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JULY 23, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Lawrence A. Hamilton, Philip B. Hamilton and Judy H. Casper, Plaintiffs/Appellees, v. Larry G. Woll, Cynthia J. Woll, Tracy J. Holiday, Robert V. Holiday, Philip Knolyn Gatcg II, Jacki DeMay, R. Craig Woll, Dorothy Jean Griswold, Russell Rapp, Jeffery R. Carius, Michael Carius, Mark S. Rapp, Tandals Farm Inc., James H. Bragg, Julie K. McKinley, J. Michael Gleason DBA Gleason Land Co., Strata Minerals, Inc., Frances A. Hannifin, Alan R. Hannifin, Desert Partners II L.P., Value Petroleum Inc., J. Kyle Jones, Margaret J. Hannifin, Fall River Resources, Chatfield Company, Walter E. Opper, Emma Smart, John M. Schattyn, Lloyd S. Schattyn, Noel L. Schattyn Soren, Avalon North LLC, Dakota West Energy LLC, Ronald Rowland, Lee LaBarre, Terry Aronson, Burlington Resources Oil & Gas Company LP; Peyton Woll, Jr.,Trust dated June 8,1993, Peyton H. Woll, Trustee, Dana G. Woll, Successor Trustee; John H. Woll and Dorothea E. Woll, Trustees of the John & Dorothea Woll Trust Agreement dated 1-31-90; Helen F. Rapp, Trustee of the Helen F. Rapp Declaration of Trust dated 8-17-2004; Alvin C. Schopp, Trustee; and all other persons unknown claiming any estate or interest in or lien or encumbrance upon the property described in the Complaint, Defendants/Appellants.	Supreme Court No. 20140011 Bowman County No. 06-10-C-00043 APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ENTERED NOVEMBER 12, 2013, AND JUDGMENT ENTERED NOVEMBER 18, 2013, IN BOWMAN COUNTY DISTRICT COURT, SOUTHWEST JUDICIAL DISTRICT THE HON. DANN E. GREENWOOD, PRESIDING

BRIEF OF APPELLEES

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LAW AND ARGUMENT

THE COURT CORRECTLY CONSTRUED THE MINERAL INTEREST CONVEYED BY HAMILTON AS A ROYALTY INTEREST.

¶1 Plaintiffs ("Hamiltons"), the descendants of Finlay L. Hamilton, brought this suit seeking declaratory judgment construing certain deeds from the late Finlay L. Hamilton to convey only a royalty interest and quieting title to the remaining royalty and mineral interest underlying the property described in the deeds. N.D.C.C. § 32-23-02 gives the Court the power to construe deeds and declare the rights, status and legal effect of the deeds given by Finlay L. Hamilton.

¶2 The issue in this case centers on the construction of the Finlay L. Hamilton deeds. Hamiltons contend that the deeds convey only a royalty interest and not mineral acres. The trial court agreed with Hamiltons' position. Judge Greenwood is the third District Court Judge to reach this same conclusion.

¶3 Judge Donald Jorgensen first determined that these deeds conveyed royalty interest and were not mineral deeds. In *Williams Company v. Hamilton*, 427 N.W.2d 822 (N.D.1988), the Williams Company sued Hamiltons seeking to recover lease bonus payments. In that case, like the one before this Court, Finlay Hamilton used mineral deeds to convey to various parties royalty interests. The language and deeds used by Hamilton in those deeds is identical to the deeds before this Court with the exception of the grantees and the legal description. The trial court granted summary judgment in favor of the Hamiltons, construing the deeds to convey a royalty interest only and directed the Williams Company to account for the production from the property. Williams Company appealed, which appeal was

dismissed, this Court holding that Williams Company "has appealed from a judgment that only partially disposes of an action in which 'more than one claim for relief is presented.' Rule 54(b), N.D.R.Civ.P." *Anderson v. State*, 344 N.W.2d 489 (N.D.1984). Because Rule 54(b), N.D.R.Civ.P., has not been complied with, "[t]he partial disposition embodied in the judgment appealed from therefore is not ripe for review (*Id.*, at 490), and we dismiss the appeal."

¶4 The Court also noted that the Williams Company failed to join indispensable parties, specifically the grantees of the deeds, suggesting they may have evidence which would aid in explaining the "ambiguous intent" of the deeds. Williams Company did not further pursue recovery of the lease bonus and no further proceedings were had at that time to construe or interpret the deeds.

¶5 In the present case, prior to the first appeal to the North Dakota Supreme Court, Judge Weir stated as follows: "I have reviewed *Williams*. I find that the contested instruments in the present case are ambiguous for the same reason the Supreme Court in *Williams* found them to be ambiguous. This Court does not agree that the Supreme Court's clearly articulated opinion that the insertion of the 'royalty' language was ambiguous, is nothing more than dicta. In denying the petition on rehearing, Justice VandeWalle said the petition was directly contrary to the Court's holding that summary judgment was improper because the deeds were ambiguous. In addition, the fact that Finlay affirmatively added the word 'royalty' in the granting clause of an instrument captioned 'mineral deed' created the ambiguity."

¶6 Later in the opinion, Judge Weir writes, "There are rules of construction adopted by the Legislature and Supreme Court cases interpreting those statutes which provide some

guidance. Under N.D.C.C. §9-07-16, when a contract is partly written and partly printed, the written parts control the preprinted parts. Finlay typed the word 'royalty' into a preprinted warranty deed form. He received his mineral acres from Clark using the same type of deed. He affirmatively inserted the 'royalty' language in Exhibits 2-16 using the warranty deed format. He then deeded out the 10 mineral acres in April 1956 using the warranty deed form.

"It is inexplicable why Finlay would have typed in 'royalty' in the granting clause of the disputed deeds if he did not intend to grant only a royalty interest. It is undisputed that Finlay was in the business of buying and selling oil properties. Individuals purchasing and selling interests in this type of property know (or should know) what was being transferred. While there is some merit on the argument that contractual ambiguities should be construed against the originator of the ambiguity, in this case the only extrinsic evidence is Finlay's experience (and the fact that Finlay's grantees in subsequent deeds transferred mineral acres). But the grantees from Finlay only got royalty interests and could not transfer what they did not receive. The Court is also persuaded by the fact that after issuing the disputed deeds conveying a royalty interest, Finlay, within a month's time, using the same deed form, conveyed out 10 mineral acres without inserting the word 'royalty' in the granting clause. It is difficult for the Court to find that an experienced oil broker would have mistakenly, 15 times in a row, conveyed royalty interests and then discovered he was transferring interests he didn't intend to transfer. Finlay began transferring interests he designated 'royalty' in March of 1953 and continued to February 1956, a period of almost three years. If, shortly after he received his mineral acres, he had used royalty language in one or two deeds and then reverted to using mineral acres, the question, factually, or what he intended, may be a

closer question."

¶7 Appellants assert as a fact that Finlay drafted the deeds. That is not established in the evidence submitted. The Stipulation of Facts establishes only that Finlay executed the deeds. Appendix at 88.

¶8 Still later Judge Weir, agreeing with Judge Jorgensen, says, "The decision of the court is that Exhibits 2-16 executed by Finlay Hamilton to the various grantees conveyed to each grantee a royalty interest in the fractional amount set forth in the granting clause of each exhibit." He was thus the second District Court Judge to rule that the deeds conveyed royalty only.

¶9 On the first appeal of the present case, this Court found the deeds to be ambiguous and suggested that extrinsic evidence may help in construing the deeds. The deeds being ambiguous, applicable rules of construction are to be resorted to determine what Finlay Hamilton conveyed away. In this case, however, very little such evidence exists.

¶10 North Dakota, like all other jurisdictions, recognizes that a "royalty" interest is separate and distinct from a full mineral interest. The Court in *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (N.D. 1991), discussed the difference between a royalty interest and a full mineral interest or mineral acre and held:

> A mineral acre is the full mineral interest in one acre of land. 8 Williams & Meyers, Manual of Terms, p. 561 (1987). A mineral interest is a property interest created after an oil and gas severance from the surface and generally includes the right to sell all or part of the estate, the right to explore and develop the estate, the right to execute oil and gas leases, and the right to create fractional shares of the mineral estate. 1 Williams & Meyers, supra, at Sec. 301; 8 Williams & Meyers, supra, at p. 562. Mineral rights generally include those same basic interests. 8 Williams & Meyers, supra, at p. 563. A royalty interest is a smaller interest in a mineral estate which is a share of the

> product or proceeds reserved to the owner for permitting another to develop or use the property. 1 Williams & Meyers, supra, at Sec. 301; 8 Williams & Meyers, supra, at p. 564. Mineral and royalty interests are separate property interests with different characteristics. *Texaro Oil Co. v. Mosser*, 299 N.W.2d 191 (N.D.1980). Although royalty interests are part of the full spectrum of a mineral estate, the interest in minerals in place and the interest in royalty based on the production of those minerals are separate and distinct estates. *Selman v. Bristow*, 402 S.W.2d 520 (Tex.Civ.App.1966).

¶11 It is undisputed that Finlay acquired 80 mineral acres under the subject lands. It is further undisputed that he conveyed away 10 mineral acres by mineral deeds. It is the remaining deeds using the fractional interest of a royalty interest that were deemed to be ambiguous, requiring construction.

¶12 The deeds requiring construction and interpretation are all preprinted forms entitled "Mineral Deed." In each of the deeds Finlay conveyed a fractional "royalty" interest in the oil and gas and other minerals. The fractional interest conveyed varied from deed to deed, some conveying 1/320ths royalty and others a 5/320, a 2/320ths or 10/320ths fractional royalty. The fractional interest and the term "royalty" were added to the preprinted form deed by typing in the granting clause the fractional interest of royalty to be conveyed . It is this language resulted in a conveyance of a royalty interest and not mineral acres.

¶13 Oil and gas royalty is an interest in real property. *GeoStar Corp. v. Parkway Petroleum, Inc.*, 495 N.W.2d 61, 67 (N.D.1993). Thus, the rules for the construction of such grants are the same ones applicable to the construction of a written contract. *Johnson v. Mineral Estate, Inc.*, 343 N.W.2d 778(N.D. 1984); N.D.C.C. § 47-09-11:

> 47-09-11. Interpretation of grants.
>
> Grants shall be interpreted in like manner with contracts in general except so far as is otherwise provided by this chapter. If the operative words of a grant

are doubtful, recourse may be had to its recitals to assist the construction, and if several parts of a grant are absolutely irreconcilable, the former part shall prevail. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.

¶14 The Court in *Carkuff v. Balmer*, 2011 ND 60, ¶ 8, 795 N.W.2d 303, stated:

> In construing a deed, the primary purpose is "to ascertain and effectuate the grantor's intent, and deeds are construed in the same manner as contracts." *State Bank & Trust of Kenmare v. Brekke*, 1999 ND 212, ¶ 12, 602 N.W.2d 681; *see Williams Co. v. Hamilton*, 427 N.W.2d 822, 823 (N.D.1988). If a deed is unambiguous, this Court determines the parties' intent from the instrument itself. *See Brekke*, at ¶ 12; *Stracka v. Peterson*, 377 N.W.2d 580, 582 (N.D.1985). In other words, "[t]he language of the deed, if clear and explicit, governs its interpretation; the parties' mutual intentions must be ascertained from the four corners of the deed, if possible." *North Shore, Inc. v. Wakefield*, 530 N.W.2d 297, 300 (N.D. 1995); *see* N.D.C.C. §§ 9-07-02, 9-07-03, 9-07-04, 47-09-11. Whether or not a contract is ambiguous is a question of law. *Brekke*, at ¶ 12.

¶15 *See also Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.*, 2011 ND 95,¶ 7, 797 N.W.2d 770, where the Court held:

> Grants of interests in real property are "interpreted in like manner with contracts in general . . ." N.D.C.C. § 47-09-11; *Valley Honey Co., LLC v. Graves*, 2003 ND 125, ¶ 12, 666 N.W.2d 453; *Schulz v. Hauck*, 312 N.W.2d 360, 363 (N.D. 1981); *see also Mougey Farms v. Kaspari*, 1998 ND 118, ¶¶ 18-20, 579 N.W.2d 583. In *Kuperus v. Willson*, 2006 ND 12, ¶ 11, 709 N.W.2d 726, we explained:
>
> > Contracts are construed to give effect to the mutual intention of the parties at the time of contracting. The parties' intention must be ascertained from the writing alone if possible. A contract must be construed as a whole to give effect to each provision, if reasonably practicable. We construe contracts to be definite and capable of being carried into effect, unless doing so violates the intention of the parties. Unless used by the parties in a technical sense, words in a contract are construed in their ordinary and popular sense, rather than according to their strict legal meaning.

> If a written contract is unambiguous, extrinsic evidence is not admissible to contradict the written language. However, if a written contract is ambiguous, extrinsic evidence may be considered to show the parties' intent. Whether or not a contract is ambiguous is a question of law. An ambiguity exists when rational arguments can be made in support of contrary positions as to the meaning of the language in question.
>
> (quoting *Lire, Inc. v. Bob's Pizza Inn Rests., Inc.*, 541 N.W.2d 432, 433-34 (N.D. 1995) (citations omitted).

¶16 As noted above, the Hamilton deeds have been found to be ambiguous and thus extrinsic evidence may be considered. Due to the passage of time and the impossibility of obtaining testimony from the parties to the deed, extrinsic evidence is minimal. The trial court considered the fact that Finlay Hamilton was a professional investor in oil and gas properties, and that he invested in properties in Texas and North Dakota. Transcript page 16, lines 22 - 25; page 22, lines 8 - 10; page 76, lines 20 - 21. He knew the difference between conveying mineral acres and royalty interests. Transcript page 77, lines 2 - 8.

¶17 Exhibits 20, 21, and 22 are examples of deeds used by Finlay Hamilton to acquire mineral rights and royalty interests. Appendix at 99 - 101. These deeds predate the deeds in dispute. The deeds in dispute follow the format of Exhibit 20. Appendix page 99. These deeds are evidence of Finlay's intent to convey royalty interest. The deed by which he acquired 80 mineral acres in January of 1953 was clearly a conveyance of mineral acres. In April of 1953 he began his conveyances in which he made specific mention of "royalty", unlike the deed he received from C.F. Clark. The last two deeds he gave in 1956 did not mention "royalty", and were therefore conveyances of fractional mineral acres. He knew the difference between royalty and mineral acres. He inserted the word "royalty" in his deeds for

a purpose and with the intent to convey royalty. Hamilton's experience and profession were appropriately considered by the trial court in construing the deeds.

¶18 Finlay Hamilton also crossed out the warranty language in each of the deeds. This is further evidence of some knowledge about oil and gas matters. The absence of a warranty clause would eliminate the effect of the mineral deed language in the preprinted form as long as the deed is construed as conveying royalty. The exception is Exhibit 18, where the word "royalty" is not inserted. This is further evidence that the intent on the remaining deeds was to convey only royalty interest.

¶19 In the case of *Arkansas Val. Royalty Co. v. Arkansas-Oklahoma Gas Co.*, 222 Ark. 213, 258 S.W.2d 51 (Ark. 1953), the court construed a deed deemed to be ambiguous as it was unclear if a royalty interest or mineral acres were being conveyed. The court relied in part in construing the deed on the drafter's years of experience in the oil business and held:

> And a practical oil man of many years experience in the oil business, serving as president of a royalty company, is presumed to know and fully understand the difference between these separate estates.

¶20 Because of the similarity of facts of the Arkansas case involving the use of a mineral deed to convey royalty, the Arkansas case is especially relevant to the case before this Court. Despite the fact that the deed conveyed what appeared to be full mineral interests and granted easements for exploration and development in one part and also referred to the grant of royalty in another part of the deed, the Arkansas court nevertheless found a conveyance of royalty. *Arkansas Valley Royalty Co., supra.*

¶21 Another case finding a royalty conveyance despite opposite-tending mineral terminology is *Atlantic Refining Co. v. Beach*, 78 N.M. 634, 637; 436 P.2d 107 (N.M. 1968).

This case required construction of a conveyance by a document denominated "Mineral Deed" as to whether it conveyed a 1/16 of the minerals in place, or 1/2 of the usual 1/8 royalty. The New Mexico court reviewed in detail the relevance of the title of the deed, and the deed's mineral terminology. The court determined that because it was the intent to convey royalty, the deed must be construed to convey royalty only:

> Canons and rules of construction are but aids in determining the intention of the instrument and all rules of construction must yield to the expressed intention of the parties. *Davis v. Hardman*, 148 W.Va. 82, 133 S.E.2d 77. In this case, the parties offered no testimony in support of any claimed construction of the language of the instrument. We must, accordingly, interpret the intention from the language of the instrument itself. Under such circumstances, we are committed to the rule that the intention of the parties 'as gathered from the four corners of the deed is the polestar of construction and that all parts of the deed must be examined together for the purpose of ascertaining the intention.' *Sharpe v. Smith*, 68 N.M. 253, 360 P.2d 917; *Price v. Johnson, supra*. Applying these rules, we agree with the appellees that the deed granted a royalty interest.

¶22 At page 638 the court went on to state:

> The weight of the decided cases construe instruments describing the intention to grant or reserve a royalty interest, to convey or reserve that interest only despite the presence of 'opposite tending mineral terminology.' 1 Williams & Meyers, Oil & Gas Law, § 304.8 and § 304.10. *See also Arkansas Valley Royalty Co. v. Arkansas-Oklahoma Gas Co., supra*; *Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699; *Armstrong v. Bell*, 199 Miss. 29, 24 So.2d 10.

¶23 The fact that Finlay inserted in the deeds the word "royalty" compels a finding that the deeds conveyed royalty only. The typed in word "royalty" cannot be ignored and supersedes the preprinted language. Each word or provision in a contract must be given effect if reasonably possible. *Lire, Inc. v. Bob's Pizza Inn Rests., Inc.*, 541 N.W.2d 432, 433-34 (N.D.1995). Under N.D.C.C. § 9-07-16, when a contract is partly written and partly

preprinted, the written parts control the preprinted parts. *See Thiel Indus., Inc. v. Western Fire Ins. Co.*, 289 N.W.2d 786, 788 (N.D.1980); *Olson v. Peterson*, 288 N.W.2d 294, 298 (N.D.1980). The handwritten insertions in an agreement control and must be construed to have meaning. *Estate of Dionne*, 2009 ND 172, 772 N.W.2d 891, 896.

¶24 Attorney Rowland argues that the law in Oklahoma once had a broader meaning for the word "royalty." That was never the case in North Dakota. The evidence at trial is that Finlay Hamilton did not buy and sell minerals in Oklahoma. Transcript page 22, line 10; page 79, line 21 - 23. He was not aware of the law in Oklahoma. Transcript at page 79, lines 10 - 15.

¶25 Rowland's argument is that the language stating the interest conveyed as a royalty actually means that a mineral interest was conveyed. This is premised upon cases from Oklahoma, West Virginia, and Colorado dating from the middle of the 20th Century or earlier. There is no evidence Finlay Hamilton was aware of these minority cases. These decisions have no support in North Dakota law. Nothing in this State has ever indicated that a mineral interest and a royalty interest are one and the same. Rowland is searching for an explanation which does not exist in North Dakota law. Such an interpretation exists entirely in conjecture and is not evidence that the District Court made a mistake.

¶26 There simply is no way in North Dakota to construe the word "royalty" to convey a mineral acre.

¶27 Admittedly, it is unusual to convey royalty by describing it as a fractional interest. However, that is the way Hamilton received royalty. See Exhibit 20, Appendix Page 99. A total of the fractional interest conveyed by Finlay is 37/320 in a portion of the land with a

conveyance of 1/160ths in the NW1/4 29-131-105. The fraction 37/320 is equal to 0.115625. Leases in the 1950's generally provided for a 1/8th royalty or 0.125 for the mineral owner. Converting the fractional interest to percentage reveals Finlay conveyed a little over 0.1218 royalty in the NW1/4 of 29 and 0.1156 royalty in all of the remaining acreage. It appears that he was careful not to convey over 0.125 percent, confirming an intent to convey royalty. This would leave Finlay owning some royalty in the conveyed interest as well as 70 mineral acres.

¶28 It is also important to keep in mind division orders, utilized by oil companies in determining the amount of royalty to be paid out of production, also use percentage interests and not fractional interests. Had Finlay used a percentage interest in describing the royalty conveyed, his intended conveyance would have been clearer. If the deeds described the interest to be conveyed on a percentage and did not mention royalty, the language would appear somewhat as follows: .00625 interest in the oil gas and other minerals. Mineral acre conveyances almost never use percentage interest. A conversion of the factional interest in Finlay's deeds to a percentage interest further supports the contention that the interest conveyed is royalty and is consistent with a construction of the deeds to convey royalty only.

¶29 Attorney Rowland acquired his interest in the minerals from what were described as elderly persons and widows for a total sum of approximately $2,000. Transcript page 89, lines 16 - 19; page 110, lines 13 - 15; and page 111, lines 3 - 25. He became aware of the minerals by reviewing a Notice of Claim of Abandoned Minerals in the Bowman County paper. He paid as little as $50 per acre for the minerals and all of the leases are 1/8th royalty leases, which is unconscionable. Appendix at page 111, lines 13 - 16. These were extremely

one-sided transactions, with a skilled attorney-landman taking advantage of elderly, unsophisticated mineral owners.

¶30 Rowland was aware of the word "royalty" in the Hamilton deeds, and although he is an experienced landman and an attorney, wrongfully interpreted the deeds based upon Colorado Law, not North Dakota Law. Appendix at page 86, lines 1 - 8; page 115, lines 6 - 25. He stated that he knew he was taking a risk. Appendix at page 115, lines 23 - 24; page 116, lines 5 - 7; and page 118, lines 18 - 22. Since he was aware of the risk, he is not prejudiced and was not acting in good faith. He is simply trying to parlay a $2,000 investment into a million dollar payoff (estimated 15,000 barrels in suspense, Appendix at page 106, line 18) at the expense of widows, the elderly, and the Hamilton family.

¶31 Rowland has expended money to participate in the development and production activities on the land, but he has also received income. He was aware of the risk. The decision determining the deeds in question to be royalty conveyances still results in Rowland continuing to receive royalty payments for the royalty interests that he purchased.

¶32 Rowland argues that the subsequent signing of oil and gas leases by some of the Finlay grantees is evidence of the intent when the deeds were executed. That cannot be assumed. Oil companies often approach mineral owners and offer to lease their minerals even though the mineral owner does not think they own any minerals. Some of these are protective leases. Rarely will a mineral owner refuse to accept the offered bonus, although if knowledgeable, they may strike the warranty provision from the lease. This is not evidence that the grantees thought they were acquiring more than a royalty interest.

¶33 One more point that needs to be made is if Rowland wanted the matter to be resolved sooner, he could have brought his own declaratory judgment action. The delay was just as much his fault as it was the Plaintiffs'.

¶34 The facts are compelling that Finlay conveyed only a royalty interest. The fact that Finlay inserted in deeds (Exhibits 2-16) the word "royalty" compels a finding that the deeds conveyed royalty only. The typed in "royalty" cannot be ignored and supersedes the preprinted language. There is no way under North Dakota law to construe the word "royalty" to convey a mineral acre. To do so would create uncertainty with well-established North Dakota law. The last two deeds by Finlay did not mention "royalty" and were therefore conveyances of fractional mineral acres (Exhibits 17, 18). Finlay was in the business of buying and selling oil interests. He knew the difference between conveying mineral acres and royalty interests. He had previously acquired royalty in a mineral deed with the word "royalty" typed in and had separately acquired royalty and mineral interests. See Exhibit 20, Appendix at page 99. Since he was using a preprinted mineral deed form in all these transactions, he had to have known the difference between what he received and what he transferred.

CONCLUSION

¶35 Rowland's appeal is without merit. There is nothing to support his argument that an error has been made. Finlay Hamilton conveyed a royalty interest and Rowland is loath to accept that. His appeal is without merit and the judgment of the District Court should be affirmed.

Dated this 22 day of July, 2014.

Respectfully submitted,

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IN THE SUPREME COURT
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CERTIFICATE OF SERVICE

I certify that on the 23rd day of July, 2014, the following document:

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