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	**Case No. 98-CV-40**
ANADARKO PETROLEUM CORPORATION,	
Defendant.	

ANADARKO PETROLEUM CORPORATION'S CORRECTED MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendant Anadarko Petroleum Corporation ("Anadarko") respectfully moves this Court, pursuant to K.S.A. 60-252(c), for judgment as a matter of law on the grounds that Plaintiffs have failed to offer sufficient – if any – evidence to justify any reasonable conclusion except for a judgment in favor of Anadarko. [1]/

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[1]/ K.S.A. 60-252(c) reads as follows: "*Judgment on partial findings.* If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subsection (a)."

I. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF PROVING THAT DEFENDANT HAS BREACHED ITS OBLIGATIONS UNDER THE EXPRESS AND UNAMBIGUOUS TERMS OF THE LEASES

Plaintiffs have failed to provide any evidence that could possibly meet their burden of proving that Anadarko has breached its obligations under the express and unambiguous terms of the oil and gas leases at issue in this case. "In an action based on contract the burden of proof is on the plaintiff to show . . . the defendant's breach insofar as such matters are in issue." *Van Brunt v. Jackson*, 212 Kan. 621, 623, 512 P.2d 517, 520 (1973). Throughout this case, however, Plaintiffs have persistently ignored the undisputed and dispositive fact that Anadarko has fully complied with its contractual obligations.

Anadarko's obligation to pay royalties to Plaintiffs is controlled exclusively by the express terms of its leases. *Williams v. Safeway Stores, Inc.*, 198 Kan. 331, 331, 424 P.2d 541, 542 (1967) (Syl ¶ 1) ("An express covenant in a lease on a given subject matter excludes the possibility of an implied covenant of a different or contradictory nature."); *Duvanel v. Sinclair Ref. Co.*, 170 Kan. 483, 227 P.2d 88 (1981) (Syl. ¶ 1) (same). Plaintiffs have introduced only two leases into evidence, that of Mr. Coulter and Mrs. Leighnor, as Plaintiffs' Exhibits 134 and 138, respectively. The controlling clause of those leases states that "if the gas is sold at the well, the royalty shall be 1/8th of the proceeds from the sale of the gas." (emphasis added). This language is clear and unambiguous: when gas is sold at the well, royalty is to be paid on the basis of that sale. [2/]

Plaintiffs have introduced evidence that establishes that:

[2/] As noted in Defendant's Trial Brief, several courts have found identical lease language to be unambiguous and to require the calculation of gas royalty based on the proceeds derived from the sale of gas at the well. *See Ashland Oil & Gas Refining Co. v. Staats, Inc.*, 271 F.Supp. 571 (D. Kan. 1967); *Sternberger v. Marathon Oil Co.*, 257 Kan. 315, 894 P.2d 788 (1995).

(1) **Anadarko gas is in fact sold at the well**, [3]/ and

(2) **royalty is paid on the proceeds of that sale**. [4]/

Moreover, Plaintiffs have not introduced any evidence to the contrary. Indeed, it has been stipulated that this case does not raise "any claim that Anadarko has not used the proper starting point for calculation of royalty payments" or "any claim that the deductions from royalty payments are unreasonable in amount." Pretrial Order at 10 (Dec. 10, 2001). That the starting

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[3]/ *See* Testimony of Richard Hanson, Trial Transcript at 88:

> Q: And [Anadarko's decision on whom to sell to after FERC Order 636] could change from day to day?
> A: Yes, sir.
> Q: Because all of this gas was being sold at the wellhead, correct?
> A: Yeah, I believe that's correct. I don't know the exact reason, but there was no long-term contract anymore, so they could apparently sell the gas wherever they wanted to.

[4]/ The following deposition testimony has been designated by Plaintiffs:

Deposition of Jon D. Brown at 43 (Sept. 29, 1999):

> Q: For that period, August of 1996 to date, how did the value for gas appear on royalty remittance statements?
> A: It was the Inside FERC has sales price less the gathering fee and fuel deduction.

Deposition of O'Neill J. Toups at 70 (Dec. 3, 1999):

> Q: And I said insofar as those gas purchases are made from Anadarko Petroleum at the wellhead, I wanted to understand how that price was computed, right? Are you with me so far?
> A: I am.
> Q: And I think you told me that that price is computed by beginning with an index and then deducting the gathering fee and the fuel adjustment.
> A: I said that.
> Q: Is that correct?
> A: Yes.

Deposition of Joe Toups (O'Neill J. Toups) at 7 (May 17, 2000):

> Q: How is that price fixed?
> A: The vast majority of the gas that we are talking about in all material respects is priced using a standard formula which incorporates a monthly published index and some basis for gathering deductions along – fuel deductions to arrive at a net price, which is not a net back price.
> (The following has been counter-designated by Anadarko for completeness)
> Q: Okay. You will have to enlighten me. Why is that not net back price? In your mind why is that? Why did I misdescribe that; how did I mischaracterize that?
> A: Well, because the price that could be realized by Anadarko Energy Services, and is realized by Anadarko Energy Services, is typically downstream of the wellhead delivery point and subject to a number of different commercial contracts, many of which could incorporate this index that we have talked about.

point – the FERC index price – and the royalty calculation are not in question should seemingly resolve the case. Stipulations aside, however, Plaintiffs have failed to provide a single piece of evidence – because no such evidence exists – that Anadarko does not sell its gas at the wellhead. As Plaintiffs bear the burden of proving by a preponderance of the evidence that Anadarko has violated the terms of its contracts, their failure to do so obviates any further inquiry. This case should therefore end where it should have begun – at the first, and controlling, clause of the relevant leases.

Even if Plaintiffs had introduced evidence that Anadarko sells its gas at points distant, however, their burden would still not be met. The second clause of Plaintiffs' leases states that "if the gas is not sold at the well, the royalty shall be $1/8^{th}$ of the market value of the gas at the well." (emphasis added). Thus, even when gas is sold away from the well, the royalty is still calculated "at the well." Again, the Court has stipulated, and Plaintiffs have offered no evidence to contradict, that the practice and method of calculating royalty at the well is both reasonable and in compliance with the express and unambiguous terms of the subject leases. The foregoing provides the Court with more than adequate grounds for dismissing Plaintiffs' case.

II. PLAINTIFFS HAVE FAILED TO ESTABLISH A RIGHT OF RECOVERY UNDER ANY IMPLIED COVENANT

The evidence introduced by Plaintiffs establishes that Anadarko has complied with the express terms of the subject leases; consequently, Plaintiffs have no recourse to implied covenants in their leases. In *Smith v. Amoco Prod. Co.*, 31 P.2d 255 (Kan. 2001), the Kansas Supreme Court held that implied covenants in oil and gas leases are "implied in fact." As a result, those covenants "are limited by the express terms of the lease agreement and the intent of the parties as reflected by the nature and purpose of the leasing transaction." *Id.* at 268 (quoting 1 Pierce, Kansas Oil and Gas Handbook, § 10.01, pp. 10-4 to 10-5). *See also Kansas Baptist*

Convention v. Mesa Operating Limited Partnership, 253 Kan. 717, 864 P.2d 204 (1993) ("no duty may be implied which would displace the parties' express stipulation"); *Yzaguirre v. KCS Resources, Inc.*, 2001 WL 690435, Case No. 00-0829 (Tex. June 21, 2001) ("The implied covenant to market oil and gas . . . does not override the express terms of the oil and gas lease . . . ."). Having failed to show either a violation of the lease, or the ambiguity of its terms, Plaintiffs cannot prevail before this Court.

Additionally, even if this Court finds it necessary to reach the issue of covenants implied in fact, Plaintiffs have offered no evidence of what terms, if any, are to be implied. It is axiomatic that to establish the existence and terms of any covenant implied in fact, Plaintiffs must offer actual facts, such as the parties' "intent, conduct, and motives" at the time of contracting and throughout the contractual relationship. *Smith*, 31 P.2d. at 264. Plaintiffs, however, have introduced no evidence concerning the circumstances or bargaining history of the Coulter or Leighnor leases. That is, Plaintiffs have supplied the Court with no actual evidence from which it could determine the existence, or terms, of any implied covenant. Again, Plaintiffs have failed to meet their burden.

III. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF PROVING THAT THE GAS IN QUESTION IS NOT MARKETABLE AT THE WELL

Even if the Court does find in the leases an implied duty to place the gas in a marketable condition before selling it and calculating royalties, Plaintiffs have failed to meet their burden of proving that Anadarko fails to do so. Proof of non-marketability is a necessary element of Plaintiffs' claim, and they therefore bear the burden of proof on the issue: "The burden of proving a disputed fact or issue rests upon the party asserting it as a basis of claim and remains with that party throughout trial." *In the Matter of Cline*, 258 Kan. 196, 206-07, 898 P.2d 643,

650 (1995). Plaintiffs' conclusory and unsupported claims that Anadarko's gas is unmarketable at the well cannot carry that burden.

Plaintiffs' marketability claim is both unfounded and contrary to all available evidence. Plaintiffs do not seriously contest that an active and vibrant market exists at the wellhead, at which Anadarko sells gas to Anadarko Energy Services, to other gas marketers and aggregators such as Duke Energy Field Services and Oneok, to local users, to irrigation pumps and irrigation cooperatives, to municipal users such as the City of Liberal, and to industrial users such as National Beef. Nor do Plaintiffs contest the legitimacy of those sales. Rather, they draw meaningless and inconsistent distinctions based on to whom the gas is sold, and on how, where, and if the gas is used. Such distinctions, even disregarding the evidence to the contrary, cannot carry Plaintiffs' affirmative burden of establishing by a preponderance of the evidence that Anadarko's gas is not marketable at the well.

Plaintiffs' only affirmative attempt to offer evidence on the issue of marketability – the testimony of their expert witnesses – is quantitatively and qualitatively insufficient to carry Plaintiffs' burden. Putting aside any questions of reasonableness, consistency, and method, opinion testimony, even expert witness testimony, cannot support a judgment absent actual facts in favor of Plaintiffs' claim. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). In sum, Plaintiffs have failed to provide any affirmative evidence that could support their claim that Anadarko gas is not marketable at the well.

IV. PLAINTIFFS' CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES

While Anadarko contends that this case constitutes an action at law for breach of contract, Plaintiffs have characterized their claim as one for an equitable accounting, and the Court has agreed with that characterization. If Plaintiffs' action does sound in equity, however, it is barred by the equitable doctrine of laches. Kansas courts have long held that "he who seeks equity, must do equity," and that plaintiffs "are only entitled to such relief as is equitable and just under the circumstances." *Kirsch v. City of Abilene*, 120 Kan. 749, 244 P. 1054, 1055 (1926). Applied to the laches doctrine, this principle requires that:

> If a party sleeps on his rights or unnecessarily delays action until the rights of others have intervened, or conditions have been changed so that it would be inequitable to enforce the right asserted, relief will be denied on the ground of laches. If the plaintiff stands by and remains passive while the adverse party incurs risks, enters into obligations, and makes large expenditures, so that by reason of the changed conditions disadvantages and great loss will result to the adverse party which might have been avoided, if the plaintiff had asserted his claim with reasonable promptitude, there are grounds for declining to grant the relief.

Id.

The evidence clearly indicates that Plaintiffs Coulter and Leighnor and their predecessors have slept on their rights. Plaintiffs or their predecessors have leased their rights and been paid royalties under the subject oil and gas leases for over 50 years. Yet at no time prior to the filing of this lawsuit did either Plaintiff challenge the validity or propriety of Anadarko's method and practice of calculating and paying royalties based on the sale of gas at the wellhead, though they must be charged with constructive, if not actual, notice of Anadarko's practices of calculating royalty on leases to which they were parties and for which they received monthly statements. *See Malone v. Young*, 148 Kan. 250, 81 P.2d 23, 23-24 (1938) ("Laches is not excused by courts of equity upon the mere ground of ignorance of the facts. The test is not whether the plaintiff actually knows but rather what he might have known by the use of information within his reach,

had he exercised the diligence the law requires of him."). Equity is therefore unavailable to parties, such as Plaintiffs, who have failed to pursue their claims.

Kansas courts have even expressed heightened concern with laches issues in the context of oil and gas rights: "The doctrine that a person claiming an interest or a right may be required to assert it promptly is especially applicable to oil and gas properties which are subject to rapid fluctuation in value." *Malone v. Young*, 148 Kan. 250, 81 P.2d 23, 30 (1938). In *Malone*, the Court barred the claim of a plaintiff who had waited five years and nine months before bringing his claim against his co-tenant in an oil and gas lease. Similarly, in *Maune v. Landowners Ass'n*, 170 Kan. 18, 223 P.2d 1001 (1950), the Court barred the claim of a plaintiff lessor who had waited over ten years to bring his claim. The *Maune* plaintiff had brought an equitable accounting action in which he also sought to cancel a conveyance of and quiet title to a tract of land in which he claimed a $1/8^{th}$ royalty interest. The Court held that the plaintiffs could not seek equitable relief due to the fact that they "stood by for ten years . . . and took no action while during that time the 100,000 barrels of oil, of which the petition speaks, was being taken from under their land." *Id.* at 28.

In this case, as in the cases cited above, Plaintiffs have sat idle for years during which they could have taken action to enforce their rights. Plaintiffs were, or should have been, well aware of Anadarko's method for calculating royalties based on sales at the wellhead, and were therefore required under the law to bring their claims in a timely fashion. *Malone v. Young*, 148 Kan. 250. Moreover, Anadarko has during this period spent hundreds of millions of dollars to produce, and enhance production of, its gas for the mutual benefit of itself and its lessors. In light Plaintiffs' and Plaintiffs' predecessors' unexcused and protracted delay, they have forfeited their right to equitable relief.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant this motion for judgment as a matter of law.

Respectfully submitted,

Edward C. Duckers
Lowell R. Stern
Hogan & Hartson
555 Thirteenth St. NW
Washington, D.C. 20004-1109
(202) 637-5600

Daniel H. Diepenbrock (No. 12424)
Miller & Diepenbrock, P.A.
150 Plaza Drive, Suite 2
P.O. Box 2677
Liberal, KS 67905-2677

Attorneys for Defendant Anadarko Petroleum Company

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the ~~8th~~ 11th day of February, 2002, I hand-delivered a copy of the above and foregoing document to the persons hereinafter named:

Thomas D. Kitch
Gregory J. Stucky
David G. Seely
FLEESON, GOOING, COULSON & KITCH
125 N. Market, 16th Floor
Wichita, KS 67202

Bernard E. Nordling
Erick E. Nordling
KRAMER, NORDLING & NORDLING
209 E. Sixth Street
Hugoton, KS 67951

Honorable Tom R. Smith
Stevens County Courthouse
200 E. 6th
Hugoton, KS 67951

Daniel H. Diepenbrock