

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

GILBERT H. COULTER and
ELIZABETH S. LEIGHNOR, individually
and as representative plaintiffs on behalf of
persons or companies similarly situated,

Plaintiffs,

vs

ANADARKO PETROLEUM CORPORATION,

Defendant.

Case No. 98-CV-40

**ANADARKO PETROLEUM CORPORATION'S COMBINED MOTION AND
MEMORANDUM TO AMEND ORDER BY THE COURT UPON THE
PLAINTIFF'S MOTION FOR TRIAL BY THE COURT SO AS TO PERMIT
DEFENDANT TO FILE AN INTERLOCUTORY APPEAL**

Defendant respectfully moves this Court to amend its December 4, 2001,
Order by the Court Upon the Plaintiff's Motion for Trial by the Court ("Order") to
make findings, pursuant to K.S.A. 60-2102(b), necessary for defendant to apply for
an immediate interlocutory appeal of the following controlling question of law:

Whether the right to a trial by jury provided by Section 5 of the Kansas
Constitution Bill of Rights and K.S.A. 60-238(d) attaches to a claim
that a lessee breached certain oil and gas leases by paying royalties
based on the value of the leases' natural gas production at the
wellhead, instead of at a downstream delivery point.

K.S.A. 60-2102(b) provides in relevant part that:

When a district judge, in making in a civil action an order not otherwise appealable under this section, is of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge shall so state in writing in such order.

There are three findings that the Court must make to support application for an immediate appeal under K.S.A. 60-2102(b): (a) the order involves a controlling question of law; (b) there is substantial ground for difference of opinion; and (c) immediate appeal may materially advance ultimate termination of the litigation. All three findings are justified here.

The Order in question was principally based on a finding that *Karnes Enterprises, Inc. v. Quan*, 221 Kan. 596 (1977) provides for a categorical right to an accounting in lease royalty disputes, and that the relief sought in this case is therefore equitable in nature. This finding was determinative of the jury trial issue, and therefore constitutes a controlling issue of law. Moreover, the ambiguity in the relevant caselaw between an "equitable action for an accounting" and a legal action for breach of contract, combined with the narrowness of the Kansas Supreme Court's opinion in *Karnes*, indicates a substantial ground for difference of opinion. Finally, early appellate review and reversal of the Order would materially advance the ultimate termination of the litigation. Hence, the requirements for certification under K.S.A. 60-2102(b) are met. We discuss each of these points briefly below.

1. THE QUESTION TO BE CERTIFIED IS A CONTROLLING QUESTION OF LAW.

The question to be certified is clearly a controlling question of law.

Section 5 of the Kansas Constitution Bill of Rights grants litigants the right to a jury trial, and whether that right applies to a particular cause of action is indisputably a question of law. Moreover, the question of whether Plaintiff's claim is equitable or legal in nature is completely determinative of the jury trial issue, and is therefore "controlling." ^{1/}

2. THERE IS SUBSTANTIAL GROUND FOR DISAGREEING WITH THE COURT'S ANALYSIS OF AND ANSWER TO THE QUESTION TO BE CERTIFIED.

Substantial ground exists for disagreeing with not only the answer reached by the Court, but also with the analysis that the Court employed. The Court expressly rested its opinion on the case of *Karnes Enterprises, Inc. v. Quan*, 221 Kan. 596 (1977). While it is true that the present case shares certain facts with *Karnes*, it is the differences between them that should have animated the Court's

^{1/} Cases and commentary interpreting the analogous federal interlocutory appeal statute, 28 U.S.C. § 1292(b), serve as an appropriate model for this Court's analysis. *Cf. Reed v. Hess*, 239 Kan. 46, 716 P.2d 555 (1986) (analyzing appellate review of discovery orders in light of federal court precedent "since our Kansas Code of Civil Procedure is modeled after the Federal Code of Civil Procedure"). Under that statute, "a question is 'controlling' if its incorrect disposition would require reversal of a final judgment." 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3930 (2d ed. 1996).

analysis. More to the point, however, the Court's Order rests on a common misunderstanding of the nature of the equitable accounting remedy, and in doing so runs against the sound decisions of other courts that have decided analogous issues under federal and state law. These facts more than establish a substantial ground for difference of opinion.

The Kansas Supreme Court's opinion in *Karnes* does not sweep as broadly as the Court's Order suggests. *Karnes* involved a claim that the plaintiff's lessee, who was obligated to pay rent based on a percentage of its sales, was intentionally secreting receipts and consequently underpaying on the lease. An accounting was therefore necessary to determine not only the amount of damages sustained, but also *whether a breach had occurred at all.*^{2/} In other words, due to the allegation that the relevant information was intentionally withheld, the plaintiff required an accounting for the purposes of discovery. In this case, however, Plaintiff has alleged a specific claim of breach of contract and has requested an accounting *only as a measure for calculating damages if and when plaintiffs can establish liability.* The determination of Anadarko's liability under the relevant leases is clearly a legal question. As there is no allegation that Anadarko is withholding or secreting the relevant information, the discovery provisions of the Kansas Code provide the appropriate – and exclusive – vehicle for obtaining that information.

^{2/} In addition, *Karnes* involved indisputably equitable claims for cancellation of the contract and restoration of the property in question that led the court to label the third claim one for an accounting.

The Court's Order also rests on a common misconception that has produced conflicting and inconsistent opinions in the state and federal courts: that any action requesting that a defendant "account" for sums allegedly due under a contract amounts to an "equitable action for an accounting." In fact, the action has traditionally been predicated on (1) a fiduciary relationship, (2) complex or mutual accounts, or (3) the need for discovery.^{3/} Various decisions by the courts of other states, including some of those cited by the court in *Karnes*,^{4/} reflect these principles.^{5/} Yet none of these necessary predicates is present in this case.

Various federal courts have also employed analyses, and reached conclusions, different than those supporting the Court's Order. In a line of reasoned

^{3/} See generally Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 Ind. L.J. 463, 484 (1985):

The accounting remedy has thus been surrounded by a certain amount of semantic confusion as the name of the remedy and the process of accounting became synonymous. It is shown that there are several different remedies called an "accounting," similar only in that all end in an order or judgment for the payment of money. The true accounting yields a restitutionary award of a defendant's profits; the "accounting" to settle complex or mutual accounts functionally grants a non-jury trial; and a now obsolete remedy also called an "accounting" compelled discovery in cases of disputed accounts.

^{4/} See *Vess v. Fred Astaire Dance Studios Corporation*, 229 F.2d 892 (5th Cir. 1956) (involving complex accounts); *H.B. Zachary C. v. Terry*, 195 F.2d 185 (5th Cir. 1952) (involving complex, mutual accounts); *Collesion v. Collesion*, 2 Misc.2d 10, 154 N.Y.S.2d 345 (1955) (involving fiduciary relationship); *Armstrong v. Gill*, 392 P.2d 737 (Okla. 1964) (involving what was essentially a fiduciary relationship).

^{5/} See, e.g., *Terner v. Glickstein & Terner, Inc.*, 283 N.Y. 299, 38 N.E.2d 846 (1940) ("Even though an accounting were required to ascertain the amount of damages, that fact would be insufficient to support a claim for equitable relief unless a fiduciary relationship were shown, and none is pleaded."); *Huebener v. Chinn*, 186 Or. 508, 207 P.2d 523 (1949) (finding no right to an equitable accounting for sums allegedly due on a lease).

opinions beginning with the Supreme Court's decision in *Dairy Queen v. Wood*, 369 U.S. 469 (1962), several federal courts have recognized and enforced the distinction between genuine and pretextual equitable accounting claims. ^{6/} That Plaintiff's claimed right to an "accounting" is merely a pretext for denying Anadarko its right to a jury trial is made evident by the consistent acknowledgment by the parties and the Court that the action is essentially legal in nature.^{7/}

The Court's holding that Plaintiff enjoys a right to an accounting therefore rests on the invalid assumption that Anadarko's possession of the relevant information necessitates the invocation of equitable jurisdiction.^{8/} Beyond conflicting with persuasive law from other jurisdictions, this assumption ignores the realities of modern Kansas procedure and discovery. *See* Eichengrun at 476 ("One would imagine this basis for accounting to be obsolete today. Even in those jurisdictions retaining separate law and equity courts, the same discovery is usually available in both."). Moreover, it does so at the expense of the "inviolable" right to a

^{6/} *See also* *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150 (10th Cir. 1965) (finding a jury trial right on a breach of contract claim, even though "the original complaint was couched in terms of an accounting for damages"); *Arnold Productions, Inc. v. Favorite Films Corporation*, 298 F.2d 540 (2d Cir. 1961) (same).

^{7/} *See, e.g.*, Petition ¶ L (asserting that "defendant has . . . breached its duties and obligations (both express and implied) arising under the aforementioned leases"); Pretrial Order at 2 ("Anadarko is breaching its contractual obligations under the express and implied terms of its oil and gas leases by deducting expenses incurred to produce gas and place it in marketable condition from its royalty payments to members of the Plaintiffs.").

^{8/} The Court's Pretrial Order summarizes Plaintiff's argument as follows: "Anadarko, having exclusive possession of all information necessary to calculate royalty payments and being required to make such payments to Plaintiffs, has the duty fully and accurately account to Plaintiffs." Pretrial Order at 2.

jury trial. See *Bourne v. Atchison, T. & S. F. Rly. Co.*, 209 Kan. 511, 516, 497 P.2d 110, 114 (1972) ("The right of trial by jury is a substantial and valuable right and should never be lightly denied."). Whereas Kansas law generally holds that an equitable remedy is only available absent a clear, adequate, and complete remedy at law, see *Hill v. Hill*, 185 Kan. 389, 400, 345 P.2d 1015, 1025 (1959), the result of the Court's order is to make an accounting available upon the simple utterance of the right word. The right to a trial by jury should not be so easily overcome.

Kansas courts have not shied from taking extraordinary action in dealing with jury trial issues, and at various times have granted mandamus in order to ensure the right was adequately protected. See *Cloonan v. Goodrich*, 161 Kan. 280, 167 P.2d 303 (1946) (granting mandamus and overruling the denial of trial by jury despite the plaintiffs' request for an accounting); *State Highway Commission v. Hembrow*, 190 Kan. 742, 378 P.2d 62 (1963) (granting mandamus and overruling the denial of trial by jury in a condemnation action); *Muck v. Claflin*, 197 Kan. 594, 419 P.2d 1017 (1966) (acknowledging the availability of mandamus to compel the granting of a jury trial). In light of the substantial ground for difference of opinion and the importance of the rights at stake, this Court should amend its Order to allow for Anadarko's interlocutory appeal.

3. AN IMMEDIATE APPEAL WOULD MATERIALLY ADVANCE ULTIMATE TERMINATION OF THE LITIGATION.

Early appellate review and reversal of the Order would also materially advance the termination of the litigation. Failure to review the Court's Order now could result in an appeal of the eventual final judgment and, potentially, a retrial –

the very types of burdens on the courts and litigants that the interlocutory appeal statute is designed to prevent. Moreover, decisions of Kansas and other courts have indicated that to materially advance the litigation an issue need not be dispositive of the case as a whole. In *Parker v. Volkswagenwerk Aktiengesellschaft*, 245 Kan. 580, 781 P.2d 1099 (1989), for example, the Kansas Supreme Court heard an interlocutory appeal of the order disqualifying plaintiff's counsel.

Furthermore, several federal courts have certified and heard interlocutory appeals of orders affecting jury trial rights. See *Ruggiero v. Inca Capac Yupanqui*, 498 F.Supp. 10 (E.D.N.Y. 1980) (certifying for interlocutory appeal the question of whether certain suits would have been considered "suits at common law" entitling a party to a jury trial under federal law); *Johnson v. Georgia Highway Express, Inc.*, 417 F. 2d 1122 (5th Cir. 1969) (hearing interlocutory appeal of order which, *inter alia*, denied plaintiff's motion to strike defendant's demand for a jury trial). The efficiencies achieved by those courts could be similarly realized by interlocutory appeal here.

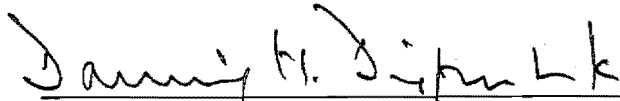
Conclusion

For all the above reasons, this Court should amend its Order to incorporate findings necessary for Defendant to apply for an immediate interlocutory appeal pursuant to K.S.A. 60-2102(b).

Respectfully submitted,

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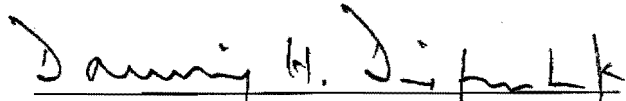
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REQUEST FOR HEARING

Defendant requests a hearing before the Court on the above motion.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2001, that true and correct copies of the above and foregoing were mailed, postage prepaid, by United States Mail, and properly addressed to:

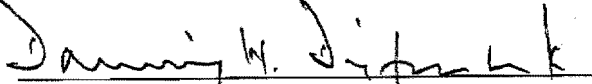
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