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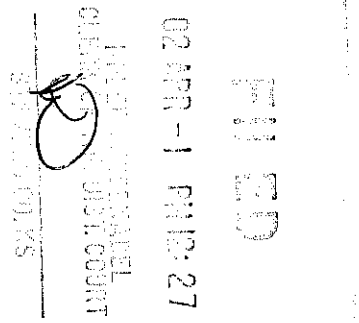

IN THE TWENTY-SIXTH JUDICIAL DISTRICT
DISTRICT COURT, STEVENS COUNTY, KANSAS
CIVIL DEPARTMENT

OPAL LITTELL and CHERRY RIDER, co-trustees of the Opal Littell Family Trust, and BONNIE BEELMAN, individually and as representative plaintiffs on behalf of persons or concerns similarly situated,	)	
Plaintiffs,	)	
vs.	)	Case No. 98-CV-51
OXY USA INC.,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR TRIAL BY THE COURT

COME NOW the plaintiffs, and move the Court, pursuant to K.S.A. 60-239(a)(2), for its order removing this case from the jury trial docket and setting the matter for trial by the Court.

In support of their motion, plaintiffs state that they hereby revoke and waive their earlier demand for trial by jury. Further, K.S.A. 60-239(a)(2) expressly authorizes this Court to decide whether claims should be tried to a jury, notwithstanding the positions of the parties. Upon analysis of the claims and issues to be tried, it is evident that there is no right of trial by jury in this case.

This is an action for an equitable accounting. Numerous Kansas cases have recognized the validity of this remedy in actions for alleged underpayment of royalties, including claims of

improper deductions. *E.g., Brubaker v. Branine*, 237 Kan. 488, 701 P.2d 929 (1985); *Lippert v. Angle*, 211 Kan. 695, 508 P.2d 920 (1973); *Ruthven & Co. v. Pan Am. Petroleum Corp.*, 206 Kan. 639, 482 P.2d 28 (1971); *Schupbach v. Continental Oil Co.*, 193 Kan. 401, 394 P.2d 1 (1964).[1] There is no right to trial by jury in an action for an accounting. *Karnes Enterprises, Inc. v. Quan*, 221 Kan. 596, Syl. ¶5, 561 P.2d 825 (1977).

It is undisputed that OXY 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*, the Kansas Supreme Court held 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, OXY is obligated to pay royalties derived from its 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 OXY has been deducting expenses associated with its operations, which it is obligated to bear in their entirety under the leases. Thus, in the final analysis, each lessor is (was) claiming that its

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[1]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 above, *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).

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.

The 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.

> 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 that OXY 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 OXY under this Court's equitable supervision. As in *Karnes*

Enterprises, the fact that an accounting may ultimately 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.

Moreover, like the plaintiffs in *Karnes Enterprises*, the plaintiffs here are seeking other types of relief, which are also equitable in nature, including a declaratory judgment, and an injunction with regard to the manner in which OXY performs its accountings in the future.

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).

CONCLUSION

In the similar case of *Coulter v. Anadarko*, Case No. 98-C-40, this Court correctly applied the principles set forth in *Karnes Enterprises* and concluded that the essential nature of the action was one for equitable relief in the form of an accounting, and, therefore, that neither party had a right to a jury trial. (Order by the Court Upon the Plaintiffs' Motion for Trial by the Court, December 4, 2001). That same conclusion is applicable here. Plaintiffs respectfully request that their motion for trial by the Court be granted.

WHEREFORE, for all the foregoing reasons, plaintiffs respectfully request that this case be tried by the Court sitting without a jury.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2002, I served a copy of the foregoing **Plaintiffs' Motion For Trial By The Court** by mailing same, postage prepaid and properly addressed to:

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