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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Border Resources, LLC, Plaintiff and Appellee, vs. Irish Oil & Gas, Inc., and Twin City Technical, LLC, Defendants and Appellants.	**SUPREME COURT NO. 201402674** Civil No. 45-2012-CV-00223

APPEAL FROM JUDGMENT OF THE DISTRICT COURT

STARK COUNTY DISTRICT COURT, SOUTHWEST
JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
THE HONORABLE DANN GREENWOOD, PRESIDING

BRIEF OF APPELLEE

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[¶1] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶2] Was the District Court's finding that the agency relationship between Border and Irish ended of March 24, 2011, thus terminating Border's fiduciary duty, clearly erroneous?

[¶3] Was the District Court's finding that Irish sold the subject leases at a price of $1,100 per net mineral acre clearly erroneous?

[¶4] Did the District Court abuse its discretion when it denied Irish and Twin City's motion to amend their counterclaim to add individual landmen as counterclaim defendants?

[¶5] STATEMENT OF THE CASE

[¶6] Irish Oil & Gas, Inc. ("Irish") contracted with Border Resources, LLC ("Border), a landman brokerage located in Dickinson, to pay Border 25% of the profit from the sale of oil and gas leases to be acquired by Border for Irish. Irish sold the leases acquired by Border, but told Border the leases had been sold for $825 per net mineral acre rather than their actual price selling price of $1,100. Upon learning the true sale price, Border sued for breach of contract to collect $330,000 in additional compensation. Irish and its partner in the prospect, Twin City Technical, LLC ("Twin City"), denied liability and counterclaimed for alleged breach of fiduciary duty.

[¶7] A bench trial was held in Stark County District Court in February 2014. On April 21, 2014, the district issued a 26-page Memorandum Decision in favor of Border on both its claim and the counterclaim. (App. 1-28) The Memorandum Decision was followed by detailed Findings of Fact, Conclusions of Law and Order for Judgment. (App. 29-38) An

Amended Judgment was subsequently entered in favor of Border and against Irish and Twin City. (S. App. 23) This appeal followed.

[¶8] STATEMENT OF THE FACTS

[¶9] 1. Contract Between Border and Irish

[¶10] This dispute stems from an agreement in which Border acquired mineral leases for Irish within a defined prospect known as "IRS-TP", which was subsequently sold by Irish with 25% of the profit belonging to Border. (Tr. 48, 448; S. App. 1) The profit was represented by the difference in the price of acquisition by Irish, and the value of the subsequent sale by Irish to a third-party. (Tr. 401) The principals who negotiated this agreement were Jeff Skaare, a Registered Professional Landman with Border (Tr. 47), and Tim Furlong, Irish's Chief Executive Officer (Tr. 397). The agreement is represented by a series of e-mails exchanged between Furlong and Skaare in late January 2011, and a map on which Furlong marked the prospect purchase area with a green line. (Tr. 48; S. App. 1-4, 216)

[¶11] The green perimeter drawn by Furlong represented a demarcation line of Border's authority. Border was authorized to acquire leases within the green line without prior approval from Irish, but was required to seek Irish's review and approval for any acquisitions in the area directly outside the green line—an area which became known as the "review area." (Tr. 570-71) Border was encouraged by Irish to seek leases towards the north of the prospect, as these were perceived as more valuable "geologically and from the standpoint of marketability." (Tr. 404) At all times, Irish retained the right to independently acquire leases within both the prospect and the review area. (Tr. 427)

Furthermore, Furlong testified that the agreement did not limit Border's ability to do business with others outside the prospect. (Tr. 426-27)

[¶12] In addition to specifying the geographic parameters, Irish also defined Border's authority to purchase leases as Irish's agent, including the upper limit of the price Irish would pay, the lease term, and royalty percentage within the purchase area delineated by Furlong. (S. App. 1, 2 and 3) Irish advised Border that it desired to acquire between 3,500 and 4,000 net mineral acres in the IRS-TP prospect, with a target closing date of April 15, 2011. (Tr. 402) Border's functions under the agreement were accurately summarized by the district court:

> 12. Under its contract with Irish, Border was to perform three or more distinct functions:
>
> A. Acquire oil and gas leases in Irish's name within the "purchase" area delineated on Furlong's map within the parameters established by Furlong;
>
> B. Submit for Irish's review oil and gas acreage within the "review" area outside the "purchase" area on the Furlong map marked as Exhibit 3; and
>
> C. Complete "due diligence" including title curative work on leases acquired by Border for Irish in the IRS-TP prospect.

(App. 31-32, ¶ 12) At no point did Irish contract with Border's landmen directly for any services. (App. 32, ¶ 14; Tr. 277, 333) All payments for land work on the prospect from Irish and Twin City were made directly to Border. (Ex. 81, Doc. #219; Ex. 91, Doc. #229)

[¶13] **2. Performance and Conclusion of Lease Acquisition by Border for Irish**

[¶14] By early March, Border had acquired 3,697 net mineral acres, and thus had reached the target acreage originally sought by Irish. (Exh. 28, Doc. #166) Irish

indicated its satisfaction with Border's efforts, and encouraged Border to continue acquiring leases. (Tr. 92) Border regularly reported to Irish its progress throughout the this process. (See e.g., Ex. 12, Doc. #150; Ex. 17, Doc. #155; Ex. 18, Doc. #156; Ex. 25, Doc. #163; Ex. 27, Doc. #165; and Ex. 32, Doc. #170)

[¶15] On March 22, 2011, Furlong sent Skaare an e-mail expressing Irish's intention to conclude its agreement with Border. (App. 217) Furlong stated, "Please cut off all negotiations as of Thursday March 24th. I would like to have all the hard schedule of exactly what we have in hand on Friday afternoon March 25th. I think we can close on this by April 15th." (Id.) Skaare immediately forwarded Furlong's e-mail to the other landmen working the prospect. (Tr. 95-96) Understanding they had only two days left to acquire leases for Irish, Border's landmen notified their remaining contacts that any leases would have to be signed by March 24. (Tr. 334-35) On March 25, Border provided Irish with the hard schedule of acquired leases as requested, which reflected Border's acquisition of 4,226.87 net mineral acres. (Exh. 34, Doc. ID 172) Irish ultimately authorized Border to buy more than 4,000 acres.

[¶16] In April 2011, Furlong sent Skaare a series of e-mails aimed at bringing the agreement to its conclusion. One e-mail informed Skaare (and Border) that Irish had committed the acquired IRS-TP mineral acreage to a purchase and sale agreement. (S. App. 10-11) Another asked for Border's estimate on when its due diligence would be complete, so that final documentation could be provided to Irish in order to close the sale. (S. App. 5).

[¶17] At this point, Border understood it was no longer authorized to acquire any mineral leases for the IRS-TP prospect, and Border's remaining role was to aid Irish in

closing. Skaare took Furlong's e-mails indicating that Border was to "cut off all negotiations" as a clear direction that Border was no longer authorized to acquire leases for Irish, and that Irish intended to close on the sale by April 15, 2011. (Tr. 182-83) Border's other landmen shared the same impression, having been told they were no longer to negotiate with landowners, the target acreage had been acquired, and this acreage had been applied to the purchase and sale agreement. (Tr. 336-37) Twin City's principal testified he was aware that Border had been instructed to cease acquiring leases for the prospect. (Tr. 451-52) Furlong admitted he never had any discussion with Skaare or anyone else at Border after March 22 advising Border to resume acquiring leases in the prospect. (Tr. 412-413). Based on the evidence, the District Court found that Border's authority to acquire leases as Irish's agent ended on March 24, 2011, when Irish withdrew Border's authority. (App. 32, ¶ 17) The District Court further found:

> 22. In light of the termination of Border's agency authority to acquire leases for Irish in the IRS-TP prospect as of March 24, 2011 and the anticipated sale of the leases by Irish on April 15, 2011, Border had no contract obligation after March 24, 2011 to submit oil and gas leases within the "review" area designated on Furlong's map to Irish.

(App. 32, ¶ 22).

[¶18] **3. Sale of the Prospect by Irish and Failure of Payment to Border**

[¶19] In June 2011, Irish and Twin City reached an agreement to sell a package of oil and gas leases containing the IRS-TP prospect, and separate acreage leased from the Evangelical Lutheran Church in America ("ELCA"), to Chesapeake Exploration. (App. 218-228; Tr. 404) Chesapeake paid Irish and Twin City $1,100 per net mineral acre for these leases. (Tr. 406) Final payment was received from Chesapeake in August 2011. (Tr. 420). Despite Border's interest in the payment received from Chesapeake—namely, its right to 25% of the profit realized by Irish—Border was not informed of the sale of the

IRS-TP prospect until two weeks after Chesapeake's final payment. (Tr. 408, 421-22) In a subsequent telephone conversation between Skaare and Furlong, Border was informed that the IRS-TP acreage had been sold for $825 per net mineral acre, not the actual sale price of $1,100 per net mineral acre. (Tr. 121-22)

[¶20] Not only did Irish misrepresent the sale price, but it underpaid Border even using the erroneous sale price. Border was informed that Irish and Twin City would issue partial payment to Border, but that this payment would be about $10,000 short. (Tr. 123) Irish and Twin City subsequently issued checks, with each paying $169,800, for a total of $339,600. (Exh. 81, Doc. ID 219 and Exh. 91, Doc. ID 229) Based on the incorrect figure of $825 per net mineral acre, the payment received by Border was short by $45,577.55, and not $10,000 as conveyed to Border. (Tr. 123) Irish and Twin City have never paid the additional money owed to Border, and Furlong admitted at trial that Irish still owes Border money. (Tr. 123, 409)

[¶21] Throughout the remainder of 2011, Border continued to seek a final accounting and payment from Irish. (S. App. 7; Ex. 43, Doc. #181) In December 2011, Border was finally invited to perform an accounting of the transaction. (S. App. 16-17) It was only then that Border learned the IRS-TP acreage had been sold to Chesapeake for $1,100 per net mineral acre, rather than for $825 as represented by Irish. (Tr. 133) Without any indication that Irish was ever dissatisfied with Border's work—which yielded acreage in excess of what was originally projected by Irish—Irish failed to provide any further accounting or explanation for its actions. (Tr. 134-36)

[¶22] Irish does not contend that Border is due anything less than 25% of the profit or even that it attempted to negotiate a contrary figure. (S. App. 1; Tr. 134) The district

court found that Irish agreed to pay Border 25% of the profit from the sale of the IRS-TP leases acquired by Border and that those leases were sold to Chesapeake for $1,100 per net mineral acre. (App. 31, ¶ 2; App. 33, ¶ 34; App. 34, ¶ 43) Although Irish argues that the IRS-TP acreage was worth less than the ELCA acreage sold to Chesapeake as part of the sale, the district court found that Irish had not presented any evidence that the sale price for the IRS-TP acreage was anything other than $1,100 per net mineral acre. (App. 34, ¶ 45) The court explained:

> [T]he only evidence provided to the Court of what was the amount for which the leases acquired by Border for Irish were actually sold is the $1,100 per each net mineral acre referenced in the Irish/Chesapeake Purchase and Sale Agreement (Exhibit #71). The Court finds that $1,100 per each net mineral acre was the clearly stated sale price in the Irish/Chesapeake Purchase and Sale Agreement. The Court further finds that Irish has not presented any evidence that the clearly stated sales price for the leases acquired by Border for Irish sold Chesapeake was any other specifically stated sum.
>
> The Court further finds that the testimony of Jeff Brooks, the Chesapeake representative who negotiated and executed the Irish/Chesapeake Purchase and Sale Agreement, does not indicate that any other price for the leases acquired by Border for Irish was either understood or agreed between Irish and Chesapeake. In fact, Brooks testified that the price paid for the leased [sic] which were the subject of the Irish/Chesapeake Purchase and Sale Agreement was $1,100 per net mineral acre; and he couldn't recall how that price was arrived upon except that such was the price paid to Irish in a previous deal. It is also noteworthy to the Court that Furlong testified that Brooks told Furlong he did not have authority to purchase at the $1,350 per net mineral acre, which Furlong claims the ELCA leases were worth.
>
> . . .
>
> Based upon the clear terms of the parties' contract and evidence of the stated sales price in the Irish/Chesapeake Purchase and Sale Agreement, undifferentiated from the ELCA leases as to sales price, the Court finds that the sale price of the leases acquired by Border for Irish was $1,100 per net mineral acre.

(App. 10-12)

[¶23] **4. The Wolski/Billings I Leases**

[¶24] In March 2011, three days prior to the termination of Border's authority to acquire leases for Irish, a Border landman named Toby Zastoupil was asked by an individual named Dustin Stuber to acquire mineral leases in Slope County which were between 4 and 6 miles outside of the IRS-TP prospect. (Tr. 284, S. App. 12) Eight days later—and five days after the termination of Border's authority to acquire leases for Irish—Zastoupil spoke with an individual named Harvey Wolski about the Slope County leases. (Tr. 285) During these discussions, there was no discussion of any land in Billings County. (Tr. 287)

[¶25] In April 2011, Zastoupil once again contacted Wolski regarding the potential Slope County leases. (Tr. 288) At this time, Zastoupil was informed that the Wolski family also owned minerals in Billings County. (Tr. 288) Zastoupil subsequently brought this information to Stuber's attention, who directed Zastoupil to acquire a lease for the minerals in Slope County and to discuss the Billings County minerals with Skaare. (Tr. 288-89; S. App. 13) The Billings County leases (referred to by the District Court as the Wolski/Billings I leases, in Irish's brief as the Wolski Leases and in some of the testimony as the Billings I leases) (hereafter "Wolski/Billings I leases") are immediately adjacent to the IRS-TP prospect. (Tr. 289) These leases were just outside the purchase area and within the review area delineated on Furlong's map. (App. 33, ¶ 27)

[¶26] It is undisputed that Zastoupil (or any Border representative) did not learn about the availability of the Wolski/Billings I leases through its work for Irish. (Tr. 126, 289) Border's first knowledge of the Billings leases came on April 15, 2011, which is more than three weeks after Irish terminated Border's authority to acquire leases for Irish. (Tr.

288) Zastoupil testified that Border did not offer the Wolski/Billings I leases to Irish because Border had been told to stop leasing for Irish effective March 24, and the land was outside the purchase area identified by Irish. (Tr. 290) Further, throughout the time Border was working the IRS-TP prospect for Irish, Irish had told Border it was not interested in land outside the purchase area south of the 137-100 township line. (Tr. 189, 292)

[¶27] Zastoupil testified he did not believe his work on the Wolski/Billings I leases was in conflict with Irish's interests, because the leases were outside the prospect purchase area and outside the timeframe in which Border could acquire leases for Irish. (Tr. 299) Border's work for Irish in mid to late April, when Zastoupil was first informed of the Billings County minerals, consisted solely of obtaining curative documents for the leases already obtained. (Id.) The Wolski/Billings I leases are outside the purchase area on the map provided by Irish to Border, and Furlong admitted Border could not make any offers to purchase such leases for Irish without first getting approval from Irish. (Tr. 570)

[¶28] Border subsequently acquired a 50% interest in the Wolski/Billings I leases (Tr. 197) and reached an agreement to resell the leases to Chesapeake. (S. App. 14-15) Furlong admitted that prior to October 2011, he had never said anything to Border about the Wolski/Billings I leases. (Tr. 424) In fact, he only raised the issue after Border persisted in seeking an accounting and final payment regarding the IRS-TP prospect. (S. App. 7)

[¶29] Based on this evidence, the District Court made the following findings regarding the Wolski/Billings I leases:

> 28. Border did not learn of the availability of the Wolski/Billings I leases through any work performed for Irish or based upon any information obtained as a result of Border's work for Irish.
>
> 29. Border acquired the Wolski/Billings I leases for itself and Interwest Petroleum between April 26 and May 11, 2011.
>
> 30. Furlong learned from a member of the Schnell family that Border was negotiating to purchase the Wolski/Billings I leases while those negotiations were in progress on or after April 18, 2011. This knowledge came to Furlong after Furlong had terminated Border's authority to acquire oil and gas leases for Irish.
>
> 31. Furlong did not contact Zastoupil or anyone else at Border regarding the Wolski/Billings I leases when he learned that Border was negotiating to purchase those leases.
>
> 32. Furlong knew or should have known that Border was not negotiating purchases of the Wolski/Billings I leases on behalf of Irish because Furlong knew at the time that Border no longer had any authority to purchase leases for Irish.
>
> 35. Furlong knew when Irish and Twin City entered into the purchase and sale agreement with Chesapeake on June 24, 2011 that the Wolski/Billings I leases were not included within the acreage sold to Chesapeake.

(App. 33-34)

[¶30] The District Court made the following additional findings relating to the termination of Border's agency authority and the continuation of its contract duties:

> 57. After March 24, 2011, Border performed due diligence and title curative work on oil and gas leases which Border had acquired for Irish but all such work was merely contract work as opposed to work within the scope of the agency authority granted by Irish to Border to acquire oil and gas leases during the period from January 24 through March 24, 2011.
>
> 58. Furlong's email of March 22, 2011 terminated the agency relationship between Irish and Border relative to the IRS-TP prospect, effective March 24, 2011, by providing notice to Border of expiration of the agency's term as well as notice of extinction of the subject matter of the agency: acquisition of oil and gas leases for Irish.
>
> 59. The agency relationship between Border and Irish ended as of March 24, 2011.

> 60. Border's obligation under its contract with Irish to submit leases for review had been fully performed prior to the time when Border entered negotiations for the Wolski/Billings I leases on April 18, 2011.
>
> 61. When Border learned of the availability of Wolski/Billings I leases on April 15, 2011, it was justified in not submitting those leases to Irish for review.
>
> 62. Border no longer owed any fiduciary duty to Irish (or Twin City) once the agency relationship terminated effective March 24, 2011.

(App. 35, ¶ 57, 58, App. 36, ¶ 59, 60, 61, 62) The district court's findings and conclusions are supported by substantial evidence and the law, and should not be disturbed on appeal.

[¶31] LAW AND ARGUMENT

[¶32] **1. The district court correctly concluded that Border did not breach a fiduciary duty in acquiring the Wolski/Billings I leases.**

[¶33] **A. Border's fiduciary duty to Irish terminated when it lost the authority to acquire leases for Irish as its agent**

[¶34] Irish and Twin City contend that Border breached a fiduciary duty to Irish by acquiring the Wolski/Billings I leases and selling them to Chesapeake, rather than presenting them to Irish. The existence of a fiduciary duty is a question of law to be determined by the Court. See Diegel v. City of West Fargo, 546 N.W.2d 367, 370 (N.D. 1996) ("[W]hether a duty exists is generally a preliminary question of law for the court to decide."); see also, Kortum v. Johnson, 2008 ND 154, ¶ 24, 755 N.W.2d 432 (existence of a shareholder's fiduciary duty is a question of law). Questions of law are fully reviewed on appeal. Green v. Green, 2009 ND 162, ¶ 5, 772 N.W.2d 612. Whether a fiduciary duty has been breached, however, is a question of fact subject to the clearly erroneous standard of review. In re Estate of Fisk, 2010 ND 186, ¶ 6, 788 N.W.2d 611; see also Gillmore v. Morelli, 472 N.W.2d 738, 740 (N.D. 1991).

[¶35] Irish and Twin City spend considerable time in their brief explaining how Border's representatives admitted they owed a fiduciary duty to Irish[1]. Border has never denied the existence of a fiduciary duty but the duration and nature of this duty differs significantly from that claimed by Irish and Twin City. Irish and Twin City ignore the purpose of the contract, the agency relationship formed with Border and the termination of Border's authority—all of which shape the parameters of Border's fiduciary duty.

[¶36] "The existence and scope of a fiduciary duty depends upon the terms of the parties' agreement." Auction Effertz, Ltd. v. Schecher, 2000 ND 109, ¶ 9, 611 N.W.2d 173. This Court has cautioned against the imprecise use of the term "fiduciary" to allege duties where none exist and made clear that the nature of the agreement between the parties is dispositive:

> Even though the present joint operating agreement may be seen to create a joint venture with attendant fiduciary duties, the court is mindful that the term "fiduciary" is easily bandied-about without precision. The scope of the transactions affected by the relation and the extent of the duties imposed are not identical in all fiduciary relations. . . . [T]he law is well established that the determination of the existence and extent of such duties is controlled by the terms of the agreement between the parties.

Grynberg v. Dome Petroleum Corp., 1999 ND 167, ¶ 21, 599 N.W.2d 261 (quoting Tenneco Oil Co. v. Bogert, 630 F. Supp. 961, 967 (W.D. Okla. 1986)); see also, Burlington N. and Santa Fe Ry. Co. v. Burlington Res. Oil & Gas Co., 1999 ND 39, ¶ 15, 590 N.W.2d 433 ("[W]hether an agent has improperly managed a principal's affairs depends on the interpretation of their agreement."). The district court correctly concluded the contract between Irish and Border created an agency relationship in which

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[1] As explained later in this brief, this fiduciary duty was not personal in nature to these individuals, but rather was between Border and Irish.

Border owed a fiduciary duty to Irish directly related to the acquisition of the mineral leases for the IRS-TP prospect. "Agency is the relationship which results where one person, called the principal, authorizes another, called the agent, to act for him in dealing with others." N.D.C.C. § 3-01-01. It cannot reasonably be disputed that Irish engaged Border to act as its agent in acquiring the mineral leases in the IRS-TP prospect, and Irish and Twin City acknowledged this agency in their brief. (Appellant's Brief at ¶ 56).

[¶37] The crux of the district court's holding was that the mere existence of a contract did not give rise to Border's fiduciary duty. The purpose of the contract was to create an agency relationship for the acquisition of leases by Border for Irish, and therefore, it was this agency that gave rise to the duty. Once the agency terminated, the attendant fiduciary duty terminated as well. The pertinent question is when the agency terminated. North Dakota statute defines the circumstances under which an agency is terminated:

> 1. An agency is terminated as to every person having notice thereof by:
>
> a. Expiration of its term;
>
> b. Extinction of its subject;
>
> (balance omitted)

N.D.C.C. § 3-01-11(1). Furlong's e-mail of March 22, 2011 terminated the agency relationship because it provided notice to Border of (a) the expiration of its term (March 24, 2011) and (b) extinction of the agency's subject (lease negotiations). (App. 217).

[¶38] Questions related to the existence of an agency are questions of fact. See First State Bank of Buxton v. Thykeson, 361 N.W.2d 613, 616 (N.D. 1985). The detailed findings of the district court on the termination question are supported by ample evidence, and are therefore are not clearly erroneous. See Brash v. Gulleson, 2013 ND 156, ¶ 7, 835 N.W.2d 798. The district court found:

> 15. On March 22, 2011, Furlong directed Border to stop acquiring leases for Irish as of March 24, 2011 and to provide a hard schedule of all leases acquired for Irish in the IRS-TP prospect on March 25, 2011.
>
> 17. Border's authority to acquire leases in the IRS-TP prospect as Irish's agent ended on March 24, 2011, when Irish withdrew Border's authority.
>
> 21. Border did not acquire any additional oil and gas leases for Irish in the IRS-TP prospect after March 24, 2011 and was never authorized or requested to do so by Irish.

(App. 32). The District Court also found that after Border's authority to acquire leases was terminated, Border had no contractual obligation to submit oil and gas leases within the "review" area on Furlong's map. (App. 32, ¶ 22) These findings are fully supported by the record, as explained in the Memorandum Decision:

> The record reflects that Border did not acquire any more leases for Irish after March 24, 2011 and reflects that Border was never requested to do so. The record does reflect that Border continued its contractual obligations to provide curative work and due diligence on the titles for the leases it had acquired on Irish's behalf. As such, this Court finds that the agency relationship, whereby Border was authorized by Irish to acquire leases on behalf of Irish by negotiating with mineral rights owners in the area within the green border and whereby Border was required to present leads to possible leases in the review area, ended as of March 24, 2011. After that date Border no longer had the authority to act on behalf of Irish because lease acquisition and the necessary negotiations to acquire leases w[sic] halted by Furlong's email. Any curative work or due diligence left to complete on the already-acquired leases was merely a contractual agreement whereby Border worked for Irish as opposed to working on behalf of Irish as its agent. Because it was the agency relationship that conferred the fiduciary duties on the parties, not the contract, and since the agency relationship was terminated on March 24, 2011, Border did not owe a fiduciary duty to Defendants at the time Border dealt with the Billings I [Wolski/Billings I] leases in April 2011. Furthermore, based upon:
>
> a. Furlong's direction that Border cut off all negotiations as of Thursday March 24;
>
> b. His request for a hard schedule of exactly what leases they had by March 25;

c. His statement indicating an expectation that they would close by April 15; and

d. His failure to subsequently advise otherwise;

the Court finds that Border's obligation under that portion of the contract addressing submission of leases for review had been fully performed prior to that point in time when Border entered into negotiations for what became the Wolski/Billings I lease[sic], which are Defendants' Exhibits #JJ through RR. Still further, the Court finds that Border was justified in reaching that conclusion.

(App. 23-24) After Border's purchase authority was withdrawn, Border's only remaining obligation was to complete due diligence related to the leases already acquired. Border's remaining duty, therefore, was to continue assisting with curative work on leases already provided to Irish, and there is no allegation that Border failed in any respect to uphold this duty. The district court correctly determined that Border's fiduciary duty to Irish regarding the lease acquisitions was extinguished when Irish revoked Border's authority to acquire leases on its behalf.

[¶39] B. Irish failed to establish a binding industry standard regarding a landman's fiduciary duty

[¶40] Irish and Twin City have attempted to get around the substantial evidence indicating that the fiduciary duty ended with the termination of the agency by alleging that industry standards imposed a fiduciary duty on Border even after it was no longer authorized to act on Irish's behalf. At trial, Irish called Bucky Heringer as a purported expert on the duties of landmen. Heringer testified that he believed a fiduciary duty attached to Border regarding the Wolski/Billings I leases. Heringer's authority is dubious. For instance, he has never been a member of the American Association of Professional Landmen ("AAPL"), a group whose policy Irish and Twin Cities rely upon. (Tr. 382) Even more importantly, Heringer had never testified before trial concerning the

standard of care applicable to a landman and he admitted he did not know what the standard of care for landmen in North Dakota is. (Tr. 386, 390). The weight and credibility of an expert witness is for the trier of fact to determine, and the clearly erroneous standard of review applies. Stillwell v. Cincinnati Inc., 336 N.W.2d 618, 621 (N.D. 1983). Given the lack of foundation and logical support for Heringer's opinions and the ample evidence to the contrary demonstrating that no fiduciary duty existed, it was not clearly erroneous for the district court to reject Heringer's opinions.

[¶41] The district court also properly rejected Irish's contention that the AAPL, through its By-Laws and/or Code of Ethics, established an industry standard of care. Irish's own expert, Heringer, testified that a landman does not have to become a member of the AAPL and Irish offered no testimony that the AAPL sets an industry-wide standard of care. (Tr. 382) In its Memorandum Decision, the district court explained:

> However, testimony at trial by the Defendants' expert and other witnesses indicates the membership in the AAPL is optional, thus one can be a landman without being a member of the AAPL. As such, the Court disagrees with Defendants' assertion that the AAPL standards provide an industry–wide standard of care.

(App. 25). Irish and Twin City cite two cases for the proposition that industry standards are evidence of the standard of care, both of which fail to validate their argument. Schwartz v. Ghaly, 318 N.W.2d 294, 301 (N.D. 1982) is irrelevant to the instant case because it concerned the effect of bylaws adopted by a hospital on its employee, a scenario starkly different than is present in this case. Further, the reference to the standard of care in Spieker v. Westgo, Inc., 479 N.W.2d 837, 844 n.5 (N.D. 1992) has even less value, because it was found in a requested jury instruction that was never even presented to the jury.

[¶42] The district court properly rejected Irish's contention that any breach of the AAPL By-Laws or Code of Ethics could be used to establish a breach of a duty by Border. The district court analogized the AAPL Code of Ethics to the Rules of Professional Conduct applicable to lawyers, citing Nesvig v. Nesvig, 2004 ND 37, ¶ 23, 676 N.W.2d 73:

> Our rules of professional conduct are designed to provide guidance to lawyers and a structure for regulating conduct through disciplinary agencies, and they are not intended to be a basis for civil liability.

(App. 27). The AAPL Code itself specifies that "conduct inconsistent with the provisions set forth in this Article shall be considered unethical and said individual's membership status shall be subject to review for possible disciplinary action . . . ." (App. 26) (emphasis added). Accordingly, any alleged violation is to be properly pursued in a disciplinary action, not as a basis for liability in a civil action.

[¶43] As the district court found, it is significant that Irish did not even raise the issue regarding the Wolski/Billings I leases until Border sought payment of the balance due under the contract. (App. 19) It is apparent that the breach of fiduciary duty claim was developed only in response to Border's legal challenge seeking damages for Irish's misrepresentation of the sale price. The district court correctly determined this claim was meritless in finding that, based on the overwhelming evidence in the record, Furlong's March 22, 2011 e-mail terminated the agency relationship. (App. 18) Since the fiduciary duty arose from Border's status as Irish's agent, the court's conclusion that the fiduciary duty ended when Irish terminated Border's agency authority is sound. (App. 36, ¶ 4) Accordingly, when Border learned of the availability of the Wolski/Billings I leases on April 15, it had no duty to offer those leases to Irish.

[¶44] **II. The District Court correctly found that the sale price of the IRS-TP leases was $1,100 per net mineral acre**

[¶45] **A. The plain language of the agreements establishes a selling price of $1,100 per net mineral acre, and extrinsic evidence should not be considered**

[¶46] Irish and Twin City contest the district court's finding that the IRS-TP leases were sold to Chesapeake for $1,100 per net mineral acre. This is a plain finding of fact, subject to the clearly erroneous standard of review: "The findings of fact of the court, trying the case without a jury, are binding [on appeal] unless clearly erroneous." Dobler v. Malloy, 214 N.W.2d 510, 514 (N.D. 1973). Irish and Twin City urge that the court's finding is fully reviewable because it requires interpretation of the contract. (Appellant's Brief at ¶ 65) Irish and Twin City's understanding of the standard of review (and their entire arguments on this issue) are misplaced, because the purchase and sale agreement with Chesapeake is not ambiguous. (App. 10) The question of whether a contract is unambiguous is a question of law. Entzel v. Moritz Sport and Marine, 2014 ND 12, ¶ 8, 841 N.W.2d 774. However, unambiguous language in a contract is given its clear meaning. Kief Farmers Co-op. Elevator Co. v. Farmland Mut. Ins. Co., 534 N.W.2d 28, 32 (N.D. 1995). The district court correctly held that the operative contracts are unambiguous, and the plain terms agreed-upon by Irish and Chesapeake reflect a uniform selling price of $1,100 per net mineral acre for all leases acquired. (App. 218)

[¶47] The intent of the parties is to be ascertained from the writing alone if possible. N.D.C.C. § 9-07-04. Accordingly, extrinsic evidence is not admissible to contradict unambiguous written contract language. Myaer v. Nodak Mut. Ins. Co., 2012 ND 21, ¶ 10, 812 N.W.2d 345. The purchase and sale agreement between Irish (and Twin City) and Chesapeake provides in its first numbered paragraph that the purchase price to be paid by Chesapeake for the leases it purchased is $1,100 per net mineral acre, without

any qualification. (App. 218) Absolutely no language in the agreement indicates a differentiation in selling price between the IRS-TP and ELCA leases.

[¶48] Additionally, nothing in the separate agreement between Border and Irish makes Border's compensation dependent upon the value of the leases acquired. Border was simply entitled to 25% of the profit of the sale of the IRS-TP leases by Irish. (S. App. 1-2) The terms of the purchase and sale agreement negotiated by Irish establish a uniform sale price of $1,100 per net mineral acre for all leases, and therefore, this figure must be used to calculate Irish's profit.

[¶49] Irish and Twin City argue the selling price is altered in the purchase and sale agreement through the inclusion of an escape clause. (Appellant's Brief at ¶ 77) There is no language in the clause whatsoever even suggesting an intent to attach different values to leases within this same transaction. Rather, this provision simply reflects the reality that in virtually any sale of leases, values are likely to vary and the parties need an avenue to terminate if an excessive percentage of the leases fail.

[¶50] Irish and Twin City also point to an attached lease schedule listing the value of the leases as evidence of their claim. (Appellant's Brief at ¶68) Once again, however, Border was entitled to 25% of the selling price of the leases, not the appraised value of those leases. (S. App. 1-2) Irish did not offer any worksheets or internal analysis of Chesapeake which disclosed any allocation of purchase prices for the subject leases, and thus, the contractual terms themselves dictate without qualification that the sale price of the leases was $1,100 per net mineral acre.

[¶51] B. Even if extrinsic evidence is considered, the district court's findings were still proper

[¶52] Irish and Twin City substantially rely on extrinsic evidence in attempting to defeat the plain language of the operative agreements. If this Court determines that extrinsic evidence is relevant, then the testimony of Chesapeake's representative, Jeff Brooks, squarely contradicts Irish and Twin City's claim. Brooks did not recall that the lease package increased with the inclusion of the ELCA leases beyond that what would have been paid for the IRS-TP leases alone. (Doc. # 261, p. 64) Indeed, he had no knowledge of the alleged difference in value between the ELCA leases and the IRS-TP leases. (Id.) When asked how he came up with a price of $1,100 per acre for the Irish 2 package (which included both the ELCA and IRS-TP leases), Brooks responded that he agreed to pay the same price he had paid for a previous lease package with Irish. (Id. at 63) Brooks' testimony confirms the lack of any evidence establishing that the IRS-TP leases were sold at a price other than $1,100 per net mineral acre.

[¶53] Irish knew at all times that Border was entitled to 25% of the profit from sale of the IRS-TP leases. If Irish truly believed there was a disparity in lease values, it had the option of either selling the IRS-TP leases in a separate transaction or seeking a modification of the contract with Border. Irish chose neither of these options and opted instead to tell Border that the leases had been sold for $825 per net mineral acre—a blatant lie under the plain language of the purchase and sale agreement. Irish is essentially asking the Court to reform the agreement between Irish and Border, without any justification other than seller's remorse. The fact that Irish believes, in hindsight, that it made a poor bargain does not justify paying Border less than the amount to which it is entitled under the contract. The district court's finding that the purchase price was

$1,100 is supported by substantial evidence in the record and is not clearly erroneous. (App. 34, ¶ 45, 46)

[¶54] **III. The district court did not abuse its discretion in denying Irish and Twin City's motion to amend their counterclaim to add Border landmen as defendants.**

[¶55] The District Court's denial of defendants' motion for leave to amend their counterclaim is reviewed under the abuse of discretion standard. Darby v. Swenson Inc., 2009 ND 103, ¶ 11, 767 N.W.2d 147. In Darby, the Court stated:

> A district court has wide discretion in deciding matters relating to amending pleadings after the time for an amendment as a matter of course has passed. The Court will not reverse a district court's grant or denial of a motion to amend unless the district court abused its discretion.
>
> . . .
>
> A district court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process leading to a reasoned determination. A district court does not abuse its discretion in denying a motion to amend the complaint when such an amendment would be a futile act.

Darby, ¶¶ 11-12 (citations omitted).

[¶56] Irish and Twin City sought leave to amend their counterclaim to assert claims against Border's landmen in their individual capacities. (Doc. #30) Border resisted the motion because it was beyond the deadline set by the district court for amending pleadings and because the proposed amendments would be futile. (Doc. #33) The district court denied the motion on the grounds of futility and because there was no proposed amended answer and counterclaim on which to fully understand what Irish and Twin City intended to allege. (S. App. 18, 20)

[¶57] The district court correctly concluded the amendment would be futile because Border's landmen were not individual agents of Irish. (S. App. 20). Whether a principal-

agency relationship exists is a question of fact. Pfliger v. Peavey Co., 310 N.W.2d 742, 745 (N.D. 1981). Border admits that it was Irish's agent, but denies that its individual landmen were Irish's agents. (Tr. 260)

[¶58] Where the existence of an agency relationship is denied, the burden is upon the party claiming the existence of the relationship to prove it by clear and convincing evidence. Johnson v. Production Credit Association, 345 N.W.2d 371, 374 (N.D. 1984). The agreement in this case was solely between Border and Irish as entities. (S. App. 1-2) The only payments made by Irish and Twin City were the two checks made payable to Border Resources LLC. (Exh. 81, Doc. ID 219 and Exh. 91, Doc. ID 229) Skaare testified that neither he nor any of the other Border landmen were hired or retained, individually, by Irish to do work on the IRS-TP prospect. (Tr. 260) Border's other landmen testified they never contracted with Irish and that all of their work on the IRS-TP prospect was for Border. (Tr. 277, 333) Irish has not contradicted this evidence in any fashion, and certainly not in a manner that rises to the level of clear and convincing evidence as necessary to establish the existence of an agency relationship.

[¶59] Because Border is an artifical entity, performance of its contract with Irish necessarily required that it act through its employees and agents. See American National Fire Insurance Company v. Hughes, 2003 ND 43, ¶ 16, 658 N.W.2d 330, 336 (an artificial entity can only act through its agents). This fact does not make Border's individual landmen agents of Irish. By statute, agents of limited liability companies are not personally liable for the acts or obligations of the company, merely by being agents of the company. N.D.C.C. § 10-32-29(1). In addition, N.D.C.C. § 3-02-15 provides: "A mere agent of an agent is not responsible as such to the principal of the latter." See also,

Commercial Bank v. Red River Valley Nat'l Bank of Fargo, 8 N.D. 382, 79 N.W. 859, 861 (1899) ("A mere agent of an agent is not responsible as such to the principal of the latter.") Under North Dakota law, in the absence of a separate agreement with Irish, Border's landmen were not Irish's agents. As such, the proposed amendment by Irish was futile, and the district court did not abuse its discretion in denying Irish's motion to amend.

[¶60] CONCLUSION

[¶61] Irish and Twin City only raised their breach of fiduciary duty claims months after the Wolski/Billings I leases were executed and only after Border sought damages for Irish's intentional misrepresentation as to the sale price to Chesapeake. The district court properly recognized that these retaliatory claims had no basis in the facts in the record and its findings and conclusions are properly supported by substantial evidence and the law. Accordingly, the amended judgment of the district court should be affirmed.

Respectfully submitted this 4th day of March, 2015.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Border Resources, LLC, Plaintiff and Appellee, vs. Irish Oil & Gas, Inc., and Twin City Technical, LLC, Defendants and Appellants.	SUPREME COURT NO. 201402674 AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF CASS)

Carol Magnuson, being first duly sworn upon oath, deposes and says that she is of legal age and not a party to the above-entitled matter.

On March 5, 2015, Affiant delivered via e-mail a true and correct copy of the following document:

1. Brief of Appellee;
2. Supplemental Appendix.

A copy of the foregoing was securely e-mailed to the address as follows:

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The best of Affiant's knowledge, the e-mail address above given is the actual e-mail address of the party intended to be so served and said party has consented to service by e-mail.

Carol Magnuson

Carol Magnuson

Subscribed and sworn to before me this 5th day of March, 2015.

KATHY M. SUMPTION
Notary Public
State of North Dakota
My Commission Expires Jan. 5, 2018

(SEAL)

Kathy M. Sumption

Notary Public, Cass County, North Dakota

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1. Brief of Appellee;
2. Supplemental Appendix.

A copy of the foregoing was securely e-mailed to the address as follows:

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The best of Affiant's knowledge, the e-mail address above given is the actual e-mail address of the party intended to be so served and said party has consented to service by e-mail.

Carol Magnuson

Subscribed and sworn to before me this 5th day of March, 2015.

HOLLI ZORTMAN
(SEAL) Notary Public
State of North Dakota
My Commission Expires Feb. 27, 2019

Notary Public, Cass County, North Dakota

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