive language to that effect. The Holders of any canceled Equity Interest shall have no rights arising from or relating to such Equity Interests, or the cancellation thereof, except the rights, if any, provided in the Plan. In accordance with the foregoing, except as specifically provided in the Plan or confirmation Order, the Confirmation Order shall be a judicial determination of the discharge or termination of all such Claims, other Debts and Liabilities against, or Equity Interest in, the Debtor, pursuant to Sections 524 and 1141 of the Bankruptcy Code, and such Discharge shall void any judgment obtained against the Debtor at any time, to the extent that such judgment relates to a discharged or terminated Claim, Liability, Debt or Equity Interest. Notwithstanding the foregoing, if under the Plan the Creditors' Trust is obligated to make payments to Holders of Allowed Unsecured Claims, the Creditors' Trust shall remain obligated to make such payments.

**B. Exculpation from Liability.** The Debtor, the Reorganized Debtor, Phoenix, the Creditors' Trust Trustee and the agents, general partners, employees and professionals of the Debtor, the Reorganized Debtor, Phoenix, and the Creditors' Trust Trustee, including accountants and legal counsel (acting in such capacity) shall have no liability to any entity for any act taken or omitted to be taken in connection with or related to the formulation, preparation, dissemination, implementation, confirmation or consummation of the Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document relating to, arising out of or in connection with the Plan or the Creditors' Trust, or any act omission, transaction, event or other occurrence taking place between the Petition Date and the Effective Date, or with respect to the professionals of the Debtor, taking place before the Petition Date which is any way relating to the reorganization case, and any other property of the Debtor, the business operations of the Debtor, the Plan, the Plan documents or any of the transactions contemplated thereby unless the liability of any entity that would otherwise result from any such act or omission was the result of gross negligence or willful misconduct. The Confirmation Order shall enjoin the prosecution by any Person or Entity, whether directly, indirectly, derivatively or otherwise, of any such Claim, obligation, suit, judgment, damage, right, remedy, cause of action, charge cost, Debt, indebtedness, or Liability which arose or accrued during such periods or was or could have been asserted against any of the listed parties, except as otherwise provided in the Plan, the Plan documents or the Confirmation Order. Each of the listed parties shall have the right to individually seek enforcement of this provision. This exculpation from liability provision is an integral part of the Plan and is essential to its implementation.

**C. General Injunction.** Pursuant to §§ 105, 1123, 1129 and 1141 of the Bankruptcy Code, in order to preserve and implement the various transactions contemplated by and provided for in the Plan, as of the Effective Date, except as otherwise provided in the Plan or in the Confirmation Order, all Persons or Entities that have held, currently hold, or may hold a Claim or other Debt, Liability or Equity Interest that is discharged or terminated pursuant to the terms of the Plan are and shall be permanently enjoined and forever barred to the fullest extent permitted by law from taking any of the following actions on account of any such discharged or terminated Claims, Debts, Liabilities, or Equity Interests, other than actions brought to enforce rights under the Plan, Confirmation Order, or the Plan documents: (a) commencing or continuing in any manner any action or other proceeding against the Debtor, Reorganized Debtor, the Creditors' Trust, or Phoenix; (b) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order against the Debtor, the Reorganized Debtor, the Creditors' Trust or Phoenix; (c) creating, perfecting or enforcing any lien or encumbrance against the Debtor, the Reorganized Debtor, the Creditors' Trust or Phoenix; (d) asserting a setoff, right of subrogation, or recoupment of any kind against any Debt, Liability or obligation due to the Debtor, the Reorganized Debtor, the Creditors' Trust or Phoenix; and (e) commencing or continuing, in any manner or in any

place, any action that does not comply with or is inconsistent with the provisions of the Plan or Confirmation Order. The Debtor, the Reorganized Debtor, the Creditors' Trust and Phoenix shall have the right to independently seek enforcement of this general injunction provision. This general injunction provision is an integral part of the Plan and is essential to its implementation.

**D. No Liability for Tax Claims.** Unless a taxing governmental authority has asserted a Claim against the Debtor before the Bar Date established therefor, no Claim of such Governmental authority shall be allowed against the Debtor or the Reorganized Debtor for taxes, penalties, interest, additions to the tax or other charges arising out of the failure, if any, of the Debtor, any of its affiliates, or any other Person or Entity to have paid the tax or to have filed any tax return (including any excise tax return, income tax return or franchise tax return) in and for any period or arising out of an audit of any return for a period before the Petition Date. The Reorganized Debtor shall be responsible for the filing of all unfiled tax returns of the Debtor relating to any period prior to the Effective Date.

**E. No Successor Liability.** Except as otherwise provided in the Plan or in the Confirmation Order, Phoenix does not, and shall not be deemed to, pursuant to the Plan, the Stock Purchase Agreement, or otherwise, assume, agree to perform, pay or indemnify any Holders of any Claims or Equity Interests or otherwise have any responsibilities for any Liabilities, Claims, Debts or obligations of the Debtor or the Reorganized Debtor, whether arising prior to, on or after the Effective Date. Phoenix is not, nor shall it be deemed to be a successor or successor in interest to the Debtor by reason of any theory of law or equity, and shall have no successor or transferee liability of any kind or character, and the Confirmation Order shall contain language to this effect.

#### **ARTICLE X- RETENTION OF JURISDICTION**

Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court shall retain the fullest and most expansive jurisdiction that is permitted under applicable law to issue any order or process to carry out the provisions of the Plan, including, but not limited to, determine all claims, enforce all obligations established in the Plan and the Confirmation Order, adjudicate any adversary proceeding or contested matter pending on the Confirmation Date or contemplated in the Plan, determine any application for the allowance of compensation pursuant to §§ 330, 331 or 503(b), to enforce and interpret the Plan and the Creditors' Trust Agreement and to resolve any dispute and questions of any kind arising in connection with any act arising out of or contemplated by the Plan and the rights created herein or in the Confirmation Order.

## ARTICLE XI - MISCELLANEOUS PROVISIONS

A. Modification of the Plan. The Debtor may modify the Plan at any time prior to the entry of the Confirmation Order provided that the Plan as modified, and the Disclosure Statement meet applicable Bankruptcy Code and Bankruptcy Rule requirements. The Plan may not be altered, amended or modified without the written consent of the Debtor, or the Reorganized Debtor or the Reorganized Debtor (as the case may be) and Phoenix; provided, however, if: on the date of the Confirmation Hearing Phoenix is unable or unwilling to perform its obligations under the Plan, the Debtor may amend or modify the Plan without consent of Phoenix.

After entry of the Confirmation Order, the Debtor or the Reorganized Debtor (as the case may be) may modify the Plan to remedy any defect or omission or to reconcile any inconsistencies in the Plan or in the Confirmation Order, as may be necessary to carry out the purposes and effects of the Plan, provided that (a) the Debtor or the Reorganized Debtor (as the case may be) obtains approval of the Bankruptcy Court for such modification, after notice and hearing, and (b) such modification shall not materially or adversely affect the interests of Phoenix, or the interests, rights, treatment, or distributions of any Class of Allowed Claims or Equity Interests under the Plan.

After the Confirmation Date, and before substantial consummation of the Plan, the Debtor or the Reorganized Debtor (as the case may be) may modify the Plan in a way that materially or adversely affects the interests, rights, treatment, or distributions of a Class of Claims or Equity Interests, provided that (a) the Plan, as modified, meets applicable Bankruptcy Code requirements, (b) the Debtor or the Reorganized Debtor obtains Bankruptcy Court approval of such modification, after notice and hearing; (c) such modification is approved by Phoenix and accepted by at least two-thirds in amount, and more than one-half in number, of Allowed Claims or by at least two-thirds in amount of Allowed Equity Interests voting.

B. Confirmation Order and Plan Control. To the extent that the Confirmation Order or the Plan is inconsistent with the Disclosure Statement or any agreement entered into between the Debtor and any third party, the Plan controls the Disclosure Statement and any such agreements, and the Confirmation Order (and any other orders of the Bankruptcy Court) shall be construed together with the terms of the Plan.

C. Governing Law. Except to the extent that federal law (including the Bankruptcy Code or the Bankruptcy Rules) is applicable, or where the Plan or the provisions of any contract, instrument, release, indenture or other agreement or document entered into in connection with the Plan provide otherwise, the rights and obligations arising under the Plan

shall be governed by, and construed and enforced in accordance with, the laws of the State of Florida, without giving effect to the principles of conflicts of law thereof.

D. **No Admissions.** The Plan provides for the resolution, settlement and compromise of Claims against and Equity Interests in the Debtor. Nothing herein shall be construed to be an admission of any fact by the Debtor or otherwise binding upon the Debtor in any manner prior to the Effective Date.

E. **Revocation or Withdrawal of the Plan.** The Debtor reserves the right to revoke or withdraw the Plan prior to Confirmation Date. If the Debtor revokes or withdraws the Plan, or if confirmation of the Plan does not occur, then the Plan shall be deemed null and void in all respects and nothing contained in the Plan shall be deemed to (a) constitute a waiver or release of any Claims by or against, or Equity Interests in, the Debtor or any other Person, or (b) prejudice in any manner the rights of the Debtor or any other Person in any further proceedings involving the Debtor.

F. **Further Assurances.** The Debtor or the Reorganized Debtor (as the case may be) agrees, and is hereby authorized, to execute and deliver any and all papers, documents, contracts, agreements, and instruments which may be necessary to carry out and implement the terms and conditions of the Plan.

G. **Notices.** All notices, requests or other documents in connection with, or required to be served by, the Plan shall be in writing and shall be sent by first class United States mail, postage prepaid, or by overnight delivery by a recognized courier service to:

If to the Debtor or Reorganized Debtor:	Elder N. Ripper, III Telephone Company of Central Florida, Inc. 3575 West Lake Mary Blvd., Suite 107 Lake Mary, Florida 32746
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with a mandatory copy to	Peter N. Hill or Nicholas B. Bangos Wolff, Hill, McFarlin & Heron, P.A. P.O. Box 2327 Orlando, Florida 32802
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If to Phoenix:	Mr. Gerard Haryman Phoenix International Industries, Inc. 501 South Dixie Highway West Palm Beach, Florida 33401
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with a mandatory copy to: Robert A. Schatzman , Esq.  
Suite 1050, First Union Financial Center  
200 South Biscayne Boulevard  
Miami, Fl 33131

**H. Estimated Claims.** To the extent any Claim is estimated for any purpose other than for voting, then in no event shall such Claims be Allowed in an amount greater than the estimate amount.

**I. Consent to Jurisdiction.** Upon any default under the Plan, the Debtor, the Reorganized Debtor, Phoenix and the Creditors' Trust consent to the jurisdiction of the Bankruptcy Court, or any successor thereto, and agree that it shall be the preferred forum for all proceedings relating to any such default.

By accepting any distribution or payment under or in connection with the Plan, by filing any Proof of Claim, by voting on the Plan, or by entering an appearance in the Chapter 11 Case, all Creditors, Holders of Equity Interests and other parties in interest, including foreign Creditors, and foreign parties in interest, have consented and shall be deemed to have expressly consented, to the jurisdiction of the Bankruptcy Court for all purposes with respect to any and all matters relating to, arising under or in connection with the Plan or the Chapter 11 Case, including the matters and purposes set forth in Article II of the Plan. The Bankruptcy Court shall maintain jurisdiction to the fullest extent allowed under applicable law over all matters set forth in Article II of the Plan.

**J. Modification of Payment Terms.** The Reorganized Debtor and the Creditors' Trust Trustee reserve the right to modify the treatment of any Allowed Claim, as provided in § 1123(a)(4) of the Bankruptcy Code, at any time after the Effective Date upon consent of the Holder of such Allowed Claim.

**K. No Waiver of Exclusivity.** The Debtor and Phoenix have each expended substantial time and resources and relied upon the representation of the other to proceed in good faith to seek confirmation of this Plan. In the event this Plan is not confirmed, then Phoenix agrees that (a) the Debtor shall have (i) an additional forty-five (45) days following

the date of the Confirmation Hearing to file another plan of reorganization and (ii) an additional ninety (90) days following the filing of such plan to seek confirmation thereof, and Phoenix shall support a motion, if any filed with the Bankruptcy Court seeking such extensions, and (b) Phoenix will not file, or solicit or support, a competing plan of reorganization during such 45 day period or thereafter until the Bankruptcy Court has held a hearing on confirmation of any plan of reorganization during such 45 day period.

Dated: January 25, 1999

TELEPHONE COMPANY OF CENTRAL FLORIDA, INC.



Elder N. Ripper, III, President  
Telephone Company of  
Central Florida, Inc.



Nicholas B. Baños  
Florida Bar No. 0834238  
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Attorneys for the Debtor in Possession

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

IN RE:

TELEPHONE COMPANY OF  
CENTRAL FLORIDA, INC.,

CASE NO. 98-04587-6B1

Debtor.  
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DEBTOR'S SECOND AMENDMENTS TO PLAN

The Debtor, Telephone Company of Central Florida, Inc. files its Second Amendments to the Plan of Reorganization ("the Plan").

1. Debtor's First Amendments to the Plan are stricken.
2. Article III of the Plan is amended as follows:
  - A. Except as provided in section C of this Article, if the Bankruptcy Court has not previously entered an order approving assumption, rejection and/or assignment of leases and contracts, then the Confirmation Order shall constitute an order of the Bankruptcy Court approving all such assumptions, assignments, and rejections of executory contracts and unexpired leases as of the Petition Date, unless there is pending before the Bankruptcy Court on the Confirmation Date a motion to assume such executory contract or unexpired lease.
  - B. If an executory contract or unexpired lease is rejected, then the other party

to the agreement may file a Claim for damages incurred by reason of rejection within such time as the Bankruptcy Court may allow or be forever barred. Such Claim shall be served upon the Debtor and the Creditors' Trust Trustee (as the case may be). In the case of rejection of employment agreements and leases of real property, damages are limited under the Bankruptcy Code. Such claims shall be deemed to be Class III claims for purposes of administration of the Creditors' Trust. The Plan shall constitute adequate and sufficient notice to Persons or Entities which may assert a Claim for damages from the rejection of an executory contract or unexpired lease of the Bar Date for filing a Claim in connection therewith.

- C. In the case of the Agreement between BellSouth Telecommunications, Inc. and the Telephone Company of Central Florida, Inc., Regarding the Sale of BST's Telecommunications Services to Reseller for the Purpose of Resale ("the Agreement"), the Debtor intends to assume the Agreement, however, the Debtor has asserted counterclaims against BellSouth in Adversary Proceeding 99-65. Notwithstanding the applicability of Article II to executory contracts, in accordance with Article IX of the Plan until the entry of a final order has been entered under 28 U.S.C. § 157(b)(2)(C) on Adversary Proceeding 99-65, the Debtor's assumption of the

Agreement will not be effective and the Confirmation Order will not discharge BellSouth's claim for sums due under the Agreement as requested by BellSouth in its \$388,098.76 proof of claim and the Order Dissolving Injunction and Establishing Adequate Protection entered on May 4, 1999 shall remain in full force and effect.

3. Article IX is amended as follows:

- A. **Discharge of Claims and Termination of Equity Interests.** Except as otherwise expressly provided in the Plan or the Confirmation Order, the Confirmation Order shall operate as a discharge, pursuant to Section 1141(d) of the Bankruptcy Code, to the fullest extent permitted by applicable law, as of the Effective Date, of any and all Debts or Claims of any nature whatsoever against, and any Equity Interests in the Debtor or the Reorganized Debtor that arose at any time prior to the Effective Date, including any and all Claims for principal and interest, whether accrued before, on, or after the Petition Date; provided, however, the Confirmation Order shall not constitute a discharge from any claim of BellSouth Telecommunications, Inc. ("BellSouth") based upon its proof of claim in the approximate amount of \$388,098.76.

Without limiting the generality of the foregoing, on the Effective Date, the Debtor and the Reorganized Debtor, and their respective successors or assigns, shall be discharged from any Debt or Claim that arose prior to the Effective Date and from any and Debts and Claims of the kind specified in Section 502(g), 502(h), or 502(i) of the Bankruptcy Code, whether or not (a) a Proof of Claim based on such Debt or Claim was filed pursuant to Section 501 of the Bankruptcy Code, (b) a Claim based on such Debt is an Allowed Claim pursuant to Section 502 of the Bankruptcy Code, or (c) the Holder of a Claim based on such Debt has voted to accept the Plan. As of the Effective Date, except as otherwise expressly provided in the Plan or Confirmation Order, all Persons and Entities, including all Holders of a Claim or Equity Interest, other than BellSouth on accounts of its \$388,098.76, shall be forever precluded and permanently enjoined to the fullest extent permitted by applicable law from asserting directly or indirectly against the Debtor, the Reorganized Debtor, the Creditors' Trust, or any of their respective successors and assigns, or the properties of any of them, any other or further

Claims, Debts, rights, causes of action, remedies, liabilities or Equity Interests based upon any act, omission, document, instrument, transaction or other activity of any kind or nature that occurred prior to the Effective Date or that occurs in connection with implementation of the Plan, and the Confirmation Order shall contain appropriate injunctive language to that effect. The Holders of any canceled Equity Interest shall have no rights arising from or relating to such Equity Interests, or the cancellation thereof, except the rights, if any, provided in the Plan. In accordance with the foregoing, except as specifically provided in the Plan or confirmation Order, the Confirmation Order shall be a judicial determination of the discharge or termination of all such Claims, other Debts and Liabilities against, or Equity Interest in, the Debtor, pursuant to Sections 524 and 1141 of the Bankruptcy Code, and such Discharge shall void any judgment obtained against the Debtor at any time, to the extent that such judgment relates to a discharged or terminated Claim, Liability, Debt or Equity Interest. Notwithstanding the foregoing, if under the Plan the Creditors' Trust is obligated to make payments to Holders of Allowed Unsecured Claims, the Creditors' Trust shall remain obligated to make such payments.

- B. Exculpation from Liability.** The Debtor, the Reorganized Debtor, Phoenix, the Creditors' Trust Trustee and the agents, general partners, employees and professionals of the Debtor, the Reorganized Debtor, Phoenix, and the Creditors' Trust Trustee, including accountants and legal counsel (acting in such capacity) shall have no liability to any entity for any act taken or omitted to be taken in connection with or related to the formulation, preparation, dissemination, implementation, confirmation or consummation of the Plan, the Disclosure Statement, or any contract, instrument, release or other agreement or document relating to, arising out of or in connection with the Plan or the Creditors' Trust, or any act omission, transaction, event or other occurrence taking place between the Petition Date and the Effective Date, or with respect to the professionals of the Debtor, taking place before the Petition Date which is any way relating to the reorganization case, and any other property of the Debtor, the business operations of the Debtor, the Plan, the Plan documents or any of the transactions contemplated thereby unless the liability of any entity that would otherwise result from any such act or omission was the result of gross negligence or willful misconduct. The Confirmation Order shall enjoin the prosecution by any Person or Entity, whether directly, indirectly, derivatively or otherwise, of any such Claim, obligation, suit, judgment, damage, right, remedy, cause of action, charge cost, Debt, indebtedness, or Liability which arose or accrued during such periods or was or could have been asserted against any of the listed parties, except as

otherwise provided in the Plan, the Plan documents or the Confirmation Order. Each of the listed parties shall have the right to individually seek enforcement of this provision. This exculpation from liability provision is an integral part of the Plan and is essential to its implementation. The exculpation of liability hereunder shall not affect the liability of any party under 26 U.S.C. § 6672 for any liability arising, before, during or after the Petition Date until the Effective Date of the Plan.

C. **General Injunction.** Pursuant to §§ 105, 1123, 1129 and 1141 of the Bankruptcy Code, in order to preserve and implement the various transactions contemplated by and provided for in the Plan, as of the Effective Date, except as otherwise provided in the Plan or in the Confirmation Order, all Persons or Entities that have held, currently hold, or may hold a Claim or other Debt, Liability or Equity Interest that is discharged or terminated pursuant to the terms of the Plan are and shall be permanently enjoined and forever barred to the fullest extent permitted by law from taking any of the following actions on account of any such discharged or terminated Claims, Debts, Liabilities, or Equity Interests, other than actions brought to enforce rights under the Plan, Confirmation Order, or the Plan documents: (a) commencing or continuing in any manner any action or other proceeding against the Debtor, Reorganized Debtor, the Creditors' Trust, or Phoenix; (b) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order against the Debtor, the Reorganized Debtor, the Creditors' Trust or Phoenix; (c) creating, perfecting or enforcing any lien or encumbrance against the Debtor, the Reorganized Debtor, the Creditors' Trust or Phoenix; (d) asserting a setoff, right of subrogation or recoupment of any kind against any Debt, Liability or obligation due to the Debtor, the Reorganized Debtor, the Creditors' Trust or Phoenix; and (e) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of the Plan or Confirmation Order. The Debtor, the Reorganized Debtor, the Creditors' Trust and Phoenix shall have the right to independently seek enforcement of this general injunction provision. This general injunction provision is an integral part of the Plan and is essential to its implementation.

D. **No Liability for Tax Claims.** Unless a taxing governmental authority has asserted a Claim against the Debtor before the Bar Date established therefor, no Claim of such Governmental authority shall be allowed against the Debtor or the Reorganized Debtor for taxes, penalties, interest, additions to the tax or other charges arising out of the failure, if any, of the Debtor, any of its affiliates, or any

other Person or Entity to have paid the tax or to have filed any tax return (including any excise tax return, income tax return or franchise tax return) in and for any period or arising out of an audit of any return for a period before the Petition Date. The Reorganized Debtor shall be responsible for the filing of all unfiled tax returns of the Debtor relating to any period prior to the Effective Date.

**E. No Successor Liability.** Except as otherwise provided in the Plan or in the Confirmation Order, Phoenix does not, and shall not be deemed to, pursuant to the Plan, the Stock Purchase Agreement, or otherwise, assume, agree to perform, pay or indemnify any Holders of any Claims or Equity Interests or otherwise have any responsibilities for any Liabilities, Claims, Debts or obligations of the Debtor or the Reorganized Debtor, whether arising prior to, on or after the Effective Date. Phoenix is not, nor shall it be deemed to be a successor or successor in interest to the Debtor by reason of any theory of law or equity, and shall have no successor or transferee liability of any kind or character, and the Confirmation Order shall contain language to this effect.

**F. Treatment of BellSouth's \$388,098.76 Claim.**

On August 17, 1998, BellSouth filed a proof of claim in the amount of \$388,098.76 representing sums due for prepetition services under the Agreement. TCCF commenced Adversary Proceeding 99-65 against BellSouth seeking monetary damages for BellSouth's breach of the Agreement prior and subsequent to the Petition Date. As of May 17, 1999, the court had not scheduled a final evidentiary hearing on TCCF's claims against BellSouth in Adversary Proceeding 99-65. Upon the entry of a final order on TCCF's counterclaims in adversary proceeding 99-65, TCCF shall either assume or reject the Agreement will BellSouth. Upon the entry of a final order in Adversary Proceeding 99-65, the provisions of Article IX (A)-(E) shall supplant this provisions of this paragraph and BellSouth's claim shall be discharged as set forth in this Article.

During the pendency of Adversary Proceeding 99-65 and until the entry of a final order under 28 U.S.C. § 158(b)(2)(C) is entered the Order Dissolving Injunction and Establishing Adequate Protection entered on May 4, 1999 shall remain in full force and effect. This provision is an integral part of the Plan and is essential to its implementation.

4. Article I- Definitions is amended to provide as follows:

Creditors' Trust Assets shall mean (a) the reserved funds to be deposited

pursuant to the Plan by Phoenix and the proceeds of any Avoidance Claims set forth in Article V of the Plan and the Creditors' Trust Expenses and the Class III creditor's share of the proceeds of TCCF's claims against BellSouth; (b) any net income earned by the Creditors' Trust through investment of assets comprising the Creditors' Trust pursuant to the terms of the Creditors' Trust Agreement.

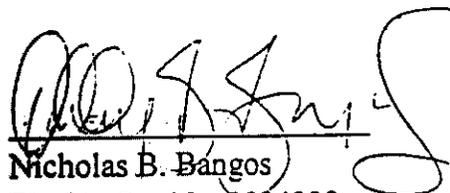
Initial Distribution Date when used with respect to each Claim or Interest shall mean as soon as practicable after the latest of (a) the Effective Date; (b) the date that all contested Claims or interests in any class or classes that are designated to participate pro rata in a distribution are either Allowed or Disallowed; (c) the date on which the distribution to the holder of the Claim would have been made in the absence of the Plan.

5. Article V D of the Plan is amended to provide as follows:

**D. Revesting of Assets.** The property of the estate of the Debtor shall revest in the Debtor on the Effective Date, except as otherwise provided in the Plan, in order to permit the liquidation of additional assets as set forth in the Plan. As of the Effective Date, all property of the Debtor shall be free and clear of all Claims and Interests, except as specifically provided in the Plan.

Phoenix has agreed to allow the creditors in Class III to participate in the proceeds of TCCF's claims against BellSouth to the extent of authorizing the assignment of ten percent (10%) of the net proceeds of any such claims to the Creditors Trust. The assignment shall be effective upon the entry of a final order under 28 U.S.C. § 157(b)(2)(C) in Adversary Proceeding 99-65.

Dated this 18<sup>th</sup> day of May, 1999.



Nicholas B. Bangos

Florida Bar No. 0834238

Wolff, Hill, McFarlin & Herron, P.A.

1851 W. Colonial Drive

Orlando, FL 32804

Telephone (407) 648-0058

Facsimile (407) 648-0681

Attorneys for the Debtor

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

SEP - 8 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

Plaintiff, )

v. )

CHARLES W. PARSONS )

aka Charles Wayne Parsons aka Charles Parsons; )

SHONDA L. PARSONS aka Shonda Lynn Parsons )

aka Shonda Parsons aka Shonda Shallenburger; )

TRANSAMERICA FINANCIAL SERVICES, INC.; )

SEARS, ROEBUCK AND COMPANY; )

COUNTY TREASURER, Tulsa County, )

Oklahoma; )

BOARD OF COUNTY COMMISSIONERS, )

Tulsa County, Oklahoma, )

Defendants. )

ENTERED ON DOCKET

DATE SEP 09 1999

CIVIL ACTION NO. 98-CV-0886-B (M)

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 8<sup>th</sup> day of Sept.

1999. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that Defendant, Shonda L. Parsons aka Shonda Lynn Parsons aka Shonda Parsons aka Shonda Shallenburger, appears not, having previously filed her Disclaimer; that Defendants, Charles W. Parsons aka Charles Wayne Parsons aka Charles Parsons, Transamerica Financial Services, Inc., and Sears, Roebuck and Company, appear not, but make default.

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

9

The Court being fully advised and having examined the court file finds that the Defendant, Charles W. Parsons aka Charles Wayne Parsons aka Charles Parsons, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on December 15, 1998; that the Defendant, Shonda L. Parsons aka Shonda Lynn Parsons aka Shonda Parsons aka Shonda Shallenburger, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on November 23, 1998; that the Defendant, Transamerica Financial Services, Inc., executed a Waiver of Service of Summons on June 29, 1999, by its assistant vice president; that the Defendant, Sears, Roebuck and Company, was served with Summons and Complaint through its service agent by certified mail, return receipt requested, delivery restricted to the addressee on November 23, 1998.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on December 8, 1998; that the Defendant, Shonda L. Parsons aka Shonda Lynn Parsons aka Shonda Parsons aka Shonda Shallenburger, filed her Disclaimer on March 15, 1999; that the Defendants, Charles W. Parsons aka Charles Wayne Parsons aka Charles Parsons, Transamerica Financial Services, Inc., and Sears, Roebuck and Company, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 3, 1995, Charles Wayne Parsons and Shonda Lynn Parsons filed their voluntary petition in bankruptcy in

Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 95-03465-W. The subject real property was made a part of the bankruptcy estate as shown on Schedule A of the bankruptcy schedules. On March 5, 1996, the debtors were released from all dischargeable debts. Subsequently, Case No. 95-03465-W, United States Bankruptcy Court, Northern District of Oklahoma, was closed on June 27, 1996.

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

Lot Four Hundred Twenty-eight (428), of the Re-Subdivision of Lots 11, 12, 13, 14, 15, Block 2, RODGERS HEIGHTS SUBDIVISION, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 6, 1994, Charles W. Parsons executed and delivered to Brumbaugh & Fulton Company, his mortgage note in the amount of \$38,658.00, payable in monthly installments, with interest thereon at the rate of 6.48 percent per annum.

The Court further finds that as security for the payment of the above-described note, Charles W. Parsons and Shonda L. Parsons, husband and wife, executed and delivered to Brumbaugh & Fulton Company, a real estate mortgage dated May 6, 1994, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on May 9, 1994, in Book 5622, Page 2402, in the records of Tulsa County, Oklahoma.

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

The Court further finds that the Defendant, Charles W. Parsons aka Charles Wayne Parsons aka Charles Parsons, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$39,323.19, plus administrative charges in the amount of \$539.00, plus penalty charges in the amount of \$141.44, plus accrued interest in the amount of \$4,079.20 as of March 26, 1998, plus interest accruing thereafter at the rate of 5.0 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, Shonda L. Parsons aka Shonda Lynn Parsons aka Shonda Parsons aka Shonda Shallenburger, disclaims any right, title or interest in the subject real property.

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

The Court further finds that the Defendants, Charles W. Parsons aka Charles Wayne Parsons aka Charles Parsons, Transamerica Financial Services, Inc., and Sears, Roebuck and Company, are in default and therefore have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against Defendant, Charles W. Parsons aka Charles Wayne Parsons aka Charles Parsons, in the principal sum of \$39,323.19, plus administrative charges in the amount of \$539.00, plus penalty charges in the amount of \$141.44, plus accrued interest in the amount of \$4,079.20 as of March 26, 1998, plus interest accruing thereafter at the rate of 5.0 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.724 percent per annum until fully paid, plus the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Charles W. Parsons aka Charles Wayne Parsons aka Charles Parsons, Shonda L. Parsons aka Shonda Lynn Parsons aka Shonda Parsons aka Shonda Shallenburger, Transamerica Financial Services, Inc., Sears, Roebuck and

Company, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

**First:**

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

**Second:**

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

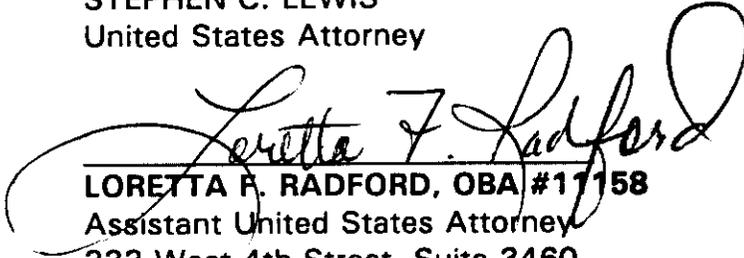
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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



**DICK A. BLAKELEY, OBA #0852**  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4841  
Attorney for County Treasurer and Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Case No. 98-CV-0886-B (M) (Parsons)

LFR:css

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

**FILED**  
SEP 8 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMES V. GRAHAM and  
CONNIE GRAHAM,

Plaintiffs,

vs.

GROLIER PUBLISHING COMPANY,  
et. al.,

Defendants.

No. 99-C-544B(M)

ENTERED ON DOCKET  
DATE SEP 09 1999

**ORDER**

Comes on for consideration Plaintiffs' Motion to Remand (Docket #5) in the above-styled case and the Court finds the same shall be granted.

Defendants removed this action from the District Court of Creek County for the second time on July 9, 1999. The case was originally filed in Creek County on March 18, 1998, removed to this Court under the case number 98-CV-289, voluntarily dismissed by Plaintiffs with a Motion to Remand pending, refiled in Creek County on June 8, 1999 with the only change to the Petition being in the amount of damages sought, and re-removed again by Defendants on July 9, 1999. The re-removed action was randomly assigned to Senior Judge H. Dale Cook, however under the rules governing assignment of cases in this District, the case was transferred to the undersigned as having been assigned the originally removed, virtually identical action.

1

Plaintiffs move to remand primarily on the ground that they seek a total of \$74,500, less than the \$75,000 required jurisdictional amount to be in federal court in their Petition and this Court is therefore without subject matter jurisdiction.

Defendants have the burden of establishing the amount in controversy by a preponderance of the evidence. *Barber v. Albertsons, Inc.*, 935 F. Supp. 1188 (N.D.Okla 1996), citing *Gafford v. General Elec. Co.*, 997 F.2d 150, 157-60 (6th Cir. 1993). In this case, Defendants attach a demand letter presented to them in July, 1995, wherein the Plaintiffs' counsel values the case at over two million dollars. However, this letter is too remote in time to the filing of either the original Petition or the more recently filed Petition to aid the Court in evaluating the true worth of the claim.

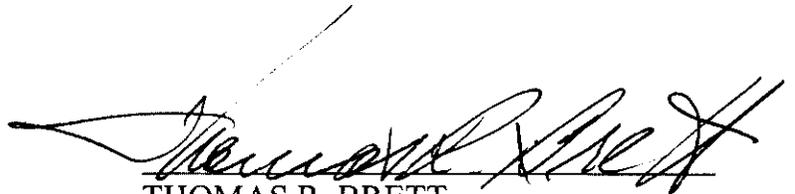
Removal statutes are narrowly construed and uncertainties resolved in favor of remand. The presumption is against removal jurisdiction. This presumption is so strong as to require federal courts to review removed actions on their own, whether or not a motion to remand is filed by defendants. *Laughlin v. Kmart Corp.*, 50 F.3rd 871 (10th Cir. 1995). If it appears from the notice and any exhibits thereto that removal should not be permitted, "the Court shall make an order for summary remand." 28 U.S.C. §1446.

The Court concludes it is without subject matter jurisdiction to proceed in this matter. Accordingly, the case should be remanded to the District Court of Creek County, Oklahoma.

IT IS THEREFORE ORDERED that the above styled action is hereby remanded

to the District Court of Creek County, Oklahoma. The Clerk of Court is directed to take the necessary action to remand this case without delay.

DATED THIS 8<sup>th</sup> DAY OF SEPTEMBER, 1999, AT TULSA, OKLAHOMA.

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

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

1/11  
9-7-99

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

FILED

SEP - 8 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JERRY GLISSON and LYNNETTE GLISSON, )

Plaintiffs, )

vs. )

FEDERATED MUTUAL INSURANCE CO., )

Defendant. )

Case No. 99 CV 0512B(M)

ENTERED ON DOCS  
SEP 09 1999  
DATE

STIPULATION OF PARTIES AND ORDER OF REMAND

Whereas, the parties hereto have stipulated that Plaintiffs dismiss their causes of action for bad faith against Defendant, including all claims for actual, punitive and/or exemplary damages arising from such alleged bad faith; and

Whereas, the parties further stipulate that the amount in controversy, exclusive of attorney's fees and interest, is \$30,382.

IT IS THEREFORE ORDERED that:

- 1) Plaintiffs' causes of action for bad faith and actual, punitive or exemplary damages arising from said bad faith are hereby dismissed; and
- 2) Because the amount in controversy now does not exceed \$75,000, the amount necessary to confer federal diversity jurisdiction pursuant to 28 USC §1332, this cause is remanded to the District Court of Creek County, State of Oklahoma, (Bristow Division), the originating court, for judicial disposition.

Dated Sept. 8<sup>th</sup>, 1999.

  
THOMAS R. BRETT, United States District  
Judge



AGREED AND APPROVED:

A handwritten signature in black ink, appearing to read "Mitchell E. Shamas". The signature is written in a cursive style and is positioned above a horizontal line.

Mitchell E. Shamas, OBA #08113  
Attorney for Plaintiffs

---

Sarah J. Rhodes, OBA#07532  
Attorney for Defendant

AGREED AND APPROVED:

---

Mitchell E. Shamas, OBA #08113  
Attorney for Plaintiffs



---

Sarah J. Rhodes, OBA#07532  
Attorney for Defendant

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

ALLEN F. McKINNEY and MARY E. )  
McKINNEY, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
SHONN J. MAPES and HY-VEE, INC. / )  
PERISHABLE DISTRIBUTORS )  
OF IOWA, LTD., and HAWKEYE )  
SECURITY INSURANCE COMPANY, )  
a foreign insurance company, )  
 )  
Defendants. )

ENTERED ON DOCKET  
SEP 09 1999  
DATE \_\_\_\_\_

Case No. 99-CV-562H(J)

**FILED**

SEP 9 1999 *SL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

This matter coming on before the undersigned Judge of the United States District Court on the Joint Application for Transfer of the above cause, the Court having reviewed said Application finds and directs that this case be transferred to the United States District Court for the Western District of Missouri, St. Joseph Division.

That the court clerk's costs and fees, if any, of effecting the transfer shall be borne by the Plaintiffs herein.

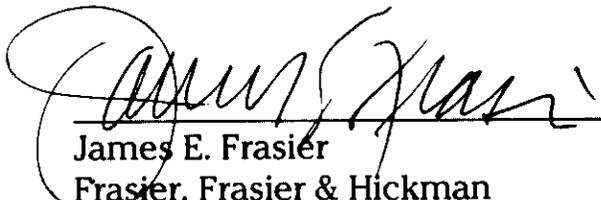
The Court further orders that upon the matter being docketed in said Court, the Defendants shall have twenty (20) days within which to enter appearances in said matter. The clerk is hereby ordered to transfer all records and papers in this

action, to the Clerk of the District Court, Western District of Missouri, St. Joseph  
Division, together with a certified copy of this Order.

Dated this 8<sup>TH</sup> day of September, 1999.

  
\_\_\_\_\_  
Sven Erik Holmes  
Judge of the United States District Court

APPROVED AS TO FORM:

  
\_\_\_\_\_  
James E. Frasier  
Frasier, Frasier & Hickman  
Attorney for Plaintiffs

  
\_\_\_\_\_  
John R. Woodard, III  
Feldman, Franden, Woodard & Farris  
Attorney for Defendants

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

KEVIN L. WENGER, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 CRC-EVANS PIPELINE )  
 INTERNATIONAL, INC., a )  
 Delaware corporation, and )  
 WEATHERFORD ENTERRA, INC., )  
 a foreign corporation, and PHLIPCO, )  
 INC., a foreign corporation, )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE SEP 09 1999

Case No. 98-CV-401-H(J)

**FILED**

SEP 9 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER OF DISMISSAL WITH PREJUDICE OF ALL CLAIMS BY AND BETWEEN  
PLAINTIFF AND DEFENDANTS, CRC-EVANS PIPELINE INTERNATIONAL, INC.,  
WEATHERFORD ENTERRA, INC., AND PHLIPCO, INC.**

NOW before the Court is the Stipulation of Dismissal With Prejudice of all Claims by and between the Plaintiff, Kevin L. Wenger, and Defendants, CRC-Evans Pipeline International, Inc., Weatherford International, Inc., formerly known as Weatherford Enterra, Inc., and Philipco, Inc., advising that this matter has been fully compromised and settled as between Plaintiff and Defendants, CRC-Evans Pipeline International, Inc., Weatherford International, Inc., formerly known as Weatherford Enterra, Inc., and Philipco, Inc. Upon review of such Stipulation of Dismissal with Prejudice, this court finds that an Order of Dismissal with Prejudice of All Claims by and between Kevin L. Wenger and Defendants, CRC-Evans Pipeline International, Inc., Weatherford International, Inc., formerly known as Weatherford Enterra, Inc., and Philipco, Inc., should be entered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that any and all claims and causes of action by and between Plaintiff, Kevin L. Wenger and Defendants, CRC-Evans Pipeline International, Inc., Weatherford International, Inc., formerly known as Weatherford

Enterra, Inc., and Philipco, Inc., be, and hereby are, dismissed with prejudice pursuant to the Stipulation of Dismissal with Prejudice of All Claims by and between Plaintiff, Kevin L. Wenger and Defendants, CRC-Evans Pipeline International, Inc., Weatherford International, Inc., formerly known as Weatherford Enterra, Inc., and Philipco, Inc. Plaintiff, Kevin L. Wenger and Defendants, CRC-Evans Pipeline International, Inc., Weatherford International, Inc., formerly known as Weatherford Enterra, Inc., and Philipco, Inc., are each to bear their own costs and attorney fees.

DONE this 8<sup>TH</sup> day of September, 1999.

  
\_\_\_\_\_  
United States District Judge

Randall J. Snapp  
CROWE & DUNLEVY  
321 South Boston, Suite 500  
Tulsa, OK 74103-3313  
(918) 592-9855  
(918) 599-6335 - Fax  
ATTORNEYS FOR DEFENDANTS

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

**FILED**

SEP 8 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

USA, )  
)  
Plaintiff(s), )  
)  
vs. )  
)  
ELIZABETH M. DEMAURO, )  
aka Elizabeth M. Littlesun, )  
)  
Defendant(s). )

Case No. 99-C-367-B

ENTERED ON DOCKET  
SEP 09 1999  
DATE \_\_\_\_\_

**ADMINISTRATIVE CLOSING ORDER**

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

IF, within 60 days of a final adjudication of the bankruptcy proceedings or a lifting of the stay, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 8<sup>th</sup> day of September, 1999.

  
THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

**F I L E D**

SEP 8 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

MICHAEL EUGENE JACKSON, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STEVE KAISER, Warden, )  
 Davis Correctional Facility, )  
 )  
 Defendants. )

Case No. 99-C-142-E (E) /

ENTERED ON DOCKET  
DATE SEP 09 1999

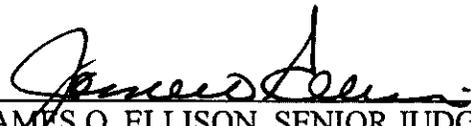
ORDER

Now before the Court is the Motion to Dismiss Without Prejudice (Docket #7) of the Petitioner, Michael Eugene Jackson.

Petitioner seeks to dismiss his Petition for Writ of Habeas Corpus without prejudice after receiving the Report and Recommendation of the United States Magistrate Judge recommending that his Petition be dismissed without prejudice to refile after he has exhausted his claims in state court. Respondent does not object to the motion of Petitioner or to the Report and Recommendation of the United States Magistrate Judge.

Accordingly, Petitioner's Motion to Dismiss Without Prejudice (Docket #7) is granted.

IT IS SO ORDERED THIS 9<sup>TH</sup> DAY OF SEPTEMBER, 1999.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

*J*

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

**FILED**

SEP 8 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CARYL STRAUB, )  
)  
Plaintiff, )  
)  
vs. )  
)  
RAE CORPORATION, )  
)  
Defendant. )

No. 99-C-480-B(E)

ENTERED ON DOCKET

DATE SEP 09 1999

**ORDER**

Before the Court is the Motion to Dismiss Plaintiff's Invasion of Privacy Cause of Action filed by the defendant RAE Corporation ("RAE")(Docket No. 6). Plaintiff Caryl Straub ("Straub") brings claims against RAE under Title VII and common law causes of action for violation of the public policy of the State of Oklahoma, intentional infliction of emotional distress, and invasion of privacy. RAE moves to dismiss Straub's claim for invasion of privacy pursuant to Fed.R.Civ.P. 12(b)(6).

Oklahoma recognizes the claim set forth in Restatement of Torts (Second), Ch. 28A, Intrusion Upon Seclusion, § 652B: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Munley v. ISC Financial House, Inc.* 584 P.2d 1336, 1339 (Okla. 1978). This claim may arise in the workplace when a supervisor/employer intrudes into a employee's private concerns, such as "by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an

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inspection of his personal documents." *Eddy v. Brown*, 715 P.2d 74, 77 n. 10 (Okla. 1986)(quoting Restatement of Torts (Second), Ch. 28A, Intrusion Upon Seclusion, § 652B, comment b, (1977)).

Straub alleges her coworkers and managers intruded upon her privacy by sexually harassing her, specifically by providing her with "knee pads" during a performance review which suggests her alleged preference for oral sex. This "suggestion" as well as plaintiff's other allegations of sexually inappropriate remarks do not support a claim for intrusion into seclusion under §652, Restatement of Torts (2d).

Accordingly, the Court grants RAE's motion to dismiss Straub's claim for invasion of privacy for failure to state a claim (Docket No. 6).

IT IS SO ORDERED, THIS 7 DAY OF SEPTEMBER, 1999.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 GERALD R. ARNOLD, )  
 )  
 Defendant. )

ENTERED ON DOCKET

DATE SEP 09 1999

CASE NO. 99CV0639H(J) **FILED**

SEP 9 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

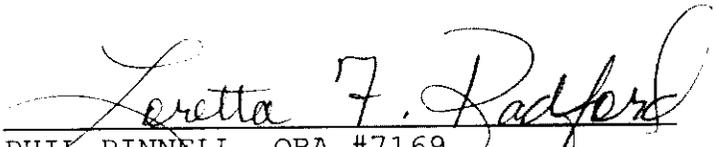
Upon the motion of the plaintiff, United States of America, to which there is no objection, it is hereby ORDERED that all claims against defendant **Gerald R. Arnold**, be dismissed without prejudice, the parties to bear their own costs and attorneys' fees.

Dated this 8<sup>TH</sup> day of SEPTEMBER, 1999.

  
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney

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

PEP/jmo

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE SEP 09 1999

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 ) No. 99CV0216H (J) ✓  
 )  
 LORI A. SCHNEDLER, )  
 )  
 Defendant. )

**FILED**

SEP 9 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEFAULT JUDGMENT

The Plaintiff's Application for Default Judgment comes on for hearing this 15<sup>th</sup> day of September, 1999. The Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Lori A. Schnedler, appears not. The Court finds that pursuant to Rule 55 of the Federal Rules of Civil Procedure, notice of the hearing was given to the Defendant.

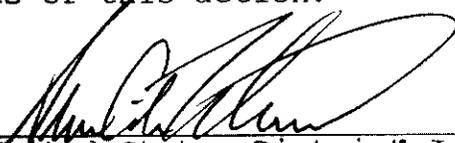
The Court gave due consideration to the pleadings and documents filed in support of the plaintiff's Complaint. The Court finds the plaintiff is entitled to judgment from its review of the supporting documentation.

The Court being fully advised and having examined the court file finds that Defendant, Lori A. Schnedler, was served with Summons and Complaint on June 25, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by

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the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Lori A. Schnedler, for the principal amounts of \$2,399.97 and \$2,596.32, plus accrued interest of \$1,201.58 and \$1,088.69, plus administrative charges in the amount of \$11.19 and \$46.75, plus interest thereafter at the rates of 7.51 percent and 8.00 percent respectively per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.224 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

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

PEP/do

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

**F I L E D**

SEP - 7 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

INTUIT INC. and LACERTE  
SOFTWARE CORPORATION,

Plaintiffs,

v.

TAX AND ACCOUNTING SOFTWARE  
CORPORATION and RICHARD R.  
SCHINDALL,

Defendants.

**99CV0550B (J)**

Case No.

ENTERED ON DOCKET  
DATE SEP 08 1999

**PRELIMINARY INJUNCTION ORDER**

CAME ON FOR CONSIDERATION Plaintiffs Intuit Inc. and Lacerte Software Corporation's (collectively, "Plaintiffs") Motion for Preliminary Injunction. The Court, having reviewed the Motion, the Response, argument of counsel and other pleadings on file with this Court is of the opinion that the Motion should be **GRANTED**.

**IT IS HEREBY ORDERED** that Defendants Tax and Accounting Software Corporation and Richard R. Schindall (collectively, "Defendants") are enjoined:

- A. from making any further use of the TaxByte customer list or the information from such list, including any derivative lists or partial lists taken from the information which was wrongfully retained and misused by Schindall;
- B. from further contacting those persons whose names were brought to their attention as a result of their being on the confidential customer list; and
- C. from further soliciting or accepting business from those persons whose names appear on the list.

*Handwritten initials*

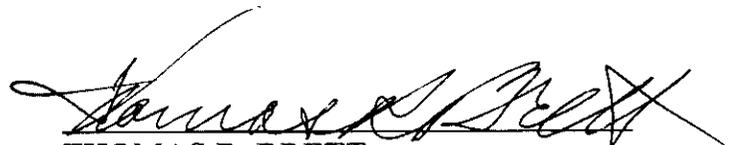
*Handwritten signature/initials*

**IT IS FURTHER ORDERED** that Defendants shall deposit, within seven (7) days of the date of this Order, any and all TaxByte customer lists in their possession, whether in written or electronic form, and any derivative lists therefrom with the Court, pending the outcome of this lawsuit.

**IT IS FURTHER ORDERED** that Defendant provide a copy of this Order to each of their officers, agents and employees within 24 hours of service of this Order upon Defendants.

**IT IS FURTHER ORDERED** that Plaintiffs shall post a cash or surety bond in the amount of \$50,000 with the Clerk of Court within seven (7) days of the date of this Order.

ENTERED THIS 7<sup>th</sup> DAY OF SEPTEMBER, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**FILED**

SEP - 7 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

INTUIT INC., and LACERTE  
SOFTWARE CORPORATION,

Plaintiffs,

vs.

TAX AND ACCOUNTING SOFTWARE  
CORPORATION and RICHARD  
SCHINDALL

Defendants.

No. 99-C-550-B(J)

ENTERED ON DOCKET  
DATE SEP 08 1999

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having considered the evidence presented on July 23, 1999 at the show cause hearing on Plaintiffs' Motion for Preliminary Injunction, all of the pleadings and motions in the record, and the arguments of counsel, the Court enters the following findings of fact and conclusions of law:

**Findings of Fact**

1. Taxtronics, Inc. f/k/a TaxByte, Inc. ("TaxByte"), Intuit, Inc. ("Intuit") and Lacerte Software Corporation ("Lacerte") are companies that develop and sell computer software, including income tax preparation software. Tax and Accounting Software Corporation

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("TAASC") sells software to income tax preparation specialists and is a direct competitor of Intuit, Lacerte and TaxByte.

2. TaxByte's principal product has **been** DOS-based computer software that TaxByte sold to income tax preparation specialists for use in preparing income tax returns. The identity of the customers who purchased TaxByte software is valuable information that TaxByte's competitors would be able to **use** to market their software products.

3. Competitors, such as TAASC, which markets Windows-based tax preparation computer software, who obtain TaxByte's specific customer information, as opposed to having much larger general lists of **prospective** clients, will have an advantage in selling their software.

4. Intuit, Inc. acquired the intellectual property rights of TaxByte on April 7, 1999, including its customer list ("List") of **approximately** 3,500 tax preparers and miscellaneous users who have **purchased** tax preparation software from TaxByte or had free access to it by virtue of their **employment** status with TaxByte. The terms of the asset purchase agreement between Intuit and TaxByte include "rights relating to the protection of trade secrets and confidential information" and the right to sue for the infringement of these rights. **Approximately** eighty-five percent of the \$11.9 million dollar purchase price, or **approximately \$9.35** million dollars, represented the value the parties placed upon the List. Intuit and Lacerte have brought this lawsuit to enforce the rights acquired from TaxByte.

5. TaxByte took reasonable steps to **protect** the List by: (1) requiring all of its

employees, at the beginning of their employment, to sign an agreement titled "Non-Disclosure and Ownership Agreement,"<sup>1</sup> acknowledging that customer "data, including names, addresses, buying or selling cycles" was confidential information which the company had a legitimate right to keep confidential; (2) not disclosing the List to third parties except in limited circumstances necessary to promote new customers or conduct normal business activities; (3) limiting employee access to the List by storing the data electronically in such a manner that any downloading of the List or printing of the entire List was traceable; and (4) restricting the number of hard copies of the entire List to only one which was kept by the President of TaxByte.

6. Former TaxByte employee, Richard R. Schindall ("Schindall"), was TaxByte's National Sales Director for approximately ten (10) years. As part of his duties as National Sales Director for TaxByte, he had access to the names and addresses of TaxByte's 3,500 active customers.

7. Even though Schindall was never required to sign the "Non-Disclosure and Ownership Agreement," Schindall was aware that the TaxByte's customer list was considered a trade secret, was proprietary and confidential, and was a valuable asset of the business. (Schindall depo., pp. 8-9) He was also aware that TaxByte did not distribute its List outside of the company except where necessary to solicit other customers.

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<sup>1</sup>This was required routinely beginning in 1996 but was required of the majority of employees prior to 1996, although not all. It is commonly understood in the industry that this information is confidential.

Schindall was given partial customer lists to use in marketing, however he understood the List was confidential and TaxByte was justified in its expectation that Schindall would not wrongfully disclose that information.

8. Schindall was terminated by TaxByte on April 15, 1999, following the sale of the company and he was paid severance compensation. In connection with his termination, Schindall attended a meeting in which TaxByte representatives discussed, among other things, Schindall's (and all employees') continuing duty to maintain the confidentiality of TaxByte's trade secrets and proprietary information. At the meeting, Schindall and other terminated employees were also instructed to return all TaxByte materials, information and data, including confidential information within their possession. Since his termination, however, Schindall has, without TaxByte's permission, solicited former TaxByte customers on behalf of TAASC. The solicitations sent by TAASC and Schindall were directed specifically to TaxByte customers although they were also sent to additional general prospects. One such solicitation of the former TaxByte customers stated and appeared as follows:

## Many have asked...

If you are a former Taxbyte user, you are now being forced to change tax software programs. As you may already know, the former National Sales Manager for Taxbyte has come to the conclusion that Tax And Accounting Software Corporation provides the best tax software solution for former users of Taxbyte tax software.

As a tax practitioner whose livelihood also depends so heavily on making the right software choice, Rich Schindall (who prepares over 300 returns!) has taken the time to explore the market and has found that our tax package and our company is the option that he recommends. Since there has been such a high level of interest expressed by former Taxbyte users, he has made himself available to answer any questions that you might have on why he feels we are the obvious choice.

If you would like to speak with him directly, please feel free to contact him at his office in Davenport, Iowa, by calling his toll free number listed below.

**Rich Schindall**

FORMER NATIONAL SALES MANAGER FOR TAXBYTE

**(800) 771-2730**

Additional solicitations are attached hereto as Ex's. "A," "B," "C," and "D."

9. After being contacted by a number of former TaxByte clients, TaxByte conducted a survey in one of its remote market areas to determine how many former TaxByte customers were contacted by Schindall and/or TAASC. The results of the survey showed 43 of 44 of TaxByte's former clients surveyed have received at least one solicitation from either Schindall or TAASC or both. Most former clients surveyed who received a solicitation also received an unsolicited, workable copy of TAASC's tax preparation software.

10. Shortly after his employment with TaxByte ceased, Schindall spoke with TAASC about employment and contracted with TAASC to provide consulting services.

11. The circumstantial evidence leads the Court to conclude that TAASC wrongfully obtained TaxByte's customer list and used the List to contact TaxByte's former customers.

12. A comparison of a nine (9) state TAASC mailing list obtained through discovery to the TaxByte customer list resulted in a 93.96% match, which is statistically highly improbable. Normal marketing avenues would produce only an approximate 20% match.

13. TAASC mailings were received by employees and/or former employees of TaxByte whose names would not have been available from any other source than the TaxByte customer list. They were not tax preparers but were on the List by virtue of having been allowed to use TaxByte software to prepare their personal taxes. See affidavits of Helen Walker, Carol Garner and Lisa Blocker, Plaintiff's Exhibits 2, 3 and 4. Further, the

TAASC list assigned numbers to customers and listed them sequentially. The TaxByte former customer names which were also on the TAASC list had been assigned high numbers, indicating they were added more recently and in close proximity in time to each other. See mailing envelopes and "User ID/User Name" number on "Limited Edition Authorization System," attached to Plaintiffs' Exhibits 2, 3 and/or 4.

14. Schindall breached his continuing duties to TaxByte by using TaxByte's customer information for his own benefit and for the benefit of TAASC.

15. TAASC's continued use of TaxByte's customer list will diminish the value of the List and the \$9.3 million consideration paid by Intuit for the List. It is difficult for Plaintiffs to determine the precise value of the harm to their reputation and goodwill or the number of customers they have lost as a result of Defendants' solicitations.

16. Defendants will suffer comparatively less harm from the requested injunctive relief, because Defendants are enjoined only from contact with the roughly 3,500 customers on the misappropriated TaxByte, now Intuit, customer list. There are an additional in-excess of 200,000 tax preparers to whom Defendants can continue to market their software products. Plaintiffs face substantial harm, in lost goodwill, sales, and customers, if Defendants are not enjoined from continuing to misuse the TaxByte, now Intuit, customer list.

### **Conclusions of Law**

1. Jurisdiction of this action is proper under 28 U.S.C. §1332, as there is complete diversity of citizenship between the parties. The amount in controversy exceeds the sum

of Seventy-five Thousand and No/100 Dollars (\$75,000.00), exclusive of interest and costs. Venue is appropriate in this District pursuant to 28 U.S. C. §1391(a).

2. Any finding of fact which is properly characterized as a conclusion of law is included herein.
3. Plaintiffs are entitled to the requested injunctive relief because Plaintiffs will suffer irreparable injury unless the injunction issues. *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10<sup>th</sup> Cir. 1992);
4. TaxByte's, now Intuit's, customer list is a trade secret because it is information that has derived its economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality. 765 Ill. Comp. Stat. 1065/2 (West 1993); *see also* 78 Okla. St. § 86(4);
5. The threatened injury to Plaintiffs is substantially outweighed by any damage the proposed injunction may cause to Defendants; *Resolution Trust Corp.*, 972 F.2d at 1198;
6. It is in the public interest to enjoin Defendants under the present facts. *Resolution Trust Corp.*, 972 F.2d at 1198.
7. Plaintiffs have established "questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair grounds for litigation."<sup>2</sup> *Id.* at 1199 (quoting

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<sup>2</sup>The Court notes the word "doubtful" makes the standard to be applied by the Court confusing. The term was first used in 1904 by a New Jersey Circuit Court in *Harriman v. Norther Securities Co.*, 132 F.464. The second circuit adopted it in *Hamilton Watch Co., v. Bernus Watch Co.*, 206 F.2d 738 (2nd Cir. 1953), which was thereafter cited by this Circuit and others. The term has no significance to the case at bar.

Otero Savings and Loan Ass'n v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir.1981));

8. There is a likelihood that Plaintiffs will succeed on their claim that Defendants misappropriated TaxByte's, now Intuit's, trade secret by disclosing and using TaxByte's, now Intuit's, customer list without TaxByte's, now Intuit's, express or implied consent. And at the time of disclosure and use, Schindall and TAASC knew or had reason to know that knowledge of the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. 765 Ill. Comp. Stat. 1065/2 (West 1993); *see also* 78 Okla. St. § 86(2).

ENTERED THIS 7 DAY OF SEPTEMBER, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

*Taasc* **FORCE**<sup>®</sup>  
TAX AND ACCOUNTING SOFTWARE CORPORATION

Dear Professional,

According to our records, you **have been** a user of Taxbyte software which has been sold to Intuit and you will be **directly impacted** by this transaction. (*If our records are incorrect, please disregard this letter.*)

Although this acquisition may **seem** rather sudden and unexpected, I want to encourage you to really look at all of the options that are available to you before you rush into making a decision on what tax software you **will be** relying on next tax season and beyond. Even if you are feeling like you are being **forced into** making a decision by May 31st because you are being **forced** to switch tax software . . . please don't be.

We want to give you an opportunity to see for yourself one of the best options available. Within the next couple of days, you **will be** receiving a special package from us outlining all of the special arrangements and **exclusive** "Two Year Fixed Pricing" that we are making available to former Taxbyte users. If you **have not yet** received a copy of our Professional Tax System to review, you will also be receiving a **complimentary** copy to review in the convenience of your own office.

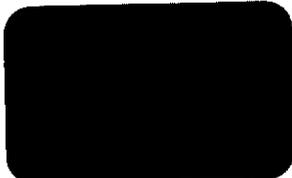
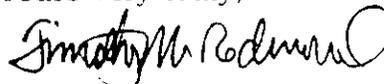
And since your livelihood **depends so heavily** on you making the right decision with your tax software, we have also enclosed a **schedule** of the **FREE** informational seminars that we will be offering - many of which are **before** Intuit's imposed May 31st deadline. (R.S.V.P. and attend one of these seminars and **save an additional \$100!**)

In fact, the former National **Sales Manager** for Taxbyte has come to the conclusion that we are the most logical choice and **best option** available and will be attending many of these seminars personally. This is what **he** had to say about choosing Taasc**FORCE**:

*After carefully evaluating all of the alternatives for Taxbyte users, Tax and Accounting Software Corporation comes out on top. I strongly recommend that all of our former Taxbyte clients switch to Taasc**FORCE** tax software. - Rich Schindall*

We understand that there are **so many** changes that you are being forced to make now that Taxbyte is no longer in business. I **want** to encourage you to carefully weigh all of your options and select the best software at the **best price** that is going to provide you with the absolute best value.

Yours Very Truly,

Timothy M. Redmond, CPA  
Executive Vice-President

**P.S.** We have several years of experience in converting Taxbyte client data to our program.

# Richard R. Schindall

R & S Tax Service • 6313 N. Hazelwood Ave. • Davenport, Iowa 52806

Dear Former Taxbyte Customer,

By now, all of you have received the letter that documents the recent sale of Taxbyte to Intuit.

Now that the initial shock (to all of us, including me!) and impact of this sale has subsided, you are faced with the most important phase of the sale - choosing tax software to replace a program that has consistently served you for many years.

After carefully evaluating all of the key tax software companies and programs, I have come to the conclusion that Tax and Accounting Software Corporation (TaascFORCE) comes out on top. Since I felt that it was important to share some of my thoughts with you personally, TaascFORCE has kindly agreed to use their own database and send this letter to you on my behalf. Please consider the following:

In my 10 years of service to Taxbyte, I have watched the evolution of Taxbyte tax software and feel that it was one of the best DOS-based tax software products on the market. Unfortunately, we were unable to complete the Windows development in a timely and cost effective manner, making the sale of Taxbyte inevitable.

During my time as the National Sales Manager for Taxbyte, I constantly evaluated other tax programs, especially ones that had already made the move to a true Windows 32-bit platform. During this evaluation process, there was always one tax program that piqued my interest - the Professional Tax System from TaascFORCE.

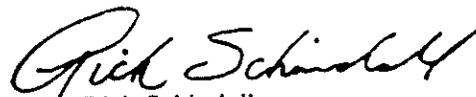
As we were still in the development stage of our own Windows-based program, the program that most closely resembled what we were striving for in design, layout, and functionality could be found in TaascFORCE's tax program. And since TaascFORCE offers a Windows-based program that has several years of use in the field, it is clear they offer a proven product that we as tax preparers can rely upon in the heat of tax season.

By now you have been inundated with countless offers and deadlines from many different tax software providers. As a result, I'm sure that you may have more questions than ever on which tax program to choose and how to decipher some of the rumors from fact.

One of the rumors I want to address relates to the conversion of your Taxbyte data. It is simply untrue that the only company that is able to convert your Taxbyte client files is the new owner of that source code. This is not even close to the truth. In fact, Taxbyte has been converting clients from several competitors' programs for the last few years as has TaascFORCE - and for the last two years TaascFORCE has been able to successfully convert Taxbyte files. They will continue doing so.

I can certainly understand that you may have countless questions on why I think that Tax And Accounting Software Corporation is the one software company that I feel former Taxbyte users should switch to. If you would like to speak with me directly, ask questions and hear for yourself some of my thoughts and conclusions of why I am using TaascFORCE for my tax practice, feel free to call me at my office at (800) 771-2730.

Best Regards to You and Yours,

  
Rich Schindall

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# Taasc **FORCE**<sup>®</sup>

TAX AND ACCOUNTING SOFTWARE CORPORATION

May 18, 1999

Lisa Blocker  
1415 N Stark St  
Davenport, IA 52804

Dear Lisa:

If you are a former Taxbyte user, you **have** very important choices to make about your livelihood. But don't be rushed! Those who have **worked** with Taxbyte clients for years are concerned that you are being forced into using a package that **won't** meet your expectations. Their recommendations . . .

**Rich Schindall**, a top manager at Taxbyte for over nine years, stated, "After carefully evaluating all of the alternatives for Taxbyte users, Tax And Accounting Software Corporation comes (TaascFORCE) out on top. I strongly recommend that **all of our former Taxbyte clients** switch to TaascFORCE software." Rich will also be using our **software** for his tax practice.

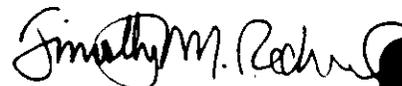
**Chris Bird, EA**, a former spokesman for Taxbyte and an independent lecturer and consultant for tax professionals believes that TaascFORCE is **best** suited to address the needs of former Taxbyte users. He has already committed to use our **tax package** for his tax practice this coming year.

I also believe that we've got what you **need**. To help you see this for yourself, we've enclosed our complete tax product line for your review **absolutely FREE** with no further obligation! Consider the following:

- We offer one of the most **complete tax product lines** available anywhere. Review the enclosed summary sheet to see all of the **modules** that we pack into our CD-ROM options.
- Our software is very easy to use (**even our Windows-based version!**) – you'll be up and running in a matter of minutes and not hours.
- Review our built-in tutorials – **it's like having** our support staff right in the office training you. You may also call us at **(800) 998-9990** to have one of our consultants walk you through the system.
- We have **successfully converted Taxbyte client data to our program for the last several years** – free conversions are available to all tax professionals who used Taxbyte last year.
- Taxbyte users have an exclusive **2-year fixed pricing** discount (save up to \$1100!) for orders received by June 30th! Please **see** the enclosed certificate and order form for more details.
- Attend one of our free seminars and **save an additional \$100!** (See the enclosed seminar sheet)
- This software is backed by a **very stable company** that has weathered the turbulence of the software industry for almost 20 years. Now we are stronger and more secure than ever.

We understand that there are so many **changes** that you are being forced to make now that Taxbyte is no longer in business. I want to **encourage** you to carefully weigh all of your options and select the best software at the best price and value – not just for the next two years, but for the life of your practice!

Yours Very Truly,



Timothy M. Redmond, CPA  
Executive Vice-

# Taxbyte **FORCE**

## TAX AND ACCOUNTING SOFTWARE CORPORATION

Dear Tax Professional,

If you used Taxbyte software last tax season, this letter is written specifically to you.

In making such an important decision, we suggest that you focus on "just the facts, ma'am" because we believe that the facts speak for themselves! Even though you've been forced into switching tax software, don't make a rash decision that you might regret before you get honest, straightforward answers.

As we have communicated the "facts" about what we uniquely offer, we've been overwhelmed by the warm response from so many former Taxbyte users - many of which have already come to the conclusion that we offer the best tax software option.

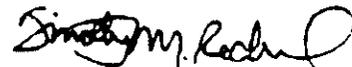
We certainly understand why other companies really want your business - former Taxbyte clients are excellent clients to do business with and expect to be treated in an honest, straightforward and fair manner. Our approach is to inform you about the benefits we offer instead of trying to discredit the competition. So here are some facts that we want to make sure you understand:

- 1) We are a rock-solid company financially and technically. Our growth has been the result of offering tax professionals quality, easy to use software that provides an exceptional value backed by caring and effective service. Quite simply, we have the financial strength and technical depth to flourish in this competitive environment and have plans to serve you for many years to come!
- 2) We offer Taxbyte conversions! We've successfully offered a conversion of Taxbyte data to our Professional Tax System for the last several years and will continue to offer FREE conversions to former Taxbyte users this year. In fact, if you would like to see how easy our conversion is to use, we can send you a copy of last year's conversion to try in the convenience of your own office.
- 3) Taxbyte "insiders" are recommending us! Many who have faithfully worked with Taxbyte for years, including Rich Schindall and Chris Bird, have researched the competition and have come to the conclusion that we are the best option for former Taxbyte users. Rich is even open to answering questions you may have regarding his research and conclusions. Call his office at (800) 771-2730.
- 4) We listen to our users! We've already started making enhancements to our 1999 tax program based on specific feedback from former Taxbyte users. We're confident that our new Taxbyte users will be very pleased with these enhancements once they are implemented.

We're very excited about what the future holds, not only for us but also our valued clients. So, if you hear rumors that are intended to discredit us, be sure to call us at (800) 998-9990. We'll give you the honest, straightforward facts - then leave it up to you to make the final, well-informed choice.

We would love to have the opportunity to serve you. Join your fellow Taxbyte colleagues who have already made their decision to use our software for the coming years. You'll be glad you did.

Committed to Your Success.



Timothy M. Redmond, CPA  
Executive Vice President

P.S. Purchasing our 1999 tax system by June 30th qualifies you for the best discounts PLUS gives you FREE admission into one of our in-depth training seminars later this summer (save \$125!). Details to follow.

6414 South Yorktown Avenue, Tulsa, OK 74136 Sales (800)998-9990 Support (918)493-5900 Fax (800) 920-1



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

**F I L E D**

SEP - 7 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

INTUIT INC. and LACERTE  
SOFTWARE CORPORATION,

Plaintiffs,

v.

TAX AND ACCOUNTING SOFTWARE  
CORPORATION and RICHARD R.  
SCHINDALL,

Defendants.

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**99CV0550B (J)**

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ENTERED ON DOCKET  
DATE SEP 08 1999

**PRELIMINARY INJUNCTION ORDER**

CAME ON FOR CONSIDERATION Plaintiffs Intuit Inc. and Lacerte Software Corporation's (collectively, "Plaintiffs") **Motion** for Preliminary Injunction. The Court, having reviewed the Motion, the Response, argument of counsel and other pleadings on file with this Court is of the opinion that the Motion should be **GRANTED**.

**IT IS HEREBY ORDERED** that Defendants Tax and Accounting Software Corporation and Richard R. Schindall (collectively, "Defendants") are enjoined:

- A. from making any further **use** of the TaxByte customer list or the information from such list, including any **derivative** lists or partial lists taken from the information which was **wrongfully** retained and misused by Schindall;
- B. from further contacting those persons whose names were brought to their attention as a result of **their being** on the confidential customer list; and
- C. from further soliciting or **accepting** business from those persons whose names appear on the list.

*clerk*

**IT IS FURTHER ORDERED** that Defendants shall deposit, within seven (7) days of the date of this Order, any and all TaxByte customer lists in their possession, whether in written or electronic form, and any derivative lists therefrom with the Court, pending the outcome of this lawsuit.

**IT IS FURTHER ORDERED** that Defendant provide a copy of this Order to each of their officers, agents and employees within 24 hours of service of this Order upon Defendants.

**IT IS FURTHER ORDERED** that Plaintiffs shall post a cash or surety bond in the amount of \$50,000 with the Clerk of Court within seven (7) days of the date of this Order.

ENTERED THIS 7<sup>th</sup> DAY OF SEPTEMBER, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

SEP - 7 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARY R. EDELMAN,

Plaintiff,

vs.

COMMUNICATION GRAPHICS, INC.,  
an Oklahoma corporation,

Defendant.

No. 98-CV-250-B

ENTERED ON DOCKET

DATE SEP 08 1999

**FINDINGS OF FACT**  
**AND**  
**CONCLUSIONS OF LAW**

This case, brought under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 216(b)], was tried to the Court, sitting without a jury, on September 1, 1999. After considering the evidence, the issues, applicable law, and arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Jurisdiction is applicable under 28 U.S.C. §§ 1331, 1337, 1343 and § 16(b) of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 216(b)].
2. The Plaintiff is a resident of the Northern District of Oklahoma and was employed by the Defendant in Tulsa County, Oklahoma.
3. Communication Graphics, Inc., ("CGI") is an Oklahoma corporation, with its principal place of business in Broken Arrow, Tulsa County, Oklahoma. CGI has been in the business of custom designing and printing decals and similar products for approximately

twenty years. CGI's customers range from radio and television stations to manufacturers who purchase decals for labeling machinery.

4. At all times since December 1996, CGI has employed and is employing employees engaged in interstate commerce or in the production of goods for interstate commerce, within the meaning of § 3 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 203(a).

5. The Plaintiff had prior education, training and experience in the field of accounting and had spent approximately fifteen (15) years working for various companies in clerical and in mid-level accounting positions.

6. The Defendant's business was growing and expanding. In the latter part of 1996, the Defendant obtained a new large contract with a national company that would entail opening an off-site office. This was going to require the comptroller, who had good auditing skills but poor people skills, to work at the off-site location much of the time. Management determined that two new supervisory accounting positions should be created, an accounts receivable supervisor and an accounts payable supervisor, in essence as assistant comptrollers, each to be new hires.

7. The Plaintiff, Mary R. Edelman, was employed to fill the accounts receivable supervisor position on December 30, 1996. It was clearly intended this position was to be a salaried position, exempt under the Fair Labor Standards Act ("FLSA") because it involved managerial responsibilities and the exercise of discretion in dealing with management, compiling reports, making credit decisions, dealing with customers, and supervising clerical

help. The position for which Plaintiff was hired on December 30, 1996, paid her \$23,000.00 annually (comparable to \$11.06 per hour).

8. However, when Plaintiff started work the Defendant was months behind in year-end closing of its books, so Plaintiff was not permitted to commence work as the accounts receivable supervisor but spent the first two months as a clerical worker in closing the books for the preceding period, which was also the fiscal year. The company president, Mr. Lawrence, admitted that during the months of January and February, 1997, when the Plaintiff was employed by CGI, she was not involved to any significant degree in the accounts receivable supervisory duties due to the demands of the closing of the books, which was the pressing need. On February 28, 1997, the Plaintiff voluntarily quit work for the Defendant without giving any advance notice because of the tensions she was experiencing from the demands of the work regarding the closing of the books and the personality conflict she had developed with the comptroller.

9. Clerical hourly workers employed by CGI were paid from \$8.50 to \$8.75 per hour, and were paid appropriate overtime under the FLSA when entitled.

10. Plaintiff was paid as follows:

Pay Check Dated	Hours Worked	Overtime	Wage Rate
12-31-96	19.60	-0-	\$11.00
01-15-97	116.50	36.50	"
01-31-97	113.50	33.50	"
02-14-97	108.60	28.60	"
02-28-97	96.00	16.00	"
TOTAL		114.60	

11. Plaintiff's pay rate for hours worked overtime was \$16.50. The time and one-half Plaintiff worked, when multiplied by the overtime rate, totals \$1,890.90.

12. During the two-month period the Plaintiff was employed by the Defendant, because her work was essentially that of a clerical worker, she was entitled to be paid overtime hours.

13. CGI was in good faith in believing it was not in violation of the FLSA in not paying the Plaintiff overtime because she was being paid in excess of the ordinary clerical hourly rate and it was from the outset intended that she would soon move into her supervisory duties as an accounts receivable assistant comptroller.

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction under 28 U.S.C. §§ 1331, 1337, 1343, and § 16(b) of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 216(b)], and venue by virtue of the employment herein being in Tulsa County in the Northern District of Oklahoma.

2. Any Finding of Fact above which might be properly characterized a Conclusion of Law is incorporated herein.

3. The Defendant is an employer subject to § 16(b) of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 216(b)].

4. The Plaintiff met the burden of proving that while working for the Defendant, the Plaintiff performed job duties for which she should have been paid overtime.

5. The Defendant has met its burden of establishing that its failure to pay overtime pay was done in good faith as there were reasonable grounds to believe the work

was exempt, and it would be unfair to impose liquidated damages upon the Defendant herein.

29 U.S.C. § 216(b) 260.

6. Plaintiff is entitled to damages in the amount of \$1,890.90.

7. The Plaintiff is entitled to no liquidated damages. The Plaintiff is entitled to prejudgment interest in the amount of 6% per annum from February 1, 1997, to the date of judgment.

8. The Plaintiff is entitled to post-judgment interest at the rate of 5.224% from the date hereon until paid, 28 U.S.C. § 1961.

9. Plaintiff is entitled to recover her costs herein upon timely submission of her bill of costs under L.R. 54.1. 28 U.S.C. § 1920.

10. The Plaintiff is entitled to a reasonable attorney's fee if timely applied for under L.R. 54.1; § 16(b) of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 216(b)].

DATED this 7<sup>th</sup> day of September, 1999.

  
THOMAS R. BRETT  
UNITED STATES SENIOR DISTRICT JUDGE

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

**F I L E**

SEP - 7 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARY R. EDELMAN, )  
)  
Plaintiff, )  
)  
vs. )  
)  
COMMUNICATION GRAPHICS, INC., )  
an Oklahoma corporation, )  
)  
Defendant. )

No. 98-CV-250-B

ENTERED ON DOCKET  
DATE SEP 08 1999

**J U D G M E N T**

In keeping with the Findings of Fact and Conclusions of Law entered this date, judgment is hereby entered in favor of the Plaintiff, Mary R. Edelman, and against the Defendant, Communication Graphics, Inc., in the amount of One Thousand Eight Hundred Ninety and 90/100 Dollars (\$1,890.90), with prejudgment interest at the rate of 6% per annum from February 28, 1997, and post-judgment interest at the rate of 5.224% from the date hereon. The Plaintiff, as the prevailing party, is hereby awarded her costs if timely applied for pursuant to L. R. 54.1, and a reasonable attorney's fee if timely applied for according to L. R. 54.2.

DATED this 7<sup>th</sup> day of September, 1999.

  
THOMAS R. BRETT  
UNITED STATES SENIOR DISTRICT JUDGE

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

**F I L E D**

ANTHONY TOWRY, a Minor, by and )  
through his next friend and father, )  
MARK TOWRY, )

SEP 7 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Plaintiffs, )

vs. )

No. 98-C-684-C

BROKEN ARROW, INDEPENDENT )  
SCHOOL DISTRICT NO. 3; BOARD OF )  
EDUCATION OF BROKEN ARROW )  
SCHOOLS; DR. JERRY W. HALL, )  
Superintendent, in his individual and )  
official capacities; DR. THERESA )  
WILLIAMSON, Assistant Principal, in her )  
individual and official capacities; and STEVE )  
NIDA, Principal, in his individual and official )  
capacities, )

ENTERED ON DOCKET

DATE SEP 08 1999

Defendants. )

**ORDER**

Pending before the Court is the motion for summary judgment filed by defendants, pursuant to Rule 56 of the Federal Rules of Civil Procedure.<sup>1</sup>

On September 9, 1998, plaintiff, Anthony Towry, by and through his father, Mark Towry, filed the present action, alleging violations of the First,<sup>2</sup> Ninth<sup>3</sup> and Fourteenth Amendments to

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<sup>1</sup> All defendants join in the motion for summary judgment. Defendants state, however, that the Board of Education has no separate legal existence and is not legally capable of being sued, per 70 O.S. §§ 5-105 and 5-106. In any event, this is a moot issue in light of the Court's decision that summary judgment should be granted in favor of all defendants.

<sup>2</sup> In the present motion and response brief of Towry, there is no First Amendment argument. Rather, argument is directed entirely at whether Towry was afforded due process with respect to his suspension, which is a Fourteenth Amendment issue. Even if Towry has not abandoned his First Amendment claim, the Court does not find that defendants deprived Towry of any right he may have had under that Amendment. Towry surely has no First Amendment

the United States Constitution and 42 U.S.C. § 1983, arising out of Anthony Towry's (Towry) lengthy suspension from school. Towry sought damages and injunctive relief. Also on September 9, Towry filed a motion for a temporary restraining order (TRO) to force defendants to readmit him to school, and he also filed a motion for preliminary injunction. Following a hearing on September 22, 1998, the Court denied Towry's TRO motion, and the Court offered to set a hearing on his motion for a preliminary injunction. Towry, however, apparently abandoned his motion for preliminary injunction, as he did not request the Court to set a hearing on the matter subsequent to the TRO hearing. Towry completed his suspension at the end of the Fall 1998 semester, and there is no indication that Towry is now on suspension. Hence, the Court finds Towry's claim for injunctive relief moot.

On July 23, 1999, defendants filed their motion for summary judgment. Towry filed his response brief on August 13, 1999, and defendants filed a reply on August 24. All materials regarding defendants' motion for summary judgment have now been submitted, and the matter is ripe for ruling.

### **Facts**

The following material facts are undisputed. Towry is now a student at Broken Arrow

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right to send e-mail bombs to his school, which has the effect of crashing the school's system.

<sup>3</sup> It has been held, however, that "the ninth amendment does not confer substantive rights in addition to those conferred by other portions of our governing law. The ninth amendment 'was added to the Bill of Rights to ensure that the maxim expressio unius est exclusio alterius would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution.'" Gibson v. Matthews, 926 F.2d 532, 537 (6<sup>th</sup> Cir. 1991) (quoting Charles v. Brown, 495 F.Supp. 862, 863-64 (N.D.Ala.1980)). See also Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174, 182 (1<sup>st</sup> Cir. 1997) (the Ninth Amendment does not create substantive rights beyond those conferred by governing law).

High School and is scheduled to graduate at the end of the 1999-2000 school year. The events giving rise to Towry's suspension occurred while he was a sophomore at Broken Arrow North Intermediate High School (BANIHS).

On April 25, 1998, in the early morning hours, Towry used a program that he had downloaded from the Internet to send the same e-mail message numerous times to a particular instructor at BANIHS. Towry configured the program to send the e-mail message 2,600 times to the Broken Arrow School District electronic mailbox of Janet Bauer, a computer instructor at BANIHS. The e-mail messages, known as an e-mail bomb, were also sent to Bauer's private electronic mailbox, which she accessed from her home computer. Towry additionally configured the e-mail messages so that it appeared that they had been sent by "A Beller", who was Towry's sophomore geometry instructor at BANIHS.

As a result of the e-mail bomb, the Broken Arrow School District's e-mail system crashed. The entire school district's e-mail system was down for half a day following the e-mail bomb. However, the e-mail post office serving BANIHS and four other schools in the district had to be taken off-line for an entire day. Because problems in the system persisted, the entire district's e-mail system had to be taken off-line again for an entire day.

Numerous schools in the Broken Arrow School District are connected to, and rely upon, the district's e-mail system. Approximately 1,300 employees are linked by the system, and it is used extensively for a variety of purposes.

On April 27, 1998, Bauer advised Dr. Theresa Williamson, the assistant principal of BANIHS, that she had received several e-mail messages at her school mailbox. On May 1, Bauer advised Dr. Williamson that she suspected that Towry had sent the messages, due to the fact that

some of her students reported that Towry had been bragging about bombing the school's e-mail system. On the same day, Dr. Williamson interviewed certain students, who reported that Towry had, in fact, bragged about bombing the school's e-mail system. On May 4, Dr. Williamson obtained written statements from certain students regarding Towry's involvement in the e-mail bomb.

After receiving this information, Dr. Williamson confronted Towry directly on May 4. Towry initially denied his involvement, but he subsequently admitted that he had sent the e-mail messages. Towry told Dr. Williamson that he did not like Bauer, and this is why he sent the e-mail bombs to her school and home mailboxes. Dr. Williamson asked Towry to provide a written statement to her. Additionally, Dr. Williamson unsuccessfully attempted to contact Towry's parents. Towry submitted a total of three written statements. However, only the third statement was signed by him.<sup>4</sup> Dr. Williamson also contacted the authorities, and a Wagoner County sheriff's deputy was dispatched to interview Towry. Towry's mother ultimately received Dr. Williamson's message, and she arrived at the school around 10:30 a.m. on May 4. His mother was present while Towry was interviewed by the sheriff's deputy.

After receiving Towry's written statement and his admission, and visiting with his mother, Dr. Williamson announced her decision to place Towry on out-of-school emergency suspension

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<sup>4</sup> Defendants represent that Dr. Williamson never told Towry what to write in his statements. However, Towry maintains that he was asked to write several statements because Dr. Williamson rejected the initial ones. Towry asserts that Dr. Williamson coached Towry on what he should put in the statements, and that they would not be accepted unless they contained certain information and an admission. Defendants respond that Towry admitted during his deposition taken in regard to the present action that everything he wrote in the third and final statement is accurate and correct. The Court will accept this admission by Towry as evidence that everything in the third statement written by him is true, and that this fact is undisputed.

for five days, on the grounds that his conduct had disrupted the educational process.<sup>5</sup> Dr. Williamson cited the Broken Arrow School District's student discipline policy, which states that a student may be suspended on an **emergency basis** in situations where the conduct of the student reasonably indicates that the continued **presence** of the student will constitute an immediate danger to the safety of the students or **employees** or to school property, or a substantial disruption of the educational process. Dr. Williamson prepared a written notice of emergency out-of-school suspension, which advised that Towry had violated several provisions of the discipline code. The notice advised that an informal conference had been scheduled for May 6.

After determining to suspend Towry, Dr. Williamson learned that Towry and another student had also created a spoof page of the Broken Arrow School District's Internet web site, and they posted the spoof on the Internet. The students had used the school's computers to create and post the spoof page. The second student changed the default setting on one of the computers in the BANIHS media center so that it would automatically access the spoof page. The spoof page contained disparaging remarks regarding the Broken Arrow School District and defaced photographs of certain instructors. A link on the spoof page also took the user to Playboy's web

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<sup>5</sup> Towry disputes that he interrupted the educational process, because, he argues, it went on despite the problems with the e-mail system. However, Dr. Williamson testified that Towry's conduct did, in fact, disrupt the educational process. The Court agrees with defendants that, from a review of the evidence presented, it is reasonable to conclude that Towry's actions disrupted the educational process. As noted above, the e-mail system links 1,300 employees of the Broken Arrow School District, and the entire system was taken off-line for one and a half days. In addition, the post office that serves BANIHS and four other schools was taken off-line for two full days. In light of the fact that the school district and its employees rely on the e-mail system for a variety of purposes, the bombing of the e-mail system and its resulting shutdown did substantially disrupt the educational process. Further, it is not the Court's place to question the wisdom of the school officials in determining that Towry posed a danger of substantial disruption to the educational process.

site. However, the students did not damage, take off-line or otherwise alter the school district's official Internet page.

On May 6, Dr. Williamson met with Towry's parents. Dr. Williamson advised that Towry would be suspended for the remainder of the current semester and all of the following semester and that his Internet privileges at school would be revoked for one year.<sup>6</sup> Dr. Williamson cited several grounds for the suspension, including numerous violations of the discipline code, and she advised Towry of his appeal rights.

Towry and his parents appealed the suspension to the Suspension Review Committee, and a hearing was held on May 12. Dr. Williamson presented the case to the committee, and Towry's father presented a rebuttal. Towry's father admitted that Towry had engaged in wrongful conduct, but argued that the punishment was too severe. By letter dated May 12, 1998, the Committee advised that it found Towry guilty of violating numerous provisions of the discipline code, but it found that he was not guilty of harassment or disobedience of a school official.<sup>7</sup> The Committee affirmed Towry's suspension through the end of the fall semester of the 1998-1999 school year and modified the suspension of his Internet privileges at school to a suspension for

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<sup>6</sup> Towry represents that it is disputed as to who made the decision to suspend him. He argues that the suspension was ordered by Principal Steve Nida prior to the May 6 meeting. Dr. Williamson testified that Nida advised her that he felt that Towry deserved the maximum punishment if he admitted to the conduct at issue. Defendants argue that Dr. Williamson had suspended Towry on an emergency basis prior to discussing the situation with Nida. Defendants also argue that since Towry nor his parents disputed Towry's involvement in the conduct in question, Dr. Williamson imposed the maximum suspension. The Court agrees with defendants that there is no indication that Nida unconditionally ordered Dr. Williamson to impose a certain term of suspension regardless of the facts, argument or defense presented at the May 6 hearing.

<sup>7</sup> Both of these grounds were included in the list of violations previously prepared by Dr. Williamson.

the remainder of Towry's school attendance.<sup>8</sup>

Towry and his parents appealed to the Broken Arrow Board of Education. A hearing was held on June 8, 1998, and Towry was represented by an attorney. The school district was also represented by an attorney. Towry was permitted to present evidence and witnesses on his behalf, and he was allowed to cross-examine the school district's witnesses. At the close of the hearing, the Board voted to affirm Towry's suspension.

During his suspension, Towry attended school from 7:00 a.m. to 11:00 a.m. on Saturdays to receive and turn in home work assignments and take tests.<sup>9</sup> With respect to classes in which Towry was enrolled in May 1998, he received the grade he had earned at the time of his suspension in non-core classes, and, with respect to core classes, he was permitted to take final exams on May 16. Dr. Williamson discussed with Towry's parents the option of him attending the Broken Arrow School District Alternative Academy during the pendency of his suspension. However, Towry's parents rejected the option because they did not want him to attend that particular school.<sup>10</sup>

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<sup>8</sup> Towry complains that the Suspension Review Committee was comprised of officials who were directly affected by the problems attributed to the e-mail bomb. He therefore argues that these officials were biased against him. The Court, however, agrees with defendants that Towry has not shown that these officials were bent on seeing Towry suspended for the maximum term, and, further, it is clear that the Committee was not the final arbiter. Rather, the Board of Education affirmed the suspension decisions made below.

<sup>9</sup> Defendants maintain that Towry's educational needs were met under this plan. Towry states in his response brief that it is disputed as to whether his educational needs were met under the plan. The Court agrees with defendants, however, that Towry's response does not raise a dispute in light of the fact that his assertion is not supported by any evidence.

<sup>10</sup> It is not clear from the record why Towry waited until September 1998, to file suit when his suspension became final the previous June. It would seem that if Towry desired to be readmitted to school by virtue of court action, he would have filed his suit well prior to

As noted above, there is no indication that Towry is currently under suspension. Rather, he is now attending Broken Arrow High School as a senior. He is scheduled to graduate at the end of this school year.

### **Standard of Review**

In considering a motion for summary judgment, the Court “has no real discretion in determining whether to grant summary judgment.” U.S. v. Gammache, 713 F.2d 588, 594 (10th Cir.1983). The Court must view the pleadings and documentary evidence in the light most favorable to the nonmovant, Cone v. Longmont United Hosp. Ass’n, 14 F.3d 526, 527-28 (10th Cir.1994), and summary judgment is only appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). “A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Akin v. Ashland Chemical Co., 156 F.3d 1030, 1034 (10th Cir. 1998). “[T]he moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment.” Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991) (quoting Ewing v. Amoco Oil Co., 823 F.2d 1432, 1437 (10th Cir.1987)). However, once the moving party meets its burden, the burden then shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter. Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir.1991). The “party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.”

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September.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citations omitted).

### **Discussion**

The Court notes at the outset its **agreement** with defendants that the Court may not, and indeed will not “sit as a ‘super school board’ and second guess the decisions of the administration and Board of Education.” It is well-settled that school officials must be given wide latitude in their efforts to deal with and correct **disruptive behavior** in their schools. The power to fashion appropriate discipline to combat, **deter, and punish aberrant behavior** is crucial to the establishment and maintenance of a **proper environment** for learning. As the Supreme Court said in Wood v. Strickland, 420 U.S. 308, 326 (1975), “The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members . . .” “Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.” New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring). See also Horton v. Goose Creek Independent School District, 690 F.2d 470, 480 (5<sup>th</sup> Cir. 1982) (teachers and school administrators must have broad supervisory and disciplinary powers).

While it is true that educators have **broad authority** to control conduct and discipline their students, this authority is not without its **limits**. See Goss v. Lopez, 419 U.S. 565, 574 (1975) (the authority to prescribe and enforce **standards of conduct** in school, although very broad, must be exercised consistently with constitutional **safeguards**). The Supreme Court has thus held that, with respect to school suspensions, **students enjoy** certain due process rights under the Fourteenth Amendment. In this context, **due process requires** that the

student be given oral or written **notice of the charges** against him and, if he denies them, an explanation of the **evidence the authorities have** and an opportunity to

present his side of the story. The [Due Process] Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school. There need be no delay between the time 'notice' is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. . . . [I]n being given an opportunity to explain his version of the facts at this discussion, the student [must] first be told what he is accused of doing and what the basis of the accusation is.

Id., at 581-82. However, in certain circumstances, immediate suspension without prior notice and a hearing is permissible if the student poses a continuing danger to others or to property, or a threat of disrupting the educational process. Id. at 582-83. "In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable." Id. Additionally, with respect to long-term suspensions, as is present in the instant case, more formal procedures may be required. Id. at 584.

The Court finds and concludes that the undisputed facts reveal that Towry was afforded adequate due process with respect to his emergency suspension and his more lengthy suspension which followed. The Court further finds and concludes that the suspension was proper under Oklahoma law.

With respect to the first issue regarding whether the emergency suspension deprived Towry of his right to due process, it is clear that the suspension was consistent with the school's discipline policy, and it was preceded by an opportunity for Towry to be heard and present his case. As noted above, Towry was first questioned at length by Dr. Williamson on May 4, 1998, prior to being placed on the five-day emergency suspension. At that time, Dr. Williamson advised Towry of the nature of the violation and the charges against him, and she afforded him an opportunity to present his side of the story and defend himself against the charges. Further, Dr. Williamson met with Towry's mother prior to imposing the emergency suspension, and

Towry had the benefit of his mother's assistance. After receiving Towry's written statement, which contained his admission to the charged acts, Dr. Williamson found that emergency suspension was warranted on the grounds that Towry substantially disrupted the educational process. Dr. Williamson prepared a written notice of suspension, advising of several violations of the school's discipline code and advising that an informal conference was scheduled for May 6.

The Court finds that this case is therefore akin to the great majority of cases contemplated by Goss in which the disciplinarian informally discussed the alleged misconduct with the student shortly after it occurred. As the Supreme Court said, "there need be no delay between the time 'notice' is given and the time of the hearing." Id. at 581-82. In the present case, notice was given, Towry was immediately afforded a right to be heard, and he was then placed on emergency suspension. This course of events satisfies the guarantee that a student will receive a rudimentary hearing prior to being placed on suspension.

As further evidence that Towry was afforded adequate due process, the emergency suspension was then immediately followed by another opportunity to be heard, held two days later, on May 6, at which Towry's parents fully participated. The Court finds that the emergency suspension was reasonably based on the grounds that his conduct was a threat to the educational process. As explained above, the Court will not attempt to second guess the wisdom of any particular punishment, provided that the punishment does not violate the student's legal rights, and the Court's focus in the present case is limited on the narrow issue of whether the punishment was imposed in violation of Towry's right to due process. For the reasons previously stated, the Court concludes that defendants did not deprive Towry of his right to due process with respect

to the emergency suspension.

With respect to the second issue regarding the long-term suspension, Dr. Williamson announced, after meeting with Towry and his parents on May 6, her decision to suspend Towry for the remainder of the current semester and all of the following semester.<sup>11</sup> She cited several grounds for the lengthy suspension and several violations of the discipline code. Finally, Towry was advised of his appeal rights. Towry appealed to the Suspension Review Committee, which held a hearing on May 12. Towry was afforded the opportunity to present whatever evidence and argument he desired, and he was assisted by his parents. The Committee affirmed Towry's suspension that same day based on substantially the same violations relied upon by Dr. Williamson. Towry then appealed to the Board of Education, which held a hearing on June 8, 1998. Towry had the benefit of counsel at the hearing and was permitted to argue his case, present any and all evidence he wanted the Board to consider, and cross-examine defendants' witnesses. The Board, however, voted to affirm the suspension.<sup>12</sup>

Towry argues that he was given the second, lengthy suspension without a further hearing, that the decision to suspend him had already been made prior to the May 6 hearing, that any attempt to argue his case was futile in light of the predetermined decision to suspend him, and that the May 6 meeting did not provide him with any sort of due process. He further complains that the Suspension Review Committee was comprised of members who were biased against him, and he was therefore denied an impartial hearing, in violation of due process. In essence, Towry argues that the hearings afforded by the school district were nothing but a sham, and his fate was

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<sup>11</sup> This term of suspension is permissible under Oklahoma law. 70 O.S. § 24-101.3.

<sup>12</sup> Under Oklahoma law, this decision is final. 70 O.S. § 24-101.3(B)(2).

predetermined and inescapable. Towry **argues that** by the time he received a hearing before the Board of Education, he had been **deprived of his last two weeks** of the school semester. However, Towry makes no allegation that he was **denied due process** in his hearing before the Board.

The Court finds Towry's assertions **meritless**. Towry points to no competent evidence showing that the decision to suspend him for the Fall 1998 semester was predetermined prior to the May 6 hearing, and there is no **competent evidence** which suggests that regardless of Towry's presentation, argument, or defense at **that hearing**, his punishment would have been the same. Moreover, there is nothing which **demonstrates** that the Review Committee was improperly biased against him or that he was **unable to receive** a fair hearing before the Committee on May 12. Indeed, the Committee struck two **grounds** relied upon by Dr. Williamson, although the suspension was upheld. Finally, as **noted**, Towry does not complain that he was denied due process before the Board of Education.

The Court agrees with defendants **that** Towry had ample opportunity to present and argue his case both prior to and after the **determination** was made to suspend him. It is clear that Towry received the more formal procedures **contemplated by Goss** with respect to his long-term suspension. It just so happens that **the school district** determined that the admitted acts were serious enough to warrant a very **lengthy suspension**, and each level of review upheld the prior determination. Although the Court **does view the** suspension as somewhat lengthy in relation to the conduct charged and admitted, it is **certainly not** this Court's place to substitute its judgment for that of the school district or **question the wisdom** of the district's choice of punishment. "It is not the role of the federal courts to **set aside decisions** of school administrators which the court may view as lacking a basis in **wisdom or compassion**. . . . [Section] 1983 does not extend the

right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." Wood, 420 U.S. at 326. Once the Court finds that Towry was afforded adequate due process in relation to the suspension, the Court's inquiry is at an end. The Court has made such a finding.

In short, Towry was made aware of the charges against him prior to the imposition of his suspension, and he was afforded no less than four opportunities to be heard and argue his case. Two such opportunities occurred prior to Towry receiving the long-term suspension. Moreover, Towry was afforded the assistance of his parents at the first three hearings and the assistance of counsel at the final hearing before the Board. The Court therefore finds and concludes that Towry received adequate due process with respect to his suspension, and the Court finds no violation of any other Constitutional right possessed by Towry.<sup>13</sup>

Accordingly, the Court hereby GRANTS defendants' motion for summary judgment.

IT IS SO ORDERED this 7<sup>th</sup> day of September, 1999.



H. DALE COOK  
United States District Judge

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<sup>13</sup> Because the Court concludes that Towry's rights were not violated, it need not consider the defense of qualified immunity.



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9-1-99

RECEIVED

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

U.S. ATTORNEY  
N.D. OKLAHOMA

FILED

SEP 7 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN R. COLLINS,

Defendant.

CIVIL ACTION NO.  
99CV0649C(J)

ENTERED ON DOCKET

DATE SEP 08 1999

AGREED JUDGMENT

This matter comes on for consideration this 7th  
day of ~~August~~ <sup>Sept.</sup>, 1999, the Plaintiff, United States of America, by  
Stephen C. Lewis, United States Attorney for the Northern District  
of Oklahoma, through Phil Pinnell, Assistant United States  
Attorney, and the Defendant, Melvin R. Collins, appearing pro se.

The Court, being fully advised and having examined the  
court file, finds that the Defendant, Melvin R. Collins,  
acknowledged receipt of Summons and Complaint on August 9, 1999.  
The Defendant has not filed an Answer but in lieu thereof has  
agreed that Melvin R. Collins is indebted to the Plaintiff in the  
amount alleged in the Complaint and that judgment may accordingly  
be entered against Melvin R. Collins in the principal amount of  
\$13,450.89, plus accrued interest in the amount of \$6,007.04, plus  
interest thereafter at the rate of 8% per annum until judgment,  
plus filing fees in the amount of \$150.00, plus interest thereafter  
at the current legal rate until paid, plus the costs of this  
action.

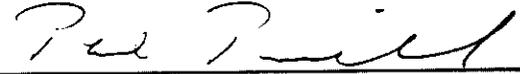
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$13,450.89, plus accrued interest in the amount of \$6,007.04, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 5.224 until paid, plus the costs of this action.

  
UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

  
PHIL PINNELL  
Assistant United States Attorney

  
MELVIN R. COLLINS

LFR/11f



**CERTIFICATE OF MAILING**

I, John H. Lieber, hereby certify that on the 8<sup>th</sup> day of September, 1999, a true and correct copy of the above and foregoing was mailed with sufficient postage thereon to the following:

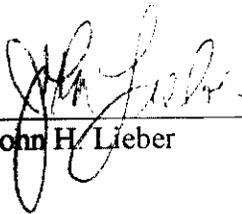
Valley M. Branscum, Esq.  
510 S. Main Street  
P.O. Box 1331  
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William C. Sellers, Esq.  
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111 E. Dewey Street  
Sapulpa, Oklahoma 74067

John L. Harlan, Esq.  
404 E. Dewey St., Suite 106  
P.O. Box 1326  
Sapulpa, Oklahoma 74067

  
\_\_\_\_\_  
John H. Lieber



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

WASATCH ENERGY CORPORATION,

Plaintiff,

v.

NM&O OPERATING COMPANY,

Defendant.

ENTERED ON DOCKET

DATE SEP 07 1999

Case No. 98-CV-168-K (J) ✓

**F I L E D**

SEP 07 1999 SA

ADMINISTRATIVE CLOSING ORDER Phil Lombardi, Clerk  
U.S. DISTRICT COURT

The Court, having been advised by counsel Joseph C. Woltz September 3, 1999, that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 3 day of September, 1999.



TERRY C. KERN, Chief  
United States District Judge

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

IN RE:

TARANTINO, WILLIAM JOHN,

Debtor,

WILLIAM JOHN TARANTINO,

Appellant,

vs.

DELAWARE PLACE, INC.,

Appellee.

**FILED**

SEP 3 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-272-K (M)

ENTERED ON DOCKET

DATE SEP 07 1999

**REPORT AND RECOMMENDATION**

This appeal from a decision of the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. Appellant, Debtor William John Tarantino, appeals from an order of the Bankruptcy Court modifying the automatic stay to enable Appellee, Delaware Place, Inc., (DPI) to evict the debtor from property pursuant to a state court judgment entered in a forcible entry and detainer action. As hereafter explained, the undersigned recommends that the Bankruptcy Court be affirmed.

**I. BANKRUPTCY COURT'S FINDINGS OF FACT**

The Bankruptcy Court read its findings of fact and conclusions of law into the record. The factual findings pertinent to this appeal are outlined below.

1. Chapter 13 bankruptcy was filed December 23, 1998. [Dkt. 8, p. 3].

2. At the time of the filing, Mr. Tarantino (Debtor) resided in a residential property located at 2540 South Delaware Place, referred to throughout the findings as "Delaware Place." [Dkt. 8, p. 3-4].

3. Legal title to Delaware Place at the time of filing was in the name of Delaware Place, Incorporated (DPI). [Dkt. 8, p. 4].

4. DPI obtained the title to Delaware Place from Mr. Sharp. Mr. Sharp obtained title from a Mr. Craig Talkington who delivered a quit claim deed. Mr. Talkington obtained title to Delaware Place from Mr. Tarantino. According to Mr. Tarantino, real estate taxes on Delaware Place were delinquent. Mr. Talkington offered to make a loan for payment of the delinquent taxes. Mr. Tarantino believes he signed a note and mortgage. The documents received into evidence were a contract for sale and a warranty deed. In October of 1997 Mr. Sharp and Mr. Tarantino reached an agreement whereby Delaware Place would be returned to Mr. Tarantino and Mr. Tarantino would be paid \$5,000 in damages. That agreement was not fulfilled. [Dkt. 8, p. 4-6].

5. On October 8, 1998, DPI filed an action to evict Mr. Tarantino from the property. Mr. Tarantino filed an answer alleging that fraud had occurred in procuring the deed to the property from him. An evidentiary hearing was held in that action on November 2, 1998. [Dkt. 8, p. 6]. The District Court of Tulsa County entered an order that DPI was "entitled to the immediate possession of" the property. [Dkt. 8, p. 7].

6. On October 29, 1998, Mr. Tarantino filed a separate action against DPI, Mr. Sharp and Mr. Talkington alleging fraud and seeking specific performance of the

October 1997 agreement between Mr. Tarantino and DPI's sole shareholder, George Sharp. The court denied Mr. Tarantino's request for a temporary restraining order to prevent enforcement of the order of possession and delivery of Delaware Place to DPI. [Dkt. 8, p. 7].

7. The Tulsa County Health Department has found Delaware Place to be unfit for human habitation and issued an order that the situation be corrected or the property vacated.<sup>1</sup> [Dkt. 8, p. 16].

8. Mr. Tarantino did not offer any form of protection or showing that the problems identified by the health department had been abated. [Dkt. 8, p. 16].

## **II. BANKRUPTCY COURT DECISION**

The Bankruptcy Court examined the applicability of res judicata to this action and concluded that it is "bound under the principles of res judicata to recognize the validity of the Tulsa County District Court [order]" that DPI is entitled to the immediate possession of Delaware Place. [Dkt. 8, p. 17]. The Bankruptcy Court stated that Mr. Tarantino was in effect asking it to ignore the state court judgment or effectively vacate or reverse it and ignore the fact that a state court of competent jurisdiction refused to restrain enforcement of the possession order. The Bankruptcy Court found that in filing bankruptcy, Mr. Tarantino was seeking a "third bite at the apple in the forcible entry and detainer action which failed." [Dkt. 8, p. 15]. He lost following hearing in the original action and failed in his attempt to obtain a temporary restraining

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<sup>1</sup> Findings 7 and 8 were contained in the Bankruptcy Court's conclusions of law, but are more appropriately incorporated in this report as findings of fact.

order so he filed the bankruptcy for the sole purpose of obtaining another forum to litigate the question of possession of Delaware Place. *Id.* The Court stated that the Bankruptcy Code is not intended to provide a debtor with an alternative forum to relitigate issues which it could have or did litigate in court pre-petition.

The Bankruptcy Court also concluded that DPI's right to immediate possession is not adequately protected in that the Tulsa County Health Department's finding that Delaware Place is unfit for human habitation has an effect on the value of Delaware Place and Mr. Tarantino has not offered any form of protection or made any showing that the problems prompting the health department notice have abated. [Dkt. 8, p. 16].

Based on the foregoing, the Bankruptcy Court granted DPI's motion for relief from the automatic stay under 11 U.S.C. § 362(d).

### **III. JURISDICTION AND STANDARD OF REVIEW**

The District Court has jurisdiction over this appeal under 28 U.S.C. § 158. 11 U.S.C. § 362(d) allows the granting of relief from the automatic bankruptcy stay under appropriate circumstances. The decision whether to lift the stay is committed to the discretion of the Bankruptcy Court. The decision will not be reversed unless it constitutes an abuse of discretion. *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987). Under the abuse of discretion standard, an appellate court will not disturb a trial court's decision absent "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Thomas v. International Business Machines*, 48 F.3d 478, 482 (10th Cir. 1995), quoting *United States v. Ortiz*, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986).

Conclusions of law as to the applicability of *res judicata* are reviewed de novo. *In re Gledhill*, 76 F.3d 1070, 1082 (10th Cir. 1996).

#### IV. DISCUSSION

The filing of a bankruptcy petition operates to automatically stay civil litigation against the debtor and property of the bankruptcy estate. 11 U.S.C. § 362. Section 362(d) provides for relief from the stay in certain circumstances:

- (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
  - (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

[emphasis supplied].

Mr. Tarantino argues that the Bankruptcy Court's grant of relief from the automatic stay is inconsistent with the following comments contained within the Bankruptcy Court's findings: that it had heard nothing that would justify Mr. Sharp's failure to abide by the agreement to convey Delaware Place back to Mr. Tarantino; that Mr. Tarantino had at the minimum a possessory interest in Delaware Place; that title to Delaware Place held by DPI is less than certain; and that DPI is entitled to the immediate, perhaps not the ultimate, possession of Delaware Place. He asserts that these comments evince a recognition of his legitimate claims against DPI and that issue preclusion should not apply because he was not afforded the full and fair opportunity to litigate title in the forcible entry and detainer action.

Mr. Tarantino also argues that he raised the right to title as a defense to the forcible entry and detainer action, the assertion of which he claims deprived the Oklahoma small claims court of jurisdiction to enter judgment and renders the judgment that was entered void. Although not clearly stated, the crux of Mr. Tarantino's argument seems to be that the Bankruptcy Court should have examined the jurisdictional facts of the underlying judgment; found jurisdiction to be lacking; and then refused to accord res judicata effect to the judgment.

In response, DPI argues first, that the appeal should be dismissed as moot because DPI executed on its forcible entry judgment by having the Tulsa County Sheriff's Office remove Mr. Tarantino from the subject property. Secondly, DPI argues that the Bankruptcy Court properly determined that DPI had established "cause" for modifying the automatic bankruptcy stay pursuant to 11 U.S.C. § 362(d) in that DPI established, and the Bankruptcy Court found, that Mr. Tarantino filed for Chapter 13 relief in an attempt to avoid being evicted from the property, and that DPI's right to immediate possession of the property was not adequately protected.

This appeal raises three questions: (1) whether the appeal should be dismissed as moot; (2) whether the Bankruptcy Court correctly determined that res judicata, or issue preclusion, applied to prevent re-examination of the facts underlying the forcible entry and detainer order; and (3) whether the Bankruptcy Court abused its discretion in lifting the stay.

### A. Dismissal as Moot

Debtor has not responded to DPI's motion to dismiss. Consequently, there is nothing before the court indicating any factual dispute of DPI's assertion that Debtor was evicted from the property on January 20, 1999, in execution of the forcible entry judgment.

A case presents a justiciable controversy only if there is an actual dispute between adverse litigants and a substantial likelihood exists that a favorable court decision will produce some effect on the legal rights of the parties. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). A case is moot if a litigant's interest in the outcome of the action ceases before judgment. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 402, 404, 63 L.Ed.2d 479 (1980).

In this case the Oklahoma forcible entry and detainer action is complete. Debtor has apparently been removed from the property. If he was wrongly removed the remedy available in this action, reinstatement of the automatic stay, will not affect the legal rights of the parties. *See In re Jones*, 176 B.R. 645, 647-48 (D. N.H. 1994) (holding debtors appeal from relief of stay was moot where debtor failed to seek temporary stay of order and eviction proceeding had been completed). Consequently, the undersigned United States Magistrate Judge recommends that this appeal be dismissed as moot.

To the extent this appeal could be construed as presenting an actual case or controversy, the undersigned has addressed the substantive arguments presented.

## **B. Res judicata or Issue Preclusion**

The preclusive effect of a state court judgment in a subsequent federal lawsuit is determined by the full faith and credit statute which provides that state judicial proceedings shall have the same full faith and credit in every court within the United States as they have by law or usage in the courts of such state from which they were taken. 28 U.S.C. § 1738 and *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1331-32 (1985). Under Oklahoma law, 12 Okla. Stat. § 1148.1, the district court has jurisdiction to try all actions for the forcible entry and detention of real property. Any ruling in a forcible entry and detainer action brought under that section is "conclusive as to any issues adjudicated therein, but it shall not be a bar to any other action brought by either party." *Id.*

The court finds that the Bankruptcy Court correctly determined that it could not re-examine the findings of the Tulsa County District Court. In Oklahoma, under the doctrine of issue preclusion, or collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, the same parties or their privies may not relitigate the issue in a suit brought upon a different claim. In *Fent v. Oklahoma Natural Gas Co.*, 898 P.2d 126, 133 (Okla. 1994), the Oklahoma Supreme Court stated:

The principle of issue preclusion applies with equal force to jurisdictional as well as to nonjurisdictional questions. It operates to bar from relitigation both correct and erroneous resolutions of jurisdictional challenges but it cannot be made binding on anyone unless the party against whom the earlier decision is interposed had "full and fair opportunity" to litigate the critical issue in the earlier case. No more than

a single opportunity is afforded by law to litigate a disputed jurisdiction of a tribunal. [footnotes omitted].

*Id.* These statements accurately reflect the status of the law in Oklahoma concerning the application of issue preclusion.

Mr. Tarantino was a party to the subject forcible entry and detainer action. He does not dispute that he was afforded an opportunity to be heard concerning matters relative to the Oklahoma court's jurisdiction to adjudicate the issue of immediate possession of Delaware Place, nor does he claim that he was denied hearing on the issue of immediate possession of the property. Rather, Mr. Tarantino argues that he was not permitted to litigate title. However, the judgment in the forcible entry and detainer action does not presume to adjudicate title, it adjudicated only the right to immediate possession of Delaware Place. Based on the foregoing, the undersigned concludes that the Bankruptcy Court correctly determined that Mr. Tarantino was precluded from relitigating the Tulsa County order.

**C. Relief Under 11 U.S.C. § 362(d)**

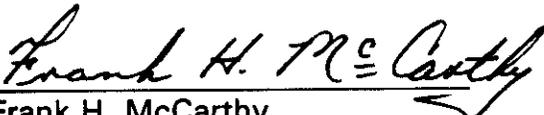
Mr. Tarantino has forwarded no argument pertaining to the Bankruptcy Court's conclusion that DPI's right to immediate possession of Delaware Place was not adequately protected and that relief is therefore appropriate under 11 U.S.C. § 362(d). The undersigned United States Magistrate Judge therefore recommends that the court affirm the Bankruptcy Court order granting relief from the automatic stay under 11 U.S.C. § 362(d).

**V. CONCLUSION**

The undersigned United States Magistrate Judge RECOMMENDS that DPI's Motion to Dismiss [Dkt. 7] be GRANTED and the appeal be DISMISSED AS MOOT. Alternatively, the Bankruptcy Court Order should be AFFIRMED.

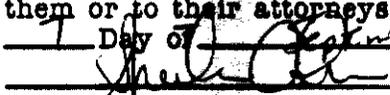
In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from 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 3<sup>rd</sup> Day of September, 1999.

  
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

7 Day of September, 1999.  


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

OZARK FINANCIAL SERVICES, Inc.,

Plaintiff,

v.

T.R. ELLIS, d/b/a/  
A LADY'S EXPRESS POT LUCK  
TRUCKING CO.,

Defendant.

ENTERED ON DOCKET

DATE SEP 07 1999

Case No. 99-CV-310-H

**FILED**

SEP 7 1999 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

This matter comes before the Court pursuant to the hearing on damages held on September 1, 1999, at 9:30 AM. Defendant T.R. Ellis failed to appear at that hearing. Plaintiff Ozark Financial Services ("OFS") filed a certificate of service on August 20, 1999, indicating that Mr. Ellis had been properly served with notice of the hearing.

At the hearing, OFS presented evidence that Mr. Ellis owes OFS \$132,253.81, \$52,551.93 of which allegedly consists of attorney fees and costs from an adversary proceeding before the Bankruptcy Court for the Eastern District of Oklahoma. Debts incurred prior to Mr. Ellis's filing of bankruptcy, which were not discharged in bankruptcy, amount to \$79,701.88. Mr. Ellis failed to appear and submit any evidence controverting the existence and accuracy of an indebtedness in this amount duly owed by Defendant to Plaintiff. Therefore, the Court finds that judgment should be entered in favor of Plaintiff and against Defendant in the amount of \$79,701.88.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant in the amount of \$79,701.88.

IT IS SO ORDERED.

This 2<sup>ND</sup> day of September, 1999.



Sven Erik Holmes  
United States District Judge

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

ROBERT HELLARD, )  
)  
Plaintiff, )  
)  
vs. )  
)  
PACIFICARE OF OKLAHOMA INC., )  
d/b/a SECURE HORIZONS, )  
)  
Defendant. )

ENTERED ON DOCKET

DATE SEP 07 1999

Case No. 98CV943 H (J)

**FILED**

SEP 7 1999 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER OF DISMISSAL WITH PREJUDICE**

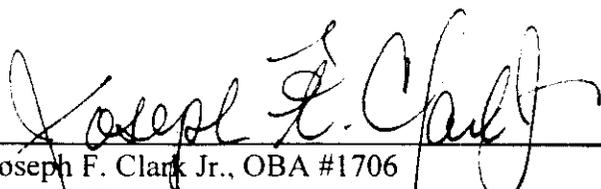
This cause comes before the Court on the parties' Stipulation of Dismissal With Prejudice, and upon being advised that the parties are in agreement regarding the dismissal of this case as indicated by said Stipulation, finds that said Stipulation is proper, and this case should be dismissed with prejudice.

IT IS THEREFORE ORDERED, that this action, including all claims and causes of action between the parties, is hereby dismissed with prejudice, each party to bear its own costs and fees.

Dated this 2<sup>ND</sup> day of SEPTEMBER, 1999.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

  
\_\_\_\_\_  
Joseph F. Clark Jr., OBA #1706  
1605 S. Denver  
Tulsa, OK 74119  
(918) 583-1124  
ATTORNEY FOR PLAINTIFF  
ROBERT HELLARD

  
\_\_\_\_\_  
Kimberly Lambert Love, OBA #15806  
John A. Burkhardt, OBA #1336  
BOONE, SMITH, DAVIS, HURST & DICKMAN  
500 ONEOK Plaza, 100 West Fifth Street  
Tulsa, OK 74103  
(918) 587-0000  
ATTORNEY FOR DEFENDANT  
PACIFICARE OF OKLAHOMA INC. d/b/a  
SECURE HORIZONS

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

**FILED**  
SEP 3 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

AEGIS MORTGAGE CORPORATION, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DENNIS RETTIG, GREG AUEN, MONTE S. )  
COX, JAMES COATS, LANCE WALKER, )  
ANTHONY POUND, LANNY PEREZ, and )  
CHRISTI HEELAN, and FIELDSTONE )  
MORTGAGE COMPANY, )  
 )  
Defendants. )

ENTERED ON DOCKET  
DATE **SEP 07 1999**

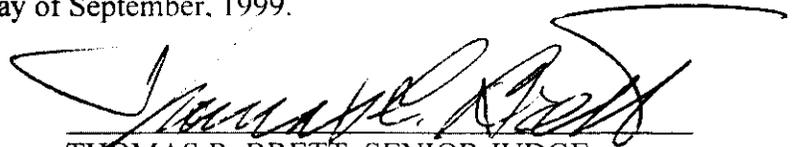
Case No. 99-C-0619-B (M) /

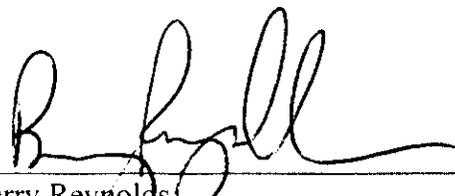
**AGREED ADMINISTRATIVE CLOSING ORDER**

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

If, by 9/30/99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 3<sup>rd</sup> day of September, 1999.

  
THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

  
Barry Reynolds,  
Counsel for Plaintiff AEGIS Mortgage Corporation



---

T. Lane Wilson  
Counsel for Defendants, Fieldstone Mortgage  
Company and Greg Auen

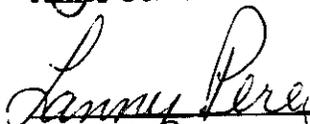


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Rick White  
Counsel for Defendant Dennis Rettig



James Coats



Lanny Perez



Christi Heelan

Sep-02-99 01:01P FIELDSTONE Muskogee 9186814066 P.02

SEP 2 1999 11:28AM  
FAX 01:1999 11:28 AM

BOONE SMITH & DAVIS 9185999317

NO. 221 P. 6/7

  
George A. Cox

  
Lance Walker



Anthony Pound

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

FILED

SEP 2 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

AGAR CORPORATION INC.,  
PLAINTIFF

§  
§  
§  
§  
§  
§  
§

V.

CIVIL ACTION NO. 97CV 590B (W)

DATRAN CORPORATION and  
MULTI-FLUID INTERNATIONAL AS,  
DEFENDANTS.

ENTERED ON DOCKET  
DATE SEP 07 1999

**PLAINTIFF'S STIPULATED DISMISSAL  
AGAINST MULTI-FLUID INTERNATIONAL AS**

In view of the fact that the patents-in-suit are involved in reexamination proceedings in the United States Patent and Trademark Office, Plaintiff Agar Corporation dismisses all claims against Defendant Multi-Fluid International AS pursuant to Rule 41(a)(1)(i).

Respectfully submitted,

9-1-99

Date

Richard T. Redano

Richard T. Redano  
Texas Bar No. 16658400  
DUANE, MORRIS & HECKSCHER LLP  
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Phone: (713) 552-9900  
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Local Counsel

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Tulsa, Oklahoma 74103-3825  
Phone: (918) 583-4276  
Fax: (918) 583-8590

Attorneys for Plaintiff,  
AGAR CORPORATION, INC.

50

C25

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the following document:

**PLAINTIFF'S STIPULATED DISMISSAL  
AGAINST MULTI-FLUID INTERNATIONAL AS**

was delivered via U.S. Mail to:

Robert J. Bartz  
Barber & Bartz  
110 W. 7<sup>th</sup> Street, Suite 200  
Tulsa, OK 74119-1018

Kent A. Rowald  
Vaden, Eickenroht & Thompson  
One Riverway, Suite 1100  
Houston, TX 77056-1982

on this 1 day of September, 1999.

Tracie Nigpen

MT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 7 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN O. HORTON,

Defendant.

Case No. 99CV0650E(J)

ENTERED ON DOCKET  
SEP 07 1999  
DATE \_\_\_\_\_

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 7<sup>th</sup> day of September, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

*Phil Pinnell*

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

CERTIFICATE OF SERVICE

This is to certify that on the 7<sup>th</sup> day of September, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: John O. Horton, 10913 E. 19th Pl., Tulsa, OK 74128.

*Libbi L. Felty*  
Libbi L. Felty  
Paralegal Specialist

2

CLJ

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

**FILED**

SEP 2 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARVIN SUMMERFIELD, ROBIN  
MAYES, and DAVID CORNSILK,

Plaintiffs,

vs.

No. 98-C-328-B(EA)

MARK MCCOLLOUGH, REX EARL  
STARR, JENNIE L. BATTLES,  
LISA FINLEY, and JOE BYRD,

Defendants.

ENTERED ON DOCKET

DATE SEP 07 1999

**ORDER**

Before the Court are the Motion for Partial Summary Judgment against defendant Joe Byrd on the issue of liability under 18 U.S.C. §2520 (Docket No. 129), Motion for Partial Summary Judgment against defendant Mark McCollough on the issue of liability under 18 U.S.C. §2520 (Docket No. 174)<sup>1</sup> and the Motion for Partial Summary Judgment against defendant Jennie L. Battles on the issue of liability under 18 U.S.C. §2520 (Docket No. 133) filed by Plaintiff Marvin Summerfield (“Summerfield”); Motion for Summary Judgment on all claims filed by defendant Rex Earl Starr (“Starr”) (Docket No. 261); Motion for Partial Summary Judgment against defendant Summerfield on his claim under 18 U.S.C. §2520 (Docket No. 263 ), Motion for Partial Summary Judgment against plaintiff David Cornsilk (“Cornsilk”) on his claim

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<sup>1</sup> Defendant Mark McCollough did not file a response to this motion. However, as he filed a motion for summary judgment on plaintiffs’ claim under 18 U.S.C. §2520 and plaintiffs have responded to his motion, the Court considers both motions at issue.

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under 18 U.S.C. §2520 (Docket No. 265),<sup>2</sup> and Motion for Partial Summary Judgment against plaintiffs Summerfield and Cornsilk on their claims under 42 U.S.C. §§1983, 1985(3) and 1986 (Docket No. 262) filed by defendant Jennie L. Battles (“Battles”); Motion for Summary Judgment [on plaintiffs’ 18 U.S.C. §2520 claim] filed by defendant Mark McCollough (“McCollough”) (Docket No. 282); and Motion for Summary Judgment against Summerfield and Cornsilk on all claims (Docket No. 266) filed by defendant Joe Byrd (“Byrd”).

Plaintiffs Summerfield and Cornsilk allege defendants Byrd, Battles, Starr and McCollough unlawfully used and/or disclosed intercepted conversations between plaintiffs and others in violation of 18 U.S.C. §2520 and 2511; under color of state law, deprived plaintiffs of their rights, privileges and immunities in violation of 42 U.S.C. §1983; conspired to deprive defendants of equal protection of the laws in violation of 42 U.S.C. §1985(3); and knew but failed to prevent the conspiracy to deprive defendants of equal protection of the laws in violation of 42 U.S.C. §1986. Both plaintiffs and defendants assert they are entitled to summary judgment.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court stated:

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

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<sup>2</sup> Cornsilk did not file a response to this motion. As the Court has overruled defendants’ motions for summary judgment on plaintiff Summerfield’s claim under 18 U.S.C. §2520 and overruled plaintiff Summerfield’s motion for partial summary judgment on his claim under 18 U.S.C. §2520 against defendants, the Court overrules Battles’ motion for partial summary judgment against Cornsilk on his 18 U.S.C. §2520 based on the reasons set forth herein.

which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a “genuine issue of material fact.” *Anderson*, 477 U.S. at 247-48.

The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

*Id.* at 252. Thus, to defeat a summary judgment motion, the nonmovant “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

The Court first addresses plaintiffs’ claims under 18 U.S.C. §2511. Section 2511 states in pertinent part the following:

(1) Except as otherwise specifically provided in this chapter any person who--

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of

a wire, oral, or electronic communication in violation of this subsection; . . .

. . . shall be subject to suit [pursuant to 18 U.S.C. §2520].

18 U.S.C. §2511(1). Section 2520, title 18 of the United States Code, permits the Court to assess damages to a plaintiff who establishes a violation of §2511 as the greater of

- (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
- (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.

18 U.S.C. §2520(c)(2).

To prevail on their use and/or disclosure claims under §2511, plaintiffs must establish the use or disclosure was intentional, the defendant knew “the information used or disclosed came from an intercepted communication,” and the defendant knew “sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of Title III.”<sup>3</sup> *Thompson v. Dulaney*, 970 F.2d 744, 748-49 (10<sup>th</sup> Cir. 1992). After reviewing the briefs, the Court finds there are genuine issues of material facts as to intent, knowledge, use and/or disclosure of the contents of the intercepted communication which preclude summary judgment on the issue of liability under 18 U.S.C. §2511 in favor of all moving parties. Further, the Court rejects defendants’ argument that plaintiffs have failed to establish any actual damages for the alleged use and/or disclosure of

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<sup>3</sup> Although a defendant may be presumed to know the law, to establish use and disclosure liability under Title III, a defendant must be shown to have been aware of the factual circumstances that would violate the statute. For example, it is not enough to show that a defendant merely knew he was using or disclosing information from an intercepted communication. It must also be shown that the defendant knew, inter alia, that neither party to the intercepted conversation had consented to the interception.

*Thompson*, 970 F.2d at 749(citations omitted).

the intercepted conversations and therefore defendants are entitled to summary judgment on the §2511 claims against them. As noted above, §2520 permits the Court to assess statutory damages if a violation of §2511 is established. Accordingly, the Court denies summary judgment to both plaintiffs and defendants on plaintiffs' claim pursuant to 18 U.S.C. §2511.

The Court, however, concludes plaintiffs have not established their claims against defendants Byrd, Battles and Starr under 42 U.S.C. §§1983, 1985(3) and 1986 and thus defendants are entitled to summary judgment on plaintiffs' civil rights claims.<sup>4</sup>

To establish their prima facie claim under 42 U.S.C. §1983, plaintiffs must show defendants acted under "color of law" to deprive plaintiffs of a constitutional or federal statutory right. The Court finds plaintiffs have not established that these defendants acted under "color of law."

In their Third Amended Complaint, plaintiffs allege the following:

Defendant Rex Earl Starr ("Starr") is an individual who, upon information and belief, was at all times relevant to the matters alleged in this Complaint, General Counsel for and an employee of the Cherokee Nation. Upon information and belief, Mr. Starr is a resident of Stilwell, Adair County, Oklahoma.

Defendant Jennie L. Battles ("Battles") is an individual who, upon information and belief, was at times relevant to the matters alleged in this Complaint, Secretary-Treasurer for and an employee of the Cherokee Nation. Upon information and belief, Ms. Battles is a resident of Tahlequah, Cherokee County, Oklahoma.

Defendant Joe Byrd ("Byrd") is an individual who, upon information and belief, was at times relevant to the matters alleged in this Complaint, Principal Chief and an employee of the Cherokee Nation. Upon information and belief, Mr. Byrd is a resident of Tahlequah, Cherokee County, Oklahoma.

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<sup>4</sup> Although Summerfield and McCollough have moved for summary judgment on plaintiffs' claim against McCollough under 18 U.S.C. §2520, neither party addressed plaintiffs' civil rights claims against McCollough. For the reasons stated below, however, plaintiffs cannot state a claim against any of the defendants under 42 U.S.C. §§1985(3) or 1986.

Thus, at all times relevant to plaintiffs' claims, defendants Byrd, Battles<sup>5</sup> and Starr were officials or employees of the Cherokee Nation.

As officials of the Cherokee Nation, defendants were not acting under color of law for purposes of §1983. *McKinney v. State of Oklahoma, Department of Human Services*, 925 F.2d 363, 365-66 (10<sup>th</sup> Cir. 1991); *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9<sup>th</sup> Cir. 1983).

[N]o action under 42 U.S.C. §1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law. Indian tribes are separate and distinct sovereignties, and are not constrained by the provisions of the fourteenth amendment. As the purpose of 42 U.S.C. §1983 is to enforce the provisions of the fourteenth amendment, it follows that actions taken under color of tribal law are beyond the reach of §1983 . . .

*Williams*, 719 F.2d at 982 (citations omitted). Further, plaintiffs have provided insufficient evidence to withstand summary judgment on their conclusory allegation that defendants combined with a state actor, *i.e.*, the Housing Authority or its employees, or acted as the Housing Authority's agent in a conspiracy to violate plaintiffs' constitutional rights. *See generally, Adickes v. Kress & Co.*, 398 U.S. 144, 152 (1970).

In reference to their claim under 42 U.S.C. §1985(3), plaintiffs must establish, *inter alia*, "(1) that 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action,' and (2) that the conspiracy 'aimed at interfering with rights' that

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<sup>5</sup> Plaintiffs respond in part to Battles' motion for partial summary judgment as to plaintiffs' civil rights claims by relying on Battles' former position as an employee of the Housing Authority of the Cherokee Nation (the "Housing Authority") to characterize her as a "state actor" for purposes of their §1983 claim. This characterization of Battles clearly conflicts with the allegation in the Third Amended Complaint that she "was at times relevant to the matters alleged in this Complaint, Secretary-Treasurer for and an employee of the Cherokee Nation," and plaintiffs have provided no evidence to link her former status as an employee of the Housing Authority to the alleged wrongful conduct. The Court, therefore, finds that "at times relevant to the matters alleged" in this case, Battles was an employee of the Cherokee Nation, and not the Housing Authority.

are ‘protected against private, as well as official, encroachment.’” *Bray v. Alexandria Women’s Health Clinic* 506 U.S. 263, 268 (1993)(quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) and *Carpenters v. Scott*, 463 U.S. 825, 833 (1983)). Plaintiffs contend their membership in the Cherokee National Party, a party widely recognized as opposed to the Byrd Administration, and their involvement as principal players in the publication of the Cherokee Observer, a publication which opposed the Byrd Administration, satisfy the requirement of “class-based, invidiously discriminatory animus.” The Court disagrees.

As recognized by the U.S. Supreme Court and the Tenth Circuit, the “perhaps otherwise class-based, invidiously discriminatory animus” required by the Supreme Court in *Griffin* is narrowly drawn.

Whatever may be the precise meaning of a “class” for purposes of *Griffin*’s speculative extension of §1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the §1985(3) defendant disfavors. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under §1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with. This definitional ploy would convert the statute into the “general federal tort law” it was the very purpose of the animus requirement to avoid. As Justice BLACKMUN has cogently put it, the class “cannot be defined simply as the group of victims of the tortious action.”

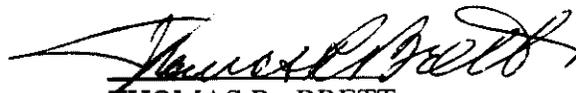
*Bray*, 506 U.S. at 269 (citations omitted); *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176 (10<sup>th</sup> Cir. 1983)(“[W]e find nothing therein to give any encouragement whatever to extend §1985 to classes other than those involved in the strife in the South in 1871 with which Congress was then concerned.”). Further, the Tenth Circuit has expressly rejected extending §1985 protection to members of a group based on political opposition. *Brown v. Reardon*, 770 F.2d 896 (10<sup>th</sup> Cir. 1985). Clearly, plaintiffs’ “class” which is defined solely by reference to their political opposition to another faction in power does not fall within the narrowly drawn class recognized

by the Supreme Court as protected under §1985(3) .

Finally, as plaintiffs cannot establish a claim under §1985(3), their §1986 claim against defendants must also fail. *Brown*, 770 F.2d at 907 (A “§1986 claim is dependent upon the existence of a valid claim under §1985.”); *Grimes v. Smith*, 776 F.2d 1359, 1363 n.4 (7<sup>th</sup> Cir. 1985).

Therefore, in accord with the above, the Court denies Summerfield’s Motion for Partial Summary Judgment against defendant Joe Byrd on the issue of liability under 18 U.S.C. §2520 (Docket No. 129), Motion for Partial Summary Judgment against defendant Mark McCollough on the issue of liability under 18 U.S.C. §2520 (Docket No. 174), and Motion for Partial Summary Judgment against defendant Jennie L. Battles on the issue of liability under 18 U.S.C. §2520 (Docket No. 133); the Court denies Battles’ Motion for Partial Summary Judgment against plaintiff Summerfield on his claim under 18 U.S.C. §2520 (Docket No. 263 ) and Motion for Partial Summary Judgment against Cornsilk on his claim under 18 U.S.C. §2520 (Docket No. 265); the Court denies McCollough’s Motion for Summary Judgment [on plaintiffs’ claim pursuant to 18 U.S.C. §2520 (Docket No. 282)]; the Court grants Battles’ Motion for Partial Summary Judgment against plaintiffs Summerfield and Cornsilk on their claims under 42 U.S.C. §§1983, 1985(3) and 1986 (Docket No. 262); the Court grants in part and denies in part Starr’s Motion for Summary Judgment on all claims (Docket No. 261); and the Court grants in part and denies in part Byrd’s Motion for Summary Judgment against Summerfield and Cornsilk on all claims (Docket No. 266).

IT IS SO ORDERED this 2<sup>nd</sup> day of September, 1999.

A handwritten signature in black ink, appearing to read "Thomas R. Brett", written in a cursive style.

THOMAS R. BRET  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP -2 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LOIS M. BRONSON, )  
SSN: 444-54-4667, )

Plaintiff, )

v. )

KENNETH S. APFEL, Commissioner, )  
Social Security Administration, )

Defendant. )

Case No. 98-CV-0920-EA

ENTERED ON DOCKET

DATE SEP 03 1999

**ORDER**

On September 2, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for supplemental security income and disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Cathryn McClanahan, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) that the plaintiff was not disabled because she could perform a significant number of jobs in the national economy is supported by substantial evidence, and the correct legal standards were applied. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

**Procedural History**

On October 29, 1993, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.) and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held

December 31, 1994, in Tulsa, Oklahoma. (R. 39-73) By decision dated April 6, 1995, the ALJ found that claimant was not disabled at any time through the date of the decision. (R. 247-60) On May 6, 1996, the Appeals Council remanded the case to the ALJ to obtain additional evidence regarding the severity of claimant's mental impairment and its residuals. (R. 272-74) A supplemental hearing was held November 25, 1996, in Tulsa, Oklahoma. (R. 74-114) By decision dated January 30, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On November 6, 1998, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

#### Claimant's Background

Claimant was born on October 5, 1950, and was 46 years old at the time of the supplemental administrative hearing in this matter. She has a degree in nursing, and her past relevant work is as a registered nurse and nurse's aide. She relinquished her nursing certificate in 1988 due to her drug abuse problem. Claimant alleges an inability to work beginning January 31, 1988, due to depression, anxiety, pain, headaches, unreliable memory, fatigue, pain and limited mobility. (Complaint, Docket # 1, at 2.) The pain is allegedly felt in her back and leg. (Cl. Br., Docket # 7, at 2.) The ALJ summarized her initial allegations of disability as depression, obesity, schizophrenia, hypertension, thyroid problems, history of drug abuse, back and leg pain, headaches. (R. 13) She claims to have suffered two nervous breakdowns, in 1988 and 1989 respectively. (R. 83)

#### The ALJ's Decision

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of medium work,

diminished by her inability to perform more than simple, unskilled jobs with moderate stress, not requiring that she relate to coworkers for more than work-related purposes, and requiring only incidental contact with the public, but she can still adapt to work situations, remain attentive and alert and carry out work despite a perception of mild to moderate pain. The ALJ determined that claimant could not perform her past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that she could perform, based on her RFC, age, education, and work experience. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision. (R.13-14)

#### Issues

Claimant asserts as error that the ALJ:

- (1) failed to give the appropriate weight to the report from a treating physician; and
- (2) did not recognize the shift of the burden at step five with regard to the RFC.

#### Applicable Law

##### **Treating Physician**

The regulations provide that, although the final responsibility for determining the ultimate issue of disability is reserved to the Commissioner, 20 C.F.R. §§ 404.1527(e)(2), 416.927(e)(2), the Commissioner will give controlling weight to a treating physician's opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, id. §§ 404.1527(d)(2), 416.927(d)(2).

A treating physician's opinion is entitled to substantial weight unless good cause is shown for rejecting it. Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted). A treating physician's report may be rejected if it is brief, conclusory,

and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

### **Burden of Proof**

The burden of proof in disability cases shifts to the Commissioner at step five of the five-step evaluation process. See Williams v. Bowen, 844 F.2d 748, 750-52 (10th Cir. 1988). At step four, the claimant must establish that he or she cannot perform his past relevant work. At step five, the Commissioner has to show that the claimant can perform other work that exists in the national economy. Miller v. Chater, 99 F.3d 972, 976 (10th Cir. 1996); Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993); see also Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) (“Once the claimant makes a prima facie showing of disability that prevents his engaging in his prior work activity, the burden of going forward shifts to the [Commissioner], who must show that the claimant retains the capacity to perform an alternative work activity and that this specific type of job exists in the national economy.”). The RFC determination is initially part of the step four evaluation and, thus, is made before the burden of proof shifts at step five. Shaffer v. Apfel, No. 97-5174, 1998 WL 314376 (10th Cir. June 4, 1998).

### **Findings**

Claimant argues that the ALJ failed to give appropriate weight to the November 1996 report of Anthony. C. Gagliano, D.O., a part-time psychiatrist who told claimant that he does not give diagnoses. Claimant saw Dr. Gagliano from June 1992 to October 1995. In 1994, Dr. Gagliano opined that she was capable of engaging in rehabilitation studies. (R. 239). In 1995, he opined that

she "is unable to compete in a competitive job market and at this time she is unemployed and unemployable." (R. 270) In 1996, when he had not seen her for more than a year, he again opined that she was incapable of employment in a competitive job market. (R. 338) Her disability period ended, for purposes of Title II, on March 31, 1993.

The ALJ discussed evidence from claimant's treating physician, Thomas Schooley, D.O., her visit to the hospital emergency room in 1984 and her hospitalization in 1989 when she was diagnosed with depression, her consultative examination by Donald R. Inbody, M.D. in 1994, and her consultative examination by John W. Hickman, Ph.D. in 1996. (R. 16). He contrasted the findings in these records with the brief, conclusory findings of Dr. Gagliano in 1996, and found that Dr. Gagliano's opinion was not supported by the evidence or entitled to controlling weight. (R. 17-18) As the ALJ pointed out, Dr. Gagliano misrepresented the frequency and number of times he saw claimant, and his notes "are almost entirely a recordation of the claimant's comments and indications of medications refills." (R. 17) Dr. Gagliano's diagnosis was not supported by his notes, and it is contradicted by the assessment and opinions of the consultative psychologist and psychiatrist. (*Id.*)

The ALJ was not required to give controlling weight to Dr. Gagliano's opinion because it was not well supported by clinical and laboratory diagnostic techniques and it was inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). Further, the ALJ showed good cause for rejecting it, see Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted), and he set forth specific, legitimate reasons for doing so. See Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

Further, contrary to claimant's argument, the ALJ explicitly recognized the shift of the burden at step five with regard to claimant's RFC. He stated: "As the claimant lacks the residual functional

capacity to return to former employment, the burden of proof shifts to the Social Security Administration to show that there are other jobs (existing in significant numbers) to which the claimant is able to make a successful vocational adjustment considering her age, education, work experience and residual functional capacity." (R. 23) As the Commissioner points out, the ALJ is not required to make two RFC findings. He made his finding prior to concluding, at step four, that claimant cannot return to any of her past work. (R. 22)

The Court agrees with the Commissioner's argument that the regulatory scheme demonstrates that claimants have only one RFC, and that RFC is determined before an ALJ decides whether a claimant can perform his or her past work. The regulations define RFC as "what you can still do despite your limitations." 20 C.F.R. §§404.1545, 416.945. Other regulations repeatedly refer to RFC in the singular. See 20 C.F.R. §§ 404.1520(e)-(f), 404.1560, 404.1561, 416.920(e)-(f), 416.960, 416.961; see also S.S.R. 96-8p ("Assessing Residual Functional Capacity in Initial Claims"). Once a claimant's RFC is established, the regulations specify that it is used at step four to determine whether a claimant can perform his or her past work, and then again at step five in connection with the determination of whether there are a significant number of other jobs that the claimant can perform. See, e.g., 20 C.F.R. §§ 404.1560(b)-(c), 416.960(b)-(c).

Tenth Circuit law is in accord. See, e.g., Miller v. Chater, 99 F.3d 972, 976 (10th Cir. 1996); Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993); see also Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) ("Once the claimant makes a prima facie showing of disability that prevents his engaging in his prior work activity, the burden of going forward shifts to the [Commissioner], who must show that the claimant retains the capacity to perform an alternative work activity and that this specific type of job exists in the national economy."). The RFC determination

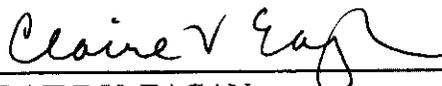
is initially part of the step four evaluation and, thus, is made before the burden of proof shifts at step five. Shaffer v. Apfel, No. 97-5174, 1998 WL 314376 (10th Cir. June 4, 1998).

The Commissioner also points out, and the Court finds persuasive, that claimants shoulder the dual burdens of production and persuasion through step four in a social security case, see Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987), which includes the claimant's RFC. See 20 C.F.R. §§ 404.1520(e)-(f), 404.1545, 416.920(e)-(f), 416.945. Yuckert is consistent with the Act which provides that "[a]n individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require . . . ." 42 U.S.C. § 423(d)(5)(A). The burden of proof in disability cases shifts to the Commissioner at step five of the five-step evaluation process. See Williams v. Bowen, 844 F.2d 748, 750-52 (10th Cir. 1988). The Commissioner met his burden in this matter by relying on vocational expert testimony based on claimant's impairments. The vocational expert found over a million jobs available to a person such as claimant. (R. 108-09)

#### Conclusion

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. **IT IS THEREFORE ORDERED** that the plaintiff's request to reverse or remand the Commissioner's decision is **denied**. The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

Dated this 2nd day of September, 1999.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE



evidentiary hearing on his ineffective assistance of counsel claims, that the state trial court lacked jurisdiction, that his sentences were improperly enhanced, and that excessive fines were imposed in violation of double jeopardy. Because Petitioner asserts that he is in state custody in violation of the Constitution, the proper authority for this action is 28 U.S.C. § 2254 which provides that this court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Therefore, this action should be converted from a § 2241 petition to a § 2254 petition for writ of habeas corpus.

Furthermore, the Court finds that this habeas corpus petition must be dismissed as a second or successive § 2254 habeas corpus petition filed without receiving prior authorization from the Tenth Circuit Court of Appeals as required by 28 U.S.C. § 2244(b). Petitioner has filed at least two previous habeas corpus actions in this court challenging his convictions and sentences from Creek County District Court, Case No. CRF-91-194. See Case Nos. 94-CV-323 and 97-CV-206. In addition, Petitioner has challenged the same convictions in the United States District Court for the Western District of Oklahoma. That court denied the § 2254 petition in its entirety, upon direction from the Tenth Circuit Court of Appeals in Cotner v. Cody, No. 96-5269, 1998 WL 4336 (10th Cir. Jan. 8, 1998) (unpublished opinion) (dismissing Petitioner's appeal from the dismissal of his habeas corpus petition by the United States District Court for the Western District of Oklahoma). The Tenth Circuit stated "in any future habeas petition, Cotner must comply with the requirements of 28 U.S.C. § 2244(b)." Id. at \*2. Under § 2244(b)(3)(A), a petitioner must receive authorization from the appropriate circuit court of appeals before filing a second or successive § 2254 petition for writ of habeas corpus petition in the district court. It is clear that Petitioner's instant petition, entitled

"petition for a writ of habeas pursuant to 28 U.S.C.A. § 2241," is a thinly veiled effort to avoid dismissal as a second or successive § 2254 petition under § 2244(b). Petitioner cannot avoid the gatekeeping provision of § 2244(b) by simply entitling his challenge to his state convictions as a § 2241 petition rather than a § 2254 petition.

Because Petitioner filed the instant petition without receiving prior authorization from the Tenth Circuit Court of Appeals, the petition must be dismissed for failure to comply with 28 U.S.C. § 2244(b).

**ACCORDINGLY, IT IS HEREBY ORDERED** that Petitioner's "§ 2241 petition" is converted to a § 2254 petition for writ of habeas corpus and is **dismissed** for failure to comply with § 2244(b). Any pending motion is **denied as moot**.

SO ORDERED THIS 2<sup>nd</sup> day of September, 1999.

  
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MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP -2 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LOIS M. BRONSON,  
SSN: 444-54-4667,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

Case No. 98-CV-0920-EA

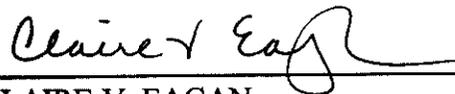
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DATE SEP 03 1999

**JUDGMENT**

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

It is so ordered this 2nd day of September 1999.



\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

KATHLEEN DONICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
HEALTHSOUTH CORPORATION, a )  
Delaware corporation, )  
)  
Defendant. )

Case No. 98-CV-0439H(M)

**FILED**

SEP 2 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE SEP 2 1999

**STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF SUSAN FREDRICKSEN**

Opt-In Plaintiff Susan Fredricksen ("Fredricksen") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(i), hereby stipulate to the dismissal without prejudice of Fredricksen's claims against HealthSouth in this matter, and Fredricksen by this dismissal, effectively withdraws her name from the class in this case.

Respectfully submitted,

*Deise J. J. J.*

J. Ronald Petrikin, OBA No. 7092  
David H. Herrold, OBA No. 17053  
CONNER & WINTERS, P.C.  
15 East Fifth Street, Ste. 3700  
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-and-

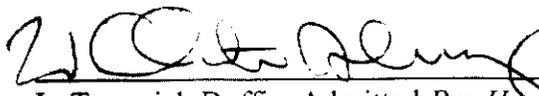
Donald E. Herrold, OBA No. 4140  
Jack N. Herrold, OBA No. 4141  
HERROLD, HERROLD, SUTTON & DAVIS, P.A.  
2250 East 73rd Street, Ste. 600  
Tulsa, Oklahoma 74136  
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Attorneys for the Plaintiff,  
KATHLEEN DONICA and those other present and former employees of HealthSouth Corporation who are similarly situated

202

015

-AND-



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-and-

Sarah Jane McKinney, OBA No. 17099  
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Attorneys for the Defendant,  
HEALTHSOUTH CORPORATION

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

**FILED**

SEP 2 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

KATHLEEN DONICA, )

Plaintiff, )

vs. )

HEALTHSOUTH CORPORATION, a )  
Delaware corporation, )

Defendant. )

Case No. 98-CV-0439H(M)

ENTERED ON DOCKET

DATE SEP 2 1999

**STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF MARK DEMPSEY**

Opt-In Plaintiff Mark Dempsey ("Dempsey") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(i), hereby stipulate to the dismissal without prejudice of Dempsey's claims against HealthSouth in this matter, and Dempsey by this dismissal, effectively withdraws his name from the class in this case.

Respectfully submitted,

*J. Ronald Petrikin*

J. Ronald Petrikin, OBA No. 7092  
David H. Herrold, OBA No. 17053  
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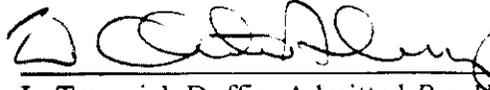
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Attorneys for the Plaintiff,  
KATHLEEN DONICA and those other present and  
former employees of HealthSouth Corporation who  
are similarly situated

201

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Attorneys for the Defendant,  
HEALTHSOUTH CORPORATION

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

DEAN L. BLANTON,  
SSN: 513-66-6517,

PLAINTIFF,

vs.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

DEFENDANT.

ENTERED ON DOCKET

DATE SEP 2 1999

CASE NO. 98-CV-318-K (M) ✓

**FILED**  
IN OPEN COURT

AUG 31 1999

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

**ORDER**

There being no objection, the Court adopts the Magistrate Judge's Report and Recommendation filed June 25, 1999. [Dkt. 13]. The Court orders that the decision of the Commissioner denying benefits be affirmed as outlined in the Magistrate Judge's Report and Recommendation.

Dated this 30 day of August, 1999.



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

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

DEAN L. BLANTON,  
SSN: 513-66-6517,

PLAINTIFF,

vs.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

DEFENDANT.

ENTERED ON DOCKET  
DATE SEP 2 1999

CASE NO. 98-CV-318-K (M) ✓

FILED  
IN COURT

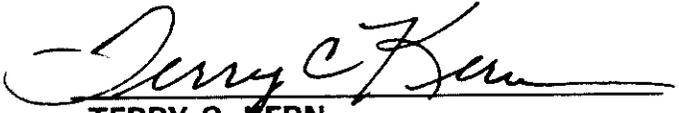
SEP 01 1999

FILED  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**JUDGMENT**

This Court entered an Order on the 31 day of August, 1999, adopting the Report and Recommendation of the United States Magistrate Judge to affirm the decision of the Commissioner to deny benefits.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant and against Plaintiff on this 31 day of August, 1999.

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

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

GREGORY DALE HARDING, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RON CHAMPION, Warden, )  
 )  
 Respondent. )

ENTERED ON DOCKET  
DATE SEP 2 1999  
No. 99-CV-102-K (E) ✓  
**FILED**  
IN OPEN COURT  
SEP 01 1999  
Phil Combarau, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge entered on May 17, 1999, in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. Petitioner appears *pro se*. In the Report, the Magistrate Judge recommends that Petitioner's petition for a writ of habeas corpus be dismissed for failure to exhaust state remedies. Neither party has filed an objection to the Report.

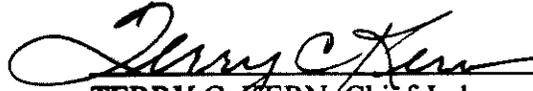
Having reviewed the Report and the facts of this case, pursuant to Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. The Report and Recommendation of the Magistrate Judge (#14) is adopted and affirmed.
2. Respondent's motion to dismiss (#9) is granted.
3. Petitioner's motion to dismiss (#12) is granted.
4. Petitioner's motion to stay (#11) is denied.

5. The petition for a writ of habeas corpus is **dismissed without prejudice**.

SO ORDERED THIS 31 day of August, 1999.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

SEP -2 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

AIDA SANTIAGO, )  
o/b/o Kevin M. Brown, )  
SSN: 444-02-0434, )

Plaintiff, )

v. )

KENNETH S. APFEL, Commissioner, )  
Social Security Administration, )

Defendant. )

Case No. 98-CV-0786-EA

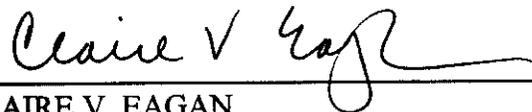
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DATE ~~SEP 02 1999~~

**JUDGMENT**

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

It is so ordered this 2nd day of September 1999.



\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE



found that claimant was not disabled at any time through the date of the decision. On August 14, 1998, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 416.1481.

#### Claimant's Background

Claimant was born on December 3, 1991, and was 5 years old at the time of the administrative hearing in this matter. Claimant alleges disability beginning May 24, 1995, due to irrational behavior, rebellion, and fits of anger and violence. (Complaint, Docket # 1, at 2.) He has been diagnosed with disruptive behavior disorder NOS, attention deficit hyperactivity disorder (ADHD), and parent-child problem. (R. 136) Claimant's mother took him to Children's Medical Center on May 3, 1995 for evaluation and treatment. Doctors at CMC prescribed Ritalin, counseling sessions, parenting sessions, and placement in a therapeutic day care program. Claimant's GAF has ranged from 45-60.

#### The ALJ's Decision

The ALJ made his decision at the third step of the sequential evaluation process. He found that claimant had disruptive behavior disorder and attention deficit hyperactivity disorder (ADHD). However, the ALJ found that claimant did not have an impairment or combination of impairments either listed in or medically or functionally equivalent in severity to an impairment listed in Appendix I, Subpart P, Regulations No. 4, Parts B or A, respectively (20 C.F.R. § 416.926a.) The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision. (R. 26-27)

#### Issues

Claimant asserts as error that the ALJ's Step Three analysis falls short of the applicable legal standard and is not otherwise supported by substantial evidence.

### Applicable Law

An individual under the age of 18 shall be considered disabled for the purpose of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C.A. § 1382c(a)(3)(C)(i) (West Supp. 1999).

The regulations provide that a claimant's impairment must meet, medically equal, or functionally equal in severity the set of criteria for an impairment listed in the Listing of Impairments in 20 C.F.R. Pt. 404, Subpt. P, App. 1. 20 C.F.R. § 416.924(d). At step three, an ALJ is "required to discuss the evidence and explain why he found that [claimant] was not disabled" in his written decision. Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). However, a claimant bears the burden of proving that a Listing has been equaled or met. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988). Accordingly, claimant is disabled only if claimant can establish that his condition meets or equals a Listing at step three of the sequential evaluation process for children's disability benefits.

Attention Deficit Hyperactivity Disorder requires marked inattention, impulsiveness, hyperactivity, and two factors from Listing 112.02(B) - (Age-Appropriate Criteria) indicating: marked impairment in cognitive/communicative functioning; or marked impairment in social functioning; or marked impairment in personal functioning; or deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner.

20 C.F.R., Part 404, Subpt. P, App. 1. - Listing 112.11.

## Findings

The ALJ thoroughly discussed the law and regulations applicable to children's disability benefits following passage of the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996). The Act amended the substantive standards for the evaluation of children's disability claims. The statutes and regulations prior to the effective date of the Act required application of a four-step evaluation process to claims for disability benefits made on behalf of a child.<sup>1</sup> See 42 U.S.C.A. § 1382c(a)(3)(A) (West 1992); 20 C.F.R. § 416.924(b)-(f) (1995). The regulations which implement the Act effectively eliminate step four of the analysis under the prior statute and regulations. Brown et al. Wallace v. Callahan, 120 F.3d 1133, 1135 (10th Cir. 1997) ("In reviewing the Commissioner's decision, therefore, we do not concern ourselves with his findings at step four of the analysis; we ask only whether his findings concerning the first three steps are supported by substantial evidence.").

Claimant contends that the ALJ "merely stated the finding that Kevin's impairments did not meet or equal any Listed Impairment. (R. at 21)." (Cl. Br., Docket # 7, at 5.) This is not true. A review of the ALJ's decision indicates that the ALJ discussed the medical records at length prior to that statement (R.18-20) and he followed that statement with a detailed assessment of whether

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<sup>1</sup> First, the Commissioner determined whether the minor was engaged in substantial gainful activity. If she was, the minor was considered not disabled. If the minor was not engaged in substantial gainful activity, the Commissioner then proceeded to the second step to determine whether the minor's impairment was severe. If the impairment was not severe, the minor was considered not disabled. If the minor's impairment was severe, the Commissioner then proceeded to the third step to determine whether the minor had an impairment that met or equaled the severity of one of the impairments listed at 20 C.F.R. Pt. 404, Subpt. P., App. 1 ("the Listing"). If the minor's impairment was of Listing severity, the minor was considered presumptively disabled. If the minor's impairment was not of Listing severity, the Commissioner then proceeded to the fourth step to determine whether the impairment was of "comparable severity" to an impairment that would disable an adult. 20 C.F.R. § 416.924(b)-(f) (1995).

claimant's impairments functionally equal the severity of any listed impairment. He also provided an extensive summary of the testimony of claimant's mother. The ALJ pointed out that the medication taken by claimant controlled his problems and that many of claimant's problems were related to parental problems.

The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991).

The ALJ has done precisely what the amended statute and regulations require him to do. There is substantial evidence in the record, as set forth by the ALJ and the Commissioner, to support the ALJ's decision.

#### Conclusion

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. **IT IS THEREFORE ORDERED** that the plaintiff's request to reverse or remand the Commissioner's decision is **denied**. The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

Dated this 2nd day of September, 1999.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

SEP 1 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROBERT HELLARD, )  
)  
Plaintiff, )  
)  
vs. )  
)  
PACIFICARE OF OKLAHOMA INC., )  
d/b/a SECURE HORIZONS, )  
)  
Defendant. )

Case No. 98CV943 H (J)

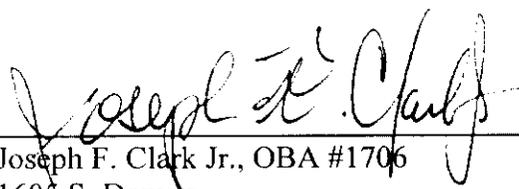
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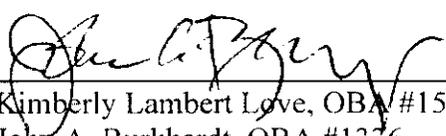
**STIPULATION OF DISMISSAL WITH PREJUDICE**

It is hereby stipulated by the undersigned counsel of record for each of the parties in the above-captioned case that the above-entitled case, including all causes of action, and claims may be dismissed with prejudice, each party to bear its own costs and attorney fees.

Dated this 1<sup>st</sup> day of September, 1999.

Respectfully submitted,

  
Joseph F. Clark Jr., OBA #1706  
1605 S. Denver  
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(918) 583-1124  
ATTORNEY FOR PLAINTIFF  
ROBERT HELLARD

  
Kimberly Lambert Love, OBA #15806  
John A. Burkhardt, OBA #1336  
BOONE, SMITH, DAVIS, HURST & DICKMAN  
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Tulsa, OK 74103  
(918) 587-0000  
ATTORNEY FOR DEFENDANT  
PACIFICARE OF OKLAHOMA INC. d/b/a  
SECURE HORIZONS

CH

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

FILED

SEP 01 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TERESA A. NIMAN,  
SSN: 444-58-0165,

Plaintiff,

v.

CASE NO. 98-CV-609-M

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

Defendant.

ENTERED ON DOCKET

DATE SEP 01 1999

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 1<sup>ST</sup> day of SEPT., 1999.

*Frank H. McCarthy*

FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

SEP 01 1999 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TERESA A. NIMAN, )  
SSN: 444-58-0165, )  
 )  
PLAINTIFF, )  
 )  
vs. )  
 )  
KENNETH S. APFEL, )  
Commissioner of the Social )  
Security Administration, )  
 )  
DEFENDANT. )

CASE NO. 98-CV-609-M ✓

ENTERED ON DOCKET  
DATE SEP 01 1999

**ORDER**

Plaintiff, Teresa A. Niman, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

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

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<sup>1</sup> Plaintiff's February 12, 1992 (protective filing date of January 15, 1992) application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held February 22, 1995. By decision dated January 22, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 11, 1998. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born February 14, 1954 and claims to have been unable to work since 1974 due to psoriasis, mental retardation and a hernia. [R. 44, 59-60]. The ALJ determined that Plaintiff has severe impairments consisting of mental retardation, a hernia and psoriasis but that she retains the residual functional capacity (RFC) to perform sedentary work limited to performing only simple tasks and having no exposure to the general public. [R.27]. He determined that Plaintiff has no past relevant work but that there are a significant number of jobs in the economy that Plaintiff can perform with this RFC and found, therefore, that Plaintiff is not disabled as defined by the Social Security Act. The case was thus decided at step 5 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 the decision of the ALJ is not based upon substantial evidence. Specifically, Plaintiff alleges the ALJ: 1) failed to properly evaluate Plaintiff's non-exertional mental impairment; 2) mechanically applied the medical vocational guidelines (grids); 3) failed to present a proper hypothetical to the vocational expert (VE); 4) failed to properly evaluate medical evidence; 5) failed to properly assess Plaintiff's impairments under the Listings of Impairments (listings); and 6) failed to fully develop the record by not ordering a consultative examination. [Plaintiff's Brief].

The record contains a Mental Status Examination Report by Minor Gordon which indicated Plaintiff's Wechsler Adult Intelligence Scale-R (WAIS-R) score was in the borderline range of mental retardation. [R. 134-135]. Plaintiff does not contest the validity of the test or the merits of the report. Rather, she contends that her low IQ of 72, combined with her psoriasis, imposed additional and significant work related limitations which supported an equivalency determination. For this contention, Plaintiff relies upon a statement by consultative examiner, Michael Karathanos, M.D., in his evaluative report dated August 2, 1995, as follows:

I would like to point out that the combination of below average mental capacity, her appearance (marked obesity and psoriasis, which for some people does look offensive) and the large ventral hernia suggest significant limitation for any realistic prospects for employability.

[R. 248]. Defendant responds that the ALJ was not required to adopt Dr. Karathanos's comment regarding Plaintiff's employability in making his determination that Plaintiff could perform sedentary work. It is the ALJ, rather than the physician, who is authorized to make a final decision concerning disability. 20 C.F.R. § 5

404.1527(e)(2), 416.927(e)(2)(the ultimate issue of disability is the responsibility of the Commissioner); *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027 (10th Cir. 1994). Furthermore, Dr. Karathanos's report, reviewed in its entirety, does not present an opinion that Plaintiff is disabled for any work. Rather, the sentence just before the above quoted closing comment, reads:

Due to her mental retardation, she cannot perform any complicated tasks, but she could perform simple repetitive type tasks.

[R. 248]. The court finds no error by the ALJ in rejecting Dr. Karathanos's comment regarding Plaintiff's job prospects.

Alternatively, Plaintiff asserts her psoriasis condition was so severe that the ALJ was required to explain why he didn't find the condition met a listing. Again, Dr. Karathanos's report offered support for the ALJ's finding that Plaintiff's psoriasis is not so severe that it prevents her from engaging in any work. It was Dr. Karathanos's medical opinion that Plaintiff's psoriasis "in itself does not seem to be a significantly limiting factor." [R. 247]. He opined that Plaintiff did not meet a listing or a combination of listings, and was not impaired by any condition equaling a listing. *Id.* This opinion is further supported in the record by the report of Dan E. Calhoun, M.D., who examined Plaintiff on March 10, 1992. He reported that Plaintiff's psoriasis was moderately severe but that the condition did not keep Plaintiff from working. [R. 110].

Plaintiff asserts that her appearance keeps her from being employed, claiming that no one will hire her. [R. 270-271]. Plaintiff's argument in this regard is without merit. In order to qualify for disability benefits under the Social Security Act, a

claimant's physical or mental impairment or impairments must be 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 which exists in the national economy, **regardless** of whether such work exists in the immediate area in which he lives, or **whether** a specific job vacancy exists for him, or **whether he would be hired if he applied for work**. 42 U.S.C. § 423(d)(2)(A)[emphasis added]. There is no evidence in the record that Plaintiff was ever denied employment because of her appearance. Dr. Karathanos's comment that Plaintiff's prospects for employability would be significantly **limited** is not evidence that she was ever denied employment because of her appearance or condition. At any rate, the jobs identified by the VE and cited by the ALJ were jobs with no exposure to the general public.

Contrary to Plaintiff's argument, the ALJ properly considered the combination of Plaintiff's impairments and limited her residual functional capacity (RFC) to that of sedentary work that was simple, accounting for her mental impairment, and work that did not expose her to the general public, allowing for the "appearance factor." There is substantial evidence in the record to support the ALJ's determination that Plaintiff's low IQ and psoriasis are severe but not so severe that she was precluded from performing the work activities described by the VE and adopted by the ALJ in his decision as jobs available to Plaintiff with her RFC. The same is true of Plaintiff's hernia, which was described as "mild" and for which the ALJ included lifting

limitations in the RFC for sedentary work. [R. 111, 247].<sup>2</sup> The ALJ discussed the medical and testimonial evidence and his findings in accordance with the regulations and the law.

Likewise, the court finds no error on the part of the Commissioner in evaluating and assessing Plaintiff's condition under the listings. The mere diagnosis of an impairment listed in Appendix 1 is not sufficient to sustain a finding of disability. While the Listing of Impairments describes conditions that are generally considered severe enough to prevent a person from doing any gainful activity, the ALJ "will not consider your impairment to be one listed in Appendix 1 solely because it has the diagnosis of a listed impairment. It must also have the findings shown in the Listing of that impairment." 20 C.F.R. § 404.1525(d). For the diagnosis of psoriasis to qualify as a listed impairment, there must be extensive lesions, including involvement of the hands or feet which impose a marked limitation of function and which are not responding to prescribed treatment. 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 8.05. The only evidence offered by Plaintiff that psoriasis involves her feet is her testimony at the hearing that the bottoms of her feet "break out from time to time." [R.275-276]. The ALJ disbelieved Plaintiff's assertions about her psoriasis because they conflict with the medical records, other statements and testimony and her daily

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<sup>2</sup> Sedentary work as defined in the regulations, is work that involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 C.F.R. § 404.1567(a).

activities.<sup>3</sup> The medical evidence does not show that Plaintiff's psoriasis has caused the "marked limitation of function" required under Listing 8.05. Nor is there any evidence that the condition did not respond to prescribed treatment. Again, the only evidence offered by Plaintiff that the ointment prescribed for treatment "did not work" is her testimony, which the ALJ found not credible. Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990).

As to Plaintiff's fleeting mention of impairment due to obesity, left hand and finger manipulation problems and back problems in her brief, there is no objective medical evidence indicating Plaintiff suffered severe impairments of this sort. Dr. Calhoun reported left arm pain and decreased range of motion at the left shoulder with decreased left hand grip due to a previous left arm strain during his examination of Plaintiff on March 10, 1992. [R. 111]. There is no mention of these problems during subsequent medical treatment and examinations in the record and Plaintiff did not allege continued problems with her left arm and hand as an impairment in her application or during her hearing. A claimant bears the burden of demonstrating the existence of a medically severe impairment which significantly limits the abilities and aptitudes necessary to do most jobs. 20 C.F.R. §§ 404.1520(c), 404.1521(b). *Gossett v. Bowen*, 862 F.2d 802, 804 (10th Cir. 1988). Apart from Plaintiff's

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<sup>3</sup> All reasons given by Plaintiff for inability to walk or stand were associated with hip and back complaints, not psoriasis "outbreaks" on her feet. [R. 85, 95, 105, 270, 274, 278]. Plaintiff reported being able to do housekeeping work, cooking meals, taking care of her children and lifting 10 pounds. [R. 88, 99, 100, 101, 105, 269].

assertions that she is impaired by obesity and back problems, there is no evidence in the record to support such claims. The Commissioner is not obligated to accept as true, Plaintiff's subjective complaints that are not accompanied by medical evidence. *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir.1985). Such complaints may be disregarded if they are unsupported by clinical findings. *Maounis v. Heckler*, 738 F.2d 1032, 1034 (9th Cir.1984); *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986).

Plaintiff contends the ALJ's failure to order a consultative examination resulted in his failure to fully develop the record. The ALJ has broad latitude in ordering a consultative examination. *Diaz v. Secretary of Health & Human Servs.*, 898 F.2d 774, 777 (10th Cir. 1990). "[T]he ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result of the consultative exam could reasonably be expected to be of material assistance in resolving the issue of disability." *Hawkins v. Chater*, 113 F.3d 1162, 1169 (10th Cir. 1997). A consultative examination is required only if the record establishes that such an examination is necessary to enable the ALJ to make the disability decision. See *Turner v. Califano*, 563 F.2d 669, 671 (5th Cir. 1977). Plaintiff asserts the severity of her psoriasis could have been assessed by a consultative examiner and contends the 1992 report of the only physician to personally physically examine her was insufficient to support the finding of the Commissioner. However, at the hearing, Plaintiff testified that her condition was the same as it was in January 1992. [R. 272]. Furthermore, when asked if there were any more documents or "anything else" than what was presently in the record that should

be in the record, counsel for Plaintiff answered definitively that there was not. [R. 263]. At no time prior to, during or after the hearing, did Plaintiff request that a consultative evaluation be performed or indicate she believed the record was incomplete. [R. 31]. The *Hawkins* court stated that "when the claimant is represented by counsel at the hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored." *Hawkins*, 113 F.3d at 1167-68. It is appropriate for the ALJ to require counsel to identify issues requiring further development. Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of Health and Human Servs.*, 13 F.3d 359, 360-61 (10th Cir. 1993). If Plaintiff believed that it was necessary to order a consultative examination, it was the obligation of Plaintiff and her counsel to bring that information to the attention of the ALJ. In the absence of such a request by counsel, this Court will not impose a duty on the ALJ to order a consultative examination unless the need for one is clearly established in the record. See *Hawkins*, at 1168. The record in this case contains no evidence to suggest that a consultative examination would have produced material information. There is no direct conflict in the medical evidence requiring resolution; the medical evidence in the record is not inconclusive; and additional tests are not required to explain a diagnosis already contained in the record. See *Id.* at 1166. The Court finds that the ALJ did not err in failing to order a consultative examination.

Plaintiff further asserts that the ALJ mechanically applied the grids and failed to present a proper hypothetical to the VE. Contrary to Plaintiff's contention, the ALJ did not rely conclusively upon the Medical-Vocational Guidelines ("Grids"), 20 C.F.R., Pt. 404, Subpt. P, App. 2, but used them as a framework for analysis, and based on the testimony of a vocational expert, determined that there are a significant number of jobs in the national economy that Plaintiff can perform.

Plaintiff complains the ALJ's hypothetical question to the vocational expert was fragmentary and improperly failed to include problems "much more extensive" than the ones presented. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the 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 hearing transcript reflects careful questioning of the VE by the ALJ regarding the availability of jobs for someone who was limited to sedentary work, requiring performance of only simple tasks, and who had "the skin problem that we've heard about here as a further limitation" with regard to the appearance factor and the scaling. [R. 281-282]. In response, the VE identified two representative jobs available in the economy which would allow for those limitations. The court finds the ALJ incorporated all impairments he accepted as true into his hypothetical questions to the VE and his reliance on the VE's responses to those questions was proper.

**Conclusion**

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his **determination** that Plaintiff retained the capacity to perform sedentary work with limitations. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 1<sup>st</sup> day of sept., 1999.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

SEP -1 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**LEON MINOR,**  
**SSN: 445-60-4813,**

**Plaintiff,**

**v.**

**KENNETH S. APFEL, Commissioner,**  
**Social Security Administration,**

**Defendant.**

Case No. 98-CV-0557-EA

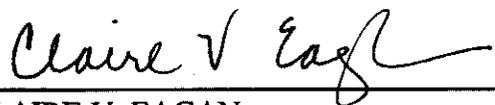
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DATE SEP 01 1999

**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 1st day of September, 1999.



\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP - 1 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LEON MINOR, )  
SSN: 445-60-4813, )

Plaintiff, )

v. )

KENNETH S. APFEL, Commissioner, )  
Social Security Administration, )

Defendant. )

Case No. 98-CV-0557-EA

ENTERED ON DOCKET

DATE SEP 01 1999

**ORDER**

On September 1, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny his application for supplemental security income and disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Cathryn McClanahan, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

**Procedural History**

On July 18, 1995, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.) and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held September 13, 1996, in Tulsa, Oklahoma. By decision dated October 25, 1996, the ALJ found that claimant was not

disabled at any time through the date of the decision. On May 27, 1998, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Claimant previously applied for benefits on March 30, 1988. On May 13, 1988, the Social Security Administration denied his application. Claimant did not further appeal that decision.

#### Claimant's Background

Claimant was born on October 12, 1954, and was 41 years old at the time of the administrative hearing in this matter. He testified that he completed the third or fourth grade, and was passed through each subsequent grade through the ninth grade in special education classes. He did not finish the tenth grade, and he cannot read. Claimant has worked as a general laborer, landscape helper, and janitor. Claimant alleged an inability to work beginning August 12, 1993, due to left leg swelling and a broken collar bone. (R. 39) He filed his complaint alleging back pain, cracked collarbone, ankle pain and swelling, hand pain, neck pain, and limited mobility. (Complaint, Docket # 1, at 2.) These impairments apparently arise out of an operation to repair claimant's ruptured left Achilles tendon, a fracture of his right clavicle, and thoraco-lumbar strain. Claimant's brief, however, focuses on his alleged disability due to his borderline retardation and depression, which are, in turn, affected by his illiteracy and inability to tolerate stress. (Pl. Br., Docket # 6, at 1-2.) His insured status expired on September 30, 1996.

#### The ALJ's Decision

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant has status post operative repair of ruptured left Achilles tendon, status post fracture of right clavicle, thoraco-lumbar strain, depression, and mental retardation, but that he does not have

an impairment or combination of impairments listed in, or medically equal to one listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. He also found that claimant has the residual functional capacity (RFC) to perform the physical exertional and nonexertional requirements of work except for work that does not require more than occasional bending and stooping; does not require reading, writing, or performing math; and lifting no more than 20 pounds at a time with frequent lifting and carrying of objects weighing up to 10 pounds. (R. 15, 19) He indicated that claimant has a limited education, but no transferable skills. The ALJ determined that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision. (R. 20)

#### Issues

Claimant asserts as error that:

- (1) the ALJ failed to properly consider the impact of claimant's mental impairment on his ability to perform alternative work; and
- (2) the ALJ's finding that the claimant has a limited education is not supported by substantial evidence.

#### Applicable Law

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. §§ 404.1520a, 416.920a, when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey 92 F.3d at 1024; Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence

or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

### Findings

The ALJ failed to follow the procedures applicable to the evaluation of mental impairments. He determined at step two of the sequential evaluation process that claimant suffered from depression and mental retardation which cause more than minimal limitations in his ability to work (R. 19). However he failed to evaluate the degree of functional loss resulting from claimant's impairment or to complete a PRT form, attach it to his decision, and discuss it in his decision. Although the ALJ is not required to follow the regulatory procedures where the record contains no evidence of a mental impairment that prevents a claimant from working, Andrade v. Secretary of Health & Human Services, 985 F.2d 1045, 1048 (10th Cir. 1993), there is evidence in the record that claimant had some mental limitations, and the ALJ so found at step two. (R. 19)

William L. Cooper, Ph.D., a psychologist, observed in August 1995 that claimant appeared depressed, was limited in his ability to tolerate stress, and scored between 74 and 77 on the WAIS-R

IQ tests, thus indicating that he functioned in the borderline intelligence range. (R. 153-54)<sup>1</sup> The ALJ describes the key findings of Dr. Cooper's report (R. 15), but dismisses the report (as part of his pain analysis) because "there is no record of any treatment for substance abuse, nor evidence of physical or mental problems arising from such abuse. The claimant stated that he had some depression, but did not seek mental health treatment." (R. 17) Although the ALJ included claimant's mental impairments in his hypothetical question to the vocational expert (R. 266-67), he did not include any mental limitations in his written RFC assessment other than that claimant's ability to perform light work is reduced to positions that do not require reading, writing, or performing math. (R. 15, 19)

Further, the ALJ erred in determining that claimant had a "limited" education pursuant to the regulations. "Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. [The Commissioner] generally considers that a 7th grade through the 11th grade level of formal education is a limited education." 20 C.F.R. §§ 404.1564(b)(3), 416.964(b)(3). Formal schooling at a 6th grade level or less is a marginal education. 20 C.F.R. §§ 404.1564(b)(2), 416.964(b)(2). The Commissioner acknowledges that the numerical grade level completed in school may not represent actual education abilities. Accordingly, the

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<sup>1</sup> The medical consultant who reviewed the matter for the Social Security Administration on September 5, 1995, prior to its initial determination, noted claimant's IQ scores and depression. (R. 44) The PRT form, completed as part of the Administration's reconsideration, also indicates that claimant was evaluated utilizing the categories for affective disorders, mental retardation and autism. (R. 53-61) The form indicates the presence of some functional limitations associated with claimant's impairments. (Id.)

Commissioner uses the numerical grade level to determine education abilities *if there is no other evidence to contradict it.* 20 C.F.R. §§ 404.1564(b) 416.964(b).

The evidence in this matter contradicts claimant's stated ninth grade special education level because claimant is functionally illiterate. (See, e.g., R. 214, 240-41, 245-46, 261-62) Further, the ALJ's finding that claimant has a limited education is inconsistent with his RFC assessment that claimant is limited to light work activity that does not require reading, writing, or performing math. (See R. 15)

#### Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. If the Commissioner "failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence." Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case." Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988).

**IT IS THEREFORE ORDERED** that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

Dated this 1st day of September, 1999.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 ) No. 99-CV-362K(M)  
 )  
 CHARLES W. ZABEL III, a/k/a )  
 CHARLES W. ZABEL, )  
 )  
 Defendant. )

ENTERED ON DOCKET

DATE SEP 01 1999

**F I L E D**  
IN COURT

AUG 31 1999

FILED CLERK  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**DEFAULT JUDGMENT**

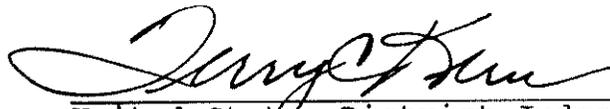
This matter comes on for consideration this 30 day of August, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Charles W. Zabel III, a/k/a Charles W. Zabel, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Charles W. Zabel III, a/k/a Charles W. Zabel, was served with Summons and Complaint on July 28, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Charles W. Zabel III, a/k/a Charles W. Zabel, for the principal amount of

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\$4,027.02, plus accrued interest of \$211.98, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.224 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

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

PEP/dlo



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

**FILED**

AUG 31 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DON RAY JONES, )  
)  
Petitioner, )  
)  
vs. )  
)  
SAM CALBONE, Warden, )  
)  
Respondent. )

Case No. 98-CV-760-B (J)

ENTERED ON DOCKET

DATE SEP 01 1999

**ORDER**

Before the Court in this habeas corpus action is Respondent's motion to dismiss for failure to file within the limitations period (Docket #3). Petitioner has filed a response to the motion to dismiss (#7). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition was not timely filed and Respondent's motion to dismiss should be granted.

***BACKGROUND***

On April 1, 1987, Petitioner was convicted after entering a plea of *nolo contendere* to one (1) count of First Degree Murder in Craig County District Court, Case No. CRF-86-106 (#4, Ex. A). He was sentenced to life imprisonment. Petitioner did not move to withdraw his plea and did not otherwise perfect a direct appeal.

On May 3, 1996, Petitioner challenged the execution of his sentence by filing a petition for writ of habeas corpus in the state district court (see #4, attachment to Ex. B). Petitioner alleged that

his transfer to, and continued incarceration in, a Texas private prison was unlawful. After the state district court denied the requested relief on May 3, 1996, Petitioner filed a petition in error in the Oklahoma Court of Criminal Appeals on June 3, 1996. On July 3, 1996, the state appellate court affirmed the denial of habeas corpus relief (#4, Ex. B).

On April 30, 1997, Petitioner filed an application for post-conviction relief in the state district court. On June 18, 1997, that court denied the requested relief (#4, attachment to Ex. C). Petitioner appealed to the Oklahoma Court of Criminal Appeals (#4, Ex. D) where the denial of post-conviction relief was affirmed on September 5, 1997 (#4, Ex. C).

On September 14, 1998, Petitioner filed the instant petition for writ of habeas corpus in the United States District Court for the Western District of Oklahoma (#1). On October 1, 1998, the petition was transferred to this Court.

### ***ANALYSIS***

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable

to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitations does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, were afforded a one-year grace period within which to file for federal habeas corpus relief.

The Tenth Circuit Court of Appeals has also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled during time spent pursuing state applications for post-conviction relief properly filed during the grace period.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to perfect a direct appeal, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on April 11, 1987. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw *nolo contendere* plea within ten (10) days from the date of the

pronouncement of the Judgment and Sentence in order to commence an appeal from any conviction of a plea of *nolo contendere*). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Under Simmonds, 111 F.3d at 746, Petitioner had until April 23, 1997, to submit a timely petition for writ of habeas corpus.

Although the running of the limitations period would be tolled or suspended during the pendency of any post-conviction or other collateral proceeding with respect to the pertinent judgment or claim properly filed during the grace period, 28 U.S.C. § 2244(d)(2); Hoggro, 150 F.3d at 1226, Petitioner's collateral proceedings either challenged the execution of the sentence, not the judgment of conviction, or were filed in the state courts after the grace period ended. The subject of Petitioner's state habeas corpus action was neither the constitutionality of the judgment nor any of the claims raised in the instant action. Therefore, the Court concludes that the limitations period as to the judgment entered in Craig County District Court, Case No. 87-106, was not tolled during the pendency of Petitioner's state habeas corpus proceeding.

Similarly, the limitations period was not tolled during the pendency of Petitioner's post-conviction proceedings because the application was filed in the state district court on April 30, 1997, or seven (7) days after expiration of the grace period. A collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998). In his response to the motion to dismiss (#7), Petitioner argues that because he mailed his post-conviction application on April 22, 1997, or one day prior to expiration of the limitations period, his application should be considered filed as of April 22, 1997 under the "prison mailbox rule." If filed on April 22, 1997, the federal limitations period

would be tolled during the pendency of the post-conviction proceedings. However, the limitations period is tolled during the pendency of "properly filed" state post-conviction proceedings. "Properly filed" means properly filed according to state law. Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). Under Oklahoma law, pleadings submitted to the Court of Criminal Appeals by prisoners are considered filed upon receipt by the court clerk, not upon receipt in a prison mailroom. See Hunnicutt v. State, 952 P.2d 988 (Okla. Crim. App.1997) (finding the "prison mailbox rule" developed in Houston v. Lack, 487 U.S. 266 (1988) inapplicable to criminal matters filed in the Oklahoma Court of Criminal Appeals). Based on the Court of Criminal Appeals's rejection of the "prison mailbox rule," the Court concludes that under state law, Petitioner's post-conviction application was filed in the state district court on April 30, 1997, the date it was received by the court clerk. Because Petitioner's limitations period had already expired, the period was not tolled during the pendency of the post-conviction application filed April 30, 1997. As a result, the Court finds that neither the post-conviction proceedings nor the state habeas corpus proceedings toll the limitations period in this case.<sup>1</sup> Petitioner did not file his federal petition until September 14, 1998, more than a year and five months beyond the April 23, 1997 deadline. Therefore, absent a basis for either statutory or equitable tolling, this action is time-barred.

In his response to the motion to dismiss (#7), Petitioner argues that the limitations period

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<sup>1</sup>The Court notes that even if the limitations period in this case were considered tolled during the pendency of both Petitioner's state habeas corpus petition and his application for post-conviction relief, the instant petition for writ of habeas corpus would nonetheless be time-barred. Petitioner's state habeas corpus petition was pending from May 3, 1996 to July 3, 1996, a total of 62 days. Using Petitioner's asserted file date of April 22, 1997, his state post-conviction application was pending from April 22, 1997 to September 5, 1997, a total of 137 days. Thus, the total time the limitations period could have possibly been tolled was 199 days. Extending the April 23, 1997 deadline by 199 days results in a new deadline of November 8, 1997, a Saturday. The latest possible date for filing the instant petition would have been Monday, November 10, 1997. Petitioner did not file his federal petition until September 14, 1998, more than ten (10) months too late.

should be extended because he could not pursue his claim of ineffective assistance of counsel based on alleged misrepresentations concerning eligibility for parole "until 1996 and 1997" when he apparently became aware that he would not be considered for parole after serving only seven (7) years of his sentence. However, Petitioner was sentenced April 1, 1987. If Petitioner believed he would be eligible for parole after serving seven (7) years, then he should have known by April, 1994, that the information he believes he received from his attorney was inaccurate. Nonetheless, Petitioner did not assert his claim of ineffective assistance of counsel until April, 1997, ten (10) full years after sentencing. The Court finds that Petitioner could have discovered, through the exercise of due diligence, the claim he now seeks to pursue well before April of 1997 and the limitations period should not be extended. Furthermore, Petitioner's status as a "layman to the law" does not serve to excuse his untimeliness. See, e.g., Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir.1991) (cause and prejudice standard applies to pro se prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir.1992) (actual knowledge of legal issues not required by *pro se* petitioner). Therefore, the Court declines to excuse Petitioner's untimely filing and concludes Respondent's motion to dismiss should be granted.

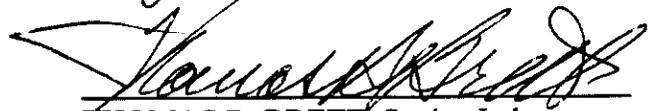
### **CONCLUSION**

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period, see Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998); United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss for failure to file within the limitations period should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#3) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 31<sup>ST</sup> day of Aug., 1999.



THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

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

JENKINS, et al, )  
)  
Plaintiffs, )  
)  
v. )  
)  
LIBERTY MUTUAL FIRE, )  
)  
Defendant. )

ENTERED ON DOCKET  
DATE SEP 01 1999  
No. 99-CV-126-K  
**FILED**  
IN OPEN COURT  
AUG 31 1999 *SA*  
Phil Lomida, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by counsel Bo Rainey August 2, 1999 that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to *N.D. LR 41.0*.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 30 day of August, 1999.



TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE