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IN THE 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.

9/CIVIL NO. CIV-90-55349

Southern District Court
Action No. 87-1744E (CM)

BRIEF OF APPELLEES VRABLE, WALDEN, AND HAMERSLY

In the United States Court of Appeals,
Ninth Circuit, from the United States
District Court, Southern District of California.

Honorable William B. Enright

HOGG, FENTON, JONES & APPEL, INC.
BY: CHARLES H. BROCK
MAUREEN A. FOLAN

60 South Market Street
San Jose, CA 95113
Telephone (408) 287-9501

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Attorneys for Intervenors/Appellees
STEPHEN R. VRABLE, N. RUSSELL WALDEN
and WAYNE HAMERSLY.

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CERTIFICATE OF INTERESTED
PARTIES AND STATEMENT OF
RELATED CASES

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

Intervenors/Appellees.

The undersigned, counsel of record for Stephen R. Vrable,
N. Russell Walden, and Wayne Hamersly certifies that the following
have an interest in the outcome of this case:

PETRO-VENTURES, INC., a corporation, Plaintiff/Appellant

GARY G. TAKESSIAN, Defendant/Appellee

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

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

CHARLES H. BROCK
Attorney of Record for
STEPHEN R. VRABLE, N. RUSSELL
WALDEN, and WAYNE HAMERSLY

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ISSUE PRESENTED FOR REVIEW

2 In a second suit by plaintiff for claims arising out of the same
3 transaction, was the district court clearly erroneous in holding that
4 by their settlement of the earlier litigation, the parties intended to
5 and effectively did release all disputes which might arise out of that
6 transaction?

STANDARD OF REVIEW

Examining the language of the settlement agreement and the circumstances under which it was executed, the district court found the parties intended to release all claims, known and unknown, arising from a transaction in which oil and gas properties were exchanged for GAP partnership units. The proper standard of review in such a case is "clearly erroneous."

"When the inquiry extends beyond the words of a contract and focuses on the related facts, however, the trial court's consideration of the extrinsic evidence is entitled to great deference and its interpretation of the contract will not be reversed unless it is clearly erroneous. (Cites.) . . . Because a trial court's review of the extrinsic evidence is essentially an inquiry into the intent of the contracting parties, its conclusions based on such evidence must be accorded great weight." (In re U.S. Financial Securities Litigation (1984) 729 F.2d 628, 632.)

"A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed." (Cites.) (Hecht v. Harris Upham & Co. (1970) 430 F.2d 1202, 1209 citing, Clostermann v. Gates Rubber Company (9th Cir. 1968) 394 F.2d 794, 796.)

In the instant action, no such mistake has been committed. The lower court correctly ruled plaintiff's claims are barred by the settlement and release it executed.

STATEMENT OF THE CASE

The transaction from which this appeal originates occurred in May 1986 when appellant, Petro-Ventures (PVI) exchanged oil and gas producing properties for Great American Partners (GAP) partnership units. Defendant/appellee Gary Takessian and intervenors/appellees Stephen R. Vrable, N. Russell Walden, and Wayne Hamersly sat on the board of directors of Great American Resources, Inc. (GAR), when this securities deal was struck. GAR was a general partner of GAP, a master limited partnership. (CR 40, 41.)¹ What started as an amicable business dealing soon deteriorated into a series of costly and protracted lawsuits.

Just two months after the exchange took place, July 25, 1986, GAP and GAR filed a complaint against PVI in San Diego Superior Court for breach of contract, fraud, and rescission. (CR 42, p. 22; see Complaint attached to Request for Judicial Notice filed with Appellee's Motion to Dismiss/Summary Judgment Motion.) That action was removed to the United States District Court for the Southern District of California. (CR 42, p. 36; see Petition for Removal attached to same Request for Judicial Notice.)

Less than a month later, on August 19, 1986, PVI filed a complaint against GAP and GAR in the United States District Court for the Western District of Oklahoma asserting, among other claims, conversion of the partnership units because GAP and GAR issued "stop transfer" orders to its transfer agent. (CR 42, p. 39; see Complaint

¹References to the Clerk's Record shall be designated as "CR" and references to Excerpts of Record shall be designated as "ER."

1 attached to same Request for Judicial Notice.) That case was
2 subsequently transferred to the United States District Court for the
3 Southern District of California. (CR 42, p. 48; see Order of Transfer
4 Attached to same Request for Judicial Notice.)

5 Then, on May 29, 1987, the parties agreed to end their dispute,
6 terminate their relationship, and settle all claims arising from the
7 underlying securities transaction. After comprehensive negotiations
8 between the parties and their counsel, they memorialized their intent
9 by a settlement agreement and release and chose California law to
10 govern its terms and provisions. (CR 42; ER 1-8.) Paragraph 9 of
11 that agreement contains a release provision stating:

12 "PVI, CUDD, GAP, GAR, NEEDCO, and Takessian hereby
13 release any and all claims, demands, damages, or
14 other causes of action they might have, each
15 against the other, based upon the negotiations for
16 sale and the conveyance of the producing oil and
17 gas properties which was the subject of the sale
18 and conveyance from PVI to NEEDCO in May of 1986,
19 regardless of whether or not said claims have been
20 set forth in the litigation referred to in para-
21 graph 1 and 2 of this agreement . . . In further
22 consideration and inducement for the compromise
settlement contained herein, the parties expressly
waive the benefit of California Civil Code section
1542 which provides:

23 "'A general release does not extend to claims which
24 a creditor does not know or suspect to exist in his
25 favor at the time of executing the release, which,
26 if known by him, must have materially affected his
settlement with the debtor.'" (Emphasis added.)

23 PVI then paid GAR \$181,000; specified wells were reassigned to
24 PVI and limited partnership units were reassigned to GAR. (CR 42; ER
25 1-8.) This mutual parting of the ways did not last long. Less than a
26 year later, appellant attempted to resurrect claims stemming

1 from the underlying securities transaction. On December 7, 1987, PVI
2 filed the instant suit against Takessian only, seeking damages under
3 state and federal securities laws. (CR 1.) Then, on October 20,
4 1988, PVI filed suit in Oklahoma District Court naming Takessian,
5 Vrable, Walden, Hamersly, and Peter R. Crystl. (CR 42, p. 75; see
6 Complaint attached to same Request for Judicial Notice.) That
7 complaint alleged essentially the same facts and involved essentially
8 the same issues as the California action. On January 12, 1989, the
9 presiding district court judge issued an order staying the Oklahoma
10 litigation pending the conclusion of the California action. (CR 42,
11 p. 85; see Order of Judge attached to same Request for Judicial
12 Notice.)

13 Defendants Vrable, Walden, and Hamersly intervened in the
14 California action on April 24, 1989. (CR 23.) Thereafter, on May 26,
15 1989, Judge Enright granted Takessian's motion to dismiss which was
16 based on the previously executed settlement agreement and release. In
17 its memorandum decision and order, the court found that, based on the
18 language of the settlement agreement and circumstances surrounding its
19 execution, the parties intended to fully and finally resolve all
20 disputes from which the prior and present litigation arose. (CR 31;
21 ER 9-16.) Defendant intervenors Vrable, Walden, and Hamersly then
22 filed a 12(B)(6) or in the alternative, summary judgment motion on the
23 ground that the release and settlement applied to them as well. (CR
24 40, 41.) Said motion was granted in September 1989. (CR 51; ER 17-
25 21.) Petro-Ventures filed its notice of appeal on October 24, 1989.
26 (CR 53, ER-22.)

1
2
3 ARGUMENT

4 I

5 PETRO-VENTURES' STATEMENT OF THE ISSUE
6 IS INACCURATE AND RESTS ON A FAULTY ASSUMPTION.

7 Appellant Petro-Ventures contends the district court erroneously
8 applied California law (Civ. Code, § 1542) to release federal securi-
9 ties claims and that only federal law can determine whether federal
10 statutory claims have been released. (Dice v. Akron, Canton &
11 Youngstown Railroad (1952) 342 U.S. 359 [72 S.Ct. 312, 96 L.Ed. 398].)
12 This assertion is not only erroneous, it fundamentally misconstrues
13 the lower court's ruling. First, a plain reading of the lower court's
14 memorandum decision and order reveals that the court acknowledged that
15 Civil Code section 1542 applies only to claims based on California
16 law. However, the court found that:

17 "The express waiver by the parties of the protection
18 provided by section 1542 is indicative of the
19 parties' intent to have a final resolution of all
20 disputes which might arise out of the transaction
21 from which the prior and present litigation arose."
22 (ER 13.)

23 Second, although federal law generally governs questions regard-
24 ing the validity of releases involving federal claims, state law has
25 frequently been applied to evaluate releases of federal securities
26 claims. (See, Finn v. Prudential Bache Securities, Inc. (11th Cir.
1987) 821 F.2d 581, 586, note 5 [applying state law chosen by party to
evaluate validity of release of federal securities claim]; Pettinelli
v. Danzig (11th Cir. 1984) 722 F.2d 706 [applying state law to issue
of validity of release of federal securities law claims].)

1 Indeed, the parties in the underlying transaction specifically
2 chose California law and Civil Code section 1542 to govern the terms
3 and provisions of the settlement agreement. The district court was
4 well within its province in according great weight to the significance
5 of Civil Code section 1542.

6 Simply put, appellant's statement of the issue rests on a faulty
7 premise. The lower court did not rule California law released federal
8 claims. Rather, aided by Civil Code section 1542, the court deter-
9 mined the parties intended to bury their dispute, terminate their
10 relationship, and insure no further litigation arising out of the
11 disputed transaction would ever result. The issue is thus not as
12 appellant presents it, but rather whether the lower court's interpre-
13 tation of the parties' intent was clearly erroneous. In this case, it
14 was not.

II

IN A COMMERCIAL TRANSACTION, A RELEASE WHICH CLEARLY
MANIFESTS THE PARTIES' INTENT TO FINALLY RESOLVE
THEIR DISPUTE MUST BE UPHELD AS VALID.

Where, as here, sophisticated business parties represented by experienced counsel enter into a settlement agreement in which they agree to release all claims, known and unknown, arising from an underlying securities transaction, great weight must be accorded to the language used. When that language clearly manifests the parties' intent to terminate their dispute and end all litigation arising from it, a release to that effect must be upheld as valid. (Locafrance U.S. Corp. v. Intermodal Systems Leas. (2d Cir. 1977) 558 F.2d 1113.)

Locafrance, supra, is precisely on point with the case at bar. There, as part of a settlement agreement resulting from a lawsuit, Locafrance Corporation executed a general release of any and all claims it might have against Intermodal, Inc. Locafrance later filed suit against Intermodal for violations of state and federal securities laws. Claiming the settlement agreement and release barred plaintiff's claims, Intermodal brought a summary judgment motion which the District Court granted. Affirming the lower court, the appellant court reasoned:

"[w]hen, as here, a release is signed in a commercial context by parties in a roughly equivalent bargaining position and with ready access to counsel, the general rule is that if 'the language of the release is clear, . . . the intent of the parties [is] indicated by the language employed.'" (Cites omitted.) (Id., at p. 1115.)

In the instant action, the same reasoning applies. The parties to the underlying transaction were sophisticated, represented by counsel, and

1 enjoyed equal bargaining power. The language chosen by them indis-
2 putably manifests their intent to finalize their dispute and end all
3 litigation once and for all.

4 Petro-Ventures' bold assertion that the release is limited and
5 applies only to negotiations for the sale and conveyance of producing
6 oil and gas properties is absurd. (Petro-Ventures' Opening Brief, p.
7 11.) The consideration for those properties was the issuance of units
8 in GAP. The prior litigation and the settlement involved the entire
9 transaction, not just one side of it. Further, the settlement
10 agreement is broadly crafted. At the outset, it proclaims the parties
11 "desire to and in fact have settled all claims arising out of the
12 transaction described above and in the litigation described above."
13 (ER 1, 2.) Also, the release clause specifically references the
14 underlying transaction and is comprehensively drawn to extinguish
15 liability based on any and all claims which may even conceivably arise
16 from it.

17 Paragraph 9 of the agreement states that the parties:

18 ". . . hereby release any and all claims, demands,
19 damages or causes of action they may, have each
20 against the other, based on negotiations for sale
21 and the conveyance of producing oil and gas proper-
22 ties which were the subject of the sale and convey-
23 ance . . . in May, 1986, regardless of whether or
24 not those claims have been set forth in the liti-
25 gation . . ." (Emphasis added.) (ER 4.)

26 Finally, in an effort to make completely dispositive the extent
to which the parties intended to release claims and end their liti-
gious relationship, the parties expressly waived the benefit of
California Civil Code section 1542. That section provides:

1 "A general release does not extend to claims which a
2 creditor does not know or suspect to exist in his
3 favor at the time of executing the release which,
4 if known by him may have materially affected his
5 settlement with the debtor." (ER 4.)

6 Based on the foregoing, the lower court correctly found the
7 parties intended to completely resolve their dispute, release all
8 claims, and prevent litigation arising out of this transaction from
9 ever resurfacing.

10 Like the rule announced in Locafrance, supra, the rule of law in
11 California is the same. (Larsen v. Johannes (1970) 7 Cal.App.3d 491
12 [86 Cal.Rptr. 744].) In a commercial transaction, where a release
13 manifests a deliberate and definite expression of the parties' intent
14 to discharge all claims, known or unknown, it must be upheld as valid.
15 The Larsen court distinguished releases executed in a personal injury
16 setting from those executed in a commercial transaction and noted
17 public policy safeguards found in personal injury cases do not operate
18 in a commercial transaction.

19 "[t]here is no insurance company receiving a wind-
20 fall through release of an obligation it was paid
21 to assume (Id. at p. 111) nor is there damage to
22 human tissue 'difficult to anticipate where the
23 opportunity is great' (Id. at p. 111) the release
24 was not drafted by experts and presented in a 'take
25 it or leave it manner' (Id. at p. 111)." (Id. at
26 p. 505 citing, Casey v. Proctor (1963) Cal.2d 97.)

Simply put, the fear or overreaching and unequal bargaining power
does not exist in a commercial setting where both parties are sophis-
ticated, and have ready access to counsel. These considerations must
weigh heavily in upholding the instant release.

/ / / / /

1 Finally, aside from scrutinizing the specific language of the
2 settlement agreement, the court also examined the surrounding circum-
3 stances under which it was executed.

4 The court correctly found the parties were in the midst of
5 contentious litigation at the time the settlement was executed; that
6 each party was represented by counsel; that arms length negotiations
7 took place; and that claims from the prior litigation were dismissed
8 with prejudice. (ER 10-15.) Combining these factors with the
9 specific language of the release, the court determined the parties
10 clearly intended to release all claims, known and unknown, arising
11 from the transaction. This determination of the parties' intent may
12 not be reversed unless clearly erroneous. (In re U.S. Financial
13 Securities Litigation (1984) 729 F.2d 628, 632.) As the
14 overwhelmingly evidence indicates, it was not.

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III

PETRO-VENTURES VALIDLY RELEASED
FEDERAL SECURITIES CLAIMS.

Petro-Ventures relies on Burgess v. Premier Corp. (9th Cir. 1984) 727 F.2d 826, 831 and Royal Air Properties, Inc. v. Smith (9th Cir. 1964) 333 F.2d 568, to argue it did not release federal securities claims because at the time it executed the settlement agreement and release, it did not have "actual knowledge" such claims existed. This argument is without merit. The above cases are clearly distinguishable. In Burgess, unlike the case at bar, no litigation ensued before the release was signed. The release in Burgess was signed as part of a transaction in which defendants repurchased cattle from plaintiffs and then signed a document releasing all claims. Here, the parties were engaged in protracted litigation. Both sides were represented by counsel and comprehensive negotiations took place before execution of the settlement agreement. Each party deliberately gave up the rights to "all claims . . . regardless of whether those claims have been set forth in litigation." Finally, the parties expressly waived the benefit of California Civil Code section 1542 and specifically provided that California law would govern the terms and provisions of the agreement. (ER 4, 5.) In Burgess, unlike the present case, no evidence indicates the parties consciously and deliberately negotiated to release all claims and fully end their litigious relationship. As such, Burgess, is not controlling.

As the trial court observed, the case on which the Burgess court relied, Royal Air Properties, Inc. v. Smith (9th Cir. 1964) 333 F.2d

1 568, can also be distinguished. In the case at bar, the issue below
2 was to what extent a party can release a federal securities claim but
3 the Royal case addressed the extent to which a party can waive a
4 federal securities claim. (Id., at p. 571.) The Royal court said
5 that in a case of waiver, a party should not be held to diligence in
6 discovering his rights because "no detriment to a third party is
7 required for waiver, it is unilaterally accomplished." (Id.) How-
8 ever, as the lower court correctly pointed out, while a waiver may be
9 unilaterally accomplished, a release is a result of negotiations and
10 bargaining between the parties. As such, the Royal court's analysis
11 of waiver does not support the broad statement made by the Burgess
12 court that a release of federal securities claims must be made know-
13 ingly. (ER 13, 14.) Judge Enright was absolutely correct in making
14 this distinction.

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1 They also request this court to award them attorneys' fees and
2 costs for this appeal.

3 DATED: June 14, 1990

4 Respectfully submitted,
5 HOGE, FENTON, JONES & APPEL, INC.

6
7 By 
8 CHARLES H. BROCK
9 MAUREEN A. FOLAN
10 Attorneys for Intervenors/
11 Appellees

PROOF OF SERVICE BY MAIL

CASE TITLE: PETRO-VENTURES vs. TAKESSIAN

CASE NUMBER: 9/CIVIL NO. CIV-90-55349

I, the undersigned, say:

That I am now and at all times herein mentioned have been over the age of eighteen years, a resident of and/or employed in Santa Clara County, California, and not a party to the within action or cause; that my business address is 60 South Market Street, San Jose, California 95113-2396; that I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that I served a copy of the attached

BRIEF OF APPELLEES VRABLE, WALDEN, AND HAMERSLY

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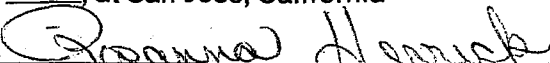
John S. Einhorn, Esq.
Attorney for Gary G. Takessian
401 West "A" Street
San Diego, CA. 92101

Benjamin T. Willey, Jr., Esq.
Attorney for Petro-Ventures, Inc.
501 N.W. Expressway, Suite 525
Oklahoma City, OK. 73118

which envelope was then sealed and, with postage fully prepaid thereon, was on June 15, 1990 placed for collection and mailing at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service at San Jose, California on the above-referenced date in the ordinary course of business; that there is delivery service by United States mail at the place so addressed.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on June 15, 19 90, at San Jose, California


ROSANNA HERRICK