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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert Post Johnson, and A.V.M. Inc., Appellants, vs. Statoil Oil & Gas LP, formerly known as Brigham Oil & Gas LP, Missouri Basin Well Service, Inc., MBI Oil and Gas, LLC, Northern Energy Corporation, Sunshine Pacific Corp., Stewart Geological, Inc., Brent Clum, Earthstone Energy, Inc., Vincent Melashenko, Hill L.P., LGFE-J L.P., Reef 2011 Private Drilling Fund, L.P., Missouri River Royalty Corporation, Rainbow Energy Marketing Corporation, United Energy Trading, LLC, Abaco Energy, L.L.C., Wolfe Exploration LLC, Joe Wolfe, Global Gas & Oil, L.L.C., SourceRock Exploration, LLC, Cody Oil & Gas Corporation, David Peterson, Slawson Exploration Company, Inc., Hess Bakken Investments II, LLC, LGFE-M L.P, Appellees.	Supreme Court No. 20180050 McKenzie County District Court Case No.: 27-2014-CV-00286

Appeal from Judgment Entered on December 7, 2017
Case No. 27-2014-CV-00286
County of McKenzie, Northwest Judicial District
The Honorable Robin A. Schmidt, Presiding

BRIEF OF APPELLANTS

Braaten Law Firm

Derrick Braaten, ND Bar #06394
Kyra Hill, ND Bar #08443
JJ England, ND Bar #08135
109 North 4th Street, Suite 100
Bismarck, ND 58501
Phone: (701) 221-2911
Attorneys for Plaintiffs/Appellants Robert Post Johnson and A.V.M. Inc.

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether Pugh clauses in two oil and gas leases stating "[n]otwithstanding anything to the contrary, on expiration of the primary term of the lease, the lease shall terminate as to any part of the property not included within a well unit or units … from which oil or gas is being produced in paying quantities" terminated the subject leases as to units without production at the expiration of the primary term.

[¶2] Whether the Pugh clauses conflict with the continuous drilling clauses and habendum clauses of the subject leases, such that the subject leases are ambiguous.

[¶3] If the leases are ambiguous, whether such ambiguity must be resolved as a matter of law in favor of Appellants pursuant to N.D.C.C. § 9-07-16.

II. STATEMENT OF THE FACTS

[¶4] Plaintiff Robert Post Johnson's ("Johnson") and Plaintiff A.V.M. Inc.'s ("AVM") (collectively, "Appellants") appeal arises out of an action to release a portion of two oil and gas leases entered into with Appellee Missouri Basin Well Service, Inc. and its assignees under N.D.C.C. § 47-16-37, and to quiet title to mineral interests under N.D.C.C. § 32-17.

The Subject Leases

[¶5] The first lease at issue was executed between Johnson (as lessor) and Missouri Basin Well Service, Inc. (as lessee) on April 22, 2008. ("Subject Lease 1") App. 368. The second lease at issue was executed between A.V.M., through its Vice President Lawrence Klemer (as lessor), and Missouri Basin Well Service, Inc. (as lessee), on April 24, 2008. ("Subject Lease 2") App. 370. These leases will be described herein as the "Subject Leases." Through various assignments and purchases, each of the Appellees claims an interest in the Subject Leases. Defendant-Appellee Statoil Oil & Gas LP

("Statoil"), formerly known as Brigham Oil & Gas LP, is the current operator of oil and gas wells on the property described in the Subject Leases.

[¶6] The terms and provisions of the Subject Leases are identical. The Subject Leases leased Johnson's and A.V.M.'s respective mineral interests in and under the following property ("Subject Property"):

Township 152 North, Range 98 West

Section 5:	SW1/4, W1/2SE1/4
Section 6:	NE1/4SE1/4
Section 7:	SE1/4SE1/4
Section 8:	N1/2NW1/4, SE1/4NW1/4, W1/2NE1/4, SE1/4, S1/2SW1/4, NE1/4SW1/4
Section 9:	SW1/4
Section 17:	N1/2NE1/4, NE1/4NW1/4, E1/2SW1/4, S1/2SE1/4
Section 20:	N1/2SE1/4, SW1/4SE1/4
Section 29:	W1/2NE1/4, N1/2SE1/4, NE1/4SW1/4

Subject Leases, App. 368-371.

[¶7] The majority of the language in the Subject Leases is pre-printed form language. However, both leases also contain three specially drafted typewritten provisions. Both Appellants "wanted assurances that the leases would terminate on all parcels which did not have a producing well." Aff. Robert Post Johnson, App. 372, ¶ 3. In response, Missouri Basin Well Service, Inc.'s representative, Jack Paris, "drafted the Pugh clause

contained in [the Subject] leases." *Id.* at ¶ 4. This Pugh Clause[1] is the second of the three specially typewritten provisions in the Subject Leases. In full, the identical Pugh Clauses state:

> Notwithstanding anything to the contrary, on expiration of the primary term of the lease, the lease shall terminate as to any property not included within a well unit or units, as established by appropriate regulating authority, from which oil or gas is being produced in paying quantities and shall also terminate as to 100' below geologic strata or formations from which production has not occurred during the primary term.

Subject Leases, App. 368, 370. This is a one-time Pugh clause because it applies one-time, i.e., "on expiration of the primary term."[2] *Id*.

[¶8] The remainder of the lease contains provisions that were part of the pre-printed, form document. *Id.* The provisions of Paragraph 1 of the Subject Leases, which is pre-printed language, are also relevant to this appeal. Paragraph 1 of the Subject Leases is comprised of a "habendum" clause,[3] a "continuous drilling operations" clause,[4] and a

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[1] A Pugh clause is "a type of pooling clause which provides that drilling operations on or production from a pooled unit or units shall maintain the lease in force only as to lands included within such unit or units." 8 HOWARD WILLIAMS ET AL., WILLIAMS & MEYERS OIL AND GAS LAW 848 (2016) (hereinafter "WILLIAMS & MEYERS").

[2] The primary term in a lease is defined as "[t]he period of time during which a lease may be kept alive by a lessee even though there is no production in paying quantities by virtue of drilling operations on the leased land or the payment of rentals. After the expiration of the primary term, the lease usually can be kept alive only by production in paying quantities, absent some savings clause in the lease, such as a … continuous drilling operations clause." 8 WILLIAMS & MEYERS 805.

[3] A "habendum" clause sets forth "the duration of the grantee's or lessee's interest in the premises." *Id.* at p. 465.

[4] A "continuous drilling operations" clause provides that "a lease may be kept alive after the expiration of the primary term and without production by drilling operations of the type specified in the clause continuously pursued." *Id.* at p. 205.

"cessation of production" and "dry hole" clause.[5, 6] The habendum clause states:

> It is agreed that this lease shall remain in force for a term of three (3) years from this date and as long thereafter as oil or gas of whatsoever nature or kind is produced from said leased premises or on acreage pooled therewith, or drilling operations are continued as hereinafter provided.

Id. The continuous drilling clause states:

> If, at the expiration of the primary term of this lease, oil or gas is not being produced on the leased premises or on acreage pooled therewith but Lessee is then engaged in drilling or reworking operations thereon, then this lease shall continue in force so long as operations are being continuously prosecuted on the leased premises or on acreage pooled therewith, and operations shall be considered to be continuously prosecuted if not more than ninety (90) days shall elapse between the completion or abandonment of one well and the beginning of operations for the drilling of a subsequent well.

Id. The cessation of production and dry hole clause states:

> If after discovery of oil or gas on said land or on acreage pooled therewith, the production thereof should cease from any cause after the primary term, this lease shall not terminate if Lessee commences additional drilling or re-working operations within ninety (90) days from the date of cessation of production or from the date of completion of [sic] dry hole.

Finally, the last sentence of Paragraph 1 refers back to both the continuous drilling clause and the cessation of production and dry hole clause:

> If oil or gas shall be discovered and produced as a result of such operations at or after the expiration of the primary term of this lease, this lease shall continue in force so long as oil or gas is produced from the leased premises or on acreage pooled therewith.

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[5] A "cessation of production" clause addresses situations in which "a lease may be preserved despite cessation of production." *Id*. at p.142. A "dry hole" clause is a clause "specifying the means by which a lessee may keep a lease alive after the drilling of a dry hole." *Id.* at p. 298.

[6] In the Subject Leases, the habendum, continuous drilling operations, and dry hole clauses are combined in one clause, which is not uncommon. *See* 3 WILLIAMS & MEYERS 360 ("Variations in the combination of these three elements (*viz*., dry hole, cessation of production, and drilling operations provisions) seem approximately as numerous as the mathematical combinations of the numerous variants of each of these three elements.").

Id.

[¶9] Each of these clauses has application at specific points in time. The Pugh clause takes effect only once, "on expiration of the primary term of the lease." *Id.* The habendum clause sets forth the three-year primary term and a secondary term lasting "as long thereafter as oil or gas of whatsoever nature or kind is produced from said leased premises…or drilling operations are continued as hereinafter provided." *Id.* The continuous drilling operations clause takes effect only once, "at the expiration of the primary term." *Id.* The cessation of production and dry hole clause applies to cessation of production or the drilling of a dry hole anytime "after the primary term." *Id*.

[¶10] Under the habendum clause, the three-year primary term of Subject Lease 1 ended at midnight on April 22, 2011, three years from the date of execution under the terms of the Lease. *Id.* Under the habendum clause, the three-year primary term of Subject Lease 2 ended at midnight on April 24, 2011, three years from execution under the terms of the Lease.

Wells Drilled on Leasehold during the Subject Leases' Primary Term

[¶11] Three wells were drilled on the leasehold and lands pooled therewith during the Subject Leases' primary terms and were producing at the expiration of the primary term. The following table shows the wells that were drilled on the Subject Property, as well as the original operators, the dates the wells were spud, the dates the wells were completed, and the spacing unit in which each well was included.

Well Name	Operator	Date Spud	Date Completed	Spacing Unit
Wil E. Coyote 9-2H (NDIC File No. 17514, API No. 33-053-02927-00-00)	Panther Energy Company, LLC, transferred to Statoil on August 24, 2010	August 25, 2008	February 12, 2009	640-acre spacing unit consisting of Section 9, T152N, R98W
Roscoe 2H-8 (NDIC File No. 17755, API No. 33-053-02960-00-00)	Panther Energy Company, LLC, transferred to Statoil on August 24, 2010	January 3, 2009	May 1, 2009	640-acre spacing unit consisting of Section 8, T152N, R98W
Ceynar 29-32H (NDIC File No. 19350, API No. 33-053-03223-00-00)	Zenergy, Inc	October 16, 2010	February 3, 2011	1,276-acre spacing unit consisting of Sections 29 and 32, T152N, R98W

[¶12] Although drilling operations for another well, the Enderud 9-4 2H, were commenced on or around the expiration of the primary term of the Subject Leases, this well was not producing and is therefore irrelevant to application of the Pugh clause, as explained *infra* (and even if the Enderud 9-4 #2H had been producing, it is on Section 9 which was already held by production from the Wil E. Coyote 9-2H). *See* Scout Ticket for Enderud 9-4 2H, Doc. ID 144 (showing spud date of April 22, 2011, and completion date of September 17, 2011).

[¶13] All parties agree that at the expiration of the Subject Leases' primary terms on April 22 and April 24 of 2011, the three wells described in the above table were the only wells producing on the leasehold. *See* Answer of Hess Bakken Investments, App. 28, ¶ 5; ¶¶ 42 and 43 of the Answers of All Other Defendants, App. 031-367. Production from these

three wells indisputably held the first three sections of the property within the spacing units described above. All parties also agree that there were no producing wells on any of the other five sections or lands pooled therewith. *See* Answer of Hess Bakken Investments, App. 28, ¶ 5; ¶ 33 of the Answers of All Other Defendants, App. 031-367.

[¶14] The following table shows, by section, the lands indisputably held by production from the wells listed above, and the sections with respect to which there was indisputably no production on those sections themselves, or on lands pooled therewith, at the expiration of the Subject Leases' primary terms:

Township 152 North, Range 98 West	
Section 5	No production on expiration of primary term
Section 6	No production on expiration of primary term
Section 7	No production on expiration of primary term
Section 8	Held by production from Roscoe 2H-8
Section 9	Held by production from Wil E. Coyote 9-2H
Section 17	No production on expiration of primary term
Section 20	No production on expiration of primary term
Section 29	Held by production from Ceynar 29-32H

Sections 5, 6, 7, 17, and 20 had no producing wells at the expiration of the primary term and will hereafter be referred to as the "Contested Sections."

III. STATEMENT OF THE CASE

[¶15] Plaintiffs filed their Summons and Complaint to release the Subject Leases as to the Contested Sections in McKenzie County District Court in October of 2014. Summons, Doc. ID 1; Complaint, Doc. ID 2. Plaintiffs filed an Amended Complaint, adding an additional factual claim not at issue on appeal, in January of 2016. App. 12. In January of 2017, the parties filed Cross-Motions for Summary Judgment on the effect of the Subject Leases' Pugh clause on the Contested Sections of the leasehold. *See* Motion for Summary Judgment of all Defendants except Hess Bakken Investments, Doc. ID 116;

Plaintiffs' Motion for Summary Judgment, Doc. ID 126; Response of Defendant Hess Bakken Investments to Motions for Summary Judgment, Doc. ID 136 (adopting all other defendants' motion and arguments).

[¶16] The parties agreed to present this legal question to the court prior to engaging in discovery on other fact-intensive questions raised in the amended complaint. Plaintiffs argued that the Pugh clause terminated the lease as to the Contested Sections. *See generally* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Doc. ID 127. Defendants argued that the leases were extended pursuant to the habendum and continuous drilling clauses, regardless of the Pugh clause. *See generally* Memorandum in Support of Defendants' Motion for Summary Judgment, Doc. ID 124. After briefing and oral argument on the Cross-Motions, the District Court granted Defendants' Motion and denied Plaintiffs' Motion in a short email and directed counsel for Defendants to file a proposed order granting Defendants' motion and denying Plaintiffs' motion.[7]

[¶17] On May 23, 2017, Defendants filed a nine-page Proposed Order granting their Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment. Doc. ID 177. Plaintiffs conferred with Defendants' counsel, and shortly thereafter, Defendants filed an amended nine-page Proposed Order with the District Court. App. 375-383. The amended Order addressed some of Plaintiffs' concerns, but Plaintiffs'

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[7] Judge Schmidt's email was never entered into the District Court record (likely because it was an email). Because it is not part of the record, the Appellants are unable to include the e-mail in their Appendix or quote it specifically. *Oien v. Oien*, 2005 ND 205, ¶ 11, 706 N.W.2d 81 (providing that hand-written note from judge in Appellants' Appendix would not be considered and that including it in the Appendix could subject the Appellants to sanctions). This information is provided simply to provide context for why there is a proposed order in the record prior to any ruling from the judge in the record.

primary objection was to the filing of a lengthy memorandum Order by Defendants that purported to express reasoning and rationale on the part of the District Court that was absent from the record. Plaintiffs noted their Objection to Defendants' Proposed Order by filing an objection and their own Proposed Order with the District Court on May 24, 2017. App. 384-388.

[¶18] On June 26, 2017, the District Court signed the Defendants' Proposed Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment. App. 389-397.[8] Several additional claims remained before the District Court; however, Appellants stipulated to the dismissal of all remaining claims with prejudice, and those claims are therefore not at issue on appeal. Joint Stipulation to Dismissal of Remaining Claims, App. 398; Order Granting Stipulated Motion to Dismiss Remaining Claims, App. 402. An Order for Judgment and final Judgment was signed by the District Court and entered on December 7, 2017. App. 403-406. This appeal followed.

IV. STANDARD OF REVIEW

[¶19] The issues on appeal come before the Court from simultaneous Cross-Motions for Summary Judgment briefed below.

[¶20] "Summary judgment . . . is a procedural device under N.D.R.Civ.P. 56 for prompt and expeditious disposition of a controversy without a trial if either party is entitled to judgment as a matter of law, and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result." *Perez v. Nichols*, 2006 ND 20, ¶ 5, 708 N.W.2d 884 (*quoting Green v. Mid*

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[8] The order adopted, verbatim, all of Defendants' proposed order except for the first two paragraphs, which simply contained introductory language regarding the nature of the motions and the parties.

Dakota Clinic, 2004 ND 12, ¶ 5, 673 N.W.2d 257). "Summary judgment is appropriate if the issues in the case are such that the resolution of any factual disputes will not alter the result." *State ex rel. N. Dakota Hous. Fin. Agency v. Center Mut. Ins. Co.*, 2006 ND 175, ¶ 9, 720 N.W.2d 425 (internal quotations omitted). "The party moving for summary judgment must show that there are no genuine issues of material fact and that the case is appropriate for judgment as a matter of law." *Id*.

[¶21] On appeal from a summary judgment ruling, "the evidence must be viewed in the light most favorable to the opposing party, and that party must be given the benefit of all favorable inferences." *Hurt v. Freeland*, 1999 ND 12, ¶ 7, 589 N.W.2d 551. "Whether the trial court properly granted summary judgment is a question of law which [the Court] review[s] de novo on the entire record." *Green v. Mid Dakota Clinic*, 2004 ND 12, ¶ 5, 673 N.W.2d 257 (internal citations omitted).

[¶22] "Generally, the interpretation of a written contract is a question of law for the court, making summary judgment an appropriate method of disposition in contract disputes." *Myaer v. Nodak Mut. Ins. Co.*, 2012 ND 21, ¶ 10, 812 N.W.2d 345 (*citing Tri–State Ins. Co. v. Commercial Grp. W., LLC*, 2005 ND 114, ¶ 10, 698 N.W.2d 483 *and Garofalo v. Saint Joseph's Hosp.*, 2000 ND 149, ¶ 7, 615 N.W.2d 160). "We construe written contracts to give effect to the parties' mutual intention when the contract was formed, and if possible, we look to the writing alone to determine the parties' intent." *Id.* (*citing Doeden v. Stubstad*, 2008 ND 165, ¶ 14, 755 N.W.2d 859; N.D.C.C. § 9-07-03).

[¶23] "The same general rules that govern interpretation of contractual agreements apply to oil and gas leases. The construction of a written contract to determine its legal effect is a question of law for the court to decide, and on appeal, this Court will

independently examine and construe the contract to determine if the trial court erred in its interpretation of it. Words in a contract are construed in their ordinary and popular sense, unless used by the parties in a technical sense or given a special meaning by the parties. We also construe contracts in light of existing statutes, which become part of and are read into the contract as if those provisions were included in it. A contract must be read and be considered in its entirety so that all of its provisions are taken into consideration to determine the true intent of the parties." *Irish Oil & Gas, Inc. v. Riemer*, 2011 ND 22, ¶ 15, 794 N.W.2d 715 (internal citations omitted).

V. SUMMARY OF THE ARGUMENT

[¶24] The issues before the Court on appeal hinge upon rules of contract interpretation and construction, and the clear and plain meaning of the lease language at issue. According to the Pugh clause in the Subject Leases, which explicitly states that "[n]otwithstanding anything to the contrary, on expiration of the primary term, the lease *shall terminate*" as to the non-producing portions of the leased property, the lease terminated as to the lands that were not within producing units at the expiration of the primary term. The Pugh clause was triggered by non-producing units at the expiration of the primary term. There is no conflict between the Pugh clause and the continuous drilling operations clause in the Subject Leases because each clause applies under a unique set of facts. Even if the Pugh and continuous drilling operations clauses would otherwise conflict, however, the Pugh clause applies "notwithstanding anything to the contrary," and N.D.C.C. § 9-07-16 requires that the Pugh clause, as a special provision added to the form lease, controls other provisions of the Subject Leases as a matter of law.

VI. ARGUMENT

[¶25] This Court should reverse the decision of the District Court for four separate and distinct reasons. First, the Pugh clause in the Subject Leases is "clear and explicit." N.D.C.C. § 9-07-01. It plainly says at "the expiration of the primary term" that "the lease shall terminate as to any part of the property not included within a well unit or units … from which oil or gas is being produced in paying quantities." Second, the Pugh clause says that this lease termination shall occur "notwithstanding anything to the contrary"—language that is absent from the habendum and continuous drilling clauses. For both reasons, the original parties' mutual intent that the subject lease terminate as to non-producing units is therefore clear based upon the plain language of the Pugh clause. Third, the continuous drilling clause was never triggered by its plain language because that clause is only triggered if "at the expiration of the primary term … oil or gas is not being produced on the leased premises or acreage pooled therewith," and here, oil and gas *were* being produced at the expiration of the primary term. Fourth, even if the Court finds the Subject Leases ambiguous, the Court must reverse because the Pugh clause was written under the special direction of the original parties and therefore controls the remainder of the printed form lease as a matter of law. N.D.C.C. § 9-07-16.

A. The Pugh clause clearly and explicitly "terminated" the lease as to lands without "production in paying quantities" at the "expiration of the primary term."

[¶26] "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." N.D.C.C. § 9-07-02. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible…." N.D.C.C. § 9-07-04. Here, the Pugh clause is clear and explicit based upon its plain language. Further, its "notwithstanding anything to the

contrary" language clearly indicates the parties' intent that the clause controls in the event of any conflict with other provisions within the Subject Leases.

i. The Pugh clause was plainly triggered at expiration of the primary term due the presence of lands not included in a producing unit.

[¶27] The relevant language of the Subject Leases' Pugh clause states: "[n]otwithstanding anything to the contrary, on expiration of the primary term of the lease, the lease shall terminate as to any property not included within a well unit or units, as established by appropriate regulating authority, from which oil or gas is being produced in paying quantities." App. 368, 370. Taken by itself, this language is "clear and explicit." N.D.C.C. § 9-07-02. It provides a specific, single time that this Pugh clause would be triggered: "on expiration of the primary term." It also plainly sets forth the circumstance that triggers this clause: the existence of leased "property not included within a well unit or units … from which oil or gas is being produced in paying quantities." Finally, the Pugh clause plainly describes its effect when the clause is triggered: "the lease shall terminate" as to such non-producing property.

[¶28] At the expiration of the primary term, as indicated by the table provided in ¶ 14, there were three producing wells on the Subject Property: the Roscoe 2H-8 well, which held Section 8; the Wil E. Coyote 9-2H, which held Section 9; and the Ceynar 29-32H well, which held Section 29. The leased portions of the five Contested Sections had no producing wells at the expiration of the primary term. *See supra*, ¶¶ 13-14. Therefore, the Pugh clause was triggered because at the expiration of the primary term "oil or gas [was] being produced in paying quantities" from these three wells on the leased premises, and there were no producing wells within the other five sections or lands pooled therewith. App. 368, 370. By operation of the Pugh clause's clear and explicit terms, at the "expiration

of the primary term, the lease shall terminate as to any part of the property not included within a well unit or units. . . from which oil or gas [was] being produced in paying quantities." App. 368, 370. Thus, the Pugh clause terminated the lease as to Sections 5, 6, 7, 17, and 20 because there were no wells producing oil or gas in paying quantities on those sections or lands pooled therewith at the expiration of the primary term.

[¶29] This is also consistent with the general principles regarding Pugh clauses set forth in two previous cases in which this Court has had the opportunity to interpret such clauses. *See Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, ¶ 12, 848 N.W.2d 691; *Egeland v. Continental Res., Inc.*, 2000 ND 169, ¶ 16, 616 N.W.2d 861. The general principles are helpful even though in *Tank*, the Court noted that Pugh clauses "can vary widely in form." *Tank*, 2014 ND 123, ¶ 14; *see also* 6 WILLIAMS & MEYERS 714 ("Variations in the language of such clauses are legion").

[¶30] Those cases explained, "[a]n oil and gas lease is generally indivisible by nature, and production or other operations on any part of the land will generally maintain the lease beyond the primary term for all of the land covered by the lease." *Tank*, 2014 ND 123, ¶ 12 (citing *Egeland*, 2000 ND 169, ¶ 16). The Pugh clause changes this default rule. "A Pugh clause generally provides for a severance of the lease where less than all of the leasehold is included in a single unit." *Id.* at ¶ 14 (internal quotations omitted). "Pugh clauses are generally included in a lease to protect the lessor." *Tank*, 2014 ND 123, ¶ 28. To be effective, "[a] Pugh clause cannot arise by implication and must clearly and explicitly direct a division of the lease into several parts." *Id.* (internal quotes removed).

[¶31] In this case, there is no question that the Subject Leases contain a Pugh clause and that the Pugh clause "explicitly direct[s] a division of the lease[s] into several

parts." *Id.* The Pugh clauses in the Subject Leases accomplished this division by directing that "the lease shall terminate as to any property not included within a well unit or units, as established by appropriate regulating authority, from which oil or gas is being produced in paying quantities" at the expiration of the primary term. App. 368, 370. The Pugh clause divides the lease into two portions: "property not included within a well unit or units … from which oil or gas [was] being produced in paying quantities," and property which *was* "included within a well unit or units … from which oil or gas [was] being produced in paying quantities." *Id.* Under the Subject Leases' Pugh clause, the lease terminated as to the former, i.e., the property not included in a producing well unit.

ii. The plain language of the Pugh clause indicates that it applies "Notwithstanding anything to the contrary."

[¶32] Further, the express language of the Subject Leases indicates that in the event of an unanticipated conflict, the Pugh clause controls. Specifically, the Pugh clause indicates that it applies "[n]otwithstanding anything to the contrary." App. 368, 370 (emphasis added). The habendum, continuous drilling, and cessation of production and dry hole clauses do not include this language. *Id.* "When parties use the clause 'notwithstanding anything to the contrary contained herein' in a paragraph of their contract, they contemplate the possibility that other parts of their contract may conflict with that paragraph, and they agree that this paragraph must be given effect regardless of any contrary provisions of the contract." *Helmerich & Payne Int'l Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635, 643 (Tex. App. 2005) (citing cases from Texas and the Fifth Circuit in support of this statement).

[¶33] *Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, ¶ 27, 848 N.W.2d 691, discussed *supra*, supports this general rule. In that case, "[t]he Pugh and the drilling

operations clauses both include[d] language stating each clause applies notwithstanding any contrary provision in the lease." *Id.* (emphasis added). Due to the presence of this "notwithstanding" language in both clauses, this Court held that "[t]he clauses conflict" because "each clause includes language stating it supersedes and controls any contrary provisions." *Id.* But in the current case, the only clauses in the entirety of the Subject Leases that have this "notwithstanding anything to the contrary" language are the three type-written clauses that were written specially for Appellants by Mr. Paris. The habendum, continuous drilling, and cessation of production and dry hole clauses do not have this corresponding language. This case therefore presents the inverse fact pattern to *Tank* vis-à-vis the "notwithstanding" language, and the Pugh clause controls in the event of any "contrary" language in the Subject Leases.

B. The continuous drilling clause does not conflict with the Pugh clause because the continuous drilling clause, as a savings clause, was not triggered.

[¶34] The District Court, in its adopted order, held that "the Pugh Clauses permit extension of the Subject Leases in their entirety by drilling operations continuously prosecuted on any part of the Subject Lands at and after the end of the Subject Leases primary terms." App. 395, ¶ 12. This is incorrect as a matter of the plain language of not just the Pugh clause (as described above), but also the plain language of the continuous drilling clause. Specifically, the continuous drilling clause was not triggered at all.

[¶35] The Subject Leases' continuous drilling clause states that "[if] at the expiration of the primary term, oil or gas is not being produced from said leased premises or acreage pooled therewith … then this lease shall continue in force for so long as operations are being continuously prosecuted on the leased premise . . . ." App. 368, 370.

[¶36] Like the Pugh clause, the Subject Leases' continuous drilling operations clause is also clear and explicit. It provides only one precise point in time that this continuous drilling clause can be triggered: "at the expiration of the primary term." *Id.* It also plainly sets forth the circumstance that triggers this clause: "oil or gas is not being produced from said leased premises or acreage pooled therewith." *Id.* (emphasis added). Finally, the continuous drilling clause plainly describes the lessee's reserved rights *if* the circumstances necessary to trigger this savings clause occur: "the lease shall continue in force so long as operations are being continuously prosecuted … [and] [i]f oil or gas shall be discovered and produced as a result of such operations" then the "lease shall continue in force so long as oil or gas is produced from the leased premises." *Id.*

[¶37] Here, the continuous drilling operations clause was not triggered at all because oil and gas *were* being produced from the leased premises at the expiration of the primary term by the Wil E. Coyote, Roscoe 2H-8 , and the Ceynar 29-32H wells. *See supra*, ¶¶ 13-14 In fact, all defendants admitted this in their answers. Answer of Hess Bakken Investments, App. 28, ¶ 5; ¶¶ 42 and 43 of the Answers of All Other Defendants, App. 031-367. Production from these three wells means that the continuous drilling clause was not triggered because it was not true that "oil or gas [was] not being produced from the leased premises" at the expiration of the primary term. App. 368, 370. To the contrary, "oil or gas" was "being produced from said leased premises" at the "expiration of the primary term." *Id.*

[¶38] To further illustrate the purpose of this clause, it helps to put the continuous drilling operations clause in the context of the form lease. Even though "the oil and gas lease is far from standardized" and "the forms in use may vary in the hundreds, if not the

thousands," modern leases typically have both (1) some form of a habendum clause and (2) some form of a savings clause. 4 WILLIAMS AND MEYERS 569. Because the drilling clause (or continuous drilling clause) is a savings clause to the habendum clause, the clauses must be considered together.

[¶39] Under a typical form oil and gas lease's habendum clause, a well that produces during the primary term will be sufficient to hold the lease into the secondary term so long as the well continues to produce oil or gas. Continuous drilling operations would not be necessary to hold the lease beyond the primary term in this circumstance—the producing well alone is sufficient. The purpose of the continuous drilling clause is therefore to serve as a savings clause in case no production has occurred during the primary term. *See, e.g.*, *Shown v. Getty Oil Co.*, 645 S.W.2d 555, 559 (Tex. App. 1982) ("Ordinarily a lease may be kept alive after the primary term only by production in paying quantities absent some savings clause such as [a] drilling operations clause or continuous drilling operations clause.") The clause provides the operator a final opportunity to hold the lease in the absence of production on the leasehold by conducting drilling operations that begin before the expiration of the primary term but conclude after the expiration of the primary term.

[¶40] In other words, under the setup common to many form oil and gas leases, the continuous drilling clause would not be triggered so long as production is already occurring at the expiration of the primary term. This is because, by design, it is not necessary to invoke this savings clause when there is already production at the expiration of the primary term. The same is true with the Subject Leases. The savings clause, by

design, was not triggered because there was already production from the leased premises at the expiration of the primary term.

C. Even if the Pugh and continuous drilling operations clauses conflict, the plain language of the Pugh clause controls as a special provision added to a form lease.

[¶41] Plaintiffs' reading of the Subject Leases above gives effect to the plain meaning of each provision of the contract. N.D.C.C. § 9-07-06 ("The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others."); *Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, ¶ 10, 848 N.W.2d 691 ("We attempt to give effect to every clause, sentence, and provision in a contract."). It also indicates the original parties' mutual intentions based upon "the writing alone." N.D.C.C. § 9-07-04. However, if this Court believes that the Pugh and continuous drilling operations clauses nonetheless conflict, N.D.C.C. § 9-07-16 directs that as a matter of law the Pugh clause "control[s]" the language "copied from a form." This is because the Pugh clause was "printed under the special directions of the parties and with a special view to their intention." N.D.C.C. § 9-07-16.

[¶42] The following facts, set forth in the Affidavit of Appellant Robert Post Johnson in support of Plaintiffs' motion for summary judgment, were not opposed by any of the Appellees:

> 3. During negotiations for the Subject Leases, both myself and Lawrence Klemer wanted assurances that the leases would terminate after three years on all parcels which did not have a producing well. I informed Jack Paris that we would only agree to accept a royalty of three-sixteenths (3/16th) rather than one-fifth (1/5th) if Jack Paris would ensure that the lease would terminate as to all lands without a producing well (or in a unit with a producing well) at the end of three years.
>
> 4. In response, Jack Paris drafted the Pugh clause contained in our leases.

> 5. This clause was drafted specifically to address my request that any lands without a well producing in paying quantities would be released at the expiration of the three-year primary term of the leases.

App. 372-373.

[¶43] This set of facts is exactly what N.D.C.C. § 9-07-16 addresses. First, the Subject Leases were a "form originally prepared without special reference to the particular parties and the particular contract in question." N.D.C.C. § 9-07-16. Second, the Pugh clause was added "under the special directions of the parties" and "the remainder" was "copied from [the] form." *Id.* Therefore, "the parts which are purely original control those which are copied from [the] form," and to the extent that "the two are absolutely repugnant the latter [i.e., the form] must be disregarded insofar as such repugnancy exists." *Id.* Therefore, as a matter of law, any ambiguity in the Subject Leases, including an irreconcilable conflict between the provisions, must be resolved as a matter of law in favor of giving effect to the Pugh clause. This has been the longstanding rule in North Dakota (the rule existed in § 942 of the original 1877 Civil Code) and it has been repeatedly upheld and applied.[9]

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[9] *See, e.g. Hagen v. Dwyer*, 162 N.W. 699, 701 (1917) ("Where there is a conflict between the plain meaning of the inserted clauses and those appearing in the printed blank used, the meaning to be deduced from the inserted clauses must prevail."); *Kern v. Kelner*, 75 N.D. 292, 303, 27 N.W.2d 567, 573 (1947) ("If there were any grounds for claiming ambiguity or possibility of conflict between the printed words and the typewritten words the latter would control as showing the deliberate agreement of the parties."); *McGraw-Edison Co. v. Haverluk*, 130 N.W.2d 616, 620 (N.D. 1964) ("it is a rule of construction, established in this jurisdiction, that typewritten words of a provision in a contract prevail over printed words, as showing deliberate agreement of the parties"); *Thiel Indus., Inc. v. Western Fire Ins. Co.*, 289 N.W.2d 786, 788 (N.D. 1980) ("The conflict between the words in a contract provision and the words in an amendment to that contract provision cannot supply the basis for a conclusion that the contract is ambiguous. Even in cases where one of the provisions is not labeled an "amendment," the general rule requires that typewritten additions to preprinted documents shall control.").

VII. CONCLUSION

[¶44] The Pugh clause in the Subject Leases terminated the leases as to any unit without a producing well at the expiration of the primary term. The plain language of the Pugh clause dictates this result, and no further analysis is required. To the extent the Court considers the continuous drilling clause, however, it was not triggered. Further, N.D.C.C. § 9-07-16 directs that the Pugh clause controls. The District Court erred by granting Defendants' summary judgment motion and denying Plaintiffs' summary judgment motion, and the Appellants therefore respectfully request that the District Court's order and judgment be reversed.

Signed this 28th day of March 2018.

BRAATEN LAW FIRM

/s/ Derrick Braaten
Derrick Braaten (ND ID #06394)
Kyra Hill (ND ID #08443)
JJ England (ND ID 08135)
109 North 4th Street, Suite 100
Bismarck, ND 58501-4004
Telephone: 701-221-2911
Fax: 701-221-5842
derrick@braatenlawfirm.com
kyra@braatenlawfirm.com
jj@braatenlawfirm.com

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert Post Johnson, and A.V.M. Inc., Appellants, vs. Statoil Oil & Gas LP, formerly known as Brigham Oil & Gas LP, Missouri Basin Well Service, Inc., MBI Oil and Gas, LLC, Northern Energy Corporation, Sunshine Pacific Corp., Stewart Geological, Inc., Brent Clum, Earthstone Energy, Inc., Vincent Melashenko, Hill L.P., LGFE-J L.P., Reef 2011 Private Drilling Fund, L.P., Missouri River Royalty Corporation, Rainbow Energy Marketing Corporation, United Energy Trading, LLC, Abaco Energy, L.L.C., Wolfe Exploration LLC, Joe Wolfe, Global Gas & Oil, L.L.C., SourceRock Exploration, LLC, Cody Oil & Gas Corporation, David Peterson, Slawson Exploration Company, Inc., Hess Bakken Investments II, LLC, LGFE-M L.P, Appellees.	)	Supreme Court No. 20180050 McKenzie County District Court Case No.: 27-2014-CV-00286

Appeal from Judgment Entered on December 7, 2017
Case No. 27-2014-CV-00286
County of McKenzie, Northwest Judicial District
The Honorable Robin A. Schmidt, Presiding

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2018, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents in the above-captioned matter:

1. Brief of Appellants; and

2. Appendix of Appellants

and on March 28, 2018 served the same by electronic mail upon the following counsel for all parties to this appeal:

Lawrence Bender, lbender@fredlaw.com

Michael D. Schoepf, mschoepf@fredlaw.com

Spencer Douglas Ptacek, sptacek@fredlaw.com

Fields Alexander, falexander@beckredden.com

Parth Gejji, pgejji@beckredden.com

David Gunn, dgunn@beckredden.com

Paul Jonathan Forster, pforster@crowleyfleck.com

John W. Morrison Jr., jmorrison@crowleyfleck.com

/s/ *Kyra Hill*
Kyra Hill