

FILED

NOV 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

CRAIG NEON, INC., an Oklahoma
corporation, and RAY TORABY,

Plaintiffs,

vs.

No. 99-C-63-B(E)

TRENT MCKENZIE; NEW RAPID OF
KANSAS, L.L.C., a Kansas L.L.C., and
NEW RAPID OF OKLAHOMA, L.L.C.,
a Kansas L.L.C.,

Defendants.

ENTERED ON DOCKET
DATE NOV 18 1999

ORDER

Before the Court are Defendants' motion to dismiss plaintiff Ray Toraby (Docket No. 30), motion to dismiss plaintiffs' claim for tortious breach of business confidence (Docket No. 50), and motion for partial summary judgment (Docket No. 49). In this action, Plaintiffs Craig Neon, Inc. ("Neon") and Ray Toraby ("Toraby") allege defendants Trent McKenzie ("McKenzie"), New Rapid of Kansas, L.L.C. and New Rapid of Oklahoma, L.L.C. (collectively referred to as "New Rapid") improperly appropriated plaintiffs' signage designs and used these designs to remodel New Rapid's Kansas and Oklahoma outlets. Plaintiffs assert claims for fraud, conversion, tortious breach of business confidence and violation of the Oklahoma Uniform Trade Secrets Act, 78 O.S. §§ 85 through 95.

Defendants move to dismiss plaintiff Toraby as not the real party in interest in this case. Defendants assert Craig Neon, the corporation, through its sole owner and president, Toraby, and not Toraby in his individual capacity, entered into discussions with New Rapid concerning

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signage for New Rapid stores, and therefore, there is no separate duty New Rapid owed to Toraby individually upon which he can bring a claim. Toraby responds that defendants' motion to dismiss is actually a motion for summary judgment as defendants rely on materials outside the pleadings (Toraby's deposition testimony) and there are disputed facts which preclude summary judgment. Specifically, Toraby cites his affidavit and deposition testimony that he represented to New Rapid managers Todd Bridges and Trent McKenzie that the model, plans and designs he produced to New Rapid were jointly owned by him and the corporation.

Given that Toraby was the sole shareholder and employee of Craig Neon at the relevant times herein and appears to have received compensation for prior large projects through salary and bonus payments to him as a shareholder and employee of Craig Neon, the Court questions whether plaintiffs can establish at trial Toraby had a separate ownership interest in the signage materials presented to New Rapid. However, Toraby's cited deposition testimony creates a genuine issue of material fact to preclude summary judgment on the record before the Court. Accordingly, the Court denies defendants' motion to dismiss (motion for summary judgment). (Docket No. 30).

Defendants also move to dismiss plaintiffs' claim for tortious breach of business confidence. Defendants argue there is no Oklahoma authority which recognizes this claim. Plaintiffs apparently concede this claim is not a separate cause of action. As the Court finds no basis in Oklahoma law to support any claim for tortious breach of business confidence, the Court grants defendants' motion. (Docket No. 50).

Finally, defendants move for partial summary judgment on plaintiffs' claim under the Oklahoma Trade Secrets Act, 78 O.S. §§ 85-94. To establish their claim under the Act, plaintiffs must prove (1) the existence of a trade secret; (2) misappropriation of this secret by defendants;

and (3) use of the secret to the detriment of the plaintiffs. *Micro Consulting, Inc. v. Zubeldia*, 813 F.Supp. 1514, 1534 (W.D.Okla. 1990), *aff'd* 959 F.2d 245 (10th Cir. 1992). Defendants contend plaintiffs cannot establish the first element of their claim.

A "trade secret" is defined in the Oklahoma Act as follows:

information, including a formula, pattern, compilation, program, device, method, technique or process, that:

- a. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- b. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

78 O.S. §86(4). Thus, "[p]roving the existence of a trade secret requires proof of (1) information not generally known in the industry (2) which gives rise to a competitive advantage to the owner of such information and (3) which is maintained as a secret. *Micro Consulting*, 813 F.Supp at 1534.

Defendants first contend plaintiffs cannot show the color and black and white drawings of proposed exterior signage and a three-dimensional model of a New Rapid store are trade secrets as the Act does not protect designs, creative or artistic expressions, or finished products; it protects information, techniques, processes and methods that would be involved in the manufacturing of a product and would not be easily ascertained from viewing the product. Second, because it has no unique information, Craig Neon never had an advantage over its competitors. Third, plaintiffs cannot show their "compilation" was maintained as a secret because Toraby transported the three-dimensional model uncovered to New Rapid's office in Wichita and brought it to a meeting which David Ellingson, a non-New Rapid employee,

attended.

"W]hat constitutes a trade secret and whether one exists, as claimed, is an issue of fact." *Rivendell Forest Products, Inc. v. Georgia-Pacific Corp.*, 28 F.3d 1042, 1045 (10th Cir. 1994)(addressing a claim under the Colorado Trade Secret Act); *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 951 (10th Cir. 1978); *Central Plastics Co. v. Goodson*, 537 P.2d 330, 333-35 (Okla. 1975). These issues are in dispute in this case. The Court disagrees with defendants' position that plaintiffs' drawings and three-dimensional model cannot be trade secrets under any and all circumstances because they are "creative" expressions. The definition of "trade secret" in 78 O.S. §86(4) is not so limited. *See Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123 (5th Cir. 1991), *aff'd on other grounds*, 505 U.S. 763 (1992) (interpreting Texas' version of the Uniform Trade Secrets Act and concluding "architectural plans and kitchen layout and design drawing may be trade secrets"). As noted by the Tenth Circuit in distinguishing trade secret from patent protection, "[trade secret] protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. The protection is merely against breach of faith and reprehensible means of learning another's [sic] secret." *Rivendell*, 28 F.3d at 1044 (quoting Restatement of Torts §757, comment b at 6-7 (1939)). The inquiry therefore centers on whether the plaintiffs took reasonable precautions to keep their drawings and model confidential. Plaintiffs argue they took those precautions when Toraby repeatedly stressed to McKenzie and Bridges the confidentiality of plaintiffs' product, and the drawings expressly stated that "[t]his design is submitted confidentially and is not to be shown or described to others nor reproduced in whole or part without our written permission." Plaintiffs further argue the secrecy of their product was not

compromised by Ellingson's attendance at the Wichita meeting as Toraby assumed Ellingson was a New Rapid employee, and in any case, Ellingson is not a competitor in the signage business. Based on the above, the Court finds the matter in dispute and therefore denies defendants' motion for partial summary judgment. (Docket No. 49).¹

IT IS SO ORDERED, this 16th day of November, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹ At the Pretrial Conference on November 12, 1999, the Court also ruled or reserved ruling on the parties' motions in limine. The Court instructed defendants' counsel to draft an order reflecting those rulings and with the approval of plaintiffs' counsel submit the order to the Court for its signature.

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

FILED

NOV 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NCMIC INSURANCE COMPANY, formerly)
known as NATIONAL CHIROPRACTIC)
MUTUAL INSURANCE COMPANY, an)
Iowa corporation,)

Plaintiff,)

vs.)

JAY P CRAIG, D.C., an individual, CRAIG)
CHIROPRACTIC, P.C., an Oklahoma)
professional corporation, MALINDA M.)
SIMMONS, a/k/a MALYNDA M.)
SIMMONS, an individual, PATRICIA)
MERCER, an individual, and LINDY ANNE)
FUTTER, a/k/a LINDY ANNE FUTTER, an)
individual, and JANICE RIDGEWAY, an)
individual,)

Defendants.)

Case No. 99-CV-253B(M)

ENTERED ON DOCKET
NOV 18 1999
DATE _____

**JOINT STIPULATION OF
DISMISSAL WITHOUT PREJUDICE**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto stipulate that the Plaintiff shall dismiss without prejudice this matter in its entirety.

WHEREFORE, the parties request the Court enter the Order of Dismissal Without Prejudice, attached hereto as Attachment 1, and require each party to bear their respective attorney fees and costs.

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

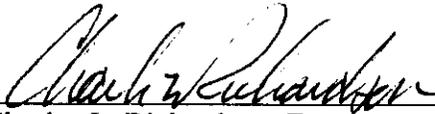
By:  

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Audra K. Hamilton, OBA No. 17872
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Tulsa, OK 74103
(918) 582-1211
(918) 591-5360 (FAX)
Attorneys for Plaintiff, NCMIC Insurance Company

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RICHARDSON & WARD



Charles L. Richardson, Esq.
6555 S. Lewis, Suite 200
Tulsa, OK 74136
Attorneys for Defendants Malinda M. Simmons, Patricia Mercer,
Lindy Anne Futter, and Janice Ridgeway

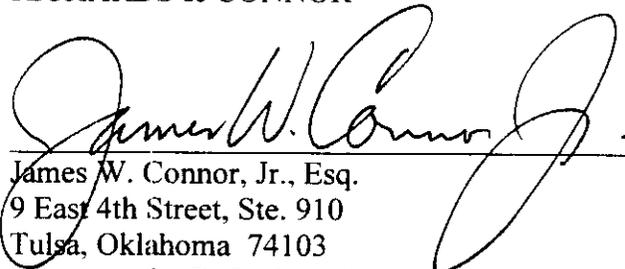
RICHARDS & CONNOR

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Tulsa, Oklahoma 74103
Attorneys for Defendants Jay P. Craig and Craig Chiropractic

RICHARDSON & WARD

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Tulsa, OK 74136
Attorneys for Defendants Malinda M. Simmons, Patricia Mercer,
Lindy Anne Futter, and Janice Ridgeway

RICHARDS & CONNOR



James W. Connor, Jr., Esq.
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Tulsa, Oklahoma 74103
Attorneys for Defendants Jay P. Craig and Craig Chiropractic

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

NCMIC INSURANCE COMPANY, formerly)
known as NATIONAL CHIROPRACTIC)
MUTUAL INSURANCE COMPANY, an)
Iowa corporation,)

Plaintiff,)

vs.)

JAY P CRAIG, D.C., an individual, CRAIG)
CHIROPRACTIC, P.C., an Oklahoma)
professional corporation, MALINDA M.)
SIMMONS, a/k/a MALYNDA M.)
SIMMONS, an individual, PATRICIA)
MERCER, an individual, and LINDY ANNE)
FUTTER, a/k/a LINDY ANNE FUTTER, an)
individual, and JANICE RIDGEWAY, an)
individual,)

Defendants.)

Case No. 99-CV-253B(M)

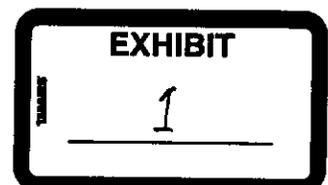
ORDER OF DISMISSAL WITHOUT PREJUDICE

This matter comes before the Court on the Joint Stipulation of Dismissal Without Prejudice by the parties. The parties represent to the Court they have entered into an agreement for the entry of this Order of Dismissal.

IT IS THEREFORE ORDERED that this matter is dismissed without prejudice. Each party shall bear their own attorney fees and costs.

Dated this ___ day of _____, 1999.

JUDGE OF THE DISTRICT COURT



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

FILED

NOV 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANTHONY G. WHITE)
)
 Plaintiff,)
)
 vs.)
)
 AMR CORPORATION, and AMERICAN)
 AIRLINES, INC.,)
)
 Defendants.)

Case No.: 99-CV-0442-B

ENTERED ON DOCKET

DATE NOV 18 1999

**PLAINTIFF'S DISMISSAL OF CLAIM
PURSUANT TO RULE 41(a)(1)(i)**

COMES NOW Plaintiff, ANTHONY G. WHITE, by and through his attorneys of record, ARMSTRONG, POSTON & LOWE, by Ronald E. Hignight, and dismisses his claim as against the Defendants showing that the Complaint in this matter has not been served upon the Defendants and there is no pending motion for summary judgment.

Respectfully submitted:

ANTHONY G. WHITE, Plaintiff

By: 

Ronald E. Hignight, O.B.A. #10334
ARMSTRONG, POSTON & LOWE
Attorneys for the Plaintiff
1401 S. Cheyenne
Tulsa, OK 74119
(918) 582-2500
(Fax) 583-1755

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

FILED

NOV 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MODULAR STORAGE SYSTEMS, INC.,
and GREAT HOUSE,

Plaintiffs,

vs.

THE SHERWIN WILLIAMS COMPANY, an
Ohio corporation,

Defendant.

Case No. 98-CV-774-BU

ENTERED ON DOCKET
NOV 18 1999

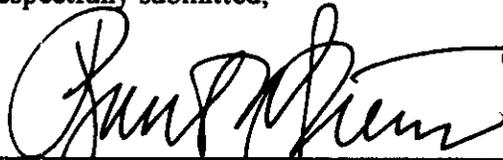
DATE _____

STIPULATION OF DISMISSAL

COME NOW the parties, by and through their attorneys of record, and hereby stipulate and agree that the Plaintiffs', Modular Storage Systems, Inc. and Great House's, claims against Defendant, The Sherwin-Williams Company, are dismissed with prejudice.

DATED: October 27, 1999.

Respectfully submitted,



Robert R. Peters, II (OBA #15043)
JONES, GIVENS, GOTCHER & BOGAN, P.C.
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Tulsa, OK 74103-4309
Telephone: 918/581-8200
Facsimile: 918/583-1189
ATTORNEYS FOR PLAINTIFFS, MODULAR STORAGE
SYSTEMS, INC., AND GREAT HOUSE

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Robert P. Redemann (OBA #7454)
RHODES, HIERONYMUS, JONES, TUCKER
& GABLE, P.L.L.C.
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Tulsa, OK 74121-1100
Telephone: 918/582-1173
Facsimile: 918/592-3390
ATTORNEYS FOR DEFENDANT,
THE SHERWIN WILLIAMS COMPANY

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

FILED

NOV 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VATANA PHAISAL ENGINEERING)
CO., LTD., a corporation,)
)
Plaintiff,)
)
vs.)
)
BORN INC., a corporation,)
)
Defendant.)

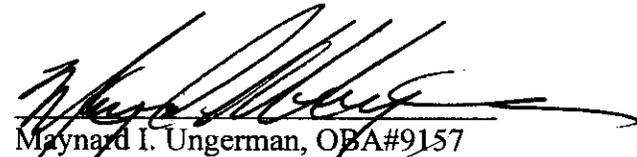
98-CV-0323 BU(S) /

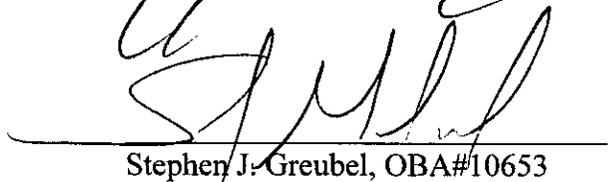
ENTERED ON DOCKET
NOV 18 1999
DATE _____

STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Vatana Phaisal Engineering Co., Ltd., by and through its attorney, Jonathan C. Neff, and the Defendants, Born, Inc., Sidney Born and Harold Born, by and through their attorneys, Maynard I. Ungerman and Stephen J. Greubel, and pursuant to Federal Rule of Civil Procedure 41(a)(1) (ii), Plaintiff hereby dismisses with prejudice all of Plaintiff's causes of action herein and Defendants dismiss with prejudice their counterclaim against Plaintiff.

Respectfully submitted,


Maynard I. Ungerman, OBA#9157


Stephen J. Greubel, OBA#10653

UNGERMAN ATTORNEYS
1323 East 71st Street, Suite 300
Tulsa, Oklahoma 74136
(918) 495-0561

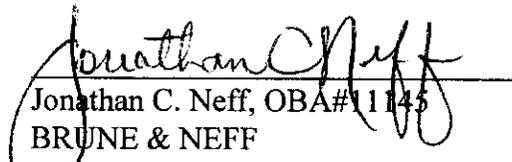
Attorneys for Defendants

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c/s

A handwritten signature in black ink, reading "Jonathan C. Neff". The signature is written in a cursive style and is positioned above a horizontal line.

Jonathan C. Neff, OBA#11145

BRUNE & NEFF

A Professional Corporation

Mid-Continent Tower, Suite 230

401 South Boston Avenue

Tulsa, Oklahoma 74103-4032

(918)599-8600

Attorneys for Plaintiff

MT

FILED

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

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NOV 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

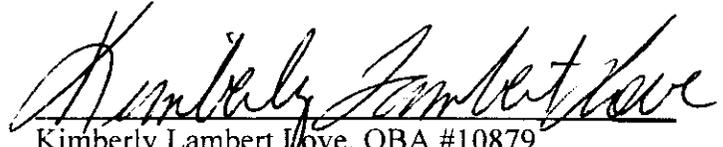
DONALD ZANDERS, JR.)
)
 Plaintiff,)
)
 v.)
)
 BP AMOCO, a corporation,)
 Formerly Amoco Corporation)
)
 Defendant.)

Case No. 99-CV-0091B (J)

**ENTERED ON DOCKET
NOV 17 1999
DATE _____**

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), Fed.R.Civ.P., the parties hereby stipulate that the above-captioned case be dismissed with prejudice.

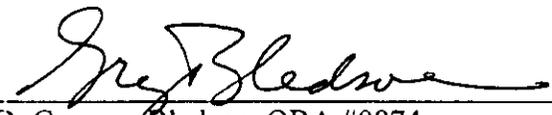


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Attorneys for Defendant, BP Amoco



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(918-599-8123)

Attorney for Plaintiff, Donald Zanders, Jr.

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

F I L E D

NOV 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEWAYNE GARRETT,)

Plaintiff,)

vs.)

Case No. 99-CV-904-C ✓

STATE OF OKLAHOMA,)

and)

JERRY MADDOX, PAUL)

SEIGLER, DIANN YOUNG,)

SHELLEY CLEMENS,)

CURTIS DeLAPP, MARGARET)

SNOW, THOMAS "TOM" JANER)

and CITY OF BARTLESVILLE,)

Defendants.)

ENTERED ON DOCKET

NOV 17 1999

DATE _____

ORDER

Before the Court is a motion to dismiss filed by defendants Shelley Clemens, Curtis DeLapp and Thomas Janer. Clemens, DeLapp, and Janer are Assistant District Attorneys for Washington County, Oklahoma. Defendants seek dismissal based on lack of subject matter jurisdiction.

The complaint asserts claims for violations of federal criminal statutes under Title 18, United States Code, Sections 495, 371, and 1792. These criminal statutes do not create a civil cause of action which can be brought by private persons. Thus, the Court lacks subject matter jurisdiction over the claims.

Accordingly the Court grants the motion to dismiss as to defendants Shelley Clemens, Curtis DeLapp and Thomas Janer. Further, the Court *sua sponte* grants dismissal as to the remaining

defendants named in the complaint, the State of Oklahoma, the City of Bartlesville, Jerry Maddox,
Paul Seigler, Diann Young, and Margaret Snow.

IT IS SO ORDERED this 15th day of November, 1999.

A handwritten signature in black ink, appearing to read "H. Dale Cook", written over a horizontal line.

H. DALE COOK
Senior U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
Robert W. Hopper,)
Defendant.)

CIVIL ACTION NO.
96-CV-0053-J

ENTERED ON DOCKET
NOV 17 1999

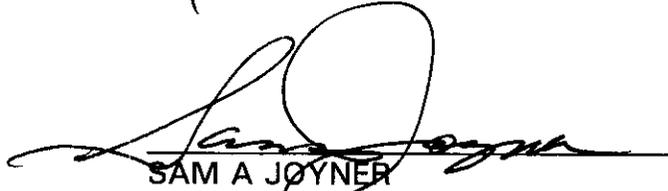
DATE _____

ORDER OF DISMISSAL WITH PREJUDICE BASED UPON SETTLEMENT

Upon the joint motion to dismiss and good cause being shown,

IT IS THEREFORE ORDERED THAT this case is dismissed with prejudice, and
the parties will pay their own costs and attorney fees.

IT IS SO ORDERED on November 16 1999.



SAM A JOYNER
UNITED STATES MAGISTRATE JUDGE

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

HELEN M. GREEN,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of the Social)
Security Administration,)
)
Defendant.)

NOV 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-545-M ✓

ENTERED ON DOCKET

DATE NOV 17 1999

ADMINISTRATIVE CLOSING ORDER

This case was remanded to the Commissioner of Social Security (Commissioner) under sentence six of 42 U.S.C. §405(g). In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 16th day of NOV., 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
SEVENTEEN ELECTRONIC AND/OR)
MECHANICAL GAMBLING DEVICES,)
MORE OR LESS, AND PROCEEDS,)
)
Defendants.)

ENTERED ON DOCKET
DATE NOV 17 1999

CIVIL ACTION NO. 97-CV-762-K(M) ✓

FILED
IN DISTRICT COURT

NOV 16 1999

FILED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORFEITURE

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

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 20th day of August, 1997, alleging that the defendant properties are subject to forfeiture pursuant to 18 U.S.C. § 1955, because the machines were used to conduct an 'illegal gambling business,' as that term is defined in 18 U.S.C. § 1955, and pursuant to 15 U.S.C. § 1177 because the machines were used in violation of the provisions of 15 U.S.C. §§ 1171 through 1178.

Warrants of Arrest and Notice *In Rem* were issued on the 28th day of August 1997, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for notice and publication in the Northern District of Oklahoma, a newspaper of

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general circulation in the district in which this action is pending, and to the United States Marshal for the District of Kansas for the seizure and arrest of the defendant properties and for publication in the Coffeyville Journal and the Independence News, being newspapers of general circulation in the counties and district in which the defendant properties were seized.

The United States Marshals Service served a copy of the Complaint for Forfeiture *In Rem* and the Warrant of Arrest and Notice *In Rem* on the defendant properties on February 5, 1998, and all persons and entities with possible standing to file a claim to the defendant properties as reflected in the USMS 285 forms are on file herein, save and except Donna Cooke, Michael W. Roberts, Edwin Mercer, and Charles Newkirk which filed their Disclaimers herein.

Neil Harris, Dorothy Harris, American Legion Post 20, William Austin, Donna Cooke, Verle J. Westhoff, William Mann, Michael W. Roberts, Edwin Mercer and Charles Newkirk were determined to be the only individuals with possible standing to file a claim to the defendant properties, and, therefore the only individuals to be served with process in this action.

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

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant property, and no persons or entities have plead or otherwise defended in this suit as to said defendant property, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant properties and all persons and/or entities interested therein, save and except American Legion Post 20, Donna Cooke, Michael W. Roberts, Edwin Mercer and Charles Newkirk, who filed their disclaimers herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending on April 15, 22 and 29, 1999. Proof of Publication was filed May 12, 1999.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Coffeyville Journal, Coffeyville, Kansas, a newspaper of general circulation in the District of Kansas and the county in which some of the defendant gambling devices were seized, including, but not limited to, in addition to the gambling devices, the keys, operating manuals, repair books, repair or proceeds logs, and proceeds on February 14, 21 and 28, 1999, and in the Independence News, Independence, Kansas, a newspaper of general circulation in the District of Kansas and the county in which the remaining defendant gambling devices were seized, including, but not limited to, in addition to the gambling devices, the keys, operating manuals, repair books, repair or proceeds logs, and proceeds on February 13, 20 and 27, 1999. Proof of Publication was filed herein on March 19, 1999.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-
described defendant properties

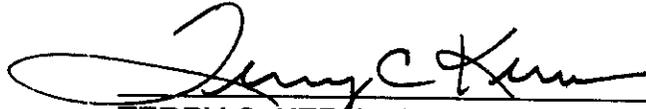
SEVENTEEN ELECTRONIC AND/OR MECHANICAL GAMBLING DEVICES, MORE OR LESS, INCLUDING, IN ADDITION TO SAID MACHINES, THE KEYS, OPERATING MANUALS, REPAIR BOOKS, REPAIR OR PROCEEDS LOGS, AND PROCEEDS, described as follows:

- a) One Cherry Gambling Device seized from the Horseshoe located at Coffeyville, Kansas, plus proceeds in the amount of \$111.00.
- b) One Double Up Gambling Device seized from American Legion Post 20 in Coffeyville, Kansas, and any proceeds seized therefrom.
- c) One Cherry Bonus Gambling Device seized from American Legion Post 20, Coffeyville, Kansas, and any proceeds received therefrom.
- d) One Gambling Device, Serial No. 09411686851, seized from American Legion Post 20, Coffeyville, Kansas, and any proceeds received therefrom.
- e) One Gambling Device, Serial No. 052312197799, seized from American Legion Post 20, Coffeyville, Kansas, and any proceeds received therefrom.
- f) One Magical Odds Gambling Device seized from American Legion Post 20, Coffeyville, Kansas, and any proceeds therefrom.
- g) The sum of Five Dollars seized from one or more of the gambling devices seized from American Legion Post 20, Coffeyville, Kansas.
- h) One Cherry Gambling Device seized from Jigg's Tavern, Coffeyville, Kansas, and any proceeds therefrom.

- i) One Dyna Gambling Device seized from Jigg's Tavern, Coffeyville, Kansas, and any proceeds therefrom.
- j) One Dyna 1992 Gambling Device seized from Jigg's Tavern, Coffeyville, Kansas, and any proceeds therefrom.
- k) One Lucky 8 Lines Gambling Device seized from Jigg's Tavern, Coffeyville, Kansas, and any proceeds therefrom.
- l) One Magical Odds Gambling Device seized from Jigg's Tavern, Coffeyville, Kansas, and any proceeds therefrom.
- m) One Super Cherry Master Gambling Device seized from Jigg's Tavern, Coffeyville, Kansas, and any proceeds therefrom.
- n) Proceeds in the amount of \$5.00 seized from one or more of the six gambling devices seized from Jigg's Tavern, Coffeyville, Kansas.
- o) One Treasure Island Gambling Device seized from Bill's Place, Coffeyville, Kansas, and any proceeds therefrom.
- p) One Cherry Angel Gambling Device seized from Bill's Place, Coffeyville, Kansas, and any proceeds therefrom.
- q) One Super Cherry Master Gambling Device seized from Bill's Place, Coffeyville, Kansas, and any proceeds therefrom.
- r) One Cherry Bonus 3 Gambling Device seized from Bill's Place, Coffeyville, Kansas, and any proceeds therefrom.
- s) One Magical Odds Gambling Device seized from Bill's Place, Coffeyville, Kansas, and any proceeds therefrom.
- t) Proceeds in the amount of \$957.00 seized from one or more of the gambling devices seized from Bill's Place, Coffeyville, Kansas.

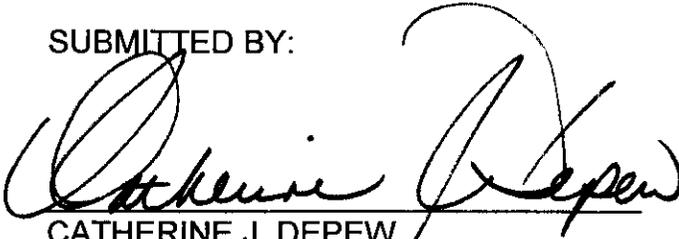
be, and they hereby are, forfeited to the United States of America for disposition according to law.

Entered this 15 day of November, 1999.



TERRY C. KERN
Chief Judge of the United States District Court
for the Northern District of Oklahoma

SUBMITTED BY:



CATHERINE J. DEPEW
Assistant United States Attorney

N:\udd\peaden\Forfeiture\Ozark Vending\Judgment of Forfeiture

MP

teb:kw
10/20/99

FILED
NOV 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

MID-AMERICA PIPELINE COMPANY,)
a Delaware corporation,)
)
Plaintiff,)
)
vs.)
)
J&J CONSTRUCTION AND SUPPLY,)
INC., a Kansas corporation,)
)
Defendant.)

Case No.: 98CV-0700H-(M) J

ENTERED ON DOCKET
DATE NOV 16 1999

STIPULATION FOR ORDER OF DISMISSAL

COMES NOW all parties to this action through attorneys of record, and hereby stipulate that the Court can and should dismiss with prejudice all claims, counterclaims, and cross-claims filed within this action.

A resolution of all claims was reached after the parties participated in a formal Settlement Conference presided over by an Adjunct Settlement Judge.

26

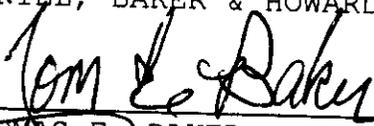
e15

Each party is to bear its own costs and attorney's fees and execute privately any other closing documents requested by the other.

Respectfully submitted,

DANIEL, BAKER & HOWARD

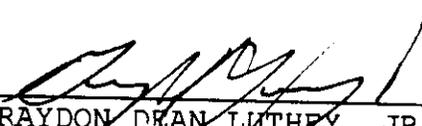
BY:


THOMAS E. BAKER, OBA #11054
2431 East 51st Street, Suite 306
Tulsa, Oklahoma 74105
(918) 749-5988

Attorneys for Defendant

AND

BY:


GRAYDON DEAN LUTHEY, JR., OBA #5568
320 South Boston, Suite 400
Tulsa, Oklahoma 74103-3708

Attorney for Plaintiff

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing instrument was deposited in the U.S. Mail this 15 day of Nov., 1999 addressed to Mack Greever, P.O. Box 1647, Claremore, OK 74018 with proper postage thereon fully prepaid.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILMA I. WATERS,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL, Commissioner)
 of the Social Security Administration,)
)
 Defendant.)

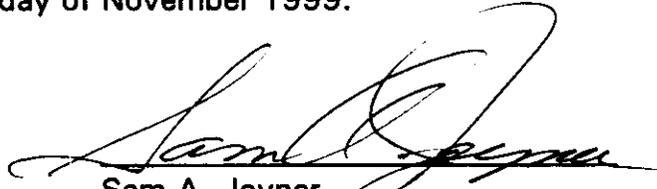
Case No. 99-CV-456-J ✓

ENTERED ON DOCKET
DATE NOV 16 1999

JUDGMENT

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

It is so ordered this 16th day of November 1999.


Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILMA I. WATERS,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of the Social)
Security Administration,)
)
Defendant.)

Case No. 99-CV-456-J ✓

ENTERED ON DOCKET

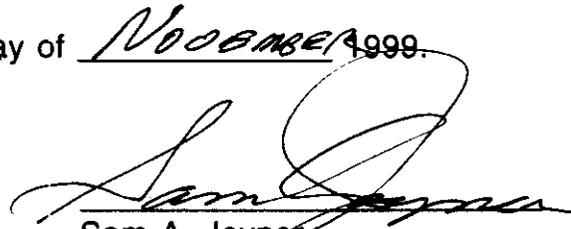
NOV 16 1999

DATE _____

ORDER

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

DATED this 16 day of November 1999.



Sam A. Joyner
United States Magistrate Judge

9

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, appearing to read 'CMM', with a long horizontal flourish extending to the right.

Cathryn McClanahan, OBA #14853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

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

KATY D. CHAMPAGNE and ANDRE)
CHAMPAGNE,)

Plaintiffs,)

v.)

SECURITY LIFE INSURANCE)
COMPANY OF AMERICA and)
CORPORATE BENEFIT SERVICES)
OF AMERICA, INC.,)

Defendants.)

ENTERED ON DOCKET

DATE NOV 16 1999

Case No. 98-CV-170-K (J) ✓

FILE
NOV 16 1999

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court are Plaintiffs' motion and Defendant Security Life Insurance Company of America's ("SLIA's") cross-motion for partial summary judgment. Plaintiffs argue that Defendants were not entitled to reduce benefits based on their determination of the "usual and customary" charge. SLIA asks the Court for judgment that such deductions were proper under the contract. Corporate Benefit Services of America, Inc. ("CBSA") adopts and incorporates SLIA's response to Plaintiffs' motion.

Brief History of Case

On September 9, 1998, Plaintiffs filed an Amended Complaint alleging four causes of action, including the following: (1) breach of contract (SLIA only); (2) breach of the implied covenant of good faith and fair dealing (SLIA & CBSA); and (3) intentional

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infliction of emotional distress (SLIA & CBSA) through the denial of claims, delay in paying claims, reduction of claim payments, and increase in premiums.¹ These motions regard Defendants' reduction of benefits in excess of the usual and customary charges for similar services in similar areas.

These counts arise from Plaintiffs' health insurance contract with SLIA and the administration of that contract by CBSA around the time Plaintiff Katy Champagne developed breast cancer in 1997. In 1996, Plaintiffs applied for and received health insurance coverage with SLIA. This insurance was governed by the "Master Policy," although the parties dispute what this policy includes. Plaintiffs also received a "Comprehensive Major Medical Certificate" containing a provision limiting benefits to charges considered reasonable by CBSA, the administrator. The parties dispute whether this certificate formed a part of the insurance contract. The Master Policy, alone, contains no such limitation on benefits. During the period at issue, Defendants paid an amount less than that claimed six times, for a total of \$ 796.00.²

Summary Judgment Standard

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

¹Plaintiffs' fourth cause of action, tortious interference with contract and prospective economic advantage against CBSA, is not the subject of these motions.

²Because one provider wrote off a \$ 5.00 difference in payment, Plaintiffs paid \$ 791.00 from their own pocket.

The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *see also Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must “go beyond the pleadings” and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Mach.*, 48 F.3d 478, 485 (10th Cir. 1995).

Discussion

For the most part, the parties do not dispute the facts underlying this motion but disagree as to the applicability of the Comprehensive Major Medical Certificate (“Certificate”) to the insurance contract. If it is not part of the contract, Defendants had no contractual right to deduct from claim payments to the extent they exceeded the “usual and customary charges” of similarly-situated doctors in similar cases. If it is, the opposite is true.

The Certificate provides for the payment only of usual and customary charges while the Master Policy is silent on this issue. The Certificate defines “charge” as

an amount that is reasonable, as determined by the Administrator, when taking into consideration, among other factors, amounts charged by providers for similar services and supplies when provided in the same general area under

similar or comparable circumstances and amounts accepted by a provider as full payment from others for such similar services and supplies.

(“Definitions,” Certificate, at 1.) The Master Policy is silent as to the definition of the charges it will pay, merely stating that the administrator will pay those benefits payable on charges for covered services. (“Claims Procedures,” MP, at 6.)

Defendants cannot use the Certificate’s definition of charges to reduce Plaintiffs’ benefits, because the Certificate is not part of the insurance contract. Insurance policies are contracts of adhesion. *See Littlefield v. State Farm Fire & Cas. Co.*, 857 P.2d 65, 69 (Okla. 1993). If the terms are clear, unambiguous, and consistent, the Court will apply the policy’s plain language to carry out the expressed intentions of the parties. *See Phillips v. Estate of Greenfield*, 859 P.2d 1101, 1104 (Okla. 1993). If, however, the contract is ambiguous, the Court will adopt the interpretation most favorable to the insured. *See Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376-77 (Okla. 1991). Whether or not the contract is ambiguous is a question of law to be determined by the Court. *See Phillips*, 859 P.2d at 1104. The Court will neither indulge a forced or strained construction nor take any provision out of context in order to construe an ambiguity. *See Dodson*, 812 P.2d at 376.

The Master Policy and Certificate indicate that the Certificate is not part of the insurance contract. The Master Policy states that,

The Administrator will issue . . . a certificate, and any amendments to the certificate, which generally describe, without amending, superseding or changing this policy in any way, the essential features of coverage to which the insured is entitled under this policy.

(“Certificates,” MP, at 3.) The Master Policy continues,

The policyholder’s group application, the policyholder’s group change application, if any, the participating employer’s application for participation and change application, if any, this policy and each insured’s application and supplemental application, if any, constitute the entire contract between the policyholder and Security Life.

(“Contract Documents,” MP, at 4.) The Certificate, the document provided to the insureds, is even more explicit. It states that

This certificate *is not the contract of insurance*. It is merely evidence of the insurance provided under the group master policy. All benefits are paid according to the terms of the group master policy. This certificate describes the essential features of the insurance.

(Cert., at cover page (emphasis added).) This language clearly states that the Certificate is not the contract of insurance, and the Court sees no reason to go against this clear language to the detriment of Plaintiffs, who had no hand in writing either the Master Policy or Certificate.

Defendants’ argument that other provisions indicate an intention to include the Certificate in the contract are unavailing, as they at most create an ambiguity that must be resolved in Plaintiffs’ favor. Defendants point to the cover page of the Master Policy, which states,

This policy includes this page and all attached pages which follow and are incorporated herein, including amendments, if any, and the certificate.

(MP, at cover page.) This does not constitute plain and unambiguous language that includes the Certificate in the contract of insurance, given the contrary language elsewhere in the

Master Policy and in the Certificate, as quoted above. The Court will not adopt a forced and strained construction that makes the Certificate's plain language not only surplusage but patently false. At most, this sentence creates an ambiguity as to whether the parties intended to include the Certificate in the contract. As noted above, all ambiguities must be resolved in favor of the insureds, Plaintiffs, and against Defendants, who had complete control over the drafting of the instrument.³

The Court, therefore, finds that the insurance contract does not include the Certificate, to the extent that it limits benefits to "usual and customary" charges. Therefore, Defendants had no contractual right to refuse to pay charges exceeding that amount.

Because the Court is granting Plaintiffs' summary judgment motion, there is no need to reach Plaintiffs' argument that, to the extent such reductions were allowed, they were unreasonably and arbitrarily calculated.

³Defendants argue that, if the Court finds that the Certificate is not part of the insurance contract, they owe no benefits to Plaintiffs. This contention runs contrary to well-settled Oklahoma law. As noted above, all ambiguities are resolved in favor of the insured. Moreover, in cases where the certificate provides broader coverage than the master policy, Oklahoma has held the certificate binding on the insurer. *See Martin v. Oklahoma Farmers Union*, 622 P.2d 1078, 1079-80 (Okla. 1981). While the Defendants may feel this result to be unfair, they had complete control over the drafting of the language and cannot require Plaintiffs to bear the brunt of their own imprecision.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Partial Summary Adjudication (# 61) is GRANTED and Defendant Security Life Insurance Company's Cross-Motion for Partial Summary Judgment Regarding "Usual and Customary Reductions" (# 67) is DENIED.

ORDERED THIS 15 DAY OF NOVEMBER, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

JAMES FONDREN and SYLVIA
FONDREN,

Plaintiffs,

vs.

REPUBLIC AMERICAN LIFE
INSURANCE COMPANY, and
RICHARD B. O'CAIN,

Defendants.

FILED ON DOCKET
DATE **NOV 16 1999**

No. 99-CV-565-K ✓

F I L E D
IN OPEN COURT

NOV 15 1999

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court are multiple motions. Plaintiffs commenced this case by filing a state court petition in Creek County on June 10, 1999. The petition alleged that plaintiffs were residents of Oklahoma, defendant Republic American Life Insurance Company ("Republic") was a foreign company and that defendant Richard O'Cain ("O'Cain") was a resident of Oklahoma. Further, the petition alleged that Republic had issued plaintiffs a comprehensive health care coverage policy in 1990. O'Cain was alleged to have sold plaintiffs the policy, representing to them that Republic was a "good company" and that the policy provisions were as described in the Outline of Coverage.

The petition also alleged that plaintiff James Fondren was diagnosed with multiple myeloma in 1995, but that Republic denied its policy applied to the prescribed treatment (i.e., chemotherapy). Plaintiffs alleged claims of breach of contract, specific performance, breach of the duty of good faith and sought an injunction seeking compliance with policy provisions by

67

Republic. Regarding O'Cain, the petition only alleges that the representations of Republic being a good company "proved false and were a breach of duty." The petition by its terms does not seek damages or other relief against O'Cain.

On July 14, 1999, Republic filed its notice of removal in this Court. Republic contended that (1) Cain had been fraudulently joined and thus complete diversity existed and (2) plaintiffs' claims were preempted by ERISA. On July 20, 1999 plaintiffs filed a motion to remand. Plaintiffs asserted that the state court petition stated a valid cause of action against O'Cain for negligence and negligent misrepresentation, and that their claims were not preempted by ERISA. On the same day, they filed an amended complaint. The amended complaint contains allegations that O'Cain negligently led the plaintiffs to believe that policy benefits provided under the policy would always be available to plaintiffs so long as they paid premiums and that O'Cain negligently failed to inform plaintiffs of a hidden exclusion in the policy. The amended complaint alleges (1) negligence against O'Cain (2) constructive fraud against O'Cain (3) breach of contract against Republic (4) specific performance against Republic (5) breach of the duty of good faith against Republic and (6) injunction against Republic, restraining it from denying its policy obligations.

On August 2, 1999, Republic filed a supplemental notice of removal. In that pleading, Republic asserted that on or about July 29, 1999, Republic learned for the first time that O'Cain was in fact a citizen of Colorado, not Oklahoma. Attached to the pleading was an affidavit executed by one Richard B. O'Cain, which stated that he was the O'Cain named in the plaintiffs' complaint and that he had been a resident of Colorado for seven years. Thus, Republic argued, no doubt existed that complete diversity existed between the parties, even if O'Cain was properly named as a party defendant.

On August 18, 1999, plaintiffs filed an application for leave to amend and supplemental

motion to remand. Plaintiffs sought leave to add two additional party defendants, Life of America Insurance Company ("Life of America") and American Reserve Life Insurance Company ("American Reserve"). In that application, plaintiffs stated that they had taken the deposition of Carl E. Moseley, a Vice-President of Republic. Moseley had been unable to produce the claim file dealing with plaintiffs because the claim was being handled by American Reserve, a sister company. American Reserve is an Oklahoma company. Life of America is the owner of both Republic and American Reserve. Plaintiffs sought to add Life of American and American Reserve under principles of piercing the corporate veil. Further, plaintiffs sought remand pursuant to 28 U.S.C. §1447(e). Republic objects, arguing that joinder of the additional defendants is not appropriate or necessary.

As the foregoing summary indicates, the parties have proceeded in a convoluted manner. For purposes of clarity, the Court will address each issue separately as it arose chronologically in the pleadings filed. In its notice of removal, Republic asserted the doctrine of fraudulent joinder as one ground. Fraudulent joinder is a term of art and is not intended to impugn the integrity of plaintiffs or their counsel. Brown v. Allstates Ins. Co., 17 F.Supp.2d 1134, 1137 (S.D.Cal.1998). If the plaintiff fails to state a claim against a defendant, and the failure is obvious according to the settled rules of the state, the joinder of the defendant is fraudulent and may be disregarded. Id.

Republic argues, and the Court agrees, that "Plaintiffs' Petition contains a total of four causes of action, none of which are directed against O'Cain." (Response to Plaintiffs' Motion to Remand at 4). In response, plaintiffs correctly quote language from decisions involving fraudulent joinder that there must be "no possibility" that a plaintiff could state a cause of action against defendant before the doctrine will be recognized. However, this language clearly means no

possibility under the allegations of the petition, not a metaphysical possibility based upon amendments thereto. This is so because the Court's focus in considering an allegation of fraudulent joinder must be on plaintiff's complaint at the time the petition for removal was filed. Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3rd Cir.1992). While plaintiffs' amended complaint in this Court clearly does state a cause of action against O'Cain, the Court may not consider it as to the first motion to remand.¹

Since the Court finds that O'Cain was improperly joined in the state court petition (i.e., no cause of action was stated against him), only plaintiffs and Republic were proper parties. It is undisputed that diversity of citizenship existed between those parties and that plaintiffs' demand for damages exceeded \$75,000.00. Accordingly, the Court finds removal was appropriate under 28 U.S.C. §1332. The Court finds removal was not appropriate under Republic's alternative theory of ERISA preemption. Plaintiffs have cited abundant authority that ERISA does not govern a "plan" that is merely an insurance policy under which the only beneficiaries are the company's owners, as is the situation herein. See Matinchek v. John Alden Life Ins. Co., 93 F.3d 96 (3rd Cir.1996)(holding that plan covering only sole business owner and his or her immediate family members cannot qualify as employee welfare benefit plan under ERISA); Peckham v. Board of Trustees, 653 F.2d 424 (10th Cir.1981)(holding that sole proprietors cannot have dual status under ERISA as employer and employee).

Having found that removal was proper based upon diversity of citizenship, the Court need not consider Republic's supplemental notice of removal which relates O'Cain's Colorado

¹Plaintiffs are represented by different counsel than they were when the state court petition was filed.

residence. Further, it was filed outside the thirty-day time limit imposed by 28 U.S.C. §1446(b). Arguably, an equitable exception to the time limit exists when a plaintiff incorrectly names a defendant as non-diverse, leaving it up to a removing defendant to ferret out the correct residence. Again, the Court need not address this issue under the facts of this case.

The remaining, and dispositive, issue is whether to permit plaintiffs to add Life of America and American Reserve as defendants. 28 U.S.C. §1447(e) provides:

If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to state court.

As the language suggests, the statute "leaves the matter to the discretion of the district court." 14C Wright, Miller & Cooper, Federal Practice and Procedure §3739 at 442 (3rd ed.1998). It does not matter whether the defendant sought to be added is indispensable to the action. See Casas Office Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668, 674 (1st Cir.1994). However, an amendment seeking to add a non-diverse defendant in a removed case should be scrutinized more closely than an ordinary amendment. See, e.g., Sexton v. G & K Services, Inc., 51 F.Supp.2d 1311, 1313 (M.D.Ala.1999). The factors to be considered in determining whether permitting joinder will comport with fundamental fairness are (1) any delay, and the reason for the delay, in seeking to amend; (2) any resulting prejudice to the defendant; (3) the likelihood of multiple litigation; (4) the plaintiffs' motivation in moving to amend. Wyant v. National Railroad Passenger Corp., 881 F.Supp. 919, 923 (S.D.N.Y.1995).

On July 26, 1999, plaintiffs took the deposition of Republic's Rule 30(b)(6) corporate representative, Carl E. Moseley. Mr. Moseley testified that he was a Vice President of Republic

and a Vice President of Life of America, Republic's parent company. Further, Life of America is the sole owner of both Republic and a sister corporation, American Reserve. Mr. Moseley was unable to produce the claim file pursuant to the plaintiffs' subpoena duces tecum because Republic's claims are handled by American Reserve and the claim file was in Tulsa, Oklahoma. American Reserve is an Oklahoma corporation and a non-diverse party.

Plaintiffs have established without dispute that Life of America owns 100% of the stock of Republic. However, American Reserve is not owned by Republic or Life of America. American Reserve does have some of the same shareholders as Life of America, and some of the same officers and directors as Republic and Life of America. Steve Merziere is the President of all three corporations. The three companies have a written Cost Sharing Agreement.

In opposing the present motion, Republic focuses primarily on the first and fourth of the Wyant factors listed above. It argues that plaintiffs were aware of the corporate relationship between the three insurance companies long before this time, but only chose to seek the joinder of American Reserve when they saw no other means of defeating federal jurisdiction. Plaintiffs disagree, noting that they served discovery requests upon Republic on the same day the notice of removal was filed, which sought information relevant to allegations of corporate veil piercing. Plaintiffs' counsel has also cited pleadings from other cases in which such strategy has been employed by plaintiffs' counsel in bad faith insurance cases. They correctly note that the Oklahoma Supreme Court has permitted additions of affiliated companies solely for the purpose of enhancing a punitive damages award, assuming sufficient evidence was ultimately adduced to pierce the corporate veil. See Oliver v. Farmers Ins. Group, 941 P.2d 985, 987 (Okla.1997). The Court is not persuaded that there was inordinate delay on the part of plaintiffs or that their

motive is solely to defeat federal jurisdiction.

In the same context, Republic virtually concedes that the possibility of multiple litigation exists, but argue that plaintiffs will not be "significantly injured" if the amendment is denied. (Republic's Response at 12). The Court is not persuaded this is the appropriate test. The purpose of joinder is to avoid multiple litigation, and that purpose is served in this case. The case at bar is in its infancy. A scheduling order has not even been put in place yet. The existence of a sister corporation has already hampered discovery efforts, in that Republic's corporate representative contended he could not produce the claim file, because it was in the possession of American Reserve, which was actually handling the claim. Plaintiffs note that Wolf v. Prudential Ins. Co. of America, 50 F.3d 793 (10th Cir.1995) recognized a possible bad faith claim against a claims adjuster. Republic responds that the ruling does not apply to the facts of this case. While a somewhat heightened scrutiny is appropriate to a proposed §1447(e) amendment, the Court is not persuaded that the proposed amendment must survive a "summary judgment" type analysis. The Court cannot say that the proposed amendment is futile under Oklahoma law. See County of Cook v. Philip Morris, Inc., 1997 WL 667777 (N.D.Ill.). Under either a traditional "alter ego" theory or under the Wolf decision, the Court finds that plaintiffs have stated colorable claims against the new defendants, one of which is non-diverse.

The only prejudice recited by Republic is that it is denied its choice of a federal forum. This prejudice exists in any removal/remand issue, and again the Court is persuaded its discretion is best exercised in permitting the amendment.

Plaintiffs' motion to remand (#5) is DENIED. Plaintiffs' application for leave to amend and second motion to remand (#16) is hereby GRANTED. Pursuant to 28 U.S.C. §1447(e), this action is hereby remanded to the District Court of Creek County, State of Oklahoma.

ORDERED this 12 day of November, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

NOV 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILLY JOE HESS,)
)
 Petitioner,)
)
 v.)
)
 STEPHEN KAISER, Warden,)
 Davis Correctional Facility,)
)
 Respondent.)

Case No. 99-CV-0230-K (E)

ENTERED ON DOCKET
DATE NOV 16 1999

REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 2254, petitioner Billy Joe Hess filed a Petition for Writ of Habeas Corpus (Dkt. # 1). Acting *pro se*, petitioner challenges the three consecutive 20-year sentences he received in the District Court of Delaware County, State of Oklahoma, Case No. CF-96-231. Petitioner was charged with one count of burglary in the second degree and two counts of knowingly concealing stolen property. Following a jury trial in October 1996, he was convicted on all three counts and sentenced on January 17, 1997. His conviction was affirmed on direct appeal (No. F-97-1170) by the Oklahoma Court of Criminal Appeals (CCA) on September 9 and December 7, 1998.

This case was referred to the undersigned for a report and recommendation. See 28 U.S.C. § 636, and 28 U.S.C. § 2254, Rules 8, 10. Based on a review of the record and the parties' briefs, the undersigned proposes findings that the adjudication of petitioner's claims did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. For the reasons set forth below, the undersigned recommends that the Petition for Writ of Habeas Corpus (Dkt. # 1) be **DENIED**.

BACKGROUND AND PROCEDURAL HISTORY

In June 1996, petitioner and his cousin, Kevin Hilton, were charged with stealing two lawnmowers. At that time, there was also a warrant for petitioner's arrest after he had removed an electronic monitoring device placed on him by the Oklahoma Department of Corrections and fled to Missouri. Hilton convinced him to return to Oklahoma and assist with the remodeling of Hilton's mobile home. Hilton also apparently convinced petitioner to ride with him to pick up two lawnmowers and sell them so that Hilton could repay \$40 he owed petitioner. The prosecution presented evidence at trial that the two of them stole one lawnmower from an open outdoor shed at one house, and they broke into a locked outdoor shed at another house to steal a lawnmower, a tiller, and a gas can. Hilton sold the lawnmowers later that day for \$200 and gave petitioner \$40.

Soon after the sale, the two men were stopped by police and questioned. Petitioner was released after he gave a false name and social security number. Hilton later gave a statement implicating petitioner in the theft of the lawnmowers. The next day petitioner was arrested on the outstanding escape warrant and taken into custody. The police chief took that opportunity to question petitioner about the lawnmower theft. He read petitioner his Miranda rights, and petitioner gave a statement purportedly recounting his version of the events surrounding the theft of the lawnmowers.

Petitioner plead not guilty, and testified at a jury trial in October 1996 that the police chief did not accurately record his words in the statement. The statement indicates that petitioner and Hilton acted in concert to steal the lawnmowers. However, petitioner testified that Hilton acted alone in stealing the first lawnmower, and he believed the second one they picked up belonged to Hilton.

Hilton's statement, indicating that petitioner and a third person picked up the lawnmowers (but implying that petitioner acted alone), was read at trial over the objection of petitioner's counsel.

The jury convicted petitioner, and recommended the minimum sentence on each count. Because petitioner had previously been convicted in Oklahoma for knowingly concealing stolen property (1978), uttering a forged instrument (1989), and driving under the influence (1992 and 1995), the minimum sentence on each count was 20 years. The trial judge ruled that petitioner's sentences were to run consecutively rather than concurrently.

As grounds for his petition, petitioner claims that (1) the admission of the co-defendant's statement to police violated his constitutional rights to confront and cross-examine witnesses; (2) he was prejudiced by the prosecutor's misconduct; and (3) the consecutive sentences he received are excessive and should be modified to run concurrently. Petitioner was represented by an attorney through sentencing and by a different attorney on appeal. Petitioner presented these same arguments to the CCA. The CCA reviewed the matter on the merits.

Relying on Parker v. State, 917 P.2d 980, 984 (Okla. Crim. App. 1996), the CCA found that the content of co-defendant's statement which was exculpatory to petitioner was introduced by defense counsel, and therefore the prosecutor did not err by introducing other parts of the statement. (Resp. Br., Dkt. # 10, Ex. A, at 2.) The CCA found that the prosecutor erred when he tried to align the jury with the State, and when he went outside the record to argue that petitioner's parents had "given up" on him; however, the CCA considered this conduct harmless error because petitioner confessed to the crime and the jury imposed the least possible punishment. Id. Finally, the CCA found no abuse of discretion in the trial court setting the sentences to run consecutively. (The CCA corrected its order of September 9, 1998, which indicated that the trial court set the sentences to run

concurrently; however, the CCA issued its Order Correcting Summary Opinion on December 7, 1998, which affirmed the trial court's decision setting the sentences to run consecutively. (See id., and Ex. B, at 1.) The appellate court pointed out that the counts against petitioner were charged after former conviction of two felonies, and the jury recommended the minimum punishment on each count. (Id., Ex. A, at 1.)

In defense, respondent argues that (1) the adjudication of petitioner's first and second grounds for relief resulted in a decision in accord with, and based on a reasonable application of, Supreme Court law; and (2) petitioner's third ground for relief pertains to a matter of state law which does not raise a federal constitutional question. Respondent concedes that petitioner has exhausted his state remedies on all the issues presented in his petition and that the limitations period has not expired. (Id., Resp. Br., at 2.)

DISCUSSION AND LEGAL ANALYSIS

Standard of Review

Habeas corpus actions requiring the review of state court judgments and sentences are governed by 28 U.S.C. § 2254:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1996). Section 2254 was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, tit. I, § 104 (1996). The AEDPA established

a more deferential standard of review of state court decisions in habeas corpus cases. Deference is appropriate in this matter as to the CCA's decision.

Respondent argues that the Tenth Circuit follows the interpretation of the standard of deference afforded state court adjudications under § 2254(d)(1) as set forth in Drinkard v. Johnson, 97 F.3d 751, 768 (5th Cir. 1996), overruled on other grounds by Lindh v. Murphy, 521 U.S. 320 (1997).¹ To support this argument, respondent cites to Lafevers v. Gibson, No. 98-6302, 1999 WL 394508, at *5 (10th Cir. June 16, 1999); White v. Scott, No. 97-6248 (1998 WL 165162, at *2 (10th Cir. Apr. 9, 1998); Roberts v. Ward, No. 98-6066, 1999 WL 162751, at *2 (10th Cir. Mar. 25, 1999); and Sexton v. French, 163 F.3d 874, 880 (4th Cir. 1998). (Resp. Br., Dkt. # 10, at 3-4.) Since the respondent filed its brief, however, the Tenth Circuit has recognized that federal courts of appeals differ in their interpretation of the standards of deference and the United States Supreme Court has granted *certiorari* to review the Fourth Circuit's interpretation of the standard. See Moore v. Gibson, Nos. 98-6004, 98-6100, 1999 WL 765893, *8 (10th Cir. Sept. 28, 1999); Smallwood v. Gibson, No. 98-6397, 1999 WL 704274, *19, n. 2 (10th Cir. Sept. 10, 1999); Bryson v. Ward, 187 F.3d 1193, 1199, n. 3 (10th Cir. 1999); Robedaux v. Gibson, No. 98-6021, 1999 WL 672305, *2, n. 2 (10th Cir. July 8, 1999) (all citing to Williams v. Taylor, ___ U.S. ___, 119 S. Ct. 1355, 143 L.Ed.2d 516 (1999)).

In these recent Tenth Circuit cases, the court has declined to adopt a specific interpretation and it has held that, under any of the deferential standards announced by the circuit courts of appeal,

¹ In Drinkard, the Fifth Circuit held that the application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court's ruling was incorrect. 97 F.3d at 768-69.

the court would have reached the same result. Likewise, under any interpretation of § 2254, the undersigned believes that petitioner's claims do not merit habeas relief.

Admissibility of Co-Defendant's Statement

Generally, an incriminating hearsay statement of a non-testifying co-defendant is inadmissible against a defendant. See Bruton v. United States, 391 U.S. 123, 124 (1968). Although Hilton and petitioner were not tried together, Hilton's statement to the police was read into the record on redirect examination by the prosecutor over the objection of petitioner's attorney. (Tr. 475-79, 493, 495)² Apparently, Hilton was released by police on his own recognizance and was not present for the trial. Relying primarily on Lee v. Illinois, 476 U.S. 530 (1986), petitioner argues that (1) he did not waive his Sixth Amendment right to confront and cross-examine Hilton; (2) Hilton's statement was unreliable and inadmissible against petitioner; and (3) the error was not harmless. (Reply Br., Dkt. # 15, at 2-3.)

Respondent argues that petitioner's counsel "opened the door" on cross-examination by questioning the police chief about the content of Hilton's statement. (See Tr. 459-61). The Tenth Circuit has long held that "[c]ross examination 'may embrace any matter germane to the direct examination, qualifying or destroying, or tending to elucidate, modify, explain, contradict, or rebut testimony given in chief by the witness.' Admission of rebuttal evidence, particularly when the defendant 'opens the door' to the subject matter, is within the sound discretion of the district court." United States v. Burch, 153 F.3d 1140, 1144 (10th Cir. 1998) (quoting United States v. Troutman, 814 F.2d 1428, 1450 (10th Cir. 1987)); see also United States v. Gauvin, 173 F.3d 798, 803 (10th

² The entire trial transcript is attached as Ex. 1, vol. III, to Resp. Br., Dkt. # 10.

Cir. 1999). The trial court did not err by admitting the statement of petitioner's co-defendant. Curiously, Hilton's statement was offered into evidence by petitioner's own counsel. (Tr. 495.)

Even if petitioner's counsel had not opened the door, the admission of Hilton's statement would have been harmless error. Petitioner claims that Hilton's statement implicated petitioner because Hilton stated that petitioner acted alone in picking up both lawnmowers and picked up one of them as payment for a drug deal between Hilton and the lawnmower owner. (Reply Br., Dkt. # 15, at 4, 6; see Tr. 475-76.) "The admission of a nontestifying codefendant's confession may be harmless error if the properly admitted evidence is so overwhelming and the prejudicial effect of the codefendant's statement is so insignificant that an average jury 'would not have found the State's case significantly less persuasive had the testimony as to [codefendant's] admission been excluded.'" Mark v. Evans, No. 96-6419, 1997 WL 687687, at *2 (10th Cir. Oct. 29, 1997) (quoting Schneble v. Florida, 405 U.S. 427, 432 (1972)).

As petitioner points out, even the police chief admitted that Hilton's statement was unreliable. (Reply Br., Dkt. # 15, at 3; see Tr. at 494) The jury could easily have made the same deduction. No other evidence at trial even remotely corroborated Hilton's statement regarding any drug deal or that petitioner acted alone. Further, as the CCA pointed out, petitioner essentially confessed to the crimes when he gave his statement to the police chief (if the chief's testimony is believed and petitioner's is not). (Resp. Br., Dkt. # 10, Ex. A, at 2.) The admission of Hilton's statement did not significantly contribute to the jury verdict, nor did it violate petitioner's Sixth Amendment rights.

Prosecutorial Misconduct

Similarly, the harmless error rule applies to petitioner's claims of prosecutorial misconduct. Petitioner claims that the prosecutor attacked defense counsel's strategy, attempted to instill societal

alarm in jurors and implied that they had a duty to convict petitioner, vouched for testifying law enforcement officers, and commented on the absence of witnesses (petitioner's parents). (Reply Br., Dkt. # 15, at 7-11.) In addition, petitioner suggests that the cumulative effect of these statements requires reversal of his convictions. (*Id.* at 1.) All but one of the prosecutor's statements occurred in closing argument. (*See* Tr. 587-88, 613-14, 617-18, 631, 633-34.) The prosecutor also cross-examined petitioner as to the law enforcement officers' testimony. (*See* Tr. 553) However, the prosecutor reiterated the same remarks in closing argument. (Tr. 587)

In general, the Tenth Circuit reviews allegations of prosecutorial misconduct to determine if the allegedly improper conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Johnson v. Gibson*, 169 F.3d 1239, 1250 (10th Cir. 1999) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). In making that determination, the Court is to consider all of the surrounding circumstances at trial, including the strength of the State's case and the prejudice, if any, attributable to the prosecutor's comments. *See Boyd v. Ward*, 179 F.3d 904, 920 (10th Cir. 1999); *Johnson*, 169 F.3d at 1250; *Brecheen v. Reynolds*, 41 F.3d 1343, 1355 (10th Cir. 1994).

The prosecutor's attack on defense counsel, petitioner's first allegation of prosecutorial misconduct, amounts to the prosecutor's "anger" that defense counsel would fault the law enforcement officers for failing to use a tape recorder instead of recording a written statement. (Tr. 613-14) This comment does not rise to the level of disparagement that constitutes error. Accusing defense counsel of lying, as the defendant did in *McCarty v. State*, 765 P.2d 1215, 1220-21 (Okla. Crim. App. 1988) (cited by petitioner) is far different from expressing anger over an opponent's legitimate trial strategy and tactics. Second, the prosecutor's comment to the jurors to "go do your

job” as “the voice of Delaware County” (Tr. 617-18) did not impose upon them a duty to convict petitioner. “[I]mproper appeals to societal alarms” or requests for “vengeance for the community to set an example” are not due process violations *per se*. See Brecheen, 41 F.3d at 1356 (quoting Darden v. Wainwright, 477 U.S. 168, 181-82 (1986), and Coleman v. Saffle, 869 F.2d 1377, 1396 (10th Cir. 1989)).

Petitioner’s third allegation of prosecutorial misconduct is the prosecutor’s expression of a personal opinion that the law enforcement officials involved in petitioner’s case would not have jeopardized their careers, livelihood, and freedom over two lawnmowers. (Tr. 553, 587-88) This was improper, but it appears to be more of an appeal to common sense as a persuasive technique than truly vouching for the police officers. Finally, the prosecutor’s reference to the absence of petitioner’s parents at the trial, that they had “given up” on him (Tr. 613), was also error. There is no evidence that their testimony was necessary or that either side called them. There are a myriad of legitimate reasons why petitioner’s parents might not have shown up at the trial other than their “giving up” on their son. Nonetheless, these errors were harmless. Even assuming that the prosecutor’s comments in this case were all improper, none of them significantly influenced the jury’s decision, given the evidence establishing petitioner’s guilt. In all likelihood, the verdicts in this case would have been no different absent the prosecutor’s allegedly improper comments.

Excessive Sentence

The verdicts might have been different, however, if the jurors had known that the trial court intended to run the sentences consecutively rather than concurrently. As petitioner points out, the jury reached its decision during the sentencing phase of the proceedings only after the trial court gave them a “deadlocked jury” charge. (Reply Br., Dkt. # 15, at 12.; see Tr. 634-37.) It is true that

petitioner fled the jurisdiction after removing an electronic monitoring device from his ankle after his conviction for DUI. He also admitted to giving a false name and social security number to police officers when they stopped the pickup driven by Hilton after the lawnmowers were sold. However, petitioner profited a mere \$40 from the sale of the lawnmowers, and all of the stolen property was returned to the owners. His four prior felony convictions were for non-violent offenses. Petitioner was 40 years old when he was sentenced. Sixty years for stealing two lawnmowers seems an unduly harsh sentence.

Nonetheless, the undersigned cannot agree that the adjudication of petitioner's claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). In a technical sense, petitioner has not raised a constitutional issue cognizable on federal habeas review: he has merely alleged that the sentence is excessive, and he has merely argued that, pursuant to Oklahoma law, the sentence should "shock the conscience" of this Court because the punishment does not "bear a direct relationship to the nature and circumstances of the offense committed." (Reply Br., Dkt. # 15, at 11-14, quoting Maxwell v. State, 775 P.2d 818, 820 (Okla. Crim. App. 1989), and Gable v. State, 424 P.2d 433, 436 (Okla. Crim. App. 1967)).

Nonetheless, if *pro se* petitions are to be read liberally, see Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)), the Court could construe petitioner's pleading as asserting a claim arising under the Eighth Amendment's prohibition against cruel and unusual punishment. "Cruel and unusual punishment" includes "sentences that are

disproportionate to the crime committed.” Solem v. Helm, 463 U.S. 277, 284 (1983). Thus, petitioner’s claim would appear to give rise to an Eighth Amendment “proportionality review” of petitioner’s sentence, taking into account (1) “the gravity of the offense and the harshness of the penalty”; (2) “the sentences imposed on other criminals in the same jurisdiction”; and (3) “the sentences imposed for commission of the same crime in other jurisdictions.” Id. at 291-92. After performing such a review, the Solem court held that a life sentence without parole was significantly disproportionate to the petitioner’s crime of uttering a “no account” check for \$100. Id. at 303. The Solem defendant had previous convictions for third-degree burglary, obtaining money by false pretenses, grand larceny, and third-offense driving while intoxicated. He was sentenced under a South Dakota recidivist statute. The Court stated:

In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant was been convicted. Reviewing courts, of course should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is *per se* constitutional.

Id. at 290.

The Solem court distinguished Rummel v. Estelle, 445 U.S. 263, 284-85 (1980), in which the Court ruled that the mandatory life sentence imposed under the Texas recidivist statute did not constitute cruel and unusual punishment for defendant’s third felony conviction. The Rummel defendant was convicted for obtaining \$120.75 by false pretenses after having been previously convicted for felonies of fraudulent use of a credit card to obtain \$80 worth of goods or services and for passing a forged check in the amount of \$28.36. Id. at 265-66. The Solem court pointed out that

the Rummel defendant would have become eligible for parole, whereas the Solem defendant could only hope for commutation of his sentence by executive clemency. Id. at 301-02.

Prior to Solem, the Supreme Court had reversed a decision by the Fourth Circuit Court of Appeals for that court's failure to heed the Supreme Court decision in Rummel. Hutto v. Davis, 454 U.S. 370, 372 (1982). In Hutto, a Virginia prisoner argued that a 40-year sentence and a \$20,000 fine for possession of less than nine ounces of marijuana constituted cruel and unusual punishment. Id. at 371. The Supreme Court chastised the appellate court for affirming the district court's decision adopting the prisoner's argument, stating that the appellate court had "sanctioned an intrusion into the basic line-drawing process that is 'properly within the province of legislatures, not courts.'" Id. at 374 (quoting Rummel, 445 U.S. at 275-76). While a proportionality review under Solem might offer a basis for finding that petitioner's sentence violates the Eighth Amendment, Rummel and Hutto appear to control in this instance. The arguments of counsel before the trial court sentenced petitioner indicate that parole is available to petitioner (Tr. 643-53), and, when viewed in light of the punishment the Texas court gave the Rummel defendant, petitioner's sentence does not seem cruel or unusual. Further, the Supreme Court has severely curtailed, or at least severely criticized, the Solem proportionality analysis.

In Harmelin v. Michigan, 501 U.S. 957 (1991), the Supreme Court upheld the imposition of a life sentence without the possibility of parole for a defendant who was convicted of possessing more than 650 grams of cocaine. The Supreme Court held that the mandatory sentence did not constitute cruel and unusual punishment in violation of the Eighth Amendment even though such mandatory sentences do not provide for the consideration of mitigating factors such as the fact that petitioner had no prior felony convictions. Id. at 994-96. Justice Scalia, writing a portion of the opinion in

which Chief Justice Rehnquist joined, concluded that “the Eighth Amendment contains no proportionality guarantee,” id. at 965, while Justice Kennedy, who filed a concurring opinion joined by Justices O’Connor and Souter, indicated that the Eighth Amendment “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” Id. at 1001 (quoting Solem, 463 U.S. at 288, 303). The remaining four justices dissented.

Given the lack of consensus by the Supreme Court as to the viability of the Solem proportionality criteria, the Tenth Circuit has continued to apply it in some instances. See United States v. Montoya, No. 95-8052, 1996 WL 229188, **3 (10th Cir. May 7, 1996); United States v. Villegas-Viscaino, No. 94-2084, 1995 WL 72364, **2 n. 4 (10th Cir. Feb. 22, 1995); United States v. Easter, 981 F.2d 1549, 1556 (10th Cir. 1992); United States v. Turley, Nos. 92-3162, 92-3163 (10th Cir. April 30, 1993); but see United States v. Johnson, No. 91-3170, 1991 WL 230166, **1 (10th Cir. Nov. 7, 1991). When applied to this matter, the gravity of petitioner’s offense is not severe, but his sentence does not appear harsh in comparison to the conviction affirmed by the Supreme Court in Rummel (life sentence for obtaining \$120.75 by false pretenses) or the conviction overturned in Solem (life sentence *without parole* for uttering a \$100 “no account” check). Even if the Solem analysis were not applied, petitioner’s sentence does not appear “grossly disproportionate” to the offense as contemplated by three justices concurring in Harmelin, 501 U.S. at 1001, given the the sentence imposed in Rummel, the authority of the Oklahoma legislature, and the discretion of the trial court. Petitioner’s sentence does not constitute cruel and unusual punishment in violation of the Eighth Amendment.

CONCLUSION

For the reasons stated herein, the undersigned recommends that the Petition for Writ of Habeas Corpus (Dkt. # 1) be **DENIED**.

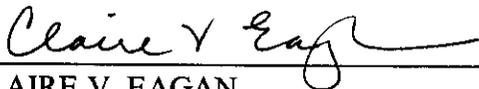
OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1); and § 2254, Rules 8, 10; see also Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999).

DATED this 15th day of November, 1999.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on all of the parties hereto by mailing the same to their attorneys of record on 16 Day of Nov, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

NOV 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 TIM LANDRY,)
)
 Defendant.)

No. 96-CR-011-B
98-CV-556-B (E)

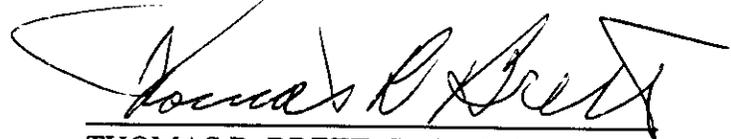
ENTERED ON DOCKET
DATE NOV 16 1999

JUDGMENT

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 15th day of Nov, 1999.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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C/10 R

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

F I L E D

NOV 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 TIM LANDRY,)
)
 Defendant.)

No. 96-CR-011-B ✓
~~98-CV-556-B (E)~~

ENTERED ON DOCKET

DATE NOV 16 1999

ORDER

Before the Court is the *pro se* Defendant Tim Landry's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #36) together with his brief in support of his § 2255 motion (#38). The government has filed a response (#40) and a supplement to the response (#42). Defendant has filed a reply to both the response (#41) and the supplemental response (#43). In addition, Defendant has filed a motion for an evidentiary hearing (#47), a motion to invoke limited discovery (#48) and supporting memorandum (#49), a motion to set date for evidentiary hearing and for appointment of counsel for indigent movant (#51). The government has filed a response to Defendant's motion for limited discovery (#50) to which Defendant has replied (#52). After reviewing the entire record in this case, the Court finds that an evidentiary hearing is not necessary and that the motion pursuant to §2255 lacks merit and should be denied. Defendant's motions for an evidentiary hearing, for appointment of counsel, and to invoke limited discovery should also be denied.

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9/10/99

BACKGROUND

According to information contained in the Presentence Investigation Report ("PSR") (#37, Ex. N), an officer of the San Diego, California International Airport Narcotics Task Force contacted an agent at the Tulsa, Oklahoma office of the Drug Enforcement Administration ("DEA") on January 16, 1996, to report that Defendant and another individual, Dewayne Curry, were flying via American Airlines flight 1648 from San Diego to Tulsa and were transporting methamphetamine. The San Diego officer provided flight information and baggage claim numbers for checked baggage. Upon arrival in Tulsa, a drug detection dog alerted to luggage belonging to Defendant and Curry. Both men were stopped by DEA agents after removing their bags from the baggage carousel. They were escorted to the airport's security office where they were advised of information indicating that they were transporting narcotics. As agents prepared to search Defendant's person, Defendant produced a white paper bag from his front pants pocket containing a substance that field-tested positive for methamphetamine. Subsequent laboratory analysis of the methamphetamine indicated a net weight of 110.2 grams of a mixture containing methamphetamine or 84 grams of actual methamphetamine.

On February 6, 1996,¹ Defendant was charged in a single count indictment with knowingly and intentionally possessing with the intent to distribute approximately four ounces of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1). See Docket #1.

¹The date-stamp placed on the Indictment by the Court Clerk bears the date "February 6, 1995." However, the government has provided under seal the Affidavit of Custodian of the Grand Jury Records (#46, Ex. A). According to the Custodian's affidavit, "February 6, 1996 is the correct date of the Indictment and that the stamped date of February 6, 1995, is a clerical error." (Id.)

Defendant pled guilty to the charge pursuant to a plea agreement signed on July 12, 1996 by the Assistant U.S. Attorney, Defendant, and Defendant's retained attorney, Rex Earl Starr. In the plea agreement, Defendant admitted that he knowingly, willfully, and intentionally committed or caused to be committed the acts constituting the crime alleged in the indictment and confessed to the Court that he was in fact guilty of the crime. (Plea Agreement at 4). Defendant acknowledged that the statute called for imprisonment of ten years to life and a fine of up to \$4 million for this offense, but that the Court retained final discretion to sentence Defendant pursuant to the United States Sentencing Guidelines ("sentencing guidelines" or "U.S.S.G."). (Plea Agreement at 8-11).

At the change of plea hearing, Defendant testified that he was guilty as charged because "[i]n January 1996 I flew from Tulsa, Oklahoma to San Diego, California and returned with intent to buy and possess methamphetamine. I was arrested at the Tulsa International Airport in possession of the methamphetamine on 16 January '96." (Change of Plea trans. at 23). Defendant further testified that he and Curry "got our heads together and decided we would go to California. He was from California, had friends out there, said he could make a deal, we could do a deal, and I thought it sounded good, so I went out there and - he bought it from his friend, and we flew back on the plane and got arrested in the airport." (Change of Plea Trans. at 25). Defendant also testified that he was planning to keep half of the methamphetamine for his own use and to "get rid" of the other half to pay for the trip. (Change of Plea Trans. at 28).

Prior to sentencing, the United States Probation Office prepared the Presentence Report ("PSR"), referenced above, to which neither Defendant nor his counsel objected at the time of sentencing. According to the PSR, the statutory sentencing range was a minimum of 5 years to a maximum of 40 years imprisonment. The Probation Officer determined that the appropriate base

offense level in this case, based on Defendant's possession of 84 grams of actual methamphetamine, was 30. However, based on the government's determination that Defendant satisfied the requirements of the "safety valve" provision of 18 U.S.C. § 3553(f)(1) through (5), found in the sentencing guidelines at U.S.S.G. § 5C1.2 (1) through (5), Defendant was credited with a two point reduction. Defendant was also credited with a three level reduction for Acceptance of Responsibility pursuant to U.S.S.G. § 3E1.1 (a) and (b). The resulting total offense level as determined in the PSR was 25. Because Defendant had a criminal history category of I, the resulting guideline range for imprisonment was 57 to 71 months, with a supervised release term of four years. On January 12, 1997 the Court held sentencing proceedings at which neither Defendant nor his counsel stated an objection to the PSR. After hearing defense counsel's argument concerning Defendant's good work record and status as a good citizen but finding no additional basis for sentence reduction, the Court adopted the recommendations of the PSR. The Court sentenced Defendant to 57 months imprisonment, the minimum sentence available under the sentencing guidelines, to be followed by four years of supervised release, and imposed a fine of \$1,000 (#15). The Court explained that it sentenced Defendant at the low end of the guidelines range because of Defendant's lack of a prior criminal history. The judgment was entered on January 31, 1997 (#15).

Defendant appealed his conviction and sentence. On August 15, 1997, the Tenth Circuit Court of Appeals entered an Order dismissing the appeal, citing 10th Circuit Rule 27.3(i) and stating, "Appellant's letter received and filed in this court on August 11, 1997 is construed as a motion to dismiss and is granted." (#28).

On July 24, 1998, Defendant filed this *pro se* motion pursuant to § 2255 (#36), raising three (3) grounds for relief. Specifically, Defendant alleges that:

1. Landry's sentence and conviction must be vacated, because his plea was neither voluntary, nor knowingly and intelligently made.
2. Landry's sentence must be vacated, because his counsel was ineffective by failing to provide meaningful representation during Landry's sentencing process.
3. Landry's sentence must be vacated, because appellate counsel was ineffective by only filing an *Anders* brief on direct appeal.

(#36 at 5a). Defendant requests that his sentence and conviction be vacated, "so that he may exercise his original intent of going to trial" (#38 at 63).

The government responds that the transcript from the change of plea hearing contradicts Defendant's contention that his plea was involuntary, that Defendant did not receive ineffective assistance of counsel, and that appellate counsel did not provide ineffective assistance by filing an *Anders* brief.

In his reply to the government's response, Defendant accuses the government of intentionally withholding discovery material and states that the government used "deception, misrepresentation, and out right lies" to gain his conviction. Defendant further alleges that the government made material misrepresentations concerning the statutory sentencing range in order to obtain his plea of guilty, that he was coerced into pleading guilty by the government's threats to prosecute his wife, and that he received ineffective assistance of counsel during all phases of his criminal proceeding.

ANALYSIS

A. Preliminary motions.

1. Motions for evidentiary hearing

Section 2255 provides that "[u]nless the motion and the files and records of the case

conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” 28 U.S.C. § 2255. Contrary to Defendant’s assertions, the Court finds that an evidentiary hearing is not necessary in this case because, as discussed in Part B below, the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). Therefore, Defendant’s motion for evidentiary hearing (#47) and motion to set date for evidentiary hearing (#51-1) should be denied.

2. *Motion for appointment of counsel*

After carefully reviewing the complexity of the legal and factual issues involved, the Court exercises its discretion to deny Defendant's motion for appointment of counsel. There is no constitutional right to counsel beyond the direct appeal of a conviction. See Swazo v. Wyoming Department of Corrections, 23 F.3d 332 (10th Cir. 1994). Further, there is no statutory right to appointed counsel, under Rule 8(c) of the Rules Governing 2255 Proceedings, when relief is denied without an evidentiary hearing. See United States v. Vasquez, 7 F.3d 81, 83 (5th Cir.1993). As discussed above, the Court determines that no evidentiary hearing is necessary. Therefore, Defendant’s motion for appointment of counsel (#51-2) should be denied.

3. *Motion for limited discovery*

In his motion to invoke limited discovery (#48), Defendant requests leave to conduct limited discovery to require the government “to produce certain documents and other things believed by Landry to be in the Government’s possession.” However, Rule 6(a), *Rules Governing Section 2255 Proceedings For the United States District Courts*, provides that a § 2255 movant is entitled to

undertake discovery only when "the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." In this case, the Court, in its discretion, finds that Defendant's motion should be denied. As discussed below, the issues raised by Defendant in his § 2255 motion may be resolved on the basis of the motion and the case file. No further discovery is necessary.

B. Defendant is not entitled to relief under 28 U.S.C. § 2255

1. Defendant's guilty plea was knowing and voluntary

As his first proposition of error, Defendant maintains that his guilty plea was not "knowing and voluntary" and, as a result, was constitutionally invalid. The plea must be "a voluntary and intelligent choice among the alternative courses of action open to the defendant." Parke v. Raley, 506 U.S. 20, 28-29 (1992). This is because "a guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination." Id.

At Defendant's July 12, 1996, change of plea hearing, this Court held a plea colloquy in accordance with Fed. R. Crim. P. 11. At that hearing, in direct contravention of his current allegations, Defendant acknowledged that he had voluntarily entered a plea of guilty (Change of Plea Trans. at 11), denied that anyone had forced him or threatened him in any way in order to secure a guilty plea (Change of Plea Trans. at 11), acknowledged that he was mentally competent and knew what he was doing at the time he entered his plea (Change of Plea Trans. at 18), acknowledged he had consulted with his attorney about entering a plea of guilty (Change of Plea Trans. at 19), and stated that he was satisfied with the representation provided by his attorney (Change of Plea Trans.

at 19). Also, as discussed above, the Court established that a factual basis for a plea of guilty existed. (Change of Plea Trans. at 23-28). Based on the record, the Court finds Defendant has failed to show that his decision to enter a formal plea of guilty was anything but a voluntary choice he knowingly made after adequate opportunity for reflection and thought. "Solemn declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 74 (1977). In light of Defendant's plea hearing testimony, the Court concludes that Defendant knowingly and voluntarily chose to plead guilty.

Furthermore, the Court finds that none of Defendant's grounds allegedly contributing to render the plea involuntary has merit. Defendant asserts three grounds supporting his contention that his guilty plea was involuntary: (1) it was premised on "coercion" by his attorney and the government, (2) it was based on material misrepresentations made in the plea agreement and at the change of plea hearing, and (3) his counsel was ineffective throughout the plea process.

Because each of Defendant's claims has an ineffective assistance of counsel component, the Court will begin its analysis of Defendant's arguments concerning the voluntariness of his guilty plea by addressing his ineffective assistance of counsel allegations. Where a defendant enters a guilty plea upon the advice of counsel, the voluntariness of the plea depends on whether the defendant received effective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 56-57 (1985). The two-prong standard adopted in Strickland v. Washington, 466 U.S. 668, 687 (1984), applies to guilty plea challenges based on ineffective assistance of counsel and requires that a defendant show both that counsel's performance fell below an objective standard of reasonableness (the performance prong) and that, but for counsel's unprofessional errors, the result of the proceeding would have been different (the prejudice prong). Hill, 474 U.S. at 57. To satisfy the prejudice prong, the defendant

must show that there was a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Id. at 59. Where a defendant alleges that his counsel failed to investigate or discover potentially exculpatory evidence or failed to advise the defendant of a potential defense to the crime charged, the resolution of the "prejudice" inquiry depends largely on whether the evidence would have changed the outcome of a trial or whether the defense would have succeeded at trial. Id.; see also United States v. Gray, 182 F.3d 762, 767 (10th Cir. 1999).

Furthermore, as to the "performance prong" of the Strickland standard, there is a very strong presumption that the strategic and tactical decisions of counsel were within the range of professional competency considered reasonable. Strickland, 466 U.S. at 689. The test in assessing trial counsel's performance is one of objective reasonableness. Strickland, 466 U.S. at 687-88. In addition, courts should avoid viewing trial counsel's tactical decisions with hindsight, and give deference to the strategy employed by defendant's attorney. Id. at 689. The reasonableness standard is exercising all of the "skill, judgment and diligence of a reasonably competent defense attorney." Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir.1988) (citations omitted). Also, defense counsel must advise the defendant based upon his familiarity with the facts and law. See Scott v. Wainwright, 698 F.2d 427, 429 (11th Cir. 1983). "Counsel's advice need not be errorless, and need not involve every conceivable defense, no matter how peripheral to the normal focus of counsel's inquiry, but it must be within the realm of competence demanded of attorneys representing criminal defendants." Id.; see also McMann v. Richardson, 397 U.S. 759, 771 (1970).

As to Defendant's first assertion that his plea was involuntary because it was coerced by his attorney, Defendant maintains that he was the victim of a "reverse sting" operation by the

government, that “he had been set-up from the very beginning, and that Curry was working for the DEA.” (#38 at 6). Defendant argues that his attorney failed to investigate and develop his claims of “entrapment, duress, and illegal search and seizure[.]” (#38 at 7). Defendant further argues that his claims were meritorious. As discussed above, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error “prejudiced” the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

As to Defendant’s claim that he was “set-up” by the government in the instant case, it is well-established that a defense of entrapment has two elements: government inducement of the crime and the absence of predisposition to commit the crime on the part of the defendant. See, e.g., United States v. Garcia, 182 F.3d 1165, 1168 (10th Cir. 1999). Assuming *arguendo* that Defendant could demonstrate government inducement of the crime, nothing indicates an absence of a predisposition on Defendant’s part to commit the crime. Defendant’s illegal search and seizure argument fares no better (see discussion, at p. 12 below). Thus, even if counsel did fail to investigate and develop either an entrapment or an illegal search and seizure claim, the claims are without merit and they would not have changed the outcome of a trial. Defendant cannot satisfy either the deficient performance prong or the prejudice prong of the Strickland standard.

Defendant also alleges that his guilty plea was rendered involuntary by his attorney’s advice that he would be placing his entire family at risk of being charged with conspiracy if Defendant insisted on proceeding to trial rather than entering a plea of guilty. Defendant specifically asserts

that "he would not have pled guilty but for Starr's threats that the Government would prosecute his wife and her family if he proceeded to trial." However, as stated by the government in its response to Defendant's § 2255 motion, the fairly presented ramifications of a guilty jury verdict and future prosecutions are well within the range of required competence. Mosier v. Murphy, 790 F.2d 62, 66 (10th Cir. 1986). Thus, even if Defendant's allegations are true, his attorney's advice concerning the drawbacks of proceeding to trial and the benefits of pleading guilty does not constitute deficient performance under Strickland and cannot be viewed as rendering Defendant's guilty plea involuntary.

Defendant also asserts that his counsel, John Street and Rex Starr, were both ineffective throughout the plea process. Defendant discharged attorney Street at the March 8, 1996 pretrial conference. Thereafter, Defendant hired attorney Starr to replace Street. Defendant asserts that Street failed to investigate Defendant's claims thereby failing to provide effective assistance of counsel and questions Street's tactics. As to the representation provided by Starr, Defendant alleges that counsel abandoned his loyalties to his client in advising Defendant to plead guilty and in refusing to withdraw Defendant's guilty plea. Of course, a defense attorney who abandons his duty of loyalty to his client and effectively joins the prosecution in an effort to attain a conviction suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, " 'represents' the defendant only through a tenuous and unacceptable legal fiction." See Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988) (quoting Faretta v. California, 422 U.S. 806, 821 (1975)). However, after reviewing the case file, the Court finds in this case, given the evidence against Defendant, counsel did not provide ineffective assistance in their representation of Defendant during the plea process. The letters provided by Defendant in his Appendix to the § 2255 motion (#37) indicate that

his attorneys attempted to secure the best outcome possible for Defendant. They attempted to work with the government so that Defendant could be considered for a downward departure from the sentencing guidelines for cooperating and providing assistance in the on-going investigations of drug activity. See #37, Exs. G and H. In addition, upon receipt of the PSR and prior to sentencing, attorney Starr corresponded with Assistant U. S. Attorney McLoughlin to discuss previously undisclosed information contained in the PSR. (#37, Ex. I). Furthermore, as referenced in counsel's September 20, 1996 letter (id.), Defendant's sentencing was delayed pending satisfactory explanation of the information. Based on the record, the Court finds Defendant has failed to demonstrate that either attorney abandoned his loyalty to Defendant. Therefore, the performance of Defendant's attorneys did not fall outside the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689. Defendant's guilty plea was not rendered involuntary due to ineffective assistance of counsel.

Lastly, Defendant attempts to tie the voluntariness of his plea to counsel's failure to move for suppression of all evidence obtained during the search at the airport. The Court finds that Defendant's argument is patently without merit. Based on the facts of this case, any challenge to the airport search would have failed. It is undisputed that a drug sniffing dog alerted to Defendant's luggage at the airport. According to Tenth Circuit case law, a drug sniffing dog's detection of contraband itself establishes probable cause enough for an arrest. See United States v. Williams, 726 F.2d 661, 663 (10th Cir. 1984). Any subsequent search of Defendant's person would have been a valid search incident to arrest. See Lavicky v. Burnett, 758 F.2d 468, 474 (10th Cir. 1985). Because Defendant's search and seizure argument is meritless, his counsel did not provide ineffective assistance to the extent they may have failed to investigate the claim. As a result, Defendant's guilty

plea was not rendered involuntary.

The Court also finds that Defendant's plea was not rendered involuntary by any action of the government. Although Defendant asserts that the government somehow coerced his plea, his specific accusations concern only his counsels' actions. Those arguments have been considered and rejected above. The Court finds nothing in the record otherwise supporting Defendant's claim that he was coerced by the government. Defendant does argue, however, that his plea was involuntary because of "material misrepresentations" in the plea agreement and at the change of plea hearing. (#38 at 20). Landry complains that "[t]hroughout the entire plea process, [he] was repeatedly battered with the threat of 10 years to life in prison." Landry contends that the sentencing range represented by the government and his own attorney was erroneous. However, the Court finds no error in the sentencing range representation made in the plea agreement and at the change of plea hearing. As cited by Defendant in his brief, the parties stipulated that "for purposes of the Guideline Sentencing, the amount of methamphetamine involved in the offense conduct was approximately a total net weight of 106.1 grams." See #37, Ex. M. Pursuant to the relevant statute in effect at the time of the plea agreement, the sentencing range for a violation involving "100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture . . ." is not less than 10 years to a maximum of life imprisonment. 21 U.S.C. § 841(b)(1)(A)(viii) (1996). No misrepresentation of the sentencing range occurred.

In summary, the Court finds Defendant's guilty plea was informed and voluntary. The transcript from the Change of Plea hearing indicates the Court fully complied with the requirements of Fed. R. Crim. P. 11 by making a careful and searching inquiry to insure that the plea was made voluntarily and with full understanding of the charges and the consequences of a guilty plea.

Defendant, by his own admission in the courtroom, was afforded effective assistance of counsel when he entered his plea. Furthermore, none of Defendant's arguments concerning actions by his counsel or the government contributing to render his plea involuntary has merit.

2. Counsel did not provide ineffective assistance during the sentencing process

As his second proposition of error, Defendant asserts that his sentence must be vacated because counsel was ineffective by failing to provide meaningful representation during the sentencing process. Specifically, Defendant asserts that "counsel failed to provide effective representation when (A) counsel failed to address the discrepancies in the Presentence Investigation Report; and (B) counsel allowed a breakdown to occur at the sentencing hearing." (# 38 at 46).

Upon a review of the record, the Court finds that the PSR "discrepancies" identified by Defendant would have had no impact on the sentence received by Defendant and that counsel did not provide ineffective assistance in failing to object to the PSR. First, Defendant again argues that he was "set-up" by the government and that the government withheld information concerning an informant, believed by Defendant to be Curry. Defendant asserts that the information contained in ¶ 5 of the PSR allegedly revealing for the first time the involvement of an agent in San Diego constitutes a "discrepancy" to which his counsel voiced no objection. However, the letter from attorney Starr to Assistant U.S. Attorney McLoughlin, provided by Defendant in his Appendix (#37, Ex. I) and discussed above, indicates counsel did seek clarification of the information contained in the PSR prior to the sentencing hearing. Also, the letter indicates counsel continued his efforts to secure the best outcome possible for Defendant by cooperating with the government during its investigation of drug activity in Defendant's area.

As stated in the Background section above, Defendant was arrested at Tulsa International Airport upon his arrival from San Diego, California, with over 100 grams (net weight) of methamphetamine in his possession. However, Defendant now argues that because he was “set-up,” he “shared only a mitigating role as a minimal participant in the offense by being the one to transport the alleged drugs from one point to another under strict DEA surveillance and escort.” He further contends that he would have not only qualified for a sentence reduction under the safety valve provision but also a mitigating role adjustment under U.S.S.G. § 3B1.2 had his counsel objected to the PSR. The Court finds Defendant’s argument unpersuasive. Under U.S.S.G. § 3B1.2, if a defendant was a “minimal participant” in the criminal activity, the offense level is reduced by four; if the defendant was a “minor participant,” the level is reduced by two. § 3B1.2(a), (b). Application Note 1 provides that a minimal participant is “plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant’s lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.” See also United States v. Harfst, 168 F.3d 398 (10th Cir. 1999). Application Note 3 defines a “minor participant” as “any participant who is less culpable than most other participants, but whose role could not be described as minimal.” Other than Defendant’s own self-serving statements, nothing in the record supports Defendant’s contention that he was a minimal or minor participant, acting merely as a courier, transporting the methamphetamine from one point to another. At the time of sentencing, Defendant had already advised the Court at his change of plea hearing that he had purchased the methamphetamine both for his own use and to sell to cover the cost of the trip to California. (Change of Plea Trans. at 26-28). That testimony defeated the possibility of invoking the mitigating role adjustment under U.S.S.G. § 3B1.2. Counsel did not

provide ineffective assistance of counsel in failing either to object to the PSR or to move for additional sentence reduction based on U.S.S.G. § 3B1.2.

The second PSR “discrepancy” identified by Defendant as a ground for his ineffective assistance of counsel claim concerns the weight of methamphetamine used in determining the Guideline sentence. According to Defendant, the amount identified in the Plea Agreement was 106.1 grams (net weight) methamphetamine. Using that weight and methamphetamine designation, Defendant asserts that the base offense level would have been 26 pursuant to U.S.S.G. § 2D1.1(c)(7). However, in the PSR, the Probation Office used 84 grams (actual) methamphetamine to arrive at a base offense level of 30 pursuant to U.S.S.G. § 2D1.1(c)(5). Defendant claims that his counsel provided ineffective assistance in failing to object to this “discrepancy.” The Court finds Defendant’s claim to be without merit. Even if the weight of the methamphetamine is viewed as a “discrepancy,” Defendant acknowledged in the Plea Agreement that “[p]ursuant to Sentencing Guidelines § 6B1.4(d), it is understood that neither the Court nor the United States Probation Office is bound by the foregoing stipulations [regarding weight and methamphetamine designation], either as to questions of fact or as to determination of the correct sentencing guidelines to apply to the facts and the defendant shall not be allowed to withdraw the plea of guilty entered pursuant to this agreement if the Court rejects the parties’ stipulations.” (#37, Ex. M at 16-17). Based on Defendant’s acknowledgment concerning the effect of the stipulation on the Court and the Probation Office, the Court finds that counsel did not render ineffective assistance in failing to object to the PSR on this basis.

The third PSR “discrepancy” identified by Defendant as a ground for his ineffective assistance of counsel claim concerns the applicable statutory sentence identified in ¶ 42 of the PSR.

In ¶ 42, the Probation Office identifies the applicable statutory range as 5 years to 40 years. Defendant complains that his attorney and the government had erroneously advised him that the sentencing range was 10 years to a maximum of life imprisonment in order to gain his guilty plea. He asserts that he agreed to plead guilty in order to avoid a sentence of life imprisonment. However, returning again to the Plea Agreement, Defendant acknowledged that “the sentence to be imposed upon the defendant will be determined solely by the sentencing judge. The United States cannot and does not make any promise or representation as to what sentence the defendant will receive.” The fact that counsel did not object to the Probation Office’s determination that a lower statutory minimum and maximum sentencing range applied in this case does not amount to ineffective assistance of counsel under Strickland. Quite simply, Defendant cannot prove that he was prejudiced by counsel’s failure to object to a sentencing range lower than that specified and agreed to by Defendant in the Plea Agreement. See also discussion at p.13, above.

As to Defendant’s claim that counsel provided ineffective assistance by allowing a breakdown to occur at the sentencing hearing, the Court finds, after reviewing the transcript from the sentencing hearing, that Defendant has failed to satisfy the deficient performance prong of the Strickland standard. As discussed above, neither counsel’s failure to address the “discrepancies” in the PSR nor his failure to object to a lower statutory minimum sentence than that specified in the plea agreement constitutes ineffective assistance of counsel. Similarly, counsel’s failure to move for a downward departure below the statutory minimum based on Defendant’s rehabilitation efforts does not constitute ineffective assistance. As discussed in the Background section above, Defendant was credited with a three level reduction for Acceptance of Responsibility pursuant to U.S.S.G. § 3E1.1 (a) and (b). A three level adjustment is the maximum allowed under § 3E1.1. Because no

further reduction would have been allowed by the guidelines, Defendant's counsel did not provide ineffective assistance in failing to move for additional sentence reduction for Defendant's rehabilitation efforts. In summary, after review of counsel's overall performance, the Court concludes that defense counsel's representation at sentencing clearly fell "within the range of reasonable professional assistance" expected of attorneys in criminal cases.

3. Appellate counsel did not provide ineffective assistance

As his third proposition of error, Defendant alleges that his sentence must be vacated because appellate counsel was ineffective by filing only an *Anders* brief on direct appeal. According to Defendant, Julia L. O'Connell, an attorney in the Federal Public Defender's Office, was appointed to represent him on appeal on March 27, 1997. On July 30, 1997, after conferring and corresponding with Defendant, O'Connell filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), with the Tenth Circuit Court of Appeals, advising that after thorough review of the case file, transcripts and the law, she found no meritorious issues for direct appeal. Defendant now claims that by filing an *Anders* brief, appellate counsel failed to pursue meritorious issues. Defendant states that "had counsel took a thorough look at the entire documentary trail of the case, many issues and several 'dead bang winners' could have been raised on appeal." In his reply to the government's response, Defendant identifies the following as being meritorious claims that could have been and were not raised on direct appeal: "(1) the Rule 11 violations occurring at Landry's change of plea hearing and at sentencing; (2) the government's material misrepresentations in the Plea Agreement; (3) the government's breach of the Plea Agreement at sentencing; (4) the coercion used to induce Landry into pleading guilty; (5) the government failing to be held to their burden of proof at sentencing; and

(6) Landry's eligibility for a downward departure based on post offense rehabilitation." The Court rejects Defendant's argument. Although the mere filing of an *Anders* brief cannot form the basis for a claim of ineffective assistance of counsel, see United States v. Martinez-Lomeli, No. 95-4102, 1996 WL 282211 (10th Cir. May 29, 1996) (unpublished opinion), it is possible that the filing of an *Anders* brief that fails to point out meritorious issues can, in principle, constitute ineffective assistance. See, e.g., Steward v. Gilmore, 80 F.3d 1205, 1213 (8th Cir. 1996) (citing Robinson v. Black, 812 F.2d 1084 (8th Cir.1987)). Each of the claims identified by Defendant in his reply has been considered and rejected by the Court *supra*. In addition, after reviewing the case file and the relevant law, this Court has not found a meritorious claim that could have been raised on direct appeal. As a result, the Court rejects Defendant's claim that he received ineffective assistance of appellate counsel when his counsel filed an *Anders* brief on direct appeal.

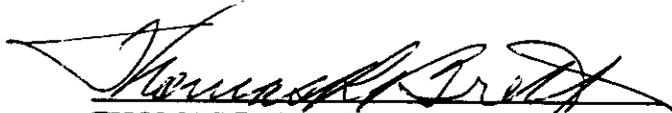
CONCLUSION

Defendant has failed to demonstrate that his plea of guilty was involuntary or uninformed or that he received ineffective assistance of counsel, either during plea proceedings, at sentencing or on appeal. Therefore, his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Defendant's motions for evidentiary hearing (#s 47 and 51) are **denied**.
2. Defendant's motion for appointment of counsel (#51) is **denied**.
3. Defendant's motion for limited discovery (#48) is **denied**.
4. Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket #36) is **denied**.

SO ORDERED THIS 15th day of Nov., 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED
NOV 15 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

PETROLEUM DEVELOPMENT COMPANY,)
AN Oklahoma Corporation,)
)
Plaintiff,)

vs.)

Case No. 99-C-149-E

RED MOUNTAIN, EXPLORATION, L.L.C., a)
Colorado L.L.C., MEWBOURNE DEVELOPMENT)
CORP., a foreign corporation, MMP 1998, a Texas)
partnership, CURTIS W. MEWBOURNE, CURTIS)
MEWBOURNE, trustee, MEWBOURNE ENERGY)
PARTNERSHIP 98-A, a Texas partnership, and)
3MG CORPORATION, a foreign corporation,)
)
Defendants.)

ENTERED ON DOCKET
DATE NOV 16 1999

ORDER

Now before the Court is the Motion for Summary Judgment (docket #13) of the Defendants, the Motion For Summary Judgment (Docket #17) of the Plaintiff.

Although Plaintiff's Complaint is couched in terms of seven different causes of action, Plaintiff's claims all center around alleged breaches of an agreement with Red Mountain regarding the exploration and development of property in Ellis County, Oklahoma. The Agreement provides, in relevant part:

Red Mountain will acquire from PDC, without warranty of title, express or implied, at 75% NRI (all NRI's above 75% being reserved by PDC) all leaseholds now owned by PDC for \$100.00 per acre. Upon payout of the test well, PDC will have the option to convert the reserved overriding royalty interest to a 15% working interest. Net revenues delivered after payout to Red Mountain will be 77.813%. In addition to any information that may be required under a well proposal, Red Mountain will provide PDC with revenue statements and monthly payout reports.

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In the event Red Mountain elects not to drill a test well in Section 21, within 90 days prior to the expiration date of the first expiring lease tendered under this agreement, Red Mountain will notify PDC of its intention to not develop said section and offer the leasehold to PDC to develop before said leases expire. PDC must elect to Red Mountain in writing within 15 days of said notice of its desire to drill a test in said Section 21. In the event PDC drills a well pursuant to its election, PDC will earn a borehole assignment at 75% net revenues with no backin after payout to total depth drilled in said test well.

* * * * *

In connection with any and all wells drilled by Red Mountain under the terms of this agreement, Red Mountain will provide PDC with all well information in a timely manner, including monthly payout reports on producing wells.

* * * * *

PDC reserves the right to conduct an audit and full accounting of any well drilled by Red Mountain or its assigns in the sections covered by this agreement.

The crux of the dispute is the clause requiring notice to PDC if Mewbourne does not intend to drill a test well, also known as the reassignment clause. Mewbourne, by letter of October 31, 1998, represented to PCS that a well would be commenced in January 1999. However, neither Mewbourne nor Red Mountain drilled such a well prior to the "expiration date of the first expiring lease," February 3, 1999. Rather Mewbourne sought to extend the lease, receiving a new expiration date of September, 1999. Mewbourne then commenced drilling a well on February 8, 1999. PCS sued for breach of contract, declaratory relief, quiet title, and trespass.

Both sides argue that the contract is clear and unambiguous and both seek summary judgment on their particular theory of interpretation of the contract. Mewbourne argues that the purpose of the reassignment clause, the fact that it never intended to not drill a well and the fact that nothing in the clause prohibits or addresses the extension of leases all support its position that the extension of the lease was perfectly proper within the terms of the contract. PCS, on the other hand, argues that the Defendant's obligations under the contract were clear, and that Defendant failed to meet those

obligations by failing to drill a well prior to the expiration date of the lease, and that time was of the essence.

Legal Analysis

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 (10th Cir. 1986). In Celotex, the court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." 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). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are

irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Id. at 1521.

Under Oklahoma law, the question of whether a contract is ambiguous is a legal question. Dillard & Sons Const., Inc. v. Burnup & Sims, 51 F.3d 910, 914 (10th Cir. 1995). If the contract is unambiguous, its interpretation is a question of law for the Court. Id. Lastly, the language of the contract is to govern its interpretation. Id. In this instance, both sides have submitted affidavits in order to bolster their interpretation of the contract and their understanding of the parties' intent in entering into the contract. Although the contract does not directly address the issue of a party seeking extension of a lease, the Court finds that the language of the reassignment clause is clear and unambiguous and dispositive of the issue.

Plaintiff argues that February 3, 1999 was a "drop dead" date for commencing the initial well on Section 21, and that time was of the essence to the contract. A review of the contract does not support either of these assertions. In reviewing the clear language of the contract, the reassignment clause requires that Defendant inform "PDC of its intention to not develop said section and offer the leasehold to PDC to develop before said leases expire." Here, however, Defendants did not have any

"intention to not develop said section," and therefore the reassignment clause does not come into play. Moreover, there is nothing in the clear language of the contract that requires drilling before expiration of the lease. Lastly, the Court rejects Plaintiff's assertion that this interpretation fails to give effect to all of a contract's provisions or renders any provision meaningless. Obviously the intent of the reassignment provision is to prevent Defendant from allowing the lease to expire without taking any action. This did not happen in this case, nor were the leases extended indefinitely as argued by Plaintiff.

Defendant also argues that it is entitled to summary judgment on its counterclaims for quiet title and slander of title. While the decision on the interpretation of the contract is dispositive of the quiet title claim, the Court finds that questions of fact exist with respect to the claim for slander of title.

Plaintiff's Motion for Summary Judgment (Docket #13) is Denied. Defendant's Motion for Summary Judgment (Docket #17) is granted with respect to Plaintiff's first four claims and denied with respect to Plaintiff's remaining claims and Defendant's counterclaim for slander of title.

IT IS SO ORDERED THIS 15TH DAY OF NOVEMBER, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

NOV 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HELEN M. GREEN,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL, Commissioner of)
 the Social Security Administration,)
)
 Defendant.)

Case No. 99-CV-545-M ✓

ENTERED ON DOCKET
DATE NOV 15 1999

ORDER

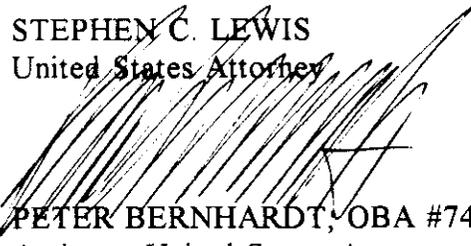
Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this 10th day of November, 1999.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

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

The People of Oklahoma, ex rel,)
Polly Blackstock and)
Richard Maynor Blackstock, creditor/principle)
and Secured Party for debtor)
BLACKSTOCK RICHARD M)

Complainant,)

vs.)

District Court of Tulsa County, Oklahoma)
Department of Tulsa County Commissioners)
Oklahoma State Highway Patrol and)
Kyle B. Haskins, private capacity)
dba KYLE B. HASKINS, alleged)
Tulsa County District Court Judge)

Thomas Gillert, private capacity)
dba THOMAS GILLERT, alleged)
Tulsa County District Court Judge)

Sally Howe Smith, private capacity)
dba SALLY HOWE SMITH, Clerk of)
Tulsa County District Court Judge)

Curtis Williams, private capacity)
dba CURTIS WILLIAMS, pre-trial release)
officer, Dept. of Tulsa County Commissioners)

Mark Page, private capacity)
dba MARK PAGE, Oklahoma State Highway)
Patrol officer, no. 360, Troop D)

D. Griffith, private capacity)
dba D. GRIFFITH, Oklahoma State Highway)
Patrol officer)

FILED
NOV 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-C-875-H ✓

FILED ON DOCKET
DATE NOV 15 1999

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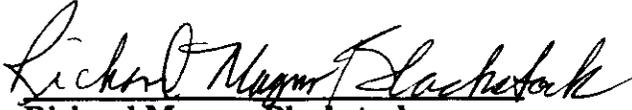
"John Doe" Cowpen, private capacity)
dba COWPEN, Oklahoma State Highway)
Patrol Officer, no. 176)
))
Caleb Reynolds, private capacity)
dba CALEB REYNOLDS, Tulsa County)
Asst. District Attorney)
))
Glenda A. Greaves, private capacity)
dba GLENDA K. GREAVES, Tulsa County)
Asst. District Attorney)
))
Richard A. Blakely, private capacity)
dba RICHARD A. BLAKELY, Tulsa County)
Asst. District Attorney)
))
Tim Harris, private capacity)
dba TIME HARRIS, Tulsa County)
Asst. District Attorney)
))
Defendants.)
))

NOTICE OF VOLUNTARY DISMISSAL UNDER FRCP 41(a)(1)(I)

The plaintiffs, The People of Oklahoma, ex rel, Polly Blackstock and Richard Maynor Blackstock, creditor/principle and Secured Party for debtor Richard M. Blackstone, hereby give notice of the voluntary dismissal of their claims for relief against the defendants.

The Complaint in the above referenced litigation was filed October 18, 1999. As of the date of this Notice of Dismissal, none of the defendants has filed either (a) an Answer; (b) an affirmative claim for relief or (c) a Motion for Summary Judgment. Therefore, *ex parte* dismissal of the plaintiffs' claims is appropriate pursuant to Federal Rule of Civil Procedure 41(a)(1)(I).

Respectfully submitted,


Richard Maynor Blackstock


Polly Blackstock

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid and properly addressed on this 12th day of November, 1999.

Department of Tulsa County Commissioners
500 South Denver
Tulsa, Oklahoma 74103

Kyle B. Haskins
Tulsa County District Court Judge
500 South Denver
Tulsa, Oklahoma 74103

Thomas Gillert
Tulsa County District Court Judge
500 South Denver
Tulsa, Oklahoma 74103

Sally Howe Smith
500 South Denver
Tulsa, Oklahoma 74103

Curtis Williams
Dept. of Tulsa County Commissioners
500 South Denver
Tulsa, Oklahoma 74103

James E. Britton

James E. Britton, OBA #1143
Michael D. Gray, OBA#11326
BRITTON, GRAY and HILL, P.C.
700 Bank of Oklahoma Plaza
201 Robert S. Kerr Ave.
Oklahoma City, OK 73102
(405) 239-2393
(405) 232-5135 (telecopier)

ATTORNEYS FOR DRIVER PIPELINE CO., INC.

1\driver\STIP-DISSISSAL.113

12/17

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

FILED
NOV 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAMS COMMUNICATIONS, INC.,)
)
Plaintiff,)
)
vs.)
)
DRIVER PIPELINE CO., INC.,)
)
Defendant.)

Case No. 98-C-583-K(M) ✓

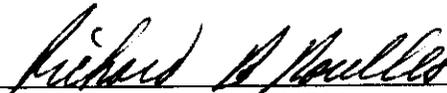
ENTERED ON DOCKET

DATE NOV 15 1999

MUTUAL STIPULATION AND DISMISSAL WITH PREJUDICE

Williams Communications, Inc., as Plaintiff, and Driver Pipeline Co., Inc., as Defendant, pursuant to Rule 41 of the Federal Rules of Civil Procedure hereby stipulate and agree that the claims between them have been compromised, settled and adjusted and that all claims in this action should be and are hereby dismissed with prejudice to the filing of future action.

DATED this 11th day of November, 1999.



Richard B. Noulles, OBA #6719
Gable & Gotwals
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4217
(918) 582-9201
(918) 586-8383 (telecopier)

ATTORNEYS FOR WILLIAMS
COMMUNICATIONS, INC.

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015

James E. Britton

James E. Britton, OBA #1143
Michael D. Gray, OBA#11326
BRITTON, GRAY and HILL, P.C.
700 Bank of Oklahoma Plaza
201 Robert S. Kerr Ave.
Oklahoma City, OK 73102
(405) 239-2393
(405) 232-5135 (telecopier)

ATTORNEYS FOR DRIVER PIPELINE CO., INC.

1\driver\STIP-DISSMISSAL.113

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)
v.)
)
LARRY LA WAYNE LUCAS aka Larry L. Lucas;)
JOYCE A. COOPER fka Joyce A. Lucas;)
SPOUSE OF JOYCE A. COOPER;)
STATE OF OKLAHOMA ex rel.)
Oklahoma Tax Commission;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE NOV 15 1999

FILED
IN OFFICE OF CLERK
NOV 12 1999

PHIL LOMBARDI, CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 99-CV-0687-K (J) ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10 day of November
1999. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the
Northern District of Oklahoma, through Peter Bernhardt, Assistant United States
Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of
County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley,
Assistant District Attorney, Tulsa County, Oklahoma; that the Defendant,
Larry La Wayne Lucas aka Larry L. Lucas, appears not having previously filed his
Disclaimer; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission,
appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, Joyce A.
Cooper fka Joyce A. Lucas and Spouse of Joyce A. Cooper who is one and the same
person as Melvin Cooper, appear not, but make default.

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The Court being fully advised and having examined the court file finds that the Defendant, Larry La Wayne Lucas aka Larry L. Lucas, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on September 4, 1999; that the Defendant, Joyce A. Cooper fka Joyce A. Lucas, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on or before August 23, 1999; that the Defendant, Spouse of Joyce A. Cooper who is one and the same person as Melvin Cooper, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on August 20, 1999.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on September 13, 1999; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on or about September 3, 1999; that the Defendant, Larry La Wayne Lucas aka Larry L. Lucas, filed his Disclaimer on September 13, 1999; and that the Defendants, Joyce A. Cooper fka Joyce A. Lucas and Spouse of Joyce A. Cooper who is one and the same person as Melvin Cooper, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Eleven (11), Block Nineteen (19), VALLEY VIEW
ACRES ADDITION to the City of Tulsa, County of Tulsa,
State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on September 15, 1973, Larry La Wayne Lucas executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, his mortgage note in the amount of \$9,500.00, payable in monthly installments, with interest thereon at the rate of 4.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Larry La Wayne Lucas, a single person, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated September 15, 1973, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on September 17, 1973, in Book 4088, Page 438, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendant, Larry La Wayne Lucas aka Larry L. Lucas, 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 \$3,214.09, plus administrative charges in the amount of \$183.80, plus penalty charges in the amount of \$8.80, plus accrued interest in the amount of \$1,507.84 as of October 2, 1998, plus interest accruing thereafter at the rate of 4.5 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 \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, Larry La Wayne Lucas aka Larry L. Lucas, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer 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, Joyce A. Cooper fka Joyce A. Lucas and Spouse of Joyce A. Cooper who is one and the same person as Melvin Cooper, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Internal Revenue Service may have a lien upon the property by virtue of a Notice of Federal Tax Lien dated April 5, 1990, and recorded on April 16, 1990, in Book 5247, Page 172 in the records of the Tulsa County Clerk, Tulsa County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, by agreement of the agencies the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Secretary of Veterans Affairs.

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, Larry La Wayne Lucas aka Larry L. Lucas, in the principal sum of \$3,214.09, plus administrative charges in the amount of \$183.80, plus penalty charges in the amount of \$8.80, plus accrued interest in the amount of \$1,507.84 as of October 2, 1998, plus interest accruing thereafter at the rate of 4.5 percent per annum until judgment, plus interest thereafter

at the current legal rate of _____ percent per annum until fully paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Larry La Wayne Lucas aka Larry L. Lucas, Joyce A. Cooper fka Joyce A. Lucas, Spouse of Joyce A. Cooper who is one and the same person as Melvin Cooper, State of Oklahoma ex rel. Oklahoma Tax Commission, 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 appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

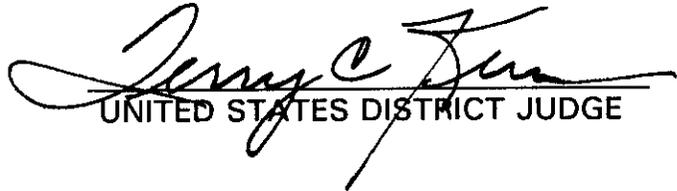
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

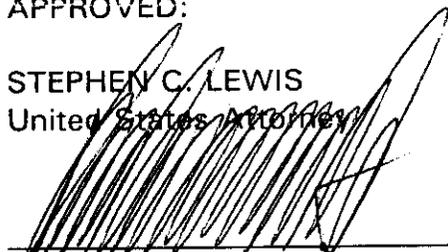
In payment of the judgment rendered herein in favor of the Plaintiff.

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

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


UNITED STATES DISTRICT JUDGE

APPROVED:


STEPHEN C. LEWIS
United States Attorney

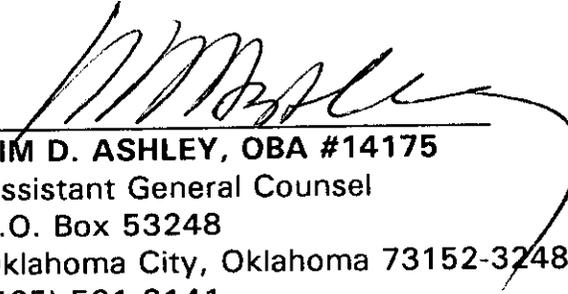
PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463


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. 99-CV-0687-K (J) (Lucas)

PB:css



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission
D-99-521

Judgment of Foreclosure
Case No. 99-CV-0687-K (J) (Lucas)

PB:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JIMMY C. HATFIELD,

Defendant.

)
)
)
)
)
)
)
)
)
)

ENTERED ON DOCKET

DATE NOV 15 1999

No. 99CV0725K(E) ✓

F I L E D
IN DISTRICT COURT

NOV 12 1999

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

DEFAULT JUDGMENT

This matter comes on for consideration this 10 day of November, 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, Jimmy C. Hatfield, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jimmy C. Hatfield, was served with Summons and Complaint on August 31, 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, Jimmy C. Hatfield, for the principal amount of \$2,766.33, plus accrued

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interest of \$1,813.89, 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 5.411 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/llf

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

FILED

NOV 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD LEE SMITH,

Plaintiff,

v.

SUN LIFE ASSURANCE COMPANY OF
CANADA, a foreign Corp.,

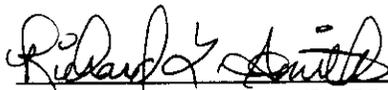
Defendant.

Case No. 98CVO 418B (e)

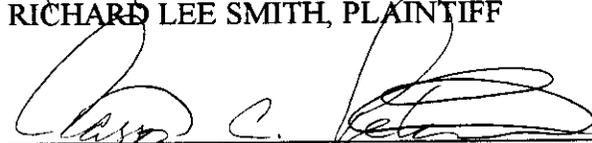
ENTERED ON DOCKET
DATE NOV 13 1999

JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE

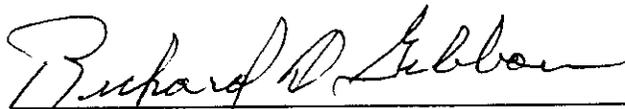
Richard Lee Smith, plaintiff, and his attorneys of record, Aaron C. Peterson and Richard D. Gibbon, along with Sun Life by its attorneys, Arlen Fielden and Madalene Witterholt, hereby dismiss this cause with prejudice to the bringing of another action and further, move that this court enter an order dismissing this case with prejudice.



RICHARD LEE SMITH, PLAINTIFF



AARON C. PETERSON, OBA #11467
5200 S. Yale Avenue, Suite 601
Tulsa, Oklahoma 74135-7491
(918) 481-5767

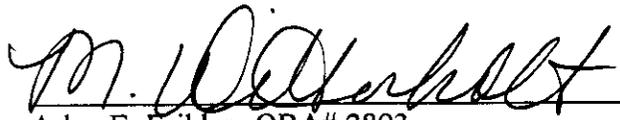


RICHARD D. GIBBON, OBA #3340
1611 S. Harvard Avenue, Suite 601
Tulsa, Oklahoma 74112

ATTORNEYS FOR PLAINTIFF

C15

2,6



Arlen E. Feilden, OBA# 2893

Madalene A.B. Witterholt, OBA#10528

Crowe & Dunlevy

321 South Boston, Suite 500

Tulsa, Oklahoma 74101

ATTORNEYS FOR DEFENDANT

F I L E D

NOV 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

RICHARD LEE SMITH,)

Plaintiff,)

vs.)

No. 98-C-418-B(E)

SUN LIFE ASSURANCE COMPANY OF)
CANADA, a foreign corporation,)

Defendant.)

ENTERED ON DOCKET
DATE NOV 15 1999

ORDER

Pursuant to the parties' joint stipulation filed this date, the Court dismisses this case with prejudice.

ORDERED this ^{cm} 12 day of November, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

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

FILED

NOV 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN R. RUDY,

Plaintiff,

vs.

MS LIFE INSURANCE COMPANY, a
foreign insurance company, and
LOAN SERVICING ENTERPRISE,

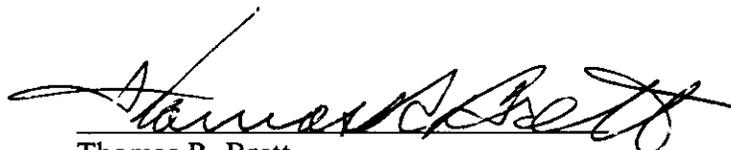
Defendant.

Case No. 99CV008-B(E)

ENTERED ON DOCKET
DATE NOV 15 1999

ORDER

NOW, on this 12th day of November, 1999, the Stipulation for Dismissal Without Prejudice comes on for consideration before me the undersigned Judge of the United States District Court. This Court finds that General Motors Acceptance Corporation is hereby dismissed without prejudice.


Thomas R. Brett
U.S. District Judge

Joseph F. Clark, Jr., OBA #1706
1605 South Denver
Tulsa, Oklahoma 74119
(918) 583-1124

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FILED

NOV 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

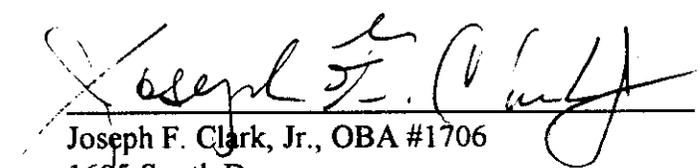
JOHN R. RUDY,)
)
Plaintiff,)
)
vs.)
)
MS LIFE INSURANCE COMPANY, a)
foreign insurance company, and)
LOAN SERVICING ENTERPRISE,)
)
Defendant.)

Case No. 99CV008-B(E)

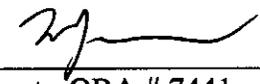
ENTERED ON DOCKET
DATE NOV 15 1999

**STIPULATION FOR DISMISSAL OF GENERAL MOTORS
ACCEPTANCE CORPORATION WITHOUT PREJUDICE**

COME NOW the parties, John R. Rudy, and General Motors Acceptance Corporation,
and stipulate to the dismissal without prejudice of General Motors Acceptance Corporation.



Joseph F. Clark, Jr., OBA #1706
1605 South Denver
Tulsa, Oklahoma 74119
(918) 583-1124



Brian J. Rayment OBA # 7441
7666 Est 61st Street, Suite 240
Tulsa, Oklahoma 74133
(918) 254-0626

CERTIFICATE OF MAILING

I, Joseph F. Clark, Jr., hereby certify that on the ____ day of November, 1999, I mailed a true and correct copy of the above and foregoing document with sufficient postage thereon fully prepaid to:

Brian J. Rayment OBA # 7441
7666 Est 61st Street, Suite 240
Tulsa, Oklahoma 74133

Joseph F. Clark, Jr.

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

FILED

NOV 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VALERIE GRAMM, an individual,)
)
Plaintiff,)
)
v.)
)
FLEMING COMPANIES, INC.)
an Oklahoma corporation)
)
Defendant.)

Case No. 99-CV-0113-B(J) ✓

ENTERED ON DOCKET
DATE NOV 12 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Valerie Gramm, and Defendant, Fleming Companies, Inc. hereby stipulate that this action be dismissed with prejudice . Each Party will bear its own attorneys fees, costs and expenses.

Respectfully submitted,



Bill V. Wilkinson
Andrew P. DeCann
Wilkinson Law Firm
7625 E. 51st St., Suite 400
Tulsa, OK 74145
Telephone: 918/663-2252
Facsimile: 918/663-2254
Attorneys for Plaintiff



Elizabeth Scott Wood
James R. Webb
McAfee & Taft A Professional Corporation
211 N. Robinson Avenue
10th Floor, Two Leadership Square
Oklahoma City, Oklahoma 73102
Telephone: 405/235-9621
Facsimile: 405/235-0439
Attorneys for The Fleming Companies, Inc.

ALT

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

FILED

NOV 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

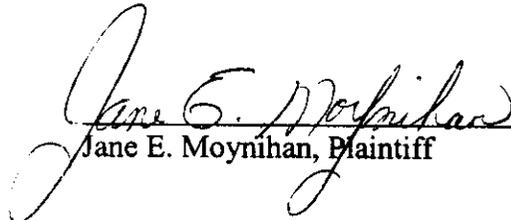
JANE MOYNIHAN,)
)
Plaintiff,)
)
vs.)
)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY,)
a foreign insurance carrier,)
)
Defendant.)

No. 98-CV-0979B (E) ✓

ENTERED ON DOCKET
NOV 12 1999
DATE _____

RULE 41 STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff and Defendant, pursuant to Rule 41(a)(1) F.R.C.P., stipulate to the dismissal of the above-styled and numbered cause of action without prejudice, each party to bear their own costs.


Jane E. Moynihan, Plaintiff


Larry T. Shiles, Attorney for Plaintiff


John R. Woodard, III, Attorney for Defendant

15

CLJ

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BOBBY TRAYWICK,

Plaintiff,

vs.

NELSON ELECTRIC SUPPLY
COMPANY, trade name for
SUMMERS GROUP, INC.,

Defendant.

Case No. 99 CV 0235E(J)

ENTERED ON DOCKET
DATE NOV 12 1999

STIPULATION OF DISMISSAL

Come the parties, by their respective counsel, pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, and announce to the Court that all issues in controversy in the above-styled cause have been resolved in accordance with a Confidential Settlement Agreement and Release of All Claims between the parties, by the terms of which the plaintiff has agreed to a full and final settlement, compromise and accord and satisfaction of his claims and contentions in this lawsuit. Accordingly, the parties hereby stipulate that the above-styled cause may be dismissed with prejudice pursuant to Rule 4(a)(1), Federal Rules of Civil Procedure, each party to bear its own costs.

This 12th day of November, 1999.

17

cb

WILKINSON LAW FIRM

By: Andrew P. DeCann

Bill V. Wilkinson

Oklahoma Bar No. 9621

Andrew P. DeCann OBA# 17602

BancFirst Building, Fourth floor

Tulsa, OK 74145-7857

(918) 663-2252

Counsel for Plaintiff

Kenneth A. Weber

BAKER, DONELSON, BEARMAN & CALDWELL

511 Union Street, Suite 1700

Nashville, TN 37219

(615) 726-5600

(615) 726-0464 (facsimile)

Timothy A. Carney

GABLE & GOTWALS

Oklahoma Bar No. 11784

Suite 2000 Nations Bank Center

15 West 6th Street

Tulsa, Oklahoma 74119-5447

(918) 582-9201

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by facsimile and mailed by first class U.S. Mail, postage prepaid to Kenneth A. Weber, Baker, Donelson, Bearman & Caldwell, 511 Union Street, Suite 1700, Nashville, TN 37219, this the 12th day of November, 1999.

Andrew P. DeCann

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

FILED

NOV 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENLOW AUTO AUCTION,)
)
Plaintiff,)
)
vs.)
)
ONEOK EMPLOYEES CREDIT UNION,)
)
Defendant.)

Case No. 99-CV-766-BU(E)

ENTERED ON DOCKET

DATE NOV 12 1999

ORDER

This matter comes before the Court upon Plaintiff's Motion to Dismiss Count V and All Federal Claims of Plaintiff's Complaint. Defendant has responded to Plaintiff's motion and offers no objection to the dismissal of Count V. Upon due consideration of the unopposed motion, the Court finds that the same should be granted.

This action was originally removed to this Court from the District Court for Creek County, Oklahoma pursuant to 28 U.S.C. § 1441 and § 1446 on the basis that Count V of Plaintiff's Petition alleged a federal-law claim. The Court has now dismissed the federal-law claim. Since the remainder of this action involves pendent state-law claims, the Court has the discretion to decline to exercise supplemental jurisdiction over the pendent state-law claims and remand this action to the District Court for Creek County, Oklahoma. See, 28 U.S.C. § 1367(c)(3); see also, Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1987).

Discretion to try state-law claims in the absence of any federal-law claim should only be exercised in those cases in which,

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given the nature and extent of the pretrial proceedings, judicial economy, convenience and fairness would be served by retaining jurisdiction. Thatcher Enterprises v. Cache Corp., 902 F.2d 1472, 1478 (10th Cir. 1990). Generally, when a federal-law claim is eliminated before trial, the balance of factors to be considered will point towards declining to exercise jurisdiction over the remaining state-law claims. Cohill, 484 U.S. 343, 350 n. 7. "Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary." Ball v. Renner, 54 F.3d 664, 669 (10th Cir. 1995) (quoting Thatcher Enterprises, 902 F.2d at 1478).

The Court finds no compelling reason to exercise its supplemental jurisdiction and determines that in the interest of comity and federalism that Plaintiff's state-law claims be adjudicated in the District Court for Creek County, Oklahoma. Moreover, the Court notes that this action is in its early stages. Discovery in regard to the state-law claims has just commenced and there are no dispositive motions which have been filed. The Court does not opine that judicial economy, convenience and fairness would be served by retaining jurisdiction.

In its response to Plaintiff's dismissal motion, Defendant contends that in addition to the judicial convenience and fairness factors, the Court should consider the extent to which Plaintiff has engaged in tactics designed solely to defeat Defendant's statutory right to removal in deciding whether to remand the state-law claims. In Cohill, the Supreme Court stated that if "the plaintiff has attempted manipulate the forum, the court should take

this behavior into account in determining whether the balance of factors to be considered under pendent jurisdiction doctrine support a remand in this case." Cohill, 484 U.S. at 357. While it appears that Plaintiff requested dismissal of the federal-law claim in order to obtain a remand of this action to state court, the Court finds that such behavior does not tip the balance of the other factors to require the Court to retain jurisdiction over the state-law claims or to dismiss those claims without prejudice instead of remanding them to state court.

Accordingly, Plaintiff's Motion to Dismiss Count V and All Federal Claims of Plaintiff's Complaint (Docket Entry #12) is **GRANTED**. The Court **REMANDS** the remainder of this action to the District Court for Creek County, Oklahoma.

Entered this 10th day of November, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

NOV 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HARVEY R. MORRIS,
SSN: 436-21-8865,

PLAINTIFF,

vs.

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

DEFENDANT.

CASE No. 98-CV-679-M ✓

ENTERED ON DOCKET

DATE NOV 12 1999

ORDER

Plaintiff, Harvey R. Morris, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ 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

¹ Plaintiff's April 17, 1996 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held June 24, 1997. By decision dated July 14, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 22, 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 claims disability since July 1, 1994, due to epileptic seizures and hernia. The ALJ determined that Plaintiff is impaired by seizures which are under control. [R. 15]. He concluded, however, that Plaintiff retains the residual functional capacity (RFC) for a full range of work subject to precautions for seizures such as: no driving, no work around heights, and no work around dangerous machinery. [R.14]. He determined that Plaintiff is unable to perform his past relevant work (PRW) of trash sorter, custodian, clerk and auto detailer but that, based upon the testimony of a vocational expert (VE), there are a significant number of jobs in the economy which Plaintiff can perform with his RFC. [R. 14]. The ALJ, therefore, found that Plaintiff was not disabled as defined by the Social Security Act. [R. 15]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's credibility analysis was improper and that his findings regarding Plaintiff's RFC were not based upon substantial evidence. The Court finds the ALJ's analysis is based upon factual determinations unsupported by the record which undermine his credibility determination and which, in turn, undermine his ultimate determination that Plaintiff could perform the jobs as set forth in his decision. Therefore, this case must be reversed and remanded for further proceedings.

The factual inaccuracies in the ALJ's decision begin with the ALJ's finding that Plaintiff was 46 years old with a birthdate of March 14, 1951. [R.11-12]. In fact, Plaintiff was 36 years old with a birthdate of March 14, 1961. [R. 24, 48]. The ALJ reported that Plaintiff had testified he had not driven in 8 or 9 months. [R. 12]. In fact, Plaintiff testified he had not driven in 8 or 9 years [R. 26] and stated in his disability report that he could not drive at all. [R. 107]. The ALJ discounted Plaintiff's testimony regarding the frequency of his seizures, stating:

Even more specifically, the claimant is not credible because he alleges that he has had one seizure a day, however, his most recent medical visit shows that he did not allege any seizures, and he worked up until 1994 which indicates that his seizures are under control. If he had seizures at the frequency he alleges, he would have sought more frequent medical treatment and his medication would have been changed, added to, or altered.

[R. 13]. This finding is contrary to the facts contained in the record. When Plaintiff applied for social security benefits, he reported his inability to work was due to seizures "once or twice a week." [R. 105]. He reported frequency of seizures at one

time per week to the Social Security Agency's medical examiner. [R. 128]. And, he testified at his hearing that he "passes out" about once a week. [R. 29].²

In addition to misstating Plaintiff's allegation as to the frequency of his seizure episodes, the ALJ's error in analyzing Plaintiff's credibility was compounded by his misinterpretation of the report from the University of Oklahoma Health Sciences Center dated March 24, 1997. He said: "[t]he claimant was examined on March 24, 1997, was doing well, he reported that had not had any seizures." [R. 12]. In fact, the medical examiner at the OU Health Sciences Center on that date, wrote: "doing well x [except] for Hx [history] of epilepsy" and "having SZ (passing out) 1-2x/d 10-15 minutes." [R. 149]. Plaintiff's medication, Tegretol, was adjusted at that time, with a clear plan for future follow-up treatment, including rechecking Plaintiff's blood chemistry. *Id.* This evidence directly contradicts the ALJ's comment that Plaintiff had never told any doctor that he had seizures at the level he alleged at his hearing and that he had not sought more medical treatment or alteration of his medication. [R. 13, 149].³

² In his brief defending the ALJ's decision, the Commissioner did not explain or even comment upon this factual inaccuracy and further confused the matter by stating Plaintiff claimed "monthly seizures." [Defendant's Brief, p. 2].

³ The court notes the report indicates Plaintiff complained of seizures once a day when he appeared at the OU Health Sciences Center in 1997. However, there is no indication in the ALJ's decision that he understood Plaintiff was claiming daily seizures based upon this document instead of the one or two a week Plaintiff reported on his application and at his hearing. The ALJ did not mention or discuss any conflict in the evidence in this regard. In fact, the ALJ did not discuss the report at all, and referred to it only as support for his conclusion that Plaintiff's seizures were controlled with medication and that, because no mention had been made at that hospital visit of a hernia, he must have had no impairment due to a hernia.

The ALJ also improperly discounted Plaintiff's complaints regarding his lifting limitations due to hernia. The ALJ stated that since the March 24, 1997 examination record at OU Health Sciences Center did not mention a hernia condition, Plaintiff's "hernia is not significant and does not affect his ability to perform work-related activities." [R. 13, 149]. He made this determination despite the report by Dr. Angelo Dalessandro, the Agency's medical examiner, that physical examination on June 5, 1996, revealed the presence of a direct left inguinal hernia. [R. 126].

While an ALJ's credibility determinations are entitled to deference, *Kepler v. Chater*, 68 F.3d 387, 390 (10th Cir. 1995), the determinations must be based on the evidence. Here the ALJ made credibility determinations based on alleged facts which are completely unsupported by the record. Furthermore, the ALJ's credibility determinations must be closely and affirmatively linked and logically connected to substantial evidence. *Kepler*, 68 F.3d at 39. This, the ALJ failed to do.

Accordingly, the decision of the Commissioner finding Plaintiff not disabled is REVERSED and REMANDED to the Commissioner for further proceedings and reconsideration.

SO ORDERED this 10th day of Nov., 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

NOV 10 1999

HARVEY R. MORRIS,
SSN: 436-21-8865,

Plaintiff,

v.

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

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 98-CV-679-M ✓

ENTERED ON DOCKET
DATE NOV 12 1999

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 10th day of Nov., 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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