

MORRISON & HECKER L.L.P.
600 Commerce Bank Ctr., 150 N. Main Str.
Wichita, Kansas 67202-1320
(316) 265-8800
(316) 265-1349 FAX

IN THE TWENTY-SIXTH JUDICIAL DISTRICT
DISTRICT COURT, STEVENS COUNTY, KANSAS

GILBERT H. COULTER and)	
ELIZABETH S. LEIGNOR, individually)	
and as representative plaintiffs on behalf)	
of persons or companies similarly situated,)	
)	Case No. 98-CV-40
Plaintiffs,)	
v.)	
)	
ANADARKO PETROLEUM)	
CORPORATION,)	
)	
Defendant.)	
_____)	

**ANADARKO PETROLEUM CORPORATION'S
RESPONSE TO PLAINTIFFS' MOTION FOR TRIAL BY THE COURT**

Defendant Anadarko Petroleum Corporation ("Anadarko Petroleum") responds in opposition to Plaintiffs' Motion for Trial by the Court. Specifically, Plaintiffs improperly attempt to "revoke and waive their earlier demand for a jury trial." Alternatively, Plaintiffs erroneously contend that neither party has the right to a jury trial on their claims.

I. Plaintiffs May Not Withdraw their Demand for a Jury Trial.

When Plaintiffs filed their Petition in this matter on October 7, 1998, they included a demand for a jury trial as to all issues. See K.S.A. 60-238(b). Throughout the next three years, Plaintiffs did not waiver from that jury demand. In fact, in the proposed Pretrial Order, both Plaintiffs and Anadarko stipulated to a trial by jury. Plaintiffs cannot unilaterally withdraw that demand. Kansas law clearly provides that Plaintiffs' demand

for jury trial "may not be withdrawn without the consent of the parties." K.S.A. 60-238(d). Anadarko does not consent to the withdrawal of that demand for trial by jury.

II. The Parties are Entitled to a Jury Trial on Plaintiffs' Claims.

In their belated attempt to avoid a jury trial, Plaintiffs mischaracterize their action as one for an "equitable accounting." Based on that mischaracterization, Plaintiffs argue that they are not entitled to a jury trial. In fact, Plaintiffs' claims are legal claims for breach of contract, breach of an alleged duty of good faith, and constructive fraud. Plaintiffs seek money damages for each of those claims. Their request for an accounting is simply a method to measure the amount of the relief that they seek – i.e., calculating damages if and when liability is found.

Under Kansas law, Anadarko's right to a jury trial is "a substantial and valuable right." Karnes Enterprises, Inc. v. Quan, 221 Kan. 596, 600, 561 P.2d 825 (1977)(citing Bourne v. Atchison, T, S, F. Rly Co., 209 Kan 511). Moreover, the law favors trial by jury and that right should be carefully guarded against infringement. Id.

The right to a jury trial depends upon the nature of Plaintiffs' claims for relief. If their claims are primarily legal, then the parties have a right to a jury trial. Carnes v. Meadowbrook Executive Bldg. Corp., 17 Kan.App.2d 292, 836 P.2d. 1212 (1992). If their claims are primarily equitable, then the parties are not entitled to a jury trial. Id. Kansas Courts have stated that "the availability of actual damages distinguishes legal from equitable actions and, thus, historically determined when a jury trial was available." Smith v. Printup, 254 Kan. 315, 325, 866 P.2d 985 (1993)¹; see also Samsel v. Wheeler, 233 Kan. 517, 664 P.2d 813 (1990) (holding that the state constitution and state common law supply a right to jury trial where claims for damages are involved). The Petition clearly states that "defendant has . . . breached its duties and obligations

¹ Smith v. Printup also holds that a prayer for punitive damages does not, by itself, necessitate a jury trial because punitive damages was not a "remedy at common law." However, Plaintiffs' claim for actual damages for alleged breach of contract was a "remedy at common law" to which a right to jury trial attaches. See Karnes Enterprises, Inc., 209 Kan. at 602; K.S.A. 60-238(a).

(both express and implied) arising under the aforementioned leases.” (Petition ¶¶ L) Plaintiffs also request money damages resulting from that alleged breach. (Petition ¶¶ O(3)) Plaintiffs request an accounting only to determine the amount of their damages if and when liability is determined. Although Plaintiffs have pled both legal and equitable claims, the primary thrust of their action is clearly a claim for breach of contract and money damages.

Plaintiffs argue that their claim is primarily one for accounting, so that despite their earlier request for a jury trial and their stipulation to jury trial in the pre-trial order, the trial should now not go before a jury. However, Kansas courts have held that when an action is primarily for breach of contract and a money judgment is requested, so that an accounting is only incidental to the action, then a right to jury will attach because the action is not *primarily* equitable. See Karnes Enterprises v. Quan, 221 Kan. 596, 600, 561 P.2d 825 (1977)(holding for jury right when accounting is incidental to contract claims); see also McCalester v. National Reserve Life Ins. Co., 151 Kan 378, 99 P.2d 758 (1940) (holding where demand for accounting was incidental to an action for breach of contract that defendant was entitled to a jury trial). These holdings are consistent with the U.S. Supreme Court’s holding that “in an action to collect debt for breach of contract between [the] parties, petitioner has a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any, but also just what the contract is.” Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479, 82 S.Ct. 894, 900 (1962).²

Plaintiffs are now, at the eleventh hour, “casting” their claim as equitable to suit their own purposes. The U. S. Supreme Court has specifically addressed this issue. In

² Notably, the petitioner in that case was the defendant so the case stands for the proposition that in a contract action, defendant has an inherent right to jury trial. Therefore, since Anadarko relied on Plaintiffs’ request for jury trial in the instant case, it would be inequitable, or even unconstitutional now to allow Plaintiffs to waive their jury right at the expense of Anadarko’s rights.

response to a party's contention that its claim, which was for money damages but also requested an accounting, lied in equity the court stated:

[R]espondent's contention . . . is based primarily upon the fact that their claim is *cast* in terms of an 'accounting,' rather than in terms of an action for 'debt' or 'damages.' But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings.

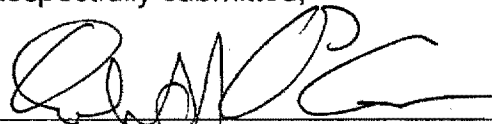
See Dairy Queen, Inc., 369 U.S. at 477, 82 S.Ct. at 899 (emphasis added).

Overall, Plaintiffs' action is primarily for actual damages for breach of contract. Plaintiffs' equitable claim for an accounting is simply ancillary and incidental to their legal claims. Thus, Anadarko clearly has the right to a jury trial.

III. Conclusion

Plaintiffs' motion for trial by the Court should be denied. Plaintiffs' claims are primarily for money damages resulting from an alleged breach of contract. Anadarko is entitled to a jury trial on those issues and does not waive that right.

Respectfully submitted,



Robert J. O'Connor (#5956)
David E. Bengtson (#12184)

MORRISON & HECKER L.L.P.
150 N. Main Street, 600 Commerce Bank Ctr.
Wichita, Kansas 67202-1320
Telephone (316) 265-8800
Fax: (316) 265-1349

-and-

Dan Diepenbrock (#12424)
MILLER & DIEPENBROCK, P.A.
150 Plaza Drive, P. O. Box 2677
Liberal, Kansas 67905-2677
Telephone (316) 626-8502
Fax: (316) 626-6804

Attorneys for Defendant Anadarko
Petroleum Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was served via U.S. mail, first class postage prepaid, on this 8th day of October, 2001, addressed to:

Thomas D. Kitch
Gregory J. Stucky
Charles E. Millsap
David G. Seely
FLEESON, GOOING, COULSON & KITCH
125 North Market, Suite 1600
Wichita, Kansas 67202

Bernard E. Nordling
Erick E. Nordling
KRAMER, NORDLING & NORDLING
209 E. Sixth Street
Hugoton, Kansas 67951
Attorneys for Plaintiffs

and

The Honorable Tom R. Smith
District Court Judge
Seward County Courthouse
200 East 6th Street
Hugoton, Kansas 67951

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