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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Golden Eye Resources, LLC, Plaintiff, Appellee and Cross-Appellant vs. Debra K. Ganske, Wesley G. Borgen, Gay M. King, Michael R. Borgen, Sue E. Evans, and Linda R. McCoy, Defendants, Debra K. Ganske, Wesley G. Borgen, Michael R. Borgen, Sue E. Evans, and Linda R. McCoy, Appellants and Cross-Appellees.	Supreme Court Case No. 20130219 District Court Case No. 53-2010-CV-00536

APPELLEE'S RESPONSE BRIEF

APPEAL FROM THE DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
WILLIAMS COUNTY, NORTH DAKOTA
THE HONORABLE DAVID W. NELSON

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I. STATEMENT OF THE ISSUES

1. Whether a contracting party claiming "unilateral rescission" may deprive the other party of all opportunity to adjudicate the issue before a court where the non-rescinding party disagrees that rescission is proper.

2. Whether a party may claim fraud in the inducement to rescind a contract where the alleged fraud conflicts the terms of the contract and the rights specifically granted thereunder, and the party claiming fraud has expressly acknowledged that the written contract is the final embodiment of the deal and is pleased with its terms.

3. Whether a party may claim fraud in the inducement to rescind a contract when he or she is completely satisfied with the contract and has received the benefit of the bargain.

4. Whether granting an economic interest in the money proceeds from oil and gas production is a working interest assignment.

5. Whether the assignment of an overriding royalty is a working interest assignment.

6. Whether breach of contract by repudiation is recognized in North Dakota.

7. Whether the election of remedies doctrine bars a breach of contract action because the contract was adjudicated valid and effective.

8. Whether the Appellants are entitled to a jury trial for an inherently equitable defense simply because they sent a notice to the Appellee.

II. FACTS

A. The Parties

[1] Golden Eye Resources, LLC ("Golden Eye") is a small oil and gas exploration and production company that has been active in oil and gas development in the Williston Basin for years. (Appellee's App. 69, 72) With advances in horizontal drilling and hydraulic fracturing technology, Golden Eye has sought to increase its lease holdings in the Basin for Bakken shale development. (*Id.* at 70.)

[2] The Defendants below are the owners of 610 net mineral acres in the following described lands in Williams County:

Township 156 North, Range 101 West, 5th Principal Meridian:
Section 10: SE/4
Section 11: NW/4, SW/4
Section 15: NW/4
Section 21: N/2SE/4, SE/4SE/4

[3] The Appellants Debra Ganske, Linda McCoy, Mike Borgen, Sue Evans, and Wes Borgen are siblings of one another and each own 53 net mineral acres. (*Id.* at 12.) Gay King (first cousin, once removed from Appellants) is the owner of 345 net mineral acres, and was also a Defendant in the proceedings below. (Appellant's App. 248; Appellee's App. 12, 117, 118.) Mrs. King is not a party to this appeal.

[4] Debra Ganske was the negotiator for all Defendants during the leasing process. (*See* Appellee's App. 10-36.) Mrs. Ganske holds a Bachelor of Arts in Business from Minot State College and a Juris Doctorate with distinction from the

University of North Dakota School of Law. (*Id.* at 37, 98-100, 104-05.) She was a licensed realtor prior to law school and, after law school, she practiced as an attorney for about five years in Minot. (*Id.* at 101-03.) She currently engages in independent legal research and writing for other attorneys. (*Id.* at 37.)

B. Lease Negotiations

[5] Each of the Appellants entered into an oil and gas lease with Golden Eye on December 15 or 16, 2009. (Appellants' App. 19-43.) The leases all contain the same terms. Negotiations between Golden Eye and the Appellants leading up to the leases are memorialized in numerous emails between December 4, 2009 and December 12, 2009.[1] Those emails are submitted herewith in Appellee's Appendix at pages 10 through 36 and they speak for themselves.

[6] Ric Henricksen was one of the consulting landmen handling negotiations for Golden Eye. (Appellee's App. at 8.) Although each individual Appellant made his or her own leasing decisions, they acted as a unit. (*Id.* at 111, 136, 147.) All Appellants consented to Mrs. Ganske as the spokesperson on their behalf. (Appellee's App. at 111.) From the outset, Mrs. Ganske exhibited an exceptional mastery over oil and gas law and leasing, including the concepts of cost free royalties, the primary term of an oil and gas lease, and going rates for bonuses and royalties. (*Id.* at 86-87.)

[1] Although not a basis for Golden Eye's arguments herein, the alleged misrepresentations are conspicuously absent from the email communications, despite Ms. Ganske's demand that all communications be made in writing. (Appellee's App. 10-36.)

[7] Golden Eye initially furnished the Appellants with its customary lease form for their consideration. (*Id.* at 16.) The Appellants had an outside attorney review this form, and he advised them to reject Golden Eye's form for a more lessor-friendly form. (*Id.* at 107-10, 120-26, 132-39, 145-47, 152-54.) Based on their own internal discussions, the Appellants rejected Golden Eye's form and insisted on using a modified version of the North Dakota Board of University and School Lands' ("State Land Board") form. (*Id.* at 20.) The Appellants also insisted upon a Pugh clause supplied by their third party attorney, and a consent to assignment provision.[2] (*Id.* at 88-89, 107-10, 120-28, 132-39, 145-48, 152-54.) Golden Eye conceded to their every demand as to the contents of the lease form. (*Id.* at 10-36, 107-10, 120-28, 132-39, 145-48, 152-54.)

[8] The Appellants also drove the terms of the lease relating to compensation (bonus and royalty). By December 12, 2009, Golden Eye and the Appellants had fully negotiated the lease bonus, royalty rate, and the form of lease. (*Id.* at 29-32.) Early that day, Ms. Ganske emailed Mr. Henricksen the "final" lease for his review and approval. (*Id.*) Later that day, however, the Appellants wanted to consider a brand new lease offer from Tracker Resources Exploration ("Tracker"). (*Id.* at 35-36.) Following further discussions with Golden Eye's contract landmen, however, including a concession to match Tracker's bonus payment, the Appellants signed their leases with Golden Eye. (Appellant's App.

[2] A Pugh clause is a provision in an oil and gas lease that releases specified lands from the lease in the event they are not developed.

19-43.) The Defendants below leveraged Tracker's offer to obtain another $61,000 in bonus money from Golden Eye ($100 x 610 acres). (*Id.*; *See* Appellee's App. 12-13, 16, 36)

C. Post-Leasing

[9] The family was pleased with the result of Mrs. Ganske's negotiations. Each Defendant below testified to complete satisfaction with his or her lease with Golden Eye. (*Id.* at 43, 114, 129-30, 140-41, 149, 155-56, 158.) On December 12, 2009, the day she furnished the "final lease form" to Mr. Henricksen, Mrs. Ganske told Mrs. King that theirs was "the best possible lease [they] can get right now with respect to lease terms." (*Id.* at 88.) She further stated, "I don't think anyone can find a lease more protective of the lessor's interests than the one we're insisting upon." (*Id.*) On January 8, 2010, Wes Borgen acknowledged that "Deb did a great job on the negotiations . . . ." (*Id.* at 90.)

[10] Additionally, Mrs. Ganske understood the leases to be the final and exclusive embodiment of the deal the family made with Golden Eye. On January 13, 2010, she advised Mr. Henricksen of the parol evidence rule, stating, "At this point, the negotiations are irrelevant because the written lease supercedes [sic] the negotiations and controls." (*Id.* at 43; see also Appellee's App. at 112-13, 150, 156.)

[11] Despite their pleasure with the leases, the Appellants later felt remorse on the issue of compensation. In the ensuing month, the Appellants mulled over whether to "withdraw" their leases with Golden Eye and "go with Tracker."

(Appellee's App. at 91.) Wes Borgen was uncomfortable with the idea, however, since Golden Eye had accommodated them several times after reaching a deal in principle. The whole idea of "switching . . . once again" in January of 2010 felt "shady" to him. (*Id.* at 90.)

D. The Petro-Hunt Well and the "Notice of Rescission"

[12] While the parties were negotiating, Golden Eye was preparing to file an application with the North Dakota Industrial Commission ("NDIC") to establish numerous 1,280 acre stand-up drilling units. (*Id.* at 70.) *See also* N.D. Admin. Code § 43-02-03-18. On January 25, 2010, Golden Eye filed with the NDIC an Application to establish 16 units in this area. (Appellee's App. at 70, 74-77.) Golden Eye's application was docketed as Case No. 12164 and the administrative record is available on the NDIC website. The NDIC granted the application on July 26, 2010. (*Id.* at 78-82.) The Appellants' minerals are located in four different 1280 acre drilling units established by Golden Eye.

[13] Around the time Golden Eye was applying to establish drilling units, Petro-Hunt, L.L.C. ("Petro-Hunt") – unbeknownst to Golden Eye – was in the process of completing and filing an application with the NDIC for a permit to drill the Borrud 156-101-11D-2-1H well ("Borrud Well"). (*Id.* at 70.) Petro-Hunt was proposing to drill this well on one of Golden Eye's 1,280 acre drilling units covering part of the Appellants' minerals (Sections 2 & 11). (*Id.*) On May 19, 2010, the NDIC issued a well permit to Petro-Hunt for the Borrud Well. (*Id.*) In late May of 2010, the Appellants learned of Petro-Hunt's intent to drill a well on

one of the units and they immediately alleged fraud and rescission. (*Id.* at 115-16.)

[14] On May 25, 2010, Ms. Ganske sent Golden Eye a memorandum regarding the Appellants' "Fraudulent Inducement/Deceit Claims." (Appellant's App. 44-45.) In this letter, Mrs. Ganske threatened litigation and the filing of a *lis pendens*. (*Id.*) She requested Golden Eye to "accept rescission" and execute and record surrenders of the leases or, alternatively, match the bonus consideration and royalty offer made by Tracker. (*Id.*)

[15] On May 28, 2010, Mrs. Ganske sent Golden Eye a follow-up "Notice of Rescission." (*Id.* at 46.) In it, Mrs. Ganske purported to give notice that Appellants rescinded their oil and gas leases with Golden Eye. (*Id.*) She stated that the rescinding parties would offer to restore the bonus money ($305,000) paid by Golden Eye if Golden Eye executed and recorded "legally sufficient surrenders of the leases" with the county recorder. (*Id.*)

[16] Golden Eye did not accept the Appellants' increased demands. In response, Golden Eye recorded a Notice of Non-forfeiture with the Williams County Recorder and filed a Complaint for declaratory relief/quiet title and breach of contract in Williams County District Court on June 18, 2010. (Appellee's App. 159-60.) The Appellants defended on the ground that the leases are voidable based on fraud in the inducement. (Appellant's App. 88-91.)

E. Post-Dispute Development

[17] Petro-Hunt drilled the Borrud Well shortly thereafter. (Appellee's App. 71.) The Borrud Well is currently a commercially productive well. (*Id.*) Since this litigation commenced, six additional productive wells have been completed on the units covering the Appellants' acreage. (*See id*; information *available at* https://www.dmr.nd.gov/ oilgas/findwellsvw.asp.)

[18] The Appellants' placed a cloud on Golden Eye's leasehold title since claiming unilateral rescission. By making the claim of fraud and rescission based on lack of mutual assent, the Appellants have argued that their leases were void *ab initio*. This creates a difficult situation because no single lessee can halt development within a spacing unit. Every lease owner within a unit has the right to propose and drill wells. *Schank v. North Am. Royalties, Inc.*, 201 N.W.2d 419, 429 (N.D. 1972). Thus, as third parties within the units have proposed wells, Golden Eye has been faced with the difficult decision of either (i) investing substantial funds in proposed wells despite the uncertainty of title, or (ii) declining to participate in the proposed wells and facing the corresponding nonconsent penalties under N.D.C.C. § 38-08-08(3).

[19] Additionally, the first alternative is not available if the lessee desires financing from a conventional lending institution in order to participate in a proposed well. A lessor's challenge to a lessee's title under an oil and gas lease renders the lessee's title valueless for lending purposes because the collateral that the lender relies upon may or may not exist. (Appellee's App. 168.) Thus, the lessee must either secure alternative financing to participate (without any certainty

that the funds will be recaptured) or go non-consent and suffer statutory risk penalties.

[20] Golden Eye pursued alternative financing when it came time to make an election to participate in the Borrud Well. Because of the cloud Appellants placed on Golden Eye's title, Golden Eye elected to participate in the well through a contract with Northern Oil and Gas, Inc. ("Northern"). The terms of the arrangement with Northern are memorialized in a document entitled "Northeast Fork Prospect Participation Agreement" ("Participation Agreement"). (Appellant's App. 289-96.)

[21] Upon receipt of the Participation Agreement (while the rescission issue was pending), the Appellants developed additional legal theories to avoid their leases. In late December, 2011, each Appellant (but not Gay King) sent Golden Eye a "Notice of Cancellation of Oil and Gas Lease and Demand for Release" under N.D.C.C. § 47-16-36 claiming a breach of contract and a right to cancellation. (*Id.* at 304-05, 310-11, 316-17, 322-23, 329-30.) One of the stated bases was a purported "assignment or sublease" of the leases to Northern. (*Id.*) Golden Eye responded to Appellants' notices by recording in Williams County Notices of Non-forfeiture of Oil and Gas Lease pursuant to N.D.C.C. § 47-16-36 (*Id.* at 306-07, 312-13, 318-19, 325-26, 332-333.) Thereafter, the Appellants amended their counterclaim to include a breach of contract and cancellation claim against Golden Eye.

III. ARGUMENT

[22] Golden Eye does not dispute the Standard of Review stated in Appellants' brief. This Court should review the district court's rulings *de novo*, applying the applicable standard under N.D.R.Civ.P. 12(b)(6) and 56.

A. Golden Eye is Entitled to an Adjudication of Title to its Leasehold

[23] Appellants first argue that the district court should have dismissed Golden Eye's action because Golden Eye had no interest in their leases after their "unilateral rescission" under N.D.C.C. § 9-09-01 *et seq.* This Court should summarily reject this argument.

[24] First, the Appellants are incorrect as a matter of law that Golden Eye has no interest in the leases. The leases were duly executed by Appellants and recorded in the county, and Appellants accepted their bonus payments. There is no release, judgment or other document that in any way divests Golden Eye of its title.

[25] In *Ridl v. EP Operating Ltd. P'ship*, this Court held that a lessor does not extinguish the lessee's interest in an oil and gas lease by following the lease forfeiture process outlined in N.D.C.C § 47-16-36. 553 N.W.2d 784, 787 (N.D. 1996). This is true even when the lessee fails to respond to the lessor's demand within the twenty (20) day period and the lessor thereafter records a satisfaction of the oil and gas lease. *See id.* at 786 Here, the Appellants have not extinguished Golden Eye's title by merely sending a demand purportedly rescinding the leases. As a party with an interest in the leases, Golden Eye properly brought quiet title and breach of contract claims. N.D.C.C. § 32-17-01.

[26] Even assuming the Appellants are somehow correct that their Notice of Rescission completely divested Golden Eye of its title, Golden Eye would certainly be entitled to an adjudication as to whether the Appellants had a right to rescind, and its Complaint adequately raised that issue. *See Loff v. Gibbert*, 39 ND 181, 166 N.W. 810, 811 (1918). North Dakota's notice pleading standard requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." N.D.R.Civ. P. 8(a). If the substance of the allegations places a defendant on notice of the claim(s), then the pleading is sufficient. *Tibert v. Minto Grain, LLC*, 2004 N.D. 133, ¶ 18, 682 N.W.2d 294.

[27] Thus, it is immaterial whether Golden Eye denominates its claim as one for "quiet title," "declaratory judgment," or "wrongful rescission" (the claim Appellants suggest is proper). Golden Eye's Complaint adequately apprised the Appellants of the relief it sought, and Golden Eye is certainly entitled to access the courts for an adjudication. (*See, generally*, Appellant's App. 9-46.) Any other result would completely abolish contract law in North Dakota. A contracting party could simply "unilaterally rescind" under N.D.C.C. § 9-09-01 *et seq.* to evade a contract, and the innocent party could not seek redress through the judicial system. This would be an absurd result. This Court should affirm the district court's denial of the Appellants' Motion to Dismiss.

B. The "Fraud" Alleged by the Appellants Conflicts with the Contract

[28] This Court can affirm the district court's first summary judgment order based on the following undisputed facts: (i) Golden Eye and each of the

Appellants executed oil and gas leases covering their minerals (Appellant's App. 19-43); (ii) the Appellants are sophisticated parties who controlled lease negotiations (*see* Facts, Section II above); (iii) the leases are admittedly fully integrated contracts (Appellee's App. at 43, 112-13, 150, 156); and (iv) each of the Appellants is pleased with his or her lease (*Id.* at 43, 114, 129-30, 140-41, 149, 155-56, 158.).[3]

[29] The Appellants' rescission claim fails on several distinct legal theories (discussed below) for the fundamental reason that the alleged "fraud" conflicts with the terms of the leases and the rights specifically granted thereunder. At its core, the Appellants' fraud argument is two-fold. They first contend that Golden Eye promised that it was going to be the company drilling and operating all wells and, second, that Golden Eye would drill the wells immediately. (Appellant's App. 123-34; Appellant's Brief at 18.)

[30] The flaw with these alleged representations is that they flatly contradict the written leases. Both representations are defeated by the fact that the Appellants expressly granted to Golden Eye the *right* to drill on their lands for a period of up to three years, but do not *obligate* Golden Eye to drill and operate.

[31] It is customary and well-established that an oil and gas lease for a term of years, without a drilling commitment, confers upon the lessee a *right* to enter upon the premises, explore for, drill and produce oil and gas. *Slaaten v. Cliffs*

[3] Golden Eye's contract landmen adamantly dispute the representations alleged by the Appellants. For the reasons stated in this brief, however, Golden Eye is entitled to judgment as a matter of law.

Drilling Co., 748 F.2d 1275, 1277 (8th Cir. 1984); Kendor P. Jones & Jennifer L. McDowell, Keeping Your Lease Alive in Good Times and in Bad, 55 Rocky Mtn. Min. L. Inst. 23, 23-2 (2009). Naturally, lessees under such leases have the right to *not* explore, develop, produce etc. at their option. For example, a lessee may decide that the area is no longer prospective for commercial oil and gas production, or may decide that the economics of development cannot be justified. In such event, the lease lapses and the lessee loses its investment.

[32] The State Land Board lease form required by the Appellants adheres to this well-established norm. Golden Eye purchased the right to develop the leases for three (3) years at a cost of $305,000 (610 acres at $500/acre). The Appellants further granted Golden Eye the right to extend the primary term by two (2) years "if no well be commenced" during the first three (3) years by an additional payment of $274,500. (Appellant's App. 19, 23, 27, 31, 35, 39.)

[33] The Appellants' chosen leases incentivize (but do not require) drilling by giving Golden Eye the ability to extend the leases past their primary term through operations and/or production. (*Id.* at 23-43.) Payment of the bonus was therefore Golden Eye's only obligation. Beyond this, Golden Eye did not represent, warrant, assure, or guarantee any actions whatsoever. The Appellants cannot allege "fraud" to rescind based on a drilling or operatorship obligation.

[34] Second, the Appellants' allegations that Golden Eye guaranteed operatorship contradict the pooling and unitization provision in the leases. (*Id.* at 21, 25, 29, 33, 37, 41.) That provision expressly grants Golden Eye the right to

cooperate with other lease owners within the units by allowing them to drill and operate wells. It states, "Pooling and unitization shall be conducted in accordance with North Dakota law. The right to pool or unitize is limited to the spacing unit established by the State oil and gas regulatory commission." (*Id.*) As discussed below, the Appellants are attempting to deprive Golden Eye of a right that they explicitly granted.

[35] Under North Dakota law, the NDIC creates spacing units for the orderly, efficient, and economic development of oil and gas reservoirs. *See* N.D.C.C. §§ 38-08-07(1), 38-08-02(13). Spacing unit orders allow for the drilling of a specific number of wells within the unit area. However, North Dakota law also recognizes that each leasehold (working interest) owner within a spacing unit has the right to enter upon its leased premises to drill and operate a well. *Schank*, 201 N.W.2d at 429. This gives rise to an inherent tension as to how the working interest owners within a unit will drill and operate the well(s) permitted by the NDIC under its spacing order, since there are often multiple working interest within a spacing unit. This tension is heightened with Bakken formation development where, as here, the NDIC often establishes large 1,280 "stand-up" spacing units, and there are usually numerous leasehold owners within any given unit.

[36] The North Dakota legislature has resolved this tension through the enactment of N.D.C.C. § 38-08-08. When there are two or more working interest owners within a spacing unit, the owners may "pool" their interests and resources

voluntarily (by agreement) or statutorily, and cooperatively drill and operate wells on a spacing unit. N.D.C.C. § 38-08-08. If statutory pooling is utilized, the parties electing to share in the cost of drilling a well (the "consenting" or "participating" parties) may recoup from those not electing to share in the cost (the "non-consenting" parties) the non-consenting parties' proportionate share of costs plus "risk penalties." *Id.* § 38-08-08(3).

[37] Parties desiring to drill and operating a well may impose statutory risk penalties by complying with N.D. Admin. Code. § 43-02-03-16.3. This regulatory process enables the identification of the consenting and non-consenting parties. Regardless, when the interests within a unit are pooled, "[o]perations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order must be deemed, for all purposes, the conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof." N.D.C.C. § 38-08-08(1).

[38] Thus, Appellants' leases expressly give Golden Eye the right to pool pursuant to the statutory scheme discussed above. Golden Eye has the right to allow another working interest owner to physically drill and operate a well, and may coordinate and cooperate with all working interest owners who share that common goal. When the interests are pooled, operations on the unit by any working interest owner are imputed to the others as a matter of law. N.D.C.C. § 38-08-08(1).

1. The Appellants' Alleged Reliance Was Unreasonable as a Matter of Law

[39] In order for fraud to be actionable, the person alleging fraud must prove reasonable or justifiable reliance on the allegedly fraudulent statement. *Am. Bank Center v. West*, 2010 ND 251, ¶ 12, 793 N.W.2d 172; *Asleson v. West Branch Land Co.*, 311 N.W.2d 533, 541 (N.D. 1981). Further, reliance is not reasonable where a review of the written contract would reveal the falsity of the statements. This rule should hold particularly true where, as here, the party claiming fraud drafted the agreement, accepted the consideration, acknowledged the agreement as the final expression of the parties' intent, and is pleased with the agreement.

[40] This was the primary rationale adopted by the district court when it granted summary judgment to Golden Eye. That court quoted *DRC Parts & Accessories, LLC v. VM Motori, S.P.A.* for the proposition that "a party who enters into a written contract while relying on a contrary oral agreement does so at its peril and is not rewarded with a claim for fraudulent inducement when the other party seeks to invoke its rights under the contract." 112 S.W.3d 854, 858-59 (Tex. App. 2003). This Court should sustain the district court's summary judgment ruling on the same grounds. *See also Fifth Third Bank v. Waxman*, 726 F. Supp. 2d 742, 752 (E.D. Ky. 2010); *Alexander v. CIGNA Corp.*, 991 F. Supp. 427, 436-37 (D. N.J. 1998). *Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank*, 662 N.E.2d 1074,

1081 (Ohio 1996); *see also Froholm v. Cox*, 934 F.2d 959, 961-62 (8th Cir. 1991) (parties held to reading and understanding their leases).

2. The Fraud Exception to the Parol Evidence Rule Does Not Apply

[41] "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." N.D.C.C. § 9-06-07. The parol evidence rule codified in N.D.C.C. § 9-06-07 – and reiterated by Mrs. Ganske to Golden Eye's landman after negotiations – precludes a party from submitting evidence that varies or contradicts the terms of the final written agreement. *B.W.S. Invs. v. Mid-Am Rests., Inc.*, 459 N.W.2d 759, 762 (N.D. 1990).

[42] Although fraud has been recognized as an exception to the parol evidence rule, courts must be very cautious not to consider improper parol evidence under the guise of "fraud." In *Sec. Nat. Co. v. Sanders*, the North Dakota Supreme Court explained this principle: "If the proposed parol testimony tends to change the essential elements of the contract itself instead of showing . . . fraud . . . then the evidence must be rejected, for a party cannot, under the guise of showing . . . fraud . . . 'ingraft new terms and covenants' upon the writing by parol evidence." 60 N.D. 597, 235 N.W. 714, 716 (1931); *see also Radspinner v. Charlesworth*, 369 N.W.2d 109, 113 (N.D. 1985) (parol evidence may not be

offered under guise of an exception to the parol evidence rule); *Bardwell v. Willis Co*., 100 A.2d 102, 104 (Pa. 1953).

[43] Put simply, a party may not masquerade rights and obligations that contradict the final contract as fraud. There is no "fraud" under such circumstances. Therefore, the parol evidence rule – rather than the fraud exception – applies. Any other holding would severely undermine the policies of the parol evidence rule. *Bardwell*, 100 A.2d at 104; *see also Evenson v. Quantum Indus.*, 2004 ND 178, ¶ 11, 687 N.W.2d 241, 244. Those policies are certainty in business transactions reduced to writing and protection against the doubtful veracity and uncertain memories of interested witnesses. *Evenson*, 687 N.W.2d at 244.

[44] The North Dakota Supreme Court has steadfastly adhered to the rule the fraud exception does not apply where the alleged fraud conflicts with the contract. In *Evenson*, for example, the Court stated:

> Preliminary oral statements and promises related to the terms of the contract do not provide the basis for a fraud claim if there is a subsequent written contract. Because Page's alleged promise related to terms of the contract and there is contradictory language in the parties' subsequent written contract, we conclude the trial court did not err in granting summary judgment dismissing Evenson's fraud claim.

2004 ND 178 ¶ 17; *see also First State Bank v. Moen Enters.*, 529 N.W.2d 887, 892-93 (N.D. 1995) (affirming dismissal where parol evidence of "fraud" conflicted with contract).

[45] Applied here, the Appellants' assertions of fraud must be dismissed under the parol evidence rule. The Appellants' contentions that Golden Eye's contract landmen represented that drilling would occur within a certain time period, and that Golden Eye would be the regulatory "operator" of all four spacing units, are both belied by the fact that the leases do not require drilling and development at all. They are further belied by the leases' three year primary term, the two year option to extend, and the overall *incentive-based* structure for exploration and development. Finally, the claim that Golden Eye promised operatorship in every spacing unit conflicts with the rights specifically granted by Appellants to Golden Eye to pool and unitize their leases with other working interest owners in accordance with North Dakota law.

[46] The Appellants' sophistication and control over the leasing process is also noteworthy. *Gershman v. Englestad*, 160 N.W.2d 80, 86 (N.D. 1968); *Froholm*, 934 F.2d at 961-62. The Appellants maximized the likelihood of full development of the leased premises through their inclusion of a Pugh clause (horizontal and vertical). (Appellant's App. 21, 25, 29, 33, 37, 41.) Appellants also included a consent-to-assignment provision. (*Id.* at 19, 23, 27, 31, 35, 39.)

[47] In sum, the Appellants were very adept at including everything they desired in their written leases, and they all admit they are pleased with the contract. Instead of including a drilling commitment, however, the Appellants granted Golden Eye a right to drill for three (3) years with a two (2) year option to

renew. Instead of including a provision requiring Golden Eye to be the company operating each well in each unit pursuant to NDIC regulations, they broadly allowed pooling and unitization in accordance with North Dakota law.

[48] Under these facts, even if the landmen made the alleged representations – which it adamantly disputes – the Appellants' fraud claim must fail as a matter of law under the parol evidence rule. The Appellants desire to rescind based on statements that conflict with the contract. The Appellants are aware that, if they tried to include the "fraudulent" terms and conditions into their leases and assert breach of contract (and lease cancellation), the parol evidence rule would bar such any such action. They may not mischaracterize the situation and use the tort theory of fraud to bootstrap their way into a claim of rescission. This Court should affirm the trial court on this independent basis.

3. The Appellants Received and Continue to Receive the Benefit of Their Bargain

[49] The Appellants' fraud defense also fails because they are pleased with their leases, and Golden Eye is developing the leases according to their terms. The Appellants are receiving the full benefit of their bargain. As of the date of this brief, NDIC records demonstrate that seven (7) commercially productive wells have been drilled on spacing units embracing Appellants' acreage. (information *available at* https://www.dmr.nd.gov/oilgas/findwellsvw.asp.)

[50] The district court noted that "[o]ne of the essential elements of fraud is that there be a false representation of *material* fact." *Sperle v.Weigel*, 130 N.W.2d 315, 320 (N.D. 1964) (emphasis in district court decision). It then explained how leasing to the company actually contracting to drill the well(s) is of no particular significance to a lessor because, pursuant to N.D.C.C. § 38-08-08(1), "[o]perations incident to the drilling of a well upon any portion of a spacing unit are deemed, for all purposes, to be the conduct of such operations upon each separately owned tract in the drilling unit by the several owners." (Appellant's App. 152.) Accordingly, the Appellants' fraud claim fails because the alleged promises made by Golden Eye's landmen were not material.

[51] The fact that the Appellants received and continue to receive the benefit of their bargain also means that they have not been injured in any legally cognizable way. For over 100 years, this Court has held that fraud without harm is not actionable:

> The mere fact that misrepresentations were made with intent to defraud defendant would not be sufficient and would not be ground on which alone to avoid the contract. Mere intent to defraud is not alone ground on which to base an action for fraud. Damage or injury must be shown, either accrued or to accrue.

Nelson v. Grondahl, 12 N.D. 130, 96 N.W. 299, 300 (1903). "Deceit and injury must concur." *Id.*; *see also Sonnesyn v. Akin*, 14 N.D. 248, 104 N.W. 1026, 1028-29 (1905).

[52] The Appellants' defense of fraud and rescission must fail because fraud simply will not lie without injury. The legal principle stated in *Sonnesyn* and *Nelson* that fraud without injury is not actionable remains the law in North Dakota to this day. *See Grandbois v. Watford City*, 2004 ND 162, ¶ 20 685 N.W.2d 129, 136; *Schneider v. Schaaf*, 1999 ND 235, ¶ 16, 603 N.W.2d 869. The Appellants' assertions of fraud fail as a matter of law because Appellants are pleased with their leases, the leases are the final embodiment of the deal, and they have been extensively developed according to their terms.

C. The Leases Require Lessor Consent for Working Interest Assignments Only

[53] After Golden Eye's Motion for Summary Judgment was fully briefed, the Appellants filed a Motion for Partial Summary Judgment to terminate the leases on a different theory (and Golden Eye thereafter cross-moved for partial summary judgment to uphold the leases). Specifically, the Appellants sought to cancel their leases based on allegations that Golden Eye breached the consent to assignment provision found in ¶ 17. The Appellants focus their argument on the first sentence in ¶ 17, which reads: "The rights of Lessee hereunder may not be assigned or subleased in whole or in part without Lessor's prior written consent."[4]

[54] To analyze whether Golden Eye breached the consent to assignment provision, one must understand the interest and "rights" that the Appellants

[4] The Appellants are well-aware of the financial benefits of rescission. They could either lease to a new company on more lucrative terms or elect to enjoy the rights of an unleased mineral owner under North Dakota law. (Appellee's App. 142-43.) N.D.C.C. 38-08-08(3)(b).

granted to Golden Eye. The parties do not dispute that the leasehold estate granted under an oil and gas lease is the "working interest." *See Corbett v. LaBere*, 68 N.W.2d 211, 213 (N.D. 1955). A working interest is the "operating interest in an oil and gas lease." *Slawson v. N.D. Indus. Comm'n*, 339 N.W.2d 772, 776 n.3 (N.D. 1983). The term "working interest" is generally synonymous with "leasehold interest." *Miller v. Schwartz*, 354 N.W.2d 685, 689 (N.D. 1984). The owner of the working interest has the exclusive right to enter upon and "work" the premises, *i.e.*, explore and develop the oil and gas resources. *Id.* If a well is a dry hole or stops producing, the working interest owners are responsible for plugging and abandonment. N.D.C.C. § 38-08-04(8).

[55] The working interest granted to Golden Eye under Appellants' leases is no exception. The granting clause (¶ 1) defines the "rights" that the Appellants leased to Golden Eye. In that clause, each of the Appellants leased his or her minerals unto Golden Eye for the purpose of exploring for, drilling, and producing oil and gas from the premises, with corresponding rights of ingress, egress, and other reasonably necessary surface use. (Appellant's App. 19, 23, 27, 31, 35, 39.)

[56] Thus, when ¶ 17 of the leases says that the "rights" of lessee may not be assigned without the lessor's written consent, the rights contemplated are the working interest rights granted under ¶ 1. N.D.C.C. § 9-07-06. The remaining sentence of ¶ 17 confirms this conclusion. It states:

> If Lessee obtains Lessor's prior written consent and assigns all or part of this lease, both assignor and assignee shall remain subject to

> the terms of this agreement including but not limited to any express or implied covenants of exploration, development and protection from drainage [until Lessor receives notice] ... excepting, however, responsibility for environmental damage as hereinafter provided shall not be avoided by an assignment ....

(Appellant's App. 21, 25, 29, 33, 37, 41.) This sentence's reference to total or partial assignments of "this lease" confirms that the consent to assignment clause (the first sentence) applies only to working interest assignments. Further, the provision quoted above regarding implied covenants and environmental damage also confirms this conclusion, as these obligations are uniquely borne by the working interest owner. *Irgens v. Mobil Oil Corp.*, 442 N.W.2d 223, 225 (N.D. 1989); *Feland v. Placid Oil Co.*, 171 N.W.2d 829, 835 (N.D. 1969).

[57] Bearing this in mind, the Court must consider whether Golden Eye's assignment of an overriding royalty or the Participation Agreement were working interest assignments that required Appellants' consent under ¶ 17. As explained below, the answer is "no."

1. The Overriding Royalty Assignment Was Not a Working Interest Assignment

[58] The Appellants first argue that Golden Eye's assignment of an overriding royalty interest was a breach of the consent to assignment clause in their leases. This argument fails for the basic reason that an overriding royalty interest is not a working interest. N.D.C.C. § 38-08-04(8) ("The term 'working interest owner' does not mean a royalty owner or an overriding royalty interest owner."). An overriding royalty is a "share of production, free of expenses of

production." *Slawson*, 339 N.W.2d at 776 n.3. Overriding royalty owners hold "no right and thus no ability to go onto the underlying property and drill or otherwise take action to perpetuate a lease." *Ridge Oil Co., Inc. v. Guinn Investments, Inc.*, 148 S.W.3d 143, 155 (Tex. 2004). The owner of an overriding royalty enjoys none of the working interest rights which are of concern to the Appellants; as such, Golden Eye's assignment of an overriding royalty did not breach the leases.[5]

2. *The Participation Agreement Was Not a Working Interest Assignment*

[59] The Appellants next contend that Golden Eye breached the consent to assignment provision by entering into the Participation Agreement with Northern. The plain language of the agreement defeats this argument.

[60] The Participation Agreement expressly states that it "does not, in any way, assign or convey to [Northern] an interest in the Leases." (Appellant's App. 290.) Instead, it gives Northern the right to acquire an undivided 58.32% of the leases within a specific spacing unit subject to and in accordance with the "conditions" stated in Section 2. (*Id.*) As to the Appellants' leases (designated therein as the "Ganske Family Leases"), three conditions must be satisfied before Northern has a right to acquire any interest: First, Northern must pay 83.32% of Golden Eye's share of drilling and completing the Borrud Well. (*Id*.) Second, Petro-Hunt has to complete the Borrud well. (*Id.* at 291.) Third, and most

[5] Notably, the State Land Board approves working interest assignments only. N.D. Admin. Code § 85-06-06-07.

important to the case at bar, Golden Eye must obtain the Appellants' consent to assign their leases.[6] (*Id*.) This third condition precedent was specifically included to strictly adhere to the consent to assignment provision in the Appellants' leases.

[61] At this time, the Appellants have not consented to an assignment, so Northern holds only a contractual right to 58.32% of the "revenues or proceeds" from working interest production. (*Id.*). "[R]evenues or proceeds" derived from the sale of mineral production which is derived from the working interest are not part of the working interest. There are two degrees of separation. Indeed, mineral production itself is personal property and is therefore not part of the working interest. *Finstrom v. First State Bank of Buxton*, 525 N.W.2d 675, 677 (N.D. 1994); *see also Corbett v. La Bere*, 68 N.W.2d 211, 213 (N.D. 1955) (working interest is real property).

[62] Northern's present interest is no different than that held by someone who loans money to a surface tenant in exchange for a share of the revenues from selling crops. To further analogize, Northern's interest is in the proceeds from milk sales and not the cow. The Appellants fail to distinguish between the res (*i.e.*, the lease) and the "rents, issues, revenues and profits" generated from developing the res.

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[6] Northern required that Golden Eye also subject its other leases within the unit to the Participation Agreement. Otherwise, Northern would have risked all of its capital on leases which are subject to a title challenge. Those leases do not restrict transferability, so there is no question that Northern has earned an assignment *as to those leases*.

[63] Golden Eye remains the "owner" of the Appellants' leases. *See* N.D.C.C. § 38-08-02(10); (Appellant's App. 135.). Golden Eye continues to hold the exclusive right under Appellants' leases to enter the premises, engage in exploration activity, propose or drill wells, pool the interests, and influence operational decisions. Northern does not own these rights, nor does it have any corresponding obligations. Simply put, Golden Eye has not permitted a stranger to stand in its shoes without the Appellants' consent, which is the very purpose of the consent to assignment provision.

[64] The Participation Agreement is similar to the situation in *MarWin Devel. Co. v. Wilson*. 104 N.W.2d 369 (N.D. 1960). In *Mar Win*, the conditions for delivery of an oil and gas lease assignment held in escrow had not occurred, so there was no assignment (and therefore no lien could attach to the working interest). *Id.* at 373. Here, the conditions for delivery of an assignment have not occurred as to the Ganske Family Leases, so there has been no assignment (and therefore no breach of ¶ 17 of Appellants' leases).

[65] Case law in other jurisdictions also supports Golden Eye's position. For example, in *Higgins v. Exeter Oil Co.*, the California Court of Appeals held that a similar arrangement did not breach a consent to assignment provision in an oil and gas lease. 115 P.2d 13, 14-15 (Cal. App. 1941). Indeed, in that case, the purported assignee held many more rights than Northern (*e.g.*, the ability to enter the premises to drill a well). *See id.* at 14. The court nevertheless held that the

agreement was nothing more than a "business arrangement between a contractor and an owner . . ." *Id.* at 15.

[66] Another case directly supporting Golden Eye's position is *Campanella Corp. v. Lyndon Realty Trust*, 611 F. Supp. 864 (D. Mass. 1985). There, the court held that a similar arrangement was not a *de facto* assignment in violation of the consent to assignment provision in the underlying commercial leases. *Id*. at 866-67. As in *Higgins*, the alleged assignee in *Campanella* enjoyed greater rights than Northern because it received the entire economic benefit of the leases (unlike Northern's 58.32% in one unit), and it held a degree of control over the lessee's business operations (Northern has no control). *Id.* at 866. In holding that there was no assignment, the *Campanella* court concluded, "Although [the lessee] agreed to transfer its proceeds from the operation of the plants to Simeone, its rights as against [lessors] remain unchanged; how [the lessee] chose to dispose of its proceeds is not relevant to its right to earn them under the leases." *Id.* at 867. This Court should affirm the district court's ruling and hold that Golden Eye did not breach the consent to assignment provision in the Appellants' leases.

D. The Appellants Breached Their Leases by Repudiation

[67] Golden Eye also asserted breach of contract and covenant of quiet enjoyment claims before the district court. The lower court dismissed these claims, ruling that they were precluded by the election of remedies doctrine. It held that Golden Eye could not bring them because the court had quieted title to

the leases in its name. For the reasons discussed below, the district court erred and this Court should reverse and remand to allow Golden Eye to pursue these claims.

[68] In order to prove a claim for breach of contract, a plaintiff must show the existence of a contract, a breach, and damages resulting from the breach. *Gordon v. Kindred Pub. School Dist.*, 2011 ND 121, ¶ 13, 798 N.W. 2d 664. In order to prove a claim of breach of the covenant of quiet enjoyment, a plaintiff must prove the existence of a lease, interference by the lessor in the lessee's possession and/or enjoyment of the lease, and damages resulting from such interference. N.D.C.C. § 47-16-08; *Smith v. Nortz Lumber Co.,* 72 N.D. 353, 355-56, 7 N.W. 2d 435, 436-37 (1943).

[69] When the district court quieted title to the Appellants' leases in Golden Eye's name, it upheld the validity and enforceability of the leases. This established the first necessary element of Golden Eye's breach of contract and quiet enjoyment claims.

[70] When the Appellants sent their May 25, 2010 memorandum and subsequent Notice of Rescission to Golden Eye, they unequivocally told Golden Eye that they were not going to honor their leases. This communication was a repudiation of their leases as a matter of law, and North Dakota recognizes that the repudiation of a contract is a breach. *Langer v. Bartholomay,* 2008 ND 40, ¶¶ 8, 25, 745 N.W.2d 649 (holding lessor liable for lessee's lost profits due to breach by repudiation in the form of an improper notice of cancellation); *see also* Black's Law Dictionary (9th ed. 2009).

[71] Further, this communication interfered with Golden Eye's enjoyment of its leasehold. Specifically, the Appellants' repudiation interfered with Golden Eye's ability to participate in wells proposed by other working interest owners in the spacing units where the leases are located. (Appellee's App. 163, 168.) By repudiating the leases and claiming they are void *ab initio*, Appellants knowingly rendered Golden Eye's title valueless for lending purposes. (*See* id. at 168.) Golden Eye's inability to borrow against the leases forced Golden Eye into going nonconsent (as to the Defendants leases) in two wells. (*Id.* at 163.)

[72] Golden Eye's inability to participate in these wells has, needless to say, caused Golden Eye damages. (*Id.* at 162-63.) The Appellants essentially "changed the locks" to the leasehold. Golden Eye should be entitled to recover the damages recoverable at law due to the Appellants' breach of their leases and the covenant of quiet enjoyment.

[73] Ordinarily, Golden Eye could contend that the Appellants' repudiation results in a suspension of the leases until the repudiation is withdrawn or determined. *Ridge Oil*, 148 S.W.3d at 157; *NRG Exploration, Inc. v. Rauch*, 671 S.W.2d 649, 652 (Tex. App. 1984). This avenue is not available to Golden Eye, however, since third parties within the spacing units have continuously proposed and drilled wells. These third parties are strangers to this dispute and have no obligation to cease development. Indeed, any such cessation would risk loss of their own investment (*i.e.*, lease expiration). As such, Golden Eye has been forced

into determining whether it should participate in wells proposed by third parties despite the Appellants' challenge to its title.

[74] In two instances, Golden Eye was forced into going non-consent due to its inability to obtain financing. (Appellee's App. 163.) Damages are the only relief that will compensate Golden Eye for its losses, and are appropriate under the current circumstances where suspension of performance is unavailable. *Langer*, 745 N.W.2d at 659; *Mobil Oil Expl. & Prod. Southeast, Inc. v. U.S.*, 530 U.S. 604, 608 (U.S. 2000); *Nycal Offshore Devel. Corp. v. U.S.*, 106 Fed. Cl. 222, 229 (Fed. Cl. 2012); *Campanella*, 611 F. Supp. at 866.

[75] The Appellants will undoubtedly argue that they should not be "punished" for trying to exercise their legal rights. This Court should reject this argument for at least two reasons. First, an award of compensatory damages to Golden Eye for a breach of contract is not punishment. Second, any rule that grants Appellants immunity for their breach of contract would improperly shift the loss caused by the breach onto the non-breaching party. The Appellants are fully aware that their breach has effectively deprived Golden Eye of its beneficial use of the interest they granted to Golden Eye. Golden Eye's economic losses should fall on the Appellants as the breaching parties.

[76] Finally, this Court should reverse the trial court's ruling that Golden Eye's claims are precluded by the election of remedies doctrine. Fundamentally, the remedies of quiet title and contract damages are completely consistent and awarding both does not permit a double recovery. One remedy validates the

contract and holds it enforceable, while the other seeks to enforce the contract by holding the breaching party liable for damages. In no way did the district court's judgment quieting title compensate Golden Eye for the damages it sustained from the breach. Indeed, Golden Eye could have simply brought a breach of contract action (without a quiet title claim) and the title dispute would have to be determined first in any event.

[77] As indicated above, the purpose of the election of remedies doctrine is to prevent double recovery. *Advanced Irrigation, Inc. v. First Nat'l Bank of Fargo*, 366 N.W.2d 783, 785 (N.D. 1985). For example, if a seller of real estate breaches the contract to sell, the plaintiff-purchaser cannot obtain both specific performance (conveyance of the property) and money damages for the appreciation in value of the property. The plaintiff has already been compensated for the appreciation in value through the specific performance remedy. The remedies are duplicative and, therefore, inconsistent. The purchaser gets one or the other.

[78] Here, inconsistency of remedies element is completely absent. *See Grand Forks Prof'l Baseball, Inc. v. N.D. Workers Comp. Bureau*, 2002 ND 204, ¶¶ 15-16, 654 N.W.2d 426. It is completely consistent for Golden Eye to quiet title to the leases where there is a title dispute – thereby adjudicating them enforceable or "breachable" – and then continue to stand on the leases to recoup the damages sustained from the Appellants' breach. This Court should reverse the

district court's order dismissing Golden Eye's claims for breach of contract and quiet enjoyment, and should remand back to that court for a trial on those claims.

E. There Is No Jury Trial Right in the Present Case

[79] The district court initially ruled on Golden Eye's Motion to Bifurcate Trial that the Appellants are not entitled a jury trial on the quiet title portion of the case. Pursuant to a Motion for Reconsideration, however, the court later ruled to the contrary. The district court erred in reversing its prior decision.[7]

[80] In *Kopperud v. Reilly*, the North Dakota Supreme Court said, "We have long recognized that rescission of a contract, *whether the object of a suit in equity or an action at law*, is governed by equitable principles. Absent express constitutional provisions, there is no right to a jury trial in suits of equity." 453 N.W.2d 598, 601 (N.D. 1990) (emphasis added) (citations and internal quotations omitted). The Appellants have never addressed the plain holding in *Kopperud* that a jury trial is simply not available in a rescission action, regardless of the label ascribed to it.

[81] *First Nat'l Bank & Trust Co. of Williston v. Brakken* confirms that the labels do not control. 468 N.W.2d 633 (N.D. 1991). In that case, Dorothy Brakken defaulted on a note to a bank and the bank brought a foreclosure action. *Id.* at 635. Ms. Brakken "counterclaimed," arguing that the note and mortgage did not exist due to failure of consideration and fraud in the inducement. *Id.* at 636.

[7] This issue is moot if this Court affirms the trial court's decision on the issue of fraud in the inducement.

In holding that Ms. Brakken was not entitled to a jury trial, the Court first noted the equitable nature of the foreclosure action first brought by the bank. *Id.* at 635. It then said that "a party who raises legal defenses denominated as a counterclaim in an equitable action is not entitled to have a jury on those defenses." *Id.* Further, there is no right to a jury trial even as to legal *counterclaims* where the principal relief sought in the case is equitable in nature. *Id.* at 635-36; *Kopperud*, 453 N.W.2d at 601. The *Brakken* Court concluded,

> [Ms. Brakken's] allegations are affirmative defenses ... We do not believe that they present independent causes of action .... Under these circumstances, we conclude that the trial court did not err in treating Dorothy's counterclaims as defenses and denying her a jury trial on those defenses.

Brakken, 468 N.W. 2d at 636.

[82] *Brakken* yields the exact same result in this case. Golden Eye initiated the quiet title action in equity. *Tormaschy v. Tormaschy*, 1997 ND 2, ¶ 15, 559 N.W.2d 813. The Appellants' pled the affirmative defense of fraud in the inducement, and requested the Court to rule that the leases are void. The Appellants' defense cannot alter the equitable nature of the case. *Even if* this defense could be characterized as a "counterclaim," however, and *even if* the claim is legal in nature, *Brakken* holds that there is no jury trial right.

[83] In addition, the Appellants did not effect a rescission at law. Because Golden Eye did not accept their asserted rescission, the Appellants need the aid of a court sitting in equity to adjudicate their claimed right of rescission. Had Golden

Eye accepted the Appellants' rescission, on the other hand, the action would have been legal in character (*i.e.*, return of consideration).

[84] In *Omlid v. Sweeney* the Court discussed this distinction. 484 N.W.2d 486 (N.D. 1992). There, the Court said that rescission at law is based on quasi contract, *i.e.*, a promise implied at law to return the consideration paid. *Id.* at 490 n.3. It further stated that where the rescission is ineffectual, there can be no implied contract upon which to bring an action at law, so the rescinding party must obtain a decree in equity. *See id.*

[85] Applying *Omlid* here, there can be no implied contract for the parties to return their consideration because Golden Eye adamantly disputed the Appellants' alleged right to rescind. There being no implied contract, the Appellants' attempted rescission was ineffectual, so they need the aid of a court sitting in equity to adjudicate their right. Golden Eye respectfully requests that this Court reverse the trial court's order on reconsideration and remand for a bench trial *only if* the trial court's first summary judgment order is reversed.

IV. CONCLUSION

[86] Golden Eye respectfully requests that the Court affirm the trial court's first summary judgment order. Golden Eye further requests that the Court affirm the trial court's second summary judgment order, except its ruling depriving Golden Eye its ability to recover damages. The Court should remand back to the district court for a trial on the damages claims. Finally, Golden Eye requests that

the Court confirm that Golden Eye's quiet title claim and Appellants' fraud in the inducement defense are to be tried before the bench, in the event the Court reverses the district court's first summary judgment order.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Golden Eye Resources, LLC, Appellee, vs. Debra K. Ganske, Wesley G. Borgen, Gay M. King, Michael r. Borgen, Sue E. Evans, and Linda R. McCoy, Appellants.	)	Supreme Court Case No. 20130219 District Court Case No. 53-2010-CV-00536

CERTIFICATE OF SERVICE FOR APPELLEE'S ANSWER BRIEF AND APPELLE'S APPENDIX

APPEAL FROM THE DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
WILLIAMS COUNTY, NORTH DAKOTA
THE HONORABLE DAVID W. NELSON

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I HEREBY CERTIFY that on the 7th day of January, 2014, the following Word version of the Appellee's Answer Brief was filed electronically by e-mail with the Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov and were also served electronically by e-mail upon the following:

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Golden Eye Resources, LLC, Appellee, vs. Debra K. Ganske, Wesley G. Borgen, Gay M. King, Michael r. Borgen, Sue E. Evans, and Linda R. McCoy, Appellants.	)	Supreme Court Case No. 20130219 District Court Case No. 53-2010-CV-00536

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I HEREBY CERTIFY that on the 2nd day of January, 2014, the following document(s):

1. Appellee's Answer Brief; and

2. Appellee's Appendix

were filed electronically by e-mail with the Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov and were also served electronically by e-mail and by Federal Express upon the following:

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Golden Eye Resources, LLC, Plaintiff, Appellee and Cross-Appellant vs. Debra K. Ganske, Wesley G. Borgen, Gay M. King, Michael R. Borgen, Sue E. Evans, and Linda R. McCoy, Defendants, Debra K. Ganske, Wesley G. Borgen, Michael R. Borgen, Sue E. Evans, and Linda R. McCoy, Appellants and Cross-Appellees.	Supreme Court Case No. 20130219 District Court Case No. 53-2010-CV-00536

APPELLEE'S CERTIFICATE OF MAIL FOR REVISED COVER PAGE WITH RESPONSE BRIEF

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WILLIAMS COUNTY, NORTH DAKOTA
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1. Revised Cover Page for the Appellee's Response with Brief

was filed electronically by e-mail with the Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov and was also served electronically by e-mail on January 9, 2014 upon the following:

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