IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Earl R. Van Sickle and Harold R Van Sickle	)	
Appellant/ Plaintiff,	)	
v.	)	Supreme Court No. 20130003 Dist. Ct. Civil No. 2006-C-120
Hallmark & Associates, Inc. Frank Celeste, William R. Austin, Phoenix Energy, Bobby Lankford and Earskine Williams, collectively known as "Interest Holders" NEWCO, and their successors in interest, Missouri Breaks LLC	)	
Appellee/ Defendant.	)	

APPEAL FROM THE DISTRICT COURT, NORTHEAST JUDICIAL DISTRICT, MCKENZIE COUNTY, NORTH DAKOTA

BRIEF OF APPELLANT- PLAINTIFF
EARL R. Van Sickle and Harold R Van Sickle

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2) Did the lower court correctly calculate interest on the royalties due using 18% interest and should it have allowed for multiplication of interest rather than applying simple interest at that rate.

STATEMENT OF CASE

Earl R Van Sickle and Harold R. Van Sickle Appeal to the North Dakota Supreme Court from the Amended Judgment of the District Court McKenzie County Civil # 06-C-120 Dated November 21-2012 and December 10-2012- relating to the Order on Van Sickles' Motion for Reconsideration of Damages and Missouri Breaks Motion for New Trial or Amendment of Findings and Judgment and Order for Amended Judgment. There is a Cross Appeal by Hallmark et al on the same Order for Reconsideration and the Order on Damages dated February 13-2012 (sic) and other Orders. The instant case arises from proceedings on Remand in Van Sickle v Hallmark 2008 ND 12, 744 NW2d 532.

STATEMENT OF FACTS

In Van Sickle v Hallmark & Associates 2008 ND 12, 744 NW2d 532,this Court remanded proceedings to the District Court to decide whether the Van Sickles' pre confirmation claims were discharged in the Athens Alpha's bankruptcy proceeding. There were issues that Van Sickles were never placed on Notice of the Athens' case and to the extent that they were not on Notice the Supreme Court held that the State Courts of North Dakota had jurisdiction to decide the validity and amount of Van Sickle's claims.

After remand, proceedings were had in the District

Court the Hon David Nelson, District Judge presiding. He heard the proofs of the parties and issued an Order Granting Plaintiff's (Van Sickle) Motion for Partial Summary Judgement Designating Defendants as Successor in Interest. (dated February 6-2012 ; App pg 73.) That Order held in part that Interest Holders Amended Plan of Reorganization provided for the assumption of Leases and executory contracts and that the Plan (of Reorganization) specifically assumed the oil and gas leases that were at issue. Van Sickle held a royalty interest in those leases. On Remand Van Sickles urged that 11 USC 365(b) required that before executory contracts or unexpired leases of the bankruptcy debtor (Athens) could be assumed, defaults needed to be cured. Further Van Sickle urged that past due royalties due the United States in bankruptcy proceeding had been paid. As such Van Sickles past due unpaid royalties needed to be paid. Van Sickle urged liability was also on Interest Holders as they were Working Interest Owners under various leases (as well as Missouri Breaks) and had a duty to develop, produce, and pay (Miller v Schwartz 354 NW2d 685, 689 (ND 1984)- Slawson v ND Indust Commission *339 NW2d 772 (ND 1983)- 8 HG Williams and Meyer Oil and Gas* - Manual on terms 838-838.1 (1982). *Summer Oil and Gas* Sec 553).

Hallmark urged that Van Sickle did not have an allowed

claim in the Athen's bankruptcy proceeding as defined by the plan and were not entitled to payment. Further Hallmark acquired the interest of Athens- Alpha, free of all claims and charges. Notwithstanding, Judge Nelson concluded that as Van Sickle had *no notice* of the Athen's bankruptcy. As such they had no opportunity to present a claim and could be heard in State Court.

The Trial Court felt that Van Sickle did have a royalty interest in the well as was shown by various documents - that defendants operated the well- and that there was an obligation to cure the defaults and pay Van Sickle. As such the trial court concluded that under the Successor in Interest principles set forth in Downtowner Inc v Acrometal Products In 347 NW2d 118, 121 (ND 1984, -- Van Sickle met the standard of showing there was an express or implied agreement to assume the transferors liabilities and defendants were liable for unpaid pre petition royalties.

The lower Court then dealt with damages. Submissions were set forth by the parties. Van Sickle urged that interest was due on the unpaid royalties at the statutory rate set forth by NDCC 47-16-39.1 of 18% per annum. Note discrepancies on what were unpaid royalties were deminimis in amount.

Van Sickle urged the act did not reference whether

interest could be multiplied. Further the trial court had discretion in that regard. In reviewing the lower courts decision nothing was stated on the rationale of using simple or multiple interest. Also Van Sickles urged that the statute mandated the recovery of attorney fees even though the earlier ruling of the Court on Order Granting Plaintiff's Motion for Partial Summary Judgement Designating Defendants as Successor in Interest (dated February 6-2012) failed to state anything about attorney fees.

This recognizes that the Order Designating Defendants Successor in Interest(dated February 6-2012) has not been appealed by either party and proceedings thereinafter and including those for Reconsideration and/ or New Trial failed to consider or address the same. While not challenged by Hallmark, it is binding upon them and the Court's finding and conclusion that damages are due Van Sickle with interest at the statutory rate and with attorney fees. (app pg 167, 210) [see Nelson v Trinity Medical Center 419 NW2d 886, 899-889 (ND 1988) - party by moving for new trial restricted itself on appeal to those issues raised in its motion for new trial overturning Davis v Davis 268 NW2d 769 (ND 1978)]

In this matter both parties submitted to the lower court calculations of interest and the rate to be applied. Van Sickle also submitted its application for attorney fees.

The lower court on April 13-2012 issued its Order on Damages.(App pg 149.) There the Court ruled on royalties due with interest. Further it ruled that no Attorney Fees were warranted.

Van Sickle sought a reconsideration of that ruling. They also brought a Cross Motion to Amend the Judgment. In both submissions a discussion was set forth showing entitlement to fees by reason of the nature of the case and the claim that it was sought upon. Hallmark objected. It noted in its Response to Plaintiff's Motion for Reconsideration of Order for Damages, various defenses to the claim of fees including the application of authorities on offsetting costs. Further it suggested that it was the prevailing party on various non related issues. They have nothing to do with NDCC 47-16-39.1. Those earlier claims related to conversion, & intentional tortuous inference with a contract.

The parties also presented their various thoughts on interest flowing on unpaid royalties.

Judge Nelson having heard the positions of the parties ruled on November 5-2012 in the Courts Order on Van Sickle Motion for Reconsideration on Damages and Missouri Breaks Motion for New Trial or Amendment of Findings and Judgment and Order for Amended Judgment. There the trial court held

in part that:

> The breach of an operators obligation to pay royalties is controlled by NDCC 47-16-39.1 which states, in pertinent part, that "[t]he prevailing party in any proceeding brought pursuant to this section is entitled to recover any court cost and reasonable attorney fees." The statute does not address the possibility that more than one party may have a prevailed on some issues involved in the action.
>
> The focus of this lawsuit is and always has been whether the Van Sickles were entitled to payment of royalties from oil and gas produced from the Missouri Breaks Well, and it is accurate to say that the Plaintiffs and each of the Defendants have prevailed on one or more of the claims made in this case, all of which arise from the unpaid royalties and the operators obligation to pay them pursuant to NDCC 47-16-39.1.
>
> The Van Sickles would have the Court name them the prevailing party, because it has been determined that they are entitled to certain unpaid royalties. Missouri Breaks would have the Court either declare the Defendants the prevailing

parties, because they prevailed on a majority of the claims before the Court or to declare a tie, where no one is found to have prevailed.

In the end, the Court is left with a sense that, even though all of the parties prevailed on some part of this litigation, the Van Sickles had to take the initiative to insure that they received that to which they were entitled, including attorney fees. Therefore the Court award the Van Sickles costs and attorney fees in the amount of $3,000.00. (app pg 198.)

The lower Court also found that the unpaid royalties for each Van Sickle was in the amount of $3,698.65. Further that interest for each was in the sum of $6,388.02 or the total amount of $10,086.67 per plaintiff. In coming to this amount the Court considered that 18% was the appropriate rate. From that ruling this Appeal follows.

ISSUES

1) Did the lower court err as a matter of law, by offsetting various claims and defenses of Hallmark having nothing to do with the entitlement due Van Sickle for fees NDCC 47-16-39.1

2) Did the lower court correctly calculate interest on the

royalties due using 18% interest and should it have allowed for multiplication of interest rather than applying simple interest at that rate.

STANDARD OF REVIEW

It has been noted that statutory construction is a question of law fully reviewable on appeal. Nelson v Johnson 2010 ND 23 Par 2, 778 NW2d 773. Deference is afforded to a trial Courts findings. In re Estate of Sagmiller 2000 ND 151 Par 23, 615 NW2d 567, 572. However if a finding is clearly erroneous it may be set aside. A finding is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it or if the reviewing court is left with a definite and firm conviction a mistake has been made .

ANALYSIS

1) The lower court erred by denying attorney fees to Van Sickles in a reasonable amount as is required by NDCC 47-16-39.1. The Trial Court on Van Sickle's Motion for Reconsideration of its earlier denial of attorney fees- felt both parties prevailed on various issues involved in the action. That Conclusion of Law is irrelevant to any consideration of what fees are due Van Sickle for *Proceedings* under NDCC 47-16-39.1.

Note also that the lower court's ruling that Van Sickle had to *take the initiative* is not an adequate basis for limiting fees -as nothing in the statute indicates that as a limiting or touchstone consideration. Only that there be reasonable fees and which includes a full consideration of all proceedings under the act. As such if this is a finding it is induced by an erroneous view of the law. Reasonable is defined to be just and proper (Blacks Law Dictionary). A line of cases in North Dakota have set forth the standard to be considered for *reasonable fees*. Hughes v North Dakota Crime Victums 246 NW2d 774, 777 (ND 1976) City of Bismarck v Thom 261 NW2d 640m 646 (ND 1977). The instant case had no consideration of the time and labor involved; the novelty and difficulty of the question; the skill engaged; preclusion of other employment; customary fee; time limitations, experience and reputation; nature and length of legal relationship with client, award and the like.

In reviewing this matter it is necessary to consider proceeding under NDCC 47-16-39.1 and what fees are related to the same. The act noes not reference nor incorporate other issues therein by its plain language. The lower Court failed to fully follow the law as the legislature adopted it. In this matter the Statute dispenses with the *American Rule* for proceedings brought pursuant to NDCC 47-16-39.1.

The *American Rule* might be applicable to claims involving conversion, tortuous interference with contract and the like, but it is not applicable to the instant case. Further, conversion and tortuous interference are not part and parcel of any element involving recovery of royalties under NDCC 47-16-39.1. In this regard Van Sickle I at par 21 et seq, pg 539 notes the elements for both. A close examination of that ruling leads one to conclude the Trial Court on Remand, erroneously offset various claims against those pertaining to NDCC 47-16-39.1 in coming to its decision. Those earlier claims are inapplicable to proceedings brought under the Act.

The earlier appellate decision in Van Sickle I- is now the rule of the case and is binding on Hallmark et al at this time. They relate to matters on the Remand and may not now be reconsidered or applied differently on the instant matter. Thompson v Schmitz 2011 ND 70 Par 10, 795 NW2d 913,917 - legal question determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. The mandate rule- a more specific application of the law of the case, requires that trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings.

Considering the pleadings and submissions in this

matter S.L. 1995 Ch 439 Sec 1, is to be applied (NDCC 47-16-39.1). There it provides in part that:

> If the operator under an oil and gas lease fails to pay oil and gas royalties to the mineral owner or the mineral owners assignees within one hundred fifty days after oil or gas produced under the lease is marketed and cancellation of the lease is not sought, the unpaid royalties shall thereinafter bear interest calculated at the rate of 18 % percent per annum until paid....The prevailing party in any proceeding brought pursuant to this section is entitled to recover any court costs and reasonable attorney fees... (emphasis supplied).

The history behind this act was to level the playing field and afford mineral owners such as Van Sickles with a mechanism to obtain unpaid royalties. It appears that this legislative enactment is a remedial act as it was designed to provide a remedy for the enforcement of rights and to redress injuries. (*73 Am Jur 2d Statutes 8 - Remedial or curative statutes* (Gaab v Ochsner 2001 ND 195, Par 5, 636 NW2d 669, 671 holds that remedial statutes are to be construed liberally with a view to effectuation its object and to promote justice. In analyzing a statute Albrecht v Metro Area 2001 ND 61, 623 NW2d 367. said in part that:

> [¶ 14].... "Words in a statute are given their

plain, ordinary, [and] commonly understood meaning, unless defined in the code or unless the drafters clearly intended otherwise." *Id.* (quoting *Sauby v. City of Fargo*, 2008 ND 60, ¶ 8, 747 N.W.2d 65); *see also* N.D.C.C. § 1-02-02. State v. Gomez 2011 ND 29, 793 N.W.2d 451 N.D.,2011

In Investors Title Ins. Co. v. Herzig 2011 ND 7, 793 N.W.2d 371 N.D.,2011, the Supreme Court held that:

> [¶ 15] In ascertaining the intent of the legislature, we first look at the plain language of a statute, giving each word its ordinary and commonly understood meaning. *See, e.g.*, *State v. Brown*, 2009 ND 150, ¶ 15, 771 N.W.2d 267. ... In *Interest of D.S.*, 263 N.W.2d 114, 119 (N.D.1978), this Court said:
>
> The ordinary meaning of the word "must" is to impose a duty or grant a right which is *mandatory* or *imperative*. The word "must" cannot be construed to impose or grant a merely directory or nonmandatory duty or right unless the context within which it is used clearly indicates that such was the intent of the Legislature.

See also NDCC 1-03-02 ; NDCC 1-02-03. It has been noted that the legislature's intent must be sought initially

from the statutory language itself. (Johnson v Nodak Mut Ins 2005 ND 112, 699 NW2d 45. As Coldwell Banker v Meide 422NW2d 375 (ND 1985) notes- where the legislatures intent is so apparent from the face of the Statute that there can be no question as to its meaning, there is no room for construction thereof and the Court will follow the literal interpretation in applying words of the statute. It is only where there is an ambiguity that other rules may be followed. A statute is ambiguous if its meaning is susceptible to differing but rationale meanings. (Buchholz v City of Orkisa 2000 ND 115, 611 NW2d 886) It is recognized that the law means what the legislature says it means-not what is unsaid and the mention of one thing implies the exclusion of another (Zuger v North Dakotas Workers Comp 1998 ND 175, 564 NW2d 530).

NDCC 47-16-39.1 states in part that " ....*The prevailing party in any proceeding brought pursuant to this section is entitled to recover any court costs and reasonable fees....*" (Emphasis supplied) As is noted by the words the legislature used- nothing was mentioned about unrelated proceedings such as conversion or tortuous interference (as was noted above). This leads to the conclusion that the lower court initially approached the statute in a way the legislature had not authorized or

directed. Further, Van Sickle pled the Statute, (App pg 22) and otherwise applied for fees. Cost and fees flowed with damages, as the legislature said that the prevailing party was entitled to them. In this matter the legislature used the word 'is'. " Is" in this regard is directive and mandatory. While Hallmark may also seek fees- if it was a prevailing party under NDCC 47-16-39.1 - it has not shown it prevailed under the act. Nor did it plead its entitlement to them by its Amended Answer to the Complaint or otherwise. (app pg 47) Further Hallmark failed to ever formally make a request in a defined way for fees under the Act.

With Van Sickles prevailing on its recovery for royalties under the act it was entitled to fees. (App pg 73, 149) The act provides nothing about considering other issues and/or offset. This recognizes that earlier there were discrete and separate claims brought by Van Sickle. They were before the Supreme Court before in Van Sickle v Hallmark 2008 ND 12, Par 20 et al. 744 NW2d 532,539. There this Court either dismissed claims and or they were withdrawn by Van Sickles. At no time did Hallmark make a competent application for fees on the matters it asserted were due it under the act. It never earlier cross appealed at the time seeking recovery of fees. As such Hallmark waived any right it had to the same. With the lower court

being directed to do limited things on *pre confirmation royalties* there was no fee claim it could consider as to Hallmark. Kautzman v Kautzman 2000 ND 116, par #7 et seq 611 NW2d 883, 885- when the Supreme Court specifies the defect to be cured and remands, the trial court need only rectify the defect.

Notwithstanding Hallmark needed to do more than say it was a prevailing party. It had to show those claims inter connected with the act. In this regard it showed no such connection.

Hallmark feels that the Interest Holders were exempted from the duty to pay royalties by reason of the lower courts ruling. In this regard it appears that they seek to place the burden upon Missouri Breaks. This argument leads them to conclude that they were the prevailing party. (Response of Defendant to Plaintiffs Motion for reconsideration pg 3 dated March 10-2012 app pgs 82A-C, 201). In making this argument Hallmarks ignores that Robert Hallmark in his affidavit of November 2006 (ROA 10) stated that the Defendants including the Interest holders all held working ownership interests in the well. The Trial Court's Order noted that Missouri Breaks was the Successor in Interest to Athens Alpha. Nothing in that Order Granting Plaintiff's Motion for Summary Judgment designating Defendants as

Successor in Interest (app pg 73 at pg 9) states that any defendant was immune from owing damages. In fact the Trial Court found that the Defendants owe money to Van Sickles. Further the Order on Van Sickles Motion for Reconsideration et al, fails to so limit the damages to only Missouri Breaks. Note the Motion of Defendant's Missouri Breaks for a New Trial and or Amendments (app pg 166) was made by only Missouri Breaks and the other Interest Holders waived any objection they had to that ruling along with the right to appeal as their appeal is late.

Notwithstanding, the Interest Holders are the working interest owners and are/were the principal of the agent Missouri Breaks. Liability flowed upon the Interest Holders as well as Missouri Breaks (see NDCC 3-03-03; NDCC 3-03-04) see Petroleum Exchange v Poynter 64 NW2d 718, 722 (ND 1954)

> Under the usual oil and gas lease, the owner- lessor transfers to the his lessee the right to drill and produce oil and other substances. The right of the lessees presents a clear case of a profit prendre in gross, a right to remove a part of a substance of the land... This profit, vests in the lessee an incorporeal herediment, a present estate, an interest in land, which is a chattel real if it is to endure for years.

Miller v Schwartz 354 NW2d 685, 689 (ND 1984) - holds that

a working interest has been defined as the operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land. 8 H Williams and C Meyers, Oil and Gas Law, Manual on Terms pp 838- 838.1 (1982). Slatten v Cliff 748 F2d 1275,1277 - working interest is a real property interest and it gives the lessee the exclusive right to develop the minerals. Considering these authorities the working interests are the operators under NDCC47-16-39.1

Reliance upon the application of principles of good faith purchasers under the Bankruptcy Act is inappropriate as it is beyond the scope of this appeal. First that issue was incorporated into Hallmarks earlier appellate defense in Van Sickle I. Further the Order Granting Plaintiff's Motion for Partial Summary Judgment Designating Defendants as Successor in Interest has not been appealed and any appeal thereon has been rendered moot by the rule of the case doctrine from the past Supreme Court ruling in Van Sickle I. Notwithstanding it is of no merit as Van Sickles were never on notice of the Athen's bankruptcy so couldn't be bound by Hallmark's claim of being a good faith purchaser.

As is noted within, the legislature directed the award of fees for proceedings under NDCC 47-16-39.1 to the prevailing party such as Van Sickle. Supporting this

assertion is the use by the legislature of the word *'is'*, in the Act. It indicates a right or entitlement to fees for proceedings under 47-16-39.1 NDCC. The Act relates nothing about *other claims* or proceedings and which this Court thought was the basis for some type of offset and or credit. It is akin to an award of fees under NDCC 14-09-24 where the legislature mandated fees if there is a wilful and persistent act of denial of visitation. There the legislature said fees shall be awarded. [Sweeney v Sweeney 2002 ND 206, 654 NW2d 407- 'shall' is generally imperative or mandatory excluding the idea of discretion and operating to impose a duty]. Similarly 'is' - is a direction to award fees. 'Is' is the present indicative of ' be'. (Webster's Dictionary)

As was noted by Van Sickles proceedings were brought under the Statute. They related what occurred which led to their being awarded a royalty recovery. Further this Case is replete with evidence of Van Sickle's action and proceedings under the Statute. In this regard and before the lower Court earlier were Motions for Summary Judgment which outlined claims and proceedings pursuant to NDCC 47-16-39.1 (starting with March 2007 Motion for Partial Summary Judgment - see brief page 11; and subsequent Rule 56 Applications.) Invoked at the earlier Appeal in Van Sickle

I was the Statute and authorities thereto. In addition the Amended Pleadings of Van Sickle referenced the Statute under which fees were to be recovered. Further Van Sickles response on the issue of Damages that this Court directed, summarized the same. Van Sickle advised the Court what steps they had taken consistent with the law and attempting to obtain a Judgment regarding their entitlement by Statute as enacted by the legislature.

Simply put the Court misapplied the law by considering matters submitted by the I.H. and others. Those matters had no relevance or materiality to the issue of what fees Van Sickles were entitled to for proceedings under NDCC 47-17-39.1. Here the Court overlooked the statute language, and what was presented by Van Sickles for years. In doing so it made an interpretation of a Statute that misconstrued the remedial law and its purpose. Here the Act directed the award of fees for proceedings that occurred consistent with NDCC 46-16-39.1.

In this matter Van Sickle submitted detailed listing fees showing its attorneys activities and functions. That referenced by date, and time. While this Court could make the final decision of what should be set over to Van Sickle for their lawyers work that is usually the job of the lower court as the Trial Court has the power and

jurisdiction to make such findings of fact. No additional discovery is needed as all of the proof is before the Court. Hallmark has waived any objection to those submissions by not in any competent way critiquing them.

The lower court on this matter considered various authorities as submitted by Hallmark. For example Hallmark suggested that Huber v Oliver County 1999 ND 220 Par 22, 602 NW2d 710 and similar cases are somehow dispositive. There the Supreme Court relied upon NDCC 22-26-06 (cost statute) and various authorities for the proposition that if each party prevailed on certain parts of a lawsuit the trial court need not award costs to either party. This recognizes that NDCC 28-26-06 pertains to taxable costs. In this case *legal fees are not taxable costs.* Nothing therein relates to attorney fees, but to fees of witnesses, necessary deposition costs, publication expenses and expert witness costs. In City of Jamestown v Leevers 552 NW2d 365,375 (ND 1996) the Supreme Court held that the law dealing with cost shifting in NDCC 32-15-32 was specific and were as otherwise provided for by NDCC 32-15. The Supreme Court went on to state that generalized cost shifting provisions of NDRCP Rule 68(a) do not apply to eminent domain proceedings. (Following Gissel v Kenmare Twn 512 NW2d 470, 475-476 (ND 1994). The Court went on to state that for like reasons it

concludes that NDCC 28-26-06 does not apply.

In the case at bar there is a specific statute that is applicable and directed to be applied. It can not be overridden by a general statute as it has been superceded by the legislature for reasons dealing with recovery of royalties that are in the citizens interest. This is consistent with the general trend noting a distinction between costs and fees. For example see United States v Equitable Life Assurance Society 384 US 323 , 86 S Ct 1561, 16 L Ed2d 593,598 which notes that when the statute directs the fees to be added to the judgment that does not make them costs. In North Dakota a host of statutes as construed do not place 'attorney fees' in the same camp as 'costs'. In those situations they are part of the damages due the aggrieved party. See NDCC 32-15-32- eminent domain ; NDCC, 14-05- divorce; NDCC 27-10 - Contempt. No good reason is shown why such a principal should not be followed in the case at bar and when the legislature directed the award of fees for proceedings under NDCC 47-16-39.1

Considering the foregoing, the Conclusion reached by the Trial Court on its Order for Damages, needs to be reversed and reconsidered. Reasonable fees need to be awarded. It is requested that there be proceedings for the same. What was submitted shows what was done by Van Sickles

Attorneys(Rau, Rosenberg, and Cannon) was reasonable. That proof has not been challenged in any cogent way. Since the fee requests were not shown to be otherwise than reasonable, they need to be allowed.

2) Should interest be allowed at the rate of 18% per annum and is it permissible for it to be multiplied.

In the case at bar there is a small discrepancy in the base amount due for unpaid royalties. Van Sickle concedes for the sake of this submission that the base calculation of unpaid royalties is what Hallmark urged for each Van Sickle ($3,698.65) [As is noted Hallmark in various respects made an estimate of income as a best guess and this is different from what Van Sickle presented. Again Van Sickle is using for this submission the gross production as represented by Hallmark]. The royalty amount is derived from records of Athens that were turned over and or from production logs possessed by the State. Hallmark's calculations showed Gross Gas and Oil production. Earlier Hallmark used net income in calculating what it urged was due for past unpaid royalties. That was in error as the leases mandate a consideration of determining royalties from gross production or 1/8 of the gross proceeds (app pg 174). As such the initial methodology and calculation of Defendants was in error.

NDCC 47-16-39.1 has also spoken on what rate of interest should be applied. In this regard the legislature has stated that "unpaid royalties shall bear interest calculated at the rate of 18 % per annum until paid, ... " (emphasis supplied) In this regard there has been no payment and interest still runs at that rate of 18% even though the Court's ruling on damages and interest was dated November 2012.

An examination of the legislative enactment reveals that nothing is stated as to compounding and/or whether interest should by the simple interest method. Here there is a further difference between the parties' methodology as the Court noted. This is an important factor and an unsettled statutory point that needs the Court's sound discretion and wisdom. Van Sickles urged that there can be multiplying of the interest, as that is within the power of the court.

While it might be asserted that interest needs to be computed at simple interest and not compounded, nothing in the Statute in question addresses the same, or directs that to occur. Nor does it prevent multiplication. While other statutes in North Dakota prohibit compounding, the Legislature in this matter desired for their to be discretion exercised. It did so by leaving the matter open

and unaddressed. For example NDCC 28-20-34 deals with judgments. It specifically states that judgment interest may not be compounded. This is and has been noted in authorities such as Hendrickson v. Hendrickson 553 N.W.2d 215 N.D.,1996. Simply put after the judgment is entered compounding is not allowed.[Note in the case at bar the legislature directed that post judgment interest on non paid royalties continue to accrue interest at the 18% rate.]

Other enactments in North Dakota note specifically that compounding is not allowed on interest claims. In this regard see NDCC 47-14-09. That legislation involves and pertains to contract agreements. However there is silence before this Court on this legislation, and whether interest due under 47-16-39.1 NDCC may be compounded or multiplied. As such it is suggested that there is the power and discretion to compound and or multiply interest that is recovered under NDCC 47-16-39.1.

This is supported by other legislative enactments in this state dealing with prejudgement interest where the finder of fact has discretion in all regards on the award and whether it should be compounded. (NDCC 32-03-04 & 32-03-05) Nothing in the enactment prohibits its compounding or multiplication. [Note usury limitations on interest are not applicable as the legislature has directed the rate]

Van Sickle's earlier application set forth a methodology that is consistent with the state law. It allows for a recovery on the statutory penalty of interest in a way that is measured and appropriate. It does justice and meets the remedial purposes of this act. (see legislative history) The act allows 18% interest, to either be computed at simple interest or multiplied depending upon the facts of the case. As the law does not prohibit the trial court from using either method the case needs to be remanded to the trial court to explain what it intended and the mechanism to be used. As such this Court is not in the position of second guessing the lower court as it has no basis before it as to what was considered. For example the lower court has not addressed the issue of Hallmark delaying this matter and failing to concede years ago that it never gave Van Sickles notice. The lower court never heard an explanation why payment was delayed after the earlier appeal and the justification that Hallmark had for non payment. The lower court knew by Hallmark's plan of reorganization that it had the duty to cure but stonewalled the matter for years. As such is there a basis for the lower court to consider these facts and other and determine if the 18% interest should be multiplied somehow.

This recognizes that Interest is a statutory

penalty for non payment. The Act in this case is a remedial one. The court has the power to consider the equities of the case and exercise discretion. It has the power to consider the conduct of MB and how it drove costs and legal proceedings for years.

In various regards, Courts around this Country have exercised judgment and discretion as to the methodology on computing of interest. This can occur when the legislation at bay is silent on the topic. It is requested that the Court Reconsider its prior ruling and use the methodology advanced by Van Sickle. It is also suggested that an alternative compounding methodology may be employed to do justice. see Whitney Benefits Inc v US 30 Fed Clam 441 (Fed Claim 1994)-- government delayed payment of damages for property taken justified compounded interest. In International Loan Network 160 BR 1 (Bank DDC1993) --Chap 11 trustee was allowed prejudgment interest on fraudulent transfer claims to be compounded. In Re Depart of Energy Stripper Well Exemption Litigation 821 F Supp 1225 - Dist Kans 1993; Maxwell v Sampson Resources 848 P2 1166 (Ok 1993)- interest is due on royalty payments and is to be compounded.

While under the Common Law simple interest was the norm, North Dakota has enacted a law that casts that to the

side. Here the legislature could have specifically permitted only simple interest and ignored the adding up of interest at the end of the period on account of delayed payments. It however chose to do otherwise. It granted the Court discretion.

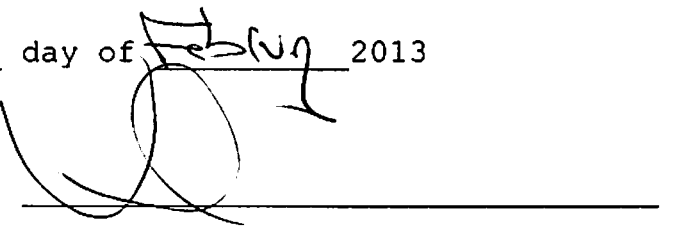
It is requested that the Court permit the damages and the form of interest to be calculated as Van Sickle requested or as is otherwise appropriate. As was noted in OKC v UPG Inc 798 SW2d 300 (Tx App 1990)- compounding interest on the annual method is appropriate when not prohibited by the law. Burnsed Oil Co. Inc. v. Grynberg 320 Fed. Appx. 222 C.A.5 (Miss.),2009 -The contract damages here were liquidated, and we think prejudgment interest compounded annually from the date of each underpayment to the date of this opinion is appropriate.

CONCLUSION

Van Sickles request that the lower court's ruling be reversed and remanded and that there be an award of attorney fees for proceedings under NDCC 47-16-39.1 and that the lower court re decide the amount of interest and whether it should be at simple or some form of multiple. Further the Court issue its directive with specificity so that there is

no doubt between the interested parties and court what was intended and or reassign the case.

Dated this 4 day of Feb 2013



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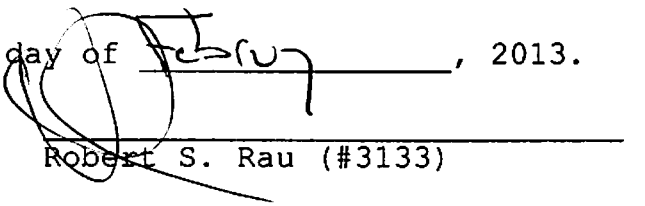
CERTIFICATE OF SERVICE

I , the undersigned , served a copy of **Appellants Brief with Appellants Appendix** on the 4 day of Feb, 2013, upon entities herein, by depositing a copy thereof , postage prepaid, or express service addressed as follows:

Jon R. Brakke
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389

Dated this 4 day of Feb, 2013.



Robert S. Rau (#3133)