

## FRAUD IN THE CONTEXT OF MARITIME PERSONAL INJURY

According to *Black's Law Dictionary*, fraud is a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed. As distinguished from negligence, it is always positive, intentional fraud, a generic term, embraces all multifarious means which human ingenuity can devise and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated. Johnson v. McDonald, 170 OK 117, 39 P.2d 150.

According to *The American Heritage Dictionary of the English Language*, "fraud" is a deception deliberately practiced in order to secure unfair or unlawful gain. A piece of trickery, a swindle, a cheat; one who assumes a false pose, an imposter, a sham.

On the other hand, "misrepresentation" involves giving an incorrect or misleading representation of some important element or item or fact relating to the claim.

Those definitions provide us with a summary of the issue assigned me, namely fraud in the context of maritime personal injury claims.

This will not deal with situations where the maritime employee has sustained a work-related injury and the issue involves the nature and extent of the employee's injury or disability. Sometimes a claimant, while not necessarily a malingerer, nevertheless exaggerates symptoms. That doesn't constitute evidence of fraud within the meaning and intent of today's topic. That issue is dealt with as it bears on credibility and demeanor when evaluating a case for settlement, or when a jury evaluates the claim on its merits.

A seaman's willful concealment of a disabling or medical condition may provide a defense to maintenance and cure for disabilities from such a condition arising later. This defense is sometimes known as the "McCorpen rule." McCorpen stated a defense on the ground of willful concealment requires proof of concealment, materiality, and a causal link between the prior and the subsequent disability. McCorpen v. Central Gulf S.S. Corp., 396 F. 2d 547 (5<sup>th</sup> Cir. 1968).

In Brown v. Parker Drilling Offshore Corp., 2005 U.S. App. Lexis 125 (5<sup>th</sup> Cir. 2005); the fifth circuit remanded for entry of judgment notwithstanding a jury verdict that the plaintiff had not misrepresented his medical condition when he checked "no" on the employer's medical questionnaire which asked if he had "past or present back and neck trouble" Brown argued that he had made no misrepresentation as the question asked about a combination of "back and neck trouble", and he had no history of neck problems. Also he said he didn't understand the term "trouble", as he had no history of a "serious injury" which he claimed to interpret as "trouble." The Brown court said to establish the defense of "willful concealment", an employer must show the claimant intentionally misrepresented or concealed medical facts concerning a prior injury or condition; the non-disclosed facts were material to the employer's decision to hire the claimant; and there is a connection between the withheld information and the injury at issue later.

Hernandez v. Bunge Corp., 814 So. 2d 783 (La. App. 2002) held a seaman may forfeit his right to maintenance and cure when he fails to disclose, or misrepresents material medical facts, when asked in an employment application, if three criteria are met: the seaman intentionally misrepresented or concealed information concerning a prior injury or condition, which is material to the employer's decision to hire, and a causal connection exists between the non-disclosed injury or condition and the injury and condition complained of in the case.

Laprarie v. Hercules Offshore Corp., 817 So. 2d 149 (La. App. 2002) involved non-disclosure of a back condition that was not disabling at the time of hire, but involved an increased probability of future disability.

Britton v. U.S.S. Great Lakes Fleet, Inc., 302 F.3d 812 (8<sup>th</sup> Cir 2002) involved a deckhand who injured his back a few weeks before he was first employed. He indicated on his post-offer medical history form that he had suffered previous back strain, but checked "no" where back injury and disc disease were listed. Almost two years after he began employment, he hurt his back while opening a 160-pound stairwell cover. The trial court granted summary judgment for U.S.S. Great Lakes Fleet on the grounds that Britton's failure to disclose the exact nature of his prior back injury rendered him ineligible for maintenance and cure. The appellate court remanded since it was a jury issue whether the employer proved it would not have hired Britton if he had fully disclosed the medical facts of his prior back injury.

The Ninth Circuit in Courtney v. American Seafoods Co., 42 Fed. Appx. 984 (9<sup>th</sup> Cir. 2002) said, "Fraud bars maintenance and cure 'where a seaman conceals a medical condition that he knows or should know is related to the illness or injury for which maintenance and cure are required.'" The court held in that case that concealment doesn't bar Jones Act or unseaworthiness claims, but did bar Courtney's maintenance and cure claim.

Guerra v. Arctic Storm, Inc., 2004 AMC 2319 (W.D. Wa. 2004) held the "intentional concealment defense does not require subjective intent if the seaman fraudulently concealed information regarding a preexisting condition about which he was directly questioned.

Weatherford v. Nabors Offshore Corp., 2004 U.S. Dist. Lexis 3435 (E.D. La. 2004) granted summary judgment to the employer when the seaman claimant failed to disclose a disabling condition in an application for employment.

Guidry v. Jen Marine LLC, 2004 U.S. Dist. Lexis 3771 (ED La 2004) followed the same rule, but didn't grant summary judgment because of a fact issue whether the seaman's failure to disclose prior back injuries were material to the employer's decision to hire the seaman.

False v. Gulf Tran Inc., 873 So. 2d 718 (La. App. 2004) awarded maintenance and cure on a finding the seaman didn't intentionally misrepresent or conceal the fact he was a diabetic.

Burkert v. Weyerhaeuser S.S. Co., 350 F.2d 826 (9<sup>th</sup> Cir 1960) held a seaman who had a good faith belief that he was fit for duty will not be denied maintenance and cure if he is not directly asked about the preexisting condition. A good faith belief on the seaman's part that he was fit for duty avoids the defense. Sammon v. Central Gulf S.S. Corp., 442 F.2d 1028 (2<sup>nd</sup> Cir 1971); Courts v. Erikson, 241 F.2d 499 (9<sup>th</sup> Cir. 1957); Capone v. St. Victoria, 1989 AMC 2785 (D. Ma. 1989).

Guillory v. Northbank Towing Cop., 1994 AMC 1071 (W.D. La. 1993) found willful concealment in a seaman's willfully failing to check a box on an employment application relative to prior back injuries.

Ruiz v. Plimsoll Marine, Inc., 782 F. Supp. 315 (M.D. La. 1992) held a seaman who was able to perform his duties for years after a prior injury did not willfully fail to disclose his prior disability.

Quiming v. Int'l Pacific Enterprises Ltd., 773 F.Supp. 230 (D. Hi. 1990) held intentional avoidance of disclosing information relative to a preexisting back condition when the employer made a pre-hiring inquiry as to that condition was willful concealment and provided a defense to the maintenance and cure claim.

Walker v. Cambridge Tankers, Inc., 1997 AMC 2785 (Ca. Sup. Ct. 1997) found willful concealment where the seaman falsely answered questions about a recurring back problem during an annual physical required by a union contract, where the employer relied on the union clinic card as evidence of fitness for duty. Walker differentiated between non-disclosure and intentional concealment. Non-disclosure was defined as failure to disclose a presently disabling condition when the employer does not require a pre-employment medical exam or interview; concealment was defined as when a seaman intentionally misrepresents or conceals material medical facts, the disclosure of which is plainly desired in a required pre-employment medical exam or interview.

Henry v. Gulf Dumar Marine, Inc., 2000 AMC 2919 (E.D. Pa. 2000) found fact issues relative to whether the seaman intentionally concealed a preexisting disability where he answered "no" to a question about prior back injury, but answered "yes" to a question asking if he'd received compensation benefits or had surgeries, when applying for employment with Gulf Dumar Marine.

Weeks Maine, Inc. v. McDevitt, 2004 U.S. Dist. Lexis 23708 (E.D. Pa. 2004) held that failure of a seaman to disclose an ongoing chronic back condition was not "intentional misrepresentation" with respect to a question on a pre-employment medical questionnaire whether he had suffered from "head or spinal injuries". He contended he understood that term to refer to traumatic injury as opposed to a recurring back condition.

There was a question in Deisler v. McCormack Aggregates Co., 43 F3d 1074 (3<sup>rd</sup> Cir. 1995) concerning whether Deisler's failure to disclose a prior back injury was material to McCormack's decision to hire him. The court said, "nondisclosure of a preexisting injury, without more, will not result in a seaman's loss of maintenance and cure. Such a forfeiture will not occur unless Deisler intentionally misrepresented or concealed medical facts that were material to the decision to hire Deisler. In addition, there must be a nexus between the improperly concealed material information and the disputed injury."

Smith v. Apex Towing Co., 949 F. Supp. 667 (N.D. Ill. 1997) followed Deisler. Materiality required some proof that disclosure of Smith's true medical status would have affected Apex's decision to hire him.

Lancaster Towing, Inc. v. Davis, 681 F. Supp.386 (N.D. Miss. 1988) held intentional non-disclosure or misrepresentation of medical facts to an employer is a defense to maintenance if the misrepresented or non-disclosed facts are material to the employer's decision to hire the seaman and there is a connection between the withheld information and the injury which is eventually sustained.

There must be a causal connection between the concealed or misrepresented condition and the following injury. Omar v. Sea-Land Service, Inc., 813 F.2d 986 (9<sup>th</sup> Cir 1987); Howard v. A.S.W. Well Service, Inc., 1992 AMC 2040 (W.D. La. 1991).

The case of Adriance v. United States of America, case number 92-1260-B (S.D. Cal. 1993), a case with which I was involved as the claim investigator, illustrates these issues.

Douglas Adriance held a third mate's license, unlimited tonnage, and had been licensed as a third mate since 1971. He graduated from the California Maritime Academy in 1971 with a B.S. degree in nautical sciences. He worked as a fireman on land or as a third mate on ships. He sailed as a third mate after graduating from the California Maritime Academy, then went to work in 1974 for the city of Chula Vista Fire Department, as a fireman, where he stayed until December 1990. During his career as a fireman, Adriance worked as a captain, as a member of the fire prevention unit, engine company, and truck company. The degree of physical exertion as a day-to-day fireman depended on the particular day. Some days he'd have to carry heavy people down ladders.

From roughly 1980 through 1990 Adriance also worked part-time for National Steel & Shipbuilding Co. in San Diego delivering ships that they'd built or refurbished. He helped deliver between 30 and 35 ships over that 10-year span. He'd sail on those ships as a watch-standing licensed officer.

Adriance left the Chula Vista Fire Department in December 1990, and rejoined the Masters Mates & Pilot's union. On January 8, 1991 he shipped out on the MAINE as a third mate. The MAINE was a ready reserve force ship deployed in Operation Desert Storm and Operation Desert Shield.

At a pre-employment physical examination on January 2, 1991 Adriance filled out a form regarding his health and medical condition. He did not check the box indicating prior back injuries. He signed the form certifying all his answers were “true and correctly recorded” and represented to the ship company that he was “physically and mentally fit for sea duty” to the best of his knowledge.

Aboard the MAINE, Adriance was assigned the 12-4 watch. He was in overall charge of the ship during his watch. When the ship was navigating, he’d stand a watch on the bridge. He also served as the ship’s medical officer. In port he’d sometime stand a gangway watch, and would supervise cargo operations. As the one in overall charge of the ship during his watch, he admitted it was his job to remedy any safety problem that arose, including arranging for the cleanup of any slippery conditions.

Adriance was hurt aboard the MAINE on February 3, 1991. The ship was in Italy then, loading heavy military equipment. That was the first time since he’d boarded the ship that cargo operations were underway.

On February 3<sup>rd</sup> Adriance relieved the chief mate just before midnight. Cargo operations were already underway when he came on duty. He was told by the chief mate that the forward crane operator was running the gear too fast, overheating the brake, and occasionally accidentally hitting the emergency shut-off switch with his arm. When that would happen, Adriance would have to climb up to the crane cab and turn the circuit breaker back on. The crane ladder leading up to the crane cab was a 360-degree vertical ladder encircling the crane pedestal. The rungs were round, painted, and welded to the sides of the ladder.

Three or four times earlier during that shift Adriance had climbed up the crane ladder to re-set the circuit breaker, then climbed back down, all without incident. He said he’d noticed a film of slippery crane lubrication oil covering the ladder rungs and surrounding areas. He said the crane seals were old and wearing out, which was why the oil was leaking out. He admitted it was his job as third mate to clean up this oil film if he thought it was necessary, or to arrange for one of the other crew to do so. He didn’t try to clean it up, and didn’t ask any one else to do so.

At about 0300 hours, Adriance for the fourth or fifth time had to climb up to the crane cab to re-set the circuit breaker. He made it up with no problem, re-set the circuit breaker, then began climbing down. Close to the top of the ladder, soon after he began descending, his hand slipped off a rung, causing him to lose his balance and fall of the ladder. He thought the rung his hand slipped from was the first rung down from the top. He landed on the deck more or less flat-footed, then jack-knifed forward and fell to the deck on his right side. He thought he fell about 10’. The accident was un-witnessed.

Adriance finished his shift, went to his room, and took some aspirin. He wrote out and accident report and gave it to the chief mate the next day. The first notation in the ship’s medical log of the incident was on March 1, 1991, almost a month later.

Adriance denied having been in any prior accidents, except for a minor incident in 1988 in which he hurt his back, and which he said cleared up after one physical therapy session.

Adriance first saw a French doctor at a port in Africa in early March 1991. The doctor took x-rays of his back, and gave him a not-fit-for-duty slip. A day or so later he was medically discharged and flew back to the United States.

The morning after he arrived home Adriance's wife drove him to the emergency room at Mercy Hospital in San Diego. His back was x-rayed and he was given Tylenol. The examining doctor told him he thought he had a fractured vertebra, and sent him home to rest in bed.

Dr. Sam Assam, Adriance's then treating physician, read a lumbar CT scan to show a ruptured disc at the L5-S1 disc level, and recommended he undergo surgery. Adriance didn't want surgery, and was referred for physical therapy instead.

Adriance then saw Dr. Dickinson, a San Diego orthopedic surgeon, and Dr. Cleary, a San Diego neurosurgeon. Dr. Dickinson confirmed a ruptured disc diagnosis and recommended surgery. Dr. Cleary likewise told him he needed surgery.

Adriance denied he was receiving any Social Security benefits, disability or otherwise, and had not applied for any.

In the course of claim investigation we learned from the City of Chula Vista that Adriance had been involved in two on-the-job accidents in which he hurt his back, one severely enough that he received a disability retirement from the city as a result.

On December 31, 1990, three days before Adriance's January 2, 1991 pre-employment physical during which he denied all prior back injury and held himself out as being fit for sea duty, Adriance retired from his career as a firefighter with the Chula Vista Fire Department because he was "physically incapacitated by orthopaedic disability" due to several on-the-job back injuries.

Adriance's medical records from Drs. Assam, Dickinson, and Cleary each diagnosed a herniated disc in Adriance's low back at the L5-S1 disc level, with right-side radiculopathy. In the history section recited by each physician there was no mention of Adriance's course of treatment for similar, if not identical, symptoms following his two accidents while with the fire department.

It would seem Adriance concealed from the physicians who examined or treated him following the MAINE incident the nature and extent of his prior back injuries with the fire department.

Records from physicians who treated Adriance following his fire department back injury reflect their diagnosis as late as December 1990 were exactly the same as his MAINE

accident diagnosis; There was no significant change in his condition as a result of the alleged incident aboard the MAINE. None of his treating physicians concerned with his fire department injury were the same as his treating physicians concerned with the MAINE injury.

Dr. Ronald Takemoto was Adriance's primary treating physician concerned with the fire department injury. He diagnosed an L5-S12 herniated disc, along with S1 radiculopathy. His December 11, 1990 diagnosis was consistent with his findings in February 1990.

Dr. Jerome Litvinoff in February 1990 said he reviewed Adriance's lumbar MRI films to show a moderate-sized central and right-sided disc protrusion. Dr. Alfred Luppi in March 1990 read lumbar MRI films to suggest a moderate L5-S1 disc herniation on the right.

All Adriance's treating physicians concerned with the fire department injury stated they believed his condition was solely attributable to the history Adriance gave them of hurting his back on the job with the fire department.

Not knowing his full medical history, all Adriance's treating physicians concerned with the MAINE injury attributed his problems solely to the MAINE incident. He denied to all of them any prior back injury.

Adriance then sued the United States in federal court in the southern district of California, the entity he must sue to recover for a Jones Act personal injury claim when working aboard a government ready reserve force ship. The MAINE was a U.S. Maritime Administration vessel operated by American Foreign Shipping pursuant to a ship manager's contract with the United States.

Judge Clarence Newcomer found Adriance "concealed, misrepresented, and failed to disclose a prior injury during a fitness-for-duty examination." He intentionally withheld information about his prior back injuries. The judge cited Omar v. Sea-Land Service, Inc., 813 F.2d 986 (9<sup>th</sup> Cir. 1987) and Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 531 (9<sup>th</sup> Cir. 1962), and concluded "a seaman who conceals, misrepresents, or fails to disclose a prior injury or illness during a fitness-for-duty examination is not entitled to maintenance and cure for a current condition if it is identical to or there is a causal link with the pre-existing, concealed disability."

Judge Newcomer found the United States was entitled to recover from Adriance "all amounts it paid because the alleged injuries sustained aboard the SS MAINE are the precise injuries plaintiff concealed prior to his employment...." He was ordered to re-pay \$792 in maintenance at \$8 per day over the 99-day period it had been paid, along with \$4,923.90 in cure expenses.

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DOUGLAS ADRIANCE : CIVIL ACTION  
: :  
v. : :  
: :  
UNITED STATES OF AMERICA : NO. 92-1260-B (CM)

Newcomer, J.

October 8, 1993.

After a two day bench trial on October 7-8, 1993, and after considering the testimony of the witnesses, the admitted exhibits and the arguments of counsel, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. At all times in question the SS MAINE was a United States Maritime Administration vessel being operated by American Foreign Shipping ("AFS") pursuant to a ship manager's contract with the United States.

2. The plaintiff, Douglas Adriance, was employed on behalf of the United States by its agent AFS as the ship's Third Mate on February 3, 1991.

3. The ship was loading cargo in Livorno, Italy at the time of the plaintiff's alleged fall from an onboard ladder.

4. Plaintiff claims to have fallen approximately five or six feet down a ladder which had been at least partially covered by oil. Adriance's alleged fall was unwitnessed, and remained unreported until sometime the next morning. Mr. Adriance knew of the requirement to immediately report accidents but did not do so.

5. Mr. Adriance had climbed the same ladder that evening

prior to his asserted fall without incident or difficulty. Plaintiff stated that he saw oil on the ladder on those earlier transits. At that time, plaintiff did not initiate any action to correct the oily condition. Plaintiff, an officer aboard the vessel, knew of the condition and did not attempt to clean or alter the condition in any manner either before or since the alleged accident.

6. Mr. Adriance had been assigned, as part of his duties, to be the ship's medical officer, yet there is no contemporaneous notation regarding his alleged accident in the ship's medical log. The first notation of any kind is found on March 1, 1991.

7. There is no notation in the February 3, 1991 deck log regarding the supposed condition of the ladder.

8. Mr. Adriance's first request to the Captain for medical attention was on March 1, 1991. Mr. Adriance did not lose any time from work due to back problems between the date he was allegedly injured, February 3, and the date he was found unfit, approximately March 3. He worked substantial hours of overtime in that month, numbering well over one hundred hours.

9. Prior to being dispatched for the job on the vessel, Mr. Adriance was required to have a "sign-on physical examination" to determine whether he was fit-for-duty on board a ship.

10. At his pre-employment examination on January 2, 1991, Mr. Adriance was required to fill out a form regarding his health and medical condition for the physician. He did not check the box indicating prior back injuries on the form. He did sign the form

certifying that all of his answers were "true and correctly recorded" and representing to the shipping company that he was "physically and mentally fit for sea duty" to the best of his knowledge. Therefore, plaintiff concealed, misrepresented, and failed to disclose a prior injury during a fitness-for-duty examination.

11. On December 31, 1990, three days before the January 2 pre-employment physical during which he denied all prior back injury and held himself out as being fit for sea duty, Mr. Adriance was retired from his career as a firefighter with the Chula Vista Fire Department because he was "physically incapacitated by orthopaedic disability" due to several on-the-job back injuries.

12. The doctor who determined that Mr. Adriance was permanently disabled and unable to return to work as a firefighter in December of 1990, diagnosed "lumbar disc herniation". Although Mr. Adriance now claims he is permanently disabled from seagoing employment and is unable to work as an officer on a ship, there is no credible testimony to persuade the court that any injuries claimed by plaintiff were the result of a fall aboard the SS Maine. In fact, the injuries plaintiff claims to have sustained aboard the SS Maine were the precise injuries which rendered him unfit to continue his employment as a firefighter a month earlier.

13. Plaintiff's duties aboard the SS Maine were similar to his duties as a firefighter in that both required climbing, lifting, bending, and being physically capable of fighting shipboard fires and reacting to other emergencies.

14. There was no credible evidence to suggest any negligence on the part of the United States, or its agents or employees, or that any unseaworthiness caused or contributed in any manner to the plaintiff's alleged injuries.

15. Mr. Adriance continued to deny a history of significant back problems to each of the health care providers he saw after returning to the United States from his service aboard the SS Maine.

16. Plaintiff was not a credible witness due to his multiple misrepresentations concerning his prior back problems and due to contradictions in his testimony.

17. In order for Dr. Levin, plaintiff's expert, to render his opinion, he was forced to either reject or ignore the reports of three other physicians who treated the plaintiff.

18. As an additional factor adversely affecting the plaintiff's credibility, within the last two years, he was convicted of the crime of impersonating a police officer.

#### CONCLUSIONS OF LAW

1. Jurisdiction against the United States exists pursuant to the provisions of the Clarification Act, 50 U.S.C. Appx. § 1291(a), and the Suits in Admiralty Act ("SIAA"), 46 U.S.C. §§ 741-752.

2. The burden of proving the unseaworthiness of a vessel or negligence of the shipowner rests upon the seaman plaintiff. See Ramos v. Matson Navigation Company, 316 F.2d 128 (9th Cir. 1963). Plaintiff has failed to establish that the SS Maine was unseaworthy and that the defendant was negligent in any manner. Plaintiff knew

of the alleged condition which he described from his previous use of the ladder in question and plaintiff had a duty as an officer to report or correct the condition.

3. The seaman plaintiff must also prove that unseaworthiness or negligence was a proximate cause of his injuries. Matter of Hechinger, 890 F.2d 202, 208 (9th Cir.), cert. denied, 111 S.Ct. 136 (1989). Plaintiff has failed to do so.

4. The injuries plaintiff allegedly sustained as the result of a fall are the exact injuries that he had prior to the alleged fall. There was no credible evidence to suggest that plaintiff's alleged fall aboard the SS Maine was the proximate cause of his claimed injuries. Even if the condition existed as plaintiff alleges, his injuries were not proximately caused by any incident occurring aboard the SS Maine.

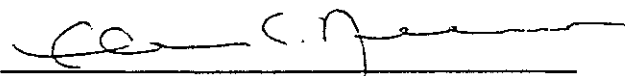
5. A seaman who conceals, misrepresents, or fails to disclose a prior injury or illness during a fitness-for-duty examination is not entitled to maintenance and cure for a current condition if it is identical to or there is a causal link with the pre-existing, concealed disability. See Omar v. Sea-Land Service, Inc., 813 F.2d 986 (9th Cir. 1987); Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 531 (9th Cir. 1962). That is precisely true in this case. Plaintiff intentionally withheld information from the defendant concerning his prior back injuries. The defendant had no obligation to pay Mr. Adriance maintenance or to pay his cure given his failure to disclose his significant prior relevant medical history and disability during the fitness-for-duty

examination. The federal Government is thus entitled to recover from him all amounts it paid because the alleged injuries sustained aboard the SS Maine are the precise injuries plaintiff concealed prior to his employment with the defendant.

6. AFS paid Mr. Adriance \$792 in maintenance on behalf of the United States, \$8.00 per day as provided by the applicable collective bargaining agreement, for the 99 days from March 7 through June 13, as well as cure in the amount of \$4,923.90. Defendant is entitled to recover these amounts.

7. Because of his intentional misrepresentations from the inception of his employment with the defendant and because of inconsistencies in his testimony, plaintiff was completely without credibility and has failed to meet his burdens of proof. In addition to all the foregoing, plaintiff's credibility was further impeached by his recent conviction of impersonating a police officer.

An appropriate Order follows.

  
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Clarence C. Newcomer, J.  
(sitting by designation)

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

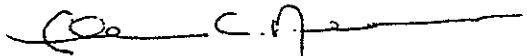
DOUGLAS ADRIANCE : CIVIL ACTION  
v. :  
UNITED STATES OF AMERICA : NO. 92-1260-B (CM)

O R D E R

AND NOW, this 8<sup>th</sup> day of October, 1993, upon consideration of the testimony of the witnesses, the admitted exhibits and the arguments of counsel, and consistent with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that JUDGEMENT IS ENTERED in favor of defendant and against plaintiff with regard to plaintiff's claims.

IT IS FURTHER ORDERED that JUDGMENT IS ENTERED IN FAVOR of defendant and against the plaintiff with regards to defendant's counter-claim against the plaintiff in the amount of \$5,715.90.

AND IT IS SO ORDERED.



Clarence C. Newcomer, J.  
(sitting by designation)