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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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| Lario Oil & Gas Company, a foreign corporation, and Gene F. Lang & Co., a foreign corporation,<br><br>Plaintiffs/Appellees,<br><br>vs.<br><br>EOG Resources, Inc., a foreign corporation,<br><br>Defendant/Appellant. | ) | Supreme Court No. 20120349 |

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Appeal from Summary Judgment entered on July 11, 2012
Case No. 31-10-C-00170
County of Mountrail, Northwest Judicial District
The Honorable Richard L. Hagar, Presiding

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# REPLY BRIEF OF DEFENDANT/APPELLANT EOG RESOURCES, INC.

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## LAW AND ARGUMENT

### I. IT IS CLEAR FROM THE FACE OF THE EOG LEASES THAT THE LEASES COVER THE DISPUTED ACREAGE.

[¶ 1] In this case, the court must determine whether a set of four oil and gas leases taken by Appellant EOG Resources, Inc. ("EOG"), in 2005 covering more than 1,200 acres of land located in Mountrail County, North Dakota cover 27.4 acres of land located under the bed of White Lake.[1] No party to this proceeding contends that the leases are ambiguous or that mutual mistake or fraud require the Court to look to extrinsic evidence. Accordingly, the Court's task is to look at the written property descriptions contained in EOG's four leases ("EOG Leases"), which are identical in all relevant respects, and determine whether those written property descriptions include the 27.4 acres of land at issue. *See* §§ 09-07-02 and 09-07-04.

[¶ 2] As EOG explained in its initial brief, the written property descriptions in the EOG Leases clearly demonstrate the parties' intention to include the 27.4 acres of land at issue in this appeal for two reasons. First, the description of the property covered includes both Lots 2 and 3 in Section 31, Township 157 North, Range 91 West, where all of the 27.4 acres are located. Second, the property descriptions in the EOG Leases also include a Mother Hubbard clause which confirms the parties intention to lease all the specifically described lands "together with all strips or parcels of land . . . adjoining or

[1] The total gross acreage covered by the four leases ranges from 1,285.62 and 2,128.54 gross acres. The only acreage that is at issue in this appeal is that portion of Lots 2 and 3, Section 31, Township 157 North, Range 91 West, Mountrail County, North Dakota, that lies under White Lake totaling 27.4 acres.

contiguous to the above described land and owned or claimed by lessor[s]." The specific property descriptions in the EOG Leases and the Mother Hubbard clauses each demonstrate the parties' intention to lease all of the land owned by the lessors in Lots 2 and 3, including the 27.4 acres under White Lake.

[¶ 3] Appellees Lario Oil & Gas Company ("Lario") and Gene F. Lang & Co. ("Lang") (collectively referred to herein as "Appellees") nevertheless contend that the property descriptions in the EOG Leases fail to describe the 27.4 acres at issue in this proceeding. Lario and Lang mischaracterize the facts in the record in an apparent attempt to mislead the Court with respect to EOG's claims and defenses. Contrary to the Appellees' assertions, EOG has maintained throughout this proceeding that its leases were intended to include, and do include, the 27.4 acres under the lakebed that are at issue in this proceeding. Lario and Lang further contend that the acreage designations accompanying the specific descriptions are incorrect. This argument ignores "well-established rules of construction." *See Hild v. Johnson*, 2006 ND 217, ¶ 12, 723 N.W.2d 389. "When there is a discrepancy in a [conveyance of real property] between the specific description of the property conveyed and an expression of the quantity conveyed, the specific description is controlling." *Id.* at ¶ 13. Finally, Lario and Lang assert that including the 27.4 acres of land in the leasehold estate based on the Mother Hubbard clause would be contrary to the purpose of such clauses in the "facts and circumstances" of this case. However, as the authorities cited by Lario and Lang make clear, one of the principal purposes of the clauses is to "make certain that the lessor's lands will be covered by the lease even if the specific description . . . fails to describe the land." Eugene Kuntz, 2 *A Treatise on the Law of Oil and Gas* § 22.3(b) (1989 & Supp. 2012).

Thus, even if the EOG Leases "fail to describe" the 27.4 acres, the purpose of the Mother Hubbard clause is to "make certain" they will still be included in the leasehold estate. *Id.*

[¶ 4] Ultimately, the EOG Leases demonstrate the parties' intention to lease all of the oil and gas interests owned or claimed by the lessors in the immediate vicinity of White Lake. The EOG Leases specifically describe the surveyed lots where the acreage at issue is located, and also provide a general description indicating that the parties' intended to include all adjacent strips and parcels of land that were owned or claimed by the lessor but not specifically included in the description. Under those circumstances, the parties' intention to include the 27.4 acres at issue is clear from the face of leases. Accordingly, the judgment of the district court must be reversed in this regard and the case should be remanded with instructions to enter judgment quieting title in EOG.

### A. The Statement of Material Facts Provided by Lario and Lang Mischaracterizes the Record in This Proceeding.

[¶ 5] Lario and Lang assert that EOG's statement of facts in its initial brief "leaves out the most material, established, or admitted facts" relevant to this appeal, and then proceed to summarize, often without citation to the record, alleged "facts" that are neither "material, established, [n]or admitted." *See* Appellees' Br., ¶ 1; *see also* N.D.R.App.P. 28(b)(6) (requiring the statement of facts to include "appropriate references to the record"). In their Brief, Lario and Lang assert that it is a fact admitted by EOG that the EOG Leases did not lease any of the "wet" acres. Appellees' Br., ¶¶ 2, 11. However, EOG has never admitted that the EOG Leases initially taken by Contex Energy Company ("Contex") and later assigned to EOG, did not include the so-called wet acreage. (App. 22–23, 36-47.) Indeed, whether the EOG Leases include the wet acreage

in Lots 2 and 3 of Section 31 is the very subject of this appeal. EOG has asserted from the time it filed its Answer and Counterclaim that all of the land owned by the lessors and located under White Lake was subject to the EOG Leases. (App. 22–23.)

[¶ 6] Lario and Lang likewise assert that the drafts used to pay the bonuses to the lessors included the "privilege of Re-Draft," as is common practice in the oil and gas industry, but that EOG and Contex failed to adjust the bonus upward when they realized that the lessors owned additional oil and gas rights under White Lake. Appellees' Br., ¶¶ 4–5. Half of that statement is true: the drafts used by Contex and EOG to pay the bonuses permitted adjustment of the payment to reflect changes in the number of net acres owned by each lessor, as is common in the oil and gas industry. (*See* App. 91–98.) Contrary to their assertion, however, EOG did, in fact, attempt to tender through Contex additional bonus payments to the lessors. (*Id.*)

[¶ 7] Lario and Lang admit that EOG attempted to tender additional bonus payments after EOG confirmed that the lessors owned the wet acreage, but suggest that EOG's offer was rightly rejected by the lessors who had already leased to Lang for better terms. Appellees' Br. ¶¶ 12, 15. In their view and the view of the district court, "Lang simply beat [EOG] to the Lessor[s'] front doors." *Id.* at ¶ 15. This assertion is contrary to the record and the expectations of the parties. EOG leased all of the lessors' interest in the lands near White Lake in 2004, at substantial risk and expense, at a time when there were no producing wells in the immediate vicinity. (App. 36-47.) Four years later, after several productive wells had been drilled, thus increasing the cost and decreasing the risk of leasing in the area, Lang and Lario took leases on land that had already been leased to EOG. They then initiated this lawsuit to cancel the EOG Leases for the wet acreage.

(App. 57–68.) The suggestion that Lang and Lario beat EOG to the lessors' "front door" with respect to the 27.4 acres at issue in this appeal is simply incorrect.

**B. The EOG Leases Specifically Describe the Wet Acreage.**

[¶ 8] Lario and Lang next assert that the EOG Leases do not specifically describe the wet acreage, and assert that it is absurd to suggest otherwise. They do not, however, cite to or make any attempt to distinguish this Court's conclusion in *Hild v. Johnson* that when there is a discrepancy between a specific description of property in a granting clause and the expression of quantity conveyed, the specific description controls. 2006 ND 217, ¶ 13, 723 N.W.2d 389. As explained in detail in EOG's initial brief, the leases Contex took from the lessors in 2004 specifically describe Lots 2 and 3 in Section 31. Pursuant to *Hild*, that specific description controls over the acreage designation. *Id.* The lessors owned all of Lots 2 and 3 when they executed the leases in favor of Context, and therefore, the leases describing all of Lots 2 and 3 conveyed the lessors' entire interest in said lots.[2]

[2] Lario and Lang suggest in passing that EOG could not have acquired the wet acreage in 2004 because the assignee can acquire no greater interest in the property than the rights held by the assignor. *See* Appellee Br., ¶ 26 (citing *Collection Ctr., Inc. v. Bydal*, 2011 ND 63, ¶ 15, 795 N.W.2d 667). This argument displays a misconception about the nature of the lessors' title to the oil and gas under White Lake. Because the State determined White Lake was not navigable when North Dakota entered the union in 1889, the State never owned the lakebed. *See* Appellant's Br., ¶ 9, n.2 and n.3. The lakebed, and the oil and gas under it, have thus belonged to the lessors from the time they acquired title to the property.

### C. Even if the EOG Leases Do Not Specifically Describe the Wet Acreage, The Wet Acreage is Brought Into the Leases By the Mother Hubbard Clause.

[¶ 9] Based on *Hild*, the EOG Leases must be read to specifically describe the wet acreage, as well as the dry acreage. As discussed in Sections A and B, *supra*, the description of the property covered by the EOG Leases includes the 27.4 acres under White Like and this specific lease description controls over the stated acreage amount. However, even if for arguments sake Lario and Lang are correct that the wet acreage is not included in the specific description contained in the EOG Leases, any defect in the specific description is remedied by the Mother Hubbard clause.

[¶ 10] It is undisputed that the lessors own, and did own at the time the EOG Leases were executed, at least 1,285 gross acres near White Lake, including 27.4 acres of land lying under White Lake in Lots 2 and 3 of Section 31. Even if the EOG Leases did not describe the 27.4 acres with sufficient specificity as Lario and Lang contend, the leases provided that it was the parties' intention to convey the specifically described lands "together with all strips or parcels of land (not, however, to be construed to include parcels comprising a regular 40-acre legal subdivision or lot of approximately corresponding size) adjoining or contiguous to the above described land and owned or claimed by Lessor." (App. 36, 39, 42, 45.) Thus, if the wet acreage is not included in the lands specifically described in the leases, such wet acreage would be adjoining or contiguous to the described land and would be brought under the coverage of the EOG Leases by virtue of the Mother Hubbard clause contained therein. In other words, without looking any further than the face of the leases, the EOG Leases conveyed at least 1,285 acres of dry land "together with" the "adjoining" and "contiguous" 27.4 acres of

land lying beneath White Lake, which were "owned" by the lessor and did not comprise a "regular 40-acre legal subdivision or lot of approximately corresponding size." Accordingly, the EOG Leases include the wet acreage along with the dry.

[¶ 11] Despite the clear language of the EOG Leases, Lario and Lang contend that Mother Hubbard clauses are not intended to be applied in the "facts and circumstances" of this case. Specifically, Lario and Lang contend that Mother Hubbard clauses are not intended to apply to tracts as large as the tract at issue here. *See* Appellees' Br., ¶¶ 35-36, 41. The argument fails for two reasons. First, the Mother Hubbard clause specifically states that it does not apply to full forty-acre subdivisions or lots of a similar size. (App. 36, 39, 42, 45.) By implication, then, the clause does apply to a fractional part of a lot or subdivision, particularly where some part of the lot or subdivision is particularly described and the strip or parcel at issue is less than forty acres.

[¶ 12] Second, all of the cases cited by Lario and Lang in support of this contention involved leases for small total acreages for the purpose of drilling vertical wells on small spacing units. The EOG Leases cover large tracts of land, and were purchased for the purpose of drilling horizontal wells on large spacing units. The 27.4 acre tract constitutes a small "strip or parcel" where the leases cover between 1,285.62 and 2,128.54 gross acres. (App. 36–47.) Notably, the gross acreage of the "parcel" at issue in this proceeding is between 1.3 and 2.1 percent of the total gross acreage covered by the EOG Leases. By contrast, in the cases cited by Lang and Lario, the courts applied Mother Hubbard clauses to bring a 3.736 acre tract into a 100 acre lease, or 3.736 percent, *Sun Oil Co. v. Burns*, 84 S.W.2d 442, 443 (Tex. 1935), to add 2.59 acres to a 76 acre lease, or 3.4 percent; *Sun Oil Co. v. Bennett*, 84 S.W.2d 447, 448 (Tex. 1935), to

insert a 5.63 acre tract in an 80 acre lease, or seven percent, *Law v. Stanolind Oil & Gas Co.*, 209 S.W.2d 381, 381 (Tex. Civ. App. 1948); and to include a one acre strip within a five-acre lease, or 20 percent, *Whitehead v. Johnston*, 467 So.2d 240, 241 (Ala. 1985). Thus, in each of the cases cited by the Appellees, the tract at issue constituted a larger part of the overall lease than the 27.4 acre tract at issue in this appeal.

[¶ 13] One prominent commentator on oil and gas law has noted that, "[a]s between parties to the lease, the validity of the Mother Hubbard clause has not been questioned by any court. The use of such a clause apparently violates no public policy, and the subject matter of the clause is one upon which the parties are free to contract." Eugene Kuntz, 2 *A Treatise on the Law of Oil and Gas* § 22.3(b) (1989 & Supp. 2012). This Court should enforce the Mother Hubbard clause as written.

## CONCLUSION

[¶ 14] For the foregoing reasons, the district court's judgment must be reversed.

DATED this 10th day of December, 2012.

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STATE OF NORTH DAKOTA )
) ss.
COUNTY OF BURLEIGH )

I hereby certify that on December 10, 2012, I electronically filed with the Clerk of the North Dakota Supreme Court the REPLY BRIEF OF DEFENDANT/APPELLANT EOG RESOURCES, INC. and served the same electronically as follows:

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