



("RHI"), a temporary employment agency. In April 1993, RHI placed Spade at Heintz Corporation ("Heintz"). While Spade was acting as Heintz's Chief Financial Officer ("CFO"), Heintz failed to make its payroll tax payments. At the end of July 1993, RHI terminated Spade's employment because of Heintz's failure to pay RHI for its services. At this time, Spade was hired as a full-time employee for Heintz. On or about August 4, 1993, Heintz filed for Chapter 11 bankruptcy. Spade's employment as Heintz's CFO ceased in September 1995.

By letter dated September 28, 1996, the Internal Revenue Service ("IRS") informed Spade that he was being assessed for the 1993 unpaid payroll taxes by Heintz. The IRS was legally allowed to seek payment from Spade in accordance with 26 U.S.C. § 6672(a). Section 6672(a) provides that individuals who were required to collect, account for, and pay taxes for a business may be personally liable for a penalty if the business fails to pay the owed taxes. 26 U.S.C. § 6672(a). According to the IRS, the amount of Heintz's unpaid taxes was \$ 25,999.86, however, due to accrued penalties and interest, the assessment against Spade amounted to \$ 123,826.01.<sup>3</sup> Spade contested his responsibility for the assessment against him. Following litigation, Spade and the IRS reached a settlement on March 16, 2000. The general terms of the settlement required Spade to pay \$12,500 according to a payment plan concluding with a final payment to be paid in August 2000. Under the terms of the plan, Spade would be severely penalized for any missed payments. In August 2000, Spade successfully paid off the \$12,500 without any penalties. In connection with the IRS litigation and settlement, Spade states that he

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<sup>3</sup> The final IRS assessment of \$ 25,999.86 related to Heintz's unpaid payroll taxes for the last week of June 30, 1993 and the first week of July 1993.

has paid an additional \$10,500 in attorney's fees.

On or about March 16, 2001, Spade filed suit in the Philadelphia Municipal Court for \$10,000 against Star Bank, N.A. ("Star Bank"), Donald C. Molton, Jr. ("Molton"), Rice and Ketchum. Spade dismissed the action. On July 2, 2001, Spade filed the instant action against the aforementioned adding the following as defendants: RHI, Heintz, James Doyle, Empire Management Group, Inc. ("Empire Management"), Clifford Crowley ("Crowley") and Grisanti, Galef & Goldress, Inc. ("GGG Inc.").<sup>4</sup> An arbitration hearing on this case was held on June 5, 2002. On June 6, 2002, an arbitration award was entered.

Spade requested a trial de novo on July 1, 2002. On this same date, Spade filed a Motion for Summary Judgment Against RHI. RHI's response to Spade's motion included a Cross-Motion for Summary Judgment. Spade's Motion for Summary Judgment Against RHI was denied on September 11, 2002. The Court granted RHI's Cross-Motion for Summary Judgment and the Motions for Summary Judgment filed by Molton and Crowley on November 6, 2002. Currently, the Court is addressing the Motions for Summary Judgment filed by Rice and Ketchum.<sup>5</sup>

## **II. LEGAL STANDARD**

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary

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<sup>4</sup> On February 8, 2002, the Court issued an Order dismissing Heintz, Empire Management and GGG Inc. due to Spade's lack of prosecution for failure to make service of complaint. (Dkt. No. 29 (Court Order)).

<sup>5</sup> The Court is addressing Rice and Ketchum's Motions for Summary Judgment at this time, not in conjunction with the earlier filed Motions for Summary Judgment, because Rice and Ketchum's Motions were belatedly filed after the Court's disposition of the previous Motions. The Plaintiff has not objected to the unpunctual filing of these Motions, therefore, the Court will address each Motion.

judgment is proper “if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). Essentially, the inquiry is “whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present “specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish *prima facie* each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

### **III. DISCUSSION**

#### **A. 26 U.S.C. § 6672<sup>6</sup>**

By law, employers must regularly withhold federal income and Social Security taxes from their employees' wages. Luce v. Luce, 119 F. Supp.2d 779, 783 (S.D. Ohio 2000)(citing 26 U.S.C. §§ 3101-02, 3402). The taxes withheld from each employee's wages constitute a special fund held in trust under the Internal Revenue Code ("IRC") for the exclusive use of the United States. See 26 U.S.C. § 7501. On a quarterly basis, these taxes are collected from employers. Luce, 119 F. Supp.2d at 783. "The withholding taxes are not a mere debt, but 'are part of the wages of the employee, held by the employer in trust for the government.'" Id. (quoting Gephart v. United States, 818 F.2d 469, 472 (6th Cir. 1987); 26 U.S.C. § 7501(a)). If these taxes are not paid at the end of each quarter, the government does not have any recourse against individual taxpaying employees. Id. However, "if these taxes are not paid at the end of each quarter, federal law imposes a 100 % penalty tax on any person who willfully fails to collect, truthfully account for, and pay over these taxes." Id. (citing 26 U.S.C. § 6672)(footnote omitted).

According to 26 U.S.C. § 6672(a), "[t]he IRS is authorized to assess and collect a trust fund recovery penalty from any officer or employee of any corporation who is responsible for collecting, accounting for, and paying over any tax imposed by the Internal Revenue Code and who willfully fails to do so." United States v. Bisbee, 245 F.3d 1001, 1005 (8th Cir.

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<sup>6</sup> 26 U.S.C. § 6672, the "Trust Fund Recovery Penalty" provision, is a collection device designed to ensure that unpaid trust fund taxes are paid, if not by the defaulting corporate employer, then by those persons responsible for the default. Smith v. United States, 894 F.2d 1549, 1553 (11th Cir. 1990).

2001)(citing 26 U.S.C. §§ 6671(b) and 6672). Section 6672(a) of the IRC provides:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a). Thus, Section 6672(a) allows a 100 percent assessment of a penalty against any person responsible for the payment of payroll taxes who willfully fails to pay such taxes. Id.

After payment of the penalty, the statute allows the “responsible person” to seek contribution from any other responsible party who would be liable for the unpaid tax. See 26 U.S.C. §

6672(d). Specifically, Section 6672(d) provides, in part:

If more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person’s proportionate share of the penalty.

26 U.S.C. § 6672(d). Thus, if more than one person is liable for the penalty for unpaid withholding taxes, Section 6672(d) provides a federal right to contribution or indemnification.

Id.

### **1. Contribution Pursuant to 26 U.S.C. § 6672**

Under Section 6672, “[p]ersonal liability . . . properly is imposed upon the person or persons who were: ‘(1) responsible for collecting, accounting for, and remitting payroll taxes, and (2) who willfully failed to do so.’” In re Sheppard, 253 B.R. 397, 403 (Bkrtcy. D.S.C.

2000)(quoting Plett v. United States, 185 F.3d 216, 218 (4th Cir. 1999); 26 U.S.C. §

6672))(citations omitted); see also Quattrone Accountants, Inc. v. I.R.S., 895 F.2d 921, 927 (3d

Cir. 1989). Thus, in order to set forth a claim for contribution against others, a person must show that the others are (1) a “responsible person,” and (2) they “willfully failed to collect or truthfully account for and pay over” the payroll taxes. Quattrone, 895 F.2d at 927 (citation omitted).

**a. “Responsible Person” Under 26 U.S.C § 6672**

For purposes of Section 6672(a), a “responsible person” is defined as an individual “who is ‘required to collect, truthfully account for or pay over any tax due to the United States.’” Greenberg v. United States, 46 F.3d 239, 242- 43 (3d Cir. 1994)(quoting United States v. Carrigan, 31 F.3d 130, 133 (3d Cir. 1994)). “‘Responsibility is a matter of status, duty, or authority, not knowledge.’ While a responsible person must have significant control over the corporation’s finances, exclusive control is not necessary.” Id. at 243 (quoting Brounstein v. United States, 979 F.2d 952, 954 (3d Cir. 1992))(quotation marks and citation omitted). It is not required that the responsible person be a corporate officer. Quattrone, 895 F.2d at 927 (citation omitted). “A person is responsible if the person has significant, though not necessarily exclusive, control over the employer’s finances.” Id. (citation omitted). “A person has significant control if he has the final or significant word over which bills or creditors get paid.” Id. (citation omitted). It is important to note that “[t]here can be more than one responsible person for a given employer.” Id. at 926 (citation omitted). “That another person also may be liable under Section 6672 does not affect the liability of the person presently subject to suit.” Id. (citation omitted). When determining whether an individual is a responsible person, courts also consider the following factors:

- (1) contents of the corporate bylaws, (2) ability to sign checks on the company’s bank account, (3) signature on the employer’s federal quarterly and other tax returns, (4) payment of other creditors in lieu of the United States, (5) identity of officers,

directors, and principal stockholders in the firm, (6) identity of individuals in charge of hiring and discharging employees, and (7) identity of individuals in charge of the firm's financial affairs.

Brounstein, 979 F.2d at 954-55 (citation omitted).

**b. “Willfulness” Under 26 U.S.C § 6672**

In order for liability to attach under Section 6672, once it is proven that an individual is a “responsible person,” there next must be a showing that the “responsible person” “willfully” failed to collect, account for or pay over the withheld taxes. 26 U.S.C. § 6672(a). “[U]nder section 6672(a), willfulness is ‘a voluntary, conscious and intentional decision to prefer other creditors over the Government.’ A responsible person acts willfully when he pays other creditors in preference to the IRS knowing that taxes are due, or with reckless disregard for whether taxes have been paid.” Greenberg, 46 F.3d at 244 (quoting Brounstein, 979 F.2d at 955-56)(citations omitted). “In order for the failure to turn over withholding taxes to be willful, a responsible person need only know that the taxes are due or act in reckless disregard of this fact when he fails to remit to IRS.” Id. “Reckless disregard includes failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid.” Id. (citations omitted). “The taxpayer need not act with an evil motive or bad purpose for his action or inaction to be willful.” Id. (citing Hochstein v. United States, 900 F.2d 543, 548 (2d Cir. 1990)). A willful failure to pay taxes includes “[a]ny payment to other creditors, including the payment of net wages to the corporation’s employees, with knowledge that the employment taxes are due and owing to the Government.” Id. (citation omitted).

**B. Analysis of 26 U.S.C § 6672 Regarding Rice and Ketchum**

**1. Rice**

Rice argues that Plaintiff's Section 6672(d) claim against him should be dismissed because he was not a "responsible person" that "willfully failed" to collect and/or pay taxes pursuant to 26 U.S.C. 6672. (Rice's Mem. Law Supp. Mot. Summ. J. at 2). Rice contends that Spade cannot show that he was a "responsible person" in accordance with Section 6672 because "there is no evidence that Rice was a controlling party over Heintz Corporation, with the decision-making authority to decide how corporate funds were spent, or that he had actual power to make such payments." (Id. at 5). Rice also argues that he did not "willfully fail" to remit Heintz's taxes and there "has been no evidence presented that Rice had any direct or indirect authority or knowledge with respect to paying taxes on behalf of Heintz corporation." (Id. at 6). Regarding the issue of whether Rice was a "responsible person," Plaintiff counters Rice's argument with the assertion that Rice was a "responsible person" because he "was one of the persons involved in the day to day operations of Heintz, Inc." (Spade's Mem. Law Answer Rice's Mot. Summ. J. at 2). Spade relies upon the exhibits attached to his Memorandum of Law in Answer to Phillip Rice's Motion for Summary Judgment, labeled P-1 through P-4, as evidence of Rice's involvement in the management of Heintz's day to day operations. (Id.). As for the issue of whether Rice "willfully failed" to remit Heintz's withholding taxes, Spade is silent. For the following reasons, the Court concludes that Spade cannot seek contribution from Rice pursuant to Section 6672(d) because he has not shown that Rice is a "responsible person" who "willfully failed to collect or truthfully account for and pay over" Heintz's payroll taxes. 26 U.S.C. §§ 6672(a) and (d).

**a. "Responsible Person"**

Rice argues that he was not a "responsible person" under Section 6672 for making

payroll taxes on behalf of Heintz. Rice states that he was not an officer, employee or shareholder of Heintz, but “was the representative of a company which owns shares in Heintz, and as such, made infrequent visits to Philadelphia for the purposes of monitoring the progress of Heintz.” (Rice’s Pre-Trial Mem. at 2). Rice states that Spade cannot prove that he was a “responsible person” because “not one document was produced by [Spade] in discovery that identifies one action Rice took on behalf of Heintz Corporation, much less, that he controlled the day-to-day operations of it and was responsible for directing the flow of monies to taxing authorities.” (Rice’s Mem. Law Supp. Mot. Summ. J. at 6).

Spade counters Rice’s argument with the assertion that Rice was, in fact, a “responsible person” under Section 6672. (Spade’s Mem. Law Ans. Rice’s Mot. Summ. J. at 3-12). In support of his argument, Spade’s relies upon four exhibits to allegedly show that Rice had primary responsibility for the management of Heintz. (Id. at 8). Examination of the exhibits does not reveal that Rice had primary responsibility for Heintz’s management. Instead, the exhibits reveal that Rice was involved in the liquidation of Heintz and negotiating a management agreement and eventual purchase and sale agreement with Empire Management. (Id., Exs. P-1, P-2, P-3 and P-4). As a result, the exhibits fail to establish the necessary showing that Rice was a person who was “required to collect, truthfully account for or pay over any tax due to the United States” on behalf of Heintz. Greenberg, 46 F.3d at 242- 43.

Based on the aforementioned, the Court concludes that Spade has failed to show that Rice is a “responsible person” who “wilfully failed” to remit Heintz’s payroll taxes. Regarding the “responsible person” prong of the Section 6672(a) analysis, Spade does not provide any evidence that Rice was a “responsible person” as defined by Section 6672(a). Thus,

Spade fails to proffer any evidence to show or create any genuine issue of material fact that Rice was “required to collect, truthfully account for or pay over any tax due to the United States” on behalf of Heintz. Greenberg, 46 F.3d at 242- 43. As a result of the aforementioned, the Court concludes that Spade has failed to prove that Rice was a “responsible person” under Section 6672(a). Consequently, Spade is unable to seek contribution from Rice pursuant to Section 6672(d).

**b. “Willfulness”**

Although, the Court’s conclusion that Spade has failed to show that Rice was a “responsible person” ends its Section 6672 inquiry, the Court takes this opportunity to note that Spade has not presented any evidence whatsoever showing that Rice “willfully failed” to remit Heintz’s payroll taxes. Although Rice argues that he did not “willfully fail” to collect or pay over any payroll taxes, Spade does not address Rice’s argument. (Rice’s Mem. Law Supp. Mot. Summ. J. at 6; Spade’s Mem. Law Ans. Rice’s Mot. Summ. J.). Spade totally ignores the “willfulness” requirement under Section 6672 and, consequently, completely fails to offer any evidence that Rice “willfully failed” to remit the delinquent taxes through reckless disregard or by making “a voluntary, conscious and intentional decision to prefer other creditors over the Government.” Greenberg, 46 F.3d at 244. As a result, the Court concludes that Spade has failed to make any showing whatsoever regarding the “willfulness” element of liability under Section 6672. Since Spade has not offered any evidence showing that Rice was a “responsible person” who “willfully failed” to pay Heintz’s taxes, Rice is entitled to summary judgment regarding Spade’s Section 6672(d) claim for contribution.

## 2. Ketchum<sup>7</sup>

Ketchum argues that he is entitled to summary judgment because “[t]he evidence establishes that [he] is not a ‘responsible person’ that willfully failed to collect and/or pay taxes pursuant to 26 U.S.C. § 6672.” (Ketchum’s Mem. Law Supp. Mot. Summ. J. at 5). Ketchum states that he was Chairman of the Board of Directors of Heintz, not the former president of Heintz as alleged by Spade. (Id. at 3-4). As Chairman of the Board of Directors, Ketchum argues that he had limited authority. (Id.). As a result of this limited authority, Ketchum contends that he was not a “responsible person” under Section 6672 because he “was not involved in the daily operations or decision making of Heintz.” (Id.). Ketchum also argues that he did not “willfully fail” to remit Heintz’s payroll taxes. (Id. at 9). In fact, Ketchum argues that he “was not aware of the non-payment of taxes until many months after Heintz filed for bankruptcy.” (Id. at 4). Spade counters Ketchum’s argument with the contention that he was a “responsible person” because he “was one of the persons involved in the day to day operations of Heintz, Inc.” (Spade Ans. Ketchum’s Mot. Summ. J. at 3). Spade relies upon his affidavit and the exhibits attached to his Memorandum of Law in Answer to Ralph D. Ketchum’s Motion for Summary Judgment, labeled Exhibits A, B, C and D, as evidence of Ketchum’s involvement in the management of Heintz’s day to day operations. (Id.). As for the issue of whether Ketchum “willfully failed” to remit Heintz’s withholding taxes, Spade is silent. For the following reasons, the Court concludes that Spade cannot seek contribution from Ketchum pursuant to Section

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<sup>7</sup> Ketchum’s motion is a Motion for Summary Judgment, and Alternatively, Motion *In Limine*. (Dkt. No. 56). Since the Court is granting Ketchum’s Motion for Summary Judgment, it will deny his Alternative Motion *In Limine* as moot. However, the Court notes that it has addressed the issues raised in Ketchum’s Alternative Motion *In Limine* at the December 9, 2002 conference.

6672(d) because he has not shown that Ketchum is a “responsible person” who “willfully failed to collect or truthfully account for and pay over” Heintz’s payroll taxes. 26 U.S.C. §§ 6672(a) and (d).

**a. “Responsible Person”**

Ketchum claims that he was not a “responsible person” under Section 6672. (Ketchum’s Mem. Law Supp. Mot. Summ. J. at 6-8). In support of his contention, Ketchum includes an affidavit declaring, among other things, that he “had no involvement or decision-making authority concerning Mr. Spade being brought in as Chief Financial Officer,” he “was not involved in the daily operations or decision making of Heintz,” he “had no control over the finances of Heintz,” he “had no authority to transfer funds of Heintz,” he “had no check funding authority or ability to authorize payments or non-payments on behalf of Heintz,” he “was never responsible for collection of or payment of taxes,” and he “did not personally hire or fire Mr. Spade.” (Id., Ex. A (Ketchum’s Aff.)). Spade counters Ketchum’s averments with his own affidavit and three exhibits. (Spade Ans. Ketchum’s Mot. Summ. J., Exs. A, B, C and D). Spade’s affidavit avers that “Mr. Ketchum would fax to [him] specific requests for wire transfer payments,” “Mr. Ketchum was listed as a signatory” on a debtor-in-possession operating bank account with “the authority to request wire transfer payments,” and Mr. Ketchum helped to hire Spade and terminated Spade’s employment with Heintz. (Id., Ex. A (Spade’s Aff.)). As for Spade’s exhibits B, C and D, they reveal that Ketchum was involved in negotiating a management agreement with Empire Management, but do not address Ketchum’s role in Heintz’s daily management or his role regarding accounting for or paying over Heintz’s payroll taxes to the IRS. (Id., Exs. B, C and D).

As a result of the affidavits, and their conflicting averments, this Court is unable to conclude whether Ketchum was, in fact, involved in the day to day operations of Heintz. The Court is unable to conclude whether Ketchum was involved in Heintz's daily operations, however, it is of no consequence since the relevant inquiry is whether Ketchum was an individual "required to collect, truthfully account for or pay over any tax due to the United States" on behalf of Heintz. Greenberg, 46 F.3d at 242- 43. Instead of showing Ketchum's role pertaining to the accounting for or payment of Heintz's taxes, Spade only focuses on arguing that Ketchum was involved in Heintz's daily operations. Spade fails to offer any evidence that Ketchum had any duty or authority regarding collecting, truthfully accounting for or paying over any of Heintz's taxes to the IRS. As a result, the Court concludes that Spade's failure to provide any evidence to show that Ketchum was an individual who was required to collect, truthfully account for or pay over Heintz's taxes necessarily results in a finding that Spade has failed to prove that Ketchum was a "responsible person" under Section 6672(a). Since Section 6672 requires a showing of "responsibility," Spade is unable to seek contribution from Ketchum pursuant to Section 6672(d).

**b. "Willfulness"**

Even though the Court's conclusion that Spade has failed to show that Ketchum was a "responsible person" ends its Section 6672 inquiry, the Court takes this opportunity to note that Spade has not presented any evidence whatsoever showing that Ketchum "willfully failed" to remit Heintz's payroll taxes. Ketchum contends that he did not become aware of the failure of Heintz to pay taxes until well after it filed for bankruptcy. (Ketchum's Mem. Law Supp. Mot. Summ. J. at 9). In furtherance of his argument, Ketchum states that "there has been no evidence

presented that [he] had any direct authority or knowledge with respect to paying taxes on behalf of Heintz” and “[t]here is also no indication that [he] was placed on knowledge that the taxes were due and he somehow ignored such notice.” (Id.). Although Ketchum argues that he never “willfully failed” to pay over any payroll taxes, Spade totally ignores Ketchum’s argument. Consequently, Spade fails to offer any evidence that Ketchum “willfully failed” to remit the delinquent taxes through reckless disregard or by making “a voluntary, conscious and intentional decision to prefer other creditors over the Government.” Greenberg, 46 F.3d at 244. As a result, the Court concludes that Spade has failed to show that Ketchum was a “responsible person” who “willfully failed” to pay Heintz’s taxes. Therefore, Ketchum is entitled to summary judgment regarding Spade’s Section 6672(d) claim for contribution.

#### **IV. CONCLUSION**

Spade fails to make the required showing that Rice and Ketchum were responsible for collecting, accounting for, and remitting Heintz’s payroll taxes, and that they willfully failed to do so. See 26 U.S.C. §§ 6672(a) and (d). As a result, Spade is unable to establish his claims for contribution against Rice and Ketchum pursuant to Section 6672(d). Thus, the Motions for Summary Judgment filed by Rice and Ketchum are granted.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JEROME SPADE,	:	
	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 01-3349
	:	
STAR BANK, et al.,	:	
	:	
Defendants.	:	
	:	

**ORDER**

AND NOW, this 19<sup>th</sup> day of December, 2002, upon consideration of the Motions for Summary Judgment filed by Defendants Phillip Rice (Dkt. No. 52) and Ralph Ketchum (Dkt. No. 56-1), and the Responses thereto, it is hereby ORDERED that:

1. the Motions for Summary Judgment are GRANTED.
2. Ralph Ketchum's Alternative Motion *In Limine* (Dkt. No. 56-2) is DENIED as moot.
3. Defendants Phillip Rice and Ralph Ketchum are DISMISSED from this action.

BY THE COURT:

Robert F. Kelly,	Sr. J.
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