UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

PARK PLANTATION, LLC — CIVIL ACTION NO. 01-1480

VS. — JUDGE MELANÇON

BLANCHARD 1986 LIMITED, ET AL. — MAGISTRATE JUDGE HILL

REPORT AND RECOMMENDATION

Pending before the undersigned for report and recommendation is the motion to dismiss filed by defendants, Blanchard 1986 Limited ("Blanchard 1986"), John Hine, Peter Turbett, Tortuga Operating Company and Tortuga Interests, Inc., (collectively, "Tortuga"). [rec. doc. 23]. Defendant, BP Amoco Corporation, successor in interest to Atlantic Richfield Company, ("ARCO") joined in the motion to dismiss filed by Tortuga and moved to dismiss on additional grounds as well. [rec. doc. 42]. Defendants Texaco Inc. and Texaco Exploration and Production, Inc. ("Texaco") and Marathon Oil Company, ("Marathon") have joined in the motion to dismiss filed by Tortuga. [rec. docs. 27 and 29]. Plaintiff, Park Plantation, LLC ("Park"), filed opposition. [rec. docs. 46 and 49]. Tortuga filed a reply. [rec. doc. 53] Park then filed a Sur-Reply [rec. doc. 57] to which Tortuga and ARCO filed Sur-Sur-Replies. [rec. docs. 59 and 60]. In its opposition to the motion to dismiss, Park seeks leave to file a second amended complaint. [rec. doc. 46]. Oral argument was held on January 23, 2002.

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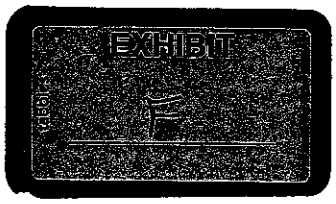

For the following reasons, it is recommended that the Motions to Dismiss filed by the defendants [rec. docs. 23, 27, 29, and 42] be **GRANTED**, and accordingly that this matter be **DISMISSED WITH PREJUDICE**. It is further recommended that Park's request for leave to file a second amended complaint be **DENIED**.

ALLEGATIONS OF COMPLAINT AND AMENDED COMPLAINT

In its complaint and amended complaint [rec. docs. 1 and 13], Park sets forth two causes of action based on a March 21, 1996 settlement of a lawsuit which was filed in 1986 in the Louisiana Sixteenth Judicial Court for St. Mary Parish by Betty D. Blanchard ("Blanchard") and Paul Maclean ("Maclean") against the same defendants as those parties made defendants herein. In the 1986 lawsuit, Blanchard sued ARCO, Texaco and Tortuga for damages resulting from an alleged breach of a mineral lease on property owned by Blanchard, and for the allegedly improper transfer by ARCO and Texaco of their interest in the lease to Tortuga after institution of default proceedings. [rec. doc. 1, ¶ ¶ 20, 21, 22, 23, 25, 58, 62, 64]. Throughout the 1986 lawsuit, Blanchard was represented by counsel, namely, G. Tim Alexander and Dale Hayes. [rec. doc. 1, ¶ 67, 73].

After nine years of litigation, on August 22, 1995, allegedly without consulting Blanchard, Mr. Alexander appeared before the court with defense counsel and dictated terms and conditions of a settlement into the record. [rec. doc. 1, ¶ 68]. This "agreement" called for Blanchard to sell one hundred fifty acres of her land to the defendants while

reserving her mineral rights. [rec. doc. 1, ¶ 69]. Blanchard refused to consummate the settlement because she did not wish to sell her land. [rec. doc. 1, ¶ 70].

Thereafter, the defendants moved to enforce the purported settlement agreement. [rec. doc. 1, ¶ 71]. Blanchard and her attorney, Mr. Hayes, appeared for the hearing on the motion to enforce the settlement on February 6, 1996. [rec. doc. 1, ¶. 73]. Rather than proceed with the hearing, the parties entered into further settlement negotiations. [rec. doc. 1, ¶ 74]. Hayes presented Blanchard with a handwritten list of terms for her approval. [rec. doc. 1, ¶ 75]. That document is not attached to the complaint, amended complaint or any of the motions, oppositions or replies thereto. At oral argument, the parties indicated that no one had a copy of this document. The handwritten note allegedly provided that Blanchard would not sell her property, but rather grant the defendants a right of first refusal if Blanchard later offered the land for sale. Additionally, the handwritten note purportedly indicated that those provisions of the August 22, 1995 settlement agreement (which had been dictated into the court record) which were not inconsistent with the handwritten note would remain in effect. [rec. doc. 1, ¶ 76, 77].

On March 21, 1996, before two witnesses and her counsel, Dale H. Hayes, who acted as Notary, Blanchard executed three written instruments: a Receipt, Release, and Settlement Agreement (the "release"); an Option to Purchase Immovable Property from Betty D. Blanchard to Atlantic Richfield Company, Texaco, Inc.,Texaco Exploration and

Production, Inc., TXO Production Corporation, Blanchard 1986 Ltd., Tortuga Operating Co., Tortuga Interests, Inc., John E. Hine and Peter L. Turbett (the "option"); and an Amendment and Ratification of Oil, Gas and Mineral Lease (the "ratification"). [rec. doc. 13, ex. 2, 3, and 4].

In 1998, Blanchard transferred the property in question known as Park Plantation to Park Plantation, LLC. [rec. doc. 13, ¶ 6, 7]. Plaintiff, Park Plantation, LLC, the sole plaintiff herein, is owned in equal parts by Betty Blanchard and her daughter, Nancy Blanchard. [rec. doc. 1, ¶ 3].

Park now claims that Blanchard signed the release, the option and the ratification with the understanding that they were consistent with the handwritten note presented to her by her attorney on February 6, 1996. [rec. doc. 1, ¶ 78]. Specifically, Park claims that Blanchard signed the option with the understanding that it reflected, and was limited to, the terms of the February 6, 1996 handwritten note, namely, that the option was triggered only if Blanchard presented the land for sale. [rec. doc. 13, ¶ 82, 83]. Park further alleges that when she executed these instruments Blanchard "was not given an explanation of the documents that she understood; nor was she given copies of them." [rec. doc. 1, ¶ 79; rec. doc. 13, ¶ 81].

In August 2000, Blanchard Ltd, through John E. Hine, attempted to exercise the option. [rec. doc. 1, ¶ 83]. Park alleges that it was only then that Blanchard discovered that the option was triggered not only if she offered the land for sale, but also if she

encumbered the land or asserted a claim alleging environmental or other damage to the property. [rec. doc. 1, ¶ 82, 83]. Park claims that Blanchard did not agree to these terms and hence, the option, release and ratification are void, invalid and must be cancelled and/or stricken. [rec. doc. 1, ¶ 86, 94]. Additionally, Park contends that the settlement documents are vague and ambiguous and hence, that there was no "meeting of the minds". [rec. doc. 13, ¶ 96].

Based upon these allegations, Park requests that all three of the written instruments be canceled, that the defendants cease operations, vacate the property, reimburse Park for all proceeds and profits generated from June 1986 to present, and that the defendants repair and clean up all environmental damages sustained by the property. Park also seeks attorney fees and costs. [rec. doc. 1, ¶ 94; rec. doc. 13, ¶99].

Park next alleges that the original mineral lease provided that Blanchard would receive 12% of all profits earned from the mining of minerals on the property. [rec. doc. 13, ¶ 22]. Park alleges that the ratification signed in 1996 provides that royalties of 1/5th will be paid on production obtained from wells drilled and completed to a subsurface depth of 8000 feet or deeper, and that "within the first year of the execution of the agreement...[Blanchard 1986] must drill, on the designated portion of the Property, a well sufficient to test horizons of eight thousand (8,000) feet or deeper." [rec. doc. 1, ¶ 88, 89, 94; rec. doc. 13, ¶ 91, 92]. Because Blanchard 1986 "failed to drill, within the designated portion of the Property, a well sufficient to test the horizons of eight thousand

(8000) feet or deeper, within a year of the execution of the Settlement Documents...", Park alleges that Blanchard 1986 has therefore breached the ratification, and that therefore the release, ratification and option must be stricken and canceled. [rec. doc. 1, ¶ 87, 90, 100; rec. doc. 13, ¶ 93, 100, 101].

Based upon these allegations and based on the fact that the release incorporates the option and ratification as a part of the release, Park requests that all three of the written instruments be canceled, and that Park receive monetary damages for lost royalties. Alternatively, Park seeks the cancellation of all three of the written instruments, that the defendants cease operations, vacate the property, reimburse Park for all proceeds and profits generated from June 1986 to present, and that the defendants repair and clean up all environmental damages sustained by the property. Park also seeks attorney fees and costs. [rec. doc. 1, ¶ 100; rec. doc. 13, ¶103].

REVIEW OF WRITTEN INSTRUMENTS ATTACHED TO THE PLEADINGS

The written instruments attached to the complaint and amended complaint consist of the following: a Receipt, Release, and Settlement Agreement (the "release"); an Option to Purchase Immovable Property from Betty D. Blanchard to Atlantic Richfield Company, Texaco, Inc.,Texaco Exploration and Production, Inc., TXO Production Corporation, Blanchard 1986 Ltd., Tortuga Operating Co., Tortuga Interests, Inc., John E. Hine and Peter L. Turbett (the "option"); and an Amendment and Ratification of Oil, Gas and Mineral Lease (the "ratification"). [rec. doc. 13, ex. 2, 3, and 4].

Receipt, Release and Settlement Agreement

The preamble to the release sets forth a summary of the litigation between the parties. That section provides that the original petition filed by Betty D. Blanchard on July 1, 1986 was for cancellation of the mineral lease on Park Plantation. By supplemental petition, Blanchard also sought termination of the lease and recovery of income from production from 1986 forward. [rec. doc. 13, att. 2, pg. 1].

The release sets forth the terms and conditions of the settlement to which the parties agreed. The first provision is that "Betty D. Blanchard shall execute the Option to Purchase Immovable property attached hereto as Exhibit 'A'". [¶ 1.0]. The second term is that "Betty D. Blanchard and Blanchard 1986, Ltd. shall execute and enter into the Amendment and Ratification of Oil, Gas, and Mineral Lease, attached hereto as Exhibit "B". [¶ 2.1]. Accordingly, the execution of the option and ratification in the form attached to the release are set forth as specific terms of the settlement agreement, and accordingly the provisions of both the option and ratification documents are made part of the settlement agreement. Paragraph 12 of the release provides that the release (with the option and ratification made a part thereof) constitutes the entire agreement between the parties. [¶ 12].

Paragraph three of the release sets forth the monetary consideration given in exchange for the settlement agreement. [¶ 3]. The defendants paid a total of $530,000. The release recited that $25,000 was paid in connection with the option and $50,000 was

paid for partial reimbursement of court costs and related litigation costs. The remaining $455,000 was paid for the release of all claims set forth in paragraph five of the release and was paid in further consideration of the other obligations undertaken by the plaintiff. [¶3]. Paragraph five expressly releases the defendants from all claims set forth in the original petition and all amended and supplemental petitions filed in the lawsuit including "any claims in any way relating to the allegation that the aforementioned oil, gas and mineral lease did not produce in paying quantities between 1984 and 1986 or at any other time." [¶ 5]. The release also contains an acknowledgment that the consideration received in connection with the settlement package was adequate. [¶ 4].

The release acknowledges that Blanchard 1986 acquires "the full ownership, as Lessee, of the Oil, Gas and Mineral Lease which is the subject of the ... lawsuit...." [¶ 5.3].

Paragraph nine of the release expressly contains a provision regarding Blanchard's full understanding of the settlement terms and her voluntary acceptance of same. That paragraph provides as follows:

> <u>9.0 Representation of Comprehension of Document</u>
> In entering into this Receipt, Release, and Settlement Agreement, Petitioners [Betty D. Blanchard and Paul Maclean] represent that they have relied upon the advice of their counsel, G. Tim Alexander and Dale Hayes, who are their attorneys of choice, concerning the legal consequences of this Receipt, Release and Settlement Agreement; that the terms of this Receipt, Release, and Settlement Agreement have been completely explained to Petitioners by their attorneys; and that the terms of this Receipt, Release, and

> Settlement Agreement are fully understood and voluntarily accepted by them.

The Release, Receipt and Settlement Agreement was signed on March 21, 1996 by Betty D. Blanchard in front of two witness and her counsel, Dale H. Hayes, who acted as Notary Public.

Option to Purchase

The option was granted by Blanchard to the following: Atlantic Richfield Company, Texaco, Inc., Texaco Exploration and Production, Inc., Blanchard 1986, Ltd., TXO Production Corporation, Tortuga Operating Co., Tortuga Interests, Inc., John E. Hine and Peter L. Turbett. The option expressly states the conditions upon which the option is exercisable. Specifically, paragraph 4 of the option states that it is

> "...exercisable by any one or all of the Grantees upon the occurrence of either or both of the following:
>
> a) Notice by the Grantor [Betty D. Blanchard] or her heirs, successors, or assigns of an intention to sell, exchange, lease, transfer, mortgage, hypothecate or otherwise encumber the Property Subject to Option described herein. Grantor, her heirs, successors, and assigns shall not sell, exchange, lease, transfer, mortgage, hypothecate or otherwise encumber the Property subject to Option without first providing written notice ...to Grantees, of her intention to do so and allowing Grantees the opportunity to exercise the Option granted herein.
>
> b) The assertion of any claim by Grantor, her heirs, successors, and/or assigns, by any governmental agency or regulatory body, or by any other third person against any or all of the grantees alleging environmental or other damage to the surface or subsurface of the Property Subject to Option or

> seeking remediation, restoration, clean up, decontamination or other repair to the surface or subsurface of the Property subject to Option. ... It is the intention of the parties that this Option to Purchase shall operate as an additional protection for grantees against claims of the type and nature described herein...."

The option was signed by Blanchard as "Grantor" on the same date as the release, March 21, 1996, before the same two witnesses and her counsel, Dale H. Hayes, who again acted as Notary Public. The Option is also signed by each of the grantees personally or through an authorized representative.

Amendment and Ratification of Oil, Gas and Mineral Lease

The ratification was executed by Betty D. Blanchard as lessor and John E. Hine, general partner of Blanchard 1986, as lessee. Blanchard signed the ratification on the same date that she signed the release and option, March 21, 1996, before the same two witnesses and her counsel, Dale H. Hayes, who acted as Notary Public. The ratification provides that "in accordance with the terms of settlement of the lawsuit" which provide that "(i) Lessor will ratify and confirm the Subject Lease is still in force and effect; (ii) Lessor and Lessee will amend the Subject Lease to provide for an increase in the royalty on production obtained from wells drilled and completed to a subsurface depth below 8000 and outside the geographic limits of the VUB Herton Unit; and (iii) Lessor will not seek cancellation of the Subject Lease under any legal theory for one year from the effective date of the instrument" ...."in consideration of the premises and of the benefits to be derived by the parties from settlement of the Lawsuit, LESSOR and LESSEE agree

as follows:

> "1. Amendment of Subject Lease:
>
> LESSOR and LESSEE agree that Paragraph 6 (the royalties paragraph) of the Subject Lease shall be amended to provide for the payment of royalties of one-fifth (1/5th) on oil, gas and liquid or gaseous hydrocarbons and one-fifth (1/5th) of the value of all other minerals mined and marketed rather than one-eighth (1/8th) on production obtained from wells drilled and completed to a subsurface depth below 8000 and situated outside the geographic limits of the VUB Herton Unit. Except as expressly amended hereby, Paragraph 6 of the Subject Lease shall remain unchanged. The royalty on all production other than that obtained from wells drilled and completed to a subsurface depth below 8000 and situated outside the geographic limits of the VUB Herton Unit shall remain one-eighth (1/8th) on all oil, gas, and liquid of gaseous minerals mined and marketed.
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> 2. Ratification of Subject Lease
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> Lessor expressly ratifies, confirms and adopts the Subject Lease, as amended hereby, and acknowledges that the same is valid, subsisting and in full force and effect, and LESSOR does by these presents grant, lease and let the property covered and affected by the Subject Lease to LESSEE upon all and singular the terms and provisions of the Subject Lease, as amended hereby."

Paragraph 3 provides a waiver of Blanchard's right to seek cancellation of the lease for a one year period. Specifically, the ratification provides that Blanchard "expressly waives the right to seek cancellation of the Subject Lease under any legal theory for a period of one year from the effective date of this instrument and expressly

agrees to refrain from making any demands upon LESSEE regarding the performance or non-performance of operations or obligations under the Subject Lease." [¶ 3].

CONTENTIONS

Tortuga asserts several grounds for dismissal of Park's action. These grounds include the following: (1) that Park has failed to state a cause of action for recission of the settlement; (2) that Park has failed to state a cause of action for breach of contract; (3) that Park's claim is prescribed; (4) that Park lacks standing to bring the instant action; and (5) that indispensable parties have not been joined herein in violation of F.R.C.P. Rule 19. Each of these grounds, as well as the arguments asserted in opposition thereto, are discussed in detail below.

LAW AND ANALYSIS

Motion to Dismiss Standard

In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000); F.R.C.P. 12(b)(6). Moreover, it is proper to consider documents that a defendant attaches to a motion to dismiss as they form part of the pleadings, if such documents are referred to in the plaintiff's complaint and are central to the plainitff's claim. *Id.* at 498-499.

In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the district court must accept all well-pleaded facts as true and view them in the light

most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). Moreover, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Kaiser Aluminum & Chemical Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982) citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

However, these principles are subject to limitations. First, conclusory allegations and unwarranted deductions of fact are not accepted as true. *Id.* citing *Associated Builders, Inc. v. Alabama Power Company*, 505 F.2d 97, 100 (5th Cir. 1974). This is particularly so when such conclusions are contradicted by facts disclosed by a document appended to the complaint. *Associated Builders*, 505 F.2d at 100. If the appended documents, reveal facts which foreclose recovery as a matter of law, dismissal is appropriate. *Id.* Further, a complaint that shows the requested relief is barred by the statute of limitations may be dismissed for failure to state a cause of action. *Kaiser*, 677 F.2d at 1050.

Plaintiff has invoked the diversity jurisdiction of this court under 28 U.S.C. §1332. [rec. doc. 1, ¶ 1]. Accordingly, the substantive law of Louisiana, the forum state, applies. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Woodfield v. Bowman*, 193 F.3d 354, 359 fn.7 (5th Cir. 1999).

Plaintiff's Claims

The plaintiff, Park, seeks recission of the release through this breach of contract action. Essentially, the plaintiff asserts that because Blanchard (its predecessor) did not agree to limit her right to encumber her property, as set out in the option which she admittedly signed, that the option is invalid and must be stricken. Further plaintiff argues that since the option forms a part of the release and ratification, that the invalidity of the option serves to also invalidate the release and ratification since all of the documents form a part of an indivisible whole, to wit, the release.

Alternatively, plaintiff claims that the defendants have breached the provisions of the release, and that therefore the release (which includes the option and ratification) is void. [rec. doc. 1, ¶¶ 91-99].

I. No Cause of Action for Rescission of Settlement

A. Error/Relative Nullity

Tortuga contends that Park cannot rescind the release on the ground that it is a relative nullity due to Betty Blanchard's lack of consent due to error. Tortuga summarizes Parks' claims in it's complaint and amended complaint as including claims that Blanchard did not understand the settlement agreement, in that she did not know that the option was as broad as it was, being triggered not only by her offering the property for sale but also if she encumbered the property or asserted a claim alleging environmental damage to the property. Tortuga notes that Park also claims that Blanchard did not know

that the lease amendment and ratification did not require an 8000 foot well be drilled within one year of the effective date of the instrument. Tortuga responds that Blanchard signed all of the documents with the aid of counsel and she should be held to the terms of the agreement and written instruments she signed. Tortuga further asserts that the handwritten note upon which Park relies does not form part of the release and is superseded thereby. Accordingly, the handwritten note may not be considered.

Specifically, Park claims Blanchard's unilateral error vitiated her consent. Tortuga argues that Louisiana law does not allow rescission for such error. First, Tortuga contends that Blanchard's inexcusable neglect in not finding the error before signing the release and related documents (i.e. her failure to read and understand the terms of the documents she signed prior to signing them) does not allow rescission. Second, Tortuga and the other defendants assert that they had no reason to believe that Blanchard suffered from any error as to the principal cause in signing the instruments nor that Blanchard did not understand the terms of the release. Tortuga argues that under such circumstances, civil code article 1949 and Louisiana jurisprudence does not permit rescission. Rather, Tortuga claims that Blanchard knew what she was signing when she signed the documents as evidenced by the express unambiguous terms of the release which states that Blanchard's counsel completely explained the documents to her and she understood same and voluntarily accepted the terms, and that it and the other defendants had no reason to think otherwise, given that Blanchard was represented by counsel throughout

and the litigation and settlement. Third, Tortuga argues that under Louisiana law and civil code articles 3078 and 3079, settlement agreements may not be rescinded for errors of law or lesion, but rather may only be rescinded for errors in the person or error in the matter in dispute, neither of which is present in the instant litigation.

Park claims that pursuant to civil code article 1949 unilateral error can vitiate consent when the error is to the principal cause and the other party knew or should have known of that cause. Specifically, Park asserts that Tortuga and the other defendants knew Blanchard thought the option was triggered only by her attempt to sell the property. In support of this contention, Park cites Blanchard's lengthy fight in the former suit to keep her property and to protect it from damage, as well as her refusal to consummate the original proposed settlement because the proposed settlement required her to sell a portion of her property.[1]

B. Absolute Nullity

Park also contends that although its amended complaint does not expressly allege that (1) the release is absolutely null due to lack of consideration, (2) the release is null because of the presence of a suspensive condition, and (3) the release is null because it contains terms that are against public policy, these claims are implied in the allegations of the amended complaint. If the court disagrees, Park asks for leave to file a second

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[1] Also, Park claims that the property and mineral rights thereto were Blanchard's only source of income. However, there is no evidence of this allegation in the complaint or amended complaint and hence, it will not be considered on Motion to Dismiss.

amended complaint.[2]

Specifically, Park argues that the option, release and ratification were agreed to because the defendants agreed to drill an 8000 foot well so that higher royalties would be paid. However, because the well wasn't drilled, no higher royalty was paid, and thus there was a failure of consideration (cause) for the release and hence, the release is an absolute nullity.

In reply, Tortuga points out that in exchange for dismissing her former lawsuit, entering into the release of all claims, entering into the option and ratifying the existing mineral lease, the defendants paid Blanchard $530,000, agreed to pay a higher royalty on any production which might be obtained below 8000 feet, and agreed to maintain the lease according to its original terms including the payment of 1/8th royalties on production above the 8000 foot level. Hence, there was more than adequate consideration to support the settlement agreement and more specifically, the ratification and amendment of the oil and gas lease.[3]

By sur-sur-reply, Tortuga asserts that a claim for rescission based upon lack of consideration is a claim for relative as opposed to absolute nullity. As such, there is no

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[2]Park requests permission to file an amended complaint. However, because Park has already has filed an amended complaint [rec. doc. 13], the instant request is interpreted as a request for permission to file a second amended complaint. The claims sought to be raised specifically by a second amended complaint will be considered here.

[3]Moreover, Tortuga asserts the lease was maintained through drilling which resulted in royalty payments of $978,000. However, as there is nothing in the complaint or amended complaint regarding the amount of royalties paid, this allegation is not considered on motion to dismiss.

basis for Park to rescind the settlement as an absolute nullity on this ground.

Park also claims that the contract was an absolute nullity because the amendment and ratification of the mineral lease contains an illegal suspensive condition, the performance of which is dependant solely upon the whim of the defendants. Specifically, Park argues that the defendants' obligation to pay higher royalties on production below 8000 feet is dependant solely on the defendants' decision to drill a well to that level. Thus, the performance of the defendants' obligation to pay higher royalties is dependant upon an illegal suspensive condition, that an 8000 foot well be drilled.[4]

Tortuga counters that the instant lease is governed by the terms of the lease and the mineral code, and there is no special implied condition to drill a well to the 8000 foot level in the first instance. Accordingly, such a non-existent obligation cannot be potestative or illegally suspensive as it simply does not exist under the lease or Louisiana law. At oral argument, Tortuga also asserted that the provision is not solely dependant on the whim of the lessee, because the decision whether or not to drill a well to a certain depth is made after consideration of numerous factors including the feasibility of such an endeavor.

By sur-sur reply, Texaco argues that plaintiff's complaint that no higher royalties may be paid unless an 8000 foot well is drilled is in civilian terms an argument that her

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[4]In reply, Tortuga alleges that an 8000 foot well was drilled. Again, however, as there is nothing in the complaint or amended complaint regarding the drilling of the alleged well, this allegation is not considered on motion to dismiss.

cause for the settlement was that an 8000 foot well be drilled in order to realize the higher royalty. However, such error is grounds for relative as opposed to absolute nullity, whether the error is asserted as to the cause of the settlement or as a lack of consideration for the settlement. Hence, plaintiff's claims of absolute nullity on these grounds are unfounded.

Park next claims that the settlement, and more specifically, the option, is absolutely null because it contains a provision that contravenes section 74 of the Louisiana Abandoned Oil field Waste Site Law. That section allegedly requires owners and responsible persons to report oil field spilling and discharge causing pollution or other damage to land or water. Park contends that the statute was enacted for the protection of the public interest and therefore, cannot be renounced. Yet, section 4(b) of the option prohibits Blanchard (and her assignee Park) from reporting such incidents at the risk of triggering the option. Moreover, because without this provision Park claims the defendants would not have consummated the settlement agreement, the entire settlement is null and void.

Tortuga counters that the cited statute is inapplicable as it concerns the reporting of unauthorized discharges of oilfield waste from abandoned waste sites, not leased producing oilfields. Additionally, Tortuga argues that there are no sanctions for failing to report a violation, but rather, sanctions are available only after a report is made, an order is entered and the responsible person fails to comply with the order.

By sur-reply, Park asserts that the statute applies since the definition of "waste sites" and "abandoned waste sites" do not exclude producing oil fields. Rather, Park contends that statute applies to leased premises so long as the leased premises has a "surface feature" that is not actively used for oil or gas operations that contains oilfield waste.

For the following reasons, the undersigned finds that Park, in its complaint and amended complaint, has failed to state a cause of action for rescission of the settlement agreement. Moreover, the undersigned has considered what Park has termed its implied allegations contained in the complaint and amended complaint. Since the undersigned finds that these allegations also fail to state a claim on which relief can be granted, the undersigned recommends that leave to file another amending complaint be denied.

Transaction or Compromise

Initially, the undersigned notes that the written instruments at issue herein were executed in connection with the settlement of an existing lawsuit. As such, these instruments must be interpreted under the laws applicable to transactions or compromises. A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. *Dumas v. Angus Chemical Company*, 742 So.2d 655, 660 (La. App. 2d Cir. 1999) citing La. C.C. art. 3071. Public policy favors

compromise agreements and the finality of settlements. *Id.* citing *Brown v. Drillers Inc.*, 630 So.2d 741, 757 (La.1994), and *Rivett v. State Farm Fire & Cas. Co.*, 508 So.2d 1356 (La.1987).

A compromise carries the authority of things adjudged, and cannot be attacked for error of law or lesion. *Id.* citing La. C.C. art. 3078. However, a compromise may be rescinded whenever there exists an error in the person or on the matter in dispute. It may likewise be rescinded for fraud or violence. *Id.* citing La. C.C. art. 3079.

The parties' intent in executing a compromise is normally discerned from the four corners of the document; extrinsic evidence is normally inadmissible to explain, expand or contradict the terms of the instrument. *Id.* at 661 citing *Brown v. Drillers Inc.*, 630 So.2d at 757. Nevertheless, when the parties to a compromise dispute its scope, they are permitted to raise factual issues regarding whether the unequivocal language of the instrument was intended to be truly unequivocal. *Id.* However, such latitude is granted only in the presence of some "substantiating evidence" of mistaken intent. *Id.* citing *Duet v. Lucky*, 621 So.2d 168 (La.App. 4 Cir.1993). In *Brown v. Drillers Inc.*, the Louisiana Supreme Court held that "substantiating evidence" must establish: either (1) that the releasor was mistaken as to what he or she was signing, even though fraud was not present; or (2) that the releasor did not fully understand the nature of the rights being released or that the releasor did not intend to release certain aspects of his or her claim. *Id.* citing *Brown*, 630 So.2d at 749. In the absence of such evidence, the compromise is

subject to the normal rules of contract analysis and enforced precisely as written. *Id.* citing *Duet v. Lucky*, supra; *Brown v. Drillers Inc.*, supra, fn. 12.

In the case at bar, the language in the written instruments is clear and unequivocal. Park does not allege error in the person, error in the matter in dispute, fraud[5] or violence. Rather, Park raises the general contention that Blanchard did not understand (was in error regarding) the terms of the agreements she executed, that is, she did not know that the option was as broad as it was, being triggered not only by her offering the property for sale but also if she encumbered the property or asserted a claim alleging environmental damage to the property, and did not know that the ratification did not <u>require</u> an 8000 foot well be drilled within one year of the effective date of the instrument. However, Blanchard's alleged errors contradict the unequivocal text of the of the release which clearly states that "[i]n entering into this Receipt, Release, and Settlement Agreement, [Betty D. Blanchard]... relied upon the advice of [her] counsel, G. Tim Alexander and Dale Hayes, who are [her] attorneys of choice, concerning the legal consequences of this Receipt, Release and Settlement Agreement; that the terms of this Receipt, Release, and Settlement Agreement have been completely explained to [Blanchard] by [her] attorneys; and that the terms of this Receipt, Release, and Settlement Agreement are fully understood and voluntarily accepted by [her]." [Release ¶ 9]. Under these circumstances,

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[5]Fraud must be pleaded with particularity. F.R.C.P. Rule 9(b). The Fifth Circuit interprets Rule 9(b) strictly, requiring the plaintiff "to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Abrams v. Baker Hughes, Inc.*, 292 F.3d 424 (5th Cir. 2002) citing *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 412 (5th Cir. 2001).

to nullify the written instruments solely on the basis of Blanchard's unsupported assertion that she did not understand what she was signing would deprecate the favored status of compromises in the law. See *Id.* citing *Brown v. Drillers Inc.*, supra.

Nevertheless to the extent that Park's allegations may be interpreted as challenging the scope of the written instruments because Blanchard was mistaken as to what she was signing, even though fraud is not specifically alleged or apparently present, the undersigned will address Park's contentions in further detail.

Error

Park alleges that Blanchard was in error when she executed the settlement documents, and accordingly, that error vitiated her consent. See La. C.C. art. 1948. This allegation forms the basis for a claim of relative nullity of the instruments. La. C.C. art. 2031. However, under Louisiana law, a compromise cannot be attacked or set aside based upon unilateral error of fact resulting from the party's own carelessness. *Wilhite v. Schendle*, 92 F.3d 372, 378 (5th Cir. 1996) citing *Sellers v. Corne, Sellers and Associates, Inc.*, 649 So.2d 1181 (La.App. 3d Cir.1995). Moreover, such error, when caused by the carelessness of the party's own attorneys and advisors, does not constitute grounds to set aside a settlement agreement. *Id.* Finally, unilateral error does not vitiate consent if the reason for the error was the complaining party's inexcusable neglect in discovering the error. *Durand v. Board of Trustees*, 704 So.2d 12, 15 (La. App. 1st Cir. 1997) citing *Scott v. Bank of Coushatta*, 512 So.2d 356, 361 (La.1987), and *DeGravelles v. Hampton*,

652 So.2d 647, 649, writ denied, 654 So.2d 332 (La. 1995); *Woods v. Morgan City Lions Club*, 588 So.2d 1196, 1201 (La. App. 1st Cir. 1991) citing *Scott*, supra., *New Jersey Life Insurance Co. v. Henri Petetin, Inc.*, 311 So.2d 454, 461 (La.1975), *Stipelcovich v. Mike Persia Chevrolet Co.*, 391 So.2d 582 (La.App. 4th Cir.1980), and *Hebert v. Livingston Parish School Bd.*, 438 So.2d 1141 (La.App. 1st Cir.1983).

In *Scott*, the Louisiana Supreme Court set forth what it considered the two primary factors in the evolution of the contractual negligence defense as follows:

> (a) Solemn agreements between contracting parties should not be upset when the error at issue is unilateral, easily detectable, and could have been rectified by a minimal amount of care.
>
> (b) Louisiana courts appear reluctant to vitiate agreements when the complaining party is, either through education or experience, in a position which renders his claim of error particularly difficult to rationalize, accept, or condone.

Woods, 588 So.2d at 1201 citing *Scott*, 512 So.2d at 362. Furthermore, Louisiana courts have rejected the defense of unilateral error where the complaining party, through education or experience, had the knowledge or expertise to easily rectify or discover the error complained of. *Id.* citing *Scott*, 512 So.2d at 363.

A contract may be invalidated for unilateral error as to a fact which was a principal cause for making the contract, but only when the other party knew or should have known that it was a principal cause. *Durand*, 704 So.2d at 15; La. C.C. art. 1949.

In accordance with the above principles, under Louisiana law, the undersigned finds that Park cannot rescind the release due to Blanchard's alleged misunderstanding of the terms set forth therein. The terms which Park claims Blanchard did not understand were easily detectable as they appear on the face of the instruments, and were clearly and plainly written. Any misunderstanding with respect to these terms could have been rectified by a minimal amount of care, that is, Ms. Blanchard's reading the documents prior to signing them and/or asking her attorneys for further explanation.

Moreover, because Blanchard was in a position to easily discover the errors complained of, Park's claim of error is particularly difficult to rationalize, accept, or condone. Blanchard was represented by counsel who, she has attested, fully explained the documents to her. Thus, any error under which she suffered was clearly a result of Blanchard and/or her attorneys' carelessness. The record also reveals that Blanchard had the knowledge and experience to discover the alleged errors, that ability having been demonstrated by her prior refusal to consummate the earlier settlement on the terms initially proposed by her attorney and defense counsel on grounds that she did not agree with those terms. It is particularly difficult to rationalize or condone Blanchard's failure here, after she admittedly carefully scrutinized the prior settlement.

Finally, even if the alleged error was as to her principal cause for entering into the settlement agreements, in light of the express, unambiguous language contained in the release indicating that Blanchard's counsel (1) fully explained the documents to her, and

(2) that she understood same and voluntarily accepted the terms, the defendants had no reason to know of Blanchard's alleged error when she executed the instruments. In fact, the defendants had every reason to rely on Blanchard's assertion, under oath, that she fully understood what she was signing. Park's contention that Blanchard's lengthy fight in the former suit and her refusal to consummate the original proposed settlement reinforce, rather than contradict, this finding. Given Blanchard's lengthy fight and her prior refusal to settle her lawsuit, the defendants could reasonably have relied upon Blanchard's acknowledgment of understanding set forth in the release. Surely Blanchard would not have given up her fight or consummated the settlement as written if she did not actually agree to all the terms of the agreement. Her litigation history belies any argument to the contrary.

Contractual Interpretation

Moreover, the undersigned's conclusion is supported by well established Louisiana law. "[A]n individual who signs a written agreement is charged with the responsibility of having read it and is presumed to know and understand its contents." *Lyons v. Coleman*, 743 So.2d 213, 216 (La. App. 2d Cir. 1999) citing *Tweedel v. Brasseaux*, 433 So.2d 133 (La.1983), *Tooke v. Houston Fire and Casualty Ins.*, 122 So.2d 109 (La.App. 2d Cir.1960), and *Shepherd v. Allstate Ins.*, 562 So.2d 1099 (La.App. 4th Cir.1990). "This is especially true in cases where the parties are intelligent, literate, erudite in business transactions, and have been assisted by counsel. *Id.* at 217 citing *Brown v. Simoneaux*,

593 So.2d 939 (La.App. 4th Cir.1992). "Failure to read a release is neither an acceptable defense nor a reasonable excuse." *Shepherd v. Allstate Insurance Co.*, 562 So.2d 1099, 1102 (La. App. 4th Cir. 1990). A person cannot nullify a release and "avoid it's obligations by contending that is was not explained or that he did not understand it." *Id.* "[S]ignatures to obligations are not mere ornaments." *Tweedel*, 433 So.2d at 137.

The record reveals that at the time the settlement was consummated, Blanchard hired not only one, but two counsel to assist her in filing her lawsuit, litigating that suit for over ten years, and ultimately negotiate the settlement of that lawsuit. There is no allegation that Blanchard was not intelligent or was unable to read the settlement documents. To the contrary, the release plainly states that she "fully understood" and "voluntarily accepted" the terms contained therein. She is therefore bound by the terms contained therein. Despite Park's claim that Blanchard failed to understand the scope of release, no further interpretation may be made in search of the parties' intentions where, as here, the explicit language of the agreement leads to no absurd consequences. See *Lyons*, 743 So.2d at 217; La. C.C. art.2046. Moreover, under these circumstances, parol evidence is inadmissable for proof of intent. *Id.*

As the Louisiana Fourth Circuit Court of Appeal noted in refusing to nullify a settlement agreement, "[i]f this settlement were set aside the message would go out to settling defendants that they can longer rely on documents signed by plaintiffs in the presence of their attorneys." *Smith v. Frey*, 703 So.2d 751, 754 (La. App. 4th Cir. 1997).

That result should also be avoided herein.

Park relies on the alleged handwritten note presented to Blanchard during settlement negotiations, a note which is not attached to either the complaint or amended complaint, is apparently missing, and has therefore never been presented to this court. Park also seems to rely on the negotiations in connection with the originally proposed settlement, which Ms. Blanchard repudiated and hence, was never consummated. However, neither the alleged note, the terms of the originally proposed settlement, nor any of the terms allegedly contained therein form part of the release at issue here. To the contrary, as set forth above, the option and ratification form a part of the release, as those documents are attached to and form part of the release. ¶¶ 1.0, 2.0. The release unambiguously states that these documents, the release, option and ratification, constitute the entire agreement between the parties. ¶ 12. There is no mention of incorporation of the terms of any handwritten note, or any of the terms of the previously proposed settlement. Under Louisiana law, "[i]t is well established, where [a] preliminary agreement is not finally incorporated into the final agreement, that the provisions of the final contract are to govern." *Slush v. Carracce,* 154 So. 62, 64 (La. App. Orl. 1934). See also *Louisiana Smoked Products, Inc. v. Savoie's Sausage and Food Products, Inc.,* 696 So.2d 1373, 1378 (La. 1997)(obligation under clause in prior contract superseded and extinguished by obligation under later contract). Moreover, "where there are preliminary prior discussions which ultimately are consummated into a written contract, that written

contract evidences the complete understanding of the parties and neither may point to prior conversations as authorizing a change from the terms of the written contract." *Piliawsky v. G. Colar,* 112 So.2d 730, 732 (La. App. Orl. 1959). (citations omitted). In light of this well established jurisprudence, Park cannot rely on the alleged note, any of the terms contained therein or any of the negotiations associated with the proposed original settlement agreement which Blanchard refused to consummate.

In finding Park has failed to state a cause of action for rescission of the settlement agreement, the undersigned notes that under similar circumstances over one hundred years ago, the Louisiana Supreme Court reached the same conclusion. In *Watson v. Planter's Bank*, 22 La. Ann. 14 (La. 1870), the court noted that in August 1863 the plaintiff signed a written agreement "believing it to contain the terms of the agreement made by him...." He proceeded with the agreement "in accordance with his understanding of the contract...." However, to his surprise, in 1866 he found the agreement "to vary materially from the terms agreed on." Accordingly, he filed suit alleging that "he signed the said document in error, and never would have signed it had he known the terms thereof...." In rejecting plaintiff's argument, the Louisiana Supreme Court articulated that the "only error alleged is in signing a contract without reading it, believing it to contain the terms of an agreement as he understood them, which, in the absence of any charge or proof of fraud, force or improper influences upon the part of the contracting party, is not an error which the law will relieve him. In this case, the plaintiff

has no one but himself to blame for signing an agreement different from the one which he says he agreed to make...." *Watson*, 22 La. Ann. at 14.

That is the case here. Blanchard signed the release and associated instruments allegedly believing them to contain terms contained in a prior settlement proposal. However, to her alleged surprise, years later, she discovered that those terms were not incorporated into the documents she signed, and the terms that appeared therein varied materially from the terms she allegedly agreed upon. Park now alleges that Blanchard would never have signed the documents had she known the terms contained therein. Although Park alleges improprieties perpetrated by attorney Trowbridge and members of his law firm, those alleged actions occurred prior to the filing of the 1986 state court action and had no bearing on the settlement that was consummated over ten years later while Blanchard was represented by independent counsel who suffered under no alleged conflict of interest. [See rec. doc. 1, ¶¶29-64 (the lawsuit was filed on July 25, 1986 and the last alleged action involving Trowbridge or his firm occurred in June 1986)]. Thus, under Louisiana law, Blanchard has no one but herself to blame for signing an agreement different from the one which she says she agreed to make. Accordingly, the law provides Blanchard and Park no relief.

Nullity Based upon Lack of Consideration

Park argues that the settlement agreement is absolutely null for lack of consideration, or in civilian terms, absence of cause. This argument is also without merit.

A claim for rescission based on lack of consideration or cause is a claim for "relative" as opposed to "absolute" nullity. *Lee Lumber Company, Ltd. v. International Paper Company*, 321 So.2d 42, 45 (La. App. 3d Cir. 1975); *New Hotel Monteleone, Inc. v. First National Bank of Commerce*, 423 So.2d 1305, 1309 (La. App. 4th Cir. 1982); *Armour v. Shongaloo Lodge No. 352 Free and Accepted Masons*, 342 So.2d 600, 602-604 (La. 1977)(Summers, J. concurring with reasons).[6]

Moreover, even if such a claim is grounds for absolute nullity, there was more than adequate consideration to support the agreements executed by the parties, and specifically, the ratification. The defendants paid a total of $530,000 in exchange for the settlement package, $25,000 of which was in connection with the option and $50,000 of which was for partial reimbursement of litigation costs. Hence, the remaining $455,000 was, as clearly stated in the release, in consideration for the release of all claims by Blanchard and "in consideration of other obligations undertaken herein by [Blanchard]." ¶3. One such obligation of Blanchard was that she execute the ratification of the existing mineral lease. ¶2. Accordingly, in consideration for dismissing her former lawsuit, entering into the release, granting the option and ratifying the existing mineral lease, the defendants paid Blanchard a large sum of money. The defendants also agreed to pay a higher royalty on production which might be obtained below 8000 feet, and agreed to maintain the lease according to its original terms including payment of 1/8th royalties on

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[6]Park cannot claim lesion as a settlement cannot be attacked on grounds of lesion. La. C.C. art. 3078.

production above the 8000 foot level. Finally, the release contains an express acknowledgment that this consideration received in connection with the settlement package was adequate "regardless of any possible contention that too little ...may have been paid." ¶ 4. Thus, although Park contends that the sole consideration for the settlement was higher royalties which would be paid on any production which might be obtained below 8000 feet, the express terms of the agreement belie that allegation.

Nullity Based upon Potestative Condition

Park argues that the settlement agreement is absolutely null because the amendment and ratification contains an illegal suspensive condition or in civilian terms, a potestative condition. Namely, Park claims that the defendants are not expressly bound to a drill a well to the 8000 foot level, and any decision as to whether such a well is drilled lies within their sole discretion. Thus, Park cannot realize higher royalties from production at that level.

This argument is without merit. A claim of nullity based upon the existence of an illegal suspensive or potestative condition is a claim for relative as opposed to absolute nullity. *New Hotel Monteleone, Inc.*, 423 So.2d at 1309 (finding that a claim for rescission based upon the existence of a potestative condition was subject to the prescriptive period applicable to relatively null contracts).

Moreover, even if such a claim is grounds for absolute nullity, the provision at issue herein is not an illegal suspensive or potestative condition because the decision as to

whether to drill a well to a certain depth is not made on a whim, but rather, is made after a reasoned and considered weighing of interests, and subjects the lessee to consequences for inaction.

A suspensive condition that depends solely on the whim of the obligor may be null. La. C.C. art. 1770. However, as the comments to Civil Code article 1770 make clear, there is a distinction between a suspensive condition dependent on the obligor's wishing or not wishing something, and one that the obligor may or may not bring about after a considered weighing of interests.[7] The first is not valid; the second is. *Haglund v. TC Properties of Baton Rouge, LLC*, 770 So.2d 885, 888 (La. App. 1st Cir. 2000).

As the defendants asserted at oral argument, the decision whether to drill a well to a certain depth is made after consideration of numerous factors rather than on a whim. Those factors include whether geological data indicates a potential for development at that depth, the number and location of other wells drilled on or near the leased property, the potential productive capacity of such a well, the cost of drilling a well to a certain depth compared with profit reasonably expected from such a well, and any demand for additional operations on the acreage involved in the lease under consideration. See *Edmundson Brothers Partnership v. Montex Drilling Company*, 731 So.2d 1049, 1055 (La. App. 3d Cir. 1999)(discussing factors pertinent in determining whether a lessee has

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[7]The comments define "whim" as the "exercise of mere unbridled discretion or arbitrariness", as opposed to the use of "judgment" defined as the "exercise of a considered and reasonable discretion." La. C.C. art. 1770, com. e. Therefore, "[a]n event is not left to an obligor's whim when it is one that he may or may not bring about after a considered weighing of interests...." La. C.C. art. 1770, com. d.

breached his implied obligation to develop a lease). The provision is, therefore, a valid suspensive condition.

The Louisiana Mineral Code provides that a mineral lease is no more than "a contract by which the lessee is granted the right to explore for and produce minerals." La. R.S. 31:114 (emphasis added). The lease is not a contract imposing an obligation to drill. Rather, the lessee has the option to drill if he so elects. The mineral code also provides for alternate ways in which the lease may be maintained: In the absence of any drilling operations, through the payment of rental fees (La. R.S. 31:123); through production in paying quantities from wells drilled anywhere on the leased premises (La. R.S. 31:114; 31:124) and by payment of royalties (La. R.S. 31:125). Should the lessee fail to maintain the lease as prescribed, the lease is subject to termination or forfeiture. (La. R.S. 31:133, 134, 137, 138, 138.1, 140, 141, 142). Thus, there are corresponding obligations and consequences attached to the exercise of discretion by the lessee in his decision to drill or not drill. Such circumstances negate the existence of a potestative condition. See *Thibodeaux v. Boeuf Land Co.*, 303 So.2d 576, 579 (La. App. 1st Cir. 1979).

Louisiana jurisprudence also recognizes that in mineral leases such provisions, which allow the lessee the option to drill or mine, are not potestative. *York v. Harper*, 91 So.2d 423 (La. App. 2d Cir. 1956); *Bullock v. Louisiana Industries*, 370 So.2d 148 (La. App. 3d Cir. 1979). In rejecting the lessor's argument that a mineral lease is invalid as a result of the existence of a potestative condition because it fails to impose an obligation to

drill on the part of the lessee, the *York* court said "a contract whereby the owner of land grants to another in consideration of payments, made and to be made, of certain agreed sums of money and other considerations which are to arise in a certain contingency, his right, or option, to drill for oil or gas within a year and to extend the time thus granted until it reaches a certain limit, contains no potestative condition by reason of its failure to impose upon the grantee any obligation to drill, since it is not within the contemplation of the contract that he should drill, unless he so elects. The ... stated the purpose of the contract was to confer the right to drill without imposing the obligation, and there is nothing in that purpose or in the nature of the contract which contravenes any law of this state." *York*, 91 So.2d at 425-426 citing *Saunders v. Busch-Everett Company*, 138 La. 1049, 71 So. 153 (1916). Similarly, in response to the plaintiff's contention that a mineral lease contains a potestative condition because the lessee is not bound to mine, the *Bullock* court articulated " [i]t is true that defendant does not have to mine under the agreement, however it is clear that defendant is bound to pay a rental fee on the property until actual production starts, after which it is bound to pay royalties. This provision does not invalidate the contract." *Bullock*, 370 So.2d at 149 citing *Thibodeaux v. Boeuf Land Company, Inc.*, 303 So.2d 576 (La.App. 1 Cir. 1974) and *Lee Lumber Company Ltd. v. International Paper Co.*, 321 So.2d 42 (La.App. 3 Cir. 1975). See also *State v. Duhe*, 9 So.2d 517, 521-522 (La. 1942)(mineral lease not invalid due to potestative condition, that is, not requiring lessee to explore for oil or other minerals, because the lease was granted

in conjunction with a sale of land for a large sum of money); *Wilkins v. Nelson*, 108 So.875 (La. 1926)(similar). As discussed above, the ratification to the lease in question was granted in conjunction with the settlement of Blanchard's former lawsuit for a large sum of money.

Finally, there is no allegation that the defendants have failed to drill any wells on the lease, failed to obtain production in paying quantities from wells drilled on the lease or failed to pay rentals or royalties due under the lease. If Blanchard had bargained for and obtained an obligation, freely made by the defendants, to drill a well below 8000 feet, that agreement might well be enforceable. No such obligation appears here. Rather, it is clear from the ratification that the parties agreed, as a matter of bargaining for the settlement of the 1986 lawsuit, that there would be different royalties due, depending on the depth from which such production occurred. Parks argues that an obligation to drill below 8000 feet is implied from the existence of this bifurcated royalty agreement. The undersigned can find no such implied covenant to drill, and would be hard pressed to find any such implied covenant in an instrument such as this ratification which was so hardly fought over and which was the resultant compromise of ten years of litigation.

Nullity as in Contravention to Public Policy

Park also claims that the settlement, and more specifically, the option, is absolutely null because it contains a provision that contravenes section 74 of the Louisiana Abandoned Oil field Waste Site Law which was allegedly enacted to protect the public

interest. La. R.S. 30:74. Specifically, Park contends that section 4(b) of the option prohibits Blanchard from reporting oil spills and other discharges which are causing pollution or other damage to her land to the Office of Conservation as required by La. R.S. 30:74 at the risk of triggering the option.

The Louisiana Abandoned Oilfield Waste Site Law (La. R.S. 30:71 et. seq.) was enacted "[i]n order to eliminate any hazards associated with abandoned oilfield waste sites,...[and] to provide for the control, prevention, abatement, and cleanup of abandoned oilfield waste sites through administrative or legal action...." La. R.S. 30:72. Section 74 of the act provides for notification by "any responsible person, owner, or operator of any abandoned waste site" whenever that person "obtains information that indicates that oilfield waste is spilling, discharging, or otherwise escaping into, or on any land or water without appropriate authorization or permit." La. R.S. 30:74(A)(1). That Act defines "waste site" or "abandoned waste site" as "a landfill, land treatment area, pit, pond, lagoon, or other surface feature that is not actively used for oil and gas operations...and which contains oilfield wastes...." La. R.S. 30:73(4).

From the express title of the Act and definitions contained therein, it is clear that the Act applies only to <u>abandoned</u> oilfields, meaning those oilfields <u>not actively</u> used for oil and gas operations. Accordingly, the undersigned rejects Park's argument that the Act applies to actively producing oilfields, such as the oilfield at issue in this litigation, if there is a contaminated "surface feature" on the actively producing oilfield that is not at

that time being actively used for oil or gas operations. Park's argument in essence is that an actively producing oilfield may be split into "abandoned" and "not abandoned" areas depending on the location and status of surface features contained therein. Such a construction contravenes the express language of the Act which makes the Act applicable to "abandoned" oilfields and the express and unambiguous language of the Act which defines the "sites" to which the Act applies as those sites "not actively used for oil and gas operations". Accordingly, the provision does not render the entire settlement agreement an absolute nullity as against public policy.

Additionally, one of the two published Louisiana Supreme Court cases citing the Act found that it "only applies when 'no financially responsible owner or operator ... can be located, or such person has failed or refused to undertake actions ordered by the commissioner...' [and that therefore, the case did] not come within the Abandoned Oilfield Waste Site Law because there [wa]s a financially responsible operator." *Magnolia Coal Terminal v. Phillips Oil Company*, 576 So.2d 475, 484 (La. 1991). LSA-R.S. 30:75(A)(4). Nothing in the record demonstrates that there is no financially responsible operator with respect to the leased premises herein. To the contrary, it appears that Blanchard's lessee/operator, Blanchard 1986, would qualify as the financially responsible person operator herein. If so, then the Act does not apply. *Magnolia Coal Terminal*, supra.

Moreover, the Louisiana legislature has provided other avenues by which the

commissioner of conservation may regulate actively producing, un-abandoned oilfields, namely by authorizing the commissioner to make reasonable rules, regulations, and orders necessary to regulate drilling, casing, and plugging of wells. See La. R.S. 30:4.

Finally, even if the Act were applicable to actively producing oilfields and paragraph 4(b) of the option was in violation of the public policy of this state, that does not necessarily render the entire settlement agreement absolutely null. Civil code article 2034 provides that "[n]ullity of a provision does not render the whole contract null unless, from the nature of the provision or the intention of the parties, it can be presumed that the contract would not have been made without the null provision." Thus, the civil code permits severance of an offensive clause. Park does not argue that Blanchard would not have entered into the settlement without the provision. To the contrary, Park's argument is exactly the opposite, that Blanchard would not have entered into the settlement had she known the option contained the provision. Moreover, the defendants have not asserted that they would not have entered into the settlement without the provision. To the contrary, at oral argument the defendants took the position that the provision was to protect them against future litigation similar to the litigation that they were then in the process of settling. However, there is no indication that the release would not have been confected without this extra protection. Simply speaking, nothing in the nature of the provision persuades the undersigned that severance of this clause would not be a viable alternative to nullification of the entire settlement agreement. Accordingly, on the record

before the court, the undersigned does not find that the contract would not have been made without the null provision. Thus, Park's argument that the entire settlement agreement is rendered null as a result of the presence of paragraph 4(b) of the option is without merit.

II. No Cause of Action for Breach of Contract

Tortuga contends that there in no alleged breach for failure to drill an 8000 foot well within one year of the effective date of the agreement as there is no requirement in the ratification that a well to that depth be drilled. The prior lease was ratified with a provision for increased royalties for production below 8000 feet. No provision of the ratification provided that the defendants were required to drill an 8000 foot well. Hence, there is no breach of this non-existent term, nor can that non-existent term be the basis for Park's breach of contract action.

Tortuga again agues that the handwritten note upon which Park relies does not form part of the release and is superseded thereby. Thus, although the drilling of an 8000 foot well was discussed in August 1995 as part of a new mineral lease that was to have been granted in connection with the originally proposed settlement, Ms. Blanchard refused to agree to that proposed settlement. In support of this argument, Tortuga cites the language of the release which unambiguously provides that the option and the ratification are incorporated in the release, and that the release contains the entire agreement between the parties.

Park contends that the obligation to pay higher royalties below the 8000 foot level contained in the amended lease implies the obligation to drill an 8000 foot well. It is Park's argument that the higher royalty provision creates a "special implied obligation" that an 8000 foot well be drilled in order that the higher royalty be realized. Additionally, Park asserts that because the obligation was "special" there was no need to place the defendants in default prior to filing this suit. Moreover, because this "special implied obligation" is material, in that without this obligation no settlement would have been consummated, Park claims it has stated a claim for rescission of the entire settlement agreement based upon this breach of this implied condition.

Tortuga contends that the only implied obligations with respect to mineral leases are set forth in the mineral code (LRS §31:122). Those implied obligations do not include any "special implied" obligation to drill a well to a certain depth. Rather, in the context of a mineral lease, such an obligation would have to be set forth as an express term mandating that a well to a certain depth be drilled. In the absence of such an express drilling obligation, mineral leases are maintained in accordance with the mineral code by paying delay rentals or by drilling during the primary term, and then once production is obtained, by drilling operations and/or production in paying quantities.[8]

A lessor is entitled to cancellation of a mineral lease for the lessee's breach of an

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[8]By Sur-Reply, Park argues that the primary term of the original lease expired. Hence, the cited principle is inapplicable. However, the original lease is not attached to the complaint or amended complaint and therefore, this argument may not be considered on motion to dismiss.

express as well as implied obligation. *McDonald v. Grande Corporation*, 148 So.2d 441, 449 (La. App. 3rd Cir. 1962).

Express Obligation

Contrary to the allegations in the complaint and amended complaint, it is clear that the ratification of the oil and gas lease contains no express term requiring an 8000 foot well be drilled within one year of the effective date of the agreement. As previously discussed, the handwritten note upon which Park relies does not form part of the settlement agreement. See release ¶ 1, 2, 12. Moreover, although the drilling of an 8000 foot well may have been discussed in August 1995 as part of a new mineral lease that was to have been granted in connection with the originally proposed settlement, Ms. Blanchard repudiated that proposed settlement. Accordingly, those proposed terms are superceded by the terms contained in the written settlement agreement ultimately consummated by the parties. See *Slush v. Carracce*, *Louisiana Smoked Products, Inc. v. Savoie's Sausage and Food Products, Inc.*, and *Piliawsky v. G. Colar, supra.* Thus, Park has failed to state a claim for breach of any express obligation contained in the settlement agreement as set forth in her complaints and amended complaints.

Implied Obligation

As there is no express obligation upon which to base its breach of contract action, Park argues that it has stated a cause of action for breach of a "special implied obligation", specifically, an alleged "special implied obligation" to drill an 8000 foot

well. Park cites no Louisiana authority for the proposition that in the absence of an express term requiring a well to be drilled to a certain depth, in an oil and gas mineral lease, such a provision may be implied. Park suggests that this court examine law pertinent to other types of leases in support of its argument that there is a "special implied obligation" on the part of the lessee to drill an 8000 foot well. Resort to such principles is appropriate where the Louisiana Mineral Code, neither expressly nor impliedly provides for a particular situation. See La.R.S. §31:1, §31:2. In those instances, resort is made to the Louisiana Civil Code or other laws, either directly or by analogy. *Frey v. Amoco Production Company*, 603 So.2d 166, 171 (La. 1992) citing La.R.S. §31:2 and the comment thereto. However, where there is a conflict between the provisions of the Mineral Code and the Civil Code, the Mineral Code prevails. *Id.* Accordingly, the undersigned will analyze the pertinent provisions of the Mineral Code.

Contrary, to Park's argument, the Louisiana mineral code suggests that an obligation to drill to a ceratin depth is not to be implied in an oil and gas lease. Article 114 of the Mineral Code states that the contractual nature of a mineral lease is the grant of the right to explore for and produce minerals, not a contract mandating that such exploration be undertaken. La. R.S. 31:114. Rather, the lessee has the option to drill if he so elects. Moreover, as previously discussed, the mineral code also provides for alternate ways in which the lease may be maintained in the absence of any drilling operations on the leased premises, through the payment of rental fees (La. R.S. 31:123),

through production in paying quantities from wells drilled anywhere on the leased premises (La. R.S. 31:114, 31:124) and by payment of royalties as set forth in the terms of the lease (La. R.S. 31:125). Should the lessee fail to maintain the lease as prescribed in the mineral code, the lease is subject to termination or forfeiture. (La. R.S. 31:133, 134, 137, 138, 138.1, 140, 141, 142). Thus, the mineral code seems to negate the argument that an obligation to drill to a certain depth may be implied in an oil and gas lease, as such a construction would render the above cited statutory provisions meaningless. Moreover, such a construction would change the nature of an oil and gas lease from the grant of a "right" to drill to that of an "obligation" to drill to a certain depth.

Additionally, the mineral code expressly provides for certain implied covenants which are incorporated into every mineral lease by operation of law. La. R.S. 31:122. Those implied obligations originate from the duty to develop and operate the leased property as a reasonable and prudent operator for the mutual benefit of both lessor and lessee. *Caskey v. Kelly Oil Company*, 737 So.2d 1257, 1261 (La. 1999). The mineral code and Louisiana jurisprudence recognizes that duty as encompassing five distinct categories of implied obligations: 1) to develop mineral formations on the leased premises; 2) to explore and test all portions of the leased premises after discovery of minerals; 3) to protect the leased property against drainage by wells located on neighboring property; 4) to market diligently the minerals discovered and capable of production in paying quantities; and 5) to restore the surface on completion of operations.

Caskey, 737 So.2d at 1261; *Frey*, 603 So.2d at 174-174 and fn 11; La.R.S. §31:122, comment.

Park contends that there is a separate, and independent implied obligation (termed a special implied obligation) to drill a well to 8000 feet. Rather than being "special" the implied obligation to drill a well to a certain depth in order to obtain minerals from that depth is encompassed within the implied obligation created by the Mineral Code to develop mineral formations on the leased premises. Indeed, in interpreting a contractual provision requiring the lessor to give notice of any alleged failure to conduct operations in compliance with the lease, the Louisiana Supreme Court has cited, as an example, a situation which may form "part of an implied obligation to develop the leased premises" as a "lessee's failure to drill to a depth where known reserves could be found." *Bouterie v. Kleinpeter*, 247 So.2d 548, 554 (La. 1971). In so noting, the court cited examples in which courts have discussed claims of an alleged breach of the implied obligation to develop the leased premises based on the allegations that additional drilling or reworking are required to increase production. *Id.* citing *Humble Oil & Refining Co. v. Romero*, 194 F.2d 383 (5th Cir. 1952); *Savoy v. Tidewater Oil Company,* 218 F.Supp. 607 (W.D.La. 1963), affd., 326 F.2d 757 (5th Cir. 1964).

The Louisiana Supreme Court has long and consistently held that the main consideration for a mineral lease is the development of the land for oil and gas; the lessee must either develop with reasonable diligence, or give up the lease. *Wier v. Grubb,* 82

So.2d 1, 5-6 (La. 1955); *Caskey*, 737 So.2d at 1262. Once production has been obtained on the lease, the lessee is bound to develop the minerals in the manner of a reasonably prudent operator. *Caskey*, 737 So.2d at 1262. The royalty provision of a mineral lease merely fixes the division between the lessor and lessee of the economic benefits accruing from any eventual yield which may result from the lessee's development. *Frey*, 603 So.2d at 173. It does not guarantee that any yield will be realized through drilling operations.

In accordance with the above principles and jurisprudence, in the absence of an express obligation mandating that a well be drilled to a certain depth on a lease where minerals have been discovered, as is the case herein, the undersigned concludes that the obligation of the lessee is in actuality the implied obligation to develop the leased premises in the manner of a reasonably prudent operator, in default of which he may be forced to give up the lease. The undersigned finds no authority for narrowing the scope of this broad implied obligation of prudence in order to carve out a separate and independent special implied obligation to drill a well to a certain depth as Park suggests.

Park attempts to circumvent this conclusion by arguing that in the instant lease, the alleged implied obligation to drill an 8000 foot well is "special" as opposed to "general". Hence, Park asserts that it had no obligation to place the lessee in default prior to filing suit. However, in the context of mineral leases, the pertinent distinction as to whether a putting in default is a prerequisite to the filing of a lawsuit, is not whether an obligation is

general or special, but rather whether the obligation is express or implied.

The distinction between general and special obligations is pertinent in determining whether a claim sounds in tort or contract for purposes of the appropriate prescriptive period. See *Certain Underwriters at Lloyds v. Sea-Lar Management, Inc.*, 787 So.2d 1069, 1074-1076 (La. App. 4th Cir. 2001).

Under the mineral code, in order "[t]o cancel a lease for breach of an implied covenant, the plaintiff is required to place the defendant formally in default prior to seeking judicial intervention." *McDowell v. PG & E Resources Company*, 658 So.2d 779, 783 (La. App. 2nd Cir. 1995) citing *Hunt v. Stacy*, 632 So.2d 872 (La.App. 2nd Cir. 1994), and *Taussig v. Goldking Properties Co.*, 495 So.2d 1008 (La.App. 3d Cir.1986), writ denied, 502 So.2d 111 (La.1987); See also La. R.S. § 31:135 and 136, and comments thereto. This requirement is intended to preserve the distinction between active and passive breaches, as well as the jurisprudence regarding these classifications, at least as to contracts involving oil, gas and other minerals. *Hunt*, 632 So.2d at 874-875; La. R.S. §31:135 comment ("It is, therefore, the intent of Article 135 generally to preserve the existing jurisprudence interpreting the Civil Code articles on default in connection with actions for nonperformance of the obligations of a mineral lease. The division of breaches into active and passive violations now contained in [C.C. arts. 1989, 1994] of the Civil Code will be preserved under Article 135.... That violations of mineral leases may be either passive or active is established.) Breach of an implied obligation in an oil and gas

lease is regarded as a passive breach. *McDonald,* 148 So.2d at 449; *Taussig,* 495 So.2d at 1014. Louisiana jurisprudence requires a formal placing in default before judicial intervention with the respect to such breaches. *Id.* at 449; *Hunt,* 632 So.2d at 875-876; *Edmundson Brothers Partnership v. Montex Drilling Company,* 731 So.2d 1049, 1056 (La. App. 3rd Cir. 1999); *Taussig,* 495 So.2d at 1014-15 (specifically finding that breach of the implied obligation to develop the leased premises is passive, thus, requiring a formal placing in default prior to institution of suit); La. R.S. § 31:135 comment.

The purpose of the default requirement in this context is to provide the lessee notice that the lessor considers the lessee's actions (or inaction) as violative of an implied obligation, and to afford the lessee a reasonable opportunity to perform its obligations. *Edmundson Brothers Partnership,* 731 So.2d at 1056 citing *Pipes v. Payne,* 101 So. 144 (1924). Since cancellation of an oil and gas mineral lease is a "harsh remedy" which terminates the lessee's interest, formal placing in default in cases where the alleged breach is that of an implied rather than express obligation is understandable; the lessee should be given notice and an opportunity to cure the alleged breach. See *McDowell,* 658 So.2d at 784.

Notably, the *Hunt* court rejected an argument similar to that presented by Park herein on grounds that in essence the lessee was attempting to transform an implied obligation into an express obligation in order to avoid placing the lessee in default prior to judicial demand for cancellation of the lease. *Hunt,* 632 So.2d at 875-876. That appears

to be the case herein. Park argues the existence of a "special implied obligation" to drill an 8000 foot well in order to avoid its admitted failure to place its lessee in default prior to filing this suit.

In light of the above, the undersigned finds that an obligation to drill a well to a ceratin depth must be stated as an express term in the lease, otherwise the obligation is at most implied and a formal placing in default is required before resorting to judicial intervention. Accordingly, Park has failed to state a cause of action for breach of any implied obligation contained in the settlement agreement, or more specifically, the ratification of the oil and gas lease. Moreover, amendment to the pleadings would not change this result as at the present time, any action for breach of an implied obligation contained in the release, or more specifically, the ratification of the oil and gas lease, is premature.[9]

III. Prescription

Tortuga argues that prescription to rescind a relatively null contract under civil code article 2032 is five years from time the person knew or should have known of the error. Because the error involved here is that Blanchard allegedly did not know what she was signing, the prescription should run from the date the release was signed, that is, from March 21, 1996. Tortuga further argues that even if Blanchard claims she did not know or understand the instruments she was signing, the knowledge and understanding of her

[9]Even if the Mineral Code would allow the existence of an implied obligation to drill, the undersigned, in view of the history of the ratification, would find no such implied condition here, for those reasons stated above.

attorneys is imputed to her as of the date of execution. Tortuga contends that the ten year prescriptive period for a breach of contract action does not apply here because the term that was allegedly breached, that an 8000 foot well be drilled within one year, does not exist. Thus, this entire case is an action for rescission based on error which is governed by the five year prescriptive period for relatively null contracts. Tortuga therefore argues that since the instant suit was not filed until August 6, 2001, more than five years after the documents were signed, that the prescriptive period has run.

Park contends that the five year period begins when the claim accrues. Because the ratified lease precluded Blanchard from seeking "cancellation of the Subject Lease under any legal theory for a period of one year from the effective date of [the] instrument", Park contends that the claims asserted herein were tolled during the first year following execution of the release, and hence, did not accrue until March 21, 1997. Thus, this action, filed within five years of that date, is timely. Alternatively, Park asserts that the claims are timely because Blanchard did not discover her error until August 2000 and hence, the prescriptive period was suspended until that time.

By sur-reply Tortuga argues that the provision in the ratification of the lease precluded Blanchard from seeking cancellation of the lease, and demanding performance or alleging non-performance of the obligations under the lease, but did not bar an action to rescind the settlement agreement. Park counters that because the lease ratification was incorporated into and forms a part of the release, any suit to rescind the release is in

essence a suit to cancel the lease.

Tortuga counters by asserting that Park's argument regarding tolling of the prescriptive period for one year by virtue of the contractual provision is without merit as civil code article 3471 provides that such provisions are null, and hence, such tolling agreements are not recognized by Louisiana courts.

Initially, the undersigned notes that Park has failed to state a cause of action for breach of contract. Accordingly, the undersigned finds that the ten year prescriptive period applicable to breach of contract actions does not apply.

As previously discussed, plaintiff's claims for rescission based on error, lack of consideration or cause and existence of a potestative condition are claims based in relative as opposed to absolute nullity. See La. C.C. Arts. 2030, 2031; *Lee Lumber Co., Ltd., New Hotel Monteleone,* and *Armour,* (Summers, J. concurring); supra. See also *Reed v. Thomas*, 355 So.2d 277 (2nd Cir. 1978)(in discussing former article 2221, now codified as article 2032, articulating the article "bars an attack on [contracts] for all nullities established in the interest of individuals,... that is, all nullities not in derogation of public order...."). Additionally, for those reasons set out above, Park's arguments under the Louisiana Abandoned Oilfield Waste Act do not make the release an absolute nullity. Accordingly, Park's claims for recission are subject to prescription.

Article 2032 of the Louisiana Civil Code provides a five year prescriptive period

for an action to annul[10] a relatively null contract. La.C..C. art. 2032 (2002).[11] In a nullity action based on error, this five year period begins to run from the time the plaintiff is aware or should have been aware of the ground for the nullity. *Albritton v. Albritton*, 591 So.2d 357, 362 (La.App. 1st Cir.1991), rev'd on other grounds, 600 So.2d 1328 (1992) citing *New Hotel Monteleone*, supra., and *Reed v. Thomas*, 355 So.2d 277 (La. App. 2d Cir. 1978); *Cajun Electric Power Cooperative, Inc. v. Gulf States Utilities Company*, 848 F.Supp 71 (M.D.La. 1994)(finding as a matter of law that the five year period contained in article 2032 begins to run from the time the plaintiff was aware or should have been aware of the ground for nullity).

When the facts supporting a claim for nullity are discernable from the face of a contract or are readily apparent thereon, Louisiana courts have found that the five year period begins to run from date of the contract was signed. *New Hotel Monteleone*, 423 So.2d at 1309 ("existence of a potestative condition would have been apparent on the face of the contract" so the five year prescriptive period "began to run when the parties entered into the contract."); *Lee Lumber Company, Ltd.*, 321 So.2d at 45 (rejecting an argument that an action on a lease alleging lack of serious consideration or cause was prescribed, as the prescriptive period "began to run when the agreement was made"..."at the time the

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[10]The terms "annul" or "nullity action" are used in reference to Park's claim for rescission of the settlement agreement, as opposed to Park's claim for breach of contract which will be discussed separately.

[11]Article 2032 contains the substance of former article 2221. However, the prescriptive period for actions to declare a relative nullity was shortened from ten to five years. La. C.C. art. 2032, comment (a).

contract of lease was confected.")

Additionally, "it is well settled that the knowledge of an attorney, actual or otherwise, is imputed to his or her client." *Andre v. Golden*, 750 So.2d 1101, 1104 (La. App. 5th Cir. 1999) citing *Wilco Marsh Buggies & Draglines,Inc. v. XYZ Ins. Co.*, 520 So.2d 1292 (La.App. 5th Cir.1988); writ denied, 522 So.2d 1094 (La.1988). Thus, although Park claims that Blanchard did not discover the alleged offensive terms until August 2000, the knowledge of Blanchard's attorney's regarding the terms of the settlement agreement may be imputed to her. Surely, Blanchard's attorneys knew or should have known the terms of the documents that they were presenting to their client on or before the date their client signed the documents.

In light of the above, the undersigned concludes that the five year prescriptive period began to run on the date the release, option and ratification were signed by Ms. Blanchard on March 21, 1996.[12] Accordingly, on the face of the complaint, amended complaint and attachments thereto, Park's action for rescission is prescribed.

Where the plaintiff's cause of action has prescribed on the face of the pleadings, the plaintiff bears the burden of establishing that prescription had not begun to run or was interrupted or suspended. *Unlimited Horizons, L.L.C. v. Parish of East Baton Rouge*, 761 So.2d 753, 758 (La. App. 1st Cir. 2000). Park's arguments in this regard are addressed

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[12]The undersigned notes that the parties stipulated that the amendment and ratification of the oil and gas mineral lease became effective on March 1, 1996, however, the agreement was not signed by Blanchard until March 21, 1996.

below. Moreover, the burden of proving the suspension of prescription under the doctrine of *contra non valentem* is on the plaintiff. *Richardson v. Say*, 740 So.2d 771, 774 (La. App. 2d Cir. 1999)

Park argues that its cause of action did not accrue for one year from the date of signing as a result of the provision in the amendment and ratification of the oil and gas lease whereby the parties agreed that Blanchard would not seek cancellation of the lease under any legal theory for a period of one year. That argument is without merit. Prescriptive periods may be shortened by agreement of the parties, however, prescriptive periods may not be contractually lengthened as a matter of public policy. *Louisiana Health Service and Indemnity Company v. McNamara,* 561 So.2d 712, 718-719 (La. 1990) citing *E.L. Burns Co. v. Cashio*, 302 So.2d 297 (La. 1974) and La.C.C. art. 3471. Moreover, civil code article 3471 expressly prohibits parties from contractually extending the prescriptive period. Because the plaintiff's interpretation of the provision would in effect permit the parties to contractually extend the prescriptive period from five to six years, Park's argument is contrary to Louisiana jurisprudence and the express prohibition contained in article 3471 of the civil code. Because Louisiana jurisprudence and article 3471 do not permit the contractual extension of the prescriptive period, it follows that a contractual provision attempting to delay the date when the prescriptive period starts is also prohibited. Park has cited no case law where the parties were permitted to contractually delay the date of accrual of a cause of action and the undersigned's research

has revealed no such jurisprudence. Accordingly, the undersigned declines to accept Park's argument.

Park also contends that the provision contained within the ratification is a "condition coupled with a contract" which under the theory of *contra non valentem* suspended the prescriptive period. Generally, the doctrine of *contra non valentem* suspends prescription where the circumstances of the case fall into one of four categories:

> 1. Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
>
> 2. Where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting;
>
> 3. Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and
>
> 4. Where some cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.

Wimberly v. Gatch, 635 So.2d 206, 211 (La. 1994); *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 800 So.2d 762, 669 (La. 2001). Only the second category is arguably present here.

The courts created the doctrine of *contra non valentem*, as an exception to the general rules of prescription. *Wimberly*, 635 So.2d at 211 (citations omitted). The doctrine is contrary to the express provisions of the Civil Code. *Id.* It is based upon "[t]he principles of equity and justice" which demand that under certain circumstances, prescription be suspended because plaintiff was effectually prevented from enforcing his rights *for reasons external to his own will.*" *Id.*; *Bouterie v. Crane*, 616 So.2d 657, 660

(La. 1993)(emphasis added).

In the case at bar, Blanchard was not prevented from enforcing her rights for any reason external to her own will. To the contrary, Blanchard voluntarily agreed to not seek judicial redress for the first year following the execution of her agreement. That act was of her own volition and in no way external to her. Moreover, because she voluntarily entered into the contractual agreement, neither equity nor justice demand that prescription be suspended for that one year period. To the contrary, equity and justice require that she be held to her contractual agreement. Accordingly, the undersigned finds that the doctrine of *contra non valentem* is inapplicable to this case.[13]

However, even if the doctrine were applicable, the exception cited by plaintiff, by it's terms, applies only where there was a "condition coupled with a contract." That is not the case herein. The condition at issue herein is a provision within the four corners of the contract voluntarily entered into by the plaintiff. It is a condition of the contract, as opposed to some condition existing separate and apart therefrom which was not in the power of the plaintiff to control. Park cites no cases wherein a condition which exists within a contract voluntarily entered into by the complaining party was found to have suspended the prescriptive period. To the contrary, the undersigned's research reveals the second category has only been applied when the condition was external to the plaintiff's will or was not a matter within the plaintiff's power to control. Examples of such

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[13] As Blanchard's assignee, Park has no greater rights than those of Blanchard. Accordingly, the doctrine cannot be invoked by Park for these same reasons.

conditions are a plaintiff's status as an unemancipated minor where it was unclear who was the proper adult with procedural capacity to file suit on his behalf (*Bouterie*, supra.), where union regulations and prior jurisprudence interpreting those regulations required exhaustion of administrative remedies prior to the institution suit (*Dalton v. Plumbers and Steamfitters Local,* 122 So.2d 88, 89 (1960)), where the plaintiff suffered from post-traumatic stress disorder which prevented her from understanding or acting (*Held v. State Farm Insurance Co.,* 610 So.2d 1017, 1020 (La.App. 3rd Cir.1992), writ denied, 613 So.2d 975 (La.1993)), the government's failure to require joinder of the proper party plaintiff until after the prescriptive period had run (*L & M Hair Care Products, Inc. v. State of Louisiana*, 622 So.2d 1194, 1196 (La. App. 2d Cir.), writ denied, 629 So.2d 1126 (La.1993), and a bank's inability to act against its board of directors, when the bank could not act without a majority vote and the wrongdoers formed the majority of the board. (*FDIC v. Caplan*, 874 F.Supp. 741, 746-747 (W.D.La. 1995).

In light of these cases and the language of the exception cited by plaintiff, the undersigned concludes that the second category does not apply in instances where the alleged condition is a provision in a contract voluntarily assumed by the plaintiff, because such a condition is not external the plaintiff's will and is a matter within the plaintiff's power to control. Accordingly, the undersigned rejects Park's argument based upon the doctrine of *contra non valentem.*

For the above stated reasons, Park has failed to carry its burden. *Unlimited*

Horizons, L.L.C., and *Richardson*, supra. Accordingly, the undersigned concludes that Park's cause of action for rescission of the settlement agreement is prescribed.

IV. PROCEDURAL ISSUES

As previously discussed the undersigned finds that the instant action should be dismissed for failure to state a claim upon which relief may be granted and alternatively, because the action is prescribed. However, for the sake of completeness, the undersigned will briefly address the remaining two grounds raised by Tortuga, that of Park's standing to bring the instant action and failure to join indispensable parties.

A. Standing

Tortuga contends that Park lacks standing to rescind or cancel the settlement agreement because it was not a party to the prior lawsuit or the settlement of that lawsuit, nor is it a signatory on any of the instruments executed in accordance with the terms of the settlement of that lawsuit. Specifically, Tortuga asserts that pursuant to civil code article 2031, the complained of error and the right to assert that error as a ground for nullity, belongs solely to Blanchard who is the party for whom the ground for nullity was established as she is the party who was allegedly in error when executing the settlement documents. Additionally, Tortuga contends that Park has no standing to overturn the settlement because it cannot vitiate agreements made by others to which it was not a party.

Plaintiff counters that Park has standing because Blanchard assigned all of her

rights in the property to Park. As assignee, Park argues that it has all of Blanchard's rights, and interests with respect to the property. Moreover, Park contends that the right to assert error as grounds for rescission is not strictly personal and hence, was assignable.

In reply, Tortuga asserts that Park was assigned Blanchard's property rights, not her rights in the prior settlement agreement. Tortuga argues that Park did not receive Blanchard's personal right to seek rescission of the settlement agreement based upon her error which under civil code article 2031 belongs only to the person in whose interest the ground for nullity was established.

In its complaint and amended complaint, Park alleges that it is a Louisiana limited liability corporation owned in equal parts by Betty Blanchard and Nancy Blanchard [¶ ¶ 2,3] and that in 1998 Blanchard "transferred the property" to Park. [rec. doc. 13, ¶ 7]. In opposition herein, Park asserts that it is the assignee of Blanchard's rights and interests in the property subject to the mineral lease and option executed pursuant to the terms of the settlement agreement at issue herein. The assignment was not attached to the pleadings, and thus may not be considered by the Court.

The relief requested in this lawsuit is that this court cancel and hold null all of the release documents executed in connection with the settlement of the prior state court lawsuit. [rec. doc. 13, ¶¶ 97 and 103]. Thus, Park seeks to hold null the release entered into by Betty Blanchard and Paul McLean as plaintiffs in the former lawsuit. Park asserts that it is the assignee of Blanchard's rights and interests in the property which is subject

to the option and ratification executed by Blanchard as a part of the settlement agreement and as such has the right to attack the release. It is undisputed that Park was not a party to the prior lawsuit, was not a signatory to the settlement agreement, and in fact did not exist until after the settlement of the former lawsuit was consummated.

Article 2031 of the civil code provides that a claim for relative nullity "may be invoked only by those persons for whose interest the ground for nullity was established...." La.C.C. art. 2031. By the clear terms of the article, the undersigned concludes that when the complained of ground for nullity is error vitiating consent to a contract, the person in whose interest the ground for nullity is established is the person in error because it is that person whose consent was defective when the contract was executed. The language of the article does not support Park's theory that a person who was not in error or whose consent was not defective may bring the action as assignee. Park cites no authority in support of its position, and the court is unable to find any such authority.

The undersigned finds support for this conclusion in the concurring opinion of Justice Summers of the Louisiana Supreme Court in *Armour v. Shongaloo Lodge*, 342 So.2d 600 (La. 1977). In discussing the differences between relatively and absolutely null contracts, Justice Summers examined the Codes of France and Louisiana as well as the writings of Demolombe, Laurent and Planiol and formulated the following concepts:

> (1) A relatively null contract can be validated by ratification or confirmation. Such ratification is a renunciation of the action for

> annulment. The contract becomes as valid as if it had been regular at its formation. Conversely, an absolutely null contract cannot be ratified. The nullity exists before any judgment is pronounced, because an absolutely null contract, although having the appearances of a valid agreement has no legal existence. It cannot be ratified because it is impossible to confirm a non-existence.
> (2) *The right of action to declare a relative nullity is available only to the incapable person or to one whose consent has been defective. With regard to all other persons, including the other party to the contract, the contract is valid.* Conversely, any interested party may have the court declare the nullity of an absolutely null contract.
> (3) The right to assert a relative nullity may be lost by prescription, but the right to have the nullity of an absolutely null contract is imprescriptible.

Armour, 342 So.2d at 603-604 (Summers, J. concurring) citing Note, 38 Tul.L.Rev. 755, 756 (1964), *Pearlstine v. Mattes*, 223 La. 1032, 67 So.2d 582 (1953), and *Whitney National Bank v. Schwob*, 203 La. 175, 13 So.2d 782 (1943)(emphasis added).

The release which is sought to be annulled contains not only an option to purchase land or an oil and gas lease, but rather they are terms of, and form a portion of, a settlement agreement confected in order to put an end to a previously existing lawsuit. As such, under Louisiana law, the release with the attached documents constitute a transaction or compromise which is an agreement between the parties to that lawsuit confected in order to put an end to that lawsuit. See *Dumas*, 742 So.2d at 660, supra. and La. C.C. art. 3071. To allow Park to void the settlement of that lawsuit, to which it was not a party, runs against the basic tenets of contract law as provided by article 2031 and against the public policy of the state in favoring settlements. Since Park is not the person for whom the nullity was established, Park lacks standing to void the settlement

agreement.

B. Indispensable Parties

Tortuga argues that Betty Blanchard, Paul Maclean and Nancy Blanchard are indispensable parties who are not joined in this litigation. In support of this argument, Tortuga claims that both Betty Blanchard and Paul Maclean were parties to the settlement agreement which is sought to be invalidated herein. Thus, in the event the settlement is rescinded their rights would be affected and could subject the defendants to further litigation. Moreover, settlement funds in the amount of $530,000 were disbursed and received by Blanchard and Maclean. Therefore, if the settlement is rescinded, pursuant to Louisiana law, this court must order that these funds be returned to the defendants in order to place the parties in their pre-contractual position. However, because neither Betty Blanchard or Paul Maclean are parties to this lawsuit they are not subject to this court's authority. Hence, this court will be unable to grant full relief in the event that Park prevails. Finally, by donation from Betty Blanchard, her daughter, Nancy Blanchard, acquired 1/4 interest in the mineral rights on the property. Therefore, should this court rescind the settlement, and more specifically, the ratification of the mineral lease at issue herein, her rights would be directly affected. Thus, the defendants argue that they will be at risk of incurring multiple additional claims in the future.

Park counters that Betty Blanchard and Nancy Blanchard are not indispensable because their interests are aligned with Park. Moreover, because in the former litigation

Paul Maclean's interests were aligned with Betty Blanchard, and Betty Blanchard's interest is now aligned with Park, Paul Maclean's interest is also aligned with Park. Hence, it is improbable that the absence of these individuals will expose the defendants to additional litigation or inconsistent obligations.

Legal Standard

Rule 12(b)(7) of the Federal Rules of Civil Procedure permits a party to bring a motion to dismiss a complaint for failure to join a party under Rule 19. See F. R.C. P. 12(b)(7). Proper joinder under Rule 19 is a two step process. *Alton Ochsner Medical Foundation v. HLM Design of North America, Inc.*, 2001 WL 1204054 (E.D.La. 2001). First, the court must decide if the absent party is a necessary party to the action, that is, whether the party should be joined. *Id.* citing F.R.C.P. 19(a); *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 1986). Second, if the absent party is a necessary party who should be joined, but his joinder is not feasible because the party cannot be joined, the court must decide whether the absent party is an "indispensable" party to the action under Rule 19(b), that is, whether the action must be dismissed in the party's absence. *Id.* citing F.R.C.P. 19(b).

Under Rule 19(a), a party is "necessary" if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent

obligations by reason of the claimed interest.

F.R.C.P. 19(a).

If a party is "necessary," but cannot be joined in the action because his joinder would defeat the court's diversity jurisdiction, the court must determine "whether in equity and good conscience the action should proceed among the parties before it..." *Id.* citing F.R.C.P. P. 19(b). The rule provides a list of four factors for a court to consider when making this determination:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

F.R.C.P. 19(b).

In *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109- 11, 88 S.Ct. 733, 737-38, 19 L.Ed.2d 936 (1968), the Supreme Court stated that the factors enumerated in Rule 19(b) may be delineated as the interests that affect four categories of persons: the plaintiff, the defendant, the absentees and the public. First to be considered is the plaintiff's interest in a federal forum, second, the defendant's interest in avoiding "multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another," third, the absentees' interest in avoiding prejudice from the proceeding, and fourth, the interest of the courts and the public in complete, consistent, and efficient

settlement of controversies. *Pulitzer-Polster*, 784 F.2d at 1312 citing and quoting *Provident.*

The distilled essence of the criteria set forth in subdivision (b) is the attempt to balance the rights of all concerned. "The plaintiff has the right to 'control' his own litigation and to choose his own forum. This 'right' is, however, like all other rights, 'defined' by the rights of others. Thus the defendant has the right to be safe from needless multiple litigation and from incurring avoidable inconsistent obligations. Likewise the interests of the outsider who cannot be joined must be considered. Finally there is the public interest and the interest the court has in seeing that insofar as possible the litigation will be both effective and expeditious." *Schutten v. Shell Oil Company*, 421 F.2d 869, 873 (5th Cir. 1970).

Necessary Parties

For purposes of Rule 19(a), the undersigned finds that Betty Blanchard, Paul Maclean and Nancy Blanchard are necessary parties to this lawsuit and should be joined as plaintiffs herein if feasible. Complete relief cannot be accorded without the joinder of Betty Blanchard and Paul Maclean. F.R.C.P. 19(a)(1). Park seeks rescission of the release which includes the option and ratification. Under Louisiana law, rescission serves to put the parties into their pre-contractual positions. *Insurance Storage Pool, Inc. v.*

Parish National Bank, 732 So.2d 815, 821 (La. App. 1st Cir. 1999); La. C.C. art. 1952.[14] The release required the defendants to pay a total $530,000 to plaintiffs, Betty Blanchard and Paul Maclean. This amount was paid and received. Should this court grant the relief requested by plaintiff, absent a showing that the defendants knew that Blanchard suffered under an error as to the principle cause of her obligation, which as discussed above, cannot be demonstrated, those funds would have to be returned to the defendants. Although Park argues it acquired Betty Blanchard's rights in the property, there has been no showing or allegation that Park is the assignee of Blanchard's rights in the former lawsuit, the settlement of that lawsuit or more specifically, the settlement funds received by Betty Blanchard as a result thereof. Moreover, nothing in the record demonstrates that Paul Maclean has transferred any of his interests in the former lawsuit, the settlement of that lawsuit, or more specifically, the settlement funds received by him as a result thereof. Since Blanchard and Maclean are not parties, this court is without the power to order them to refund the settlement proceeds.

The record reveals that on June 9, 1998, Betty Blanchard conveyed a 1/4 interest in the minerals underlying the property at issue herein to her daughter, Nancy Blanchard. [rec. doc. 23, Ex. 1]. Park argues that Betty Blanchard assigned her interest in the

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[14] La.C.C. art.1952 provides:
A party who obtains rescission on grounds of his own error is liable for the loss thereby sustained by the other party unless the latter knew or should have known of the error. The court may refuse rescission when the effective protection of the other party's interest requires that the contract be upheld. In that case, a reasonable compensation for the loss he has sustained may be granted to the party to whom rescission is refused.

property to Park. However, nothing in the record demonstrates that Nancy Blanchard transferred her interest in the minerals underlying the property to Park. Thus, while Nancy Blanchard is alleged to be an equal owner of Park, who allegedly is the assignee of Betty Blanchard's property rights, that status has no affect on Nancy Blanchard's personal interest in the minerals underlying the property absent transfer of those rights to Park by Nancy Blanchard. Accordingly, the undersigned concludes that Nancy Blanchard's interest in the minerals underlying the property which are subject to the ratification of the mineral lease sought to be voided herein is such that her absence may impair or impede her ability to protect her interests. See F.R.C.P. 19(a)(2)(i). Accordingly, she is a necessary party and should be joined as a plaintiff herein, if feasible.

Finally, Paul Maclean should be joined because he has an interest in the subject matter of this case, the cancellation of a settlement of a lawsuit to which he was a party plaintiff. Obviously, the disposition of this case in his absence, should rescission be granted, would impair his ability to protect his interests in the previous settlement as that settlement would be rendered null and void. See F.R.C.P. 19(a)(2)(i). Furthermore, a party should be joined when adjudication of the case in his absence could leave a defendant with multiple and/or inconsistent obligations. F.R.C.P. 19(a)(2)(ii). Here, adjudication of this case without Paul Maclean who was a party to the prior lawsuit and settlement agreement sought to voided herein would both impair his interests under the settlement agreement and leave the defendants at risk of multiple and/or inconsistent

obligations and litigation. Accordingly, Paul Maclean is a necessary party and should be joined as a plaintiff herein, if feasible.

Diversity Jurisdiction

In a diversity action brought under 28 U.S.C. §1332, all defendants must be of diverse citizenship from the plaintiff. See *Williams v. Louisiana Truck Insurance, Inc.*, 1989 WL 62538 (E.D.La. 1989) citing *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978)(applying rule of *Strawbridge v. Curtiss*, 7 U.S. 267 (1806), and *Getty Oil v. Insurance Co. of N. America*, 841 F.2d 1254 (1988). Thus, if even one defendant in a diversity action is a citizen of the same state as the plaintiff, the court must dismiss the entire action for lack of federal subject matter jurisdiction. *Id.*

Potential plaintiff, Nancy Blanchard, is alleged to be a citizen of Pennsylvania. [rec. doc. 13, ¶ 4]. Thus, if any defendant in this diversity action is also a citizen of Pennsylvania, the court must dismiss the entire action. A corporation is deemed to be a citizen both its state of incorporation and the state of its principal place of business for purposes of federal diversity jurisdiction. *Howery v. Allstate Insurance Co.*, 243 F.3d 912, 920 (5th Cir. 2001). Defendant ARCO is alleged to be a Pennsylvania corporation. [rec. doc. 13, ¶ 17]. Because Nancy Blanchard is also a citizen of Pennsylvania, complete diversity of citizenship will be absent if she is joined as a plaintiff herein, and this court would lack subject matter jurisdiction over this entire action. See *Strawbridge*, 7 U.S. at 267.

Potential plaintiff, Betty Blanchard, is alleged to be a citizen of Louisiana, the same as current plaintiff, Park. [rec. doc. 13, ¶ 5]. None of the defendants are alleged to be citizens of Louisiana. Hence, her joinder would not destroy diversity. Accordingly, as there are no procedural or jurisdictional bars, Rule 19 requires that Betty Blanchard be joined as a party plaintiff herein. *Schutten*, 412 F.2d at 873.

The citizenship of potential plaintiff, Paul McLean, is unknown. Thus, it is unknown if his joinder will destroy diversity. However, the undersigned will proceed as if his joinder would deprive this court of subject matter jurisdiction.

Indispensable Parties

For the reasons set out above, Paul Maclean and Nancy Blanchard are necessary parties who should be joined as plaintiffs, if feasible. The undersigned has determined that joinder of Nancy Blanchard and potentially Paul Maclean will destroy this Court's diversity jurisdiction. Therefore, the undersigned must determine whether their "presence is so vital that 'in equity and good conscience the action ... should be dismissed, [Nancy Blanchard and Paul Maclean] being thus regarded as indispensable.'" See *Mcauslin v. Grinnell Corp.*, 2000 WL 1059850 (E.D.La. 2000) citing *Haas v. Jefferson Nat'l Bank of Miami Beach*, 442 F.2d 394, 398 (5th Cir.1971)(quoting Rule 19(b)).

For the reasons stated below, the undersigned finds that Paul Maclean and Nancy Blanchard are not indispensable parties for purposes of Rule 19(b). Considering the four factors set forth in F.R.C.P. 19(b), this court can proceed in equity and good conscience

without their joinder.

Any judgment of recission rendered in the absence of Nancy Blanchard and Paul Maclean may be prejudicial to their interests and may be prejudicial to the interests of the defendants. However, this potential prejudice may be lessened or avoided by protective provisions in the judgment entered by this court or by judicial shaping of appropriate relief.

Park argues that the interests of Nancy Blanchard are aligned with Park as a result of her status as part owner of Park. Although there is no indication in the record that Nancy Blanchard transferred her personal 1/4 interest to Park, any adverse affect suffered by her may be remedied by appropriate action against Park.

The undersigned also cannot find that Paul Maclean's interests are not aligned with Park. Maclean was aligned with Betty Blanchard in the former suit as an interested prospective driller should the existing lease be terminated and the lessees be evicted. Moreover, the release does not clearly indicate that Maclean personally received any of the settlement funds from the defendants, and if so, the amount received by him. Should a judgement by this court necessitate the return of settlement funds to the defendants, this may be accomplished by an appropriate Order directed to Park and/or Betty Blanchard. Indeed, by filing the instant suit in which it seeks rescission, Park in essence has agreed to return the settlement funds should that become necessary.

Because Betty Blanchard is a necessary party who will be joined as plaintiff

herein, an order of this court requiring Park and/or Blanchard to return the $530,000 in settlement funds to the defendants would be binding on them. Thus, in the event this court grants rescission, the defendants would not be prejudiced in that they would be afforded appropriate relief upon resolution of this matter. Thus, the defendants will not be forced to engage in additional litigation in order that they receive the funds due. A defendant's interest in avoiding multiple litigation must be weighed in the balance. *Pulitzer-Polster,* 784 F.2d at 1313 citing *Schutten v. Shell Oil Co.,* 421 F.2d 869, 873 (5th Cir. 1970). Additionally, any judgment of rescission rendered in the absence of Paul Maclean and Nancy Blanchard will be adequate as an order directing the funds be returned will be binding on Betty Blanchard and Parks.

The undersigned is confident that protective provisions may be incorporated into any judgement rendered herein, and that this court will be able to shape relief in order to lessen or avoid any potential prejudice.

Finally, should this action be dismissed, Park would be able to re-file in the Louisiana state courts. However, in so doing Park would be deprived of its right to control this litigation and it's chosen federal forum. In light of the above, that right is not outweighed by the rights of others. See *Schutten,* supra.

Accordingly, the undersigned finds that Tortuga's motion to dismiss on alternate grounds of nonjoinder of Betty Blanchard, Nancy Blanchard and Paul Maclean should be denied. However, the court should order that Betty Blanchard be joined as party plaintiff

herein as she is a necessary party whose joinder will not destroy this court's diversity jurisdiction.

CONCLUSION

Based on the foregoing, it is recommended that Park's request for leave to file a second amended complaint be **DENIED**, that the Motions to Dismiss filed by the defendants [rec. docs. 23, 27, 29, and 42] be **GRANTED**, and accordingly that this matter be **DISMISSED WITH PREJUDICE.**

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within ten (10) days following the date of its service, or within the time frame authorized by F.R.C.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. ***Douglass v. United Services Automobile Association*****, 79 F.3d. 1415 (5th Cir. 1996).**

Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

Signed this 12 day of July, 2002, at Lafayette, Louisiana.

C. Michael Hill

C. MICHAEL HILL
UNITED STATES MAGISTRATE JUDGE

COPY SENT:
DATE: 7-16-02
BY: DMN
TO: Wayman
Gamble
Balden
Maynard
Waddell
Norman
Tshee
Christovich

COPY SENT:
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TO: CMH glc
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