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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sandra Horob, Steven Poeckes, Steve Shae, Mike Shae, and Paul Shae, Plaintiffs and Appellants, vs. Zavanna, LLC, et al. Defendants and Appellees.	)	Supreme Court No. 20150203 Williams County District Court Case No. 53-2014-CV-00157

Appeal from Judgment Entered on May 28, 2015
Granting Defendants' Motions for Summary Judgment and Denying
Plaintiffs' Motions for Summary Judgment
Case No. 53-2014-CV-00157
County of Williams, Northwest Judicial District
The Honorable Paul Jacobson, Presiding

BRIEF OF DEFENDANTS/APPELLEES PETRO-HUNT, L.L.C. AND THE WILLIAM HERBERT HUNT TRUST ESTATE

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STATEMENT OF THE ISSUES

[¶1] Was the District Court correct in ruling that a "drilling or reworking" savings clause was never triggered and that the oil and gas lease at issue therefore remains in force?

[¶2] In the alternative, was the District Court correct in ruling that Plaintiffs ratified their lease by accepting royalty payments and signing division orders certifying that they owned royalty interests?

STATEMENT OF THE CASE

[¶3] On January 30, 2014, Plaintiffs Sandra Horob, Steven Poeckes, Steve Shae, Mike Shae, and Paul Shae (collectively, "Plaintiffs") filed their Complaint in Williams County District Court. Docket ID# 1, 3. Answers and Counterclaims were filed by the various Defendants or their successors-in-interest on January 31, February 5, and March 19, 2014. Docket ID# 9-20, 26-39, 55. The Defendants have raised a number of defenses (for instance, laches) that would remain pending even if summary judgment in their favor is denied. *See id.*

[¶4] On May 20, 2014, Plaintiffs served their Complaint on a number of additional Defendants. Docket ID# 73-74. These Defendants served Answers and Counterclaims on June 16, June 17, June 25, July 2, July 16, and August 21, 2014. Docket ID# 80-94, 98-100, 103-104, 114-115, 122-123.

[¶5] Before the District Court's entry summary of judgment in this case, Defendants Caroline Rose Hunt f/k/a Caroline Hunt Schoellkoft, Estate of Loyd B. Sands, Huntington Resources, Atropos Exploration Company, Clark Hunt as Personal

Representative for the Estate of Lamar Hunt, Liberty Resources, LLC, and Denbury Onshore, LLC were dismissed as parties. Docket ID# 48, 62, 66, 95, 113.

[¶6] Plaintiffs filed a Motion for Summary Judgment on October 2, 2014. Appendix at 69. Petro-Hunt, L.L.C., et al. filed a Cross-motion for Summary Judgment on November 3, 2014, and Zavanna, LLC, et al. filed a Cross-motion for Summary Judgment on November 19, 2014. Appendix at 83, 102. A hearing on the motions was held on January 20, 2015. On May 13, Honorable Paul Jacobson issued an Order denying Plaintiffs' Motion for Summary Judgment and granting the Defendants' Motions for Summary Judgment, stating that: (1) Plaintiffs' argument that the Shae Lease expired failed as a matter of law, because the Rolfstad 1 well never experienced a permanent cessation of production, which would have been necessary to trigger the lease's sixty day drilling or reworking provision; (2) even if the Shae Lease expired under its own terms, the lease was subject to the terms of a federal communitization agreement and remained valid; and (3) the Plaintiffs had ratified the Shae Lease after the lapses in production and were barred from claiming that the lease was invalid. Appendix at 200-220.[1]

[¶7] A Judgment was entered on May 28, 2015. Appendix at 221-22. Plaintiffs filed a notice of appeal on July 16, 2015. Appendix at 15, 223-24.

[1] Plaintiffs criticize Judge Jacobson for adopting a proposed order and failing to make independent findings under N.D.R.Civ.P. 52. Contrary to Plaintiffs' assertion, however, Rule 52 fact-finding is not required or appropriate in a summary judgment order, which by definition must be premised upon facts that are not genuinely at issue. *See* N.D.R.Civ.P. 56. Moreover, Plaintiffs' counsel filed his own lengthy proposed order after the summary judgment hearing in this case. Doc. ID# 206.

STATEMENT OF THE FACTS

[¶8] This action centers on the continuing validity of an oil and gas lease entered into by Plaintiffs' predecessor in interest. Plaintiffs claim ownership of undivided interests in the oil, gas, and other minerals located in and under certain real property in Williams County, North Dakota, described as follows:

> Township 155 North, Range 100 West
> Section 21: S/2SW/4
> Section 28: W/2
> Section 29: S/2SE/4, SE/4SW/4
> Section 32: NW/4NE/4, E/2NE/4NW/4
>
> Township 154 North, Range 100 West
> Section 5: Lots 1, 2, 3, and 4, S/2N/2, N/2SE/4, NE/4SW/4

(the "Property"). Appendix at 21. The Property is subject to an oil and gas lease (the "Shae Lease") that was entered into by John W. Shae and Bernice Shae, as lessors, and the William Herbert Hunt Trust Estate, as lessee, on February 1, 1969. The Shae Lease was recorded as document number 341691 with the Williams County recorder. Appendix at 225-27. The primary lease term was ten years. Following the primary term, the lease would remain in force "as long thereafter as oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, is produced from said land or land with which said land is pooled." Appendix at 226 (Shae Lease ¶ 2). The lease also contained a "drilling or reworking" savings clause (also referred to as a "cessation of production" clause) that stated in relevant part:

> [I]f, after discovery of oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, the production thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter . . . .

Id. (Shae Lease ¶ 6).

[¶9] The Plaintiffs in this suit are among the successors-in-interest to the Shae Lease's original lessors. Sandra Horob and Steven Poeckes inherited mineral interests in the Property in 1992 after the death of their father, John Shae, Sr. Appendix at 229 (Sandra Horob Deposition at 23:1-5); Supp. Appendix at 136 (Steven Poeckes Deposition at 60:6-16). Brothers Steve Shae, Michael Shae and Paul Shae inherited their mineral interests from their father, John Shae, Jr., who died in 2009. Appendix at 234 (Steve Shae Deposition at 39:10-13); Supp. Appendix at 131[2] (Michael Shae Deposition at 48:3-6).

[¶10] During the time periods relevant to this case, the Shae Lease was maintained by production from the Rolfstad 1 well ("Rolfstad Well"), located in NE¼SW¼ of Section 29, Township 155 North, Range 100 West, Williams County, North Dakota. Appendix at 237. The Rolfstad Well began producing oil and gas in January 1979. Appendix at 254. A Well Production History Data sheet on file with the North Dakota Industrial Commission, Oil and Gas Division ("NDIC") indicates temporary lapses in production from April 2004 to September 2004, from November 2006 to January 2007, and then again from January 2011 to February 2011 (with one barrel of production in December 2010 and 224 barrels sold in January 2011). Appendix at 239-42.

[¶11] The Rolfstad Well had a history of mechanical problems that required the well operator, Continental Resources, Inc., to occasionally stop production from the well in order to conduct routine maintenance and repair. These mechanical problems were caused by two factors unique to the well: 1) the angle of the wellbore, which resulted in increased friction and wear on the rods, and 2) the fact that the well produced salt water in higher than normal amounts, which caused additional wear to the equipment used to

[2] Appellees Zavanna, LLC, et al. have prepared a Supplemental Appendix, and it is anticipated that the Supplemental Appendix will be filed with their brief.

operate the well. Supp. Appendix at 6 (Heath Hibbard Deposition at 18:1-10, 19:20-20:4).

[¶12] Whatever the reasons behind the stoppages, the Plaintiffs and Defendants agree that Continental did not resort to drilling or reworking operations in response to the temporary lapses in production that are at issue. Appendix at 204 (Order ¶ 8); *see also* Appellants' Brief ¶ 32. It is therefore undisputed that in each instance where production from the Rolfstad Well paused, Continental restored production without need for drilling or reworking operations. Appendix at 239-42 (indicating that production was restored after each pause).

[¶13] Plaintiffs received and cashed royalty payments from Continental after the pauses in production occurred. One of the Plaintiffs, Steve Shae, admitted that he had continued to cash his royalty checks through the time of his deposition. Appendix at 235 (Steve Shae Deposition at 83:7-12). Another of the Plaintiffs, Sandra Horob, admitted in her March 2013 deposition that she had cashed her checks "[p]rior to a year-and-a-half or two years ago." Appendix at 231 (Sandra Horob Deposition at 102:8-15). That of course means that she was cashing checks after the lapses in production upon which Plaintiffs rely, the last of which occurred more than two years before her deposition. Other Plaintiffs were unable to definitively identify when they ceased cashing their royalty checks, stating only that it was before or approximately around the time they filed a separate lawsuit against Continental regarding this lease. Appendix at 288 (Steven Poeckes Deposition at 95:1-8); Docket ID# 157 (Forster Aff. Ex. D, Michael Shae Deposition at 56:3-9).

[¶14] The Plaintiffs also signed various division orders certifying that they owned royalty interests in the Property, which of course would not have been the case if their lease had terminated. "A division order is an instrument executed by the operator, the royalty owners, and any other person having an interest in the production directing the purchaser of oil or gas to pay for the products taken in the proportions set out in the instrument." N.D.C.C. § 47-16-39.3. Steven Poeckes signed division orders with Continental Resources in 2003 and 2009 delineating how the royalty payments were to be paid. Supp. Appendix at 30-33. Michael, Steve, and Paul Shae all signed Continental Resources division orders in 2010. Supp. Appendix at 34-36. All of these division orders certified that the "type of interest" owned was a royalty interest (as opposed to an unleased mineral interest). Supp. Appendix at 30, 32, 34-36 (using the phrase "Royalty Interest" or the abbreviation "ROY").

[¶15] In August of 2011, a Bakken well was spud on the Property. Supp. Appendix at 93. Since then, numerous other Bakken wells have been drilled on spacing units containing lands within the Property. Supp. Appendix at 64, 91, 95-96. The Plaintiffs served their Summons and Complaint on November 26, 2013. Docket ID# 5.

STANDARD OF REVIEW

[¶16] "Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record." *Wenco v. EOG Res., Inc.*, 2012 ND 219, ¶ 8, 822 N.W.2d 701.

ARGUMENT

I. The District Court properly held that the production lapses experienced by the Rolfstad Well did not terminate the Shae Lease under the lease's sixty-day "drilling or reworking" clause.

[¶17] The sixty-day drilling or reworking provision in the Shae Lease is a savings clause intended to benefit the lessee if the leasehold experiences a permanent cessation of production. Because the lapses in production from the Rolfstad Well were temporary, the sixty-day provision never began to run. Additionally, even if the sixty-day provision could be triggered by a temporary lapse in production, the clause only applies to lapses that can be remedied by drilling or reworking operations. Here, it is undisputed that drilling or reworking operations were not required to restore production from the Rolfstad Well. The District Court therefore correctly held that the production lapses in the Rolfstad Well did not trigger the lease's sixty-day drilling or reworking provision.

A. The sixty-day "drilling or reworking" provision is a savings clause intended to benefit the lessee in the event of a permanent cessation of production.

[¶18] The Shae Lease contains a typical habendum clause. The clause states that the lease shall remain in effect "for a term of ten (10) years from this date (called 'primary term'), and as long thereafter as oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, is produced from said land or land with which said land is pooled." Appendix at 226. An oil and gas lease will terminate when production ceases permanently, but it is settled law in North Dakota that a temporary cessation of production does not result in lease termination. *Sorum v. Schwartz*, 344 N.W.2d 73, 76 (N.D. 1984) (reversing trial result and remanding for further proceedings); *Feland v. Placid Oil Co.*, 171 N.W.2d 829, 833 (N.D. 1969) (reversing trial court's findings of fact and conclusions of law); *see also Greenfield v. Thill*, 521 N.W.2d 87, 92 (N.D. 1994) (applying the temporary cessation doctrine to defeasible-term mineral interests). A court's determination that a cessation is permanent "must be decided in light of the

particular fact situation, keeping in mind the legitimate interests of both lessor and lessee." *Feland*, 171 N.W.2d at 835.

[¶19] The Shae Lease also contains a sixty-day drilling or reworking clause that combines a cessation of production clause with a dry hole clause. The cessation of production component of the clause states that "if, after discovery of oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, the production thereof should cease from any cause, this lease shall not terminate if the lessee commences additional drilling or reworking operations within sixty (60) days thereafter . . . ." Appendix at 226 (Shae Lease ¶ 6). This type of clause is a savings clause for the benefit of the lessee; oil and gas lease savings clauses are designed to "give the lessee the opportunity to forestall loss of his rights." Michael C. Smith, "Oil and Gas Lease Savings Clauses," 39 *Sw. Legal Fdn. Oil & Gas Institute* § 3.01 (1988). In other words, if production from a well permanently ceases, such that the lease would otherwise terminate under the habendum clause, the drilling or reworking clause allows the lessee to save the lease by engaging in drilling or reworking operations.

[¶20] Plaintiffs have never raised an argument that the Shae Lease terminated under the habendum clause, most likely because they realized that such an argument would be unlikely to succeed given the brief lapses in production here. *See, e.g.*, *Sorum v. Schwartz*, 411 N.W.2d 652, 654 (N.D. 1987) (noting that 90-day period is too short a time to judge production in paying quantities). Instead, Plaintiffs' sole argument is that the lease automatically terminated under the provisions of the drilling or reworking clause. This Court does not appear to have expressly addressed how a drilling or reworking clause fits with the temporary cessation of production doctrine. Contrary to

Plaintiffs' assertion at ¶ 33 of their Brief, the Court was silent in *Feland* and *Sorum* as to the presence or absence of a drilling or reworking clause in the leases at issue in those cases. Plaintiffs' reliance upon this savings clause is misplaced. There is no need to analyze savings clauses unless an event has occurred that would terminate the lease under the habendum clause.

[¶21] Other courts around the country have explicitly held that the provisions of a drilling or reworking clause are only triggered when an event occurs that would terminate a lease under the habendum clause. In *Pack v. Santa Fe Minerals*, the Oklahoma Supreme Court considered the following question:

> [W]hether a lease, held by a gas well which is capable of producing in paying quantities but is shut-in for a period in excess of sixty (60) days but less than one year due to a marketing decision made by the producer, expires of its own terms under the "cessation of production" clause unless shut-in royalty payments are made.

869 P.2d 323, 325 (Okla. 1994). Like the clauses contained in the Shae lease, the drilling or reworking clause in *Pack* purported to apply if production "shall cease from any cause." The court, however, held that the clause would not terminate a lease when a well was "capable of producing gas in paying quantities" and therefore satisfied the habendum clause's production requirement under Oklahoma law. *Id.* at 329. As the court explained: "[t]he term 'production' as used in the cessation of production clause must mean the same as that term means in the habendum clause. Any other conclusion would render the habendum clause useless after the primary term expires . . . ." *Id*. at 328.

[¶22] Courts in other states have reached similar conclusions. *See, e.g., Huhn v. Marshall Exploration, Inc.*, 337 So. 2d 561, 565 (La. App. 2d Cir. 1976) (holding that "[t]here was no cessation of production and no necessity for drilling or 'reworking' of the

well in the technical sense of [the cessation of production clause] because the well was capable of producing." (emphasis added)).

[¶23] Construing a drilling or reworking clause in this manner accounts for the practical realities of how oil and gas is produced. In the real world, "oil and gas are never produced and marketed in a continuous, uninterrupted operation that goes on every hour of the day and night." 2 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 26.13 (1989). In other words, oil and gas production is rife with temporary cessations that fall short of a permanent cessation that must be addressed with drilling or reworking operations. As Professor Kuntz further noted, "[o]nce it is recognized that any brief interruption in the operation [of an oil and gas well] must be tolerated as a practical matter, it becomes necessary to adopt a doctrine that permits temporary cessations of production." *Id.*

[¶24] The sixty-day drilling or reworking provision in the Shae Lease therefore can only be triggered by a permanent cessation of production such that the lease would otherwise terminate under the habendum clause. To rule otherwise would effectively read the habendum clause out of the lease.

B. Drilling or reworking operations were never required to restore production to the Rolfstad Well, so the drilling or reworking clause is inapplicable here.

[¶25] In this case, Plaintiffs have never introduced evidence or even attempted to argue that the Rolfstad Well experienced a permanent cessation of production, and indeed have admitted that drilling or reworking operations were not needed to restore production. The District Court therefore correctly held that the sixty-day period in the drilling or

reworking clause never began to run. Appendix at 210 (Order ¶ 18). The Court should uphold the District Court's ruling.

[¶26] Even if the Shae Lease's sixty-day drilling or reworking provision could be triggered by a temporary cessation, by its own terms the provision only applies to a cessation (whatever the cause) that requires "drilling or reworking" operations to cure. Put differently, the clause's application is limited not by the cause of a cessation but rather by what type of operations are necessary to restore production. Because it is undisputed that the Rolfstad well never required drilling or reworking operations to restore production, the clause does not apply.

[¶27] As Professor Kuntz observed, "[t]he fact that the event which is designed to prevent termination is the commencement of drilling or reworking operations gives some indication of the purpose of the clause and the intent of the parties." Kuntz, *supra*, § 26.13 (emphasis added). The District Court's decision properly took the purpose of the Shae Lease's drilling or reworking clause into account: "[t]he Shae Lease specifically references drilling or reworking operations as the types of operations the lessee can perform within a sixty-day window of a cessation . . . . Accordingly, for this savings clause to trigger, the cessation must be one that can be remedied only by conducting additional drilling or reworking operations." Appendix at 210 (Order ¶ 19).

[¶28] The District Court's interpretation of the Shae Lease's drilling or reworking clause is supported by significant scholarly authority. "[T]he parties must have intended that the clause would become operative if a dry well is drilled or if a producing well ceases to be capable of producing in paying quantities . . . . A literal application of the clause to every temporary cessation of production could lead to absurd and unintended

results." Kuntz, *supra*, § 26.13. Professor Richard Hemingway concurred with the Kuntz treatise on this point: "[t]he scope of the wording of the clause is much more narrow than the causes that may lead to temporary cessation of production. [Cessation] may come about by many factors that cannot be remedied by either drilling or reworking of the well." Richard W. Hemingway, *Law of Oil and Gas* 302 (2d ed. 1983). As a consequence, according to Professor Hemingway, "the application of [a drilling or reworking] clause should be limited to matters that may be remedied by drilling or reworking." *Id.*

[¶29] The District Court's interpretation of the Shae Lease also conforms to North Dakota law governing cessation of production clauses. In *Serhienko v. Kiker*, the Court gave effect to the provisions of a cessation of production clause when reworking operations were clearly required to restore production from the well at issue. 392 N.W.2d 808, 810 (N.D. 1986) ("Gulf determined that serious casing leaks existed which prevented the well from producing oil and gas"). The Court also noted that "routine maintenance procedures . . . do not constitute reworking operations." *Id*. at 813. Federal courts interpreting North Dakota law appear to have looked to drilling or reworking clauses only in cases where production had yet to be established at the expiration of the lease's primary term – an issue that can clearly only be addressed by drilling operations. *See Anderson v. Hess Corp.*, 649 F.3d 891, 892-94 (8th Cir. 2011); *Roloff v. Cont'l Res., Inc.*, No. 4:13-CV-144, 2015 WL 112800 at *2 (D.N.D. Jan. 8, 2015); *Renbarger v. Zavanna, LLC*, No. 4:12-CV-00042, 2014 WL 29505 at *1 (D.N.D. Jan. 3, 2014); *Wold v. Zavanna, LLC*, No. 4:12-CV-00043, 2013 WL 6858827 at *1-2 (D.N.D. Dec. 31, 2013).

[¶30] Here, as the District Court correctly noted, the record of this case "does not demonstrate [that] drilling or reworking operations were required to reestablish production following any period of nonproduction identified in the Complaint." Appendix at 213 (Order ¶ 24). Insofar as routine maintenance was required, the District Court was correct as a matter of law that routine maintenance does not qualify as reworking. *Serhienko*, 392 N.W.2d at 813 ("routine maintenance procedures . . . do not constitute reworking operations"). And critically, Plaintiffs' counsel "agreed at oral argument that it appears Continental did not perform drilling or reworking operations in response to the temporary lapses in production that are at issue." Appendix at 204 (Order ¶ 8); *see also* Appellants' Brief ¶ 32.

[¶31] In the end, a lease's drilling or reworking clause is only triggered by a cessation that must be remedied by drilling or reworking operations. Here, it is undisputed that production was restored without need for drilling or reworking operations. The District Court therefore correctly dismissed Plaintiffs' claim that the Shae Lease automatically terminated under its drilling or reworking clause.

[¶32] Finally, it should not be overlooked that construing the drilling or reworking clause as Plaintiffs urge would create perverse incentives for operators to avoid shutting in wells even when prudence dictates that they do so. For example, what if a shut-in is required to perform maintenance operations that do not rise to the level of a rework? To take another example, what if circumstances dictate that it would be prudent to shut in the well or wells holding a lease due to the lessee's fracking operations in neighboring lands which may damage the wells absent a shut-in? If the wells are holding a lease like the one here, the lessee would seem to risk forfeiting its lease if it acts as prudence and safety

dictate and the shut-in exceeds sixty days. Interpreting drilling or reworking clauses as Plaintiffs urge would not only do violence to contractual language but would also be a poor precedent that may force well operators to choose between acting as a prudent operator or maintaining a lease.

II. Plaintiffs ratified the Shae Lease by accepting royalty payments and signing division orders certifying that they owned royalty interests.

[¶33] This Court has previously noted that an oil and gas lessor's "acceptance of . . . royalty payments was inconsistent with their intent to and request for a cancellation of the lease . . . ." *West v. Alpar Res., Inc.*, 298 N.W.2d 484, 492 (N.D. 1980) (affirming grant of partial summary judgment against lease cancellation claim). The Court's statement in *West* is in accord with long-held precedents of other jurisdictions. *Corey v. Sunburst Oil & Gas Co.*, 233 P. 909, 912 (Mont. 1925) ("while he seeks to have the court declare the lease invalid, he himself does that which declares it valid"); *Gulf Oil Corp. v. Marathon Oil Co.*, 152 S.W.2d 711, 724 (Tex. 1941) ("It has been held that the execution of a division order and the acceptance of payments under it operate as ratification of the lease referred to in the order"). Here, it is undisputed that Plaintiffs executed division orders certifying that they owned royalty interests when they would have owned unleased mineral interests had the Shae Lease terminated. Supp. Appendix at 30-36. In addition, they accepted royalty payments that were consistent with the division orders' stated royalty interests. *See supra* ¶¶ 13-14; *see also* Supp. Appendix at 85-90. These facts provide ample support for the District Court's ruling that Plaintiffs ratified the Shae Lease.

[¶34] Plaintiffs protest that they did not have actual knowledge of the production lapses from the Rolfstad Well at the times they executed division orders and accepted royalty

payments, but such a claim, even if true,[3] does not call the District Court's ruling into question. To the extent that knowledge of the lapses was required for a ratification to occur, it is undisputed that Plaintiffs' royalty checks came with detail statements showing the months and quantities in which oil had been sold. *See* Supp. Appendix at 85-90. These statements at the very least provided constructive or inquiry notice of the lapses in production. *See* N.D.C.C. §§ 1-01-22 (notice is either actual or constructive), 1-01-24 (constructive notice is notice imputed to a person by law), 1-01-25 ("Every person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself."). Moreover, the records upon which Plaintiffs rely to prove a lapse in production are the publicly available NDIC records that have always been available to Plaintiffs.[4] *See* Appendix at 237-254. Given the above, the District Court was correct in charging Plaintiffs with knowledge of the lapses in production at the times that they accepted royalty payments and signed division orders.

[¶35] Plaintiffs also assert that the Shae Lease was never ratified because they "received no benefit or advantage by accepting payments . . . ." Brief of Plaintiffs/Appellants ¶ 55.

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[3] Plaintiffs' lack of actual knowledge regarding the lapses in production may have been assumed for purposes of summary judgment, but if this Court believes that the timing of Plaintiffs' actual knowledge about the lapses is material, the Defendants most certainly dispute Plaintiffs' characterization. For instance, one of the Plaintiffs expressly admitted accepting royalties even through the time of his 2013 deposition. Appendix at 235.

[4] In their brief, Plaintiffs provide a hyperlink (without citation to the record) regarding the fee charged to access NDIC production records, but the existence of a small fee does not change the fact that the information is publicly available. For instance, county recorders are authorized to charge a fee for issuing copies of title instruments, and yet there is no doubt that such instruments provide constructive notice. *See* N.D.C.C. § 11-18-05(3).

However, the acceptance of a benefit is not a necessary element of ratification, which merely requires "[an act] of recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it . . . ." *Daniel v. Hamilton*, 61 N.W.2d 281, 288 (N.D. 1953). As the Eighth Circuit Court of Appeals has explained, a party "who accepts performance tendered by a party seeking to enforce [an] agreement is . . . bound to the agreement because his conduct in accepting the tendered performance serves as an affirmative ratification of the existence of the agreement." *Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 408 F.3d 460, 466 (8th Cir. 2005). The District Court's holding that Plaintiffs ratified the Shae Lease should be affirmed.

III. Petro-Hunt, L.L.C. and the William Herbert Hunt Trust Estate adopt arguments for affirmance raised by other Appellees.

[¶36] The Appellees in this case are similarly situated, and it is anticipated that Appellees Zavanna, *et al.* will brief additional arguments not addressed in this brief. Petro-Hunt, L.L.C. and the William Herbert Hunt Trust Estate hereby adopt arguments for affirmance raised by other Appellees.

CONCLUSION

[¶37] For the foregoing reasons, Appellees Petro-Hunt, L.L.C., and the William Herbert Hunt Trust Estate respectfully request that this Court affirm the judgment of the District Court. In the alternative, if the Court believes that Plaintiffs' claims cannot be dismissed as a matter of law, the Court should remand this case to the District Court for trial.

DATED this 25th day of November, 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶38] This Brief contains 4,739 words, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Times New Roman, 12 point font.

By: */s/ Paul J. Forster*
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CERTIFICATE OF SERVICE

[¶39] I hereby certify that a true and correct copy of the foregoing **BRIEF OF DEFENDANTS/APPELLEES PETRO-HUNT, L.L.C. AND THE WILLIAM HERBERT HUNT TRUST ESTATE** was on the 25th day of November, 2015, served electronically on the following:

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