FILED
CLERK, U.S. DISTRICT COURT
2005 FEB -4 P 1:12
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA **Plaintiff,** **BENJAMIN ARCHULETA** **Defendant**	**ORDER TERMINATING CONDITIONAL RELEASE** **2:98-CR-00479-001-DB**

This matter came before the Court (the Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, sitting by designation) by written report from the Probation Office. The report included the recommendation of Assistant United States Attorney Michael Kennedy and defense counsel Julie George. It was recommended that Benjamin Archuleta be terminated from Conditional Release.

It is hereby ordered that Benjamin Archuleta is terminated and released from Conditional Release supervision of the United States District Court.

DATED this 2nd day of February, 2005

BY THE COURT:

Clarence A. Brimmer

Clarence A. Brimmer
United States District Judge

70

UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

CLARENCE A. BRIMMER
U.S. DISTRICT JUDGE

2120 Capitol Avenue - Room 2603
CHEYENNE, WYOMING 82001

(307) 433-2160
(307) 634-6072

February 2, 2005

Mr. Markus B. Zimmer, Clerk of Court
United States District Court
150 Frank E. Moss U.S. Courthouse
350 South Main Street
Salt Lake City, UT 84101

Re: **UNITED STATES OF AMERICA**
vs.
BENJAMIN ARCHULETA
NO. 2:98 CR 479

Dear Markus:

I recently received an **ORDER TERMINATING CONDITIONAL RELEASE** of Benjamin Archuleta, the defendant in the above captioned case, from John L. Warner, U.S. Probation Officer, of the Office of Probation and Pretrial Services in Salt Lake City, Utah. I have read his *Supervisory Summary and Recommendation* on Mr. Archuleta, concur with the findings, and am returning the order which I have signed this date.

Please file the enclosed, signed order and send copies to all parties.

With all good wishes, and kind personal regards, I am,

Sincerely yours,

Clarence A. Brimmer

CLARENCE A. BRIMMER,
U.S. District Judge

Enclosure

cc: Mr. John L. Warner, U.S. Probation Officer
Office of Probation and Pretrial Services
U.S. District Court - District of Utah
160 U.S. Courthouse
360 Main Street
Salt Lake City, Utah 84101

kvs

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:98-cr-00479

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Hon. Clarence A. Brimmer
US DISTRICT COURT
2120 CAPITOL AVE #2141
CHEYENNE, WY 82001-3658

US Probation
DISTRICT OF UTAH
,
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

Michael P. Kennedy, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

kvs

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:98-cr-00479

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Julie George, Esq.
PO BOX 112338
29 S STATE STE 7
SALT LAKE CITY, UT 84147
EMAIL

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CLERK, U.S. DISTRICT COURT
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DISTRICT OF UTAH
BY: _____
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FEB - 2 2005
U.S. DISTRICT COURT

Joseph Jardine, USB No. 8889
JARDINE LAW OFFICES
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111
Telephone: 801/350-3506
Fax: 801/534-1948

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. Fortino Castillo-Salazar, Defendant.	**ORDER ON MOTION FOR CONTINUANCE** Case No. 204-CR-525 Judge: Benson

THIS COURT having reviewed Defendant's Motion for Continuance and good cause appearing, hereby ORDERS the Trial be continued to 3/28/05, 2005, at 8:30 ~~a.m.~~. Furthermore, the Court finds that the intervening time should be excluded

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from calculation under the Speedy Trial Act requirements pursuant to 18 U.S.C. §3161(h)(1)(A), (h)(1)(F), (h)(1)(G), (h)(1)(J), (h)(8)(A) and (h)(8)(B)(i-ii).

DATED this 4 day of February, 2005.

BY THE COURT

Dee Benson

Judge Dee Benson
U.S. District Court Judge

MAILING CERTIFICATE FOR COURT CLERK

The undersigned hereby certifies that on February ___, 2005, a true and correct copy of the Order on Motion for Continuance was served by hand delivery or United States First Class Mail, postage prepaid, addressed to the following:

Colleen K. Coebergh
Prosecuting Attorney
348 East South Temple 3rd Floor
Salt Lake City, UT 84111

Joseph Jardine
Attorney at Law
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111

_____
Court Clerk

kvs

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cr-00525

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Colleen K. Coebergh, Esq.
DRUG ENFORCEMENT ADMINISTRATION
METROPOLITAN NARCOTICS TASK FORCE
348 E SOUTH TEMPLE
SALT LAKE CITY, UT 84111
EMAIL

Joseph Jardine, Esq.
JARDINE LAW OFFICES
39 EXCHANGE PLACE STE 100
SALT LAKE CITY, UT 84111
JFAX 9,7463508

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

FEB 04 2005

MARKUS B. ZIMMER, CLERK
BY _____
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2004 DEC -8 P 5:07

U.S. DISTRICT COURT
DISTRICT OF UTAH

PAUL M. WARNER, United States Attorney, (#3389)
COLLEEN K. COEBERGH, Special Assistant United States Attorney (#8052)
Attorneys for the United States of America
348 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 524-4156

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MIGUEL VASQUEZ-AVALOS and FILIBERTO VALDOVINOS, Defendants.	**ORDER EXCLUDING TIME FROM CALCULATION UNDER SPEEDY TRIAL ACT** Case No. 2:04CR00708 JTG Judge Brooke C. Wells

IT IS HEREBY ORDERED that time period from December 6, 2004, through ~~February~~ March 14, 2005, is excluded from computation under the Speedy Trial Act, 18 U.S.C. §3161(h)(8)(A), based upon the additional charges added to the Indictment which require additional discovery and adequate time so defense counsel can be prepared.

The Court finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the Defendant in a speedy trial.

Dated this 2 day February, 2005

JUDGE ~~BROOKE C. WELLS~~
UNITED STATES DISTRICT COURT

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CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing Order this 8th day of December, 2004, to the following:

James D. Garrett
Attorney at Law
2091 East 1300 South, Ste. 201
Salt Lake City, UT 84108
Attorney for Miguel Avalos-Vasquez

Bel-Ami de Montreux
Attorney at Law
180 South 300 West, Ste. 350
Salt Lake City, UT 84101
Attorney for Filliberto Valdovinos

Daniela N. Jones
Legal Secretary

asp

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cr-00708

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Colleen K. Coebergh, Esq.
DRUG ENFORCEMENT ADMINISTRATION
METROPOLITAN NARCOTICS TASK FORCE
348 E SOUTH TEMPLE
SALT LAKE CITY, UT 84111
EMAIL

Mr. James D. Garrett, Esq.
2091 E 1300 S STE 201
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EMAIL

Bel-Ami J. de Montreux, Esq.
180 S 300 W #350
SALT LAKE CITY, UT 84101
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

DIVISION

FILED
U.S. DISTRICT COURT
2005 FEB -4 P 2:01
DISTRICT OF UTAH
BY: DEPUTY CLERK

* *

JOHN F. MULLIN and DIANE L. MULLIN

Plaintiffs,

vs.

HIGH MOUNTAIN, LLC, dba HIGH MOUNTAIN PROPERTIES,

Defendants.

Case No. 2:03CV952 DS

ORDER

* *

I. INTRODUCTION

Defendant High Mountain has moved this court pursuant to Federal Rules of Civil Procedure Rule 60(b) for an order granting relief from the January 8, 2004 default judgment.

On or about October 31, 2003, Defendant High Mountain was served with a summons and complaint. Sometime in November or December of 2003, counsel for Defendant called counsel for Plaintiff and left a message regarding the case. According to Plaintiff, the message was not followed up with any written or verbal communication until December 6, 2003, when Plaintiff's counsel (Mr. Rampton) spoke with Defense counsel (Mr. Hoggan) by phone and learned that High Mountain's insurance carrier had not yet determined whether it would undertake defense of Plaintiff's claims in this matter.

On December 15, 2003, a default certificate was entered as to High Mountain. Then on January 8, 2004, default judgment was entered against High Mountain. Upon receiving notification of the default judgment, Mr. Hoggan immediately called Mr. Rampton. There is

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some dispute as to the content of that conversation. Mr. Rampton claims that the sole issue discussed during that phone conversation was whether High Mountain's insurance company would address settlement of Plaintiff's claims. Mr. Hoggan claims that he told Mr. Rampton that although it was his understanding that High Mountain's insurance company would be dealing with this matter, he intended to file an Answer in the meantime to insure that a default judgment would not get entered. He also claims that Mr. Rampton told him that he had filed the Certificate of Default to get High Mountain's attention.

Mr. Hoggan asserts that when he expressed concern that default judgment might be entered before he could get an answer filed, Mr. Rampton assured him that he would stipulate to have any default judgment set aside. According to Mr. Rampton, no such promise was ever made, nor would such a promise ever be made without Plaintiff's prior authorization, as doing so would be unethical and professionally questionable. Mr. Hoggan has not provided any confirming letter, written stipulation, or other documentation which purports to memorialize his professed belief concerning a stipulation to withdraw default judgment.

On January 12, 2004, the defendant filed an Answer, allegedly relying on Mr. Rampton's assurance that he would stipulate to have a default judgment set aside. Mr. Rampton has consistently refused to stipulate to any order setting aside the Default Judgment. On February 20, 2004, High Mountain declared bankruptcy. On September 23, 2004, Plaintiffs obtained an Order of the United States Bankruptcy Court, which lifted the automatic stay and permitted a nominal action against High Mountain in order to recover on its insurance coverage.

On October 4, 2004, Defendant's new counsel, Mr. Memmott, received a letter from High Mountain's Bankruptcy Trustee. The defendant argues that this letter finally allowed High

Mountain to move to set aside the default. Plaintiff argues that this letter is simply an agreement to permit Mr. Memmott to proceed on behalf of the insurance carrier. On November 23, 2004, High Mountain filed this motion for relief from default judgment.

II. ANALYSIS

Defendant High Mountain has moved pursuant to Federal Rules of Civil Procedure Rule 60(b) for an order granting relief from the default judgment. According to the Tenth Circuit Court of Appeals, ". . . the trial court is vested with a great deal of discretion in determining whether to grant or deny a Rule 60(b)(1) motion. . . ." *Otoe County National Bank v. W & P Trucking, Inc,* 754 F.2d 881, 883 (10th Cir. 1985). *See also, Barta v. Long,* 670 F.2d 907, 910 (10th Cir. 1982). Clearly the courts do not favor default judgment. The Utah Supreme Court recently stated, "Courts do not favor entry of default judgments and should grant relief where there is any reasonable excuse, unless it will substantially prejudice the adverse party." *Cedar Surgery Center, L.L.C. v. Bonelli*, 96 P.3d 911, (2004). In order to receive relief from default judgment, the defendant must show that 1) it acted within a "reasonable time," 2) there was good cause under Rule 60(b) to justify setting aside the default judgment, and 3) it has a meritorious defense to the allegations of the complaint.

A. The reasonable time requirement.

Rule 60(b) states that a motion under that section must be made "within a reasonable time, and . . . not more than one year after the judgment, order or proceeding was entered or taken." Rule 60(b), Fed.R.Civ.P. What constitutes a "reasonable time" turns on the facts of each case. In this case, the judgment by default was entered on January 8, 2004, and the motion for relief from that judgment was not filed until November 23, 2004–over 11 months later. High

Mountain states that its delay was reasonable because prior to filing bankruptcy on February 20, 2004, High Mountain was unaware that the default judgment was entered. And once the bankruptcy petition was filed, High Mountain could not move to set aside the judgment until the trustee of the bankruptcy gave it permission to do so. According to High Mountain permission was granted on October 4, 2004, and after obtaining necessary affidavits, High Mountain filed its motion on November 23, 2004. The defendant argues that motion was made within the one-year period, and was therefore timely.

The Tenth Circuit has held that "A motion is not timely merely because it has been filed within one year of the judgment." *White v. American Airlines, Inc.*, 915 F.2d 1414 (10th Cir. 1990). The district court in the *White* case concluded that a Rule 60(b)(1) motion was not filed within a reasonable time, even though it was filed barely within the one-year time limit. On appeal, the 10th Circuit concluded that the district court had not abused its discretion in denying the motion, because, "American has not offered sufficient justification for this delay."

B. Good Cause Requirement Under Rule 60(b) to Justify Setting Aside Default Judgment

This court must now consider whether High Mountain has offered sufficient justification for its delay. High Mountain argues that its delay was justified because Counsel was taken completely by surprise by the entry of the default judgment. He believed he had an agreement with Plaintiff's Counsel regarding the stipulated withdrawal of any default. However, since the judgment was entered, Plaintiffs have refused to withdraw it. High Mountain claims that it relied to its detriment on Plaintiff's representations and statements. High Mountain also argues that the creation and filing of an answer by its counsel demonstrates his belief that there was an agreement and his reliance on that agreement.

Plaintiffs note that High Mountain received prompt notice of the entry of judgment by default on or about January 8, 2004. The only explanation High Mountain offers for waiting over 11 months to respond is a belief–by counsel not currently representing High Mountain's interests–that there was an unwritten agreement to set aside default judgment if requested. No such request was ever forthcoming, and this court never received any notice of this "agreement."

The local rules provide that no stipulation between parties has any effect unless it is approved by the court: "No stipulation between parties modifying a prior order of the court or affecting the course or conduct of any civil proceeding will be effective until approved by the court." DUCivR 83-6. Even if there actually was a stipulation between the parties regarding setting aside the default judgment, Counsel for High Mountain should have filed its motion for relief from default judgment and a stipulated order when he filed the Answer on January 12, 2004. Had the motion be filed in such a timely manner, it almost certainly would have been granted.

However, High Mountain chose to wait over eleven months to file its motion, causing substantial prejudice to the Plaintiffs' case. Plaintiffs state that because of the delay, "the matter has lain dormant and without discovery for over a year after its filing and service, and the intervening passage of time has made it all but impossible for Plaintiffs to reconstruct what would have been their case had High Mountain acted properly." The plaintiffs have been unable to conduct discovery, preserve evidence, obtain documentation, and otherwise structure their case for resolution on the merits. High Mountain has ceased to do business, turned its business records over to a bankruptcy trustee for liquidation, dismissed its employees, and essentially ceased to exist.

Although this motion was made within one year, the court finds that because of the prejudice to the plaintiffs and because the defendant could have easily resolved the matter with a timely motion, this motion does not meet the "reasonable time" requirement of Rule 60(b), Fed. R. Civ. P.

Because we have determined that the motion was not timely, we need not consider the issue of whether High Mountain has established a meritorious defense.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Relief from Default Judgment is hereby denied.

SO ORDERED.

DATED this 3rd day of February, 2005.

BY THE COURT:

DAVID SAM
SENIOR JUDGE
U.S. DISTRICT COURT

asp

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00952

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Vincent C Rampton, Esq.
JONES WALDO HOLBROOK & MCDONOUGH
170 S MAIN ST STE 1500
PO BOX 45444
SALT LAKE CITY, UT 84145-0444
EMAIL

Craig A. Hoggan, Esq.
DART ADAMSON & DONOVAN
370 E S TEMPLE STE 400
SALT LAKE CITY, UT 84111-1255
JFAX 9,3552513

Mr. Terry M Plant, Esq.
PLANT CHRISTENSEN & KANELL
136 E S TEMPLE STE 1700
SALT LAKE CITY, UT 84111-2970
JFAX 9,5319747

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BRUCE S. JENKINS

RECEIVED CLERK
FEB - 2 2005
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

LYNETTE FISK and GLENN FISK,

Plaintiffs,

vs.

NOVARTIS AG; NOVARTIS CORPORATION; NOVARTIS CONSUMER HEALTHCARE INC.; and BAYER CORPORATION, a subsidiary of BAYER AG,

Defendants.

Case No. 2:01CV985

Judge Bruce S. Jenkins

Appearing on behalf of:
Defendant Bayer Corporation

MOTION AND CONSENT OF DESIGNATED ASSOCIATE LOCAL COUNSEL

I, Camille N. Johnson, hereby move the pro hac vice admission of petitioner to practice in this Court. I hereby agree to serve as designated local counsel for the subject case; to readily communicate with opposing counsel and the Court regarding the conduct of this case; and to accept papers when served and recognize my responsibility and full authority to act for and on behalf of the client in all case-related proceedings, including hearings, pretrial conferences, and trials, should Petitioner fail to respond to any Court order.

Date: 1/28, 2005

Camille N. Johnson, 5494
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, UT 84145-5000
Telephone: (801) 521-9000
Facsimile: (801) 363-0400

39

APPLICATION FOR ADMISSION PRO HAC VICE

Petitioner, Lana K. Varney, hereby requests permission to appear pro hac vice in the subject case. Petitioner states under penalty of perjury that she is a member in good standing of the bar of the highest court of a state or the District of Columbia; is a non-resident of the State of Utah and, under DUCivR 83-1.1(d), has associated local counsel in this case. Petitioner's address, office telephone, the courts to which admitted, and the respective dates of admission are provided as required.

Petitioner designates Camille N. Johnson of the law firm of Snow, Christensen & Martineau as associate local counsel.

Date: 1/16, 2005

Lana Varney

Lana K. Varney

Name of Petitioner: **Lana K. Varney**
Business Address: **Fulbright & Jaworski, L.L.P.**
600 Congress Avenue, Suite 2400
Austin, TX 78701-3271
Telephone: (512) 474-5201 Fax: (512) 536-4598

BAR ADMISSION HISTORY

Courts to Which Admitted	Bar No.	Date
Texas	20499500	May 5, 1989
Western District of Texas	20499500	May 5, 1989
Supreme Court of Texas	20499500	May 5, 1989

PRIOR PRO HAC VICE ADMISSIONS IN THIS DISTRICT

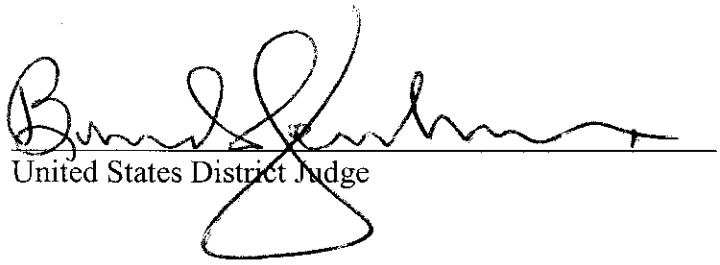
Case Title of Admission	Case No.	Date of Admission
Marlus Hardy v. Bayer Corporation (Second District Court, Weber County)	010902836	January 7, 2005

ORDER OF ADMISSION

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for Petitioner's admission pro hac vice in the United States District Court, District of Utah in the subject case is GRANTED.

DATED this 7 day of February, 2005.

BY THE COURT:



United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of **MOTION AND CONSENT OF DESIGNATED ASSOCIATE LOCAL COUNSEL/APPLICATION FOR ADMISSION PRO HAC VICE** to be sent via first-class mail, postage prepaid, this 2nd day of February, 2005, to the following:

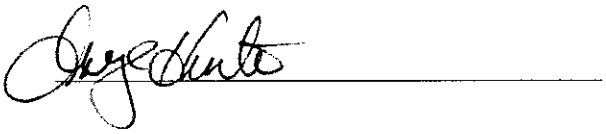
Laura Gianni
Gianni Petoyan
17383 Sunset Boulevard, Suite A340
Pacific Palisades, CA 90272
Attorneys for Plaintiffs

Arthur Sherman
Sherman, Salkow & Petoyan, P.C.
11601 Wilshire Boulevard, Suite 675
Los Angeles, CA 90025-1742
Attorneys for Plaintiffs

Joseph W. Steele
David C. Biggs
Steele, Ruffinengo & Biggs
5664 S. Green Street
Murray, UT 84107
Attorneys for Plaintiffs

Bryon J. Benevento
Tawni J. Sherman
Snell & Wilmer
Gateway Tower West, Suite 1200
15 W. South Temple
Salt Lake City, UT 84101
Attorneys for Novartis

Jan Dodd
Kaye Scholer LLP
1999 Avenue of the Stars, Suite 1700
Los Angeles, CA 90067
Attorneys for Novartis



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United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:01-cv-00985

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Camille N. Johnson, Esq.
SNOW CHRISTENSEN & MARTINEAU
10 EXCHANGE PLACE
PO BOX 45000
SALT LAKE CITY, UT 84145-5000
EMAIL

Lana K. Varney, Esq.
FULBRIGHT & JAWORSKI, LLP
600 CONGRESS AVE STE 2400
AUSTIN, TX 78701

Mr. Bryon J Benevento, Esq.
SNELL & WILMER LLP
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Jan E. Dodd, Esq.
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1999 AVE OF THE STARS STE 1700
LOS ANGELES, CA 90067

Arthur Sherman, Esq.
SHERMAN SALKOW PETOYAN & WEBER
11601 WILSHIRE BLVD STE 675
LOS ANGELES, CA 90025
EMAIL

Laura A. Gianni, Esq.
GIANNI - PETOYAN
17383 SUNSET BLVD STE A280
PACIFIC PALISADES, CA 90272
EMAIL

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2005 FEB -4 A 9:42

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U.S. DISTRICT COURT

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FEB 02 2005

OFFICE OF JUDGE
DAVID SAM

Prepared and Submitted by:

Mark R. Gaylord (#5073)
Craig H. Howe (#7552)
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221
Telephone: (801) 531-3000
Facsimile: (801) 531-3001

Attorneys for Park City Municipal Corporation

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

STICHTING MAYFLOWER MOUNTAIN FONDS and STICHTING MAYFLOWER RECREATIONAL FONDS, Netherlands associations,

Plaintiffs and Counterclaim Defendants,

vs.

THE CITY OF PARK CITY UTAH,

and

UNITED PARK CITY MINES CO., a Delaware corporation,

Defendants and Counterclaim Plaintiffs,

vs.

ARIE CORNELIS BOGERD, an individual and citizen of Hei-en Boeicop Netherlands, MAYFINANCE CV, a Netherlands

ORDER GRANTING MOTION FOR LEAVE TO FILE OVERLENGTH MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Case No.: 2:04CV00925 DS

Honorable David Sam

commanditaire vennotschap, STICHTING BEHEER MAYFLOWER PROJECT, a Netherlands Foundation, and JOHN DOES 1 THROUGH 100, limited partners of MAYFINANCE and/or Managing Directors of STICHTING BEHEER MAYFLOWER PROJECT, **Additional Counterclaim Defendants.**	

Based on the Motion for Leave to File Overlength Memorandum in Support of Motion to Dismiss (the "Motion") filed by Park City Municipal Corporation, and good cause appearing therefor,

IT IS HEREBY ORDERED that the Motion is granted.

DATED this 3rd day of February 2005.

BY THE COURT

David Sam

Honorable David Sam
United States District Court, District of Utah

asp

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00925

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Craig Smay, Esq.
174 E SO TEMPLE
SALT LAKE CITY, UT 84111
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Mr. Mark R Gaylord, Esq.
BALLARD SPAHR ANDREWS & INGERSOLL
201 S MAIN STE 600
SALT LAKE CITY, UT 84111-2215
EMAIL

Mr. Robert S. Campbell Jr., Esq.
VAN COTT BAGLEY CORNWALL & MCCARTHY
50 S MAIN STE 1600
PO BOX 45340
SALT LAKE CITY, UT 84145
EMAIL

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BY: DEPUTY CLERK

John N. Braithwaite, Bar No. 4544
David Sonnenreich, Bar No. 4917
PLANT, CHRISTENSEN & KANELL
Attorneys for Defendant Alarm Control Company
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111
Telephone: (801) 363-7611

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FEB 03 2005
OFFICE OF JUDGE
DAVID SAM

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

SAFEWAY, INC. Plaintiff, v. CONSONUS, INC., CCI MECHANICAL, INC., ALARM CONTROL COMPANY, UNION POINTE CONSTRUCTION CORPORATION, AND EHNINGER FETZER THOLEN ARCHITECTS, INC., d.b.a. EFT ARCHITECTS, INC. COLVIN ENGINEERING ASSOCIATES, INC., DUNN ASSOCIATES, INC. and ANSUL INCORPORATED Defendants.	ORDER GRANTING EXTENSION OF TIME FOR ALARM CONTROL COMPANY'S REPLY MEMORANDA Civil No. 2:02CV1216 Judge David Sam

Pursuant to the stipulation of the parties and good cause appearing, it is hereby ordered that

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Alarm Control Company shall have up to and including February 10, 2005 to file its reply memoranda in support of Alarm Control Company's Motion for Partial Summary Judgment on Strict Products Liability Claims.

DATED this 3rd day of February, 2005.

BY THE COURT:

Honorable David Sam
U.S. District Court Judge

Approved as to form:

John N. Braithwaite

Douglas Patton
Edward Havas

Blaine J. Benard
Greggory Savage
Eric Maxfield

Justin Toth

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed via U.S. Mail, first class, postage prepaid, on the 7th day of February, 2005, to the following:

Douglas H. Patton
Edward B. Havas
DEWSNUP, KING & OLSEN
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111
Attorneys for Plaintiff

John L. Young
YOUNG, ADAMS & HOFFMAN, LLP
170 South Main Street, Suite 1025
Salt Lake City, UT 84101-1654
Attorneys for Defendant CCI Mechanical, Inc.

Justin Toth
Ray, Quinney & Nebeker
36 South State Street, Suite 1400
Salt Lake City, UT 84111

Stephen J. Trayner
Robert L. Janicki
Peter C. Schofield
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3 Triad Center, Suite 500
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Phoenix, Arizona 85012

J. Stan Sexton
Shook, Hardy & Bacon
2555 Grand Boulevard
Kansas City, MO 64108-2613

asp

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-01216

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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JFAX 9,5319747

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EMAIL

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FOLK & ASSOCIATES

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Mr. Alan C. Bradshaw, Esq.
MANNING CURTIS BRADSHAW & BEDNAR LLC
THIRD FLOOR NEWHOUSE BLDG
10 EXCHANGE PL
SALT LAKE CITY, UT 84111
EMAIL

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JAN 21 2005
OFFICE OF JUDGE
DAVID SAM

FILED
CLERK, U.S. DISTRICT COURT
2005 FEB -4 A 9:42
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

RECEIVED CLERK
JAN 21 2005
U.S. DISTRICT COURT

SAFEWAY INC., Plaintiff, v. CONSONUS, INC., et. al. Defendants.	**ORDER** Civil No. 2:02 CV 1216 Judge: David Sam

The Court being fully apprised, hereby orders that all parties participate in a mediation in an effort to resolve this case prior to trial which is scheduled to begin on March 1, 2005. The mediation is to occur on ~~or before~~ February ~~2~~ 11th at 9:30 A.M., 2005. The Court has scheduled the pre-trial conference for February 3, 2005 at 3:00 p.m. At the mediation, the parties shall be present through counsel and representatives having full authority to resolve the case, as well as with individual(s) with full settlement authority from each parties' insurance carriers (including excess, umbrella and secondary carriers).

DATED this 31st day of ~~January~~ January, 2005.

BY THE COURT

David Sam
United States District Judge

494

CERTIFICATE OF SERVICE

Pursuant to Rule 77(d), Federal Rules of Civil Procedure, copies have been mailed to:

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Edward B. Havas
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36 South State Street
Salt Lake City, Utah 84111

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Salt Lake City, Utah 84111

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Salt Lake City, Utah 84180

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Jacquelyn D. Rogers
Ray, Quinney & Nebeker
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Salt Lake City, Utah 84145

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Cleveland, Ohio 44114-1583

David B. Watkiss, Esq.
Ballard Spahr
Andrews & Ingersoll, LLP
201 South Main Street # 600
Salt Lake City, Utah 84111

_____
Deputy Court Clerk

_____
Date

asp

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-01216

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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Mr. Alan C. Bradshaw, Esq.
MANNING CURTIS BRADSHAW & BEDNAR LLC
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BRUCE S. JENKINS
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FEB - 3 2005
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

DEBORAH A. DEVITO,	:	
Plaintiff,	:	Court No. 2:04 CV 00625BSJ
vs.	:	ORDER
JO ANNE B. BARNHART, Commissioner Of Social Security,	:	
Defendant.	:	

Based upon Defendant's Second Unopposed Motion To Revise Scheduling Order and good cause

appearing therefore,

IT IS HEREBY ORDERED that Defendant may have up to and including February 22, 2005, to respond to Plaintiff's Brief. Plaintiff's Reply Memorandum will then be due March 8, 2005. The hearing in this matter is scheduled for Tuesday, March 15, 2005, at 1:30 p.m.

DATED this 3 day of February, 2005.

BY THE COURT:

Honorable Bruce S. Jenkins
United States District Judge

14

asp

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00625

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Bradley N. Roylance, Esq.
NEIDER & ROYLANCE
50 S MAIN #1550
SALT LAKE CITY, UT 84144
EMAIL

Scott Patrick Bates, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

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CLERK, U.S. DISTRICT COURT
2005 FEB -7 A 8:31
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BY: _____ DEPUTY CLERK

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JAN 28 2005
U.S. DISTRICT COURT

Evan A. Schmutz (3860)
Wm. Kelly Nash (4888)
Curtis R. Hussey (5488)
HILL, JOHNSON & SCHMUTZ, L.C.
Jamestown Square, Suite 200
3319 North University Avenue
Provo, Utah 84604
Telephone: (801) 375-6600
Facsimile: (801) 375-3865

Attorneys for ELM Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JENNIFER JONES, guardian of RYAN JONES, and the class of similarly situated individuals, Plaintiffs, v. EMPLOYEE LEASING AND MANAGEMENT, INC., a Utah corporation, ELM EMPLOYEE HEALTH PLAN, PHYSICIANS HEALTH NET ADMINISTRATORS, LLC, PHYSICIANS HEALTH NET, INC., a Utah corporation, and John Does, I through X. Defendants.	**ORDER EXTENDING DEADLINES** Case No. 2:01 CV 777ST Judge Ted Stewart Magistrate Judge David Nuffer

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Based on the Stipulation for Extension of Deadlines and good cause appearing, it is hereby ORDERED that the deadline for completion of discovery shall be extended from January 14, 2005 to April 29, 2005; and the deadline for submission of dispositive motions shall be extended from February 11, 2005 to May 31, 2005. [redacted]

[redacted] Parties shall schedule a hearing for pending dispositive motions

DATED this 4th day of ~~January~~ February, 2005.

U.S. District Court Judge

Approved as to form:

Karra J. Porter

Scot A. Boyd

Brian S. King

Marcie Schapp

jmr

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:01-cv-00777

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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Marcie E. Schaap, Esq.
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U.S. DISTRICT COURT

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FEB 3 2005
OFFICE OF U.S. DISTRICT JUDGE
BRUCE S. JENKINS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

JONATHAN HAWKE,	:	
Plaintiff,	:	Court No. 2:03CV 0078BSJ
vs.	:	
	:	ORDER OF DISMISSAL
JO ANNE B. BARNHART, Commissioner Of Social Security,	:	
Defendant.	:	

This matter came before the Court on January ~~26~~ 7th, 2005. Plaintiff was represented by Bradley Roylance, Esq. The Defendant was represented by Scott Bates, Assistant United States Attorney.

The Plaintiff agreed to a voluntary dismissal of this matter. Therefore, this case shall be dismissed ten days from the entry of this Order.

IT IS HEREBY ORDERED that this action is dismissed with prejudice and that each party will bear its own costs.

DATED this 3 day of ~~January~~ February, 2005.

BY THE COURT:

Honorable Bruce S. Jenkins
United States District Court Judge

14

asp

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00078

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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TELEPHONE (801) 359-6844

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FEB 03 2005
OFFICE OF JUDGE
J. THOMAS GREENE

ATTORNEY FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, VS. FILIBERTO VALDOVINOS, DEFENDANT.	**ORDER FOR NEUROLOGICAL PSYCHIATRIC EVALUATION** CASE NO. 2:04-CR-708 JTG JUDGE J. THOMAS GREENE

Pursuant to the provision of Rule 12.2(c) of Federal Rules of Criminal Procedure, upon the Defendant's Motion and at Defendant's request, and pursuant to 18 U.S.C. §§ 4241(a) and 4242(a),

IT IS HEREBY ORDERED that a neurological psychiatric examination of Defendant be conducted, and that a neurological psychiatric report be filed with the Court, pursuant to the provisions of 18 U.S.C. § 4247(b) and (c), by a licensed or certified neurological psychiatrist or neurological psychologist.

Copies of the Report shall also be provided to Defendant's attorney and the Assistant United States Attorney at the following addresses:

Bel-Ami de Montreux
Attorney for Defendant
180 South 300 West, Suite 350
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Tel. (801) 359-6844
Fax: (801) 359-6847

Vernon Stejskal
Assistant United States Attorney
348 East South Temple
Salt Lake City, Utah 84111

Tel. (801) 524-4156
Fax. (801) 524-5803

52

Specifically, the report shall include: (1) The person's history and present symptoms; (2) A description of the neurological, psychiatric, psychological, and medical tests that were performed, and their results; (3) The examiner's findings; and (4) Whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, (5) The examiner's opinions as to the diagnosis, and whether or not the Defendant was insane or had diminished capacity at the time of the offense charged, as defined in 18 U.S.C. § 17(a).

IT IS ALSO ORDERED that Defendant is hereby committed to the custody of the Attorney General for a reasonable period of time, forthwith, to be transported by the United States Marshall.

IT IS FURTHER ORDERED, in accordance with the provisions of 18 U.S.C. § 31619(h)(1)(A), that the period of delay caused by the examination directed shall be excluded in computing the time within which trial in this matter must commence under the Speedy Trial Act.

Dated this 3rd day of February, 2005.

BY THE COURT:

J. Thomas Greene

J. THOMAS GREENE
U.S. DISTRICT JUDGE

asp

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cr-00708

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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DRUG ENFORCEMENT ADMINISTRATION
METROPOLITAN NARCOTICS TASK FORCE
348 E SOUTH TEMPLE
SALT LAKE CITY, UT 84111
EMAIL

Mr. James D. Garrett, Esq.
2091 E 1300 S STE 201
SALT LAKE CITY, UT 84108
EMAIL

Bel-Ami J. de Montreux, Esq.
180 S 300 W #350
SALT LAKE CITY, UT 84101
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

FILED
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2005 FEB -11 A 10:17
DISTRICT OF UTAH
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

MARIO RIVERA, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	**ORDER** Case No. 2:02 CR 00466 DB Judge Dee Benson

Before the Court is Petitioner's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Petitioner was arraigned on charges of illegal reentry on October 10, 2002. Petitioner plead guilty to count one of the indictment under 8 U. S. C. § 1326(a) (illegal reentry) on October 23, 2002. Petitioner's sentence of 51 months was entered on January 7, 2003. Petitioner's Judgement and Order of Conviction were entered on January 8, 2003. Although Petitioner has filed a motion as a defendant in a closed criminal case, this court will interpret Petitioner's pro se filing as a civil habeas corpus petition under 28 U.S.C. § 2255.

A claim for relief brought pursuant to § 2255 is subject to a one-year limitation period. 28 U.S.C. § 2255. Section 2255 enumerates four scenarios from which the one-year limitation period is to run. *Id.* The applicable standard in this case, based on the allegations found in Petitioner's motion, is that the motion must have been filed one year from the date Petitioner's conviction became final. *See id.* § 2255(1). The United States Supreme Court has held that "[f]inality attaches when th[e United States Supreme] Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, *or when the time for filing a certiorari petition expires*." *Clay v. United States*, 537 U.S. 522, 527, 123 S. Ct. 1072, 1076 (2003)

18

(emphasis added).

In the instant case, the Court issued a Judgment and Commitment Order terminating Petitioner's case on January 8, 2003. Although Petitioner did not appeal his case to the Tenth Circuit Court of Appeals, he had ten (10) "business" days to do so. *See* Fed. R. App. P. 4(b)(1)(A)(i). Following the Supreme Court's reasoning in *Clay*, the Judgement and Conviction Order becomes final after the Defendant's ten (10) day period to appeal has expired. Therefore the Court finds that the judgment in Petitioner's case became final on January 22, 2003. Because Petitioner did not file his motion until February 23, 2004, more than one year after his conviction became final, the Court finds that Petitioner's § 2255 motion is time-barred.

Accordingly, the Court DENIES Petitioner's § 2255 motion to vacate, set aside or reduce his sentence.

DATED this 3rd day of February, 2005

Dee Benson

Dee Benson
United States District Judge

kvs

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cr-00466

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

US Probation
DISTRICT OF UTAH
,
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

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UTAH FEDERAL DEFENDER OFFICE
46 W BROADWAY STE 110
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David F. Backman, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

FILED
CLERK, U.S. DISTRICT COURT
2005 FEB -7 A 10: 35
DISTRICT OF UTAH
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH CENTRAL DIVISION

INDYMAC BANK

Plaintiff,

vs.

PROVIDENT BANK, et al.,

Defendant,

ORDER OF DISMISSAL

Civil No. 2:02-CV-213

On January 13, 2005 , this Court issued an order requiring counsel for plaintiff to show cause why the above-entitled case should not be dismissed for lack of prosecution. No response to that order has been received, and the fifteen (15) days Plaintiff had to respond have now passed.

Wherefore, good cause appearing, the Court hereby ORDERS this case DISMISSED for failure to prosecute.

Dated this 7th day of February , 2005 .

Ted Stewart
United States District Judge

43

jmr

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-00213

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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James E. Burke, Esq.
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Mr. Clark Waddoups, Esq.
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2005 FEB -7 A 10: 35
DISTRICT OF UTAH
BY: _____
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH CENTRAL DIVISION

UNITED STATES OF AMERICA **Plaintiff,** **vs.** **5 FIREARMS AND MISCELLANEOUS AMMUNITION** **Defendant.**	**ORDER TO SHOW CAUSE** **Case No. 2:04-CV-467**

Plaintiff is hereby ordered to show cause why the above captioned case should not be dismissed. Plaintiff is directed to respond in writing within 15 days from the date of this order and inform the Court of the status of the case and intentions to proceed. Failure to do so will result in dismissal of the case.

Dated this 7th day of February, 2005.

By _____
Ted Stewart
United States District Judge

2

jmr

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00467

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Richard W. Daynes, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

USDC UT Approved 06/06/00 Revised 01/20/04

FILED
CLERK, U.S. DISTRICT COURT
2005 FEB 7 A 10:35
DISTRICT OF UTAH
BY: DEPUTY CLERK

United States District Court
District of Utah

UNITED STATES OF AMERICA

vs.

Bret Steel

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: **2:04-CR-00590-001 DKW**

Plaintiff Attorney: **Richard McKelvie**

Defendant Attorney: **James D. Gilson**

Atty: CJA ___ Ret ✖ FPD ___

Defendant's Soc. Sec. No.: _____

Defendant's Date of Birth: _____

01/13/2005
Date of Imposition of Sentence

Defendant's USM No.: **NONE**

Defendant's Residence Address:

Country USA

Defendant's Mailing Address:
SAME

Country

THE DEFENDANT:

COP **11/04/2004** Verdict _____

✖ pleaded guilty to count(s) **1 of the Felony Information**

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____

Title & Section	**Nature of Offense**		**Count Number(s)**
18 USC § 1001	False Statement	Entered on docket 2/7/05 by: Deputy Clerk	1

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

SENTENCE

Pursuant to the Sentencing Reform Act of 1984, it is the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prisons for a term of

_____

Upon release from confinement, the defendant shall be placed on supervised release for a term of _____.

✖ The defendant is placed on Probation for a period of **24 Months**.
The defendant shall not illegally possess a controlled substance.

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For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the probation officer.

☒ The above drug testing condition is suspended based on the court's determination that the defendant possesses a low risk of future substance abuse. (Check if applicable.)

SPECIAL CONDITIONS OF SUPERVISED RELEASE/PROBATION

In addition to all Standard Conditions of (Supervised Release or Probation) set forth in PROBATION FORM 7A, the following Special Conditions are imposed: (see attachment if necessary)

1. The defendant shall refrain from incurring new credit charges or opening additional lines of credit unless she is in compliance with the established payment schedule and obtains the approval of the USPO.

2. The defendant shall provide the probation officer access to all requested financial information.

3. The defendant shall comply with all rules and regulations as outlined in its license to do business and comply with any and all restrictions imposed thereon.

CRIMINAL MONETARY PENALTIES

FINE

The defendant shall pay a fine in the amount of $ **2,500.00** , payable as follows:

☐ forthwith.

☐ in accordance with the Bureau of Prison's Financial Responsibility Program while incarcerated and thereafter pursuant to a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.

☐ in accordance with a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.

☒ other:
Fine is due immediately, and shall be paid at a minimum rate of $100 per month.

☐ The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f).

☐ The court determines that the defendant does not have the ability to pay interest and pursuant to 18 U.S.C. § 3612(f)(3), **it is ordered that:**

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

The defendant shall make restitution to the following payees in the amounts listed below:

Name and Address of Payee	Amount of Loss	Amount of Restitution Ordered
Totals:	$_____	$_____

(*See* attachment if necessary.) All restitution payments must be made through the Clerk of Court, unless directed otherwise. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless otherwise specified.

☐ Restitution is payable as follows:

☐ in accordance with a schedule established by the U.S. Probation Office, based upon the defendant's ability to pay and with the approval of the court.

☐ other:

_____

☐ The defendant having been convicted of an offense described in 18 U.S.C. § 3663A(c) and committed on or after 04/25/1996, determination of mandatory restitution is continued until _____ pursuant to 18 U.S.C. § 3664(d)(5)(not to exceed 90 days after sentencing).

☐ An Amended Judgment in a Criminal Case will be entered after such determination

SPECIAL ASSESSMENT

The defendant shall pay a special assessment in the amount of $ **100.00**, payable as follows:

☒ forthwith.

☐ _____

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

PRESENTENCE REPORT/OBJECTIONS

The court adopts the factual findings and guidelines application recommended in the presentence report except as otherwise stated in open court.

RECOMMENDATION

☐ Pursuant to 18 U.S.C. § 3621(b)(4), the Court makes the following recommendations to the Bureau of Prisons:

_____

CUSTODY/SURRENDER

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district at _____ on _____.

☐ The defendant shall report to the institution designated by the Bureau of Prisons by _____ Institution's local time, on _____.

DATE: 2-5-05

David K Winder

David K. Winder
United States District Judge

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

jmr

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cr-00590

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Richard D McKelvie, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

James D Gilson, Esq.
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10 E SOUTH TEMPLE STE 900
SALT LAKE CITY, UT 84133
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

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BY: _____
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IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DALE ALMA BULKLEY, Plaintiff, vs. SALT LAKE COUNTY, SALT LAKE COUNTY SHERIFF'S OFFICE, DEPUTY J. LEE, and JOHN and JANE DOES 1-15, Defendants.	ORDER Case No. 2:03CV00269

This matter comes before the court on three motions in limine. Defendant Lee filed a motion in limine seeking an order excluding the proposed testimony of Plaintiff's witnesses David Morrow and Steve Jones. Second, Plaintiff Bulkley filed two motions in limine: the first seeking to exclude all reference to his prior medical malpractice lawsuit and the second seeking to preclude Defendant Lee and all other defense witnesses from appearing at trial in official uniform.

For the reasons set forth at the February 4, 2005 hearing on these issues, the court GRANTS IN PART and DENIES IN PART Defendant Lee's motion (Dkt. 46). The testimony of Mr. Morrow is excluded, but the testimony of Mr. Jones is admitted subject to authentication

at the time of trial. The court GRANTS Plaintiff's motion excluding all reference to his prior medical malpractice lawsuit (Dkt. 54), although testimony regarding Mr. Bulkely's physical condition may be admissible. The court DENIES Plaintiff's motion seeking to preclude Defendant Lee and other defense witnesses from appearing in official uniform (Dkt. 57).

SO ORDERED this 4 day of February, 2005.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

alt

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00269

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Donald H. Hansen, Esq.
SALT LAKE COUNTY ATTORNEYS OFFICE
2001 S STATE ST STE 3400
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EMAIL

Mr. Robert B Sykes, Esq.
ROBERT B SYKES & ASSOCIATES
311 S STATE ST STE 240
SALT LAKE CITY, UT 84111-2320
EMAIL

CC: USMS, USPO

PS8 (1/05)

United States District Court
for the District of Utah

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2005 FEB -7 A 10: 11
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BY: _____
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Petition and Order for Action on Conditions of Pretrial Release

Name of Defendant: **Deanne Mosher-Cadena** Docket Number: **2:02-CR-00678 -001 DAK**

Name of Judicial Officer: **Honorable Dale Kimball, United States District Court Judge**

Date of Release: **November 22, 2004**

PETITIONING THE COURT

[X] To issue a warrant Unknown

CAUSE

The pretrial services officer believes that the defendant has violated the conditions of supervision as follows:

Allegation No. One: On February 4, 2005, the defendant absconded from pretrial residential placement at the Cornell Community Corrections Center. Her whereabouts is unknown.

I declare under penalty of perjury that the foregoing is true and correct

Steve Noble for
Thomas G. Ogden, U.S. Pretrial Services Officer
Date: February 7, 2005

THE COURT ORDERS:

[X] The issuance of a Warrant

[ ] No action

[ ] Other

Dale A. Kimball
Honorable Dale Kimball
United States District Judge

Date: February 7, 2005

tsh

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cr-00678

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
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Julian D. Jensen (1679)
JENSEN, DUFFIN & DIBB, LLP
Attorneys for Named Defendants
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Telephone: (801) 531-6600

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CLERK, U.S. DISTRICT COURT
2005 FEB -4 P 2:35
DISTRICT OF UTAH
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CLERK, U.S. DISTRICT
2005 JAN 10 P 12
DISTRICT OF UTA
BY: _____
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

RANDALL K. FIELDS and PARK CITY GROUP, a Nevada corporation f/k/a FIELDS TECHNOLOGIES, INC., **Plaintiffs,** **vs.** **WILLIAM A. CALVO, III, LEONARD M. TUCKER, CARRINGTON CAPITAL CORP., a Florida corporation and THE YANKEE COMPANIES, INC., a Florida corporation,** **Defendants.**	**STIPULATION AND JOINT MOTION FOR RULE 41 DISMISSAL OF ACTION WITH PREJUDICE AND WITH RESERVATION** ORDER **Case Number: 2:02CV00984–PGC** **Judge: Paul G. Cassell**

COMES NOW the undersigned Counsel of Record for Randall K. Fields; Park City Group, Inc. f/k/a Fields Technologies, Inc., A Nevada Corporation; and Park City Group, Inc. A Delaware Corporation, (collectively "Plaintiffs") to stipulate and jointly move with William A. Calvo, III, and the Calvo Family Spendthrift Trust, a Florida Trust ("Defendants" and/or "Counterclaimants") for a dismissal of the above-captioned cause of action as to these parties and all causes of action existing between these parties under Rule 41 (a) 1(ii) of the Federal Rules of Civil Procedure.

It is specifically stated to the Court and reserved by the above parties that the pending action of the plaintiffs against a served defendant, known as the Yankee Companies, Inc., is not being dismissed by this Stipulation and Motion and that plaintiffs reserve a pending default action as to this defendant who has not timely filed any responsive pleading. It is not believed by any

78
75

parties to this action that this reserved defendant can interpose any answer or other pleading in this proceeding and a default may be entered as to this defendant independently of this requested Rule 41 Stipulation and Order of Dismissal. The parties further note to the Court the other named defendants, Leonard M. Tucker and Carrington Capital Corporation, were earlier dropped from the action.

NOW THEREFORE, the undersigned parties to this action, through counsel, respectfully ask this Court to enter an Order of Dismissal, pursuant to Rule 41 of the Federal Rules of Civil Procedure, dismissing with prejudice each of the enumerated parties and all claims and causes of action existing between the parties rather raised by complaint or counterclaim, except to as the reserved default proceeding as to Yankee Companies, Inc. The undersigned parties through counsel further represent to the Court that except as to the pending default proceeding against the Yankee Companies, Inc., the foregoing constitutes a dismissal of all remaining parties and causes of action arising out of or in any way related to this cause of action.

Dated this 10th day of January, 2005.

Julian D. Jensen
Attorney of Record for Defendants:
William A. Calvo, III
Calvo Family Spendthrift Trust,
a Florida Trust

Robin C. Campbell
Adorno & Yoss
Attorney for Plaintiffs:
Randall K. Fields; Park City Group, Inc. f/k/a
Fields Technologies, Inc.; and
Park City Group, Inc.

SO ORDERED

PAUL G. CASSELL
United States District Judge

Date 2/4/05

c:\documents and settings\julian\my documents\calvo\stip for dismissal 122804

tsh

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-00984

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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Calvo Family Spendthrift Trust
1941 SE 51st TERRACE
OSCALA, FL 34471-5763

William A. Calvo III
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OSCALA, FL 34471-5763

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PARK CITY, UT 84060

FILED
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2005 FEB -7 A 10: 18
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EXHIBIT A

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Sarah A. McGee
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Telephone: (801) 533-9800
Facsimile: (801) 328-1707

Attorneys for Defendant
Polaris Industries Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

BOSS INDUSTRIES, INC., Plaintiff, v. POLARIS INDUSTRIES INC., Defendant.	Civil Action No. 2:03 CV 00663 DAK **STIPULATION OF DISMISSAL WITH PREJUDICE** Hon. Dale A. Kimball ORDER

IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiff Boss Industries, Inc. and Defendant Polaris Industries Inc., through their respective counsel, that the

26

above-captioned action may be dismissed with prejudice and on the merits and without costs to any of the parties, pursuant to Fed. R. Civ. P. 41.

Date: January 25, 2005

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Telephone: (801) 532-1234
Facsimile: (801) 536-6111

Attorneys for Plaintiff
Boss Industries, Inc.

Date: January __, 2005

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Salt Lake City, Utah 84111
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Facsimile: (801) 328-1707

Attorneys for Defendant
Polaris Industries, Inc.

IT IS SO ORDERED.

Dated: 2/4/2005

Dale A. Kimball
United States District Judge

tsh

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00663

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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SALT LAKE CITY, UT 84145-0898
EMAIL

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2005 FEB -4 P 4:02
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **IRVEN DOUGLAS ADAMS,** **Defendant.**	**ORDER** **Case No. 2:03CR178 DAK**

This matter is before the court on Defendant Mr. Adams' request that the court clarify whether the "No Contact" Order that was in place during his jury trial remained in effect after the trial concluded. It was Mr. Adams' understanding that the "No Contact" Order expired when the trial ended. Mr. Adams' understanding is correct. The "No Contact" Order expired at the conclusion of Mr. Adams' trial. Thus, there has been no such order in effect since July 12, 2004.

DATED this 3rd day of February, 2005.

BY THE COURT:

Dale A. Kimball

DALE A. KIMBALL
United States District Judge

998

tsh

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cr-00178

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

US Probation
DISTRICT OF UTAH
,
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United States Marshal Service
DISTRICT OF UTAH
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EMAIL

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US ATTORNEY'S OFFICE
,
EMAIL

Robert A. Lund, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

Richard W. Daynes, Esq.
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FILED
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2005 FEB -7 P 1:44
DISTRICT OF UTAH
BY: DEPUTY CLERK

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

PAUL T. VENABLE II, Plaintiffs, vs. EQUITY ONE, INC. and DOES 1-10, Defendants.	ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT Case No. 2:04-CV-411 TS

On May 10, 2004, Plaintiff Paul T. Venable II (Plaintiff) brought an amended complaint (Complaint) against Defendant Equity One, Inc. (Defendant) that sought various forms of relief stemming from Plaintiff's displeasure with the way Defendant handled Plaintiff's mortgage loan. Plaintiff brought his case *pro se*. Defendant, represented by counsel, asks this Court to grant it judgment on the Plaintiff's pleading or, in the alternative, to grant partial summary judgment on Plaintiff's federal claims. Plaintiff failed to respond to Defendant's Motion. Given the straightforward issue raised by Defendants' request for dismissal and the uncontroverted statement of facts supporting its request for summary judgment, a hearing on this matter would

18

prove unhelpful. The Court DENIES Defendant's request for dismissal and GRANTS Defendant's request for partial summary judgment, as is set forth more fully below.

DISCUSSION

"Any party proceeding on its own behalf without an attorney [is] expected to be familiar with and to proceed in accordance with the rules of practice and procedure of this court and with the appropriate federal rules and statutes that govern the action in which such party is involved." DUCivR 83-1.1(g).

> While we of course liberally construe *pro se* pleadings, [a party's] *pro se* status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure. See Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir. 1994).

Ogden v. San Juan County, 32 F.3d 452, 455 (10th Cir. 1994).

1. Dismissal Due to Lack of Subject Matter Jurisdiction

First, Defendant moves for dismissal and alleges that the Court does not have subject matter jurisdiction over this matter. Subject matter jurisdiction relates to a court's authority to hear a given type of case and may not be waived. Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995). The party invoking federal jurisdiction bears the burden of establishing such jurisdiction as a threshold matter. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94- 95, (1998). Where a party attacks the factual basis for subject matter jurisdiction, the court does not need to presume the truthfulness of factual allegations in the complaint, but may consider evidence to resolve disputed jurisdictional facts. Pringle v. United States, 208 F.3d 1220, 1222 (10th Cir. 2000).

Defendant asserts without much argument that this Court does not have subject matter jurisdiction based on diversity jurisdiction. To establish subject matter jurisdiction under 28 U.S.C. § 1332, a party must show that complete diversity of citizenship exists between the parties and that the amount in controversy exceeds $75,000. Based on the validity of this argument, Defendant argues that Plaintiff also fails to raise a federal question under 28 U.S.C. 1331. Defendant asserts that taken together, Plaintiff's alleged failure to bring suit under diversity jurisdiction and federal question jurisdiction, results in a lack of subject matter jurisdiction.

The Court first turns to the question of whether the parties lack diversity jurisdiction. Plaintiff alleges in his Complaint that he resides in West Valley City, Utah. Complaint ¶ 1. This suggests that Plaintiff is a citizen of Utah. Defendant does nothing to rebut this assumption and in fact implicitly endorses it in the memorandum supporting its motion. Defendant's Memorandum at 3-4.

The Court next looks to Defendant's citizenship. For diversity purposes, a corporation is "deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). Defendant's Answer states that Defendant "is a Delaware corporation duly authorized to conduct business in the State of Utah." Answer ¶ 3. Defendants Memorandum asserts that it is "duly authorized to conduct business in the State of Utah." Defendant's Memorandum at 3-4. From this information, the Court is led to believe that Defendant is a citizen of Delaware and does some of its business in the State of Utah.

The Court finds the information that Defendant has presented suggests that diversity jurisdiction is present here. Defendant has not questioned the logical inference to be made from Plaintiff's Complaint: he is a citizen of Utah. Further, Defendant has failed to make a showing that it is a citizen of Utah, which would be necessary to destroy citizenship diversity. Rather, the evidence before the Court suggests that Defendant is a citizen of Delaware and that it does some business in the State of Utah. Defendant does not represent that Utah is its principle place of business or that it is a Utah corporation. Further, Defendant does not allege that Plaintiff's claim fails to meet the statutory-minimum amount required to bring a controversy in federal court. Because Defendant failed to make a showing that diversity jurisdiction is not present, the Court must DENY that part of Defendant's Motion seeking dismissal due to the lack of this Court's subject matter jurisdiction in this matter.

2. Summary Judgment

a. Standard

The standard for summary judgment is well-known: "[w]hen applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." English v. Colorado Dep't of Corrections, 248 F.3d 1002, 1007 (10th Cir. 2001) (quotation omitted). Summary judgment is appropriate only if the evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To successfully oppose summary judgment, the nonmoving party must show that there is a "genuine" issue of fact, which requires "more than simply show[ing] that there is some metaphysical doubt as to the material facts." Matsushita

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the nonmoving party fails to respond, the district court may not grant the motion without first examining the moving party's submission to determine if it has met its initial burden of demonstrating that no material issues of fact remain for trial and the moving party is entitled to judgment as a matter of law. If it has not, summary judgment is not appropriate, for "[n]o defense to an insufficient showing is required." Reed v. Bennett, 312 F.3d 1190, 1194-95 (10th Cir. 2002) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 160-61 (1970)).

b. Plaintiff's Federal Claims

Plaintiff's Complaint, construed broadly, asserts Defendant did not notify Plaintiff it intended to transfer ownership of Plaintiff's mortgage note prior to Defendant entering into such an arrangement. Plaintiff further alleges that this amounts to a violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 et seq., and the Truth-In-Lending Act ("TILA"), 15 U.S.C. § 1631 et seq., and TILA's accompanying "Regulation Z," 12 C.F.R. § 226.

The purpose of RESPA is to address "certain abusive practices that have developed" in relation to the disclosure of information regarding the "nature and costs of the [real estate] settlement process." 12 U.S.C. § 2601. RESPA requires that mortgage lenders notify those

agreeing to the mortgage that the lender intends to transfer ownership of this mortgage. Id. at § 1205.

First, it is undisputed that Plaintiff's mortgage lender was Mortgage Express, Inc., and not Defendant. However, it is also undisputed that Mortgage Express, Inc. (Mortgage Express) sold Plaintiff's mortgage to Defendant. Second, assuming *arguendo* that Plaintiff could bring a claim against Defendant for any alleged nondisclosure by Mortgage Express in its role as predecessor of that contract, the undisputed facts before this Court show that Plaintiff was informed by Mortgage Express that it did not service mortgage loans and that it intended to sale, assign, or transfer this loan. Affidavit of Mary Fisher, Appendix G, "Servicing Disclosure Statement." The Court, therefore, finds that Plaintiff received the notification required by RESPA and that summary judgment is warranted in favor of Defendant on Plaintiff's RESPA claim.

The purpose of TILA is to assure a meaningful disclosure of credit terms. 15 U.S.C. § 1601(a). A plaintiff may bring a TILA claim against an assignee "only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement . . ." 15 U.S.C. § 1641.

It is undisputed that Defendant is the assignee of Mortgage Express, Inc. Defendant's Statement of Undisputed Facts ¶¶ 5-7. The undisputed facts also show that Plaintiff received a disclosure that detailed the relevant aspects of the mortgage, including the amount financed, terms relating to the interest rate, finance charge, the sum of total payments owed, the payment schedule, and the security interest required. Affidavit of Mary Fisher, Appendix G, "Truth-In-Lending Disclosure Statement." The only disclosure Plaintiff has alleged to be lacking is that his

lender intended to sell Plaintiff's mortgage loan. Putting aside the issue of whether such disclosure is warranted under TILA, as mentioned above, it is an undisputed fact that Plaintiff received a notification that the loan would be sold. Plaintiff has not shown the absence of any disclosure that would violate TILA in any way that was "apparent on the face of the disclosure statement." 15 U.S.C. § 1641. The Court finds that summary judgment is warranted on Plaintiff's TILA claim.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Defendant's request for dismissal due to Lack of Subject Matter Jurisdiction is DENIED; it is further

ORDERED that Defendant's request for summary judgment as to Plaintiff's federal RESPA and TILA claims is GRANTED. The Court retains jurisdiction over Plaintiff's remaining State claims.

SO ORDERED.

DATED this 7th day of February, 2005.

BY THE COURT:

TED STEWART
United States District Court Judge

jmr

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00411

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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FILED
CLERK, U.S. DISTRICT COURT
2005 FEB -7 P 1:44
DISTRICT OF UTAH
BY: DEPUTY CLERK

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

KENNETH ALVILLAR, JR. and CIJI ALVILLAR, Plaintiffs, vs. MIDVALE CITY, GRANITE SCHOOL DISTRICT & DOES 1-50, Defendants.	ORDER GRANTING MIDVALE CITY'S MOTION TO DISMISS COMPLAINT Case No. 2:02-CV-1125 TS

Defendant Midvale City (Midvale City) brings Motion to Dismiss Complaint, alleging that Plaintiffs' Complaint fails to state a claim upon which relief can be granted as to Midvale City and that time for Plaintiffs to amend their Complaint to name individual Midvale City officers has long passed.

1. Motion to Dismiss

In considering a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations in the complaint are accepted as true and viewed in the light most favorable to Plaintiff as the nonmoving party. In resolving a 12(b)(6) motion, a court may not consider matters outside the pleadings. "A 12(b)(6) motion should not be granted 'unless it appears

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beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

In Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), the Supreme Court held that municipalities can be sued as "persons" under 42 U.S.C. § 1983. However, the Court explained that a municipality's liability is limited to violations arising out of its official policies or customs. Id. at 694.

Because Midvale City is a municipality, Plaintiffs must demonstrate the harm alleged in the Complaint was caused by a custom or policy within the meaning of Monell. Plaintiffs fail to allege that Midvale City had any policy or custom that related to the harm they allege they have suffered. Rather, Plaintiffs simply allege that Midvale City's officers wrongfully arrested and prosecuted Plaintiffs. Construing the Complaint in the light most favorable to the Plaintiffs, the Complaint fails to allege that actions of the officers had any nexus to any policy or custom of Midvale City. As such, Midvale City's request for dismissal is granted.

2. Failure to Amend Complaint

In their Complaint, Plaintiffs do not name individual officers, but rather, describe the actions of unnamed officers, DOES 1-50. Midvale City also argues that the time for Plaintiffs to amend their Complaint and name individual officers has long passed.

Where a responsive pleading has been filed and the district court has entered a scheduling order, as here, Fed.R.Civ.P. 16(b) requires that the standard for obtaining an extension of time is a showing of "good cause."

The time to amend passed more than a year ago. Additionally, Plaintiffs failed to respond to Midvale City's Motion that asks the Court to forbid Plaintiffs from amending their Complaint to name individual officers. Plaintiffs' inaction and non-response illustrates that good cause to amend in the instant case is lacking. The Court, therefore, grants Midvale City's request to bar Plaintiffs from amending their Complaint to name individual officers.

CONCLUSION

For the foregoing reasons, it is hereby

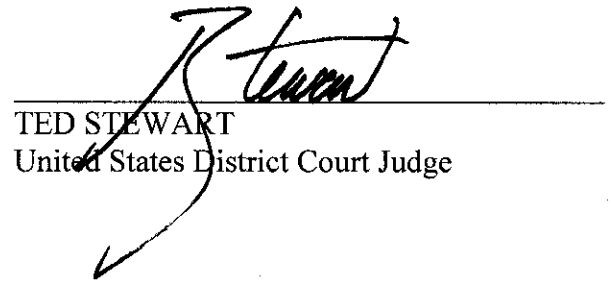
ORDERED that Midvale City's Motion to Dismiss Complaint is GRANTED; it is further

ORDERED that Defendant's request to forbid Plaintiffs from amending their Complaint to name individual Midvale City officers is GRANTED.

SO ORDERED.

DATED this 7th day of February, 2005.

BY THE COURT:



TED STEWART
United States District Court Judge

jmr

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-01125

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. David L. Church, Esq.
BLAISDELL & CHURCH
5995 S REDWOOD RD
SALT LAKE CITY, UT 84123
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Nathan N. Jardine, Esq.
39 EXCHANGE PL STE 100
SALT LAKE CITY, UT 84111-2705
JFAX 9,5198745

FILED
CLERK, U.S. DISTRICT COURT
2005 FEB -7 P 1:43
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

JOEL FERRE (#7517)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0245

RECEIVED CLERK
FEB - 7 2005
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

KRIS WINSNESS , Plaintiff, vs. STACIE A. CAMPBELL (nka MARSHALL), Salt Lake County Sheriff's Deputy, Defendant.	**ORDER ON MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER** Case No.2:04-CV-0904 TS Judge Ted Steward Mag. Judge Alba

Based upon the written stipulation of Plaintiff, Kris Winsness, through counsel Brian M. Barnard of the Utah Legal Clinic, and Defendant, Stacie Campbell, through counsel Joel A. Ferre, Assistant Attorney General, and for good cause appearing:

IT IS HEREBY ORDERED:

1. Plaintiff's motion for a temporary restraining order and preliminary injunction is granted;

2. Defendant is enjoined from enforcing Utah Code Ann. § 76-9-601 until further

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order of the Court;

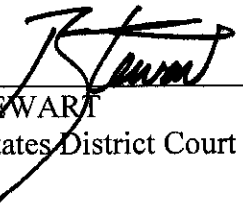
3. Plaintiff enjoys no presumption or status by virtue of this Order;

4. No security is required for the granting of this temporary restraining order;

5. The hearing on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, previously set for Tuesday, February 8, 2005 at 9:30 a.m., is stricken;

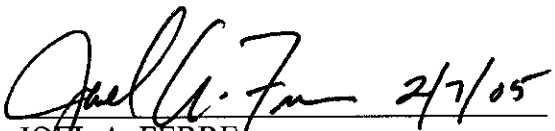
DATED this 7th day of February, 2005.

BY THE COURT

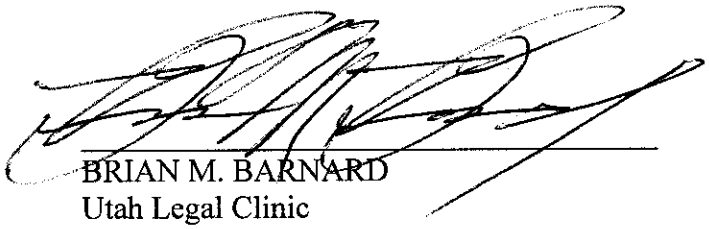


TED STEWART
United States District Court Judge

Approved as to form:



JOEL A. FERRE
Utah Attorney General's Office
Attorney for Defendant



BRIAN M. BARNARD
Utah Legal Clinic
Attorney for Plaintiff

jmr

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00904

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

James L. Harris Jr., Esq.
UTAH LEGAL CLINIC
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Mr. Philip C Pugsley, Esq.
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PO BOX 140811
SALT LAKE CITY, UT 84114-0856
EMAIL

Joel Ferre, Esq.
UTAH ATTORNEY GENERAL'S OFFICE
160 E 300 S FIFTH FL
PO BOX 140874
SALT LAKE CITY, UT 84114-0874
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH CENTRAL DIVISION

UNITED STATES OF AMERICA **Plaintiff(s),** **vs.** **GEORGE MARKS** **Defendant(s).**	**Case No. N-05-24 M** **ORDER APPOINTING COUNSEL**

The defendant, **GEORGE MARKS** requested the appointment of counsel on **1/24/05**, and at that time the court determined the defendant qualified for the appointment of counsel under 18 USC § 3006A.

Therefore,

IT IS HEREBY ORDERED the Federal Public Defender, for the District of Utah, is appointed to represent the above named defendant in this matter.

DATED this 24th day of January, 2005.

BY THE COURT:

David Nuffer
United States Magistrate Judge

7

asb

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:05-m -00024

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Leshia M. Lee-Dixon, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

Mr. Ronald J. Yengich, Esq.
YENGICH RICH & XAIZ
175 E 400 S STE 400
SALT LAKE CITY, UT 84111
EMAIL

A. Chelsea Koch, Esq.
UTAH FEDERAL DEFENDER OFFICE
46 W BROADWAY STE 110
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EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

United States District Court

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA
V.

ORDER OF TEMPORARY DETENTION
PENDING HEARING RE:
BAIL REFORM ACT

GEORGE MARKS

Case Number: **N-05-24 M**

Upon motion of the United States of America, it is ORDERED that a detention hearing is set for **Wednesday, 1/26/05** * at **11:00 a.m.** before Magistrate Judge David Nuffer United States District Court - 350 South Main Street - Room 477 - Salt Lake City, Utah

Pending this hearing, the defendant shall be held in the custody of (the United States Marshal) _____ and produced for hearing.
Other Custodial Official

Date: 24 January 2005

Judicial Officer

*If not held immediately upon defendant's first appearance, the hearing may be continued for up to three days upon motion of the Government, or up to five days upon motion of the defendant. 18 U.S.C. §3142(f)(2).
A hearing is required whenever the conditions set forth in U.S.C. §3142(f) are present. Subsection (1) sets forth the grounds that may be asserted only by the attorney for the Government; subsection (2) states that a hearing is mandated upon the motion of the attorney for the Government or upon the judicial officer's own motion if there is a serious risk that the defendant (a) will flee or (b) will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate a prospective witness or juror.

8

asb

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:05-m -00024

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Leshia M. Lee-Dixon, Esq.
US ATTORNEY'S OFFICE
,
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Mr. Ronald J. Yengich, Esq.
YENGICH RICH & XAIZ
175 E 400 S STE 400
SALT LAKE CITY, UT 84111
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A. Chelsea Koch, Esq.
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SALT LAKE CITY, UT 84101
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH CENTRAL DIVISION

UNITED STATES OF AMERICA **Plaintiff(s),** **vs.** **SILVINO GARCIA-TORRES** **Defendant(s).**	**Case No. 2:05-CR-37 TC** **ORDER APPOINTING COUNSEL**

The defendant, **SILVINO GARCIA-TORRES** requested the appointment of counsel on **1/24/05**, and at that time the court determined the defendant qualified for the appointment of counsel under 18 USC § 3006A.

Therefore,

IT IS HEREBY ORDERED the Federal Public Defender, for the District of Utah, is appointed to represent the above named defendant in this matter.

DATED this 24 day of January, 2005.

BY THE COURT:

David Nuffer
United States Magistrate Judge

8

asb

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:05-cr-00037

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Robert A. Lund, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

Carlos A. Garcia, Esq.
UTAH FEDERAL DEFENDER OFFICE
46 W BROADWAY STE 110
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EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

United States District Court

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA **ORDER OF DETENTION PENDING TRIAL**

v.

SILVINO GARCIA-TORRES Case Number: **2:05-CR-37 TC**

In accordance with the Bail Reform Act, 18 U.S.C. §3142(f), a detention hearing has been held. I conclude that the following facts require the detention of the defendant pending trial in this case.

Part I - Findings of Fact

☐ (1) The defendant is charged with an offense described in 18 U.S.C. §3142(f)(1) and has been convicted of a (federal offense) (state or local offense that would have been a federal offense if a circumstance giving rise to federal jurisdiction had existed) that is

☐ a crime of violence as defined in 18 U.S.C. §3156(a)(4)

☐ an offense for which the maximum sentence is life imprisonment or death

☐ an offense for which the maximum term of imprisonment of ten years or more is prescribed in _____ *

☐ a felony that was committed after the defendant had been convicted of two or more prior federal offenses described in 18 U.S.C. §3142(f)(1)(A)-(C), or comparable state or local offenses

☐ (2) The offense described in finding (1) was committed while the defendant was on release pending trial for a federal, state or local offense

☐ (3) A period of not more than five years has elapsed since the (date of conviction) (release of the defendant from imprisonment) for the offense described in finding (1).

☐ (4) Findings Nos. (1), (2) and (3) establish a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of (an)other person(s) and the community. I further find that the defendant has not rebutted this presumption.

Alternate Findings (A)

☐ (1) There is probable cause to believe that the defendant has committed an offense

☐ for which a maximum term of imprisonment of ten years or more prescribed in _____

☐ under 18 U.S.C. §924(c)

☐ (2) The defendant has not rebutted the presumption established by finding 1 that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community.

Alternate Findings (B)

☐ (1) There is a serious risk that the defendant will not appear.

☐ (2) There is a serous risk that the defendant will endanger the safety of another person or the community

Part II - Written Statement of Reasons for Detention

I find that the credible testimony and information submitted at the hearing establishes by (clear and convincing evidence) (a preponderance of the evidence) that

ICE HAS PLACED A HOLD ON DEFENDANT

Part III - Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a resonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

Dated: January 24, 2005

Signature of Judicial Officer

MAGISTRATE JUDGE DAVID NUFFER

Name and Title of Judicial Officer

*Insert as applicable: (a) Controlled Substances Act (21 U.S.C.§801 et seq): (b) Controlled Substances Import and Export Act (21 U.S.C. §951 et seq); or (c) Section 1 of Act of Sept. 15, 1980 (21 U.S.C. §955a).

asb

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:05-cr-00037

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Robert A. Lund, Esq.
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EMAIL

Todd A. Utzinger, Esq.
UTZINGER & PERRETTA
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BOUNTIFUL, UT 84010
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

United States District Court

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA **ORDER OF DETENTION PENDING TRIAL**

v.

ADAN RAMIREZ-MUNIZ Case Number: **2:05-CR-37 TC**

In accordance with the Bail Reform Act, 18 U.S.C. §3142(f), a detention hearing has been held. I conclude that the following facts require the detention of the defendant pending trial in this case.

Part I - Findings of Fact

☐ (1) The defendant is charged with an offense described in 18 U.S.C. §3142(f)(1) and has been convicted of a (federal offense) (state or local offense that would have been a federal offense if a circumstance giving rise to federal jurisdiction had existed) that is

☐ a crime of violence as defined in 18 U.S.C. §3156(a)(4)

☐ an offense for which the maximum sentence is life imprisonment or death

☐ an offense for which the maximum term of imprisonment of ten years or more is prescribed in _____ *

☐ a felony that was committed after the defendant had been convicted of two or more prior federal offenses described in 18 U.S.C. §3142(f)(1)(A)-(C), or comparable state or local offenses

☐ (2) The offense described in finding (1) was committed while the defendant was on release pending trial for a federal, state or local offense

☐ (3) A period of not more than five years has elapsed since the (date of conviction) (release of the defendant from imprisonment) for the offense described in finding (1).

☐ (4) Findings Nos. (1), (2) and (3) establish a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of (an)other person(s) and the community. I further find that the defendant has not rebutted this presumption.

Alternate Findings (A)

☐ (1) There is probable cause to believe that the defendant has committed an offense

☐ for which a maximum term of imprisonment of ten years or more prescribed in _____

☐ under 18 U.S.C. §924(c)

☐ (2) The defendant has not rebutted the presumption established by finding 1 that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community.

Alternate Findings (B)

☐ (1) There is a serious risk that the defendant will not appear.

☐ (2) There is a serous risk that the defendant will endanger the safety of another person or the community

Part II - Written Statement of Reasons for Detention

I find that the credible testimony and information submitted at the hearing establishes by (clear and convincing evidence) (a preponderance of the evidence) that

ICE HAS PLACED A HOLD ON DEFENDANT

Part III - Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a resonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

Dated: January 24, 2005

Signature of Judicial Officer

MAGISTRATE JUDGE DAVID NUFFER

Name and Title of Judicial Officer

12

*Insert as applicable: (a) Controlled Substances Act (21 U.S.C.§801 et seq): (b) Controlled Substances Import and Export Act (21 U.S.C. §951 et seq), or (c) Section 1 of Act of Sept. 15, 1980 (21 U.S.C. §955a).

asb

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:05-cr-00037

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Robert A. Lund, Esq.
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EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

United States District Court

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA **ORDER OF DETENTION PENDING TRIAL**

v.

ARNOLDO CAMACHO-FIGUEROA Case Number: **2:04-CR-736 TC**

In accordance with the Bail Reform Act, 18 U.S.C. §3142(f), a detention hearing has been held. I conclude that the following facts require the detention of the defendant pending trial in this case.

Part I - Findings of Fact

☐ (1) The defendant is charged with an offense described in 18 U.S.C. §3142(f)(1) and has been convicted of a (federal offense) (state or local offense that would have been a federal offense if a circumstance giving rise to federal jurisdiction had existed) that is

☐ a crime of violence as defined in 18 U.S.C. §3156(a)(4)

☐ an offense for which the maximum sentence is life imprisonment or death

☐ an offense for which the maximum term of imprisonment of ten years or more is prescribed in _____ *

☐ a felony that was committed after the defendant had been convicted of two or more prior federal offenses described in 18 U.S.C. §3142(f)(1)(A)-(C), or comparable state or local offenses

☐ (2) The offense described in finding (1) was committed while the defendant was on release pending trial for a federal, state or local offense

☐ (3) A period of not more than five years has elapsed since the (date of conviction) (release of the defendant from imprisonment) for the offense described in finding (1).

☐ (4) Findings Nos. (1), (2) and (3) establish a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of (an)other person(s) and the community. I further find that the defendant has not rebutted this presumption.

Alternate Findings (A)

☐ (1) There is probable cause to believe that the defendant has committed an offense

☐ for which a maximum term of imprisonment of ten years or more prescribed in _____

☐ under 18 U.S.C. §924(c)

☐ (2) The defendant has not rebutted the presumption established by finding 1 that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community.

Alternate Findings (B)

☑ ~~(1)~~ There is a serious risk that the defendant will not appear.

☑ ~~(2)~~ There is a serous risk that the defendant will endanger the safety of another person or the community

2/4/2005 hold

Part II - Written Statement of Reasons for Detention

I find that the credible testimony and information submitted at the hearing establishes by (clear and convincing evidence) (a preponderance of the evidence) that

Part III - Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a resonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

Dated: January 24, 2005

Signature of Judicial Officer

MAGISTRATE JUDGE DAVID NUFFER

Name and Title of Judicial Officer

*Insert as applicable: (a) Controlled Substances Act (21 U.S.C.§801 et seq): (b) Controlled Substances Import and Export Act (21 U.S.C. §951 et seq); or (c) Section 1 of Act of Sept. 15, 1980 (21 U.S.C. §955a).

asb

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cr-00736

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Jonathan D. Yeates, Esq.
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United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

United States District Court

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA

v.

LEE ERIC ELLIS

ORDER OF DETENTION PENDING TRIAL

Case Number: **2:04-CR-484 DAK**

In accordance with the Bail Reform Act, 18 U.S.C. §3142(f), a detention hearing has been held. I conclude that the following facts require the detention of the defendant pending trial in this case.

Part I - Findings of Fact

☐ (1) The defendant is charged with an offense described in 18 U.S.C. §3142(f)(1) and has been convicted of a (federal offense) (state or local offense that would have been a federal offense if a circumstance giving rise to federal jurisdiction had existed) that is

☐ a crime of violence as defined in 18 U.S.C. §3156(a)(4)

☐ an offense for which the maximum sentence is life imprisonment or death

☐ an offense for which the maximum term of imprisonment of ten years or more is prescribed in _____ *

☐ a felony that was committed after the defendant had been convicted of two or more prior federal offenses described in 18 U.S.C. §3142(f)(1)(A)-(C), or comparable state or local offenses

☐ (2) The offense described in finding (1) was committed while the defendant was on release pending trial for a federal, state or local offense

☐ (3) A period of not more than five years has elapsed since the (date of conviction) (release of the defendant from imprisonment) for the offense described in finding (1).

☐ (4) Findings Nos. (1), (2) and (3) establish a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of (an)other person(s) and the community. I further find that the defendant has not rebutted this presumption.

Alternate Findings (A)

☐ (1) There is probable cause to believe that the defendant has committed an offense

☐ for which a maximum term of imprisonment of ten years or more prescribed in _____

☐ under 18 U.S.C. §924(c)

☐ (2) The defendant has not rebutted the presumption established by finding 1 that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community.

Alternate Findings (B)

☐ (1) There is a serious risk that the defendant will not appear.

☐ (2) There is a serous risk that the defendant will endanger the safety of another person or the community

Part II - Written Statement of Reasons for Detention

I find that the credible testimony and information submitted at the hearing establishes by (clear and convincing evidence) (a preponderance of the evidence) that

Defendant appeared pursuant to a writ of habeas corpus ad prosequendum and elected to return to state custody.

Part III - Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a resonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

Dated: January 25, 2005

Signature of Judicial Officer

MAGISTRATE JUDGE DAVID NUFFER

Name and Title of Judicial Officer

14

*Insert as applicable: (a) Controlled Substances Act (21 U.S.C.§801 et seq): (b) Controlled Substances Import and Export Act (21 U.S.C. §95 et seq); or (c) Section 1 of Act of Sept. 15, 1980 (21 U.S.C. §955a).

asb

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cr-00484

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Jonathan D. Yeates, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

Mr. David B Oliver, Esq.
180 S 300 W, #210
Salt Lake City, UT 84101-1218
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

United States District Court

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA

v.

JOSE VENEGAS-PEREZ

ORDER OF DETENTION PENDING TRIAL

Case Number: **2:05-CR-43 DS**

In accordance with the Bail Reform Act, 18 U.S.C. §3142(f), a detention hearing has been held. I conclude that the following facts require the detention of the defendant pending trial in this case.

Part I - Findings of Fact

☐ (1) The defendant is charged with an offense described in 18 U.S.C. §3142(f)(1) and has been convicted of a (federal offense) (state or local offense that would have been a federal offense if a circumstance giving rise to federal jurisdiction had existed) that is

☐ a crime of violence as defined in 18 U.S.C. §3156(a)(4)

☐ an offense for which the maximum sentence is life imprisonment or death

☐ an offense for which the maximum term of imprisonment of ten years or more is prescribed in _____ *

☐ a felony that was committed after the defendant had been convicted of two or more prior federal offenses described in 18 U.S.C. §3142(f)(1)(A)-(C), or comparable state or local offenses

☐ (2) The offense described in finding (1) was committed while the defendant was on release pending trial for a federal, state or local offense

☐ (3) A period of not more than five years has elapsed since the (date of conviction) (release of the defendant from imprisonment) for the offense described in finding (1).

☐ (4) Findings Nos. (1), (2) and (3) establish a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of (an)other person(s) and the community. I further find that the defendant has not rebutted this presumption.

Alternate Findings (A)

☐ (1) There is probable cause to believe that the defendant has committed an offense

☐ for which a maximum term of imprisonment of ten years or more prescribed in _____

☐ under 18 U.S.C. §924(c)

☐ (2) The defendant has not rebutted the presumption established by finding 1 that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community.

Alternate Findings (B)

☐ (1) There is a serious risk that the defendant will not appear.

☐ (2) There is a serous risk that the defendant will endanger the safety of another person or the community

Part II - Written Statement of Reasons for Detention

I find that the credible testimony and information submitted at the hearing establishes by (clear and convincing evidence) (a preponderance of the evidence) that

ICE HAS PLACED A HOLD ON DEFENDANT

Part III - Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a resonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

Dated: January 25, 2005

Signature of Judicial Officer

MAGISTRATE JUDGE DAVID NUFFER

Name and Title of Judicial Officer

10

*Insert as applicable: (a) Controlled Substances Act (21 U.S.C.§801 et seq): (b) Controlled Substances Import and Export Act (21 U.S.C. §95 et seq) or (c) Section 1 of Act of Sept. 15, 1980 (21 U.S.C. §955a).

asb

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:05-cr-00043

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Karin Fojtik, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

Mr. Edwin S. Wall, Esq.
WALL LAW OFFICES
8 E BROADWAY STE 500
SALT LAKE CITY, UT 84111
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

AO 199A (Rev.3/87) Order Setting Conditions of Release

United States District Court

NORTHERN DISTRICT OF UTAH

UNITED STATES OF AMERICA **ORDER OF DETENTION PENDING TRIAL**

v.

JESUS SALVADOR ZEPEDA-LOPEZ Case Number: **1:03-CR-62-TC**

FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

FEB 07 2005

MARKUS B. ZIMMER, CLERK
BY _____
DEPUTY CLERK

In accordance with the Bail Reform Act, 18 U.S.C. §3142(f), a detention hearing has been held. I conclude that the following facts require the detention of the defendant pending trial in this case.

Part I - Findings of Fact

☐ (1) The defendant is charged with an offense described in 18 U.S.C. §3142(f)(1) and has been convicted of a (federal offense) (state or local offense that would have been a federal offense if a circumstance giving rise to federal jurisdiction had existed) that is

☐ a crime of violence as defined in 18 U.S.C. §3156(a)(4)

☐ an offense for which the maximum sentence is life imprisonment or death

☐ an offense for which the maximum term of imprisonment of ten years or more is prescribed in _____ *

☐ a felony that was committed after the defendant had been convicted of two or more prior federal offenses described in 18 U.S.C. §3142(f)(1)(A)-(C), or comparable state or local offenses

☐ (2) The offense described in finding (1) was committed while the defendant was on release pending trial for a federal, state or local offense

☐ (3) A period of not more than five years has elapsed since the (date of conviction) (release of the defendant from imprisonment) for the offense described in finding (1).

☐ (4) Findings Nos. (1), (2) and (3) establish a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of (an)other person(s) and the community. I further find that the defendant has not rebutted this presumption.

Alternate Findings (A)

☐ (1) There is probable cause to believe that the defendant has committed an offense

☐ for which a maximum term of imprisonment of ten years or more prescribed in _____

☐ under 18 U.S.C. §924(c)

☐ (2) The defendant has not rebutted the presumption established by finding 1 that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community.

Alternate Findings (B)

☒ (1) There is a serious risk that the defendant will not appear.

☐ (2) There is a serous risk that the defendant will endanger the safety of another person or the community

Part II - Written Statement of Reasons for Detention

I find that the credible testimony and information submitted at the hearing establishes by (clear and convincing evidence) (a preponderance of the evidence) that

BICE HAS PLACED A HOLD ON DEFENDANT

Part III - Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a resonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

Dated: February 7, 2005

Signature of Judicial Officer

CHIEF MAGISTRATE JUDGE SAMUEL ALBA

Name and Title of Judicial Officer

*Insert as applicable: (a) Controlled Substances Act (21 U.S.C.§801 et seq): (b) Controlled Substances Import and Export Act (21 U.S.C. §951 et seq); or (c) Section 1 of Act of Sept. 15, 1980 (21 U.S.C. §955a).

5/6

ss

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 1:03-cr-00062

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

US Probation
DISTRICT OF UTAH
,
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

Mr. Edwin S. Wall, Esq.
WALL LAW OFFICES
8 E BROADWAY STE 500
SALT LAKE CITY, UT 84111
EMAIL

Michael P. Kennedy, Esq.
US ATTORNEY'S OFFICE
,
EMAIL

United States District Court

FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

FEB 0 7 2005

MARKUS B. ZIMMER, CLERK
BY DEPUTY CLERK

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA
V.

ORDER SETTING CONDITIONS OF RELEASE

JOHN VINCENT ALLEN

Case Number: **2:04-CR-688 DB**

IT IS SO ORDERED that the release of the defendant is subject to the following conditions:

(1) The defendant shall not commit any offense in violation of federal, state or local or tribal law while on release in this case.

(2) The defendant shall immediately advise the court, defense counsel and the U.S. attorney in writing of any change in address and telephone number.

(3) The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed

as directed. The defendant shall next appear at (if blank, to be notified) UNITED STATES DISTRICT COURT
PLACE

350 South Main on **As Directed**
DATE AND TIME

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released provided that:

(✔) (4) The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed.

( ) (5) The defendant executes an unsecured bond binding the defendant to pay the United States the sum of

_____ dollars ($)

in the event of a failure to appear as required or to surrender as directed for service of any sentence imposed.

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Additional Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant and the safety of other persons and the community, it is FURTHER ORDERED that the release of the defendant is subject to the conditions marked below:

( ) (6) The defendant is placed in the custody of:
(Name of person or organization)
(Address)
(City and state) (Tel.No.)
who agrees (a) to supervise the defendant in accordance with all the conditions of release, (b) to use every effort to assure the appearance of the defendant at all scheduled court proceedings, and (c) to notify the court immediately in the event the defendant violates any conditions of release or disappears.

Signed:_____
Custodian or Proxy

(✔)7) The defendant shall:
(✔)(a) maintain or actively seek employment.
( ) (b) maintain or commence an educational program.
(✔)(c) abide by the following restrictions on his personal associations, place of abode, or travel:
Do not change residence without prior permission of Pretrial Services.
( ) (d) avoid all contact with the following named persons, who are considered either alleged victims or potential witnesses:

(✔)(e) report on a regular basis to the supervising officer as directed.
( ) (f) comply with the following curfew:
(✔)(g) refrain from possessing a firearm, destructive device, or other dangerous weapon.
(✔)(h) refrain from use of alcohol.
(✔)(i) refrain from any use or unlawful possession of a narcotic drug and other controlled substances defined in 21 U.S.C.§802 unless prescribed by a licensed medical practitioner.
( ) (j) undergo medical or psychiatric treatment and/or remain in an institution, as follows:

( ) (k) execute a bond or an agreement to forfeit upon failing to appear as required, the following sum of money or designated property

( ) (l) post with the court the following indicia of ownership of the above-described property, or the following amount or percentage of the above-described money:

( ) (m) execute a bail bond with solvent sureties in the amount of $
( ) (n) return to custody each (week)day as of _____ o'clock after being released each (week)day as of) _____ o'clock for employment, schooling or the following limited purpose(s):

( ) (o) surrender any passport to
( ) (p) obtain no passport
(✔)(q) the defendant will submit to drug/alcohol testing as directed by the pretrial office. If testing reveals illegal drug use, the defendant shall participate in drug and/or alcohol abuse treatment, if deemed advisable by supervising officer.
( ) (r) participate in a program of inpatient or outpatient substance abuse therapy and counseling if deemed advisable by the supervising officer.
( ) (s) submit to an electronic monitoring program as directed by the supervising officer.
( ) (t)

Advice of Penalties and Sanctions

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

A violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of release, an order of detention, and a prosecution for contempt of court and could result in a term of imprisonment, a fine, or both.

The commission of a Federal offense while on pretrial release will result in an additional sentence of a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be in addition to any other sentence.

Federal law makes it a crime punishable by up to 10 years of imprisonment, and a $250,000 fine or both to obstruct a criminal investigation. It is a crime punishable by up to ten years of imprisonment and a $250,000 fine or both to tamper with a witness, victim or informant; to retaliate or attempt to retaliate against a witness. victim or informant; or to intimidate or attempt to intimidate a witness, victim, juror, informant, or officer of the court. The penalties for tampering, retaliation, or intimidation are significantly more serious if they involve a killing or attempted killing.

If after release, you knowingly fail to appear as required by the conditions of release, or to surrender for the service of sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

(1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years of more, you shall be fined not more than $250,000 or imprisoned for not more than 10 years, or both;

(2) an offense punishable by imprisonment for a tem of five years or more, but less than fifteen years, you shall be fined not more than $250,000 or imprisoned for not more than five years, or both;

(3) any other felony, you shall be fined not more than $250,000 or imprisoned not more than two years, or both.

(4) a misdemeanor, you shall be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be in additions to the sentence for any other offense. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgment of Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release , to appear as directed , and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions set forth above.

Signature of Defendant

1275 Guard Ave
Address

SLC UT 84106 7594868
City and State Telephone

Directions to the United States Marshal

(X) The defendant is ORDERED released after processing.

( ) The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judicial officer that the defendant has posted bond and/or complied with all other conditions for release. The defendant shall be produced before the appropriate judicial officer at the time and place specified, if still in custody.

Date: 2/07/05

Signature of Judicial Officer

Chief Magistrate Judge Samuel Alba

Name and Title of Judicial Officer

United States District Court

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA

v.

ROBIN BLAZE THURBER

ORDER OF DETENTION PENDING TRIAL

Case Number: 2:04-CR-839 TC

FILED IN THE UNITED STATES DISTRICT COURT DISTRICT OF UTAH
FEB 07 2005
MARKUS B. ZIMMER, CLERK
BY DEPUTY CLERK

In accordance with the Bail Reform Act, 18 U.S.C. §3142(f), a detention hearing has been held. I conclude that the following facts require the detention of the defendant pending trial in this case.

Part I - Findings of Fact

☐ (1) The defendant is charged with an offense described in 18 U.S.C. §3142(f)(1) and has been convicted of a (federal offense) (state or local offense that would have been a federal offense if a circumstance giving rise to federal jurisdiction had existed) that is

- ☐ a crime of violence as defined in 18 U.S.C. §3156(a)(4)
- ☐ an offense for which the maximum sentence is life imprisonment or death
- ☐ an offense for which the maximum term of imprisonment of ten years or more is prescribed in _____ *
- ☐ a felony that was committed after the defendant had been convicted of two or more prior federal offenses described in 18 U.S.C. §3142(f)(1)(A)-(C), or comparable state or local offenses

☐ (2) The offense described in finding (1) was committed while the defendant was on release pending trial for a federal, state or local offense

☐ (3) A period of not more than five years has elapsed since the (date of conviction) (release of the defendant from imprisonment) for the offense described in finding (1).

☐ (4) Findings Nos. (1), (2) and (3) establish a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of (an)other person(s) and the community. I further find that the defendant has not rebutted this presumption.

Alternate Findings (A)

☐ (1) There is probable cause to believe that the defendant has committed an offense

- ☐ for which a maximum term of imprisonment of ten years or more prescribed in _____
- ☐ under 18 U.S.C. §924(c)

☐ (2) The defendant has not rebutted the presumption established by finding 1 that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community.

Alternate Findings (B)

☒ (1) There is a serious risk that the defendant will not appear.

☐ (2) There is a serous risk that the defendant will endanger the safety of another person or the community

Part II - Written Statement of Reasons for Detention

I find that the credible testimony and information submitted at the hearing establishes by (clear and convincing evidence) (a preponderance of the evidence) that

PRIOR HISTORY OF FAILING TO APPEAR

Part III - Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a resonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

Dated: February 7, 2005

Signature of Judicial Officer

CHIEF MAGISTRATE JUDGE SAMUEL ALBA

Name and Title of Judicial Officer

*Insert as applicable: (a) Controlled Substances Act (21 U.S.C.§801 et seq): (b) Controlled Substances Import and Export Act (21 U.S.C. §95 et seq); or (c) Section 1 of Act of Sept. 15, 1980 (21 U.S.C. §955a).

ss

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cr-00839

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Mark K Vincent, Esq.
US ATTORNEY'S OFFICE
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Jamie Zenger, Esq.
UTAH FEDERAL DEFENDER OFFICE
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SALT LAKE CITY, UT 84101
EMAIL

United States Marshal Service
DISTRICT OF UTAH
,
EMAIL

US Probation
DISTRICT OF UTAH
,
EMAIL

FILED
CLERK, U.S. DISTRICT COURT
2005 FEB -7 P 3:10
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT DISTRICT OF UTAH

CENTRAL DIVISION

KAREN HAGEN, **Plaintiff,** **vs.** **RAYMOND M. SCHMIDT, d.b.a. SCHMIDT TRUCKING , and PATRICK McCONE,** **Defendants.**	**ORDER** **2:03CV0411DAK** **Judge Dale A. Kimball**

This matter is before the court on Defendants' Objection to the Form of Plaintiff's proposed Judgment pursuant to DUCivR 54-1, Defendants' Motion for a New Trial, Defendants' Motion for Leave to File Third Party Complaint for Indemnification and Other Relief, and Defendants' Motion for New Trial or Alternatively a Remittitur. The court does not believe that a hearing will significantly aid in its determination of these matters. Therefore, the court renders the following Order based on the materials submitted by the parties.

DISCUSSION

I. Objection to Form of Judgment

In their Objection to the Form of Judgment, Defendants renew their objections to adverse rulings by the court before and during the trial in this matter. The court finds these objections improper. Defendants have clearly preserved these objections and their positions on these matters for appeal. The court does not believe that any of those rulings were in error.

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Defendants present no new facts or arguments that would require the court to review its earlier rulings. And, the court finds it inappropriate for Defendants to renew such objections with respect to the form of Judgment entered in this case.

A. Past Special Damages for Medical Care

As to Defendants' Objections with the Form of Plaintiff's proposed Judgment, Defendants first argue that the settlement amounts paid by Defendants' liability carrier to Plaintiff's Workers' Compensation insurance carrier ("RTW") should be broken out into their proper categories in the Judgment in order to define the rights and duties between Defendants' liability insurer, RTW, and Plaintiff. However, the jury's Verdict is a matter of record, as is the Settlement Agreement between RTW and Defendants. If Defendants have a dispute with RTW regarding their Settlement Agreement, it does not directly involve Plaintiff or affect the jury's Verdict. Such a dispute can be pursued in a separate action based on the Defendants' Settlement Agreement. In this action, Plaintiff's claim is against Defendants and her Judgment, based on the jury's Verdict, is against Defendants. The court sees no reason for including information regarding the rights and duties between Defendants and RTW in the Judgment.

In addition, Defendants contends that the Court should order that the total judgment amount for past special damages—health care/medical damage be $29,137.69 (the total award of $151,641.00 less $122,503.31, which is the amount paid by their liability insurer to the worker's compensation insurance carrier). Defendants also argue that Plaintiff has no basis in law or equity to collect prejudgment interest or Rule 54(d) costs on any amount awarded for past medicals. Plaintiff argues that the court's deduction for the amount paid by Defendants' liability carrier should be made after the statutory interest is added to her award for past special damages.

Plaintiff's proposed Judgment includes interest on her past special damages accruing at the rate of 10% per annum since the date of the subject accident, December 12, 2002. The Judgment does not specify an exact sum for that interest because Plaintiff was uncertain as to the date the Judgment would be entered. As of the date of the Verdict, January 13, 2005, the amount of interest was $38,959.98. Each day until the Judgment is entered will increase the amount by $50.09. Defendants entered into a settlement with RTW for the amount that RTW has paid for workers compensation benefits. Defendants are entitled to credit for that payment and only that payment. Defendants are not entitled to cut off Plaintiff's statutory right to prejudgment interest by paying RTW in a Settlement Agreement in which Plaintiff did not participate. Ms. Hagen was entitled to have a jury determine her past special damages and she is entitled to interest on that amount under Utah Code Annotated Section 78-27-44. By the terms of the Judgment proposed by Plaintiff, Defendants' receive full credit for the amount they have paid RTW before Judgment is entered.

As to post-Judgment costs to be awarded to Plaintiff under Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. Section 1920, none of such costs is particularly tied to past medical damages. Plaintiff's costs would be intermingled with all of the categories of damages she received. There is no support for Defendants' contention, and Defendant provides no support, that Plaintiff should not be awarded costs for past medical damages.

Defendants further argue that the award for past medical care should be eliminated from the judgment altogether based on its earlier ruling. Again, the court finds it improper for Defendants to make such an argument in an objection to the form of judgment. Defendants present no new facts or law in support of a reconsideration of the court's earlier ruling.

Therefore, the court's previous ruling will stand.

B. Past Special Damages for Lost Earnings

Based on its arguments above, Defendants assert that the Judgment should reflect a total judgment for Past Special Damages for Lost Earnings of $17,234.38 (the jury award of $28,544.00 less $11,309.62, which is the amount Defendants' liability carrier paid to RTW). Defendants also argue that prejudgment interest and costs on this amount should not be allowed. Applying the court's rational discussed above, the court similarly finds no reason for reducing the amount fixed by the jury for Plaintiff's past lost earnings or for disallowing pre-judgment interest or costs on that amount.

C. Future Special Damages for Future Lost Income and Earning Capacity

Also based on their same rationale, Defendants argue that the total judgment for Future Special Damages for lost earnings should be $370,226.78 (the jury award of $400,000 less $29,773.22, which is the amount Defendants' liability carrier paid to RTW). Furthermore, Defendants submit that prejudgment interest does not apply to future losses and should not be allowed on this or any other future damage category. In addition, Defendants argue that no costs pertaining to special damages for future lost earnings should be allowed.

Plaintiff's proposed Judgment subtracts the $29,773.22 from the Verdict before the Judgment is entered. And, Plaintiff concedes that she cannot recover prejudgment interest on future special damages. The proposed Judgment does not purport to give her such a recovery. Nonetheless, Plaintiff is entitled to compensable costs of court for this category of damages.

The court concludes that Defendants' objections to the form of Plaintiff's proposed Judgment are without merit. the court orders that Judgment shall be entered in this case as of

February 11, 2005, in favor of Plaintiff and against Defendants in the amount of the jury verdict plus pre-judgment interest on past special damages minus the amount Defendants paid RTW. Plaintiff is directed to submit a revised Judgment including exact dollar amounts as of February 11, 2005. The Judgment shall also reflect that Plaintiff is entitled to compensable court costs to be determined post-Judgment and that that total amount will bear interest at the Judgment rate applicable on February 11, 2005 from February 11, 2005 forward. Upon receipt of Plaintiff's Judgment, the Clerk of Court shall enter such Judgment.

II. Defendants' Motion for a New Trial

Defendants move for a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. Defendants base their motion on Plaintiff's counsel's alleged misconduct. Defendants contend that Plaintiff's counsel improperly (1) injected liability insurance into the trial by stating that defense counsel would consider anything less than $2 million a victory, (2) sought an award of damages to punish and exemplify Defendants by stating the jury should pick up the sword of justice and "strike a blow for justice," (3) introduced cumulative, inflammatory, and prejudicial evidence and testimony of the accident in alleged violation of the parties' August 2, 2004 Stipulation, (4) inflamed and aroused the jury by using a "per diem" argument to attack the general damage amounts advanced by Defendants, and (5) engaged in conduct that unfairly took advantage of the vulnerability of absent Defendants.

This court does not believe that Plaintiff's counsel engaged in any misconduct. Nor does the court believe that any of the complained of conduct played a substantial or meaningful role in the outcome of the trial. Most of Defendants' arguments focus on matters to which Defendants failed to object at trial. In a case where the losing party raised alleged attorney misconduct in a

motion for a new trial rather than in a contemporaneous objection, the Tenth Circuit recognized that "[t]here are 'strong policy reasons for the basic rule that timely objection is a condition precedent to review on appeal.' '[A] party may not wait and see whether the verdict is favorable before deciding to object.'" *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 962 (10th Cir. 1993) (citations omitted).

The only objection Defendants made to this list of alleged misconduct was an objection to Plaintiff's per diem analysis. The court denied Defendants' objection to per diem arguments during the jury instruction conference, which was outside the presence of the jury and before Plaintiff's counsel made his closing argument to the jury. The court ruled that it was within the discretion of the trial court to allow or disallow such an argument and that the court would allow counsel latitude in making per diem arguments during closing arguments. The court instructed the jury that there was not set formula for general damages and that what the lawyers say is not evidence. Moreover, when the court made its ruling at the jury instruction conference that Plaintiff's counsel could make per diem arguments, Defendants did not contend that any additional cautionary instructions were necessary. There was nothing improper about Plaintiff's counsel making a reasonable per diem argument in closing arguments after the court had ruled that he could. In addition, there was nothing improper about Plaintiff's counsel use of a per diem argument to demonstrate to the jury that Defendants' proposed amount of general damages was not fair compensation. Attorneys routinely make arguments to contradict their opponent's position—such arguments are mere advocacy.

Defendants' claim that liability insurance was injected into the trial by Plaintiff's counsel's statement that Defendants and their counsel would be pleased with a verdict of less than $2

million is unfounded. That statement had nothing to do with insurance and did not amount to a signal to the jury that there was an insurance limit of $2 million. It was merely an argument to support Plaintiff's position that a proper award of damages would be above $2 million. The statement did nothing to prejudice the jury against Defendants. Furthermore, Defendants did not raise a contemporaneous objection to the statement.

Defendants' argument that Plaintiff "piled on" evidence of the accident in violation of the parties' Stipulation is without merit. The parties' Stipulation provides that Plaintiff will be allowed to present evidence of the accident at trial to the extent determined by the court. Plaintiff rightfully was allowed to introduce enough evidence regarding the accident for the jury to have an idea of its severity and to have an adequate understanding of what Plaintiff experienced. Again, Defendants made no objection during the trial as to the amount of evidence regarding the accident.

The court also finds no support in the record for Defendants' contention that Plaintiff's counsel urged the jury to award damages that would punish or make an example out of Defendants. The jury was instructed that they could not award such damages, and Plaintiff's counsel reminded the jury that they were not to award damages to punish Defendants. Plaintiff's counsel's statements regarding the sword of justice were permissible oratory for closing arguments. Moreover, Defendants made no objection during closing arguments as to Plaintiff's counsel's remarks about the sword of justice.

Finally, Defendants claim that Plaintiff's counsel "engag[ed] in other conduct to take unfair advantage of the vulnerability of absent Defendants who by agreement relinquished their Constitutionally protected due process rights by agreeing not to come to trial and testify."

Defendants then proceed to argue that Defendants "bargained for the exercise of the right to testify, and now depend heavily on the protections of the Stipulation. Unless the Stipulation is properly and rigorously enforced to protect Defendants, the prejudice suffered through the misconduct of Plaintiff's counsel is equivalent to a violation [of] procedural due process." Defendants, however, do not specify what alleged misconduct allegedly took unfair advantage of the absent Defendants. Assuming Defendants imply that all of the forgoing conduct contributed to this claim, the court has already ruled that there was no misconduct. The court is unaware of any instances in which Defendants' counsel objected to Plaintiff's counsel's conduct in this regard during trial. Without more specificity as to "other conduct," the court cannot address Defendants' claim. However, the parties' Stipulation referred only to whether Defendants would testify. It did not prohibit Defendants from attending the trial. Nevertheless, Plaintiff's counsel did not comment on the absence of Defendants from trial. The court finds no basis for finding that Defendants due process rights have been or will be violated. Furthermore, it is speculative to assume that the jury's verdict would have been influenced by Defendants' appearance or testimony. The jury's verdict was well within a reasonable range given the facts of the case. Therefore, the court concludes there are no grounds for a new trial. Accordingly, Defendants' motion is denied.

III. Defendants' Motion for Leave to File Third Party Complaint

Defendants move, pursuant to Rule 14(a) of the Federal Rules of Civil Procedure for leave to file a Third-Party Complaint against American Compensation Insurance/RTW, Inc. ("RTW"). RTW is Plaintiff's workers compensation insurance carrier. Defendants' liability insurer reached a Settlement Agreement with RTW before trial and paid RTW the agreed

amounts to satisfy RTW's reimbursement claims for workers compensation payments made for Plaintiff's benefit of certain past and special damages. The Settlement Agreement also provided that RTW would pay additional special damages awarded to Plaintiff at trial and indemnify and protect Defendants and their liability insurer in that regard.

Defendants contend that the purposes of the Third Party Complaint are: (1) to afford a full opportunity for RTW to participate as a party and be heard in post trial proceedings affecting the amount of its liability as may be appropriate; (2) to afford all parties concerned with an appropriate forum for any additional matters pertaining to the settlement; and (3) upon final determination at the trial level of motions concerning special damages, to make available a speedy mechanism for RTW to resolve Plaintiff's special damages claims.

The court concludes that Defendants' motion is untimely. Defendants' first argument in support of filing a Third-Party Complaint is to allow a separate party to argue against Plaintiff's award of special damages. This case has already gone to trial, and Plaintiff has received a jury verdict against Defendants. If Defendants and RTW believed it was necessary for RTW to be involved in post-trial proceedings affecting its amount of liability, Defendants should have filed the instant motion contemporaneous with their settlement with RTW. Defendants and RTW reached their settlement before the trial in this case, acknowledged the impending trial in their agreement, and agreed to provisions with respect to post-trial liability. This is not a case where there is an unknowing party whose rights or liability was unknowingly decided. RTW entered into a settlement agreement with Defendants that determined its liability. If it had wished to participate in this litigation it should have sought a provision in the settlement agreement allowing it some sort of role in the litigation or sought to be a part of this litigation before trial.

The court is unaware of any procedure for or right of a party to gain access to post-trial proceedings when the party has not participated in the litigation or trial of the case, and Defendants have provided none.

Defendants' second purpose for filing a Third-party Complaint is equally unavailing. If Defendants need a forum for addressing additional matters pertaining to their settlement with RTW, Defendants can sue RTW in a separate action. Such matters would not involve Plaintiff and would only work to delay and complicate the instant proceedings. Moreover, Defendants proposed Third-Party Complaint seeks only a declaration of the parties' rights, duties and liabilities under the Settlement Agreement. There is no claim of breach of the Settlement Agreement, of any misunderstanding of the terms of the Settlement Agreement, or of any delay by RTW. Without some dispute between the parties, the court does not typically engage in contract construction. The parties set out their rights, duties, and liability in their Settlement Agreement. Unless there is some dispute in the application of that agreement, the court finds no basis for the Third-Party Complaint.

Finally, Defendants seek a speedy mechanism for RTW to resolve Plaintiff's special damages claims. However, as discussed above, Plaintiff's verdict is against Defendants. The fact that Defendants and RTW entered into an agreement separate and apart from this case does not entitle RTW to step into this litigation after the trial is completed. Defendant's motion appears to be more of a request to allow a party to intervene than a true third-party complaint for indemnification. Defendants have provided the court with no legal support for allowing a third-party to become involved in post-trial proceedings. Accordingly, the court finds no basis for allowing Defendants' proposed Third-Party Complaint. Therefore, Defendants' request for leave

to file a third-party complaint is denied.

IV. Defendants' Motion for New Trial or Alternatively a Remittitur

Defendants' have brought a subsequent motion for a new trial pursuant to Rule 59(a) and (e) on the grounds that jury's award of damages was against the weight of the evidence, the jury's award of future income and earning capacity relied on erroneously admitted evidence, the general damage award was excessive and the result of attorney misconduct, the damages for future loss of income and earning capacity was excessive, and the misapplication of the collateral source rule substantially prejudiced Defendants.

Defendants "bear a heavy burden of demonstrating that the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence." *See Blanke v. Alexander*, 152 F.3d 1224, 1236 (10th Cir. 1998). In fact, "every reasonable presumption should be indulged in favor of the general verdict." *See Kirkendoll v. Neustrom*, 379 F.2d 694, 699 (10th Cir. 1967). "The jury's award will be considered inviolate so long as it is not 'so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial.'" *Palmer v. City of Monticello*, 31 F.3d 1499, 1508 (10th Cir. 1994) (citations omitted). "A trial judge should not order a remittitur or a new trial when the size of the verdict turns upon conflicting evidence and the credibility of witnesses." *Id.*

Defendants' various arguments regarding the size of the jury award for almost every category of damages do not accurately consider the evidence presented by Plaintiffs' witnesses. The jury is entitled to determine the witnesses' credibility. Defendants, and all parties in a trial, run the risk of a jury agreeing with the other side's arguments. Viewing the evidence in a light most favorable to the jury's verdict, there is ample evidence in this case that the jury's verdict is

in line with the evidence presented at trial. This court will not disturb a jury's award unless it is so excessive as to shock the conscience of the court. Not only does the jury's verdict in this case not shock the conscience of the court, the court finds it a reasonable award. Therefore, the court finds no basis for ordering a remittitur.

Defendants' also argue that Professor Randle's Table 9, which projected future costs of Plaintiff's anti-depressant and sleep medications, was not admissible because it was not based on expert medical opinion establishing that Plaintiff would need the medication for the rest of her life and it was unfair that Defendants received this exhibit three days before trial. The jury was able to evaluate Randle's testimony and determine what weight to give to it. And, Defendants had ample opportunity to counter Randle's arguments through argument, expert testimony, or their own projections. Defendants cannot show prejudice as a result of this evidence.

In addition, Defendants argue that the testimony of Plaintiff's experts were erroneously admitted under Rules 702 and 703 of the Federal Rules of Evidence. Defendants' arguments are substantially similar to the arguments that they made in their motion for summary judgment. The court denied that motion and does not believe there are grounds for reconsidering its ruling based on the evidence at trial. The court does not conclude that the evidence regarding Plaintiff's future loss of income and earning capacity is too speculative. Defendants were able to present their own version of Plaintiff's future loss of income and earning capacity. The fact that both parties were able to present evidence as to future damages does not create prejudice to Defendants.

Defendants' argument that the general damage award was excessive and the result of Plaintiff's counsel's misconduct was denied by the court above. There was no misconduct on

the part of Plaintiff's counsel, and the jury was not wrongfully aroused or incited. Therefore, Defendants have not present any grounds for overturning or decreasing the general damage award.

Finally, Defendants argue that the misapplication of the collateral source rule substantially prejudiced them and denied them a fair trial. Defendants argue that the court's ruling on motions in limine prior to trial improperly precluded them from demonstrating at trial that a large amount of Plaintiff's past special damages had been paid by Defendants' insurer to Plaintiff's workers compensation carrier, RTW. The court finds no basis for reconsidering its ruling on the pre-trial motions in limine dealing with the settlement between Defendant's insurer and RTW. Nevertheless, because its previous ruling on the matter was from the bench, the court will clarify its position to Defendants in this Order.

"The collateral source rule provides that a wrongdoer is not entitled to have damages, for which he is liable, reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent collateral source." *DuBois v. Nye*, 584 P.2d 823, 825 (Utah 1978) (citations omitted). The independent collateral source is most often the plaintiff's insurer, and the usual role of the collateral source rule is to prevent insurance payments of damages from reducing the wrongdoer's liability. *See Suniland Corp. v. Radcliffe*, 576 P.2d 847 (Utah 1978) (plaintiff's insurance premium was not paid to protect tortfeasor); *Phillips v. Bennett*, 21 Utah 2d 1, 439 P.2d 457 (1968) (insurance payments belong to plaintiff and are not credited to defendant).

An unpublished Tenth Circuit states that "the collateral source rule generally does not apply 'when the collateral source is somehow identified with the tortfeasor . . . in a suit against

the tortfeasor.' Under those circumstances the additional compensation will be used to offset tortfeasor liability because it is as if the tortfeasor himself paid." *Green v. Denver & R.G.W.R.R.*, 59 F.3d 1029, 1995 US App. LEXIS 16199 (10th Cir. 1995) (unpublished decision). The Utah Supreme Court has stated that the "collateral source rule is applicable unless the collateral recovery comes from the defendant or a person acting on his behalf." *Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, 96 P.3d 893, 901 (Utah 2004). "If the benefit was a gift to the plaintiff . . . or established for him by law, he should not be deprived of the advantage that it confers. The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him." *Id.*

Defendants argued that once the settlement occurred and payment of the settlement amounts were made by Defendant's liability insurer to RTW, the source of the benefits switched from a collateral source allied with Plaintiff to a source allied with Defendants. However, the settlement agreement did not involve Plaintiff and Plaintiff's collateral source remains RTW.

Both parties agreed that Plaintiff's receipt of money from RTW would not have been admissible under the collateral source rule. However, once there was a settlement between Defendants and RTW, the question the court faced was whether the collateral source rule applied because RTW had received funds from Defendants or an entity acting for it. Before trial there were obviously concerns by both parties--Plaintiff did not want to appear like she had been paid for most of her damages and was greedy or overreaching; and, Defendants wanted to argue to the jury that they were reasonable and had already paid a portion of her special damages.

Weighing these competing interests and the policy behind the collateral source rule, the court concluded that disclosure of the settlement agreement would clearly work to Plaintiff's

disadvantage. For example, if there had been no settlement: If Plaintiff's medical bills had equaled $1,000,000 but her workers compensation carrier had negotiated the bills down and paid $500,000, she would be able to admit into evidence the bills totaling $1,000,000, potentially collect the full $1,000,000 from the jury, pay RTW back the $500,000 they had paid, and keep the additional $500,000. Therefore, the typical application of the collateral source rule can result in a plaintiff receiving an award greater than what the collateral source has paid. Clearly, in this case, if the jury had been told of the settlement between RTW and Defendant's liability carrier, it would have also been informed that insurance had negotiated the bills to a lower level, the medical bills had been paid at that negotiated amount, and she would likely not get any additional money from the jury. This is a clear departure from the typical functioning of the collateral source rule.

Under Colorado law, an agreement between the defendant and Plaintiff's worker's compensation carrier does not affect the rights of a plaintiff with respect to her pursuit of a tort claim. One matter of concern to the court in determining whether the settlement agreement between Defendants and RTW should have come in was the fact that Plaintiff was not involved in the settlement process. If Plaintiff received a no cause verdict from the jury, RTW would have still been on the line to pay the full amounts. If she received more than amount for which Defendants' settled with RTW, RTW would remain on the line to pay any additional special damages. Although Defendants argued that they fit in to the exception to the collateral source rule, stating that the collateral source rule is applicable unless the collateral recovery comes from the defendant or a person acting on his behalf, Plaintiff's collateral recovery is still only from RTW. The fact that Workers Compensation settled with Defendant's insurer does not

change anything with respect to Plaintiff. Workers Compensation was obligated to pay the sums it did to Plaintiff. It would be liable for that amount whether she received a big recovery or got nothing. The fact that RTW settled with Defendants should not have precluded Plaintiff from proceeding to trial as any other plaintiff would have.

The court concluded that the safest course was to keep the settlement out. It allowed the jury to consider this case like any other personal injury case and proper offsets and subrogation rights are now being addressed by the court after trial. Plaintiff was entitled to the reasonable value of medical care reasonably required and assessed as a result of her injuries. Defendants were not entitled to benefit from the fact that the health care providers in question received less than what they would have had Plaintiff not been injured in an employment-related activity. Evidence of the settlement agreement and the particulars of the agreement between Defendants insurer and RTW were not relevant to the issues to be decided by the jury. Any discussion of the particulars of the settlement agreement would likely have caused substantial prejudice to Hagen, confused the issues, and caused the jury to speculate about things it should not have been speculating about. To the extent that Defendants are entitled to an offset as a function of what their liability carrier paid to RTW, such offset is being properly addressed by the court after the verdict.

The fact that Defendants believed they were prejudiced by the court's ruling because it was not allowed to prove payment as a defense is unfounded. Defendants will receive the benefits of its settlement in post-verdict proceedings. Defendants claim that "it is highly likely the jury considered the overall amounts in setting general damages" and the fact that the jury was unaware of Defendant's payment of $122,000 of medical bills when calculating the award

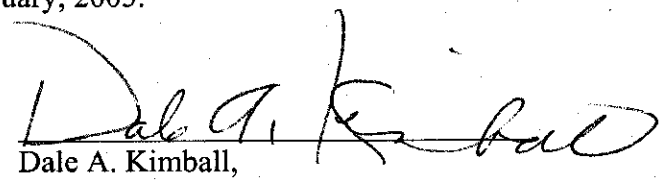
artificially inflated the award and resulted in substantial prejudice to Defendants. The court already had to weigh which party would have to bear the risk regarding the proper information to go to the jury and the court concluded that under the collateral source rule, the information regarding Defendants' payment to RTW was precluded. There were no prejudicial comments made at trail about a failure to pay. Therefore, the court concludes that Defendants have not presented adequate grounds for a new trial or remittitur.

CONCLUSION

Based on the above reasoning, Defendants' Objections to Judgment are DENIED, Defendants' Motion for New Trial is DENIED, Defendants' Motion for Leave to File Third Party Complaint is DENIED, and Defendants' Motion for New Trial or Alternatively a Remittitur is DENIED.

As discussed above, the court orders that Judgment shall be entered in this case as of February 11, 2005, in favor of Plaintiff and against Defendants in the amount of the jury verdict plus pre-judgment interest on past special damages minus the amount Defendants paid RTW. Plaintiff is directed to submit a revised Judgment including exact dollar amounts as of February 11, 2005. The Judgment shall also reflect that Plaintiff is entitled to compensable court costs to be determined post-Judgment and that that total amount will bear interest at the Judgment rate applicable on February 11, 2005 from February 11, 2005 forward. Upon receipt of Plaintiff's Judgment, the Clerk of Court shall enter such Judgment

DATED this 7th day of February, 2005.



Dale A. Kimball,
United States District Judge

tsh

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00411

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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BROOKE C. WELLS
U.S. MAGISTRATE

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BY DEPUTY CLERK

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U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MIGUEL SALCEDO-GONZALEZ, Defendant.	**ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL** Case No. 1:04CR147 DKW Magistrate Judge Brooke C. Wells

This matter has been reviewed by the Court on a Motion to Withdraw as Counsel filed by Robert K. Hunt, Assistant Utah Federal Defender; the Court being fully advised and good cause appearing, IT IS HEREBY ORDERED:

Robert K. Hunt, Assistant Utah Federal Defender, is hereby granted leave to withdraw as counsel of record for Defendant.

Dated this 7 day of February, 2005.

BY THE COURT:

HONORABLE BROOKE C. WELLS
United States Magistrate Judge

17

jmr

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 1:04-cr-00147

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

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DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

MARK HUESSER, Plaintiff, vs. JERRY JORGENSEN, et al., Defendants.	**ORDER** Case No. 2:04-CV-476 DB Judge Dee Benson

On October 30, 2004, the Court dismissed Plaintiff's case for failure to respond to an Order to Show Cause issued by the Court on August 24, 2004. In substance, Plaintiff's case was dismissed for failure to adequately plead exhaustion of prison grievances, which is tantamount to dismissing for failure to state a claim upon which relief can be granted.

Presently before the Court is Plaintiff's Motion to Reconsider filed December 3, 2004, which includes supporting documentation. In his present motion, Plaintiff claims that, in response to the August 24 Order to Show Cause, he mailed documents to the Court on September 2, 2004, proving he had exhausted his prison grievances before filing his original complaint. Those documents were never received by the Court, and Plaintiff was "shocked" to learn that his case had been dismissed. Plaintiff asks the Court to reconsider its order dismissing his case.

It is well established that courts are to construe the pleadings of pro se litigants liberally, interpreting procedural rules in favor of "deciding cases on the merits as opposed to dismissing them because of some minor technical defects." *U.S. v. Ceballos-Martinez*, 371 F.3d 713, 717 (10th Cir. 2004) (citations and quotations omitted). Plaintiff has provided the Court with documentation that apparently indicates he had exhausted his prison grievances as of June 10,

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2004. Taking Plaintiff's statements as true regarding his initial response to the Court's August 24 Order to Show Cause, it appears that Plaintiff was unable to apply with the Court's order due to circumstances beyond his control. Therefore, in an effort to liberally construe Plaintiff's pleadings and the technical requirements of filing those pleadings, the Court finds that this case was prematurely dismissed. The Court's order of October 30, 2004, dismissing Plaintiff's complaint is hereby VACATED. This case shall be reopened, and, pursuant to FED. R. CIV. P. 12(a)(1)(A), Defendants shall have 20 days from the date of this order to answer or otherwise respond to Plaintiff's complaint.

IT IS SO ORDERED.

DATED this 31st day of January, 2005.

Dee Benson
United States District Judge

kpf

United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00476

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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In the United States District Court for the District of Utah, Central Division

UNITED STATES OF AMERICA, Plaintiff, vs. JOSE BELEN LOPEZ, Defendant.	MEMORANDUM DECISION AND ORDER Case No. 2:02cr22 JTG

This matter is before the court on a timely Objection to the Report and Recommendation issued by Magistrate Judge Alba on September 28, 2004, regarding defendant's Motion to Suppress. Oral argument was heard on December 21, 2004, and at that time the court requested counsel to brief a narrow issue regarding the standard of review. Briefs were filed, and the matter was submitted for decision on January 7, 2005.

The court has carefully considered the circumstances of the case and the reviewed the record of the proceedings before Magistrate Judge Alba de novo, including also the filings by the parties. Being fully advised, the court now issues its Memorandum Decision and Order.

Procedural History

Defendant Jose Belen Lopez was indicted on January 9, 2002, for possession with intent to distribute a controlled substance, as well as possession of a firearm in furtherance of a

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drug trafficking offense. He was released on conditions set by the magistrate judge, and subsequently absconded. Defendant was rearrested on December 30, 2002, in the Southern District of Texas and since that time has remained in the custody of the U.S. Marshals.

Following his rearrest, defendant has claimed on two different occasions that his appointed counsel should be replaced. After due consideration and hearings, plaintiff was granted a new attorney. His current counsel, Mary Corporon, was appointed on September 9, 2003. Following appointment, Ms. Corporon filed a Motion to Suppress. This court referred motion to Magistrate Judge Alba under 28 U.S.C. § 636(b)(1)(B) and requested that he issue a Report and Recommendation.

Judge Alba conducted two evidentiary hearings, heard oral argument, and issued his Report and Recommendation on September 28, 2004. The court has reviewed the entire record including transcripts of testimony de novo, and after due consideration overrules defendant's objection, accepts the Report and Recommendation in all particulars, and denies defendant's Motion to Suppress.

Standard of Review

The standard of review for a magistrate judge's report and recommendation to which a timely objection has been made is as follows:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C. § 636 (b)(1).

De novo review is "statutorily and constitutionally required when written objections to a magistrate's report are timely filed with the district court." Summers v. State of Utah, 927 F.2d 1165, 1167 (10th Cir. 1992).[1]

In the present case, defendant filed a timely objection to the Report and Recommendation which we regard as a general objection to the conclusions drawn by the magistrate judge. This court therefore reviews de novo the entire Report and Recommendation.

Factual Background

On November 7, 2001, police executed a search warrant which allowed them to search defendant's person, vehicle, and home. The warrant was obtained following an investigation of the defendant which included two controlled buys of cocaine using a confidential informant. The execution of the warrant took place at two separate locations: a taco stand in a grocery store parking lot and the defendant's home.

On the date in question defendant was working at a taco stand with an assistant when several plain clothes police officers approached to order tacos. Other officers approached from different locations until defendant was surrounded. Once defendant put down the kitchen

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[1] The court also cited Gee v. Estes, 829 F.2d 1005, 1008 (10th Cir. 1987); Jeffrey S. by Ernest S. v. State Bd. of Educ., 896 F.2d 507, 512 (11Cir. 1990); United States v. Shami, 754 F.2d 670, 672 (6th Cir. 1985), and drew sharp distinction where timely objections have not been made, "In contrast, the district court is accorded considerable discretion with respect to the treatment of unchallenged magistrate report. In the absence of timely objection, the district court may review a magistrate's report under any standard ir deems appropriate." Id. at 1167 (citing Thomas v. Arn, 474 U.S. 140, 150, 154, 106 S.Ct. 466, 472, 474, 88 L.Ed.2d 435 (1985).

knife he was using to prepare the tacos, Officer Wyant, the case agent, and the other officers drew their guns in the "low and ready" position and identified themselves as police officers. Defendant hesitated a few seconds but eventually surrendered and was taken into custody. Defendant's assistant was also taken into custody for a short period of time.

Defendant was taken to a police car by Deputy Barney where he waited approximately 10 to 15 minutes while officers secured the scene. Defendant then was given his Miranda warnings in English. At the hearing, when asked to list the rights defendant was given Officer Wyant stated: "I explained to Mr. Lopez that he had the right to remain silent, that anything he said could and would be used against him in a court of law. That he had the right to speak to an attorney before speaking to officers. That he had the right to stop speaking to officers at anytime should he choose. I asked Mr. Lopez if he understood his rights which he advised me that he did, and then he declined speaking to me." (Tr. at 20). Defendant asked Officer Wyant for advice and was told that neither he nor any other officer could provide him with any legal advice. Officer Wyant then told all other officers on the scene that defendant had invoked his right to counsel and no one was to speak with him or ask him anything.

While defendant was sitting in the police vehicle with Deputy Barney, officers searched his van and found approximately four ounces of cocaine and other drug paraphernalia and packaging materials. After these items were found defendant declared he was a "mule" and "not the big guy" and asked to speak to an officer. Officer Wyant was called back to the police vehicle and told defendant that because he had invoked his right to counsel they could not speak.

Once the scene at the taco stand was secured, officers at defendant's home were

notified and a search began. The officers at the home initiated a "knock and talk" procedure. When there was no answer at the door after 30 to 45 seconds, officers made a forced entry. Defendant's wife and two young children were home. Two firearms were found in the home along with $13,000 and ammunition. One firearm was found by the bedside and the other was near the money in a dresser. The garage was also searched. It contained a firearm, ammunition, cocaine, marijuana, and plastic packaging.

Defendant's Objections

In his Motion to Suppress, defendant moved the court to suppress all evidence seized during the search of his vehicle, all evidence seized during the search of his home, and any and all custodial statements made by him. Magistrate Judge Alba concluded that no Constitutional right had been violated in the execution of the warrant and all statements made by the defendant were voluntary. The magistrate recommends that the court should deny the Motion to Suppress.

Defendant makes the following four objections to the Report and Recommendation: 1) defendant challenges Magistrate Judge Alba's conclusion that the warrant was not overly broad, and that it was sufficient to cover guns which were found even though guns are not specifically mentioned in the warrant; 2) defendant objects to the conclusion that the officers complied with the "knock and announce" rule; 3) defendant challenges the magistrate judge's conclusion that the Miranda warning analysis need not be applied because the statements made by defendant were voluntary and therefore admissible whether or not the Miranda warning

as given was defective; and 4) defendant objects to the conclusion that his statements were voluntary. These will be discussed seriatim:

1. Particularity of the warrant - overbreadth

In his Motion to Suppress defendant requested all evidence seized under the warrant be suppressed because the warrant was overly broad and therefore invalid, specifically objecting to Paragraph 7 of the recitation of "Items to be Seized" in the warrant. Magistrate Judge Alba concluded that the warrant was not overly broad because Paragraph 7 was in the context of the other six paragraphs, and limited by the nature of the offense. The magistrate judge reasoned that because the nature of the crime is drug trafficking, it would be virtually impossible to describe all of the evidence that might be relevant to such a crime, and that the warrant was not so broad as to allow officers to seize anything they saw. Also, Judge Alba found that even if Paragraph 7 were determined to be overly broad it would not invalidate the entire warrant, but only the items which would fall under the last paragraph – here, the guns. However, because the officers relied on the warrant in good faith, the magistrate recommends that the guns may be allowed to be admitted in evidence under the good faith exception. Further, the magistrate recommends that since at least one of the guns was in plain view, it may be allowed to be admitted under the plain view exception.

Analysis

The Affidavit for Search Warrant and the Search Warrant were submitted and received into evidence as Government Exhibit 1 and 2 at the evidentiary hearing. Both of those documents contained an attachment entitled "Items to be Seized" which lists seven categories of

items that were covered by the Affidavit and Warrant.[2]

Defendant's objection goes only to Paragraph 7, which he claims is so broad as to make the entire warrant invalid. In the alternative, defendant claims that even if the warrant is valid, the firearms which were seized but not listed in the warrant with particularity should be suppressed.

The Tenth Circuit has ruled that:

> The particularity requirement [for search warrants] ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.

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[2] The seven categories of items so listed are:

1. Cocaine; a white crystal substance in powder, solid, or rock form, a Schedule II controlled substance.

2. Packaging material; to include but not limited to plastic bags, tape, paper bindles cut into squares, scales, and material used to dilute the potency of the cocaine.

3. Drug paraphernalia; to include but not limited to syringes, spoons, cotton balls, mirrors, razor blades, short straws, metal or glass pipes, tubes, and other items used to make or ingest [sic.] cocaine.

4. Residency papers' to include but not being limited to utility receipts and or bills, rental/lease agreements, and articles showing occupancy of the premises.

5. U.S. currency believed to be inclose proximity to the narcotics being searched for, and any and all items determined to be collateral or proceeds from narcotics transactions.

6. Narcotic recordations; to include but not being limited to price list, amounts sold, times, dates, amounts purchased, financial gain, and especially drug indebtedness.

7. <u>Items determined to be fruits and instrumentalities of the crimes of possession and distribution of a controlled substance.</u> (Emphasis added).

Voss v. Bergsgaard, 774 F.2d 402, 404 (10th Cir. 1985). In Voss, the court invalidated the warrant because the language did not restrict the items to be seized to those relating to a specific crime, "but what it gave was carte blanche for government agents to take anything that they saw." Id.

The language of the search warrant at issue in this case is not as broad as that in Voss. This court holds that the warrant in this case is not overly broad as to the first 6 paragraphs in which the items to be seized are specifically listed. By its presence in the warrant neither does Paragraph 7 invalidate the warrant as a matter of law; in the alternative defendant claims that since guns are not listed anywhere in the warrant, including Paragraph 7, they should be suppressed in any event. Paragraph 7 provides that "Items determined to be fruits and instrumentalities of the crimes of possession and distribution of a controlled substance." It is not overly broad so as to invalidate the warrant, or so as to suppress the guns which are not described in the warrant. Officer Wyant testified at the hearing: "[I]t is very commonplace for individuals that distribute narcotics and use narcotics to carry weapons." (Tr. 1/14/04 at 23-24). That is common knowledge. This court finds that guns are sufficiently commonplace in commission of drug trafficking offenses to be considered "fruits and instrumentalities" of such offenses. Accordingly, this court independently concludes that the language of the warrant is neither so broad as to invalidate the entire warrant, nor is the language in Paragraph 7 so broad as to invalidate the guns seized under it because the items seized are sufficiently connected to the charged offense.

2. Knock and Announce

Defendant argued in his Motion to Suppress that the Fourth Amendment was violated because the officers only waited 30 to 45 seconds before entering the home and were never denied admittance. Judge Alba concluded that the officers were constructively denied admittance because they had waited a reasonable amount of time before entering the home by force. Defendant now objects to such conclusion and the court reviews the issue de novo.

Analysis

The Supreme Court has ruled that fifteen to twenty seconds without a response, is a sufficient wait time when easily disposable evidence is involved. United States v. Banks, 540 U.S. 31, 38 (2003). In Banks officers had a warrant to search defendant's apartment for cocaine and evidence of drug dealing. When they arrived they called out "police search warrant" and knocked on the door hard enough for the officers in back of the apartment to hear. Id. at 33. After "15 to 20 seconds with no answer, the officers broke open the front door with a battering ram." Id. The defendant claimed that 15 to 20 seconds was not enough because he could not hear the knock on the door from the shower. However, the Court found that "the facts known to the police are what count in judging reasonable waiting time." Id. at 39. The Banks court also approved other cases that had determined "similar wait times to be reasonable in drug cases with similar facts including easily disposable evidence." Id. at 38.

In the case at bar, defendant's home was being searched for cocaine, packaging material, drug paraphernalia, and other related items. When officers arrived at the home to execute the search warrant they knocked on the door and awaited a response. When no response

came they continued to knock on the door, loudly stating that the police were at the door, and demanded entry. (Tr. 3/11/04 at 112). After 30 to 45 seconds, the officers forced entry into the home with use of a door ram. (Tr. 3/11/04 at 112-113).

This court independently concludes upon review of the facts of this case that the 30 to 45 second interval of time between the officers first knock and the subsequent entry was a sufficient amount of time to elapse prior to forcible entry. The facts in this case are similar to those in Banks because the evidence to be found was the kind that was easily disposable. Given these circumstances the officers were reasonable in waiting 30 to 45 seconds without response before entering the home.

3. Claimed Defect in Rendition of the Miranda Warning.

Defendant argues that his Miranda rights were violated and that his statements should be suppressed first because the warning given him was deficient and second because the statements were not voluntary. The magistrate concluded that the statements were indeed voluntary, and therefore the judge did not consider the sufficiency of the Miranda warning. Defendant objects to this conclusion by the magistrate and reasserts before this court his arguments regarding the Miranda warning.

Defendant was detained in a patrol car while officers secured the taco stand. Deputy Barney was assigned to sit with the defendant while the taco stand was being secured. During the time Deputy Barney was in the car with defendant, defendant asked Deputy Barney what was going on and Deputy Barney explained that a search warrant was being served. After about 15 to 20 minutes Officer Wyant came to the patrol car along with other officers and

defendant was advised by Officer Wyant that he was under arrest and was given his Miranda Rights. Officer Wyant then showed defendant the warrant for his person, residence, and vehicle and placed defendant under arrest. Subsequent to these actions, defendant asked Officer Wyant what he should do. Wyant told him that he was not an attorney, and that officers could not advise him. Defendant then said that he did not want to talk to the other officers. After this exchange Officer Wyant told all other officers on the scene that defendant had declined to speak with them and no one was to ask him questions. None of the officers attempted to talk to defendant following the instructions from Officer Wyant. Deputy Barny was left to guard the defendant in the patrol car.

About two to three minutes after Officer Wyant left, defendant told Deputy Barny that he was "just a mule" and "not the big guy." These statements were made without a question being asked and wholly spontaneously. Deputy Barney testified that he said nothing, but that defendant repeated this statement again. Deputy Barny informed him that he could not ask any questions or talk to him, but would bring over Officer Wyant when he was available. Officer Wyant was informed of the statements made by defendant and refused to talk to defendant because he considered that defendant had invoked his right to counsel.

Analysis

Defendant argues that the Miranda warning was defective because he was not informed that if he could not afford an attorney one would be provided to him.[3] From what is set

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[3] Officer Wyant testified that he gave the defendant his rights from memory. When asked to recite those rights in court, Wyant stated:

forth in footnote 4 it seems likely that defendant was advised of his right to counsel even though Officer Wyant's testimony in court omitted that matter. Magistrate Judge Alba did not render a finding or recommendation about that matter, since he ruled that defendant's statements were voluntary and would be admissible even if defendant were un-Mirandized. This court agrees, and likewise makes no finding as to whether there was a defect in the rendition of the Miranda warning. However, even if the Miranda warning was defective the Tenth Circuit has concluded that voluntary un-Mirandized statements are admissible where such statements were not elicited by interrogation even if the defendant is in custody. United States v. Fisher, 2002 WL 3156480 (10th Cir. 2002) (unpublished). This court rules that if the statements made by defendant to Deputy Barney were truly voluntary, failure to give the Miranda warning would not render the statements inadmissible.

> "I explained to Mr. Lopez that he had the right to remain silent, that anything he said could and would be used against him in a court of law. That he had the right to speak to an attorney before speaking to officers. That he had the right to stop speaking to officers at anytime should he choose. I asked Mr. Lopez if he understood his rights which he advised me that he did, and then he declined speaking to me." (Tr. at 20).

However, Officer Wyant testified that he refused to talk to defendant after the Miranda warning was given because defendant had requested his right to counsel. So it appears that Wyant believed that defendant had invoked his right to counsel. In this regard Deputy Barny testified that as Officer Wyant recited the Miranda warning he read his copy and followed along: "I don't remember seeing if [Officer Wyant] had something in his hand reading them, but I read mine just because I am sort of a newer deputy so I read mine. I keep it in my left pocket." (Tr. 59-60). Since Deputy Barney testified that he was reading along on his own card while Officer Wyant was giving defendant his Miranda rights, it would appear likely that Barney would have corrected Wyant if part of the warning was left out.

4. Voluntariness of Defendant's Statement

The statement sought to be suppressed is defendant's unsolicited statement that he was "just a mule" and "not the big guy." Defendant argues that given the circumstances of the arrest at gun point, and that he did not know that a Spanish interpreter could be provided to him, his statements cannot be considered to be voluntary. In this regard, defendant objects to the magistrate's conclusion that he was able to understand his rights given to him in English, even though he conversed with officers in English about tacos.

Analysis

The Supreme Court has declared that "The sole concern of the Fifth Amendment , on which Miranda was based, is governmental coercion." Colorado v. Connelly, 479 U.S. 157, 170 (1986). In this regard, this court has ruled that the crucial matter is whether the government has proved that an alleged statement is "voluntary, i.e., not coerced." United States v. Oldman, 156 F.Supp.2d 1252, 1260 (D. Utah 2001), citing Connelly, 479 U.S. at 168.

None of the reasons given by defendant to support the claim that his statements were involuntary are supported by the evidence. Defendant has never claimed that he was coerced by the officers to give the statements he made. While it is true defendant speaks Spanish, the officers were convinced that he could communicate in English because of conversations at the taco stand. Deputy Barney testified that he had a whole conversation in English with the defendant about carnitas meat. (Tr. 1/14/04 at 57). Further, the statements defendant seeks to suppress were made in English and show that defendant understood what was happening and the implications of the evidence seized.

After reviewing these facts, the court independently concludes that defendant's statements to Deputy Barney were voluntarily made because they were spontaneous and not the product of any interrogation or coercion. The officers strictly complied with Officer Wyant's order not to question the defendant after defendant stated that he did not want to talk to the officers. Accordingly, no interrogation took place. Determining the defectiveness of the Miranda warning is unnecessary because a truly voluntary statement which is not the product of interrogation or coercion is admissible whether or not the Miranda warning is given.

For the forgoing reasons, Defendant's Motion to Suppress is hereby DENIED.

IT IS SO ORDERED.

DATED this 7th day of Feb., 2005.

J. Thomas Greene

J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

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United States District Court
for the
District of Utah
February 7, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cr-00022

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

BULLETPROOF TECHNOLOGIES, INC., Plaintiff, vs. NAVITAIRE, INC., Defendant.	ORDER Case No: 2:03 CV 428 PGC District Judge Paul G. Cassell Magistrate Judge David Nuffer

The magistrate judge has considered Defendant Navitaire's motion for expedited treatment of its motion to compel discovery, and has reviewed easyJet's opposition to the motion for expedited treatment.

IT IS HEREBY ORDERED that the motion for expedited treatment is GRANTED, in that:

a. easyJet shall file and serve any response to the motion to compel on or before 4:00 p.m. Wednesday February 9, 2005; and

b. the parties shall appear for hearing on the motion to compel Thursday February 10, 2005, at 2:30 p.m., Room 477, U.S. Courthouse, 350 South Main Street, Salt Lake City, Utah.

February 7, 2005.

BY THE COURT:

David Nuffer
U.S. Magistrate Judge

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United States District Court
for the
District of Utah
February 7, 2005

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