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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

VIC CHRISTENSEN MINERAL TRUST, *Plaintiff*, v. ENERPLUS RESOURCES CORPORATION, *Defendant, Cross-Claim Defendant, and Appellant,* and MEYER FAMILY MINERAL TRUST, JOANN DERYCE STRUTHERS TRUST, and STEVEN J. REED LIVING TRUST, *Defendants, Cross-Claim Plaintiffs, and Appellees.*	)	Supreme Court No. 20210050 Dunn Co. Civil No. 13-2019-CV-00012

APPELLANT ENERPLUS RESOURCES (USA) CORP.'S OPENING BRIEF

Appeal from Orders of the District Court, dated July 27, 2020 and August 10, 2020, and Judgments dated August 10, 2020, November 23, 2020, and March 17, 2021, Granting Summary Judgment against Appellant

Appeal From
Southwest Judicial District, Dunn County, North Dakota
The Honorable William Herauf

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

[1] In October 2017, Appellant Enerplus Resources (USA) Corporation[1] ("Enerplus"), an oil and gas producer, identified a dispute of title that affected royalty payments to Appellees Meyer Family Mineral Trust, Joann Deryce Struthers Trust, and Steven J. Reed Living Trust (collectively, the "Trust Defendants"). Enerplus suspended payment pursuant to N.D.C.C. § 47-16-39.1 until the issue was resolved. The Trust Defendants later cross-claimed against Enerplus for statutory interest, asserting the suspension of payments was unlawful. The District Court granted summary judgment to the Trust Defendants and against Enerplus on this claim. Enerplus identifies three issues with the grant of summary judgment in this appeal:

1. Whether the District Court erred by holding Enerplus liable under N.D.C.C. § 47-16-39.1 despite the existence of a dispute of title;
2. Whether the District Court erred in holding Enerplus was required to suspend only the precise payment amounts at issue; and
3. Whether the District Court erred in not granting summary judgment to Enerplus.

STATEMENT OF THE CASE

[2] The basis for suspense in this case was a title opinion that identified an ambiguity over the exact size of a non-participating royalty interest ("NPRI") that applied to a portion of an area known as the "W/2." At the time, the NPRI was held by the underlying plaintiff in this case, the Vic Christensen Mineral Trust ("VCMT"), and it burdened the mineral interests held by the Trust Defendants in the W/2.

[1] Enerplus Resources (USA) Corporation was incorrectly named in the District Court caption as Enerplus Resources Corp.

[3] N.D.C.C. § 47-16-39.1 states that an operator may suspend payments "in the event of a dispute of title existing that would affect distribution of royalty payments . . . however, the operator shall make royalty payments to those mineral owners whose title and ownership interest is not in dispute." N.D.C.C. § 47-16-39.1. Enerplus determined that the ambiguity at issue qualified as "a dispute of title existing that would affect distribution of royalty payments." *Id.* Consequently, Enerplus suspended payments to VCMT and the Trust Defendants (collectively, the "Owners") and requested they enter into a stipulation that clarified the size of the NPRI.

[4] Unfortunately, the Owners were not able to reach agreement on a stipulation for almost eighteen months. VCMT and the Trust Defendants each took opposing positions, with VCMT arguing for the largest possible NPRI, and the Trust Defendants arguing that the NPRI should not exist at all.

[5] In January 2019, VCMT filed a lawsuit to quiet title against the Trust Defendants. App. 10. VCMT also asserted a statutory claim against Enerplus, arguing Enerplus had been wrong to suspend all payments to VCMT on the basis of the title dispute regarding just the NPRI. In February 2019, the Trust Defendants filed an answer and counter-claim to quiet title against VCMT. App. 23. The Trust Defendants did not file any cross-claim against Enerplus at that time.

[6] On April 26, 2019, the Owners resolved the title dispute by recording a stipulation under which VCMT agreed to forego any rights to the NPRI. Enerplus promptly paid all funds that had been held in suspense. Had Enerplus not suspended funds, it would have overpaid VCMT by more than $158,000, and underpaid the Trust Defendants by the same amount.

[7] After the resolution of the title dispute, VCMT maintained its action against Enerplus for statutory interest for the payments that had been suspended. In late 2019, VCMT filed for summary judgment. Following briefing and oral argument, the District Court issued an order granting summary judgment to VCMT in February 2020.[2]

[8] In January 2020, after not having participated in the case during the preceding nine months, the Trust Defendants filed a motion for leave to file a cross-claim against Enerplus, seeking statutory interest on their own behalf for Enerplus's suspension of payments. Enerplus opposed the motion to amend as untimely, but it was granted. Immediately thereafter, the Trust Defendants filed a motion for summary judgment against Enerplus. Index # 111. Enerplus cross-moved for summary judgment on its own behalf. Index # 138.

[9] The parties participated in oral argument on the competing motions in March 2020, but the District Court decided to provide the parties several months to take additional discovery and submit supplemental briefs before a final ruling was issued. The parties filed supplemental briefs in July 2020. After additional argument, the District Court granted summary judgment to the Trust Defendants as to liability in an order dated July 27, 2020 (the "Order").[3] App. 30. Judgment was entered on August 10, 2020. App. 57.

[10] Following the Order and judgment, Enerplus and the Trust Defendants stipulated to the amount of damages owed pursuant to N.D.C.C. § 47-16-39.1, without

[2] Enerplus does not appeal the summary judgment ruling in favor of VCMT.

[3] The findings in the Order were restated with modifications in the Findings of Fact, Conclusions of Law and Order for Judgment dated August 10, 2020 ("Findings of Fact"). App. 47. This Brief provides parallel citations to the Order and the Findings of Fact when discussing the District Court's ruling.

prejudice to Enerplus's right to appeal as to liability. The damage award is reflected in judgments dated November 23, 2020, and March 17, 2021.

[11] Enerplus appeals from the Order and the other orders and judgments granting summary judgment as to liability against Enerplus and in favor of the Trust Defendants.

STATEMENT OF FACTS

I. The Conveyances at Issue

[12] The land and minerals at issue are located in Dunn County, North Dakota, and may be described as follows:

> Township 148 North, Range 95 West, 5th P.M.
> Section 1: Lots 3, 4, S½ NW¼, SW¼

App. 34 ¶ 7, 48 ¶ 6. This area is referred to in this brief as the "W/2."

[13] Prior to 1952, all land and minerals in the W/2 were owned by Mr. Victor Christensen. App. 34 ¶ 8, 49 ¶ 7. In 1952, Mr. Christensen granted the NPRI at issue through a Royalty Deed to Mr. Henry Roquette (the "Roquette Deed"). App. 68.

[14] The Roquette Deed states that the NPRI it created would apply to "ALL of the oil and of ALL of the gas produced" in the W/2 of Section 1, and further, that "the rights herein granted are and shall remain a charge and burden on the land herein described and binding on any future owners or lessees of said lands . . . ." *Id.* The Roquette Deed further states that future leases may be created "so long as there shall be included therein, for the benefit of the Assignee herein, the royalty rights herein conveyed . . . ." *Id.*

[15] The Roquette Deed describes the size of the NPRI in two different ways. First, it states that it conveys "all of [Christensen's] right, title, and interest in and to 5/128 royalty of ALL of the oil and of ALL of the gas produced" in the W/2. *Id.* However, it then

describes the W/2 as containing "320 acres more or less," and states: "It is the intention of the assignor to convey the royalty as defined here-in applicable to 100 mineral acres." *Id.* These figures were equivalent at the time the Roquette Deed was created.[4]

[16] At some point, Victor Christensen conveyed his remaining interest in the W/2 to his wife, Mildred Christensen. App. 34 ¶ 9, 49 ¶ 8. Then, in 1957 (recorded 1962), Mrs. Christensen conveyed 1/5 of her holdings in several areas, including the W/2, via a Warranty Deed to Joe S. Reed and Deryce M. Reed (the "Reeds Deed"). App. 69–70.

[17] The Reeds Deed states that the conveyance is "subject to all mineral reservations and conveyances, and oil and gas and mineral leases, patent reservations, right-of-way grants and reservations, and other reservations of record, as of the date of this instrument; and (in addition to the foregoing) excepting and reserving unto the [Grantor], her heirs, successors and assigns forever, an undivided four-fifths (4/5ths) interest in and to all" oil, gas and other minerals. *Id.*

[18] In 1968 (recorded 1969), Mr. Roquette conveyed his NPRI back to Mildred Christensen. App. 72.

[19] In the present day, Mrs. Christensen's interests are owned by VCMT, while the Trust Defendants collectively own the 1/5 interest conveyed to the Reeds. *Id.*

II. The Suspension of Payments in the W/2

[20] Prior to production beginning on the affected wells, a Drilling Title Opinion ("DTO") authored by Mr. Andrew Schill identified an error in the acreage provided in the Roquette Deed. *Id.* Specifically, the Roquette Deed referred to the W/2 as containing 320 acres, but updated surveys had shown it to contain 298.59 acres. *Id.*

[4] 100 mineral acres divided by 320 acres total, multiplied by the royalty rate of 12.5%, yield a 5/128 fractional interest.

[21] The Roquette Deed conveys an NPRI in terms of both a fractional interest (5/128) and mineral acres (100 of 320 mineral acres). App. 68. If the fractional interest controls, the acreage discrepancy is immaterial—the deed conveyed a 5/128 interest regardless of the size of the tract. However, if the mineral acres conveyance controls, the NPRI would be larger than a 5/128 interest because the denominator in the formula is reduced accordingly.

[22] The NPRI burdened the Trust Defendants' interests in the W/2, and it was held by VCMT, the only other owner of mineral interests in the W/2. The DTO therefore required that Enerplus obtain a stipulation and cross-conveyance from VCMT and the Trust Defendants to clarify the precise ownership and royalty interest applicable to each Owner. App. 73. Mr. Schill expected and assumed Enerplus would suspend all payments to the Owners applicable to the W/2 until that stipulation was obtained, in accordance with standard industry practice. App. 107 ¶ 12.

[23] On October 19, 2017, Enerplus informed the Owners that Enerplus had become aware of an issue in the chain of title covering the W/2. App. 71. In accordance with the DTO, Enerplus requested it be provided "a Stipulation of Interest with language of cross-conveyance" from the Owners. *Id.* In the meantime, due to the dispute over the amount owed to each Owner, Enerplus suspended all payments to each Owner pursuant to N.D.C.C. Section 47-16-39.1. *Id.*

III. The Owners Fail to Reach Agreement on a Stipulation

[24] Enerplus expected the issue would be resolved fairly quickly. However, it ended up taking 18 months for the Owners to agree on terms and execute the stipulation. During this time, the payments held in suspense grew to considerable sums and ultimately prompted this lawsuit.

[25] The Owners were unable to reach a resolution because VCMT and the Trust Defendants took precisely opposite positions on how to resolve the issue. VCMT's Complaint explains that the Trust Defendants provided a draft stipulation to VCMT on November 1, 2017. App. 14 ¶ 21. In this version of the stipulation, the NPRI was said to have merged back into the mineral interests and ceased to exist. *Id.*

[26] VCMT's Complaint alleged "there was no valid reason" for the NPRI to be eliminated as the Trust Defendants suggested. *Id.* ¶ 22. VCMT thus made revisions to the draft stipulation "to reflect a royalty interest of .04187184 (261,196/6,250,000) that the VCMT retained in the 1/5 of minerals owned by the Trust Defendants." *Id*. ¶ 23. VCMT provided its own draft stipulation to Mr. Monte Sandvick, who acted as the representative of the Trust Defendants, on December 22, 2017. App. 15 ¶ 24.

[27] Mr. Sandvick testified that he "disagreed with basically all of [VCMT's] red line[s]." App. 114 at 76:11–13. As a result, Mr. Sandvick "contacted the Trusts, told them what had been sent, and that there was nothing we were interested -- nothing I would recommend they sign." *Id.* at 76:14-21. The Trust Defendants agreed with this recommendation and did not accept VCMT's revised stipulation. *Id*.

[28] The parties thus reached an impasse. According to VCMT, the Trust Defendants took a "position of extortion" and had a "steadfast unwillingness to engage in anything resembling good faith, reasonable negotiations based in law and fact." App. 15 ¶ 26, 19 ¶ 51. According to Mr. Sandvick, the issue was precisely the opposite—VCMT had taken a legal position that was not supported by either the facts or the law. App. 115 at 95:11–96:12.

[29] The dispute between VCMT and Mr. Sandvick grew so great that VCMT's counsel attempted to bypass Mr. Sandvick by sending a letter directly to the Trustees of the Trust Defendants. App. 74–75. The letter attached VCMT's redlined stipulation and urged the Trust Defendants to sign it. *Id.* The tactic was not successful.

[30] Later, an attorney for VCMT emailed Mr. Sandvick and rejected the idea of even participating in a conference call together, stating that the VCMT Trustees "both do not think it would be worth their time to discuss this matter any further." App. 102. The attorney continued: "At this point, I would have to agree with them as the suspense has been ongoing for over a year and the Trusts you represent have been uncooperative and not willing to negotiate in good faith based on law and fact." *Id.*

[31] Ultimately, VCMT filed a lawsuit to quiet title against the Trust Defendants in January 2019, who then counter-claimed against VCMT for the same. App. 10, 23. VCMT also claimed it was owed statutory interest from Enerplus for unlawfully suspending payments.

IV. The Owners Record the Stipulation and Enerplus Releases Payment

[32] VCMT's lawsuit was filed in January 2019, after more than a year of disagreement between the Owners. Nonetheless, three months after the Complaint was filed—and before any discovery was taken—the Owners were able to reach agreement, and they executed a stipulation and cross-conveyance resolving the dispute. App. 108 ¶ 15. It was recorded on April 26, 2019. *Id.*

[33] VCMT had alleged in its Complaint that the Stipulation and Cross Conveyance should "reflect a royalty interest of .04187184 (261,196/6,250,000) that the VCMT retained in the 1/5 of minerals owned by the Trust Defendants." App. 14 ¶ 23. However, the executed Stipulation and Cross Conveyance states that there is no royalty

burden on the 1/5 mineral interest owned by the Trust Defendants. App. 108 ¶ 15. Thus, the dispute was resolved because VCMT agreed to forego any claim to the NPRI.

[34] The production attributable to the NPRI interest turned out to be substantial, and eliminating the NPRI increased the value of the Trust Defendants' collective net revenue interest in the W/2 by 25%.[5] As of May 31, 2019, shortly after the suspense was lifted, the cumulative value of the NPRI was $158,570.00. App. 107 ¶ 11. Enerplus would have overpaid VCMT by this amount had payments not been suspended. By January 2020, the value of the NPRI had grown to $186,396.00. *Id.*

[35] It is undisputed that Enerplus released all suspended funds to VCMT and the Trust Defendants immediately upon receipt of the stipulation. Payment arrived four days after recordation, on April 30, 2019.

STANDARD OF REVIEW

[36] The granting of summary judgment by a district court is reviewed de novo. *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754.

ARGUMENT

I. The District Court Erred by Holding Enerplus Liable Under N.D.C.C. § 47-16-39.1 Despite the Existence of a Dispute of Title.

[37] N.D.C.C. Section 47-16-39.1 states that an operator may suspend payments "in the event of a dispute of title existing that would affect distribution of royalty payments." The District Court acknowledged that there was a "dispute of title between VCMT and the Trust Defendants" here. App. 45 ¶ 37, 55 ¶ 31. However, the District Court concluded the title dispute was resolvable in favor of the Trust Defendants, and that the title opinion Enerplus relied upon was therefore wrong in identifying an ambiguity and

[5] *See* App. 108–09 ¶ 16 (collective NRI increased from .00752806 to .009413847).

requesting curative measures from the Owners. In the District Court's view, "had there been no erroneous suggestions that [the] 5/128ths Royalty burdened the 1/5 ownership of the Trust Defendants, there would have been no dispute." *Id.* As a result, the District Court held that Enerplus had acted unjustifiably in suspending payments to the Trust Defendants and ordered it to pay interest on the suspended payments at the statutory rate.

[38] This decision was erroneous in several respects. *First*, the acreage discrepancy identified by Enerplus is a genuine ambiguity that expressly required a stipulation pursuant to the North Dakota Mineral Title Standards in effect at the time. *Second*, there is in fact an interpretation of the Reeds Deed that supports the existence of the NPRI. *Third*, putting aside the legal issues, the Owners undoubtedly engaged in a protracted title dispute that they themselves extended. *Fourth*, and finally, the District Court's approach defeats the purpose of the statute and is unworkable for operators, as it essentially creates a new requirement for operators to resolve title disputes themselves before being entitled to statutory safe harbor—a requirement not found in the statute.

A. The Acreage Ambiguity in the Roquette Deed Required a Stipulation of Interest

[39] The issue that originally caused Enerplus to suspend payments was the ambiguity in the size of the NPRI caused by the acreage discrepancy in the Roquette Deed. Specifically, the Roquette Deed identifies the W/2 as containing "320 acres, more or less," but it in fact contains 298.59 acres. App. 72. The Roquette Deed describes the NPRI interest using both a fractional interest and a number of mineral acres, so it was unclear what the precise interest should be. Mr. Schill required Enerplus to obtain a stipulation from the Owners in order to resolve this ambiguity. App. 73.

[40] The District Court held that Enerplus was wrong to suspend payments because the acreage discrepancy is immaterial pursuant to *Hild v. Johnson*, 2006 ND 217, 723 N.W.2d 389. *See* App. 36–39 ¶¶ 15–21, App. 53 ¶ 24. But although *Hild* has some similarities to the present dispute, there are key distinctions as well. As a result, the District Court was wrong to hold that *Hild* resolved the acreage ambiguity such that no dispute of title existed.

[41] *Hild* involved a deed which conveyed a parcel of land "containing 582.76 acres, more or less." 2006 ND 217 ¶ 3. The landowner then conveyed "an undivided 382.76/582.76 interest" in minerals in the land, with the mineral deed again describing the tract as "582.76 acres, more or less." *Id.* Following a court ruling, the owner was found to possess additional land under the original deed, and the tract's size was revised to 640 acres. *Id.* ¶¶ 4–5, 7. The question that arose was whether the prior conveyance of mineral interests for 382.76/582.76 acres should be revised accordingly.

[42] This Court referred to several authorities, including North Dakota Mineral Title Standard 3-02, in setting forth the applicable rules. *Id.* ¶¶ 8–10. The Court ultimately held that if the size of a tract is revised after the fact, a deed that specifies a *percentage* royalty interest (*e.g.*, 50% or ½ of all oil and gas) continues to convey that same *percentage* interest, while a deed that specifies a certain number of mineral *acres* continues to convey the same number of *acres*—making the percentage interest actually conveyed smaller or larger, depending on the tract revision. *Id.* In *Hild*, the interest conveyed had been expressed as a fraction (382.76/582.76) of the total land, so "the grantees therefore acquired the stated fractional interest in all of the described tract, and gained when there was an excess in acreage above the amount contemplated by the parties." *Id.* ¶ 11.

[43] The language in the Roquette Deed is different than what was addressed in *Hild*. The deed does provide for a fractional interest—a "***5/128*** royalty of ALL of the oil and of ALL of the gas produced" in the W/2. App. 68 (emphasis added). However, the deed *also* states that "[i]t is the intention of the assignor to convey the royalty as defined here-in applicable to ***100 mineral acres***." *Id.* (emphasis added). The conveyance thus falls into both possibilities considered in *Hild*, which leads to opposite results. If the fractional interest is used, the case is like *Hild*, and the acreage discrepancy is irrelevant—the deed conveyed a 5/128 interest regardless of the size of the tract. However, if the mineral acres conveyance is used, the interest conveyed becomes larger than a 5/128 share.

[44] *Hild* does not address what occurs if a deed makes a conveyance using both percentages and mineral acres, and the result conflicts. However, Mineral Title Standard 3-02—referenced in *Hild*—addresses this situation directly. It states that "[i]f a mineral interest is conveyed both by a stated fraction or percentage and by mineral acres, and the two provisions result in a conflict, the title examiner ***must require that the conflict be resolved by all the affected parties either by a stipulation of interest***, corrective deed, or quiet title action." App. 116 (emphasis added).[6]

[45] Thus, in the precise situation faced by Enerplus, the Mineral Title Standards stated that a title examiner "must" resolve the conflict via a stipulation of interest or other action of the affected parties. This is exactly what Mr. Schill required from Enerplus, and as result, it is what Enerplus required from the Owners.

[6] The language in this Standard was revised in 2018, after the publication of the DTO and the initiation of the title dispute between the Owners. The version quoted is the 1989 version in effect when the dispute began.

[46] The District Court, by contrast, resolved this ambiguity by ignoring the mineral acres language and focusing solely on the fractional interest. App. 39 ¶ 21 (that language "is effectively superfluous").[7] The District Court's interpretation reads the conveyance by mineral acres out of the Roquette Deed entirely, and it goes directly against the guidance given by Mineral Title Standard 3-02.

[47] That is not to say that the District Court's reasoning was necessarily wrong. The District Court is authorized to interpret and render judgment as to the meaning of contracts, and it may or may not have taken the correct approach here. The problem is not with the substantive interpretation, but with the fact that the District Court faulted Enerplus for not resolving the dispute in the same manner that the District Court did.

[48] That issue is at the heart of this appeal. Enerplus is an oil and gas operator, not a court of law. Consequently, Enerplus cannot resolve title ambiguities the same way the District Court can. Enerplus lacks the District Court's expertise, and more importantly, it lacks its authority. If Enerplus had simply ignored the conveyance by mineral acres and used the smaller fractional amount as the correct interest, as the District Court did, it likely faced a lawsuit by the VCMT.

[49] This is why the legislature provides operators with safe harbor in the event of a dispute of title. N.D.C.C. § 47-16-39.1. Here, the acreage discrepancy is not easily resolvable by reference to prior precedent, and the Mineral Title Standards specifically recommended a stipulation be obtained. Under these circumstances, it was error for the District Court to hold that Enerplus was wrong to identify a potential dispute of title.

[7] The discussion on this issue in the Findings of Fact, which were submitted by the Trust Defendants at the District Court's request, is truncated compared to the original Order. *See* App. 53 ¶ 24.

B. There Are Two Possible Interpretations of the Reeds Deed, and Only One Eliminates the NPRI

[50] The second issue addressed by the District Court is whether the NPRI should exist at all. The District Court, construing the Reeds Deed, determined that the Trust Defendants' interest should not be burdened by the NPRI. But it did not recognize that other interpretations are possible as well, and that Enerplus, as an operator, is not authorized to decide which of these two interpretations is "right." The District Court's failure to recognize the potential ambiguity was erroneous, and it resulted in the incorrect conclusion that Enerplus was wrong to suspend payments.

[51] The NPRI at issue results from the Roquette Deed. This deed created an NPRI that applied to "ALL of the oil and of ALL of the gas" in the W/2, and stated that "the rights herein granted are and shall remain a charge and burden on the land herein described and binding on any future owners or lessees of said lands . . . ." App. 68. Thus, on its face, the NPRI burdens the entire W/2.

[52] That said, it is possible to convey an interest without subjecting it to an existing burden. Here, Mrs. Christensen conveyed 1/5 of the W/2 to the Reeds via the Reeds Deed. The question is whether, based on the language in the Reeds Deed, Mrs. Christensen and the Reeds intended for that 1/5 interest to be burdened with the existing NPRI.

[53] Answering that question is not simple. The granting and reservation clause of the Reeds Deed states that the conveyance is:

> ***subject to all mineral reservations and conveyances***, and oil and gas and mineral leases, patent reservations, right-of-way grants and reservations, ***and other reservations of record, as of the date of this instrument***; and (in addition to the foregoing) excepting and reserving unto the [Grantor], her heirs, successors and assigns forever, an undivided four-fifths (4/5ths) interest in and to all [oil, gas and other minerals] . . . .

App. 69–70 (emphasis added). The warranty clause states:

> And the [Grantor], for herself, her successors and assigns, does covenant with the [Grantees], their heirs and assigns, that (***subject to the exceptions and reservations above stated***) she is well seized in fee of the land and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all encumbrances ***except as above stated*** . . . .

App. 70 (emphasis added).

[54] The District Court determined that the first part of the granting clause clearly does convey an interest burdened by the NPRI. App. 42 ¶ 29, 53 ¶ 25. However, it then stated that the reservation clause is the "most important part of the particular grant." App. 42 ¶ 30, 53 ¶ 26. It noted that the reservation clause states that "4/5th of the interest in the minerals will be reserved by Ms. Christensen," which the District Court interpreted to mean there is "the expectation in the Grantee that they will receive a full 1/5th interest." *Id.* The District Court also noted the reservation clause has "no reference to the royalty interest of Mr. Roquette, specifically or generally." *Id.* From this, the District Court concluded that Mrs. Christensen "conveyed mineral acres without a reference to the outstanding royalty interest," and so as a matter of law, there should be no NPRI on the W/2. App. 43 ¶¶ 31–32, 53–54 ¶¶ 27–28.

[55] This is a plausible reading of the Reeds Deed, but it is not the *only* possible reading. Enerplus's title examiner, Mr. Schill, focused on the fact that the grant states it is "subject to all mineral reservations and conveyances," and that the deed then references "the exceptions and reservations above stated" in the warranty clause. App. 106 ¶ 7. Mr. Schill concluded that those references meant "this deed specifically and directly states that

the undivided 1/5 mineral interest was conveyed fully encumbered and burdened by the NPRIs of record, as is the undivided 4/5 mineral interest that was reserved." *Id.* ¶ 8.

[56] Mr. Schill's interpretation of the Reeds Deed is as plausible as the District Court's. It may even be more plausible, because it gives effect to every portion of the contract. *Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, ¶ 28, 848 N.W.2d 691 ("To the extent possible, we interpret contracts to give effect to every provision of the contract if reasonably practicable."). Indeed, the District Court essentially argued that position when questioning counsel for the Trust Defendants during oral argument. App. 65–67 at 15:3–17:14.

[57] Given two equally plausible interpretations, the District Court appears to have resolved the problem by reference to *Wenco v. EOG Resources Inc.*, 2012 ND 219, ¶ 12, 822 N.W.2d 701, and *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476, 480 (N.D. 1991). *See* Order ¶ 31. Broadly, these cases stand for the proposition "[t]hat a Grantor cannot grant and reserve the same mineral interest, and if a Grantor does not own a large enough mineral interest to satisfy both the grant and the reservation, the grant must be satisfied first because the obligation incurred by the grant is superior to the reservation." *Wenco*, 2012 ND 219, ¶ 12. This is sometimes called the *Duhig* rule, after *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940).

[58] The *Duhig* rule does apply under the Court's interpretation, where Mrs. Christensen "conveyed mineral acres without a reference to the outstanding royalty interest." App. 43 ¶ 31, App. 53–54 ¶ 27. At the time Mrs. Christensen conveyed a 1/5 interest to the Reeds, she owned the entire W/2 subject to the NPRI. She could not have conveyed an undivided 1/5 interest while also retaining an undivided 4/5 interest because

of the NPRI burden. The *Duhig* rule would then apply to make Ms. Christensen's retain mineral interest alone bear the outstanding royalty interest, as the District Court determined. *Id*.

[59] However, Mr. Schill's reading of the Reeds Deed was that Mrs. Christensen conveyed mineral acres *with* a reference to the outstanding royalty interest. App. 106 ¶ 8. If the 1/5 interest was conveyed with its proportional share of the NPRI burden, then Mrs. Christensen had enough mineral interests to also reserve a 4/5 interest for herself burdened by its share of the NPRI. In this reading, then, there is no conflict between the grant and the reservation, and the *Duhig* rule is inapplicable.

[60] Thus, neither *Wenco* nor *Acoma* resolves the basic question of which of the two competing interpretations is correct. In fact, none of the authority cited by the District Court answers that question. To the extent the District Court ruled out Mr. Schill's reading on the basis of *Wenco*, it plainly erred.

[61] This is not to say that the question can *never* be resolved—only that Enerplus is not the right entity to resolve it. As with the acreage ambiguity, Enerplus's authority extends only to identifying the title dispute, not solving it. This is not just Enerplus's opinion: In this precise circumstance, the North Dakota Mineral Title Standards recommend that the operator not attempt to make a determination, but instead obtain a stipulation of interest.

[62] Standards 7-05 and 7-05.1 essentially state the *Duhig* rule, but expressly note that they only apply if the conveyance is made "without any reference to the outstanding royalty interest." App. 118–19. The fact pattern in the comments contains the same limitation. *Id.* The Standards state, however, that "[u]nder circumstances when the

Acoma decision is not applicable, ***the examiner is urged to require stipulations among all of the involved parties*** on the allocation of the royalty burdens among mineral owners." *Id.* (emphasis added). Furthermore, the Standards expressly caution that "***[u]nder all circumstances, the title examiner should exercise extreme caution*** in determining the ownership of all royalty within the lands with particular attention to the burden on each mineral interest." *Id.* (emphasis added).

[63] Here, the *Acoma* decision is not applicable under one of the two potential interpretations of the Reeds Deed. Accordingly, the Standards suggest that the ambiguity is not resolvable, and state that the title examiner is "urged to require stipulations" from the affected parties. *Id.* They further warn that the title examiner must "exercise extreme caution" in making a determination regarding ownership. *Id.*

[64] It is difficult to read these warnings, along with the text of N.D.C.C. § 47-16-39.1, and come away with the conclusion that it was Enerplus's role to unilaterally resolve this dispute itself. There were and are two conflicting interpretations of the Reeds Deed, and the District Court erred by ruling out one interpretation on an incorrect premise, then faulting Enerplus for not doing the same.

C. The Factual Evidence of a Title Dispute is Overwhelming

[65] As discussed in the preceding Sections, it is plain an ambiguity existed regarding both the size and the existence of the NPRI as a matter of law. Even more clear, however, is that a dispute of title existed between the Owners as a factual matter. Indeed, the Owners took such opposing positions that the matter was not resolved until litigation. These facts alone provide a compelling reason to apply the safe harbor provided by N.D.C.C. § 47-16-39.1.

[66] Enerplus first notified the Owners of the NPRI ambiguity on October 26, 2017. Within a week after receiving the suspension letters, VCMT and the Trust Defendants adopted completely contrary positions. VCMT adopted Mr. Schill's interpretation and asserted its right to an NPRI of the maximum possible size. App. 14 ¶ 23. The Trust Defendants, by contrast, adopted the District Court's ultimate interpretation, and argued no NPRI existed at all. *Id.* ¶ 21.

[67] The Owners' positions quickly hardened, and they were unable to reach any agreement for more than a calendar year after payments were suspended. According to VCMT, the Trust Defendants took a "position of extortion" and had a "steadfast unwillingness to engage in anything resembling good faith, reasonable negotiations based in law and fact." App. 15 ¶ 26, 19 ¶ 51. According to Mr. Sandvick, the issue was precisely the opposite—VCMT had taken a legal position that was not supported by either the facts or the law. App. 115 at 95:11–96:12.

[68] This was a title dispute, and the Owners have not claimed otherwise. VCMT's lawsuit to quiet title against the Trust Defendants repeatedly refers to the issue as a title dispute. App. 12–13 ¶¶ 11–12, 15 ¶ 27, 16 ¶ 30, 19 ¶ 52. Mr. Sandvick, speaking on behalf of the Trust Defendants, similarly acknowledged the parties were involved in a title dispute multiple times during his deposition. *See* App. 112–113 at 39:2–14 (the W/2 is the "piece of property or the interest in dispute in this case"), 39:23–40:3 (the VCMT "disputed title to that property and was also claiming ownership to portions of the property that the Trust Defendants owned"), 44:7–10 ("the 1/5 interest" was the "portion of title that was being disputed between the Trust Defendants and Vic Christensen"). Even the District

Court ultimately acknowledged that there was a "dispute of title between VCMT and the Trust Defendants." App. 45 ¶ 37, 55 ¶ 31.

[69] The existence of this bona fide dispute of title should have entitled Enerplus to protection under N.D.C.C. § 47-16-39.1. This Court has not had occasion to interpret the precise contours of what qualifies as a "dispute of title" under N.D.C.C. § 47-16-39.1, but when the parties involved file lawsuits to quiet title against each other while referring to the case as a title dispute, the bar has surely been met.

[70] N.D.C.C. § 47-16-39.1 provides safe harbor "in the event of a dispute of title existing that would affect distribution of royalty payments." There was plainly a title dispute over the NPRI here, and it certainly affected the distribution of royalty payments; the cumulative value of the NPRI after the suspense was lifted was $158,570.00. App. 107 ¶ 11. Enerplus should have been entitled to statutory safe harbor on this basis alone.

D. Enerplus is Not Liable for Unlimited Damages Simply Because it Identified a Dispute of Title

[71] As noted above, the District Court acknowledged that there was a "dispute of title between VCMT and the Trust Defendants." App. 45 ¶ 37, 55 ¶ 31. However, the District Court determined that Enerplus caused the title dispute by following the title opinion and making the "erroneous suggestion[]" that the NPRI burdened the Trust Defendants' interest. *Id*. The District Court found that "there would have been no dispute" had Enerplus's "title opinion been correct in the first place." *Id.* As a result, the District Court appears to have ignored the factual evidence of the title dispute that Enerplus presented.

[72] This was erroneous. N.D.C.C. § 47-16-39.1 contains no exceptions based on whether any party "caused" the title dispute. Neither has this Court suggested that such

an inquiry is necessary or even appropriate. The theory that Enerplus is not entitled to safe harbor because it "caused" the dispute is thus in direct contradiction to plain statutory text. *See* N.D.C.C. § 1-02-05 ("When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

[73] The record also does not support the assertion that "[t]he dispute of title between VCMT and the Trust Defendants comes solely as a result of the actions of Enerplus and its title attorney." App. 45 ¶ 37, 55 ¶ 31. It is true that Enerplus sent the initial letter that resulted in the dispute, but it had no role beyond that. Enerplus did not draft or approve the underlying conveyances. And after sending its letter, Enerplus did not take sides in the dispute between VCMT and the Trust Defendants, it did not force either party to reject the others' contentions for eighteen months, and it certainly did not recommend litigation. Those decisions were made by VCMT and the Trust Defendants themselves—parties which were represented by experienced counsel and representatives like Mr. Sandvick. Putting the blame "solely" on Enerplus, as the District Court did, belies the record. *Id.*

[74] The District Court also asserted that "[h]ad the title opinion been correct in the first place and had there been no erroneous suggestions that in fact 5/128ths Royalty burdened the 1/5 ownership of the Trust Defendants, there would have been no dispute." *Id.* This claim is not supported by the record. Even if Enerplus had decided to resolve the NPRI dispute itself, there is no guarantee that the parties would have accepted Enerplus's decision. VCMT and the Trust Defendants both ended up suing Enerplus here—and VCMT *agreed* with Enerplus's interpretation of the Roquette Deed.

[75] The underlying premise that "there would have been no dispute" but for Enerplus's letter is deeply problematic in any event. *Id.* This reading suggests that Enerplus was *required* to shield the mineral owners from all knowledge of the ambiguity Enerplus's title attorney had discovered in order to avoid liability. But the Owners in this case are multi-million-dollar trusts, not helpless dependents. They are responsible for their own actions. Enerplus's mere "suggestion[]" that the NPRI existed—even if mistaken—did not override the Owners' agency or render them incapable of performing legal analysis. *Id.*

[76] These facts underscore the double standard the District Court's approach applies to operators versus interest owners. The Order admonishes Enerplus for not seeing that the title dispute was easily resolvable, but it completely absolves VCMT from the consequences of making the same (alleged) mistake. VCMT had the same opportunity that Enerplus did to review the deeds at issue and declare that the NPRI does not exist, and it could have done so as early as November 1, 2017—meaning the suspension would have ended as soon as it started. App. 14 ¶ 21. Instead, however, VCMT pressed for a large interest award and even filed a lawsuit against the Trust Defendants for not agreeing to those terms, alleging that the Trust Defendants were taking a "position of extortion" by not agreeing to VCMT's—and Enerplus's—interpretation. App. 15 ¶ 26.

[77] If Enerplus's interpretation is so obviously incorrect as to be frivolous, then certainly VCMT bears some portion of the blame for negotiating and advancing a lawsuit against the Trust Defendants based on the same reading of the deed. That Enerplus made a "suggestion" about how to resolve the dispute cannot mean it is responsible for *everything* that occurred afterwards. The Owners must bear their share of responsibility for dragging

such an allegedly simple dispute out over eighteen long months; a quicker resolution would have resolved the suspense and caused far less interest to accrue.

[78] Accordingly, even if the District Court were right that N.D.C.C. § 47-16-39.1 does not apply if the dispute is "caused" by an operator's identification of an ambiguity in the chain of title, it would still have erred by not considering whether and when responsibility passed to the Owners to resolve the dispute themselves. The District Court's failure to even consider that question, let alone to make factual findings, left unresolved issues of material fact that should have prevented a grant of summary judgment to the Trust Defendants.

[79] More to the point, if the inevitable result of informing the Owners of a potential ambiguity in the title record was more than a year of bitter negotiation, followed by competing lawsuits to quiet title, then the issue was too contentious for Enerplus to ever resolve on its own. For this reason, the District Court should have ruled that Enerplus was entitled to safe harbor under N.D.C.C. § 47-16-39.1. At a minimum, however, even if the District Court believed Enerplus was not entitled to safe harbor at the outset of the dispute, it should have examined whether that status should have changed at any point prior to April 2019, as the dispute between the Owners intensified. The District Court's failure to do so was erroneous, and its grant of summary judgment must be reversed.

II. The District Court Erred by Holding Enerplus Was Required to Suspend Only the Precise Payment Amounts at Issue

[80] Although it makes up the bulk of the Order, the District Court's determination that Enerplus was liable for suspending payments because the dispute of title was resolvable is not the only justification for the ruling. The District Court also determined that Enerplus was liable because it withheld payment on the "123/128ths" interest held by

the Trust Defendants not potentially subject to the NPRI. App. 45 ¶ 36, 54 ¶ 30. The District Court based this determination not on the statutory text, but on a rhetorical question: "There never was an issue as to the ownership of the 123/128ths interest: thus, how can it be proper under any circumstances to withhold the payment which is properly due?" *Id.*

[81] The District Court's interpretation of N.D.C.C. § 47-16-39.1 again fails to comport with the plain text of the statute. The statute states that it "does not apply . . . in the event of a dispute of title existing that would affect distribution of royalty payments . . . however, the operator shall make royalty payments to ***those mineral owners whose title and ownership interest is not in dispute***." N.D.C.C. § 47-16-39.1 (emphasis added). The statute notably does *not* say that operators must make partial payments while the dispute is pending. To the contrary, it presents a binary test: whether or not the owner has an interest "in dispute." If the owner has an interest "in dispute," payment is not required. *Id.*

[82] As explained above, the Trust Defendants were plainly "mineral owners whose title and ownership interest" *was* in dispute, at least with respect to the NPRI. Thus, the Trust Defendants were not among the class of owners that Enerplus was required to "make royalty payments to," and the plain text of the statute exempts Enerplus from liability. *Id.* This interpretation is supported by legislative history, which suggests that the exception was added solely to prevent *uninvolved* parties from being caught up in the suspension net. *See Burlington Res. Oil & Gas. Co.*, No. 4:10-CV-088, 2013 WL 3766526, at *9 ("The legislative history reflects that the reason [the exception was added] was to make clear that operators could not rely upon a title dispute over the interests of one mineral owner to delay payment to other mineral owners whose interests were not in dispute.").

[83] The Trust Defendants were not uninvolved parties here, notwithstanding the Order's assertion that there "never was an issue as to the ownership" of the Trust Defendants' other interests. App. 45 ¶ 36, 54 ¶ 30. Whether an NPRI burden existed on the 1/5 interest owned by the Trust Defendants was the exact issue in dispute in this case. And that burden was not a small proportion of the interest; to the contrary, eliminating the NPRI increased the value of the Trust Defendants' collective net revenue interest by 25%. Indeed, the NPRI was so directly connected to the Trust Defendants' ownership interests that they never made an argument about partial payment in their briefing below. Likewise, there is no evidence that the Trust Defendants requested that Enerplus pay on the undisputed portion of the proceeds during the pendency of the dispute. Instead, this argument was made for the first time by the District Court, *sua sponte*, in its Order.

[84] Enerplus is not aware of any North Dakota case that supports the District Court's view that Enerplus was required to unilaterally determine and pay amounts not at issue in the absence of even a request by the payee. Cases under the analogous Texas statute, however, support Enerplus's view that such actions are not required.

[85] For example, in *Leavitt v. Ballard Expl. Co., Inc*., a dispute arose over an NPRI that covered only 38 acres of the 234-acre Unit. 540 S.W.3d 164, 168 (Tex. App. 2017). That meant there was no dispute as to royalty payments for the other 196 acres (~84% of the whole). *Id.* Nonetheless, the court expressly held that the operator "was entitled to withhold the distribution of royalty payments ***from the [] Unit*** until the dispute over who was entitled to the distribution of those royalties was resolved." *Id.* at 176.

[86] Likewise, in *Headington Oil Co., L.P. v. White*, a mineral owner disputed the fractional NPRI listed for that owner and two others in a division order. 287 S.W.3d

204, 207 (Tex. App. 2009). In response, the operator suspended all payments to all three owners. *Id.* Yet even though portions of those payments were not in dispute, the court held that the "title dispute extinguished any liability for prejudgment interest" as to the owner. *Id.* The court thus rejected any claim that only the disputed portions of the interests at issue had to be held in suspense.

[87] Enerplus respectfully requests the Court adopt the same approach here. Deciding after the fact that Enerplus should have unilaterally determined and made payments on the "undisputed" portion of the Trust Defendants' interest, when it was not even asked to do so, turns what is supposed to be a safe harbor into a minefield of potential error. What is "in dispute" or not is a matter for judicial, not operator, interpretation, and Enerplus cannot reliably determine what a court might rule in that regard. Indeed, had Enerplus paid VCMT on what Enerplus believed to be the "undisputed" portion of the NPRI, it would have ended up overpaying by nearly $150,000.

[88] Requiring partial payments would therefore once again defeat the purpose of the statute for operators. The only workable solution is to suspend all payments potentially at issue. In this case, the affected area was the Trust Defendants' entire mineral estate in the W/2. The District Court erred when it held that Enerplus acted unjustifiably in suspending more than 5/128 of its payments to the Trust Defendants.

III. The District Court Erred by Not Granting Summary Judgment to Enerplus

[89] To summarize the preceding Sections, this case featured a potential acreage discrepancy, an ambiguity over the existence of the NPRI, and an obvious factual dispute between two parties that persisted for almost eighteen months. The Mineral Title Standards recommended suspending payment and obtaining a stipulation of interest to resolve both

the acreage discrepancy (3-02) and the validity of the NPRI (7-05 and 7-05.1), and this was the same recommendation given by Mr. Schill, a licensed title examiner.[8]

[90] It was lawful and reasonable for Enerplus to suspend payments under these circumstances. Enerplus is an oil and gas operator. In this role, it must make some determinations with respect to interest holders in order to make royalty payments, but it is not Enerplus's role to act as judge and jury with respect to complicated legal questions. Rather, it is Enerplus's role to identify title disputes and then allow the parties and/or the legal system to resolve them. Until the dispute is resolved, the best action is to place payments in trust, much like a bank in an interpleader action. This prevents any mistaken payments from being made during the pendency of the dispute.

[91] Had Enerplus not suspended payment here, it would have incorrectly paid more than $150,000 in royalties to VCMT during the course of the dispute with the Trust Defendants—royalties it later would have had to recover. *See* App. 108 ¶ 14. It also would have been liable to the Trust Defendants due to underpayment of the same amount. *See Maragos v. Newfield Prod. Co.*, 2017 ND 191, ¶ 10, 900 N.W.2d 44, 47. The purpose of the statute is defeated if multiple lawsuits are required to correct payment amounts after the dispute is resolved.

[92] Resolving the dispute in favor of the Trust Defendants at the outset would likely not have solved the issue either. Until the stipulation was entered, VCMT fiercely

[8] The Order asserts that Enerplus took the position that it is "absolved of liability as [it] acted in accordance with the opinion of an 'independent' title attorney." App. 44 ¶ 34, 51 ¶ 19. This is not accurate. Enerplus is well aware that it is ultimately responsible for its actions regardless of the legal advice it receives, and it did not argue to the contrary before the District Court. Enerplus points out that it acted according to the title opinion only to establish that it was acting with good faith when it suspended payments; the decision was not made arbitrarily or to gain financial advantage for Enerplus.

asserted its right to the NPRI; it even filed a lawsuit alleging the Trust Defendants were trying to extort it because they would not agree to the NPRI. App. 15 ¶ 26. It thus seems probable that Enerplus would have faced a lawsuit regardless of how it resolved the dispute.

[93] The legislature recognized this problem for operators, which is why the legislature carved out a safe harbor "in the event of a dispute of title existing that would affect distribution of royalty payments." N.D.C.C. § 47-16-39.1. That safe harbor exists regardless of the ultimate outcome of the dispute, and regardless of the relative merits of the parties' competing claims to title. The statute does not require operators like Enerplus to go out on a limb with their own preferred reading of the contract before they can earn the protection they are entitled to.

[94] This is the only approach that makes sense. Sometimes, like here, there are rational arguments to be made in favor of multiple different contract interpretations. *See, e.g.*, *West v. Alpar Res., Inc.*, 298 N.W.2d 484, 490 (N.D. 1980). It is up to the courts to render judgment on which is correct, not oil and gas operators. Enerplus's opinion on the matter is neither relevant nor binding. *Accord Leavitt*, 540 S.W.3d at 174 n.9 ("To the extent that the Trust is attempting to argue that [the operator] should have ignored [other parties'] claims because the Trust consistently argued that those claims lacked merit, we observe that ***nothing in [the Texas statute] requires a payor like [the operator] to evaluate the legal merit of a dispute, only that such a dispute exists***.") (emphasis added).

[95] The District Court's approach, by contrast, requires operators like Enerplus to make affirmative rulings on the merits of complicated legal questions without even notifying the parties involved. If Enerplus guesses wrong at any point in this process, including as to whether a notification is necessary, it is considered to have "solely" caused

the title dispute. App. 45 ¶ 37, 55 ¶ 31. The only way to avoid liability is to be perfect; any mistake—or even "erroneous suggestion"—is grounds for open-ended[9] punishment because Enerplus is responsible for *all* resulting damages.

[96] Enerplus respectfully submits that this approach cannot be correct. Here, it would have required Enerplus to have known, *a priori*, which portion of the Reeds Deed the District Court would ultimately find to be "most important." App. 42 ¶ 30, 53 ¶ 26. Such a standard is impossible to meet, and it cannot be squared with N.D.C.C. § 47-16-39.1, which was expressly written so that it "would ***not*** unduly penalize a lease operator if he has reasonable grounds for failing to make prompt payment." *Imperial Oil of North Dakota, Inc. v. Consol. Crude Oil Co.*, 851 F.2d 206, 211 (8th Cir. 1988) (emphasis added). Requiring operators like Enerplus to make potentially incorrect payments to avoid losing their statutory safe harbor defeats the purpose of the statute, and it all but invites chaos if enshrined as a rule.

[97] This Court should reject that outcome. The undisputed facts show that Enerplus had ample grounds to find there was "a dispute of title existing that would affect distribution of royalty payments" that permitted suspension of payments. N.D.C.C. § 47-16-39.1. No further factual findings are required to find that Enerplus was entitled to safe harbor under the statute. Enerplus respectfully requests this Court reverse the Order and grant summary judgment to Enerplus on its cross-motion against the Trust Defendants. Index # 138.

[9] The parties here took eighteen months to resolve a dispute that the District Court believed never even existed. More unscrupulous parties in the same situation could have refused to sign the stipulation solely to earn additional interest; the statutory interest rate of "eighteen percent per annum" is far higher than market rates. N.D.C.C. § 47-16-39.1.

CONCLUSION

[98] For the foregoing reasons, Enerplus acted in accordance with law and the North Dakota Mineral Title Standards when it identified a dispute of title and suspended payments to the Trust Defendants pursuant to N.D.C.C. § 47-16-39.1. The District Court's finding that no dispute existed and that Enerplus unjustifiably suspended payments was erroneous. The orders and judgments as to liability should be vacated, and summary judgment should be awarded in favor of Enerplus as to the Trust Defendants' cross-claim.

REQUEST FOR ORAL ARGUMENT

[99] Defendant, Cross-Claim Defendant and Appellant Enerplus Resources Corporation hereby request oral argument on this appeal. Oral argument will assist the court in reaching its decision and clarify any questions it may have from the parties' briefs.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of N.D. R. App. P. 32(a)(8)(A) because it contains 33 pages.

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