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September 3, 2002

CERTIFIED - RETURN RECEIPT REQUESTED
Mr. R. Kirk Flowers
Director - Jt. Interest/Revenue Accounting
Energen Resources Corporation
605 Richard Arrington, Jr., Boulevard North
Birmingham, Alabama 35203-2702

Re: Martinez #1-3132032A

Dear Mr. Flowers:

In my last letter to you dated August 16, 2002, I mentioned the fact that the sending of invoices as well as the statement in your correspondence to me of March 11, 2002, to the effect that the Forced Pool ruling of May 5, 1951 yields the same results as if I had signed the JOA, was in violation of the Unfair Practices Act. In particular, the action of Energen falsely stated what were my "rights, remedies or obligations," in violation of §§57-12-2D and 57-12-3 NMSA 1978.

Because a recent opinion of the New Mexico Court of Appeals seems to make clear what kind of activity constitutes such a violation of the Unfair Practices Act, I thought it well to bring the case to your or your legal counsel's attention.

In *Jaramillo v Gonzales*, Vol. 41, No. 30, July 25, 2002, page 12 et seq., Cert. Denied by the Supreme Court of New Mexico on May 28, 2002, No. 27,490, the plaintiff sued the Bank of America Housing Services (the "Bank") for having engaged in an unfair trade practice, among other causes of action, by refusing to acknowledge that Plaintiff had the right to revoke a sales contract. The Bank was a successor to the assignee of retail installment contract and the security agreement from the seller of a mobile home. The contract required the plaintiff to maintain insurance on the mobile home. Plaintiff consistently made the required monthly payments on the home and was current on his payments when the plaintiff's son returned to the mobile home to discover it had been flooded by leaks in the pipes. After the son made a claim with the insurance company (the manufacturer had gone out of business) and received a check for $15,317.00, the son cashed the check without informing the Bank, but did not use the money to repair the damage to the mobile home. Through his attorney plaintiff informed the Bank that the flooding had caused considerable damage and rendered the mobile home uninhabitable. The letter revoked the contract and the security agreement and asserted that the Bank, as assignee, was subject to all claims and defenses that could have been asserted against the seller of the mobile home. The Bank did not acknowledge the letter of

revocation; instead it sent a routine monthly billing statement to Plaintiff showing a past due balance. The Bank followed the billing statement with a collection letter and phone call to Plaintiff. When he told the Bank he had revoked acceptance of the mobile home and he would not be paying on the contract, the Bank advised him of his contractual obligation and the effect of non-payment on his credit rating. The Bank continued to seek to collect on the contract and reported a delinquent debt to credit agencies thereafter. Plaintiff was denied credit twice due to the reports made by the Bank. The Court of Appeals first held that the Bank as assignee of the contract was in fact subject to the defense of revocation. Addressing the Unfair Practices claim, the Court held as follows:

> **Unfair Practices Act.** The Bank argues next that the trial court erred in concluding that the Bank's refusal to concede liability under the FTC Holder Clause violated the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -22 (1967, as amended through 1999). Whether refusal to concede liability violates the statute is a question of law which this Court reviews de novo. *See Flores v. Danfelser*, 1999-NMCA-091, ¶11, 127 N.M. 571, 985 P.2d 173 (holding that we review a district court's dismissal of a tort claim based upon the exclusivity provisions of the Worker's Compensation Act as a question of law), *overruled on other grounds by Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3rd 1148.
>
> {27} The Unfair Practices Act defines an unfair or deceptive trade practice as:
>
> > any false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by any person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person and includes but is not limited to:
> >
> > ...
> >
> > (15) stating that a transaction involves rights, remedies or obligations that it does not involve.
>
> Section 57-12-2(D). The Bank makes three arguments in support of its position that it did not violate the statute: (1) failing to acknowledge liability under the FTC Holder Clause is not a "false or misleading statement"; (2) even if the Bank's action constituted a statement, it did not deceive or mislead anyone; and (3) the Bank was entitled to refuse to concede liability. We disagree with all three of the Bank's arguments.

{28} First, the Bank argues that because the trial court did not adopt Plaintiff's requested findings on misrepresentation, there could be no violation of the UPA. However, the trial court did find that the Bank refused to acknowledge liability pursuant to the FTC Holder rule. The Bank's refusal to acknowledge liability was a false representation that misled Plaintiffs into believing they were liable to the Bank on the contract when they were not. A false representation such as the one the Bank made fits within the statutory definition of an unfair practice, which includes "stating that a transaction involves rights, remedies or obligations that it does not involve." Section 57-12-2(D)(15). The UPA does not require a statement, but rather any representation. Section 57-12-2(D)

{29} Second, the Bank's refusal to acknowledge liability could, tended to, or did deceive or mislead. Section 57-12-2(D). The FTC Holder Rule holds the assignee - in this case the Bank - liable for any claims that the consumer may have against the seller. The Bank had no legal or factual basis for claiming that it could not be held liable for the claims against the seller. Thus, its denial of liability was both false and misleading to Plaintiffs. The Bank contends that because Plaintiffs were represented by counsel at the time they revoked their acceptance of the mobile home, they could not have been deceived by the Bank's refusal to acknowledge liability. Simply because Plaintiffs were represented by counsel, however, does not mean that the Bank's actions did not mislead or deceive them; the Bank misled Plaintiffs by telling them they were still responsible for payment even after acceptance was revoked.

{30} Third, we do not agree that the Bank was entitled to refuse to concede its liability under the FTC Holder Rule. As noted above, the rule is straightforward in holding the assignee subject to all claims the consumer might bring against the seller. Requiring the Bank to concede this liability does not prevent it from asserting any defenses it might have to those claims. It does, however, prevent the Bank from asserting that no claims may be brought against it. *See Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 485-86 (Ky. Ct. App. 1978) (holding that refusal to recognize remedies available under the UCC is a violation of unfair practices act) *cf. Pub. Serv. Co. v. Diamond D Constr. Co., 2001-NMCA-082*, ¶¶ 37-44, 131 N.M. 100, 33 P.3d 651 (holding, in response to an argument that there could be no culpable mental state when a party breaching a contract testified that her interpretation of the ambiguous contract was reasonable, that substantial evidence supported an opposite conclusion and that punitive damages could be awarded notwithstanding the party's professing of her beliefs).

{31} We find the Bank's arguments unpersuasive, and we therefore hold that the Bank's refusal to acknowledge its liability under the FTC Holder Rule was

> tantamount to an incorrect and misleading assertion that no claims could be brought against it and therefore was a violation of the Unfair Practices Act, particularly considering all of the other failings the trial court found on the part of the Bank. We find the Bank's contrary arguments to be based on an unduly technical parsing of the trial court's findings. We construe findings to uphold, rather than defeat, a judgment. *Smith v. Galio,* 95 N.M. 4, 6, 617 P.2d 1325, 1327 (Ct. App. 1980). (Underscoring added)

In the same case, the appellate court sustained an award of $20,000.00 in attorneys fees related to the Unfair Practices Act, compensatory damages for $29,636.00 (minus an offset for the $15,317.00 received by plaintiff from the insurance company), and $6,765.00 for alternative housing. In other words, the net recovery of $14,319 ($29,636 less $15,317) and $6,765; that is, $21,084.00 justified an almost equal legal fee of $20,000.00.

The underlying facts in the *Jaramillo* case, *supra*, with respect to the Unfair Practices Act, are comparable to what was done to me by Energen and its predecessors, owners and operators.

Monthly billing statements for the entire (not just the amount that might have been offset by my entitled share of the revenue from production) amount claimed as my *pro rata* cost of production were sent and, as of the date of this letter, have continued to be sent to me. This, despite Energen's acknowledgment that I had no legal obligation to pay such costs pursuant to the JOA, and Energen's reliance on the Pooling Order which solely authorized the operator to sell and use the revenue "only from the working interests' share (7/8) of the revenue derived from the sale of hydrocarbons produced from the well on the pooled unit." (Underscoring added) Note: The Order did not allow the production and sale of gas over and above what was necessary to reimburse the operator for the expense of producing the gas, nor for billing of the cost of producing gas, independently of its production in excess of an operating interest owner's entitled amount of gas.

What Energen and its predecessor operators did here is precisely what the Bank had done in the *Jaramillo* case - namely, sent out a routine monthly bill statement. In my case, however, knowing that I had not signed the JOA, Energen has continued to bill me monthly. When I protested the billing and imbalance statements, Energen and its predecessors, by continuing to send statements, was making, in the words of the Court in *Jaramillo*, a "false representation...that fits within the statutory definition of an unfair practice, which includes 'stating that a transaction involves rights, remedies or obligations that it does not involve'."

While the Court remarked that "the UPA does not require a statement but rather any representation," in my case your letter contains an actual statement that I have the "responsibility of paying all billed charges because you are covered by the May 5, 1961 Forced Pool ruling."

Incidentally, common sense would dictate that an operating interest owner could not be personally and individually liable if the operator should choose to continue operations at a loss. If gas produced netted revenue, for example, of $1.00 per thousand BTUs while costing $2.00 per thousand BTUs to produce because Energen wanted to con the Bureau of Land Management into believing its lease was still in existence because gas was being produced in paying quantities and Energen was continuing to pay 6.25% royalty to the Bureau, I should not be liable to pay the shortfall of the extra dollar per each thousand BTUs. And, on the expectation that revenue might increase to over $3.00 per thousand BTUs, as it has, Energen might choose to continue operations rather than shut-in the well until a rise in the price of gas. But if, as here, it should choose to produce gas at a loss, it should bear that loss itself, and reimburse the other operating interest owners for the gas to which they were entitled. Nor should other operating interest owners as a matter of principle be required to invest money in a losing venture, even if Energen elects to speculate by producing gas for operating costs exceeding the revenue.

When Energen is actually taking all of the revenue from production and not applying any of it to the cost of producing the gas to which I am entitled, the proposition that I am personally liable to Energen is even more preposterous and defies economic sense.

Preposterous or not, after I was provided with a copy of the JOA, I relied on the actions of Energen's predecessor, Burlington Resources, charging me with the operating costs of the Martinez No. 1 well, by paying Burlington Resources $464.79 on 21 November 1997. Enclosed is a copy of my check No. 148, which recited that it is in payment of:

> Joint Interest Billing Owner 026502
> Martinez No. 1 Unit/Well No. 32032 A-API
> Pictured Cliffs - Rio Arriba County
> Owner No. 00289101
> Operating Costs - Jan. 97 through August 97

I mention the payment of these operating costs because in the *Jaramillo* case, *supra*, the Bank had urged as a defense that its actions could not and did not deceive the plaintiff because plaintiff was represented by counsel. In my case, although I am a lawyer, I was falsely led to believe that a JOA effectively submitted me to liability to pay the cost of producing my entitled portion of the gas. At that time, I believe that Burlington Resources was not withholding revenue from the sale of my gas, but was first offsetting the operating costs against revenue from its sale. In any event the best evidence that I was deceived or misled consists of my parting with money. I certainly would not have done so had I believed that the JOA did not make me liable, unfair as the JOA was to the other owners of operating interests, exclusive of Burlington Resources who might have signed the JOA.

I have not yet investigated for purposes of a class action how many oil and gas wells in New Mexico are operated by Energen where the owners of operating interests are being assigned so-called "imbalances" of gas and/or oil in lieu of revenue, at the same time that their gas and/or oil is being converted by Energen and no part of the proceeds of sale used for producing that same gas or oil. Rather, invoices are sent to the owners of the operating interest, at least in the case of Martinez Well No. 1. In May of 2002, Energen shows that for the Martinez No. 1 Well alone Energen owed other operating interest owners for 22,422 units of 1,000 BTU's.

As Martinez No. 1 is a marginal well, I would suspect the "imbalances" that Energen owes on the more productive wells would bring the amount due to other operating interest owners in New Mexico to a rather staggering sum. In other words, the owners of small fractional operating interests, not being able to market their gas to which they are entitled, might be just the ones to want to join in the class.

Nor have I inquired of the SEC or the F.E.R.C. as to the accounting treatment accorded by Energen to its deficits, reserves and income. By now, the CEO of Energen must have had to swear to income and balance sheets of Energen filed with the SEC, and one of the four large accounting firms (remaining after Arthur Anderson collapsed) must have had to certify as to results of operations of Energen. All of the foregoing, being a matter of public record, Energen's financial statements filed with the SEC, and possibly the F.E.R.C., would make for interesting reading by affected parties, including me. Because of small fractional operating interest, it well may be that other owners of operating interests have not wanted to expend the time or money to investigate these matters, but would readily join in a class action.

I have written this letter simply to be certain that whoever in Energen's organization assigned to handle my case will take the above factors into account.

I look forward to hearing from Energen very soon, and before deciding whether it is necessary to bring an individual, or class action, law suit.

Sincerely yours,

Joseph A Sommer

Joseph A. Sommer
JAS:mp