

1986

# Katherine Koulis v. Standard Oil Company of California : Brief of Respondent

Utah Supreme Court

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UTAH COURT OF APPEALS  
BRIEF

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MENT  
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IN THE SUPREME COURT OF THE STATE OF UTAH  
CKET NO. 860064

KATHERINE KOULIS,  
Plaintiff-Appellant,  
vs.  
STANDARD OIL COMPANY OF  
CALIFORNIA, WESTERN OPERATIONS,  
INC.; CHEVRON OIL COMPANY dba  
STANDARD OIL COMPANY OF  
CALIFORNIA,  
Defendants-Respondents.

860064-CA  
Case No. 20205

BRIEF OF RESPONDENTS

Appeal from Summary Judgment of the District Court  
of Salt Lake County, State of Utah,  
Honorable J. Dennis Frederick, Judge

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**FILED**

MAY 16 1985

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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KATHERINE KOULIS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	
STANDARD OIL COMPANY OF	)	
CALIFORNIA, WESTERN OPERATIONS,	)	
INC.; CHEVRON OIL COMPANY dba	)	
STANDARD OIL COMPANY OF	)	
CALIFORNIA,	)	
	)	
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IN THE SUPREME COURT

STATE OF UTAH

KATHERINE KOULIS (GORAS),	)	
	)	
Plaintiff-Appellant	)	<u>RESPONDENTS BRIEF</u>
	)	
vs.	)	Case No. 20205
	)	
STANDARD OIL COMPANY OF	)	
CALIFORNIA, WESTERN OPERATIONS,	)	
INC.; CHEVRON USA, INC.;	)	
CHEVRON OIL COMPANY dba	)	
STANDARD OIL COMPANY OF	)	
CALIFORNIA,	)	
	)	
Defendant-Respondents	)	

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STATEMENT OF ISSUES<sup>1</sup>

With all due respect to appellant, respondents contend the issues herein are as follows:

1. Was summary judgment properly based upon the Statute of Limitations where appellant alleged fraud which occurred in 1968 and failed to provide a legally cognizable excuse for not filing suit until 1983.

2. Was summary judgment properly based upon the Statute of Limitations where appellant's alleged breach of

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<sup>1</sup> Respondents are all affiliated companies. For ease of discussion herein, they will be collectively referred to as "respondent."



Lease which occurred in 1968 and failed to file suit until 1983 and failed to provide a legally cognizable reason for such failure.

It is respectfully submitted that those issues denominated "2" and "4" as set forth in appellant's brief are not issues herein. With respect to appellant's denominated issue "2", as will be explained hereinafter, the "alleged breach" is irrelevant to this appeal and the ruling of the court below. The issue herein is not whether respondents "breached," but rather was the lawsuit instituted seasonably.

With respect to issue number 4, for purposes of its Motion for Summary Judgment the respondent conceded that appellant did not actually discover the alleged delicts until a date within three years of the filing of the complaint. It is contended however, that the determinative date is not, under Utah law, the date of actual discovery, but rather the date when appellant should reasonably have known of the facts constituting the fraud.

#### STATEMENT OF THE CASE

Appellant filed her original complaint on August 26, 1983. Appellant alleged generally that respondent breached the lease and its modification by failing to construct a service station completely on the property of appellant; instead, appellant alleged, such service station was constructed partially on appellant's property and partially on adjacent property belonging to a third party.

Subsequently, after respondent answered the complaint, appellant with leave of Court filed an amended complaint. In the amended complaint, sounding in both breach of lease and fraud in the inducement, appellant again alleged that the service station so constructed was not completely on appellant's property. It was also alleged that respondent concealed its fraud from appellant.

On June 26, 1984 respondent filed its Motion for Summary Judgment based upon the Statute of Limitations, as contained in U.C.A. §§ 78-12-23(2) and 78-12-26(3). Upon hearing, the trial court, the Honorable J. Dennis Frederick, judge presiding, did grant respondent's motion and issued its order thereon on August 22, 1984. (A true and correct copy of said order is attached hereto as Exhibit A.) This appeal is taken from that order. Both parties have sought summary disposition of this appeal before this Supreme Court. Such summary disposition has been denied.

#### STATEMENT OF FACTS<sup>2</sup>

The "facts" of this case are not complex. The

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<sup>2</sup>"Respondent objects to appellant's statement of facts as contained in appellant's brief in pages 2 through 6. The "Appellants Facts" are totally violative of Rule 75(p)(2) of the Utah Rules of Civil Procedure in that such "facts" contain no citations to the record. The "facts" are nothing more than argument and legal conclusions proffered by counsel for appellant. It is respectfully suggested that for such a purposeful violation of this Court's rules that the entirety of the appellant's brief be stricken.

position of respondent in the court below was that when appellant failed to file suit until fifteen years after the alleged delicts, respondent was entitled to judgment based upon the applicable statutes of limitation. In support of respondent's Motion for Summary Judgment in the trial court, respondent proffered the following facts which were not reasonably subject to dispute:

1. On August 2, 1958 respondent, as lessee, entered into a lease agreement (the "1958 Lease") with Pauline Koulis (appellant's predecessor in interest), as lessor, concerning the following-described premises (hereinafter referred to as the "Koulis Property") in the City of Salt Lake, County of Salt Lake, State of Utah:

Commencing at the Southwest Corner of Lot 4, Block 63, Plat C, Salt Lake City Survey, and running thence East 132.75 feet; thence North 74.75 feet; thence West 123.75 feet; thence South 74.75 feet, to the point of beginning.

The common address for the Koulis Property is Eighth West and North Temple in Salt Lake City. A true and correct copy of said 1958 Lease is attached hereto as Exhibit "B" and is hereby incorporated by reference. See also plaintiff-appellant's Amended Complaint, ¶ 1; defendant-respondent's Answer to Amended Complaint, ¶ 1; defendant-respondent's Exhibit 9 to the Deposition of Katherine Koulis dated June 15, 1984.

2. Respondent was unable to take possession of the leased property because appellant's predecessor had leased the same premises to a third party whose lease did not terminate

until 1967. Prior to the time of respondent's possession, the property had on it a two story building. The bottom floor housed a drug store and the top floor was used as a residence for the Koulis family. Deposition of Katherine Koulis dated January 10, 1984, p. 10, 17.

3. On or about May 16, 1967 Pauline Koulis entered into a Modification of Lease (the "1967 Modification") with respondent. A true and correct copy of said 1967 Modification is attached hereto as Exhibit "C" and is hereby incorporated by reference. See also plaintiff-appellant's Amended Complaint, ¶ 1; defendant-respondent's Answer to Amended Complaint, ¶ 1; defendant-respondent's Exhibit 10 to the Deposition of Katherine Koulis dated June 15, 1984.

4. Pauline Koulis was the predecessor in interest of appellant regarding the above 1958 Lease and 1967 Modification (hereinafter collectively referred to as the "Lease"), and all of Pauline Koulis' right, title, and interest of every type and nature in the Lease was distributed to, and vested in the name of appellant. See Amended Complaint, ¶ 2; Deposition of Katherine Koulis dated January 10, 1984, Exhibits 2, 3, 4. Appellant and her now deceased husband (a predecessor in interest) received payments from respondent from 1968 until at least 1982 under the Lease. Deposition of Katherine Koulis dated June 15, 1984, pp. 58-59.

5. In 1958 appellant was aware that her mother-in-law, Pauline Koulis, entered into the Lease with respondent for the utilization of the above-described property as a Chevron service station (hereinafter the "Chevron Station" or "Station"). Deposition of Katherine Koulis dated January 10, 1984, p. 11. Deposition of Katherine Koulis dated June 15, 1984, p. 57.

6. Appellant lived in an apartment on the Koulis Property, the property on which the Chevron Station now rests, from the 1950's until April, 1967. Deposition of Katherine Koulis dated January 10, 1984, pp. 9-11. Deposition of Katherine Koulis dated June 15, 1984, p. 65.

7. In 1967 appellant moved from the Koulis Property because the Chevron Station was being built on the Koulis Property by respondent. Deposition of Katherine Koulis dated January 10, 1984, pp. 10, 19.

8. Pauline Koulis died on or about January 20, 1968, in Salt Lake City. See Deposition of Katherine Koulis dated January 10, 1984, p. 15; "Approval of First and Final Account, Decree of Distribution and Discharge of Executors," dated July 10, 1968, p. 1, attached hereto at Exhibit "D" and also appearing as respondent's Exhibit 8 to the deposition of Katherine Koulis dated June 15, 1984.

9. Appellant was generally aware from 1967 through 1982 of the Lease between Pauline Koulis and the respondent.

Deposition of Katherine Koulis dated June 15, 1984, pp. 45, 47-48.

10. Appellant was the executrix of the Estate of Pauline Koulis in 1968 and was fully aware, as executrix, that one of the assets of the estate was the Lease, and that respondent, as lessee, paid approximately \$350.00 per month as rent for the Koulis Property. Deposition of Katherine Koulis dated January 10, 1984, p. 35; Deposition of Katherine Koulis dated June 15, 1984, pp. 49-51. See also "Approval of First and Final Account, Decree and Distribution and Discharge of Debtors, dated July 10, 1968, pp. 1, 3-4, which is defendant-respondent's Exhibit No. 8 to the Deposition of Katherine Koulis dated June 15, 1984, and which is also attached hereto as Exhibit "D."

11. In 1968 the appellant and her husband, as executrix and executor of the estate of Pauline Koulis, read the "Approval of First and Final Account, Decree and Distribution and Discharge of Debtors," dated July 10, 1968, which document recited that (1) one of the assets of the estate of Pauline Koulis was the Lease; (2) that the specific property description of the Koulis Property on which the Chevron Station now sits was subject to the Lease; and (3) that the monthly payments would be \$350.00 per month. See Deposition of Katherine Koulis dated June 15, 1984, pp. 52, 55. See also

"Approval of First and Final Account, Decree and Distribution and Discharge of Debtors, pp. 1-3, which is respondent's Exhibit 8 to the Deposition of Katherine Koulis dated June 15, 1984, and which is also attached hereto in Exhibit "D." The said "Approval of First and Final Account" was filed at the request of the appellant. Deposition of Katherine Koulis dated June 15, 1984, p. 10.

12. After leaving the Koulis Property, appellant remained in Salt Lake City, residing at 2370 Bryan Avenue, Salt Lake City, Utah until May of 1981. Deposition of Katherine Koulis dated June 15, 1984, pp. 4-5. The time to drive from appellant's Bryan address to the Koulis Property was approximately 15-20 minutes. Deposition of Katherine Koulis dated June 15, 1984, p. 4.

13. The Chevron Station was fully erected and completed sometime in 1968. Deposition of Katherine Koulis dated January 10, 1984, p. 28.

14. Appellant, as executrix of the estate of Pauline Koulis, did not attempt to obtain a copy of the 1958 Lease and 1967 Modification described above. Furthermore, appellant stated that there was no reason why she did not obtain a copy, and that she never obtained a copy of said Lease as executrix of Pauline Koulis' estate because it "[n]ever occurred to me at

the time." Deposition of Katherine Koulis dated January 10, 1984, p. 35.

15. Appellant saw the completed Chevron Station on the Koulis Property at least once in 1968 Deposition of Katherine Koulis dated January 10, 1984, p. 28. Appellant has also generally admitted that she saw the Chevron Station after it was "totally complete." Id. at 16. Appellant stated she passed the Koulis Property whenever she needed to go to Magna or Saltair. Id. at 27.

16. Prior to and after 1967-1968, appellant was aware of the boundary line between the Koulis Property and the adjacent property to the north, the "Crowther Property." Deposition of Katherine Koulis dated June 15, 1984, pp. 63-70; Exhibit 6A to Deposition of Katherine Koulis dated January 10, 1984.

17. The Chevron Station was built on both the Koulis Property and the adjoining Crowther Property. Id. at pp. 73-74. As indicated in the Affidavit of James W. Stewart, dated June 25, 1984, and the certified warranty deed attached to said Affidavit, the Crowther Property was deeded in 1967 to Diana Amelia Child Martin. As further indicated in: (1) said Affidavit and Exhibit 1 thereto; (2) the Affidavit of Rick Gates dated June 25, 1984 and Exhibit 2 thereto; and (3) the Affidavit of R. Lynn Peterson dated June 25, 1984 and Exhibits



thereto, the boundaries of the Crowther Property were identical to the property now owned by Diana Amelia Child Martin.

18. The Crowther Property, now owned by Diana Amelia Child Martin, during the period that appellant lived on the Koulis Property, consisted of a single family residence. This residence was razed and the ground subsequently paved to accommodate the Chevron Station built by respondent.

Deposition of Katherine Koulis dated June 15, 1984, p. 66.

19. The buildings comprising the Chevron Station are located partially on the Koulis Property and also extend approximately 24 feet onto the Crowther-Martin Property. Twenty-four feet is approximately one-half of the width of the Crowther-Martin Property<sup>3</sup>. Affidavit of R. Lynn Peterson (Surveyor) dated June 25, 1984; See Title Report and Affidavit of Rick Gates dated June 25, 1984, indicating appellant has a common property line with Diana Martin.

20. Appellant was aware in 1968 when she saw the completed Chevron Station that the Crowther home was no longer there. Deposition of Katherine Koulis dated June 15, 1984, p. 66.

21. In 1967 and 1968, approximately one-half of the Chevron Station was built on the Koulis Property described in

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<sup>3</sup>The Crowther-Martin Property is rectangular in shape. It is 74.75 feet long and 49 feet wide. Affidavits of Lynn Peterson and Rick Gates.

the Lease. At the same time approximately the other one-half of the Chevron Station was built on the Crowther Property (now Martin Property.) See Deposition of Katherine Koulis dated January 10, 1984, Exhibit 1; Affidavit of R. Lynn Peterson (Surveyor) dated June 25, 1984; See also Affidavit of Phyllis Vetter dated June 26, 1984 and Certified Copy of plat map, attached thereto as Exhibit 1.

22. When appellant finally decided to ask respondent to provide her with another copy of the Lease in 1982, the respondent did so. Deposition of Katherine Koulis dated January 10, 1984, p. 32.

23. Appellant did not notify respondent until on or about January 4, 1983 of the alleged "breach" of the Lease, i.e. that the Chevron Station was not built completely on the Koulis Property in 1968 as allegedly specified in the Lease. See "Notice of Breach of Lease," dated January 4, 1983, attached hereto as Exhibit "E." The alleged breach occurred in 1968, i.e. when construction on the Chevron Station was completed. Deposition of Katherine Koulis dated January 10, 1984, p. 28. Appellant did not bring an action based upon the alleged breach until approximately August 26, 1983. See Complaint, p. 6. Thus, this action was brought approximately 15 years after the alleged breach.

These facts were the facts upon which respondent contended that appellant unreasonably delayed in the bringing of this action. Recognizing the rule that a summary judgment is improper if there is a genuine issue of fact yet to be determined, respondent cannot ignore that portion of appellant's brief denominated "Appellants Facts."

As has been previously pointed out there is no citation to the record referred to by appellant. Secondly, most of the assertions are conclusions of law, not facts, and are unsupported in this tribunal and were not supported by factual averment in the court below.

Lastly, most of the statements are irrelevant. In her brief appellant continues to urge that when paragraphs 7 and 11 of the 1958 Lease are read together it is clear paragraph 7 is void. Further, it is argued that respondent's failure to build the Chevron Station solely upon appellant's property destroyed the mutuality of the Lease. Again, it must be pointed out that this case, in the present posture, does not deal with the merits of appellant's lawsuit. This appeal is solely concerned with the fifteen year delay in filing suit. Under these circumstances, whether paragraph 7 of the Lease is void, or whether the Lease lacks mutuality, does not aid this Court in resolving the issues at bar.

Additionally, whether respondent breached the Lease or whether respondent was guilty of fraud are not at issue

herein. The sole question to be determined is whether the lower Court was correct when it found:

" . . . that the Plaintiff had the opportunity of knowing the facts constituting the alleged fraud and was thereafter inactive and dilatory in commencing her action. The Court finds that all of the facts necessary for Plaintiff to have discovered the alleged fraud and commenced this action were available to her in 1968. The Court further finds that Plaintiff has failed to come forward with any legally cognizable reason to excuse her delayed discovery of the alleged fraud." Exhibit A attached hereto.

#### SUMMARY OF THE ARGUMENT

Respondent contends that there are two issues to be determined herein:

1. Whether the trial court was correct in determining that the statute of limitations as contained in Utah Code Ann. § 78-12-23(2) barred appellant's cause of action for breach of contract, and

2. Whether appellant's cause of action for fraud was barred based on the provisions of Utah Code Ann. § 78-12-26(3) requiring a fraud action to be instituted within three years of when discovery of the facts constituting the action should reasonably have been discovered.

It is respondent's position that the trial court was correct in granting summary judgment against the appellant. The facts as presented in the Court below conclusively

established that all of the facts that would put a reasonably prudent person of ordinary intelligence on notice of possible fraud were apparent in 1968. Appellant, however, through her own inattention did not institute her action until 1983. Thus, fifteen years elapsed between the time she should have been aware of her cause, and the time she filed suit. Under the existing law of this state, her claims are now barred.

#### ARGUMENT

1. SUMMARY JUDGMENT WAS PROPER, BASED UPON THE STATUTE OF LIMITATIONS, WHERE APPELLANT FAILED TO INSTITUTE SUIT UNTIL FIFTEEN YEARS AFTER THE ALLEGED BREACH OF LEASE

Utah Code Annotated § 78-12-23(2) provides that the statute of limitations for an action based upon an instrument in writing is six years. Once it was established that the alleged breach occurred in 1968 (the date the Chevron Station was completed) it was clear that the cause of action for breach of lease was barred.

The applicable case law establishes that appellant's cause of action for the alleged breach of the Lease accrued at the time that the alleged breach occurred. M. H. Walker Realty Co. v. American Surety Company of New York, 211 P. 998, 1008 (Utah 1922) ("These cases undoubtedly support the contention that in an action to recover for the breach of a contract the statute ordinarily begins to run when the breach

occurs and not when the damage is ascertained"). See also Shipp v. O'Dowd, 454 S.W.2d 845 (Tex. Civ. App. 1970) (cause of action for breach of contract arises when the breach occurs). Stated differently and in general terms, a plaintiff's cause of action accrues "at the time it becomes remediable in the courts," O'Hair v. Kounalis, 23 Utah 2d 355, 463 P.2d 799, 800 (1970), or "upon the happening of the last event necessary to complete the cause of action." Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981).

Under any of the formulations of the Utah Supreme Court quoted above, appellant's cause of action for the alleged breach of the Lease must have arisen no later than 1968, the year that the Chevron Station was completed. Any breach of the Lease based upon the fact that the Chevron Station was not constructed entirely upon the Koulis Property could not have occurred at any time beyond 1968, for appellant admits that the Chevron Station was entirely completed in 1968. Deposition of Katherine Koulis dated January 10, 1984, p.28. Consequently, appellant's failure to bring her action within six years from the date on which the Chevron Station was completed renders her claim time-barred under the provisions of Utah Code Ann. § 78-12-23(2). The Chevron Station was fully constructed by 1968. Therefore, appellant's cause of action for breach of the Lease ran in 1974, and is now barred.

Even if it were assumed, arguendo, that an exception does exist in the law of this state for "fraudulent concealment" of a breach of lease, appellant failed to come forward with any facts in the tribunal below which support such a contention. There are but two contentions by appellant concerning "concealment."

The first contention is that respondent failed to tell either appellant or her predecessors that the Chevron Station was being built on two parcels of land. This failure would have occurred in 1967 or 1968. The second contention is that when respondent recorded the Martin lease in 1968 it only recorded a "skeleton" lease thus making it more difficult for appellant to learn of the Martin interest in the service station. As found by the court below, neither of these "facts" could possibly relieve appellant of her duty of reasonable inquiry.

Although the Utah Supreme Court has held in some instances that a plaintiff's proof of concealment or misleading by the defendant constitutes an exception to the general bar of the Statute of Limitations and precludes the defendant from relying on the limitations argument (Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981)), appellant's mere allegation that she was ignorant of her claim until October, 1982 is insufficient under the law to toll the applicable statute of limitations. Amundson v. Mutual Benefit Health & Accident Association, 13

Utah 2d 407, 375 P.2d 463 (1962) (holding that plaintiff's claim for insurance death benefits which was not made until thirty-three years after the death of the insured was barred by § 78-12-23, regardless of plaintiff's allegation that she was not aware that the policy existed and that she was a beneficiary under the policy.) Once the respondent proved, prima facie, a statute of limitations defense, appellant, in the court below, was required to sustain the burden of showing that a genuine triable issue of fact existed with respect to the statute of limitations. Clawson v. Boston Acme Mines Development Company, 72 U. 137, 269 P. 147 (holding that if a defendant foreign corporation sets up in its answer that plaintiff's action is barred by the statute of limitations, plaintiff must in his reply state facts and circumstances sufficient to toll the statute.) Importantly, the appellant states in her deposition that the only circumstance she alleges was fraudulantly concealed from her or her predecessors in interest, was that the Chevron Station was built partly on the property of another. Deposition of Katherine Koulis dated June 15, 1984, pp. 38-40. Appellant has admitted she was unaware of what the respondent did to conceal this fact. Id. at 43.

It is not surprising that appellant has failed to plead or discuss her argument of fraudulent concealment with more particularity. To do so would require her to plead and



prove that respondent somehow concealed from her view the whereabouts of the Chevron Station and/or prevented her from reading the very terms of the Lease which she claims was breached -- a Lease which was a significant asset of the estate for which appellant served as executrix; a Lease appellant was at least generally aware of as early as 1958, and the rights to which she inherited from the original lessor, Pauline Koulis, in 1968. Simply to state the proof required is to expose the absurdity of appellant's argument of fraudulent concealment. There was no evidence brought forward by appellant even suggesting that respondent in any way tried to prevent her from obtaining a copy of the relevant Lease or in any way tried to prevent her from observing where the Chevron Station was constructed. Appellant concedes that respondent gave her a copy of the Lease as soon as she bothered to ask for one. Deposition of Katherine Koulis dated January 10, 1984, p.32. Indeed, it would have been next to impossible, if not impossible, for respondent to have tried to conceal the fact that approximately one-half of the Chevron Station was not constructed on the Koulis Property, because the appellant lived on the Koulis Property from the 1950's through 1967 and was familiar with property lines surrounding it. Deposition of Katherine Koulis dated June 15, 1984, pp. 63-70; Deposition of Katherine Koulis dated January 10, 1984, pp. 24, 30-32.

Finally, appellant cannot successfully plead and prove fraudulent concealment in the instant case because the undisputed facts, far from showing concealment, demonstrate as a matter of law that appellant should have discovered the existence of her cause of action through reasonable care and inquiry. This argument will be developed fully in that portion of this brief dealing with application of the statute of limitations to appellant's claim for fraud.<sup>4</sup>

In Myers v. McDonald, supra, 635 P.2d 84 (Utah 1981), Justice Oaks of the Utah Supreme Court reiterated the important policy considerations supporting statutes of limitations generally. Quoting the United States Supreme Court, Justice Oaks emphasized that statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Id. at 86.

Certainly these off-quoted policy considerations apply to the present case and compel the conclusion that appellant's actions should be barred by the statute of limitations. Appellant claims that respondent breached a Lease entered into

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<sup>4</sup>It is submitted that the rules concerning delayed discovery and reasonable inquiry are the same for contract actions as they are for fraud actions.

in 1958. Fifteen years have passed since 1968, the time of the alleged breach. During that time, not only have witnesses forgotten the circumstances surrounding the terms of the Lease and the building of the Chevron Station, but key witnesses with respect to the terms of the Lease, Pauline Koulis and her son, Paul Koulis, have died.

The present dispute is a prime example of a situation where the statute of limitations should be applied to protect respondent from the assertion of stale claims.

2. SUMMARY JUDGMENT WAS PROPERLY BASED UPON THE STATUTE OF LIMITATIONS WHERE THE FRAUD ALLEGED BY APPELLANT OCCURRED IN 1968 AND SUIT WAS NOT INSTITUTED UNTIL 1983 AND APPELLANT FAILED TO PRESENT A LEGALLY COGNIZABLE EXCUSE FOR THE DELAY

Under Utah law, actions based on allegations of fraud or mistake are subject to a three year statute of limitations. Section 78-12-26(3) of Utah Code states that a suit must be brought within three years for "[a]n action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the fraud or mistake."

The Utah Supreme Court, however, has qualified the language of §78-12-26(3) by declaring that the three year limitations period begins to run either from the time the plaintiff discovers the fraud, or from the time the plaintiff reasonably should have known of the fraud. McConkie v.

Hartman, supra, 529 P.2d 801 (Utah 1974) (holding plaintiff's action time-barred under Utah Code Ann. § 78-12-26(3) because eight years had elapsed in which time reasonable inquiry by the plaintiff would have put him on notice of the alleged mistake or fraud); Gibson v. Jensen, 48 U. 244, 158 P. 426, 427 (1916) (one informed of such facts as will put a person of ordinary intelligence and prudence on inquiry has received information sufficient to start the running of the statute of limitations); Larsen v. Utah Loan & Trust Co., 65 P. 208, 211 (Utah 1901) (the statute of limitations for fraud commences to run upon discovery of the fraud, or of facts sufficient to put an ordinarily intelligent person on inquiry); Taylor v. Moore, 51 P.2d 222, 228 (Utah 1935) ("A party who has opportunity of knowing the facts constituting the alleged fraud cannot be inactive and afterwards allege a want of knowledge that arose by his own laches and negligence.")

In McConkie v. Hartman, 529 P.2d 801 (Utah 1974) the Utah Supreme Court affirmed the lower court's application of UCA § 78-12-26(3) to bar plaintiffs' claims for fraud, in spite of plaintiffs' contention that there had been fraudulent concealment. The court refused to reform plaintiffs' warranty deeds to strike out certain reservations of mineral rights because plaintiffs had ample opportunity to discover any fraud or mistake by familiarizing themselves with the language of the

deeds. The court was unsympathetic to the fact that plaintiffs had not seen the deeds after their recordation. At page 802 the court explained:

It is the plaintiffs' claim here as well as in the court below that there was a fraudulent concealment on the part of the defendants which postponed the commencement of the running of the statute pursuant to the provisions of Section 78-12-26(3) . . . .

The court below found that the plaintiffs had full opportunity to discover the reservations in the deeds when the deeds were delivered to Security Title Company and when they reviewed problems in the chain of title. That all of the circumstances existing at or about the time the deeds were recorded were such as to furnish full opportunity to the plaintiffs for the discovery of the mistake or fraud, if any existed. The court further found that more than eight years had elapsed since the time for reasonable inquiry on the part the plaintiffs would have revealed the mistake or fraud to the time of filing their complaint.

In McConkie, plaintiffs' action was barred because of their unreasonable failure for some 8 years to apprise themselves of certain deed provisions. In the present case, appellant's action should likewise be barred because of her unreasonable failure for some 15 years to apprise herself of certain Lease provisions.

Both state and federal courts have not hesitated to determine the due diligence issue as a matter of law when, as here, the circumstances clearly warranted it. Thus, the Utah Supreme Court in Gibson v. Jensen, supra, 158 P. 426, 428

(Utah 1916) reversed a lower court judgment for the plaintiff, holding as a matter of law that "plaintiff possessed all the information required by our statute respecting the alleged fraud more than three years preceding the bringing of the action."

In Helfer v. Hubert, 24 Cal. Rptr. 900 (District Court of Appeal, Second District, Division 3, California 1962) the court held that purchasers of a residence were barred from bringing an action for fraud on grounds that the vendors had falsely represented that the property had proper drainage, because the action was brought more than three years after the plaintiffs knew of the alleged fraud or had knowledge of facts sufficient to put a prudent man on inquiry. The court held:

[W]hen the knowledge had by or imputed to plaintiff is such as to compel the conclusion that a prudent man would have suspected the fraud, the court may determine as a matter of law that there has been "discovery." Bainbridge v. Stoner, 16 Cal. 2d, 423, 430, 106 P.2d 423; Lady Washington C. Co. v. Wood, 113 Cal. 482, 486, 45 P. 809; Haley v. Santa Fe Imp. Co., 5 Cal. App. 2d 415, 42 P.2d 1078.

24 Cal. Rptr. 900, 902 (emphasis added); Accord, Beresford v. Horn 273 P.2d 302 (District Court of Appeal, Second District, Division 3, California 1954) (summary judgment against plaintiffs who had purchased and lived in a dwelling house which failed in obvious particulars to meet the requirements of

local building ordinances and who were unreasonable as a matter of law in failing to discover the nonconformance during their first thirteen months of occupancy); Wise v. Anderson, 359 S.W. 2d 876, 879 (Tex. 1962) (as a matter of law plaintiff-lessor's action was barred by statute of limitations because plaintiff had "knowledge of facts that would cause reasonably prudent person to make inquiry which would lead to a discovery of the fraud."); Polk Terrace, Inc. v. Curtis, 422 S.W. 2d 603, 605 (Tex. Civ. App. 1967) ("As a matter of law in the light of their own testimony, appellees for more than two years prior to the institution of their suit on October 1, 1965 had knowledge of such facts as would cause a reasonably prudent person to make inquiry which would have led to a discovery of the fraud."); Mason v. Laramie Rivers Co., 490 P.2d 1062, 1065 (Wyo. 1971) (granting summary judgment to defendant corporation on grounds that plaintiff shareholders' fraud action was barred by the statute of limitations; the corporate books and records contained information which would have apprised plaintiffs of the fraud if only plaintiffs had exercised due diligence and checked the corporate records).

So, too, the District Court for the Eastern District of Wisconsin, in Cahill v. Ernst & Ernst 448 F. Supp. 84 (E.D. Wisconsin 1978) affirmed a grant of summary judgment in favor

of the defendant as to plaintiff's claims of fraud under the federal securities laws. Although the applicable statute of limitations in that case was a provision from Wisconsin's Blue Sky Laws, the court analogized to Wisconsin's statute of limitations for general fraud actions which, like the Utah statute at issue in the present case, provides that "the cause of action in [a fraud] case is not deemed to have accrued until discovery, by the aggrieved party, of the facts constituting the fraud." The court quoted with approval the following language of a previous Wisconsin case, Koehler v. Haechler, 27 Wis.2d, 275, 278, 133 N.W.2d 730, 731 (1965):

Actual and complete knowledge of the fraud on the part of the plaintiff is not necessary in order to set the limitation period running.

"When the information brought home to the aggrieved party is such as to indicate where the facts constituting the fraud can be effectually discovered on diligent inquiry, it is the duty of such party to make the inquiry, and if he fails to do so within a reasonable time, he is, nevertheless, chargeable with notice of all facts to which such inquiry might have lead." [O'Dell v. Burnham, 61 Wis. 562, 21 N.W. 635 (1884)].

Commenting on the above passage, the court stated in 1961: "Under the rule quoted above, it is not necessary that a defrauded party have knowledge of the ultimate fact of fraud. What is required is that it be in possession of such essential facts as will, if diligently investigated, disclose the fraud. The burden of diligent inquiry is upon the defrauded party as soon as he has such information as indicates where the facts constituting the fraud can be



discovered." [Milwaukee Western Bank v. Lienemann, 15 Wis. 2d 61, 112 N.W.2d 190 (1961)].

448 F. Supp. 84, 88. Cahill is just one example among an impressive number of federal fraud cases which were decided for the defendant on summary judgment due to plaintiff's unwarranted delay in bringing suit. In all such cases, the statute of limitations at issue (Section 13 of the Securities Act of 1933) prescribed a period of "one year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence. See Kramas v. Security Gas and Oil, Inc., 672 F.2d 766, 770 (9th Cir. 1982); Fox v. Kane-Miller Corp., 542 F.2d at 917 (reasonable diligence is tested by an objective standard); Holtzman v. Proctor, Cook & Co., 1981-82 Fed. Sec. L. Rep. ¶ 98,421 (D.Mass. 1981); First Federal Savings and Loan Association of Miami v. Mortgage Corporation of the South, 650 F.2d 1376 (5th Cir. 1981) Militsky v. Merrill Lynch, Pierce, Fenner & Smith, Fed. Sec. L. Rep. [CCH 1982 Transfer Binder] ¶ 98,859 (N.D. Ohio 1980); Sleeper v. Kidder, Peabody and Co., Inc., 480 F. Supp. 1264, 1269 (D.Mass. 1979).

As the foregoing review of authorities readily demonstrates, where limitations hinges on the exercise of reasonable diligence by the plaintiff, the issue of his diligence may be disposed of as a matter of law. This is only

proper, since statutes of limitation are statutes of repose, and they require a plaintiff to act with specified promptness when he is in possession of sufficient facts to be put on inquiry of his potential claim. The statutory period "[does] not await [a plaintiff's] leisurely discovery of the full details of the alleged scheme." Hupp v. Gray, 500 F.2d 993, 996 (7th Cir. 1974), quoted with approval in O'Hara v. Kovens, 473 F. Supp. 1161, 1166 (D.Md. 1979), aff'd 625 F.2d 15 (4th Cir. 1980), cert. denied 449 U.S. 1124 (1981).

The present lawsuit was filed in August, 1983. To avoid the bar of the statute of limitations, appellant must not have, or reasonably should not have, discovered the alleged fraud before August, 1980. Excerpts from appellant's deposition and the general factual circumstances of this case demonstrate she knew or should have known of the facts giving rise to her complaint long before that date. Appellant was the executrix of the estate of Pauline Koulis, her predecessor in interest to the Lease. By her own admission, in 1968 she was aware that the Lease was among the assets of the Estate of Pauline Koulis. Notwithstanding this knowledge, she failed to acquaint herself with the terms of the 1958 Lease or 1967 Modification. Appellant makes no allegation that respondent in any way prevented her from discovering the terms of the Lease.

Most significantly, as early as 1968 appellant was aware of facts sufficient to put her on notice of any breach of the Lease due to the fact that the Chevron Station was not constructed entirely upon the Koulis Property. In this respect the present case is similar to Taylor v. Moore, supra, 51 P.2d 222 (Utah 1935). Taylor was a mortgage foreclosure suit in which the defendant mortgagor argued for rescission of the notes and mortgage on the ground that the vendor had fraudulently misrepresented that the mortgaged property included land upon which certain hotel and ranch buildings stood and also that title to the land constituted ownership of water supplied from a tank on adjoining property. The Utah Supreme Court reversed the trial court and held that the facts were sufficient to give notice to mortgagor three years prior to commencement of the action that the buildings were located on property owned by a railroad, not on the mortgagor's property, and that the water was also owned by the railroad. These findings precluded rescission of the notes and mortgage. The court explained:

If he had at the time he entered into the contract of purchase been lulled into security by the representation of Nephi M. Taylor respecting ownership of a good water right, surely he was then, in 1926, on notice of facts which he could not further ignore. The physical facts speak louder than any representation which Taylor could have made, that the hotel was on railroad property, and also that the water from the water

tank was owned by the railroad company. Gibson v. Jensen, 48 Utah 244, 158 P. 426. The means of knowledge is equivalent to knowledge. A party who has opportunity of knowing the facts constituting the alleged fraud cannot be inactive and afterwards allege a want of knowledge that arose by reason of his own laches and negligence. Salt Lake City v. Salt Lake Inv. Co., 43 Utah 181, 134 P. 603.

51 P.2d 222, 228-9 (emphasis added).

In the case at bar appellant admitted that at least once during 1968 she personally observed the Chevron Station, where it was built, and that the Chevron Station was entirely completed. Notwithstanding this admission, and notwithstanding the fact that appellant prior to 1968 lived on the Koulis Property for over ten years and was therefore familiar with its boundaries, she now asserts that she did not realize that the Chevron Station was constructed beyond the boundaries of the Koulis Property until 1982. Such an oversight is incredible, and unreasonable, especially in light of the fact that the Chevron Station exceeded the boundaries of the Koulis Property to such an extent. Nearly one-half of the Chevron Station was constructed on property beyond the limits of the Koulis Property onto the Crowther-Martin property. Also, she admitted she was aware of the common boundary between the Koulis Property and the Crowther-Martin Property in 1967, which is exactly the point in time that the Chevron Station was being built. The Crowther Property line is the precise property line

over which the Chevron Station overlaps. See Deposition of Katherine Koulis dated June 15, 1984, pp. 63-70; Exhibit 6A to Deposition of Katherine Koulis dated January 10, 1984; Appellant's husband and her mother-in-law, Pauline Koulis, predecessors in interest under the Lease, also knew of the Crowther Property line. See Deposition of Katherine Koulis dated June 15, 1984, p. 73. The Chevron Station was built on both the Koulis Property and the Crowther Property. Deposition of Katherine Koulis dated June 15, 1984, pp. 73-74.

Additionally, the evidence below was uncontradicted that in order to construct the station, it was necessary to raze the Crowther residence and pave both the Koulis Property and the Crowther Property. Thus, when in 1968 and thereafter, appellant saw the Chevron Station, she would be charged with the knowledge that the Crowther residence was missing. This fact alone placed a duty of reasonable inquiry upon appellant. Why, if the Station was to be completely on her property, was the Crowther Property now part of the paving for the Station, and what happened to the Crowther house?

Neither the trial court or this tribunal are required to wear blinders when confronted with statements which are patently erroneous. Common sense may not be abandoned in order to find genuine triable issues of fact where none exist. Appellant asserts (though not by affidavit or other competent

evidence) that the encroachment of the Station onto the Crowther property could not be ascertained except by a survey. The trial court had no difficulty in dismissing, as without merit, such assertion. The court below was correct in its action. How could someone as familiar with the Koulis and Crowther Properties as appellant not realize that all of the Crowther Property was being utilized for service station purposes? The entirety of the Crowther Property was paved. The Crowther house was gone. One half of the Crowther property has service station facilities on it. To simply reiterate these facts demonstrate the fallaciousness of the contention.

As stated in Taylor v. Moore 51 P.2d 222 at page 228:

The means of knowledge is equivalent to knowledge. A party who has the opportunity of knowing the facts constituting the alleged fraud cannot be inactive and afterwards allege a want of knowledge that arose by reason of his own laches and negligence.

Appellant had for fifteen years prior to instituting this action, the means of knowledge. She failed to read the Lease and failed to become aware of the obvious. She cannot now be heard to complain that she did not know.

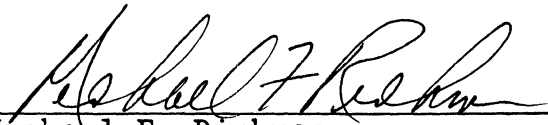
#### CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the judgment in this matter was

correctly decided and it is urged that the judgment of the trial court be affirmed in its entirety.

Respectfully Submitted  
VAN COTT, BAGLEY, CORNWALL & McCARTHY

By:

  
\_\_\_\_\_  
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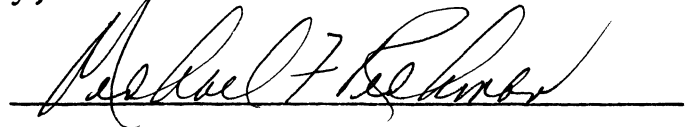
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CERTIFICATE OF DELIVERY

I HEREBY CERTIFY, that I hand delivered four (4)  
copies of the within brief (Respondents Brief) to:

Mark S. Miner  
525 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111

This 16<sup>th</sup> day of May, 1985.

  
\_\_\_\_\_



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Telephone: (801) 532-3333

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

KATHERINE KOULIS (GORAS),	)	
	)	
Plaintiff,	)	ORDER GRANTING DEFENDANTS'
	)	MOTION FOR SUMMARY JUDGMENT
vs.	)	AND DENYING PLAINTIFF'S
	)	MOTION FOR SUMMARY JUDGMENT
STANDARD OIL COMPANY OF	)	
CALIFORNIA, WESTERN OPERATIONS,	)	
INC.; CHEVRON USA, INC.;	)	Civil No. C83-6295
CHEVRON OIL COMPANY dba STANDARD	)	(Judge Frederick)
OIL COMPANY OF CALIFORNIA,	)	
	)	
Defendant.	)	
	)	

The above-entitled matter came on regularly for hearing on Defendants' written Motion for Summary Judgment and Plaintiff's written Motion for Summary Judgment, before the Honorable J. Dennis Frederick, District Judge, on the 6th day of August, 1984 at 10:00 a.m. The Plaintiff was represented by Mark S. Miner, Esq., and the Defendants were represented by Michael F. Richman, Esq., James W. Stewart, Esq. and Wayne D. Swan, Esq.

Based upon the affidavits and exhibits submitted to the Court and upon the oral argument of the respective counsel, the Court finds that the Plaintiff had the opportunity of knowing the facts consitiuting the alleged fraud and was thereafter inactive and dilatory in commencing her action. The Court finds that all of the facts necessary for Plaintiff to have discovered the alleged fraud and commenced this action were available to her in 1968. The Court further finds that Plaintiff has failed to come forward with any legally cognizable reason to excuse her delayed discovery of the alleged fraud.

Based upon the foregoing, Defendants' Motion for Summary Judgment is granted, and Plaintiff's Motion for Summary Judgment is denied. Plaintiff's action is barred both by the statute of limitations for actions upon a contract (Utah Code Ann. § 78-12-26(2)) and by the statute of limitations applicable to actions for fraud (Utah Code Ann. § 78-12-26(3)).

The Court's determination herein is not based on Plaintiff's counsel's insertion of copies of the 1967 Grade Plans for the Chevron Station as Exhibits to the Memorandum in Support of Plaintiff's Motion for Summary Judgment, the Affidavit of Katherine Koulis, and the Affidavit of Mr. Cayias.

The Court having considered the written pleadings and oral arguments of counsel for all parties concerning the above

motions, the court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

(1) Defendants' Motion for Summary Judgment is granted;

(2) Plaintiff's Motion for Summary Judgment is denied.

(3) Defendants are awarded their costs herein.

DATED this 24 day of August, 1984.

BY THE COURT:

151 J. Dennis Frederick  
J. Dennis Frederick,  
District Judge

Approved as to form:

Michael F. Richman  
Attorney for Defendants

Mark S. Miner  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand-delivered a true and correct copy of the foregoing Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's

Motion for Summary Judgment, this 10 day of August,  
1984, to the following:

Mark S. Miner, Esq.  
Peter Flangas, Esq.  
525 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111

Wayne Sutton

Received copy

Mark S. Miner

8065s  
080984

L E A S E

Dated: August 2, 1958

1. PAULINE KOULIS, Lessor, hereby leases to STANDARD OIL COMPANY OF CALIFORNIA, WESTERN OPERATIONS, INC., Lessee, the following described premises in the City of Salt Lake, County of Salt Lake, State of Utah, to wit:

Commencing at the southwest corner of Lot 4, Block 63, Plat C, Salt Lake City Survey, and running thence east 123.75 feet, thence north 74.75 feet, thence west 123.75 feet, thence south 74.75 feet, to the point of beginning.

2. The term of this lease shall commence on October 1, 1958, and end fifteen years after the first day of the first calendar month following the month during which a service station is completely constructed on the leased premises, and all fixtures and equipment are installed thereon by Lessee. Provided, however, that in no event shall said fifteen-year period commence on a date later than June 1, 1959.

3. Lessee agrees to pay Lessor rental for the use and occupancy of the leased premises as follows:

(a) An interim rental of Two Hundred Fifty Dollars (\$250.00), payable in advance on the first day of each and every calendar month commencing October 1, 1958, and ending with the rental paid on the first day of the calendar month preceding the commencement date of the fifteen-year period provided in paragraph 2 hereof.

(b) Thereafter, a regular rental in advance on the first day of each and every month during said

fifteen-year period the sum of Three Hundred Fifty Dollars (\$350.00). Provided, however, that no rental shall be due and payable hereunder until the date on which the leased premises are delivered to the lessee free and clear of all leases, liens, and encumbrances, except the lien of taxes and assessments for the current year.

4. Lessee shall have the right to remove from the leased premises all buildings and improvements located thereon, and shall be entitled to all salvable material, except two sinks located in the upstairs apartment.

5. Lessee expects to commence construction of a service station on the leased premises within thirty (30) days after possession of the leased premises is delivered to the Lessee as provided in paragraph 3, or after issuance of all necessary permits and other authorizations, whichever is later. If Lessee shall be unable to obtain such permits and authorizations, Lessee may terminate this lease by giving Lessor ten days written notice of Lessee's intention so to do, provided, however, Lessee shall not tear down or remove any buildings or improvements on the leased premises belonging to the Lessor until the permits and authorizations referred to in this paragraph are obtained.

6. Lessee shall have the right during its occupancy of the leased premises to use such premises for the primary purpose of conducting thereon a service station business and for any other lawful business that will not materially interfere with said primary use. Lessee shall further

have the right during its occupancy to construct and maintain on the leased premises such buildings, structures, improvements or equipment as Lessee may desire, and to cut curbs, construct roadways and use sidewalks for vehicles to pass to and from the leased premises. Upon the expiration of this lease, or any extension or renewal thereof, Lessee agrees to replace all curbs and sidewalks cut or removed by Lessee during the Lessee's occupancy of the premises. If it is or becomes unlawful for Lessee or anyone holding under Lessee directly or indirectly, to conduct a service station business, or to erect or maintain service station facilities on the leased premises, or if any part of the leased premises or the approaches thereto are condemned or changed by public authority, so that in any such case enumerated above it becomes impossible or impracticable to use the leased premises for service station purposes, then Lessee shall have the right at any time thereafter to terminate this lease by giving Lessor ten days notice in writing of such termination.

7. Except as provided in paragraph 11 hereof, Lessee shall have the right at any time during Lessee's occupancy of the leased premises, or within a reasonable time thereafter, to remove any and all buildings, improvements, fixtures and equipment owned or placed by Lessee, Standard Oil Company of California, or the sublessees or licensees of either, in, under or upon the leased premises, or acquired by Lessee whether before or during the term thereof, but Lessee shall not be obliged to do so.

8. Lessee shall pay all taxes levied or assessed during the term of this lease on any facilities located on the leased premises while such facilities are owned by Lessee. All other real or personal property taxes or assessments, including all street improvements or other special taxes or assessments, shall be paid by Lessor. If Lessor fails to pay its share of taxes set forth in this paragraph promptly when due, or fails to perform promptly any obligation owing to a third person, which, if unperformed, might result in termination of this lease, including any obligation to a third person secured by a lien on the leased premises, Lessee may pay such taxes or perform such obligation for the account of Lessor and bill Lessor for the cost thereof, or deduct such cost from rentals accruing under this lease.

9. Lessee, while in possession, shall have the prior right (1) to buy the whole or any part of the leased premises or any larger parcel which includes the leased premises, if Lessor receives from a third party an acceptable bona fide offer to buy, or if Lessor offers to sell, such property, and (2) to lease the whole or any part of the leased premises or any larger parcel which includes the leased premises, if Lessor receives from a third party an acceptable bona fide offer, or if Lessor offers, to lease such property for a term commencing on or after the expiration of the term hereof, or any extension thereof. In either such event, Lessor shall forthwith give Lessee written notice of such offer, together with a copy thereof, and Lessee shall



have sixty days from the receipt of such notice to buy or to lease such property, as the case may be, at the terms of such offer, or at such lesser terms as Lessor and Lessee may agree upon. If Lessee fails to exercise such option within such sixty days, Lessor shall have sixty days thereafter within which to sell or to lease, as the case may be, such property to the party and upon the terms stated in the notice to Lessee without resubmitting such offer to Lessee as hereinabove provided. If Lessor sells such property to a third person, such sale shall be made subject to the terms and provisions of this lease, including but without limiting the generality of the foregoing, the provisions of this paragraph.

10. If Lessee shall hold over after the expiration of the term of this lease, or any extension thereof, such tenancy shall be from month to month only and upon all the terms, covenants and conditions hereof.

11. Lessee may terminate this lease at anytime after completion of construction of a service station thereon by giving Lessor thirty days prior written notice of intention so to do. Provided, however, Lessee executes and delivers to the Lessor a bill of sale covering the service station building then located on the leased premises. Lessee agrees that the service station then on the leased premises shall be of modern design and in good operating condition and state of repair. Nothing in this paragraph shall be construed as requiring the Lessee to give the Lessor a bill of sale covering the service station building if the lease is terminated by

by the Lessee pursuant to the provisions of paragraphs 5 and 6 hereof.

12. Lessee agrees to reimburse Lessor for all taxes in excess of One Hundred Eighty Dollars (\$180.00) per year levied against the real estate covered by this lease. Special assessments levied against such real estate shall not be considered in determining such excess.

13. Lessee may extend this lease upon all of the terms and provisions hereof for a further period of five years by giving Lessor notice in writing of Lessee's intention so to do at any time prior to the expiration of the term hereof.

14. In the event Lessee exercises the option to extend this lease as provided in paragraph 13, it shall have the further option to extend this lease for a further period of five years by giving Lessor notice in writing of Lessee's intention so to do at any time prior to the expiration of the term provided in paragraph 13. The extension provided for in this paragraph shall be upon all of the terms and conditions of the lease, except that the rental shall be reasonable in view of business conditions then prevailing, but not less than \$375.00 per month, nor more than \$450.00 per month.

15. No failure to perform any condition or covenant of this lease shall entitle Lessor to terminate this lease unless said failure shall have continued for fifteen days after notice in writing requiring the performance of such condition or covenant shall have been given to Lessee.

16. All rentals payable hereunder shall be paid to Pauline Koulis unless and until Lessor designates some other party to receive rentals.

17. Written notices to Lessor hereunder shall, until further notice by Lessor, be addressed to Lessor at 2370 Bryan Avenue, Salt Lake City, Utah.

Written notices to Lessee hereunder shall, until further notice by or on behalf of Lessee, be addressed to Lessee at 164 South West Temple, Salt Lake City, Utah.

All notices shall be delivered personally or deposited in the United States Post Office, properly addressed as aforesaid, postage fully prepaid, for delivery by registered mail.

18. Execution of this lease by Lessor constitutes an offer which shall not be deemed accepted by Lessee until Lessee has executed this lease and delivered a duplicate original thereof to Lessor.

19. The provisions of this lease shall inure to the benefit of Lessee and of its principal, Standard Oil Company of California. This lease shall bind and also inure to the benefit of the successors and assigns of Lessee, and shall bind and inure to the benefit of the heirs, administrators, executors, successors and assigns of Lessor. Lessee may assign this lease or sublease the leased premises, or any part thereof, provided that no such act on the part of the Lessee shall operate to relieve it of any of its obliga-

This Indenture, dated the 2nd day of August, 1958,  
by and between PAUL T. POLIS  
of Salt Lake City, Utah,  
hereinafter called "Lessor," and STANDARD OIL COMPANY OF CALIFORNIA, WESTERN OPERA-  
TIONS, INC., hereinafter called "Lessee,"

WITNESSETH:

That for the term and upon the terms and conditions set forth in that certain written lease agreement, bearing date  
August 2, 1958, from Lessor to Lessee, all of which terms and conditions are hereby made a part  
hereof, as fully and completely as if herein specifically set out in full, Lessor has leased, demised and let, and does hereby  
lease, demise and let, unto Lessee, the following described real property, situate, lying and being in the City of  
Salt Lake, County, Precinct or Island of Salt Lake,  
State or Territory of Utah, more particularly described as follows, to-wit:

Commencing at the southwest corner of Lot 4,  
Block 63, Plat C, Salt Lake City Survey, and  
running thence east 123.75 feet, thence north  
74.75 feet, thence west 123.75 feet, thence  
south 74.75 feet, to the point of beginning. \_\_\_\_\_

City and County of S. Francisco) 55

On this 5/5 day of June, 1958, before me personally appeared H. D. Rasmussen, to me personally known, who by me being duly sworn did say that he is attorney in fact of Standard Oil Company of California, Western Operations, Inc., duly appointed under resolution of its Board of Directors dated the 20th day of November, 1958, which said resolution is now in full force and effect, and that the foregoing instrument was executed in the name and behalf of said Standard Oil Company of California, Western Operations, Inc., by said H. D. Rasmussen as its attorney in fact, and said H. D. Rasmussen acknowledged said instrument to be the free act and deed of Standard Oil Company of California, Western Operations, Inc.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

(Other than Calif.  
and Hawaii)

John F. Hume  
Notary Public in and for the City and County  
of San Francisco, State of California  
My commission expires SEPTEMBER 25, 1960

On this 19 day of August, 1958, personally appeared before me a Notary Public, PAULINE KOULIS, signer of the foregoing instrument, who duly acknowledged to me that she executed the same.

William J. Kulas  
Notary Public  
Residing at Salt Lake City, Utah

My Commission Expires:

February 28, 1962

Plotted \_\_\_\_\_  
Indexed \_\_\_\_\_  
Filed \_\_\_\_\_  
Date \_\_\_\_\_

FEB 19 1959  
Recorded \_\_\_\_\_ at 4:27 A.M.  
Request of STANDARD OIL CO.  
Fee Paid. Neils M. Jack,  
Recorder, Salt Lake County, Utah  
\$ 1.40 By Neils M. Jack Deputy  
Ref. 34 25 22  
P.O. Box 719. S.L.C. 10. UT.

INDENTURE

Pauline Koulis  
Lessor

Lessor

STANDARD OIL COMPANY OF CALIFORNIA,  
WESTERN OPERATIONS, INC.

Lessee

By H. D. Rasmussen  
Attorney in Fact

Acknowledge here)

STATE OF UTAH )  
COUNTY OF SALT LAKE ) ss

On this 19 day of August, 1958, personally appeared before me a Notary Public, PAULINE KOULIS, signer of the foregoing instrument, who duly acknowledged to me that she executed the same.

William H. Jones  
Notary Public  
Residing at Salt Lake City, Utah

My Commission Expires:  
February 28, 1962

Plotted \_\_\_\_\_  
Indexed \_\_\_\_\_  
Grantee \_\_\_\_\_  
Notes \_\_\_\_\_  
Reference \_\_\_\_\_

FEB 19 1959  
Recorded \_\_\_\_\_ at 9:27 A. m.  
Request of STANDARD OIL Co.  
Fee Paid Neville M. Jack,  
Recorder, Salt Lake County, Utah  
\$ 1.40 By J. H. Rasmussen Deputy  
Ref. 34-23-22  
P.O. Box 719, J.L.C. 10, UT.

INDENTURE

MODIFICATION OF LEASE

This Modification of Lease agreement, dated May 16, 1967, by and between PAULINE KOULIS, Lessor, and CHEVRON OIL COMPANY, a corporation, doing business as STANDARD OIL COMPANY OF CALIFORNIA, successor in interest of STANDARD OIL COMPANY OF CALIFORNIA, WESTERN OPERATIONS, INC., Lessee,

WITNESSETH:

In consideration of the sum of One Hundred Dollars (\$100.00), paid to Lessor by Lessee, receipt of which is hereby acknowledged, and in consideration of the mutual covenants of the parties hereto, it is agreed that the Lease, dated August 2, 1958, wherein the Lessor leased to the Lessee the following described premises in the City of Salt Lake, County of Salt Lake, State of Utah, to-wit:

Commencing at the Southwest corner of Lot 4, Block 63, Plat "C", Salt Lake City Survey, and running thence East 123.75 feet, thence North 74.75 feet, thence West 123.75 feet, thence South 74.75 feet, to the point of beginning,

shall be and the same is hereby modified as follows:

1. The fifteen year term provided for in paragraph 2 of the Lease shall commence on the date Lessee has completed construction of the service station on the leased premises, but not later than November 1, 1967, and shall end fifteen years thereafter, but not later than October 31, 1982.
2. The provisions of paragraph 12 of the Lease shall be amended as follows:

12. Lessee agrees to pay the taxes levied or assessed against the leased premises after the year 1967 and during the remainder of the term of the Lease. Taxes for the year 1967 are to be prorated as of June 1st.

3. Lessee indemnifies Lessor and agrees to hold her harmless from and against all claims, demands and causes of action on account of personal injury to or death of any person or on account of damage or injury to property resulting from the use or occupancy of the leased premises or any of the acts or conduct of the Lessee in the operation of its business upon the said premises.

4. The interim rental provided for in paragraph 3 (a) of the Lease shall commence as of June 1st, 1967, and end upon completion of construction of the service station on the leased premises by Lessee, but not later than October 31, 1967.

IN WITNESS WHEREOF, the parties have executed this agreement in triplicate.

1658 711  
1658 711  
1658 711

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

STATE OF UTAH )  
COUNTY OF SALT LAKE )

Pauline Koulis  
LESSOR

CHEVRON OIL COMPANY  
d/b/a STANDARD OIL COMPANY OF CALIFORNIA

By A. S. Duncan  
LESSEE

SS

On this 26 day of June, 1967, personally appeared before me, a Notary Public, PAULINE KOULIS, signer of the foregoing instrument, who acknowledged to me that she executed the same.

Edna S. ...  
Notary Public  
Residing at Salt Lake City, Utah

My Commission Expires:

July 14 1968



STATE OF UTAH                    )  
                                      ) SS  
COUNTY OF SALT LAKE        )

On this 3 day of July, 1967, personally appeared before me Edmund J. Anderson, who being by me duly sworn did say that he is the President of CHEVRON OIL COMPANY, doing business as STANDARD OIL COMPANY OF CALIFORNIA, and that said instrument was signed in behalf of said corporation by authority and said Edmund J. Anderson acknowledged to me that the corporation executed the same.

Edmund J. Anderson  
Notary Public  
Residing at Salt Lake City, Utah

My Commission Expires:

July 14, 1968

T. QUENTIN CANNON  
Attorney at Law  
619 Continental Bank Bldg.  
Salt Lake City, Utah  
328-3289

FILED IN CLERK'S OFFICE

Salt Lake County Utah

JUL 10 1968

W. S. [Signature]  
Clerk

IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Estate of ) APPROVAL OF FIRST AND FINAL  
PAULINE RADULJ KOULIS ) ACCOUNT, DECREE OF DISTRIBUTION AND DISCHARGE OF EXECUTORS  
Deceased. ) Probate No. 54230

The petition of Paul Koulis and Katherine Koulis, executors of the Estate of Pauline Radulj Koulis, deceased, for Approval of the First and Final Account, Decree of Distribution, and Discharge of Executors having come on regularly for hearing on the 3rd day of July, 1968, before the above entitled court, and it appearing that the said Pauline Radulj Koulis, also known as Pauline Koulis, was born on the 24th day of July, 1890, at Blato, Province of Sad, Croatia, now Yugoslavia, and she was the widow of the late George J. Koulis, and said Pauline Koulis died on the 20th day of January, 1968, at Salt Lake City, County of Salt Lake, State of Utah, and at the time of her death and for many years prior thereto she was an actual and bona fide resident of Salt Lake County, State of Utah, and left an estate in said Salt Lake County, State of Utah.

That petitioners, Paul Koulis and Katherine Koulis, were duly appointed, qualified and acted as executors of said estate; and said executors duly made and filed with the above entitled court an inventory of all property that said deceased possessed and all property transferred within three years of their deaths, and said properties were appraised by the court appraisers in the sum of \$52,605.28 and the State Tax Commission appraiser appraised said properties in the sum of \$58,686.45 and there was an increase in

EXHIBIT D

\$60,436.45.

That said executors caused Notice to Creditors to be published in the Salt Lake Times, said Notice to Creditors was published in the manner and for the period of time required by law and thereafter the court made and entered its order decreeing that due and legal notice to creditors had been given and that the time for presentation of claims had expired.

That no formal claims were filed with said executors as required by law and all claims against said estate, all expenses of the last illness of said deceased, all funeral expenses have been paid and satisfied and the State Inheritance Tax in the sum of \$529.40 has been paid in full; that a Federal and State Tax return was filed with the director of Internal Revenue and in that said estate did not exceed \$60,000.00, there was no federal estate tax due and owing.

That on the 21st day of December, 1967, said Pauline Radulj Koulis made and executed her Last Will and Testament and at said time she was not acting under any fraud, menace, duress, or undue influence of any kind and was of sound mind and disposing memory; and said Last Will and Testament was duly and properly admitted to probate as the Last Will and Testament of said deceased.

That said Last Will and Testament of Pauline Radulj Koulis deceased, provided:

"In the event my beloved son, Paul Koulis and his beloved wife, Katherine G. Koulis shall survive me, I hereby devise and bequeath to them as joint tenants or to the survivor in the event one shall predecease me, all my property, real, personal and mixed of which I may possess at the time of my death of every kind, nature and description wheresoever situated."

That said Paul Koulis and his wife, Katherine G. Koulis, survive Pauline Radulj Koulis and are acting as executors of said

estate and are the sole beneficiaries under said Last Will and Testament.

That among the assets of said estate are the following pieces of real property in the County of Salt Lake, State of Utah, to-wit:

Corner of Eighth West and North Temple, Salt Lake City, Utah, subject to lease to Standard Oil Company of California for 15 years at \$350.00 per month, more particularly described as follows:

Commencing 2.5 rods West from the Southeast corner of Lot 4, Block 63, Plat "C", Salt Lake City, Survey and running thence West 2.5 rods, North 74.75 feet; East 2.5 rods; thence South 74.75 feet to the point of beginning.

Commencing at the Southwest corner of Lot 4, Block 63, Plat "C", Salt Lake City Survey, and running thence East 5 rods, thence North 74.75 feet; thence south 74.75 feet, to the point of beginning.

2370 Bryan Avenue, Salt Lake City, Utah more particularly described as follows:

East 15 feet of Lot 22, and all of Lot 23, and then West 20 feet of Lot 24, Block 1, Wasatch Heights.

That the names and addresses of said beneficiaries under said Last Will and Testament and the names and addresses of all next of kin and heirs at law of said Pauline Radulj Koulis, are, to-wit:

<u>Name</u>	<u>Address</u>	
Paul Koulis - son	2370 Bryan Avenue Salt Lake City, Utah	Over 21
Katherine G. Koulis Daughter-in-law	2370 Bryan Avenue Salt Lake City, Utah	Over 21
Dorothy Koulis Adopted daughter	2370 Bryan Avenue Salt Lake City, Utah	January 14, 1953
Josie Koulis Adopted daughter	2370 Bryan Avenue Salt Lake City, Utah	October 4, 1948

That said executors have computed a statutory fee and commission as provided by law in Section 75-11-25 Utah Code Annotated, 1953, for executors, which fee is in the sum of \$1,316.54 and the fee for the attorney for said executors in the sum of \$2,617.4 which fee is computed in accordance with the Advisory Handbook of the Utah State Bar.

That said executors desire that said estate be distributed as provided in said Last Will and Testament of said Pauline Radulj Koulis, deceased, to Paul Koulis and Katherine G. Koulis as joint tenants who have full rights of survivorship.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the First and Final Account of the executors of the estate of Pauline Radulj Koulis, deceased, be and the same is hereby settled, allowed and approved.

2. That in accordance with said Last Will and Testament the following described properties are hereby distributed to Paul Koulis and Katherine G. Koulis, his wife, as joint tenants and not as tenants in common with full rights of survivorship:

Corner of Eighth West and North Temple, Salt Lake City, Utah, subject to lease to Standard Oil Company of California for 15 years at \$350.00 per month, more particularly described as follows:

Commencing 2.5 rods West from the Southeast corner of Lot 4, Block 63, Plat "C", Salt Lake City, Survey and running thence West 2.5 rods, North 74.75 feet; East 2.5 rods; thence South 74.75 feet to the point of beginning.

Commencing at the Southwest corner of Lot 4, Block 63, Plat "C", Salt Lake City Survey, and running thence East 5 rods, thence North 74.75 feet; thence south 74.75 feet, to the point of beginning.

2370 Bryan Avenue, Salt Lake City, Utah, more particularly described as follows:

East 15 feet of Lot 22, and all of Lot 23, and then West 20 feet of Lot 24, Block 1, Wasatch Heights.

Together with all cash, all personal property of said estate including the Pontiac Catalina, 1961 sedan, Serial 361 K 4042, 1967 Utah license CJ4805 and all household furnishings and personal effects, together with all unknown property belonging to said estate which may be hereafter discovered.

3. That the claim of said executors in the sum of \$1,316.54 is allowed and approved and the claim of T. Quentin Cannon as attorney for said executors, in the sum of \$2,617.46 is allowed and approved.

4. That said administration of said estate is closed and upon obtaining receipts from said beneficiaries that they have received their interest and the same is filed with the clerk of the above entitled court, and that said attorney's fees have been paid in full, said executors are discharged from further administration of said estate of Pauline Radulj Koulis, deceased.

Dated this 17 day of July, 1968.

BY THE COURT:

ATTEST  
W. STEERING EVANS  
CLERK  
BY [Signature]  
DEPT. CLERK

[Signature]  
JUDGE

STATE OF UTAH  
COUNTY OF SALT LAKE } ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT  
THIS 20th DAY OF Feb 19 69  
W. STEERING EVANS, CLERK  
BY [Signature]

NOTICE OF BREACH OF LEASE  
880 WEST NORTH TEMPLE,  
SALT LAKE CITY, UTAH 84116  
KOULIS TO STANDARD OIL  
COMPANY OF CALIFORNIA

Served this Notice on the within named  
defendant  
*Standard Oil Company of California*  
*Western Operations Inc.*

On the 4th day of June  
19 53 at Salt Lake City, Utah  
N. D. "PETER" HANWARD  
Sheriff, Salt Lake County, Utah

By [Signature]  
Deputy

Standard Oil Company of California  
Western Operations Incorporated  
% Service Agent  
C.T. Corporations Systems  
175 South Main Street  
Salt Lake City, Utah 84111

In Re: Lease 880 West North  
Temple, Salt Lake City, Utah  
84116--Koulis to Standard  
Oil Company of California

The Standard Oil Company of California, Western Operations Incorporated is hereby given NOTICE that on August 2, 1958 they did enter into a lease agreement with Pauline Koulis; under the terms and conditions of the said lease, the Standard Oil Company of California did solemnly agree to build a service station and maintain the service station facilities on the property of Pauline Koulis. That in direct violation of the lease, Standard Oil Company of California did not build a service station on Lessee's land as made and provided in the lease agreement and by reason thereof they have violated the lease in its entirety.

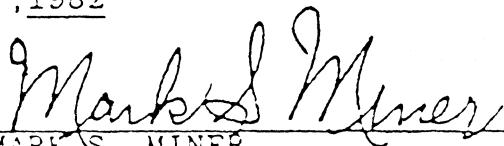
That as made and provided in paragraph fifteen (15) of said lease, the Standard Oil Company of California, Western Operations Incorporated is hereby given notice that said corporation does have fifteen (15) days after receipt of this notice to completely construct a service station on the lease premises of Pauline Koulis and Kathrine Koulis, more particularly described as follows:

In the City of Salt Lake, County of Salt Lake, State of Utah, commencing at the southwest corner of Lot 4, Block 63, Plat C, Salt Lake City Survey, and running thence east 123.75

feet, thence north 74.75 feet, thence west 123.75 feet, thence south 74.75 feet, to the point of beginning.

You are further given NOTICE that should you fail to comply with the lease and completely construct a service station on the lease premises, as made and provided in the August 2, 1958 lease also referred to in the modification of the lease, dated June 26, 1967. That the present Lessor, Mrs. Katherine Koulis, will take appropriate action as is deemed to be required, to require you to carry out the terms and conditions of said lease. You will please govern yourselves accordingly.

DATED this 30th day of December, 1982

  
\_\_\_\_\_  
MARK S. MINER  
Attorney for Lessors  
525 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111

PLEASE SERVE: C.T. CORPORATIONS SYSTEMS  
175 South Main Street  
Salt Lake City, Utah 84111