

ATTORNEYS FOR INTERVENOR PLAINTIFF  
J. BAXTER BRINKMANN

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## **I. NATURE OF THE CASE**<sup>2 3</sup>

This dispute concerns Baxter Brinkmann's request to protect and declare his ripened full ownership of the ½ Snyder Net Profits Interest, including his right to receive all cash proceeds accruing to such interest on or after August 13, 2006.

## **II. PROCEDURAL HISTORY**

On May 1, 2007, Baxter Brinkmann filed his Complaint in Intervention asserting a claim for declaratory relief against Dolenz, WTG Gas, Vealmoor, and the US Government. (Docket #63). On May 14, 2007, May 17, 2007, and May 23, 2007, respectively, the US Government, WTG Gas and Vealmoor, and Dolenz, as Trustee,<sup>4</sup> filed their answers.<sup>5</sup> (Docket #66, #71, and #74).

On August 16, 2007, the Court entered Findings of Fact and Conclusion of Law determining that the funds and interests in dispute were not held in trust. (Docket #87). The Court then ordered Dolenz to re-plead in his individual capacity. (Docket #88, #119, and #121). Dolenz, individually, failed to file a pleading denying the allegations in the Complaint in Intervention. On February 12, 2008, Dolenz filed his Third Amended Original Petition alleging "Affirmative Defenses" to Baxter Brinkmann's claims. (Docket #123).<sup>6</sup>

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<sup>2</sup> Intervenor Plaintiff's Uncontroverted Statement of Facts is included as Exhibit A to the Appendix and is incorporated herein by reference. The defined terms used herein are the same as set forth in the Intervenor Plaintiff's Uncontroverted Statement of Facts.

<sup>3</sup> As previously determined through the Court's prior orders, Dolenz did not hold his part of the life estate in the ½ Snyder Net Profits Interest in trust. With regard to Baxter Brinkmann's request for relief, however, it matters not whether Dolenz purported to hold such interest individually or through a trust as the form of prior ownership of the life estate interest had no effect on Baxter Brinkmann's remainderman interest or his current full ownership of the ½ Snyder Net Profits Interest after the passing of Virginia Brinkmann.

<sup>4</sup> Dolenz's answer was filed on behalf of an alleged trust.

<sup>5</sup> Neither Dolenz nor the US Government asserted affirmative claims against Baxter Brinkmann.

<sup>6</sup> Out of an abundance of caution, On March 3, 2008, Baxter Brinkmann filed an Original Answer to Plaintiff's Third Amended Original Petition. (Docket #129).

### **III. GROUNDS FOR SUMMARY JUDGMENT**

#### **A. Baxter Brinkmann's Affirmative Claims For Declaratory Relief – Ownership of The ½ Snyder Net Profits Interest.**

It is undisputed that since at least 1987, Baxter Brinkmann owned the remainderman interest in the ½ Snyder Net Profits Interest, such interest ripening into full ownership on August 13, 2006, the date of the passing of the former life estate holder, Virginia Brinkmann. Because Dolenz's (and the US Government's) sole basis to claim any part of the ½ Snyder Net Profits Interest was through a prior 1994 Sheriff's conveyance of Virginia Brinkmann's former life estate, neither Dolenz (nor the US Government) has any claim to the ½ Snyder Net Profits Interest or funds accruing to that interest on or after August 13, 2006.

#### **B. Dolenz's Affirmative Defenses Fail as a Matter of Fact and Law.**

Each of Dolenz's six pled affirmative defenses fails as a matter of fact and law because there is no evidence to support those affirmative defenses and, to the contrary, it is undisputed that (1) UCC 3.302 holder in due course does not apply to the ½ Snyder Net Profits Interest as same was not conveyed as part of a negotiable instrument; (2) Articles 1291 and 1297 were both repealed and the replacement property code sections 5.001 and 5.023 have no application to the personal property at issue; (3) no UCC 24.005 section exists and there was no fraudulent transfer under Tex. Bus. & Comm. Code § 24.005; (4) laches does not apply because Baxter Brinkmann made demand within six months after his remainderman interest ripened into full ownership; (5) Baxter Brinkmann had no obligation to challenge the Sheriff's sale that had no effect on his remainderman interest; and (6) limitations do not run on a remainderman interest until the life tenancy expires.



#### **IV. ARGUMENT AND AUTHORITIES**

##### **A. Claims For Declaratory Relief – Declaration Of Baxter Brinkmann’s Ownership Of The ½ Snyder Net Profits Interest and All Proceeds Accruing Thereto On or After August 13, 2006.**

##### **1. Declaratory Judgment Standard.**

The purpose of a declaratory judgment action is to establish existing rights, status, or other legal relationships. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000). Declaratory relief in this case is appropriate because, after demand, no agreement could be reached. [Appx. B, Brinkmann Aff. ¶ 15, Ex. G; Appxs. E and F, Dolenz Admission Nos. 57 and 58; Dolenz Depo. 42:21-43:3.] A court declaration will resolve the controversy. *See* 28 U.S.C. § 2201 (U.S.C.A. 2007); Tex. Civ. Prac. & Rem. Code 37.001 *et. seq.* (Vernon 2007); *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995).

##### **2. Upon The Passing Of Virginia Brinkmann, Baxter Brinkmann Became The Full Owner Of The ½ Snyder Net Profits Interest.**

##### **a. Baxter Brinkmann’s Ripened Remainderman Interest.<sup>7</sup>**

Through the express terms of the 1987 Settlement Agreement settling the R.R. Brinkmann Estate Litigation,<sup>8</sup> Virginia Brinkmann conveyed to Baxter Brinkmann the ½ Snyder Net Profits Interest, while reserving to herself only a life estate. [Appx. B, Brinkmann Aff. ¶ 7, Ex. E.] The 1987 Settlement Agreement unambiguously reconfirmed<sup>9</sup> Baxter Brinkmann’s remainderman interest in the ½ Snyder Net Profits Interest and that Virginia Brinkmann possessed only a life estate.

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<sup>7</sup> By failing to answer individually, the allegations in the Complaint in Intervention are deemed admitted. Fed. R. Civ. P. 8(b)(6). Baxter Brinkmann is therefore entitled to summary judgment against Dolenz on this basis as well.

<sup>8</sup> In 1984, the extent of Virginia Brinkmann’s interest in the ½ Snyder Net Profits Interest was placed in dispute as part of the R.R. Brinkmann Estate Litigation. [Appx. B, Brinkmann Aff. ¶ 5.]

<sup>9</sup> Baxter Brinkmann understood as far back as January 31, 1962, that he owned the remainderman interest. [Appx. B, Brinkmann Aff. ¶ 3, Ex. G.]

See e.g., *Old Republic Ins. Co. v. Fuller*, 919 S.W.2d 726, 728 (Tex. App.—Texarkana 1996, writ denied) (“A settlement agreement is a contract, and its construction is governed by legal principles applicable to contracts generally.”) Baxter Brinkmann retained and never conveyed his remainderman interest in the ½ Snyder Net Profits Interest. [Appx. B, Brinkmann Aff. ¶ 7.]

Virginia Brinkmann passed away August 13, 2006. [Appx. B, Brinkmann Aff. ¶ 14, Ex. F.] By definition, upon the death of the person to whom the life estate is reserved (in this case, Virginia Brinkmann), the interest reverts to the remainderman (in this case, Baxter Brinkmann). [Appx. B, Brinkmann Aff. ¶ 14; Appx. C, Dolenz Depo. 5:11-22.] See Black Law Dictionary, 5<sup>th</sup> Edition, p. 833 (1979) (a life estate is a “legal arrangement whereby the beneficiary (*i.e.*, the life tenant) is entitled to the income from the property for his or her life. Thus, upon the death of the life tenant, the property will go to the holder of the remainder interest ....”). Thus, Baxter Brinkmann is entitled to declaratory relief confirming his ownership of the ½ Snyder Net Profits Interest.

**b. 1994 Sheriff’s Sale of Virginia Brinkmann’s Life Estate Interest Did Not Affect Baxter Brinkmann’s Remainderman Interest.**

Dolenz’s claim to any part of the ½ Snyder Net Profits Interest is admittedly limited to the extent of the interest owned by Virginia Brinkmann in 1994. [Appx. C, Dolenz Depo. 30:20-31:2; 47:11-48:21; 83:3-84:2; 84:14-21; 85-6, Exs. 9, 9A, 10 and 2G.] Dolenz (and potentially the US Government through Dolenz) may argue entitlement through a February 1, 1994, Sheriff’s Bill of Sale to Personal Property. Such argument lacks merit.

First, the terms of the bill of sale itself are expressly limited to the interest that Virginia Brinkmann had on the date of sale in 1994, *i.e.*, only a life estate interest. [Appx. G, Dolenz Depo. 40:6-41:3, Ex. 2G; Appxs. E and F, Dolenz Admission Nos. 21 and 23, Ex. E.]

Second, Section 34.045 of the Texas Civil Practices and Remedies Code provides that an officer, in this case the Sheriff, can only deliver “all right, title, interest, and claim that the defendant in

execution [in this case Virginia Brinkmann] had in the property sold.” (Tex. Civ. Prac. & Rem. Code § 34.045(a) (Vernon 2006) (emphasis added)).

Third, the terms of the February 1, 1994, Sheriff’s Bill of Sale to Personal Property and the governing remedies code are consistent with the general rule of property law that a life tenant may not dispose of the corpus of the estate. *See Hudspeth v. Hudspeth*, 673 S.W.2d 248, 252 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.).

Based on the above, Baxter Brinkmann is entitled to summary judgment declaring him the unfettered owner of the ½ Snyder Net Profits Interest and over \$89,000 currently held in the registry of the Court. [Appx. G, Watkins Aff. ¶¶ 4-7.] In addition, upon the Court’s validation of Baxter Brinkmann’s claims for declaratory relief, he is entitled to recover his attorneys’ fees and costs, jointly and severally, from Dolenz, WTG Gas and Vealmoor, and the US Government under 28 U.S.C. §§ 2201 and 2002 (U.S.C.A. 2007) and Tex. Civ. Prac. & Rem. Code 37.001 *et. seq.* (Vernon 2007).<sup>10</sup>

**3. Dolenz’s Affirmative Defenses Fail as a Matter of Fact and Law.**<sup>11</sup>

**a. The Sheriff’s Bill of Sale to Personal Property Does Not Convey a Negotiable Instrument – Holder In Due Course Status Under U.C.C. 3.302 Therefore Does Not Apply.**

UCC Article 3, including UCC 3.302(a), applies only to “negotiable instruments.” Tex. Bus. & Comm. Code Sections 3.104(b) and 3.302(a) (Vernon 2007); *Southwest Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104, 111 (Tex. 2004). A “negotiable instrument” is defined, in part, as an unconditional promise or order to pay a fixed amount of money. Tex. Bus. & Comm. Code Section 3.104(a).

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<sup>10</sup> Baxter Brinkmann requests the right to file his motion for the award of attorneys’ fees 14 days after the Court enters his requested summary judgment pursuant to Fed. R. Civ. P. 54 and Local Rule CV-7(i).

<sup>11</sup> A moving party is entitled to summary judgment merely by pointing out the absence of evidence supporting an essential element of the non-moving party’s affirmative defenses for which the non-moving party bears the burden of proof. *See Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2554 (1986). At that point, the burden shifts to the non-moving party to produce evidence in support of its affirmative defenses by proving up and designating “specific facts showing that there is a genuine issue for trial.” *Id.* at 2553.

The ½ Snyder Net Profits Interest, to the extent conveyed under the Sheriff’s Bill of Sale to Personal Property, is a contract right to be paid a certain portion of net profits, not a negotiable instrument. [Appx. B, Brinkmann Aff. ¶ 2, Exs. A and B; Appxs. E and F, Dolenz Admission No. 53.] *See Helvering v. O’Donnell*, 58 S. Ct. 619, 620 (1938); *LeBus v. LeBus*, 269 S.W.2d 506, 511 (Tex. Civ. App. 1954, writ ref’d n.r.e).<sup>12</sup>

**b. Articles 1291 and 1297 Have Been Repealed; The Texas Property Code’s Replacement Statutes Having No Application To Ownership Of The Personal Property Interest In Dispute.**

Articles 1291 and 1297 alleged as affirmative defenses were repealed effective January 1, 1984. Acts of 1983, 68<sup>th</sup> Leg., ch. 576, § 6, eff. Jan 1, 1984.

Moreover, sections 5.001 and 5.023 of the Texas Property Code (the sections replacing Articles 1291 and 1297) do not change the analysis. First, Sections 5.001 and 5.023 by their terms apply only to “estates in land.” *See* Tex. Prop. Code Ann. §§ 5.001(a) and 5.023(a) (Vernon 2007). The ½ Snyder Net Profits Interest is a contract right to be paid a certain portion of net profits. [Appx. B, Brinkmann Aff. ¶ B, Exs. A and B; Appxs. E and F, Dolenz Admission No. 53.] *See Helvering*, 58 S. Ct. at 620; *LeBus*, 269 S.W.2d at 511. Such net profit contracts are personal property interests, not interests in real property. *See San Antonio Area Foundation v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000); *LeBus*, 269 S.W.2d at 511; *see also Helvering*, 58 S. Ct. at 620 (“The agreement to pay respondent one-third of the net profits derived from the development and operation of the properties was a personal covenant and did not purport to grant respondent an interest in the properties themselves.”). Lest there be any doubt, the Sheriff’s bill of sale is accurately and descriptively titled “Sheriff’s Bill of Sale **To Personal Property**.” [(Emphasis Added)].

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<sup>12</sup> Moreover, and as discussed above, the Sheriff’s Bill of Sale to Personal Property by its terms and under applicable law conveyed at most only the life estate interest then possessed by Virginia Brinkmann. *See* Tex. Civ. Prac. & Rem. Code § 34.045(a). Therefore, even if holder in due course status applied (it does not), such would not affect the remainderman interest held by Baxter Brinkmann.

Second, Sections 5.001 and 5.023 expressly provide that no fee simple conveyance occurs when the conveyance itself is limited by words or operation of law. *See* Tex. Prop. Code Ann. § 5.001(a) (“the estate is limited by express words or unless a lesser estate is conveyed or devised by construction or operation of law.”); Tex. Prop. Code Ann. § 5.023(a) (“Unless the conveyance expressly provides otherwise ....”). The Sheriff’s bill of sale itself is expressly limited by terms and by law to the interest that Virginia Brinkmann had on the date of the 1994 sale, *i.e.*, a life estate. *See* Tex. Civ. Prac. & Rem. Code § 34.045(a).

Third, Section 5.023 provides only an implied covenant from the grantor, in this case, the Sheriff. Tex. Prop. Code Ann. § 5.023(a). While no implied covenant was breached by the Sheriff, if one was, Dolenz’s claim would be against the Sheriff as grantor, not against the remainderman.

**c. No UCC 24.005; No Fraudulent Transfer Under Section 24.005 of the Texas Business and Commerce Code.**

Dolenz asserts an affirmative defense under UCC 24.005. No such section exists.

If the Court considers section 24.005 *et. seq.* of the Texas Business and Commerce Code precluding transfers fraudulent to present or future creditors, such affirmative defense fails as no fraudulent transfer occurred. First, Baxter Brinkmann understood as early as 1962 that he held the remainderman interest in the ½ Snyder Net Profits Interest. [Appx. B, Brinkmann Aff. ¶ 3.]

Second, the 1987 Settlement Agreement was an arms length agreement negotiated by opposing counsel that settled issues raised in the R.R. Brinkmann Estate Litigation. No intent or action hindered present or future creditors. [Appx. B, Brinkmann Aff. ¶¶ 8-13.]

Third, Dolenz did not even become a creditor of Virginia Brinkmann until six years after the 1987 Settlement Agreement. [Appx. C, Dolenz Depo. 31:9-15; Appx. D, Berthelot Depo. 38:25-39:7.]

**d. No Laches.**

Two essential elements of laches are (1) an unreasonable delay by one having legal or equitable rights in asserting them; and (2) a good faith change of position by another to his detriment because of the delay. *See City of Fort Worth v. Johnson*, 388 S.W.2d 400, 403 (Tex. 1964). The defense is only available in extraordinary cases. *See Brink v. Fidelity Bank of Fort Worth*, 966 S.W.2d 684, 684 (Tex. App.—Fort Worth 1998, no writ).

Baxter Brinkmann notified Dolenz and the other parties to this action of his right to possession within six month of the passing of Virginia Brinkmann, this intervention being filed shortly thereafter. [Appx. B, Brinkmann Aff. ¶ 15, Ex. G.] Baxter Brinkmann had no reason to take any action until that time to assert his ownership interest. *See Hensley v. Conway*, 29 S.W.2d 416, 417-18 (Tex.Civ.App.—Eastland 1930, no writ) (rejecting the possibility of a remainderman's interest being lost during the term of the life tenancy because the remainderman does not have a possessory interest). Moreover, at the time of Baxter Brinkmann's demand and intervention, Dolenz was already in this suit with the US Government seeking to obtain the extent of his interest.

**e. The Sheriff's Sale Had No Effect on Remainderman Interest.**

The Sheriff's sale only conveyed Virginia Brinkmann's life estate in the ½ Snyder Net Profits Interest. As such, Baxter Brinkmann had no reason to contest the Sheriff's sale. Only after the passing of Virginia Brinkmann did the right to possess the ½ Snyder Net Profits Interest ripen. By waiting until he obtained a possessory interest, Baxter Brinkmann did not waive his right to possession. *See Hensley*, 29 S.W.2d at 417-18.

**f. Limitations Do Not Bar Baxter Brinkmann's Claims.**

Baxter Brinkmann filed this claim within one year of the passing of Virginia Brinkmann. Limitations do not accrue against a remainderman's interest while the life tenant remains alive because the remainderman does not have a possessory interest. *See Hensley*, 29 S.W.2d at 417-18.

**V.**  
**RELIEF REQUESTED**

Baxter Brinkmann requests that the Court grant summary judgment and declare (a) that as of August 13, 2006, Baxter Brinkmann's remainderman interest in the ½ Snyder Net Profits Interest ripened into full ownership to the exclusion of all other, (b) that neither Dolenz nor the US Government has any right to the ½ Snyder Net Profit Interest or the proceeds paid pursuant to that ownership interest on or after August 13, 2006, (c) the distribution and payment to Baxter Brinkmann of funds held in the registry of the Court, such amount through May 8, 2008, being no less than \$89,104.64 (plus interest), (d) that WTG Gas and Vealmoor forward to Baxter Brinkmann all past and future distributions and payments, and (e) that Baxter Brinkmann recover from Dolenz, WTG Gas and Vealmoor, and the US Government, jointly and severally, all reasonable and necessary attorneys' fees and costs incurred by Baxter Brinkmann in seeking the declaratory relief granted herein.

Respectfully submitted,

By: /s/ Michael G. Brown

Michael G. Brown  
State Bar No. 03153800  
Lance V. Clack  
State Bar No. 24040694

FIGARI & DAVENPORT, L.L.P.  
3400 Bank of America Plaza  
901 Main Street, LB 125  
Dallas, Texas 75202-3796  
(214) 939-2000  
(214) 939-2090 (Facsimile)

ATTORNEYS FOR INTERVENOR PLAINTIFF  
J. BAXTER BRINKMANN

**CERTIFICATE OF SERVICE**

I hereby certify that, on May 29, 2008, I electronically filed the foregoing Intervenor Plaintiff's Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Susan B. Biggs  
Assistant United States Attorney  
601 N.W. Loop 410, Suite 600  
San Antonio, Texas 78216-5512

Janet Pritchett  
Bullock, Scott, Neisig, Morgan, Leeton & Strauss, P.C.  
500 W. Texas Avenue, #700  
Midland, Texas 79701

I also hereby certify that, on the same date, a true and correct copy of the foregoing document was sent by regular mail, postage prepaid, to:

Bernard Dolenz  
6102 Swiss Avenue  
Dallas, Texas 75214.

/s/ Michael G. Brown  
Michael G. Brown



## PAGE 1

- D Excerpts from the Deposition of Caroline B. Berthelot, with referenced exhibits, taken on December 17, 2007;
- E Intervenor Plaintiff J. Baxter Brinkmann's First Set of Requests For Admissions to Intervenor Defendant Bernard Dolenz, served November 14, 2007;
- F Excerpts from Dolenz Response to Brinkmann's First Set of Requests For Admissions, served December 7, 2007; and
- G Affidavit of Rick P. Watkins.

Respectfully submitted,

By: /s/ Michael G. Brown

Michael G. Brown  
State Bar No. 03153800  
Lance V. Clack  
State Bar No. 24040694

FIGARI & DAVENPORT, L.L.P.  
3400 Bank of America Plaza  
901 Main Street, LB 125  
Dallas, Texas 75202-3796  
(214) 939-2000  
(214) 939-2090 (Facsimile)

ATTORNEYS FOR INTERVENOR  
PLAINTIFF J. BAXTER BRINKMANN

**CERTIFICATE OF SERVICE**

I hereby certify that, on May 29, 2008, I electronically filed the foregoing Appendix In Support of Intervenor Plaintiff's Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Susan B. Biggs  
Assistant United States Attorney  
601 N.W. Loop 410, Suite 600  
San Antonio, Texas 78216-5512

Janet Pritchett  
Bullock, Scott, Neisig, Morgan, Leeton & Strauss, P.C.  
500 W. Texas Avenue, #700  
Midland, Texas 79701

I also hereby certify that, on the same date, a true and correct copy of the foregoing document was sent by regular mail, postage prepaid, to:

Bernard Dolenz  
6102 Swiss Avenue  
Dallas, Texas 75214.

/s/ Michael G. Brown  
Michael G. Brown

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**STATEMENT OF UNCONTROVERTED FACTS**<sup>1 2</sup>

**A. 1954 - R.R. Brinkmann's Ownership Of The Snyder Net Profit's Interest At The Time Of His Death.**

1. Intervenor J. Baxter Brinkmann ("Baxter Brinkmann") is the son of Reginald R. Brinkmann, Sr. ("R.R. Brinkmann") and Virginia H. Brinkmann ("Virginia Brinkmann"). [Appx. B, Brinkmann Aff. ¶ 1.]

2. On or about November 30, 1954, R.R. Brinkmann passed away. At the time of his death, R.R. Brinkmann owned an undivided fifteen percent (15%) "net cash gain" interest in the J. R. Butler 8.80086% interest related to a certain Snyder Gasoline Plant, such interest being reserved by J. R. Butler through an August 14, 1950, assignment (the "1950 Assignment") by and between J. R. Butler, as Assignor, and Scurry Natural Gasoline Corporation ("Scurry"), as Assignee. Such undivided fifteen percent (15%) "net cash gain" interest in the J. R. Butler 8.80086% interest is also referred to as (and is referred to herein as) the "Snyder Net Profits Interest." R.R. Brinkmann's prior ownership of the Snyder Net Profits Interest is accurately detailed in copies of September 3, 1971, Affidavit of J. R. Butler (including its exhibits) and the assignment between J. R. Butler and Scurry. [Appx. B, Brinkmann Aff. ¶ 2, Exs. A and B.; Appx. C, Dolenz Depo. p. 25:16-21; 26:21-25; 47:21-48:12, Ex. 10.]

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<sup>1</sup> The factual basis for this Statement of Uncontroverted Facts is contained in the Appendix in support of Intervenor Plaintiffs Motion for Summary Judgment (the "Appendix" or "Appx.") Exhibits B – G attached hereto. The contents of the Appendix exhibits will be cited hereinafter by the Appendix identifying exhibit letter, followed by either (a) the witness's last name, followed by the deposition page:line, affidavit paragraph, and/or exhibit references for deposition or affidavit testimony (e.g., "Appx. B, Brinkmann Aff. ¶ 3, Ex. A"), or (b) the number of the request for admission admitted by Bernard Dolenz ("Dolenz") and/or exhibit references (e.g., Appxs. E and F, Dolenz Admission No. 6, Ex. C").

<sup>2</sup> In addition, and as set forth in Intervenor Plaintiff's Motion For Summary Judgment, Dolenz individually filed no answer to the allegations set forth in Baxter Brinkmann's Complaint in Intervention. Therefore, the allegations and claims set forth in the Complaint in Intervention are deemed admitted by Dolenz and are incorporated herein by reference. However, while the statement of undisputed facts set forth herein are supported by such deemed admissions, Baxter Brinkmann does not rely solely on such deemed admissions to support his motion for summary judgment.

**B. The Snyder Net Profits Interest – A Contract Right to Net Profits From Gasoline Plant Operations.**

3. The Snyder Net Profits Interest is a contract right to be paid a certain portion of net profits determined on a monthly basis from the operations of the Snyder Gasoline Plant. [Appx. B, Brinkmann Aff. ¶ 2, Exs. A and B; Appxs. E and F, Dolenz Admission No. 53.] More specifically, under the 1950 Assignment, J.R. Butler transferred to Scurry his interest in contracts related to the Snyder Gasoline Plant and associated gathering system (collectively, the “Snyder Gasoline Plant”), including a June 9, 1950 casinghead gas purchase contract between J.R. Butler and Pan American Production Company (the “Pan American Contract”). [App. B, Brinkmann Aff. ¶ 2, Exs. A and B; Appx. C, Dolenz Depo. Ex. 10.]

4. J.R. Butler reserved a 25% interest in the “net cash gain” derived from the Pan American Contract and certain other sales, thereby creating the Snyder Net Profits Interest defined in the 1950 Assignment as:

the total proceeds which accrue to [Scurry Natural Gasoline Corporation], its successors and assigns, as assignee of the rights of said J.R. Butler under said gas purchase contract with Pan American Production Company and from the sale of any plant products and gas and residue gas incident thereto or marketed thereunder and any proceeds and returns derived from Assignee’s ownership of an interest in the Snyder Gasoline Plant, plus the proceeds, if any, derived from the sale of salvage material and/or other equipment retired from the Snyder Gasoline Plant, less and deducting therefrom in computing said net cash gain the sum of the following [described costs]. . . . [Id.]

**C. 1962 – Ownership Of Snyder Net Profits Interest – ½ Baxter Brinkmann And ½ Virginia Brinkmann Life Estate, With A Remainderman Interest To Baxter Brinkmann.**

5. By sometime in 1962, through both the succession proceedings of the R.R. Brinkmann estate as well as an agreement Baxter Brinkmann entered into with his brother Reginald R. Brinkmann, Jr., Baxter Brinkmann became the owner outright of one-half (1/2) of

the Snyder Net Profits Interest. [Appx. B, Brinkmann Aff. ¶ 3.] In addition, by an agreement entered into between Baxter Brinkmann and Virginia Brinkmann on January 31, 1962 (the “1962 Agreement”), Virginia Brinkmann conveyed a life estate relating to all of the property acquired by and between R.R. Brinkmann and Virginia Brinkmann. Therefore, as of January 31, 1962, Baxter Brinkmann understood that he owned not only one-half (1/2) of the Snyder Net Profits Interest, but also a remainderman interest in the other one-half (1/2) of the Snyder Net Profits Interest, i.e., the other undivided seven and one-half percent (7.5%) “net cash gain” interest in the J. R. Butler 8.80086% interest related to the Snyder Gasoline Plant, such being one-half (1/2) of the Snyder Net Profits Interest (the “½ Snyder Net Profits Interest”), with his mother Virginia Brinkmann possessing only a life estate in the ½ Snyder Net Profits Interest. [Appx. B, Brinkmann Aff. ¶ 3, Ex. C.]

**D. 1967 – Listed Ownership of Snyder Net Profits Interest – 1/2 Baxter Brinkmann and 1/2 Virginia Brinkmann.**

6. As of June 27, 1967, after the Louisiana succession proceeding of the R.R. Brinkmann estate had closed, and after Baxter Brinkmann entered into a 1962 Agreement with Virginia Brinkmann, Virginia Brinkmann and Baxter Brinkmann each were listed as owning the payments of both halves of the Snyder Net Profits Interest. Evidence of such is set forth in the copy of the June 28, 1967, Certificate executed by E. A. Neukom, then Treasurer of J. R. Butler & Company (the “1967 Certificate”).<sup>3</sup> [Appx. B, Brinkmann Aff. ¶ 4, Ex. D; Appx. E and F, Dolenz Admission No. 6, Ex. C.; Appx C, Dolez Depo. 27:16-28:10; 46:17-47:10, Exs. 9 and 9A.]

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<sup>3</sup> To be even more specific, Baxter Brinkmann’s understanding is that in 1967, Virginia Brinkmann owned a life Estate in the ½ Snyder Net Profits Interest that gave her ownership of the payments made on such interest during her lifetime as previously agreed in the 1962 Agreement. [Appx. B, Brinkmann Aff. ¶ 5, fn 1.]

**E. 1984 - Dispute and Lawsuit Between Baxter Brinkmann and Virginia Brinkmann.**

7. After 1967 and after the execution of both the 1962 Agreement and a later 1974 agreement (“1974 Agreement”) between Baxter Brinkmann and Virginia Brinkmann, a dispute arose between Virginia Brinkmann and Baxter Brinkmann concerning the validity and enforceability of the prior 1962 Agreement and a 1974 agreement, the existing partnership between Baxter Brinkmann and Virginia Brinkmann, and the management of the assets once forming the estate of R.R. Brinkmann. In 1984, such dispute resulted in litigation being filed by Virginia Brinkmann against Baxter Brinkmann in the First Judicial District Court in and for Caddo Parish, Louisiana, docket number 308-241, such case being removed to the United States District Court, Western District of Louisiana, Shreveport Division, Civil Action No. 84-3106 (the “R.R. Brinkmann Estate Litigation”). [Appx. B, Brinkmann Aff. ¶ 5; Appx. E and F, Dolenz Admission No. 9.] Dolenz did not participate in, has no personal knowledge concerning, and did not participate in the R.R. Brinkmann Estate Litigation or the settlement of the R.R. Brinkmann Estate Litigation. [Appx. E and F, Dolenz Admission Nos. 39, 45, and 47; Appx. C, Dolenz Depo. 41:11-25.] Caroline Bethelot (“Berthelot”), on the other hand, while not knowing the terms of settlement of the R.R. Brinkmann Estate Litigation, was on notice sometime in the late 1980’s of that litigation and that it had settled. [Appx. D, Berthelot Depo. 45:11-46:22; 47:12-48:8.]

**F. 1987 - Settlement Agreement Settling the R.R. Brinkmann Estate Litigation.**

8. After more than two years, Virginia Brinkmann and Baxter Brinkmann settled the R.R. Brinkmann Estate Litigation by entering into a 1987 settlement agreement titled “Agreement By And Between Virginia H. Brinkmann and John Baxter Brinkmann (the “1987 Settlement Agreement”). The 1987 Settlement Agreement was filed of record in various

parishes of Louisiana, Virginia Brinkmann's state of domicile. On July 22, 1987, the court entered its Order of Dismissal of the R.R. Brinkmann Estate Litigation. [Appx. B, Brinkmann Aff. ¶ 4, Ex. E; Appx. D, Berthelot Depo. 62:11-20, Ex. 2D.]

**G. 1987 Settlement Agreement Terms -- Definitive Resolution of the Estates of Ownership of the 1/2 Snyder Net Profits Interest: Life Estate To Virginia Brinkmann, Remainderman Interest To Baxter Brinkmann.**

9. Under the express terms of the 1987 Settlement Agreement, Virginia Brinkmann conveyed to Baxter Brinkmann the ½ Snyder Net Profits Interest, while only reserving to herself a life estate. Specifically, the 1987 Settlement Agreement states that:

“VIRGINIA H. BRINKMANN also herein grants, bargains, sells, conveys and delivers . . . unto JOHN BAXTER BRINKMANN, all of her right, title, and interest in and to the Snyder Net Profits Interest [defined herein as the ½ Snyder Net Profits Interest], the same being more specifically described in Exhibit “D” attached hereto, reserving, however, unto VIRGINIA H. BRINKMANN a life estate as to her interest in the Snyder Net Profits Interest and any income she would otherwise have derived therefrom.” [Appx. B, Brinkmann Aff. ¶ 7, Ex. E.]

Thus, as of 1987, it had been reconfirmed that Baxter Brinkmann owned the remainderman interest in the ½ Snyder Net Profits Interest. Conversely, as of 1987, it was reconfirmed that Virginia Brinkmann possessed only a life estate in the ½ Snyder Net Profits Interest. Baxter Brinkmann has at all times since the 1987 Settlement Agreement's execution retained and never conveyed his remainderman interest in the ½ Snyder Net Profits Interest. [Appx. B, Brinkmann Aff. ¶ 7, Ex. E.]

**H. Settlement Agreement's Purpose Was To Resolve Disputes Between Baxter Brinkmann And Virginia Brinkmann.**

10. The 1987 Settlement Agreement was not entered into to settle Baxter Brinkmann's disputes with Virginia Brinkmann. The 1987 Settlement Agreement had absolutely nothing to do with the lawsuit subsequently filed by Dolenz and Berthelot against Virginia



Brinkmann given that such lawsuit was filed almost four years later in 1991; such lawsuit apparently resulting in a judgment against Virginia Brinkmann only in 1993, approximately six years after the 1987 Settlement Agreement was executed. [Appx. B, Brinkmann Aff. ¶ 8.]

11. The 1987 Settlement Agreement and the dismissal of the R.R. Brinkmann Estate Litigation was entered into as part of an arms length compromise of disputes between Baxter Brinkmann and Virginia Brinkmann, including compromising disputes concerning the then existing partnership between Baxter Brinkmann and Virginia Brinkmann, the enforceability of the 1962 Agreement and the 1974 Agreement, the management of assets that once formed the estate of R.R. Brinkmann, and all matters arising out of and relating to these disputes. Baxter Brinkmann gave up substantial claims that Baxter Brinkmann had asserted by counterclaim against Virginia Brinkmann by agreeing to the 1987 Settlement Agreement. The Settlement Agreement was primarily negotiated between lawyers representing Baxter Brinkmann and Virginia Brinkmann. [Appx. B, Brinkmann Aff. ¶ 9.]

12. Even more specifically, by entering into the 1987 Settlement Agreement, Baxter Brinkmann had no intent to hinder, delay, or defraud any creditor of Virginia Brinkmann. Neither did Virginia Brinkmann. Baxter Brinkmann does not recall the issue of creditors of Virginia Brinkmann even being discussed as part of the settlement dialogue. [Appx. B, Brinkmann Aff. ¶ 10.]

13. When Baxter Brinkmann entered into the 1987 Settlement Agreement, Baxter Brinkmann believed Virginia Brinkmann received reasonable value for entering into such agreement, including but not limited to his agreement to drop his counterclaims and to allow Virginia Brinkmann to retain life estate interests despite arguments that she should no longer hold some or all of such interests. At the time Baxter Brinkmann entered into the 1987

Settlement Agreement, Baxter Brinkmann had never heard of Dolenz. [Appx. B, Brinkmann Aff. ¶ 11.]

14. The 1987 Settlement Agreement reconfirmed Baxter Brinkmann's understanding from the 1962 Agreement that Virginia Brinkmann held only a life estate in the ½ Snyder Net Profits Interest, while Baxter Brinkmann held the remainderman interest of the ½ Snyder Net Profits Interest. [Appx. B, Brinkmann Aff. ¶ 12.]

15. The 1987 Settlement Agreement's settlement of ownership interests concerning the ½ Snyder Net Profits Interest (and other matters) was not concealed, but instead was publicly disseminated in filings throughout parishes in Louisiana, Virginia Brinkmann's state of domicile. In addition, (1) the 1987 Settlement Agreement was executed before Virginia Brinkmann had been sued or threatened with suit by any alleged creditor (or anyone else for that matter); (2) the ½ Snyder Net Profits Interest (whether claimed to be owned by her in a life estate or otherwise) would not represent substantially all of the assets of Virginia Brinkmann; (3) Virginia Brinkmann did not flee or hide after entering into the 1987 Settlement Agreement, but instead remained at her then same place of residence; (4) Virginia Brinkmann did not remove or conceal her assets after entering into the 1987 Settlement Agreement; (5) upon the 1987 Settlement Agreement's execution, Virginia Brinkmann was not insolvent and did not become insolvent shortly thereafter; (6) the 1987 Settlement Agreement was not consummated at a time when Virginia Brinkmann engaged or was about to engage in a transaction for which her remaining assets would be unreasonably small; and (7) the 1987 Settlement Agreement was not consummated before or shortly after a substantial debt was planned to be incurred by Virginia Brinkmann. [Appx. B, Brinkmann Aff. ¶ 13.]

16. Other than Dolenz and Berthelot becoming creditors of Virginia Brinkmann in 1993, six years after the 1987 Settlement Agreement, Dolenz has no personal knowledge of any

other creditors of Virginia Brinkmann at any time. [Appx. C, Dolenz Depo. 32:13-16; 34:16-23.] Neither does Berthelot. [Appx. D, Berthelot Depo. 39:23-40:6.] Moreover, to Berthelot's knowledge, Virginia Brinkmann "always paid all of her bills." [Appx. D, Berthelot Depo. 40:7-11.]

**I. 1993 Judgment and 1994 Sheriff's Sale of Virginia Brinkmann's Life Estate In The ½ Snyder Net Gains Interest to Berthelot, Trustee.**

17. On or about August 13, 1993, six years after the ½ Snyder Net Profits Interest was divided by settlement into a life estate for Virginia Brinkmann and a remainderman interest for Baxter Brinkmann, Dolenz and Berthelot obtained a judgment in Dallas, Texas against Virginia Brinkmann (the "Judgment Against Virginia Brinkmann") based on a lawsuit they filed in 1991. [Appx. E and F, Dolenz Admission No. 17; Appx C, Dolenz Depo. 31:3-8, 37:20-38:7, Ex. 5; Appx. D, Berthelot Depo. 27:18-28:2; 28:11-29:3; 38:20-24.] Thus, August of 1993 was when Dolenz and Berthelot first became creditors of Virginia Brinkmann. [Appx. C, Dolenz Depo. 31:9-15; Appx. D, Berthelot Depo. 38:25-39:7.]

18. After such judgment was obtained, Dolenz and Berthelot had issued a writ of execution directing the Sheriff of Scurry County to execute on personal property belonging to Virginia Brinkmann. [Appxs. E and F, Dolenz Admission No. 18.] Subsequently, through a February 1, 1994, Sheriff's Bill of Sale to Personal Property, the Sheriff of Scurry County took possession of and sold to Berthelot, Trustee, Virginia Brinkmann's then existing life estate in the ½ Snyder Net Profits Interest. [Appxs. E and F, Dolenz Admission Nos. 21 and 23, Ex. E; Appx. C, Dolenz Depo. 40:6-41:3, Ex. 2G; Appx. D, Berthelot Depo. 65:5-19, Ex. 2G.] Prior to 1993, Dolenz had no knowledge of the existence of the Snyder Net Profits Interest. [Appx. C, Dolenz Depo. 39:9-12; 40:2-5.] Further, Berthelot and Virginia Brinkmann did not discuss the ½ Snyder Net Profits Interest. [Appx. D, Berthelot Depo. 33:15-20.]

19. The conveyance terms of the Sheriff's Bill of Sale to Personal Property are expressly limited to the interest that Virginia Brinkmann had on the date of sale, i.e., only her life estate interest. The February 1, 1994, Sheriff's Bill of Sale to Personal Property specifically states that the Sheriff sold:

"all the right, title and interest which the said Virginia Brinkmann had on the 1<sup>st</sup> day of February A.D. 1994, or at any time afterwards, in and to the following described property, to wit: ... a 7.5% interest of the J. R. Butler 8.0086% interest in the Snyder Gasoline Plant". (Emphasis added). To the contrary, the bill of sale states that the Sheriff sold "all the right, title and interest which the said Virginia Brinkmann had on the 1<sup>st</sup> day of February A.D. 1994, or at any time afterwards, in and to the following described property, to wit: ... a 7.5% interest of the J. R. Butler 8.0086% interest in the Snyder Gasoline Plant" [i.e. the life estate in the ½ Snyder Net Profits Interest]. (Emphasis added). [Appx. E and F, Dolenz Admission Nos. 21 and 23, Ex. E.]

Thus, all that Berthelot, Trustee, obtained at such sale, if anything, was the life estate interest formally owned by Virginia Brinkmann. [Id.; Appx. B, Brinkmann Aff. ¶ 7, Ex. E.]

**J. Dolenz's Claim To The ½ Snyder Net Profits Interest Is Based On The Life Estate Interest Obtained Through The 1994 Sheriff's Sale.**

20. Subsequent to the Sheriff's Bill of Sale to Personal Property, a dispute arose between Dolenz and Berthelot as to the rightful ownership, if any, of the Judgment Against Virginia Brinkmann, including the interest allegedly seized and sold by the Sheriff. By Judgment dated October 4, 1994, in the 68<sup>th</sup> Judicial District Court of Dallas County, Texas, No. 94-5091, a Dallas court awarded 60.88% of all proceeds obtained from the Judgment Against Virginia Brinkmann to Dolenz and 39.12% to Berthelot. [Appxs. E and F, Dolenz Admission No. 28; Appx. D, Berthelot Depo. 17:5-20; 18:23-19:3.]

21. Dolenz's claim to any part of the ½ Snyder Net Profits Interest is admittedly limited to the interest owned by Virginia Brinkmann as conveyed through the February 1, 1994,

Sheriff's Bill of Sale to Personal Property to Berthelot, Trustee. [Appx. C, Dolenz Depo. 30:20-31:2; 47:11-48:21; 83:3-84:2; 84:14-21; 85:1-6, Exs. 9, 9A, 10, and 2G.]

**K. WTG Gas Purchases Snyder Gasoline Plant in March of 2000.**

22. In March of 2000, WTG Gas Processing, L.P. ("WTG Gas") purchased Texacao Exploration and Production, Inc., interest in the Snyder Gasoline Plant. WTG Gas then became the operator of the Snyder Gasoline Plant in charge of distributing income generated by the Snyder Gasoline Plant to the various interest owners. [Appxs. E and F, Dolenz Admission Nos. 52 and 53; Appx. D, Berthelot Depo. 72:20-73:4.]

**L. The August 13, 2006, Passing Of Virginia Brinkmann.**

23. As evidenced by her death certificate, on August 13, 2006, Virginia Brinkmann passed away. Thus, as of August 13, 2006, Baxter Brinkmann's remainderman interest in the ½ Snyder Net Profits Interest ripened into full ownership. [Appx. B, Brinkmann Aff. ¶ 14, Ex. F; Appxs. E and F, Dolenz Admission Nos. 49 and 50, Ex. F; Appx. C, Dolenz Depo. 43:4-6.]

**M. Notice Of Baxter Brinkmann's Ripened Ownership Interest In The ½ Snyder Net Profits Interest.**

24. By letter dated January 25, 2007, counsel for Baxter Brinkmann notified defendant WTG Gas of his ripened ownership in the ½ Snyder Net Profits Interest formerly held in the life estate retained by Virginia Brinkmann and requested that all future payments made pursuant to that interest be forwarded to him. In addition, after Dolenz and the Defendants were advised of Baxter Brinkmann's ripened ownership of the ½ Snyder Net Profits Interest, and despite subsequent discussions, no agreement could be reached whereby Dolenz and the other defendants would stipulate to his ripened ownership in the ½ Snyder Net Profits Interest. [Appx. B, Brinkmann Aff. ¶ 15, Ex. G; Appxs. E and F, Dolenz Admission No. 57 and 58; Appx. C, Dolenz Depo. 42:21-43:3.]

N. **Funds Held In The Registry Of The Court That Accrued On Or After August 13, 2006, To The Owner Of The ½ Snyder Net Cash Gain Interest.**

25. Through May 8, 2008, WTG Gas has so far deposited into the registry of the Court pursuant to the Court's November 8, 2006 Amended Order To Deposit Funds Into the Registry of the Court ("Court Order") at least \$89,014.64 in funds that accrued on or after August 13, 2006, to the owner of the ½ Snyder Net Profits Interest in dispute in this lawsuit. In addition to the above and unless otherwise indicated at the time of deposit, amounts deposited in the future by WTG Gas into the registry of the Court pursuant to the Court Order will also represent funds that accrued on or after August 13, 2006, to the owner of the ½ Snyder Net Profits Interest in dispute in this lawsuit.<sup>4</sup> [Appx. G, Watkins Aff. ¶ 4-7.]

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<sup>4</sup> The dollar amounts set forth do not include accrued interest earned on the amounts deposited into the registry of the Court.