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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA
Supreme Court Case No: 20140264

Border Resources, LLC,

Plaintiff and Appellee,

vs.

Irish Oil & Gas, Inc., and Twin City Technical, LLC,

Defendants and Appellants.

REPLY BRIEF OF DEFENDANTS/APPELLANTS IRISH OIL & GAS, INC., AND TWIN CITY TECHNICAL, LLC

ON APPEAL FROM THE NORTH DAKOTA SOUTHWEST
JUDICIAL DISTRICT COURT
STARK COUNTY
HON. DANN GREENWOOD

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ARGUMENT

I. Border Admittedly Owed Irish a Fiduciary Duty at the Time it Acquired Leases for Itself in Irish's Prospect, and it Follows that Border Breached its Duty of Loyalty to Irish.

[1] In its brief, Border admits "[t]he district court correctly concluded the contract between Irish and Border created an agency relationship in which Border owed a fiduciary duty to Irish directly related to the acquisition of the mineral leases for the IRS-TP prospect." (Br. of Appellee ¶ 36.) At trial, Border's landmen admitted not only that they considered Border an agent of Irish, but that Border owed a fiduciary duty to Irish during the time that Border continued to perform curative and due diligence work for the IRS-TP leases that it acquired for Irish. (*E.g.*, Tr. 163-64, 241, 293-94.) The witnesses for both sides were unanimous in their testimony that landmen owe their principals a fiduciary duty throughout the time they perform landman services, including curative and due diligence work. (Opening Br. ¶¶ 47-52.)

[2] The fiduciary duty owed by an agent to a principal "preclude[s] an agent's self dealing." *Schlossman & Gunkelman, Inc. v. Tallman*, 1999 ND 89, ¶ 33, 593 N.W.2d 374, 382 (affirming jury instruction in case involving real estate agent). The district court found Border acquired for itself the Wolski Leases within the IRS-TP prospect while Border continued to

perform due diligence and curative work upon the IRS-TP leases. (App. 17, ¶¶ 5-6, 8.) Given the above, it is clear Border breached its fiduciary duty to Irish.

[3] To try to skirt these inconvenient facts, Border emphasizes that it did not acquire the Wolski Leases until after Irish withdrew Border's authority to purchase additional IRS-TP leases. Border confuses an agent's purchase authority with fiduciary duty. Just because Border was no longer authorized to purchase additional leases on behalf of Irish in the prospect did not mean that Border was free to take leases for itself without even presenting them for Irish's review. Border continued to perform curative and due diligence services in helping Irish close on its IRS-TP leases. These services were just as much a part of the agency as purchasing leases, and required Border to continue to "act for" Irish "in dealing with" mineral owners. *See* N.D.C.C. § 3-01-01 (defining agency). For instance, Border issued drafts for bonus payments and obtained a variety of title curative from mineral owners. (Dkt. No. 92, Trial Exh. T, E-mail attaching Due Diligence spreadsheet.) Border admits it provided such services for the IRS-TP leases through April 28, 2011, well after it began negotiating the Wolski Leases for itself. (Tr. 241; Dkt. No. 105, Trial Exh. GG.)

[4] Adopting Border's argument that its agency and fiduciary duty terminated even as it continued to provide professional landman services for Irish would set a dangerous precedent. For instance, if a landman's fiduciary duty does not extend to due diligence and curative work, is a landman free to bid against his client for leases in the very prospect for which the landman is providing such services? That is what happened here. Irish's Tim Furlong testified that he made an offer to lease some of the minerals that were ultimately leased by Border in the Wolski Leases. (App. 179-82.) Furlong broke off the negotiations when the mineral owner told Furlong that Border's Toby Zastoupil was making competing offers to lease these same minerals. (*Id.*) Zastoupil admitted at trial that one of the mineral owners told him that Irish had issued an offer, and yet Zastoupil never discussed the issue with Irish. (App. 96.) The district court and Border fault Irish for not raising the issue immediately, but North Dakota law makes clear that the burden is upon the agent, not the principal, to seek consent for any conflict of interest. *See generally Burlington N. & Sante Fe Ry. Co. v. Burlington Res. Oil & Gas Co.*, 1999 ND 39, 590 N.W.2d 433 (holding express approval of a conflict transaction was required despite a general contractual authorization of self-dealing).

[5] As another example, if a landman's fiduciary duty does not extend to due diligence and curative work, is a landman performing such services free to take leases in the same area as the client's leases and then compete against the client for buyers? Here, the same buyer (Chesapeake Exploration, L.L.C.) purchased both Border's Wolski Leases and Irish/TCT's IRS-TP leases. (App. 66-67, 218-228.) One can certainly envision a scenario in which a landman is retained solely to perform curative and due diligence work on leases the client has negotiated. In such a case, does the landman have no fiduciary duty to the client, even as to the prospect where the landman is providing services?

[6] Border cites no authority to suggest that a professional landman is an agent only when actively bidding on leases for a client. Not surprisingly, courts in other jurisdictions have taken a broader view of a landman's fiduciary duties than that suggested by Border. For example, the Tenth Circuit in *Tenneco Oil Co. v. Joiner* concluded that a principal established a *prima facie* case for imposition of a constructive trust against its former landman, where the landman took leases for himself in the principal's prospect area after the landman's employment ended. 696 F.2d 768, 775-76 (10th Cir. 1982). This Court should adopt the rule that where a landman-client agency arises, "Unless otherwise agreed, an agent is subject to a duty

to his principal to act solely for the benefit of the principal in all matters connected with his agency." *Harding Co. v. Sendero Res., Inc.*, 365 S.W.3d 732, 744 (Tex. App. 2012) (emphasis added, citation omitted). The court in *Harding* allowed fiduciary duty claims against two landman services companies to proceed, even though the defendant landman services companies were not parties to a contract for services. *See id.* at 741-44.

[7] Regarding whether an industry standard implied a fiduciary duty with regard to the Wolski Leases, Border disparages the evidence presented by Irish but points to no contradictory evidence—because there is none. Again, Border's representatives, Irish's Tim Furlong, and Irish's expert Bucky Herringer all agreed that Border owed Irish a fiduciary duty throughout the time Border was performing landman services for Irish. (Opening Br. ¶¶ 46-52.)

[8] Concerning the AAPL By-Laws and Code of Ethics, Border's landman identified the AAPL standards as defining the fiduciary duty Border owed to Irish at the time it negotiated the Wolski Leases for itself. Therefore, they are clearly relevant. Border analogizes them to the Rules of Professional Conduct for lawyers and quotes the maxim that such rules are "not intended to be a basis for civil liability." *Nesvig v. Nesvig*, 2004 ND 37, ¶ 23, 676 N.W.2d 73, 81. *Nesvig* is a poor example for Border, since the

case held that a defendant attorney might be liable for malpractice despite complying with a related ethical rule. *See id.* at ¶¶ 21-23. This Court has clarified that "conduct proscribed by a rule of professional conduct may also be relevant in determining whether an attorney has breached an already existing civil duty or common law obligation an attorney owes a client." *Olson v. Fraase*, 421 N.W.2d 820, 828 (N.D. 1988).

[9] The reasons Irish should have been permitted to bring fiduciary duty claims against the Border's landmen are similar to the arguments set forth above. Although Skaare, Kenjalo, and Zastoupil did not personally contract with Irish, Irish presented ample evidence with its motion to amend that they all provided professional landman services to Irish through Border. (App. 240-336.) Border should not be able avoid its fiduciary duty to Irish by hiring subcontractors. Border's argument that the three never owed a fiduciary to Irish is perplexing in light of its admission that Border did owe such a duty with respect to acquiring the IRS-TP leases—akin to arguing that a lawyer owes no fiduciary duty to a client simply because the lawyer did not personally sign the engagement letter.

[10] The uncontested evidence establishes that Border owed and breached a fiduciary duty to Irish with respect to the Wolski Leases. This evidence

requires remand to the district court for a determination of damages caused by the breach.

II. Regarding Border's Contract Claim, the Trial Court Erred by Misinterpreting the Irish-Chesapeake PSA and by Refusing to Consider the Circumstances of the Sale.

[11] Border does not contest that its contract claim resulted in a windfall for Border, by attributing a sales price of $1,100 per net mineral acre ("pnma") to leases with a market value of $600-$650 pnma. (*See* App. 10, 68, 191.)

[12] Rather, Border argues that the district court was bound to reach such an inequitable result by principles of contract interpretation. The Opening Brief set forth the manner in which the district court and Border have misinterpreted the Purchase and Sales Agreement between Irish/TCT and Chesapeake. (Opening Br. ¶¶ 64-69.) Border argues that "[t]he plain language of the agreements establishes a selling price of $1,100 per net mineral acre, and extrinsic evidence should not be considered." (Br. of Appellee ¶ 45.). The district court similarly suggested that rules of contract interpretation limited the evidence that it could consider, (App. 5-8), and declined to consider any evidence regarding the circumstances in which the leases were sold (App. 9). However, nothing in the contract between Irish and Border established a selling price of $1,100 pnma. Nor was there

evidence presented that Irish and Border actually agreed that a blended sales price would be applied to determine "profit" in the event the IRS-TP leases were packaged with more valuable leases.

[13] The Court of necessity looked to extrinsic evidence to find a sales price to use in calculating profit. Border was not a party to the Purchase and Sale Agreement between Irish/TCT and Chesapeake. (*See* App. 218.) The PSA with Chesapeake was, thus, itself extrinsic to the contract between Border and Irish. Having considered that evidence, the district court should not have refused to consider other evidence about the circumstances surrounding the sale of the leases, including the differing values of the IRS-TP leases versus the ELCA leases, and the practice of packaging together leases of differing values for a blended price. *See* N.D.C.C. § 9-07-12 (contract explained by reference to the circumstances); N.D.C.C. § 9-07-20 (stipulations necessary to make contract reasonable implied).

[14] To compound the error, Border and the district court rely on the testimony of Chesapeake's Jeff Brooks as extrinsic evidence that supports Border's interpretation in any event. It does not. The pages of Brooks's testimony cited by Border show (1) that Brooks did not recall the specifics of how he came up with the $1,100 pnma; (2) that, nevertheless, Brooks agreed it would have been his practice to average out leases of varying

values to come up with a price; and (3) that the ELCA leases appeared to be more valuable than the IRS-TP leases based on map depicting the acreage covered by the leases, though Brooks could not say how much more valuable. (App. 193, pp. 63-64 of Brooks Depo.). That testimony is consistent with Furlong's testimony that the price stated in the PSA was negotiated as a blended price for two packages of differing values. (*See* App. 169-71.) There is no evidence that the price stated in the PSA was intended as a stand-alone price for the IRS-TP leases.

[15] It was error for the district court to apply a $1,100 pnma sale price to the IRS-TP leases, and that finding should be reversed.

CONCLUSION

[16] Irish and TCT respectfully request that the Court grant the relief requested in the Conclusion of the Opening Brief.

Respectfully submitted this 18th day of March, 2015.

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CERTIFICATE OF ELECTRONIC SERVICE

ON APPEAL FROM THE NORTH DAKOTA SOUTHWEST
JUDICIAL DISTRICT COURT
STARK COUNTY
HON. DANN GREENWOOD

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[1] I hereby certify that on March 18th, 2015 the following document:

Reply Brief of Defendants/Appellants Irish Oil & Gas, Inc., and Twin City Technical, LLC

[2] was electronically filed with the Clerk of Supreme Court via e-mail and a copy was also e-mailed to:

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Respectfully submitted this 18th day of March, 2015.

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