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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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR TRIAL BY THE COURT

Anadarko incorrectly suggests that this Court cannot now address the issue of whether this case should be tried to a jury.

Contrary to Anadarko's assertion at page 1 of its Response that the petition "included a demand for a jury trial as to all issues," plaintiffs only demanded a jury trial "on all issues so triable," thereby reserving the very issue now before the Court. (Petition, at p. 8). Nor did the parties stipulate to trial by jury in their respective versions of the pretrial order now being reviewed by this Court. Even if the parties had reached such an agreement, K.S.A. 60-239(a)(2) expressly authorizes this Court to decide the issue on its own initiative.

After participating in the trial of *Youngren v. Amoco* and reviewing the applicable case law, it has become clear to plaintiffs' counsel that the claims being asserted herein are essentially equitable in nature and must be resolved by a judge, not a jury. Contrary to the analysis required by the case law, Anadarko mistakenly assumes that the inclusion of a claim for a money judgment resulting from a breach of contract dictates that this case be tried to a jury. Anadarko's Response, at p. 2. In truth, as Anadarko admits on the same page of its brief, if the plaintiffs' claims are "primarily equitable, then the parties are not entitled to a jury trial." *Id.*

In its brief, Anadarko ignores the undisputed evidence that it is accounting to its royalty owners on a monthly basis, as reflected on its check stubs, and that plaintiffs are claiming that such accountings are incorrect. In *Karnes Enterprises v. Quan*, 221 Kan. 596, 561 P.2d 825 (1977), the Kansas Supreme Court decided that a lessee, whose accountings to a lessor were the subject of an action in which the latter sought a money judgment for underpayment of rent, was not entitled to a jury trial.

In *Karnes Enterprises*, the lessee was obligated to pay rent in the amount of 10% of the gross proceeds of his restaurant business to the lessor of the premises. Likewise, Anadarko is obligated to pay royalties derived from it operations under the oil and gas leases. In both cases, the lessee has (had) exclusive control of the information necessary to calculate the amount due and purports (purported) to account to its lessor on a periodic basis in accordance with the results of its operations. The dispute in *Karnes Enterprises* centered upon the amount actually received by the lessee from the operation of his business, whereas the plaintiffs here are claiming that Anadarko has been secretly deducting expenses associated with its operations, which it is obligated to bear in their

entirety under the leases.[1] Thus, in the final analysis, each lessor is (was) claiming that its lessee is (was) liable for the underpayment of royalties (rent) which are (were) required to be calculated in accordance with the terms of the lease.

It is particularly significant that, as in *Karnes Enterprises*, the finder of fact in the present case is not being asked to decide what the parties agreed to in their contracts, as occurred in *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962), or which party breached first, which was the issue in *McCalester v. National Reserve Life Ins. Co.,* 151 Kan. 378, 99 P.2d 758 (1940). Here, neither party contests what the oil and gas leases say or which party purportedly breached the lease. Instead, as in *Karnes Enterprises*, the core of the controversy is whether the accountings accurately reflect the result of the operations required to be performed under the lease.

In view of the striking similarities between the two cases, the court's analysis and holding in *Karnes Enterprises* dictate that this case be tried to the Court:

> (6) The substance of the pleadings, not the form of the pleadings, determines the character of an action as equitable or legal in nature. (*Estey v. Holdren, supra; Russell v. Bovard,* 153 Kan. 729, 113 P.2d 1064; *Cloonan v. Goodrich,* 161 Kan. 280, 167 P.2d 303; *City of Osawatomie v. Slayman, supra.*) The fact that the plaintiff prays for a money judgment only is not controlling where the action is essentially one in equity. (*Sipe v. Taylor*, 133 Kan. 449, 300 P. 1076.)
>
> (7) Where a court of equity obtains jurisdiction of an action for the purpose of granting some distinctively equitable relief, the court will take jurisdiction for all purposes and determine all issues in the case so that a full, effective, and determinative decree adjusting the rights of the parties may be entered and enforced. (*Seibert and Lykins v. Thompson*, 8 Kan. 65; *Martin v. Martin*, 44 Kan. 295, 24 P. 218; *Sanders v. Visser*, 165 Kan. 336, 194 P.2d 511; *Place v. Place*, 207 Kan. 734, 486 P.2d 1354.)

221 Kan. at 601.

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[1]By claiming that its sale of the gas at the wellhead to an affiliated company is a "bona fide" transaction and that it is entitled to account to its royalty owners on the basis of such "proceeds," without disclosing to them what it actually received for the gas, Anadarko is raising exactly the same issue addressed in *Karnes Enterprises.*

The central issue presented on this appeal is whether the claim of Karnes Enterprises against Mr. and Mrs. Quan is essentially one for equitable relief as the plaintiff contends and as the trial court found, or whether it is one essentially at law for breach of contract as the Quans contend. To determine this issue the trial court was required to examine the pleadings and the fundamental issues raised at the pretrial conference. We have concluded that the trial court did not err in holding that the action was essentially one in equity and that the defendants Quan were not entitled to trial by jury as a matter of right.

Although no Kansas cases directly in point have been brought to our attention, the cases from other jurisdictions support the legal principle that where a lessor is entitled to rent based upon a percentage of the gross sales or profits of the lessee's business, the lessor is entitled to an accounting from the lessee where a dispute arises as to the correctness of the statement of sales or profits submitted by the lessee to the lessor. Typical cases which recognize this rule are the following: *Realty Associates Sec. Corp. v. Whitman Hotel Corp.*, 84 N.Y.S.2d 878 (Sup.1948); *Sweeney v. Happy Valley, Inc.*, 18 Utah 2d 113, 417 P.2d 126 (1966); *Vess v. Fred Astaire Dance Studios Corporation*, 229 F.2d 892 (5th Cir. 1956); *H. B. Zachry Co. v. Terry*, 195 F.2d 185 (5th Cir. 1952); *Blake v. Amreihn*, 67 Ohio App. 201, 36 N.E.2d 797 (1941); *Armstrong v. Gill*, 392 P.2d 737 (Okl.1964); *Collesion v. Collesion*, 2 Misc.2d 10, 154 N.Y.S.2d 345 (1955). We believe the rule is sound and should be followed in this state.

In this case the petition filed by Karnes Enterprises sought relief not only by way of money judgment but also types of relief which were essentially equitable in nature. At the time the case was filed the Quans were in possession of the restaurant premises. The petition prayed for cancellation of the lease and restoration of the property to the lessor. In addition the plaintiff specifically asked for an accounting of all amounts received by the Quans from the vending machines located on the restaurant premises. It should also be noted that in its demand for a money judgment for rentals due and unpaid the plaintiff requested judgment against the Quans in the sum of $29,857.65 'together with any additional sums Plaintiff may be entitled to from Defendants as rentals....' It is obvious that the specific sum mentioned was the minimum estimate of what the plaintiff believed was owed to it by the Quans. When we consider the substance of the allegations set forth in the petition, we arrive at the inescapable conclusion that Karnes Enterprises, Inc. is seeking a full accounting of the gross receipts received by the restaurant business during the period the Quans operated the same. Considering the pleadings, the relationship of the parties, and the contentions of the parties in our judgment the district court did not err in denying to the defendants Quan a trial by jury. The essential nature of the action was one for an accounting grounded on equitable rights, and clearly one in which equitable relief was sought. Since the action was one in equity, the court properly proceeded to determine all issues in the case so as to render complete and final relief to the parties in the controversy.

221 Kan. at 602-03 (emphasis added).

The accounting sought by plaintiffs is not merely "incidental" to a contract claim, but forms the very essence of the lawsuit itself. This action arises from accountings which Anadarko has already made to the plaintiff class. The primary relief sought by the class is in the form of corrected accountings to be performed by Anadarko under this Court's equitable supervision. As in *Karnes Enterprises*, the fact that such accounting may result in a money judgment does not change the essential nature of these proceedings, since such judgment will simply represent the final step in the Court's implementation of its equitable powers.

As in *Karnes Enterprises*, the plaintiffs are seeking other types of relief, which are also equitable in nature, including a declaratory judgment, an injunction with regard to the manner in which Anadarko performs its accountings in the future, and punitive damages. *Smith v. Printup*, 254 Kan. 315, 325, 866 P.2d 985 (1993) ("punitive damages may be regarded as equitable in nature").[2]

When deciding whether an action is essentially equitable in nature, the Kansas appellate courts continue to rely upon the "guiding principles" set forth in *Karnes Enterprises*. *Samsel v. Wheeler*, 233 Kan. 517, 520-22, 664 P.2d 813 (1990)(plaintiff who elected to sue for recission not entitled to jury trial); *Carnes v. Meadowbrook Executive Bldg. Corp.*, 17 Kan. App.2d 292, 297, 836 P.2d 1212 (1992)(plaintiffs who abandoned demand for an accounting and other claims "sounding in equity" wrongfully denied a jury trial).

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[2]To plaintiffs' counsel knowledge, disputes with respect to the amount of royalty paid by the producer under an oil-and gas lease have always been tried before the court–not a jury. In addition to the four cases listed by plaintiffs in the pending motion, *See Matzen v. Cities Service Oil Co.*, 233 Kan. 846, 667 P.2d 337 (1983); *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286 (1987); *Sternberger v. Marathon Oil Co.*, 257 Kan. 315, 894 P.2d 788 (1995); and *Smith v. Amoco Production Company*, ___ Kan. ___, 31 P.3d 255 (2001).

As in *Karnes Enterprises,* the "essential nature of the action" is "one for an accounting grounded on equitable rights" and this Court should proceed "to determine all issues in the case so as to render complete and final relief to the parties in the controversy." 221 Kan. at 603.

CONCLUSION

Plaintiffs respectfully request that their motion for trial by the Court be granted.

Respectfully submitted,

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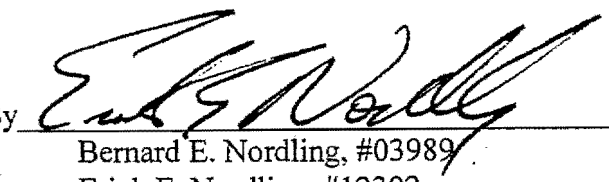
By 

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CERTIFICATE OF SERVICE

I certify that on October 23, 2001, a copy of this **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR TRIAL BY THE COURT** was placed in the United States mail in Hugoton, Kansas, first class postage prepaid, addressed to:

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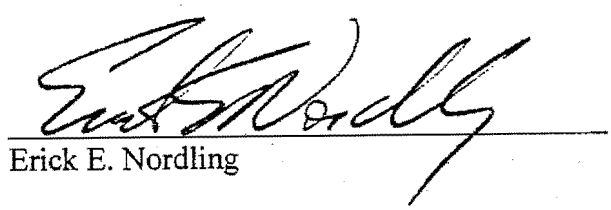

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