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*U.S. 1992-334-122/

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ORIGINAL

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETRO-VENTURES, INC., a corporation, Plaintiff/Appellant, v. GARY G. TAKESSIAN, Defendant/Appellee. STEPHEN R. VRABLE, N. RUSSELL WALDEN and WAYNE HAMERSLY, Intervenors/Appellees.	Docket Number: CIV-90-55349

FILED
MAY 23 1990
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BRIEF OF APPELLANT

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ATTORNEY FOR PLAINTIFF/APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETRO-VENTURES, INC., a corporation,

Plaintiff/Appellant,

v.

GARY G. TAKESSIAN,

Defendant/Appellee.

STEPHEN R. VRABLE, N. RUSSELL WALDEN and WAYNE HAMERSLY,

Intervenors/Appellees.

Docket Number: CIV-90-55349

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UNITED STATES COURT OF APPEALS

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PETRO-VENTURES, INC., a corporation, Plaintiff/Appellant, v. GARY G. TAKESSIAN, Defendant/Appellee. STEPHEN R. VRABLE, N. RUSSELL WALDEN and WAYNE HAMERSLY, Intervenors/Appellees.	Docket Number: CIV-90-55349

CERTIFICATE OF INTERESTED PARTIES
AND
STATEMENT OF RELATED CASES

Counsel certifies that the only known interested parties to this action are the Appellant and the Appellees herein.

Counsel further states that there are no related cases known to him.

Benjamin T. Willey, Jr.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETRO-VENTURES, INC., a corporation, Plaintiff/Appellant, v. GARY G. TAKESSIAN, Defendant/Appellee. STEPHEN R. VRABLE, N. RUSSELL WALDEN and WAYNE HAMERSLY, Intervenors.	Docket Number: CIV-90-55349

BRIEF OF APPELLANT

ISSUE PRESENTED FOR REVIEW

Were Plaintiff's unknown claims pursuant to Federal securities laws released or waived by Plaintiff's execution of a written release that, pursuant to state law, allegedly released all claims, known or unknown, that may have arisen from a transaction?

STATEMENT OF THE CASE

PROCEDURAL

This is an appeal from a final judgment entered September 11, 1989, by the United States District Court for the Southern District of California, dismissing Plaintiff-Appellant's complaint in favor of the Defendants-Appellees, Stephen R. Vrable, N. Russell Walden, and Wayne Hamersly.

Plaintiff-Appellant also appeals from the interlocutory order entered in this case on June 13, 1989, dismissing the complaint as to Defendant-Appellee Gary G. Takessian. Both of those orders appear in the Addendum at pages A-1 and A-8 respectively.

This case began with the filing on December 7, 1987, of a complaint by the Plaintiff-Appellant, Petro-Ventures, Inc., (PVI) against Defendant-Appellee, Gary G. Takessian, (TAKESSIAN). The complaint alleged that TAKESSIAN was a controlling person of a corporation which sold PVI units of a master limited partnership in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934. The complaint further alleged common law fraud against Defendant-Appellee and claimed $245,000 in actual and $1,000,000 in punitive damages. After the filing of the Defendant's answer the Court entered a pretrial scheduling order on June 29, 1988. On January 20, 1989, TAKESSIAN filed his motion and supporting papers to dismiss the complaint for failure to state a claim pursuant to F.R.C.P. Rule 12(b)(6), alleging that a release executed by PVI relating to prior litigation between the parties was a complete bar to the assertion of the securities law claims. On June 13, 1989, the Court granted TAKESSIAN'S motion to dismiss, ruling that the release was a bar to PVI'S state and federal claims.

Defendants-Appellees Vrable, Hamersly and Walden were directors of GAR at the time of the sales transaction in May, 1986 and the settlement negotiations in May, 1987. PVI filed a complaint against those directors in the U.S. District Court for the Western District of Oklahoma on December 7, 1987. PVI alleged that they were controlling persons liable for violations

of state and federal securities laws arising out of the May 1986 sales transactions. That action was stayed by the Court on January 12, 1989, pending the conclusion of the case at bar. Thereafter, Vrable, Hamersly and Walden intervened as defendants in this case on April 24, 1989.

Intervenors filed their motion to dismiss pursuant to F.R.C.P. 12(b)(6), or in the alternative for summary judgment, based on the same grounds and defenses contained in TAKESSIAN'S motion to dismiss. The Court granted defendants' motion on September 25, 1989, basing its decision on the same considerations applied in the TAKESSIAN decision and judgment. Notice of Appeal was filed in the District Court on October 24, 1989. (Addendum, page A-12).

FACTUAL

In the Spring of 1986, the Plaintiff-Appellant, Petro-Ventures, Inc., (PVI), an Oklahoma corporation, entered into negotiations with Great American Resources, Inc. (GAR), a Delaware corporation located in San Diego, California, for the sale of certain oil and gas producing properties owned by PVI in exchange for 233,132 shares of Great American Partners (GAP), a master limited partnership. GAR and TAKESSIAN, a director and president of GAR, were the partners of a general partnership that controlled the activities of GAP. The total value of the GAP units sold was $804,305 and the transaction was executed and completed on May 9, 1986.

Shortly thereafter both GAR and PVI discovered what they believed to be claims against each other that arose from the May

1986 transaction. GAR and GAP filed suit in July, 1986, against PVI and its president, B. Keaton Cudd, III, in the Superior Court for San Diego County alleging, among other claims, breach of contract and fraud. That action was removed to the U.S. District Court for the Southern District of California. In August, 1986, PVI filed a complaint against GAP, GAR, and TAKESSIAN in the U.S. District Court for the Western District of Oklahoma alleging conversion of PVI'S property and fraud in the inducement in the May 9th transaction. The Oklahoma lawsuit was transferred to the Southern District of California to be filed as a counterclaim in the July 1986 lawsuit filed by GAR. This was stipulated to by the parties on April 20, 1987, but the stipulation was conditioned on the Court's approval of filing the omitted counterclaim. However, before any of the acts mentioned in the stipulation were accomplished, the parties negotiated a settlement of the two lawsuits. (Addendum, Page A-14).

Following the transfer of the lawsuit from Oklahoma City to San Diego, the parties began negotiating a settlement of the two actions. On May 29, 1987, PVI, its president and chief executive officer, B. Keaton Cudd, III, GAR, its president and chief executive officer, Gary G. Takessian, GAP, and other GAR affiliates executed a settlement agreement releasing each other from all claims arising out of the May 9, 1986, sale transaction. The parties further agreed to "waive the benefit" of California Civil Code Section 1542 (Addendum, Page A-13) which excludes from a general release the release of unknown claims that would have materially affected a settlement agreement.

B. Keaton Cudd, III, President of Petro-Ventures, Inc., had no knowledge that the GAP units PVI purchased in May 1986 were not properly registered with the Securities and Exchange Commission; that TAKESSIAN had represented to him the units were properly registered; Cudd also had no knowledge that the units were still not properly registered at the time of the settlement in May 1987. The release of securities law claims was not discussed during settlement negotiations. (Addendum, Page A-20, Declaration of B. Keaton Cudd, III, attached as Exhibit B to Plaintiff's Memorandum of Points and Authorities filed August 14, 1989).

In its Form 10-Q for the quarter ending March 31, 1987, GAP through its general partner, GAR, stated that GAP did not currently have an effective registration statement to exchange GAP units for oil and gas properties; and that during 1986 it may have issued securities in violation of state and federal securities law, and as a result, intended to make rescission offers to purchasers of the units.

After filing a Chapter 13 petition in the Eastern Division of the U.S. Bankruptcy Court for the Northern District of Ohio, GAP, GAR, and three other GAR affiliates again stated in a court approved Disclosure Statement that they may have violated the securities laws but declined, due to lack of funds, to follow through with the GAP rescission offers as part of their reorganization plan.

During the period May 1986 through May 1987 Gary G. Takessian, Wayne Hamersly, Stephen R. Vrable, and N. Russell Walden were directors of GAR.

ARGUMENT

PLAINTIFF'S UNKNOWN CLAIMS PURSUANT TO THE FEDERAL SECURITIES LAWS WERE NOT AND COULD NOT BE RELEASED BY THE EXECUTION BY THE PLAINTIFF OF A SETTLEMENT AGREEMENT THAT ALLEGEDLY RELEASED ALL CLAIMS KNOWN OR UNKNOWN.

Even in the absence of the fraud or illegality alleged by the Plaintiff that tainted the May 29, 1987 settlement and release agreement, Plaintiff simply did not, and could not, release its unknown claims pursuant to the 1933 or 1934 Federal Securities Acts. The issue of release of such unknown claims has been repeatedly addressed in the United States Court of Appeals for the Ninth Circuit and the Court has stated a policy of scrupulous preservation of such claims against unintentional or involuntary release.

Because the law concerning waiver or release of rights or claims varies from state to state, the U.S. Supreme Court has held that federal law, not state law, governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action. Dice v. Akron, Canton & Youngstown Railroad, 342 U.S. 359, 361-62, 72 S.Ct. 312, 96 L.Ed. 398 (1952). Although Dice involved an FELA claim and its waiver or release, its holding applies to any federally created statutory right. Id.

In the case of Royal Air Properties, Inc. v. Smith, 333 F.2d 568 (9th Cir. 1964) this Court adopted an "actual knowledge" test as opposed to a "reasonable inquiry" test in determining whether

an investor had waived his rights under the federal securities laws. The Plaintiff in that case did have some, but not full, knowledge of his Section 10b-5 claims. The Court held that the Plaintiff did not waive his claims because he did not act with full knowledge of his rights. Id., page 571. In rejecting the reasonable inquiry, test the Court reasoned that:

> "It has been held by this court that waiver is 'the voluntary or intentional relinquishment of a known right. It emphasizes the mental attitude of the actor.' Since waiver is a voluntary act, there must be knowledge of the right in question before the act of relinquishment can occur... When waiver is predicated upon facts of which one has inquiry, but not actual, notice, it is no longer intentional. We feel that waiver of rights under the Securities Exchange Act of 1934 should be limited to those cases where it is intended, and that therefore the right in question must be found to be actually known before waiver becomes effective. This is as it should be because there is a period of limitations applicable to cases brought under Section 10(b); the statutory period should not be cut short by a waiver with the mental element disregarded... We therefore see no reason to find a waiver if one has not acted with full knowledge of his rights."

While the Royal Air case did not involve a waiver of securities law claims in a written release, this Court applied the Royal Air standard of "actual knowledge" to the waiver of investors' federal securities claims involved in an executed written release of claims arising out of an investment subject to the securities laws of the United States. Burgess v. Premier Corp., 727 F.2d 826 (9th Cir. 1984). In that case, five doctors purchased tax shelter investments in cattle herds from defendant Premier. After losing money for several years on their investments, four doctors resold their cattle to defendant and one sold to a third party. Each sold at a loss. When defendant repurchased the cattle from the doctors, each doctor executed a

written release purportedly releasing defendant from all claims arising out of the investment transaction. In determining the validity of the releases for purposes of waiving or releasing the federal securities claims, the Court ruled that the releases were valid only if the doctors had "actual knowledge" that such claims existed at the time. Since there were affidavits and testimony from the doctors stating that they did not have any knowledge at the time of such claims, the Court held that the trial court properly denied defendant's motions for summary judgment and a directed verdict. Id.

Plaintiff's-Appellant's officer and director, B. Keaton Cudd, III, has stated that he had no knowledge of any federal or state securities law claims when he signed the settlement agreement and that there was never any discussion of such claims during negotiations. (Addendum, Page A-20, Declaration of B. Keaton Cudd, III, attached as Exhibit B to Plaintiff's Memorandum of Points and Authorities filed August 14, 1989).

The facts in the instant case are very similar to those in Burgess with one exception. In the Burgess case, no litigation was involved. In the instant case, however, the written agreement was entered into early in the course of litigation, before any discovery was undertaken that could have reasonably led to the discovery of securities law claims. The issue therefore, becomes whether one can, in a written contract, release a federal securities law claim without actual knowledge of the claim.

Appellant would contend that since, as stated in Dice v. Akron, supra, California law cannot be applied to determine the validity of a contract of release pertaining to a federal

securities claim, the Burgess and Royal Air "actual knowledge" requirement would be rendered meaningless by the ruling of the Court below, unless the parties agreed to specifically release known and unknown federal securities claims. It would not have been unreasonable to state in the release that the parties were releasing all federal securities claims known or unknown had there been any intent to release such unknown claims.

There should be no distinction between a waiver and a release of a securities claim. Especially where releases pertain to transactions involving securities, the law of Burgess does not ask too much of the parties to require them to consciously negotiate the release of any securities claims. Nothing in the settlement agreement or in any of the pleadings or papers considered by the Court below contains the hint or mention of a securities law claim. Since plaintiff did not voluntarily or intentionally relinquish its rights to federal securities claims in the release and settlement, defendants cannot claim the release as a bar to plaintiff's Complaint. Burgess v. Premier Corp., supra.

The Appellant would argue that in its Memorandum Decision and Order of May 26, 1989, (Addendum, Page A-1) which sustained the Motion to Dismiss of the Defendant-Appellee, Gary G. Takessian, the Court has made some clearly erroneous assumptions as to the facts of this case as well as errors regarding the the application of the clearly stated priniciples of law of the Ninth Circuit to those facts.

At page 2 of its Decision, the Court accurately sets forth the language of the release as follows:

"hereby release any and all claims, demands,

> damages or causes of action they might have, each against the other, based upon the negotiations for sale and the conveyance of the producing oil and gas properties which were the subject of sale and conveyance...regardless of whether or not said claims have been set forth in the litigation....In further consideration and inducement for the compromise settlement contained herein, the parties expressly waive the benefit of Section 1542 of the California Civil Code which provides:
>
> > 'A general release does not extend to claims which a creditor does not know or suspect to exist in his favor at the time of executing the release, which, if known by him must have materially affected his settlement with debtor.'"

The Court states that "the evidence indicated that the parties attempted to draw as broad a release as possible." This is not the case. The release was specifically limited to "the negotiations for sale and the conveyance of the producing oil and gas properties...."

On page 3 of its Decision, the District Court seeks to distinguish between the facts of the Burgess case, supra, and the case at bar, correctly stating that the Burgess case involved a contractual settlement. So did the settlement agreement that is in issue here. The Court below stated, at page 3, that the parties were "in the midst of contentious litigation." While the Appellant does not know how "contentious litigation" might differ from other types of litigation, it can be stated that the settlement agreement at issue was a separate written contract of settlement and was entered into very early in the course of litigation. The only discovery that had occurred was the examination of producing well files by the Plaintiff.

The Court, at page 4 of its opinion then engaged in what the Appellant respectfully suggests is some rather difficult

reasoning that reaches the conclusion that the clear ruling by this Court in Burgess was "unnecessary to reach the outcome of Burgess." The Court then went so far as to attempt to distinguish and discredit the case upon which this Court relied in Burgess, that of Royal Air Properties, Inc., v. Smith, 333 F.2d 568 (9th Cir. 1964). On page 5 of its opinion, the Court below criticizes this Court's holding in Burgess, stating that it failed to discuss the difference between a waiver and a release. The logical conclusion to be reached is that the Court in Burgess saw no logical distinction worthy of discussion, not that its decision is somehow fatally flawed.

Finally, at page 5 of its Decision, the Court below held that the application of the clearly stated principles of the law of the Ninth Circuit would be "detrimental", "inequitable" and "impractical."

Most unfortunate of all is the Court's statement that to allow the assertion of Appellants securities law claims would discourage settlement negotiations. In fact, the well considered law of the Burgess case is intended to discourage violation of the securities laws of the United States!

A reading of the cases which the Appellant alleges are controlling in this matter, Royal Air Properties, Inc., v. Smith, 333 F.2d 568 (9th Cir. 1964); and Burgess v. Premier Corp., 727 F.2d 826 (9th Cir. 1984), in fact, show a clear intent on the part of this Court over a period of twenty years to expand the doctrine of complete non-release of unknown securities law claims to cover all situations.

Royal Air involved a purported waiver of unknown federal securities law claims. This Court held it could not be done.

Burgess involved a written contractual release of unknown securities law claims prior to litigation. This Court held it could not be done. The case at bar involves a written contractual release of unknown federal securities law claims in the very early stages of litigation. Without admitting that the facts before this Court in Burgess and in the case at bar differ in any way that should be significant to the outcome, the Appellant would state that even if such a difference did exist, it is the clear intent of the law of the prior cases that such protection from release of unknown securities law claims is intended to extend to situations such as in the case at bar.

The Appellant would suggest that the language in the Burgess case is broad. It is conclusive. It is a clear statement of law that restated a principle clearly established by this Court twenty years before Burgess.

CONCLUSION

The Appellant would respectfully suggest that it is entitled to the protection of well settled principles of law. In Burgess v. Premier Corp., supra, this Court clearly stated its intention to protect parties in positions such as the Appellant's.

Violations of the United States securities laws can be difficult to discover. They would have been in the case at bar. As in the case at bar, they are extremely damaging to the victimized party. The clear message of this Honorable Court to parties tempted to violate the law establishing its principle of non-release of unknown claims has been: DON'T DO IT! The Court below would seek to dismantle this protection, in effect, stating

"Do it if you can conceal it long enough to induce your victim to enter into a settlement agreement."

Dated: May 15, 1990

Respectfully submitted,

WILLEY & SHOEMAKER

By:

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that on this 15th day of May, 1990, I mailed, with postage prepaid thereon, a copy of the above and foregoing Brief of Appellant in the above referenced case to:

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for Gary G. Takessian
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Charles H. Brock, Attorney for
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ADDENDUM TO BRIEF

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AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Petro-Ventures, Inc.

V.

Gary G. Takessian

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 87-1774-E(CM)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendere its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Court grants the defendants' motion to dismiss with prejudice...........

June 13, 1989
Date

WILLIAM W. LUDDY
Clerk

Tina R. Helart
(By) Deputy Clerk

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MAY 26 1989
SOUTH... CALIFORNIA
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PETRO-VENTURES, INC.,
Plaintiff,
v.
GARY G. TAKESSIAN,
Defendant.

PETER CHRISTL,
Intervenor.

Civil No. 87-1744-E(CM)

MEMORANDUM DECISION AND ORDER

BACKGROUND

This case arises out of the transfer, sale and exchange of certain limited partnership units controlled by the defendant for oil and gas producing properties of the plaintiff. Prior litigation over these dealings arose with both sides claiming breach of contract, fraud and conversion. The claims were settled between the parties and the litigation dismissed with prejudice pursuant to a settlement agreement signed on May 29, 1987. The settlement agreement contained a release clause which purported to release the parties from any and all claims arising out of the above mentioned transactions.

1 On December 7, 1987, plaintiff Petro-Ventures, Inc. broug
2 suit for violation of federal securities laws. Defendant is n
3 moving for a dismissal of this action on the grounds that the pri
4 settlement released all claims against it. Plaintiff contends
5 however, that the release in the settlement does not extend t
6 cover claims under the federal securities laws unless the partie
7 were aware that those claims existed at the time they signed th
8 release.

9 DISCUSSION

10 The release signed by the parties in the prior litigatio
11 stated that the parties:

12 > hereby release any and all claims demands, damages or causes of action they might have,
13 > each against the other, based upon the negotiations for sale and the conveyance of the pro-
14 > ducing oil and gas properties which were the subject of sale and conveyance...regardless of
15 > whether or not said claims have been set forth in the litigation....In further consideration
16 > and inducement for the compromise settlement contained herein, the parties expressly waive
17 > the benefit of Section 1542 of the California Civil Code which provides:
18 >
19 > > "A general release does not extend to claims which a creditor does not know or suspect to exist in his favor
20 > > at the time of executing the release, which, if known by him must have
21 > > materially affected his settlement with debtor."

22 (Exhibit "E" to Motion to Dismiss, ¶ 9).
23
24 Although the evidence indicates that the parties attempted
25 to draw as broad a release as possible, the plaintiff argues that
26 Petro-Ventures was unaware of its security claims and that in the
27 Ninth Circuit, a party cannot release a federal security claim
28 unknowingly. As plaintiff points out, the Ninth Circuit has stated

that "[a] release is valid for purposes of federal securiti claims only if the [party] had 'actual knowledge' that such clai existed." Burgess v. Premier Corp., 777 F.2d 826, 831 (9th Ci 1984), citing Royal Air Properties, Inc. v. Smith, 333 F.2d 56 571 (9th Cir. 1964).

However, the facts in Burgess are in sharp contrast to th facts in the case at bar. The release in Burgess was signed as part of a contractual arrangement in which the defendant repurchased the assets of an investment tax shelter from the plaintiff The defendant had devised the tax shelter and in repurchasing th assets obtained a release from all claims the plaintiff may hav had against the defendant.

In the instant action, the parties were in the midst o contentious litigation. Each party was represented by counsel, and each party gave up rights to "all claims demands, damages or causes of action they might have, each against the other,... regardless of whether or not said claims have been set forth in the litigation...." (Exhibit "E", supra, ¶ 9). Finally, in an attempt to clarify the extent to which the parties were releasing their claims the parties expressly waived the benefit of Section 1542 of the California Civil Code. This section was enacted to limit the effects of a general release and, as noted above, provides that:

> "A general release does not extend to claims which a creditor does not know or suspect to exist in his favor at the time of executing the release, which, if known by him must have materially affected his settlement with debtor."

Id.

Id. at 571. Finally, the Royal court noted that in a case waiver, a party should not be held to diligence in discoveri his rights because "no detriment to a third party is requir for waiver, it is unilaterally accomplished." Id.

The Royal court's analysis of waiver does not support th broad statement made by the Burgess court that a release c federal securities claims must be made knowingly. The Burges court failed to discuss the difference between a waiver and release. While a waiver may be unilaterally accomplished, release is the result of negotiations between the parties.

In a case such as the one before this court, where th parties have negotiated at arms length and the intent of th settlement agreement is clearly to release all claims, know or unknown, it would be detrimental to allow a party to assert claims that should have been covered by the agreement. Such a result would be inequitable in light of the fact that the consideration rendered in the settlement was based upon an understanding that no further litigation would result. (See Exhibit "E", ¶ 9). Furthermore, allowing the assertion of a federal securities claim in the face of such a complete settlement agreement would discourage settlement negotiations in all litigation in which a federal securities claim may eventually be discovered.

Accordingly, this court determines that Burgess is not controlling in this matter. Although the language in Burgess is broad, it goes beyond that necessary to reach the issues before the Burgess court, and the logical extension of the language to a case such as this proves to be inequitable and impractical.

1 CONCLUSION

2 Upon due consideration of the parties' memoranda and exhibits
3 the arguments advanced at hearing, and for the reasons set fort
4 above, the court hereby grants the defendants' motion to dismis
5 with prejudice.

6 IT IS SO ORDERED.

7 DATED: May 25, 1989.

8

9

WILLIAM B. ENRIGHT, Judge
10 United States District Court

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26 Copies to:

27 Plaintiff

28 Defendant

AO 450 (Rev. 5/85) Judgment in a Civil Case

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United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Petro-Ventures, Inc.

V.

Takessian

Vrable, et al Intervenors

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 87-1744-E(CM)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rend its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

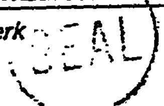
IT IS ORDERED AND ADJUDGED

The court hereby grants the defendant/intervenors' motion to dismiss. The entire action is dismissed...

....

September 25, 1989
Date

WILLIAM W. LUDDY
Clerk



Tina R. Helart
(By) Deputy Clerk

✓ FILED ____ LODGED
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SEP 11 1989
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PETRO-VENTURES, INC., Plaintiff,

v.

GARY G. TAKESSIAN, Defendant.

STEPHEN R. VRABLE, N. RUSSELL WALDEN and WAYNE HAMERSLY, Intervenors.

Civil No. 87-1744-E(CM)

MEMORANDUM DECISION AND ORDER

BACKGROUND

This case arises out of the transfer, sale and exchange of certain limited partnership units controlled by the defendant for oil and gas producing properties of the plaintiff. Prior litigation over these dealings arose with both sides claiming breach of contract, fraud and conversion. The claims were settled between the parties and the litigation dismissed with prejudice pursuant to a settlement agreement signed on May 29, 1987. The settlement agreement contained a release clause which purported to release the parties from any and all claims arising out of the above mentioned transactions.

1 On December 7, 1987, plaintiff Petro-Ventures, I[illegible]
2 brought suit for violation of federal securities laws.
3 Memorandum Decision dated May 25, 1989, this court dismis[illegible]
4 this action against defendant Gary Takessian on the grou[illegible]
5 that the prior settlement released all claims against a
6 parties. Defendant intervenors, Stephen R. Vrable, N. Russe
7 Walden and Wayne Hamersly now bring a motion to dismiss t
8 action against them on the ground that they are in the sa
9 position with plaintiff as defendant Takessian.

10 DISCUSSION

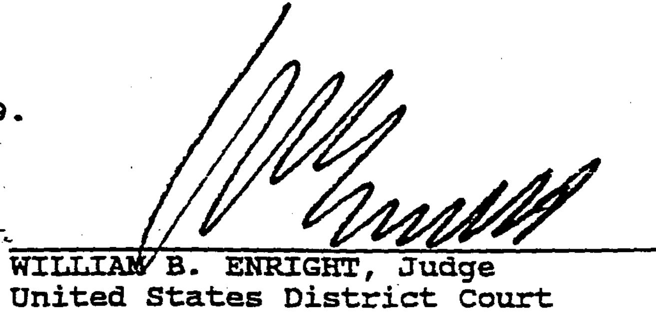
11 The issue before the court is whether the movi[illegible]
12 defendants were in the same position as defendant Takessia[illegible]
13 However, plaintiff's arguments against dismissal are limit[illegible]
14 to arguments which were presented by plaintiff in his earlie
15 response to Takessian's motion and concern the merits of th
16 case rather than issue of the relationship between the defendants
17 Plaintiff does not dispute the fact that the remainin
18 defendants were members of the board of directors of Grea[illegible]
19 American Resources, Inc., along with Takessian, or that th[illegible]
20 settlement release covered the boards of directors of al[illegible]
21 corporations involved in the settlement. Therefore, th[illegible]
22 moving defendants are similarly situated to Takessian.
23 Finally, plaintiff did not dispute the fact that it had a[illegible]
24 adequate opportunity to present and argue the above mentioned
25 issues when this court considered Takessian's motion. Accord-
26 ingly, the remaining defendants should also be dismissed from
27 this action. <u>See</u> 9 C. Wright & A. Miller, <u>Federal Practice and</u>
28 <u>Procedure</u> § 2371 (1971).

CONCLUSION

Upon due consideration of the parties' memoranda and exhibit the arguments advanced at hearing, and for the reasons set for above, the court hereby grants the defendant/intervenors' moti to dismiss. Accordingly, the entire action is dismissed.

IT IS SO ORDERED.

DATED: September 8, 1989.



WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to:

All Parties

Benjamin T. Willey, Jr.
WILLEY & SINGER
501 N.W. Expressway, Suite 525
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(405)848-1951

ATTORNEYS FOR THE PLAINTIFF,
PETRO-VENTURES, INC.

FILED ✓ LODGED
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OCT 2 1989
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PETRO-VENTURES, INC., an Oklahoma corporation

Plaintiff,

vs.

GARY G. TAKESSIAN, an individual,

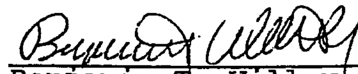
Defendant.

CASE NO. 87-1744E (CM)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Petro-Ventures, Inc., Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, the Memorandum Decision and Order dated May 25, 1989, and filed in Court on May 26, 1989, which became a final and appealable order on September 25, 1989, wherein Defendant, Gary G. Takessian's Motion To Dismiss For Failure To State A Claim was granted dismissing Plaintiff's action in its entirety with prejudice to the refiling of the same. The plaintiff also gives notice that it appeals the Memorandum Decision and Order entered on the 25th day of September, 1989, granting the Motion to Dismiss of the Intervenors Stephen R. Vrable, N. Russell Walden and Wayne Hamersly and dismissing the entire action.

DATED: October 23, 1989



Benjamin T. Willey, Jr., OBA 9631
WILLEY & SINGER

ATTORNEYS FOR PLAINTIFF

claimed was in full satisfaction of defendant's demand on that account, court properly instructed jury on principles of accord and satisfaction. Lowrey v. Rego (1944) 149 P.2d 706, 65 C.A.2d 16.

In personal injury action, instruction that, if release signed by plaintiff was obtained through fraud of parties not acting as agents of plaintiff then defendants could not take advantage of unfair settlement, was not error. Dingman v. J. E. French Co. (1935) 39 P.2d 826, 3 C.A. 512.

33. Findings

Trial court's finding that release executed by plaintiff was void did not sustain judgment for plaintiff. Winstanley v. Ackerman (1931) 294 P. 449, 110 C.A. 641.

§ 1542. General release; extent

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

(Enacted 1872. Amended by Code Am.1873–74, c. 612, p. 241, § 189.)

Historical Note

The amendment of 1873–74 mentioned claims which the creditor "does" not know or suspect to exist in his favor instead of claims which the creditor "did" not know etc.; and added the restrictive clause "which if known by him must have materially affected his settlement with the debtor".

Law Review Commentaries

A proposal for the protection of victims of unfair releases. (1949) 1 Stan.L.R. 298.

Effect of personal injury release on further recovery in California. (1954) 42 C.L.R. 161.

Effect of release given by injured party with respect to unknown injuries. (1941) 30 C.L.R. 111.

Extent to which a release by the injured party may be applied to unknown injuries. (1941) 30 C.L.R. 111.

Need for legislation in connection with the partial release of tort claims. (1944) 32 C.L.R. 101.

Library References

Release ⟹30 to 36.

C.J.S. Release § 51 et seq.

Notes of Decisions

In general 1
Actions 9
Evidence 10
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Release of known and unknown claims 4
Unknown injuries 6

1. In general

This section was not relevant to determination of the effect of a general release where the releasor did not assert that the claim in question was nonexistent or unknown at the time of the signing of the release. Gelfand v. Tanner Motor Tours, Limited (C.A.N.Y.1971) 450 F.2d 786.

Release signed by homeowners in prior suit against developers and vendors for damage to property on theories of defective engineering and manufacture and fraud and nondisclosure did not release city

SETTLEMENT AGREEMENT

This agreement, dated this 29 day of May, 1987, is by and between Petro-Ventures, Inc., a corporation, (hereinafter referred to as "PVI"), B. Keaton Cudd, III, (hereinafter referred to as "CUDD"), Great American Partners, a Texas limited partnership (hereinafter referred to as "GAP"), Great American Resources, Inc., a Delaware Corporation (hereinafter referred to as "GAR"), Needco Operating Partnership, a TEXAS Limited Partnership (hereinafter referred to as "NEEDCO") and Gary G. Takessian, an individual (hereinafter referred to as "Takessian").

WITNESSETH

1. Recitals.

A. On May 9, 1986 a certain sale of producing oil and gas properties was consummated by, between and among PVI, CUDD, GAP, GAR and NEEDCO involving a conveyance of the properties by PVI in exchange for limited partnership units in GAP.

B. Subsequent to the closing date of the sale, the parties asserted certain claims against each other resulting in the following litigation:

1. Case Number 86-1738 S (CM) in the United States District Court for the Southern District of California, styled Great American Partners, a Texas limited partnership, and Great American Resources, Inc., a Delaware corporation, Plaintiffs, vs. Petro-Ventures, Inc., a corporation; B. Keaton Cudd, III , an individual and Does 1 through 20, inclusive.

2. Case Number CIV-86-1822A in the United States District Court for the Western District of Oklahoma, styled Petro-Ventures, Inc. an Oklahoma corporation, Plaintiff, vs. Great American Partners, a Texas Limited Partnership and Great American Resources, Inc., a Delaware corporation and Gary G. Takessian, an Individual, Defendants, which case was subsequently transferred to the United States District Court for the Southern District of California as Case No. 86-2231 S (IEG).

3. PVI, CUDD, GAP, GAR, NEEDCO and Takessian desire to, and in fact, have settled all claims arising out of the

EXHIBIT "A"

transaction described above and asserted in the litigation described above.

NOW, THEREFORE, IN CONSIDERATION of the foregoing recitals and of the mutual promises, covenants and benefits herein contained, together with other good and valuable consideration the receipt and adequacy of which is hereby acknowledged by all parties, IT IS HEREBY AGREED AS FOLLOWS:

1. PVI, CUDD, GAP, GAR, NEEDCO and Takessian hereby agree to settle the litigation represented by Case No. 86-1738 S (CM) in the United States District Court for the Southern District of California and Case No. 86-2231 S (IEG) in the United States District Court for the Southern District of California. Said cases will be dismissed with prejudice by the respective plaintiffs contemporaneously with the execution of this settlement agreement.

2. PVI shall pay to GAR the amount of One Hundred Eighty One Thousand Dollars ($181,000.00) by cashiers check, at the closing of this settlement.

3. GAR, GAP and/or Needco Operating Partnership, as appropriate, shall reassign to PVI all of their right, title and interest in and to the following wells: Davenport #1, Freden #1-7, Conrad #1, Smith #1, Ira Fox #1-11, Dierkson-Petro #1, Gompf #1-30, Ward Unit, Banks #4, Reuter #1, Old Timer #16-1, Symes #1, Hyatt #2-1, Seymour #1-9, Sullivan #1-30, Sabine #1-10, Lane #1-24, Jackson #1-25, Marshall #1-24, Bowman #1 & #2, Sara Post #1, Gabriel #1-18, Rex Gregory #1-22, Taylor #1-23, Karcher #1-25, Nelson #1-25, Government "A"-1, CSC #1-6, J.R. Dick #1, J.R. Dick #2, J.R. Dick #3, Lewter Estate #1, Lewter Estate #2, Nannie Owen #1, D. Sturdivant, O.B. Rich #2, #3, #6, Penn Unit, Pronger "A" 1, A.L. Ross #2, Fleagle #1, Shaw-Jones 1-19, Brock-Kelly 1-5, Koehling 1-30, Stonestreet 1-30, Vaughn 1-4, Moyers #1 & #2, and Taylor #1 (hereinafter referred to as the PVI wells), all as more particularly described in previous assignments from Petro-Ventures, Inc. to Needco Operating Partnership. It is specifically understood and agreed that:

EXHIBIT "A"

(A) The assignment shall be in the same form as that attached as Exhibit "A" to this agreement.

(B) The assignment shall be without warranty of title except that the Assignor shall warrant title as to liens, mortgages or other encumbrances placed on the properties by GAP, GAR or NEEDCO.

(C) The assignment shall reconvey to Petro-Ventures, Inc. the exact interest previously assigned to Needco Operating Partnership undiminished to any degree by intervening assignments of any interest whatsoever, including but not limited to overriding royalty interests, reversionary working interests or farmout agreements.

4. PVI and Cudd by the execution of this Agreement release all right, title and interest in and to any limited partnership unit shares sold to GAR on or about May 30, 1986 and to any proceeds due PVI for the sale of said units, which for purposes of this settlement agreement and for all other purposes is described as the amount of One Hundred Eighty Seven Thousand Five Hundred Dollars ($187,500.00).

5. PVI shall be entitled to any funds held in suspense by any purchasers of oil or gas from the properties reassigned to PVI pursuant to this agreement (the PVI wells) as of the date of this agreement. In this regard, PVI, CUDD, GAP, GAR, NEEDCO or Takessian agree to:

(A) Forward each to the other without delay any funds received by them subsequent to the execution of this agreement, as appropriate.

(B) Notify any appropriate purchaser or party holding funds in suspense that the said funds are to be paid to the appropriate party without delay, pursuant to the terms of this agreement.

By execution of this agreement GAP, GAR, NEEDCO and Takessian disclaim any interest in any such funds relating to the PVI wells. PVI and CUDD disclaim any interest in any such funds relating to wells not reassigned to PVI, specifically the Van

Zandt #1-14, McAnally #1, R.A. Strother #2, Rawson #1 and the Goodwin #1-33.

6. PVI, Needco, GAP and GAR shall retain any proceeds of production from the properties actually received by them respectively since April 1, 1986. By executing this Settlement Agreement, the parties hereby release and disclaim any right, title, interest or claims which may arise out of the receipt or retention of said proceeds by the appropriate party.

7. PVI hereby assumes and agrees to pay all lease operating expenses now in arrears relating to the properties being reassigned to it pursuant to the terms of this agreement.

8. Not later than the time of execution of this Settlement Agreement, GAR, GAP and NEEDCO, as appropriate, shall appoint by written recordable instrument, a third party to act as attorney-in-fact to execute all division and transfer orders with GAP, GAR or NEEDCO as transferor, as necessary. Said attorney-in-fact shall be located in the City of Oklahoma City, Oklahoma and shall be acceptable to and approved in advance by PVI.

9. PVI, CUDD, GAP, GAR, NEEDCO and Takessian hereby release any and all claims demands, damages or causes of action they might have, each against the other, based upon the negotiations for sale and the conveyance of the producing oil and gas properties which were the subject of sale and conveyance from PVI to Needco in May of 1986, regardless of whether or not said claims have been set forth in the litigation referred to in Paragraph B. 1. and 2. of this agreement. This release shall be effective as to PVI, CUDD, GAR, GAP, NEEDCO and Takessian and as to their successors, assigns, affiliated entities, directors, officers, employees, agents and attorneys. In further consideration and inducement for the compromise settlement contained herein, the parties expressly waive the benefit of Section 1542 of the California Civil Code which provides:

> "A general release does not extend to claims which a creditor does not know or suspect to exist in his favor at the time of executing the release, which, if known by him must have materially affected his settlement with debtor."

EXHIBIT "A"

10. PVI, CUDD, GAP, GAR, NEEDCO and Takessian hereby represent that they have all requisite power and authority to enter into and perform their respective obligations under this Settlement Agreement and all action taken pursuant to this agreement has been validly authorized by all requisite corporate action on behalf of the respective parties. In this connection, the parties agree to cause their attorneys to execute the opinion letters in the format and content as set forth on Exhibit "B" hereto.

11. It is specifically understood that GAR, GAP, and NEEDCO will provide at closing all necessary releases of mortgage relating to a mortgage or mortgages executed in favor of Republic Bank of Dallas covering the PVI wells. By execution of this Settlement Agreement GAP hereby disclaims and quitclaims, grants, bargains, sells and conveys to PVI any interest it might have or claim in the PVI wells. Should any other mortgages exist which describe the PVI wells, GAP, GAR and NEEDCO will take all appropriate action to see that they are released upon demand.

12. GENERAL PROVISIONS.

A. This Agreement embodies the entire agreement between the parties hereto with respect to the matters expressed herein, and there are no oral or written agreements existing between the parties with respect to such matters which are not expressly set forth herein. Any amendment or modification to this Agreement shall be in writing and signed by the party affected thereby.

B. This Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns.

C. Each party to this Agreement shall pay its own costs and attorney fees incurred in connection with the litigation described in this Settlement Agreement.

D. Time shall be of the essence in the performance of this Settlement Agreement.

The terms and provisions oi his Agreement shall be construed according to California law.

F. This instrument may be executed in counterpart and any such counterpart, when so executed, shall be considered an original.

IN WITNESS WHEREOF PVI, CUDD, GAP, GAR and Takessian have caused this agreement to be executed on the date first above written.

(S E A L)

Attest:

By

PETRO-VENTURES, INC.

By

B. Keaton Cudd, III, President

B. Keaton Cudd, III, Individually

GREAT AMERICAN PARTNERS, a Texas Limited Partnership

By

Gary G. Takessian, General Partner

(S E A L)

Attest:

By

SECRETARY

GREAT AMERICAN RESOURCES, INC., a Delaware corporation

By

, President

NEEDCO OPERATING PARTNERSHIP, a Texas Limited Partnership

By

General Partner

Gary G. Takessian, Individually

* * * * * * * * * * *

EXHIBIT "A"

Benjamin T. Willey, Jr.
WILLEY & SINGER
501 N.W. Expressway, Suite 525
Oklahoma City, Oklahoma 73118
(405)848-1951

ATTORNEYS FOR THE PLAINTIFF,
PETRO-VENTURES, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PETRO-VENTURES, INC., an Oklahoma corporation Plaintiff, vs. GARY G. TAKESSIAN, an individual, Defendant.	CASE NO. 87-1744E (CM) DECLARATION OF B. KEATON CUDD, III, IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS UNDER RULE 12(b)(6) AND IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT
STEPHEN R. VRABLE, N. RUSSELL WALDEN and WAYNE HAMERSLY, Intervenors.	

I, B. Keaton Cudd, III, declare and state:

(1) That I am, and, at the times of the acts complained of in the complaint filed herein by Petro-Ventures, Inc., was its president and chief operating officer.

(2) That it was not until September of 1987, by reading an article in "The Wall Street Journal", that I became aware that it was possible that the Great American Partners limited partnership unit shares I had purchased in May, 1986, were unregistered with the Securities and Exchange Commission.

(3) That it took several weeks of diligent investigation, including attempts to contact the SEC, and

attempts to obtain copies of the pertinent 10-K and 10-Q forms before information upon which a diligent inquiry could be made was, in fact, available to Petro-Ventures, Inc.

(4) That I did not receive the 10-K and 10-Q forms until November of 1987. It took considerable time after that to review said reports and other information and ascertain that there was adequate evidence to support a claim that the unit shares were not properly registered as well as to support the other claims of omissions and misrepresentations in Petro-Ventures, Inc.'s complaint.

(5) The facts supporting my claims were not ascertained, therefore, until the latter part of November, 1987. It was not until subsequent to that time that the names of controlling parties and persons could also be ascertained.

(6) That on May 29, 1987, and prior to discovering these facts supporting claims for violations of the federal and state securities laws, I executed a settlement agreement on behalf of Petro-Ventures, Inc. in settlement of the two lawsuits referred to in defendant's Memorandum of Points and Authorities. It was Petro-Ventures, Inc.'s intention in executing the release to release only claims or identical unknown claims of the kind currently being litigated between the parties in the two lawsuits. There was never any discussion of releasing any other claims or claims relating to securities law violations nor were these types of claims addressed in the pending litigation or within the contemplation of Petro-Ventures Inc. at the time of the release.

(7) Had I been aware of the securities law violations at settlement, including the misrepresentations and omissions of material facts as alleged in the Complaint filed herein, there would have been no incentive for Petro-Ventures, Inc. to settle the litigation as it did because complete rescission and return of consideration would have been available as remedies together with other remedies provided by law and statute. Specifically, I lost approximately $245,000 on the resale of the Great American Partners partnership units, including the resale of units made to Great American Resources, Inc., as part of the May 29, 1987 settlement agreement and release. Had I known of these claims I at least would have had additional bargaining power and leverage to use during the settlement negotiations.

(8) During the settlement negotiations neither defendant nor anyone else connected with Great American Resources, Inc. or Great American Partners disclosed to me or Petro-Ventures, Inc. the earlier misrepresentations and omissions surrounding the May, 1986 purchase agreement. In particular, defendant continued to lead me to believe that the Great American Partners securities were in fact registered with the Securities and Exchange Commission. Defendant's assertion that the securities were properly registered in May, 1986, coupled with the fact that the Great American Partners units were publicly and continuously listed on the National Association of Securities Dealers Automated Quotations (NASDAQ) system until March,1988, gave me no reason to suspect that they were not registered until I read the newspaper article as described above.

EXHIBIT "B"

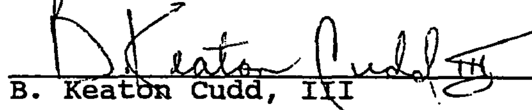
1 Although section 1542 only applies to claims bas[illegible]
2 upon California law, this court finds that the express waiv[illegible]
3 by the parties of the protection provided by section 1542 [illegible]
4 indicative of the parties' intent to have a final resoluti[illegible]
5 of all disputes which might arise out of the transactio[illegible]
6 from which the prior and present litigation arose. This find
7 ing of the parties' intent is further supported by the broa
8 language releasing all claims whether or not included in th
9 litigation and the fact that the prior litigation was dismiss[illegible]
10 with prejudice as a part of the settlement agreement.

11 Although the holding in Burgess is based upon the broa[illegible]
12 statement that, "[a] release is valid for purposes of federal
13 securities claims only if the [party] had 'actual knowledge'
14 that such claims existed," Burgess, 727 F.2d at 831, this court
15 is of the view that such a broad statement was in all probability
16 unnecessary to reach the outcome of Burgess and that such a broad
17 statement of the law was not supported by the case the Burgess
18 court relied upon: Royal Air Properties, Inc. v. Smith, 333 F.2d
19 568 (9th Cir. 1964).

20 Unlike the present case, where the issue is the extent
21 to which a party can release federal securities claims, the
22 Royal case dealt with the extent to which a party can waive
23 a federal securities claim. The Royal court limited its
24 analysis to a discussion of the nature of a waiver, and con-
25 cluded that

26 > waiver of rights under the Securities Exchange
27 > Act of 1934 should be limited to those cases
> where it is intended, and that therefore the
> right in question must be found to be actually
28 > known before waiver becomes effective.

I declare under penalty of perjury under the laws of the State of California and the State of Oklahoma that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was executed on the 11th day of August, 1989, at Oklahoma City, Oklahoma County, State of Oklahoma.



B. Keaton Cudd, III

EXHIBIT "B"