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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Hess Bakken Investments II, LLC; Arkoma Drilling II, L.P.; and Comstock Oil & Gas, LP, Plaintiffs-Appellants, v. AgriBank, FCB; Intervention Energy, LLC; and Riverbend Oil & Gas VI, L.L.C., Defendants-Appellees.	)	Supreme Court No. 20190352 Mountrail County District Court Case No. 31-2018-CV-00245

On Appeal from Order Partially Granting Motions to Dismiss
dated July 24, 2019
Case No. 31-2018-CV-00245
County of Mountrail, North Central Judicial District
The Honorable Stacy Louser, Presiding

REPLY BRIEF OF APPELLANTS HESS BAKKEN INVESTMENTS II, LLC, ARKOMA DRILLING II, L.P., AND COMSTOCK OIL & GAS, LP

ORAL ARGUMENT REQUESTED

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ARGUMENT

[¶1] None of the Appellees' arguments change the fundamental point that the Hess Group's interpretation is the only one that gives meaning to every word in "actual drilling operations," requiring more than minimal "drilling operations" but less than "actual drilling." The authorities cited by the Appellees are all non-binding and distinguishable. They should not lead the Court to conclude that "actual drilling operations" requires "actual drilling," thereby writing the word "operations" out of the Subject Leases. Moreover, the Appellees try to gloss over the fact that affirming dismissal would require the Court to make inferences that cannot be supported on a motion to dismiss, in particular as to the Hess Group's force majeure argument. The Court should reverse and remand.

A. Rule 12(b)(6) governs this appeal.

[¶2] Despite the other parties agreeing Rule 12(b)(6) governs this appeal, Intervention argues Rule 56 governs because the Hess Group allegedly submitted matters outside the pleadings. Intervention Br., ¶¶ 8–12. Intervention did not make this argument to the District Court, and the District Court undisputedly analyzed the motions under the Rule 12(b)(6) standard. App. 129–130 (citing the Rule 12(b)(6) standards).

[¶3] Nor does the argument have any merit. Incredibly, Intervention points to the exhibits to the Amended Complaint as the matters supposedly outside the pleadings. As is common, the Hess Group included several exhibits in its pleadings rather than copy and paste every word of the exhibits. Moreover, even if the Amended Complaint had not incorporated these documents, a court "may consider, in addition to the pleadings, materials embraced by the pleadings and materials that are part of the public record,

without converting the motion to a summary judgment under Rule 56." *Nelson v. McAlester Fuel Co.*, 2017 ND 49, ¶ 22, 891 N.W.2d 126 (citation omitted). By contrast, Intervention relies on caselaw involving allegations and exhibits in the answer. Intervention Br., ¶¶ 8–9. Here, the District Court properly considered the motions under Rule 12(b)(6). This Court must review *de novo* whether the Appellees have shown with "certainty" the "impossibility" of the Hess Group proving a claim upon which relief can be granted. *Ziegelmann v. DaimlerChrysler Corp.*, 2002 ND 134, ¶ 5, 649 N.W.2d 556.

B. Appellees equate "actual drilling operations" to "actual drilling," while the Hess Group's interpretation gives meaning to every word in the contract.

[¶4] Strikingly, the Appellees present no explanation for how "actual drilling operations" differs from "actual drilling." They argue "actual drilling operations" can only mean a drill bit penetrating and turning in the ground. *See* AgriBank Br., ¶ 27; Riverbend Br., ¶ 26; Intervention Br., ¶ 24. But they fail to acknowledge that "actual drilling" has the very same definition. Despite nearly one hundred pages of collective briefing, the Appellees have provided no rational explanation for how their interpretation effectuates the word "operations," nor can they.

[¶5] The Hess Group's interpretation is the only one that effectuates every word in "actual drilling operations." Contrary to the Appellees' assertions, the Hess Group's interpretation gives meaning to the word "actual," though the Appellees mischaracterize the Hess Group's argument on this point. This Court has defined "actual" to mean "real" and "substantial." *Hanneman v. Nygaard*, 2010 ND 113, ¶ 17, 784 N.W.2d 117 (emphasis added and citation omitted). Thus, the Hess Group has argued that "actual drilling operations" requires "drilling operations" that are real and substantial. Drilling operations include work done preparatory to drilling. *Abell v. GADECO, LLC*, 2017 ND

163, ¶ 10, 897 N.W.2d 914. Given this, "actual drilling operations" require preparatory work that is real and substantial.

[¶6] This interpretation results in a distinction between the substantial preparatory activities necessary to qualify as actual drilling operations and the "minimal" preparatory work for drilling that *Abell* held to potentially qualify as drilling operations. *See id.* at ¶ 13 (noting "GADECO's preparatory work for drilling was minimal . . . ."). In other words, "actual drilling operations" creates an intermediate standard requiring more than "drilling operations" but less than "actual drilling." Such a conclusion is the only way to give effect to every word in the Subject Leases. As with "drilling operations," whether "actual drilling operations" have occurred is a question of fact. *See id.* at ¶ 12 (noting "similar determinations in related contexts" are generally "questions of fact").

[¶7] The Appellees set up a straw man when they cast the Hess Group's interpretation as requiring only drilling operations that are real, as opposed to illusory, pretend, phony, or imaginary. By doing so, they disregard that the term "actual" can mean both real and substantial. *Hanneman*, 2010 ND 113, ¶ 17, 784 N.W.2d 117. The distinction urged by the Hess Group is not between real and imaginary drilling operations, but between drilling operations that are real and substantial as opposed to minimal and insubstantial.

[¶8] In interpreting "actual drilling operations" to require "actual drilling," the Appellees must also torture grammar. The parties agree "actual" and "drilling" are adjectives while "operations" is a noun. The Appellees argue at length that the Hess Group's interpretation is grammatically incorrect because "actual" is a cumulative adjective, meaning "actual" modifies the adjective-noun string "drilling operations." Riverbend Br., ¶¶ 20–25; Intervention Br., ¶¶ 30–33. Assuming this is so, it does not

follow that "actual drilling operations" requires "actual drilling." Cumulative adjectives build upon each other to describe a noun; cumulative adjectives do not build upon each other to delete a noun.

[¶9] In fact, analyzing the phrase as containing cumulative adjectives supports the Hess Group's interpretation. As a cumulative adjective, "actual" modifies the adjective-noun string "drilling operations." This construction only highlights that the phrase treats "drilling operations" as a concept—a concept defined by case law to include preparatory work. The modifier "actual" then means that the drilling operations, including work preparatory to drilling, must be real and substantial as opposed to minimal and insubstantial. In sum, viewing the adjectives as cumulative is perfectly consistent with the Hess Group's interpretation and lends no support to the Appellees.

C. The authorities upon which the Appellees rely are inapposite.

[¶10] For their authority, the Appellees rely on decisions from other states and the Interior Board of Land Appeals ("IBLA") that applied special contractual or regulatory definitions of "actual drilling operations." *See* AgriBank Br., ¶¶ 28–29; Intervention Br., ¶¶ 14, 21–22; Riverbend Br., ¶¶ 41–44. These definitions altered the plain meaning of the phrase to require actual drilling, and the Hess Group distinguished these authorities in its opening brief. Appellants Br., ¶¶ 43–47. Yet, neither Riverbend nor Intervention attempt to explain why this Court should import special definitions that are absent in the Subject Leases.

[¶11] Meanwhile, AgriBank acknowledges the distinction but suggests that the Court should adopt the special definitions found in third-party contracts or inapplicable regulations. *See* AgriBank Br., ¶¶ 28–30. To justify this, AgriBank cites to a North

Dakota canon regarding industry usage of technical words. *See* N.D.C.C. § 9-07-10. AgriBank, however, ignores that the parties in these other cases would not have needed to draft special definitions for "actual drilling operations" if the phrase unambiguously meant "actual drilling." Moreover, asking the Court to rely on special definitions in third-party contracts and inapplicable regulations amounts to an appeal to industry custom and usage. Custom and usage is "ordinarily a question of fact" and only relevant when an agreement is silent or ambiguous on a point. *Come Big or Stay Home, LLC v. EOG Res., Inc.*, 2012 ND 91, ¶ 10, 816 N.W.2d 80. As such, the Court should disregard the special definitions of "actual drilling operations" referenced in these authorities, especially when reviewing a motion to dismiss. If anything, these cases illustrate how easily AgriBank could have limited the continuous drilling clauses at issue to "actual drilling," if that was AgriBank's intent. The Appellees cannot now import special definitions after the fact.

[¶12] The Appellees also cite oil and gas treatises to avoid the linguistic difficulties posed by their interpretation. Intervention Br., ¶¶ 20–21; Riverbend Br., ¶ 38. Intervention and Riverbend argue that *Williams & Meyers Oil and Gas Law* defines "actual drilling operations" to mean "actual drilling." Actually, *Williams & Meyers* merely notes the same line of IBLA decisions discussed above and in the Hess Group's opening brief. These cases construed leases subject to a special definition of "actual drilling operations" found in federal regulations. Imperatively, *Williams & Meyers* does not endorse that definition as the general meaning of "actual drilling operations," noting, instead:

> This term has been construed by an Interior Department decision as requiring the actual penetration of the ground by the drill bit. Preliminary

> work as grading roads and well sites and moving equipment onto the leased land were viewed as insufficient. *Estelle Wolf*, IBLA 77-145, GFS (O&G) 1978-157. . . .

8 *Williams & Meyers Oil and Gas Law*, Manual of Terms 18 (2018) (emphasis added). Intervention and Riverbend conveniently omit the underlined language from the quotations in their briefs, apparently to pass off a reference to the IBLA's conclusion as a general definition endorsed by *Williams & Meyers*. *See* Intervention Br., ¶ 21; Riverbend Br., ¶ 38. This notation that "actual drilling operations" "has been construed" by a federal agency to require actual drilling stands in contrast to other terms for which the treatise endorses generally applicable definitions. *See, e.g.*, 8 *Williams & Meyers Oil and Gas Law*, Manual of Terms 288 (defining "drilling operations").

[¶13] As for 2 *Summers Oil and Gas* § 18:3 (3d ed.), to which Intervention repeatedly cites, the treatise does not define "actual drilling operations." Rather, in a footnote collecting summaries of numerous cases addressing "drilling operations," it states:

> In *Santa Fe Energy Resources, Inc.*, 138 IBLA 133, 1997 WL 123570 (Int. Bd. L.App. 1997), operations to plug and abandon a dry hole do not constitute "actual drilling operations" sufficient to extend a lease primary term. IBLA concluded that the concept of "completion" within the regulatory definition of "actual drilling operations" relates to completion of a well for production.

2 *Summers Oil and Gas* § 18:3 n.2 (3d ed.). Plugging and abandoning a dry hole is not at issue in this case. In sum, neither *Summers* nor *Williams & Meyers* provides support for construing "actual drilling operations" to mean "actual drilling," absent a special regulatory definition, and the Appellees grossly overstate their relevance to this case.

[¶14] Finally, although not in the exact context of a continuous drilling clause, case law from other jurisdictions supports the Hess Group's interpretation. Interpreting a joint operating agreement, the New Mexico Supreme Court has held on-site preparation for the

physical drilling of a well, even without a permit, can suffice to show an operator has "actually commenced drilling operations." *Enduro Operating LLC v. Echo Prod., Inc.*, 413 P.3d 866, 871–72 (N.M. 2018) (emphasis added). In addition, the Fifth Circuit has held the phrase "arising out of charterer's actual drilling operations," as used in a maritime charter contract for offshore drilling, encompasses activities reasonably incident or anticipated by the principal activity of the contract. *Wilson v. JOB, Inc*., 958 F.2d 653, 657 (5th Cir. 1992). As such, the *Wilson* court ruled that the term encompassed an injury that occurred while cleaning drilling equipment after drilling was complete. *See id.* at 658. *Wilson* is the only case cited by any party that interprets "actual drilling operations" based on its plain meaning as an undefined contractual term.

D. The Hess Group properly pled and presented the force majeure issue, which independently prevents dismissal under Rule 12(b)(6).

[¶15] Without defending the District Court's failure to address the force majeure issue, the Appellees argue the Hess Group failed to plead the issue or waived it. On a motion to dismiss, "a court's scrutiny of the pleadings should be deferential to the plaintiff, and the complaint should not be dismissed unless it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." *Ziegelmann*, 2002 ND 134, ¶ 5, 649 N.W.2d 556 (emphasis added and internal citation and quotation omitted). North Dakota's notice pleading standard only requires that a pleading "generally indicate the type of claim involved" and does not require that a pleading expound every possible legal argument. *Erickson v. Brown*, 2008 ND 57, ¶ 16, 747 N.W.2d 34.

[¶16] Here, the Hess Group asserted the force majeure argument in support of its quiet title and declaratory judgment claims, and the Amended Complaint contained facts supporting the argument. In fact, the pleading incorporated exhibits reciting the force

majeure terms and sundry notices showing a last-minute change in surface location. App. 20, 23, 43–46. Continental suddenly requested to change the surface hole locations for the Hess Wells, after permitting the wells and constructing the surface location. This creates a reasonable inference that Continental experienced an unexpected regulatory complication necessitating the move and delaying operations. The issue is not how long the NDIC took to approve applications, but rather a delay caused by a last-minute move.

[¶17] The Court is to draw inferences in favor of the Hess Group, not the Appellees. The Appellees ask the Court to infer that Continental's move of the surface hole location was merely a business decision, but such a fact is absent in the pleadings. Appellees also criticize the Hess Group for failing to put forth specific evidence equivalent to that recited in *Pennington v. Continental Resources, Inc.*, 2019 ND 228, 932 N.W.2d 897. The critical distinction is that *Pennington* involved a review of a summary judgment motion, not a motion to dismiss. *Id.* at ¶¶ 5–6. North Dakota is not a fact pleading jurisdiction, and the Hess Group was not required to plead every fact that might support its claims, or to file evidence with its pleadings. The Appellees disregard the procedural posture and standard of review when they criticize the lack of evidence in the record as to this issue.

[¶18] Finally, AgriBank argues that the Hess Group waived its force majeure argument by omitting it from arguments before the District Court. In actuality, the Hess Group both raised the issue in its briefing to the District Court and, at the motion hearing, specifically pointed to Continental's last-minute change of surface hole location as a basis for the argument. Appellee's App. 30–31; Tr. 21:7 to 22:3. The Hess Group raised

the argument and the District Court failed to address it, which is an independent ground for reversal. *See Williams v. Williams*, 2018 ND 13, ¶ 10, 905 N.W.2d 900.

CONCLUSION

[¶19] The Hess Group respectfully requests the Court reverse and remand for further proceedings.

DATED this 14th day of May, 2020.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶20] This Brief contains 12 pages, 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*
Paul J. Forster (#07398)

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STATE OF NORTH DAKOTA

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CERTIFICATE OF SERVICE

[1.] I hereby certify that a true and correct copy of the Reply Brief of Appellants Hess Bakken Investments II, LLC, Arkoma Drilling II, L.P., and Comstock Oil & Gas, LP was on the 14th day of May, 2020, served electronically on the following:

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