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FILED July 14, 2014
At 10:30 o'clock A M
SHARON JONES
District & County Clerk Martin Co., Texas
By Shelly Daly Deputy

CAUSE NO. 6387

PIONEER NATURAL RESOURCES USA, INC. AND PARKER & PARSLEY PRIVATE INVESTMENT 89 LP	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	MARTIN COUNTY, TEXAS
PETROPLEX ENERGY, INC.	§	
Defendant.	§	118th JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING VERTICAL TERMINATION AND SEGREGATION

TO THE HONORABLE TRIAL COURT:

On July 1, 2014, Plaintiffs Pioneer Natural Resources USA, Inc. and Parker & Parsley Private Investment 89 LP (collectively, "Pioneer") filed their Second Amended Petition against Defendant Petroplex Energy, Inc. ("Petroplex") seeking, among other things, a declaration from this Court that three mineral leases "are still in force and effect, thereby preserving and perpetuating Pioneer's ownership interest in the Lands covered therein." *See* Pl. Second Am. Pet. at 5. Petroplex has wrongly asserted that the three leases vertically terminated in part for lack of production on the theory that: (1) at the end of continuous development operations, the leases vertically segregated into separate units for each drilled area; (2) production on any particular drilled area perpetuates the lease as to that area only; and (3) as such, the leases have expired in any drilled area without current production. Because Petroplex's argument contravenes Texas law and the leases' plain terms, Pioneer respectfully requests that the Court grant partial summary judgment holding that the leases have not vertically segregated or vertically terminated in part, but rather remain in full force as to all acreage by virtue of current production on the fully developed leasehold estate.

I. GROUNDS FOR MOTION

Based on the uncontroverted summary-judgment evidence, the plain terms of the leases, and long-settled Texas oil-and-gas law, the three leases at issue have neither vertically segregated nor vertically terminated in part. Because no lease language effected vertical segregation at any time, any production on the leased land perpetuates the leases as to all portions of the leased acreage. And because the leases were fully developed at the end of continuous-development operations, no partial vertical termination occurred.

Therefore, Pioneer is entitled to partial summary judgment holding that:

- the leases have not vertically segregated into separate units requiring independent production on each unit to perpetuate the leases thereon;
- at the expiration of continuous-development operations, no partial vertical termination of the leasehold estate occurred because the leases were fully developed; and
- current production on the leased land perpetuates the leases as to all leased acreage.

II. SUMMARY JUDGMENT EVIDENCE

The summary judgment evidence contained in the attached Appendix is incorporated herein for all purposes. The following Exhibits are contained in Pioneer's Appendix:

Exhibit A Affidavit of Jeff O'Brien

A.1 Oil, Gas and Mineral Lease dated April 27, 1972, between Ollie Belle McReynolds Richter Bell, Irene McReynolds, B.A. McReynolds, Martha Vinson, and Joe B. McReynolds, as Lessors, and J.H. Crouch, Jr., as Lessee, as to all depths from the surface to 10,000 feet, recorded in Vol. 143, Page 650, of the Deed Records of Martin County, Texas

A.2 Oil and Gas Lease, dated May 11, 1972, between Elizabeth M. Brown, individually and as Trustee under the will of H.L. Brown, et al., as Lessor and George R. Gibson, as Lessee, as to depths from the surface to 9,500 feet, recorded in Vol. 143, Page 644 of the Deed Records of Martin County, Texas

A.3 Oil and Gas Lease, dated May 11, 1972, between W. Ridley Wheeler Estate, et al., as Lessors, and George R. Gibson, as Lessee, as to depths from surface

to 9,500 feet, recorded in Vol. 143, Page 647 of the Deed Records of Martin County, Texas

A.4 Map of Cox and Pioneer Wells (including those drilled by Parker & Parsley) on the Lands

A.5 Copy of Special Field Rules for Spraberry (Trend Area) Field

Exhibit B Excerpts from Oral and Videotaped Deposition of Rick Davis, Corporate Representative of Petroplex, dated June 17, 2014

III. STATEMENT OF UNDISPUTED FACTS

1. Pioneer is successor-in-interest to the original mineral lessees in three oil-and-gas leases covering all of Section 5 (a/k/a Survey 5), Block OH, R.N. Griffin Survey, A-938, Martin County, Texas, containing approximately 800 acres (the "Lands"), as follows:

(a) Oil, Gas and Mineral Lease dated April 27, 1972, between Ollie Belle McReynolds Richter Bell, Irene McReynolds, B.A. McReynolds, Martha Vinson, and Joe B. McReynolds, as Lessors, and J.H. Crouch, Jr., as Lessee, as to all depths from the surface to 10,000 feet, recorded in Vol. 143, Page 650, of the Deed Records of Martin County, Texas (the "McReynolds Lease");

(b) Oil and Gas Lease, dated May 11, 1972, between Elizabeth M. Brown, individually and as Trustee under the will of H.L. Brown, et al., as Lessor and George R. Gibson, as Lessee, as to depths from the surface to 9,500 feet, recorded in Vol. 143, Page 644 of the Deed Records of Martin County, Texas (the "Brown Lease"); and

(c) Oil and Gas Lease, dated May 11, 1972, between W. Ridley Wheeler Estate, et al., as Lessors, and George R. Gibson, as Lessee, as to depths from surface to 9,500 feet, recorded in Vol. 143, Page 647 of the Deed Records of Martin County, Texas (the "Wheeler Lease");

(collectively "the Leases"). *See* Exhibits A.1, A.2, and A.3 (Leases).

2. The McReynolds Lease contains a continuous-development clause stating:

> Lessee, his heirs or assigns, agrees to commence, or cause to be commenced, a location to be selected by Lessee on the above described land within 60 days from approva[l] of title and approval of said location by the Railroad Commission, operations for the drilling of a test well for oil or gas to a depth sufficient to test the Spraberry-Dean formations and then continuously drill additional wells on 160 acre

> spacings at an interval no more than 180 days from completion of one well to the commencement of another. Extensio[n] of time by drilling shall be cumulative. Failure to commence operations in the time specified shall result in expiration of this lease as to all undrilled locations.

Ex. A.1 at ¶ 12.

3. The Wheeler and Brown Leases contain a continuous-development clause stating:

> Lessee agrees to commence the drilling of a test well on the most easterly proration unit of the lease acreage within 60 days from the date hereof and to continuously develop the lease acreage until all of such acreage has been included in a proration unit as to each productive zone. In complying with this provision, not more than 90 days shall elapse between the completion of one well and the commencement of the next well. The sole penalty for failure to comply with this provision to drill and develop will be the termination of this lease as to all land covered hereby not included in a proration unit. Also at the termination of such continuous development program this lease shall terminate as to all zones not then productive in each separate proration unit created hereunder. Proration units shall be of the size prescribed by the Railroad Commission of Texas in order for a well located thereon to receive a full allowable, plus 10% tolerance if such is permitted under the regulations of the said Railroad Commission of Texas.

Exs. A.2 at ¶ 15 and A.3 at ¶ 15.

4. Pioneer's predecessor John L. Cox ("Cox") drilled five initial oil and gas wells on the Lands in accordance with the terms of the leases. Cox drilled the McReynolds No. 1, McReynolds No. 2, McReynolds B No. 1, McReynolds B No. 2, and McReynolds B No. 3 wells (the "Cox Wells"). *See* Exs. A (Affidavit of Jeff O'Brien) and A.4 (Map of Cox and Pioneer Wells). The McReynolds B No. 3 was completed on or about September 17, 1973. *Id.* Each Cox Well was placed in the Spraberry (Trend Area) Field. *See* Exs. A and A.5. *See* also Ex. B (Deposition of R. Davis at 50-52, 64).

5. Cox completed each of the Cox Wells as a producer prior to expiration of continuous-development operations as provided in the Leases. *See id*; Exs. A.1, A.2, and A.3. Ex. B at 50-52.

6. Each Cox Well was entitled to a 160-acre proration unit as prescribed by the then-applicable field rules. *See* Ex. A.5 (Copy of Applicable Special Field Rules); Ex. B (Deposition of

R. Davis at 64). As a result, all of the Lands as to depths above 9,500 and/or 10,000 feet (depending on the depths assigned in the Leases) were included in a 160-acre producing proration unit upon completion of the McReynolds B No. 3. *See* Ex. A (Affidavit of Jeff O'Brien) and Ex. B (Deposition of R. Davis at 64).

7. Upon acquisition of the Leases and Cox Wells from Cox, Pioneer's predecessor-in-interest, Parker & Parsley, Ltd. (and various Parker & Parsley affiliates), drilled five additional wells on the lands: the McReynolds B No. 4, McReynolds C No. 1, McReynolds D No. 1, McReynolds E No. 1, and McReynolds F No. 1 (the "Pioneer Wells"). *See* Exs. A (Affidavit of Jeff O'Brien) and A.4 (Map of Cox and Pioneer Wells). The McReynolds D No. 1 and McReynolds F No. 1 continue to produce oil and gas in paying quantities today. *See* Ex. A; Ex. B (Deposition of R. Davis at 53).

IV. ARGUMENT AND AUTHORITIES

A. Texas Contract-Construction Rules Are Clear: Give Parties the Benefit of the Bargain They Signed Up for—No More, No Less.

This case is, at its core, a contract-construction dispute, and therefore Texas's contract-construction rules apply to resolve it. As this Court is well aware, the construction of an unambiguous contract is a question of law and is reviewed *de novo*. *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002) (citing *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991); *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 312 (Tex. 1999)). A contract is not ambiguous "simply because the parties advance conflicting interpretations" of it. *Columbia Gas Transmission Corp. v. New Ulm Gas Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). Rather, it is unambiguous "if it can be given a definite or certain meaning." *Id.* Neither party here has alleged that the leases are ambiguous.

The Court's duty in construing a contract is to discern "the parties' intent as expressed within the [contract's] four corners," *Anadarko Petroleum Corp.*, 94 S.W.3d at 554 (citing *Luckel*, 819

S.W.2d at 461; *Yzaguirre v. KCS Resources, Inc.*, 53 S.W.3d 368, 372-73 (Tex. 2001)), and to "give the [contract's] language its plain, grammatical meaning unless doing so would clearly defeat the parties' intentions," *id.* (citing *Fox. v. Thoreson*, 398 S.W.2d 88, 92 (Tex. 1966)). Courts must "examine the entire [contract] and attempt to harmonize all its parts." *Id.* (citing *Luckel*, 819 S.W.2d at 462). "Ultimately, courts must enforce contract terms as written and may not rewrite contracts or add to their language under the guise of interpretation." *Weaver v. Jamar*, 383 S.W.3d 805, 811 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Courts simply may not alter a contract's "plain terms to give [parties] the benefit of a bargain they never made." *Yzaguirre*, 53 S.W.3d at 374.

B. Texas Lease-Construction Rules Are Also Clear: Courts Must Resolve All Doubt Against Lease Termination, and Absent Unequivocal Language to the Contrary, Production on Any Part of a Lease Perpetuates the Lease as to All Acreage.

In Texas, a mineral lease grants a fee simple determinable to the lessee. *Anadarko Petroleum Corp.*, 94 S.W.3d at 554 (citing *Texas Co. v. Davis*, 254 S.W. 304, 309 (Tex. 1923)). "Consequently, the lessee's mineral estate may continue indefinitely, as long as the lessee uses the land for its intended purpose." *Id.* (citing *Texas Co.*, 254 S.W. at 306). A "typical Texas lease"—like those here—"that lasts 'as long as oil or gas is produced'" expires when "actual production permanently ceases during the secondary term." *Id.* (citing *Amoco Prod. Co. v. Braslau*, 561 S.W.2d 805, 808 (Tex. 1978)).

Critically for purposes of this case, courts "will not hold the lease's language to impose a special limitation on the grant unless the language is so clear, precise, and unequivocal that we can reasonably give it no other meaning." *Anadarko Petroleum Corp.*, 94 S.W.3d at 554. Doubts must be resolved so as to avoid interpreting the contract in a way that would result in forfeiture of rights, if at all possible. *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 429 (Tex. 2008) (citing *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989)). Thus, in the absence of precise and

unequivocal language to the contrary, "production on one tract [of leased land] will operate to perpetuate the lease as to all tracts described therein and covered thereby." *Mathews v. Sun Oil Co.*, 425 S.W.2d 330, 333 (Tex. 1968) (citing *Orive v. Sun Oil Co.*, 346 S.W.2d 383, 384 (Tex. Civ. App.—San Antonio 1961, writ ref'd)). In fact, the Texas Supreme Court recently affirmed that long-settled black-letter principle of Texas oil-and-gas law:

> This Court has consistently recognized that when a lease covers more than one tract and provides, as the . . . lease in this case provides, that it shall remain in force for a stated term and "as long thereafter as oil or gas, or either of them is produced from said land," *production on any part of "said land" continues the lease in effect as to all land covered by the lease.*

Ridge Oil Co., Inc. v. Guinn Investments, Inc., 148 S.W.3d 143, 149 (Tex. 2004) (emphasis added).[1] Thus, "[i]f the parties intend that separate portions of the entire land covered by the lease should be developed as units [with independent production obligations,] the lease should expressly so state." *Hunt Prod. Co. v. Dickerson*, 135 S.W.2d 597, 601 (Tex. Civ. App.—Texarkana 1939, writ dism'd) (quoting Summers, Oil and Gas, Permanent Edition, Vol. 3, § 515).

C. Under the Leases' Plain Terms and the Uncontroverted Facts, the Leases Have Neither Vertically Segregated Nor Vertically Terminated in Part; Thus, Current Production on the Fully Developed Leases Perpetuates the Leases as to All Leased Acreage.

There is no question that the three leases are the type of leases for which the general Texas rule applies—*i.e.*, absent unequivocal language to the contrary, production anywhere on the leased

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[1] *See also Southland Royalty Co. v. O'Daniel*, 287 S.W.2d 182, 186 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e.); *Hillegust v. Amerada Petroleum Corp.*, 282 S.W.2d 892, 896 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.) ("[T]he law appears settled that . . . production from any one of the tracts of land described in [the lease] serves to perpetuate the lease as to all."); *Dacamara v. Binney*, 146 S.W.2d 440, 441 (Tex. Civ. App.—San Antonio 1940, writ dism'd) (rejecting segregation argument and holding that production on any part of 720-acre lease perpetuated lease as to all 720 acres); *Texas Co. v. Curry*, 229 S.W. 643, 645 (Tex. Civ. App.—Fort Worth 1921, no writ) (holding that operations "done by the appellee on one of the tracts covered by the lease" perpetuated the lease as to all tracts).

premises perpetuates the leases everywhere—because the leases state that they shall remain in force for a fixed term and then "as long thereafter as" oil or gas "is produced from said land." *See* Exs. A.1 at ¶ 2, A.2 at ¶ 2, and A.3 at ¶ 2. Any vertical termination of the leases, therefore, must also be effected in clear, precise, and unequivocal language. Given that framework, this motion raises two issues for the Court's determination:

1. *Did leased land revert to the lessors at the moment the continuous-development operations ended? More specifically, given that the leases were fully developed at the end of continuous-development operations, did the leases vertically terminate in part as to any leased acreage at the moment in time that such development operations ended?*

2. *Did leased land that was not vertically terminated at the end of continuous-development operations nonetheless revert to the lessors some time later? More specifically, does clear, precise, and unequivocal language in the leases evince the parties' intent to segregate the lease into separate units at the end of continuous-development operations—such that forever thereafter, production on one drilled area of the leased land perpetuates the lease only as to that area?*

Because the answer to both of these questions is "no," Pioneer respectfully requests that the Court grant this motion for partial summary judgment.

1. Under the leases' plain language and the uncontroverted facts, no leased land reverted to the lessors at the end of continuous-development operations because the lease was already fully developed.

The first question presented in this motion is what amount, if any, of leased acreage reverted to the Leases' lessors at the end of continuous-development operations on the Lands. Continuous-development clauses are common in oil-and-gas leases, and they operate to extend the life of a lease—in full—beyond the lease's primary term so long as the lessee continues to explore for additional oil or gas. *See Holchak v. Clark*, 284 S.W.2d 399, 402 (Tex. Civ. App.—San Antonio 1955, writ ref'd) ("Continuous operation clauses are usual in oil, gas and mineral leases and royalty conveyances."); *Tennant v. Matthews*, 19 S.W.2d 1115, 1117 (Tex. Civ. App.—Eastland 1929, writ

ref'd) (holding lease "could be kept in force" by continuous drilling operations).[2] Many leases—like those here—also include, along with a continuous-development clause, a partial-termination provision that operates to terminate some areas of leased land upon the expiration of such continuous-development operations. *E.g.*, *Community Bank of Raymore v. Chesapeake Exploration, L.L.C.*, 416 S.W.3d 752-53 (Tex.App.—El Paso 2013, no pet.); *El Paso Prod. Oil & Gas v. Tex. State Bank*, No. 04-05-000673-CV, 2007 WL 752209, at *2-3 (Tex. App.—San Antonio Mar. 14, 2007, pet. denied) (mem. op.) (partial termination takes effect "once continuous drilling stops").[3] Properly reading these two types of provisions together, "the result is that the [partial termination] clause can and will operate at the end of the primary term if production in paying quantities exists but no continuous development program is in place." *Community Bank of Raymore*, 416 S.W.3d at 756. However, if development operations continue without interruption after the end of the lease's primary term, the triggering of the partial-termination clause will be delayed until the end of such operations. *Id.*

The Leases in this case include both a continuous-development clause and a partial-termination provision, together indicating that upon the expiration of continuous-development operations, the leases will terminate in part as to acreage not then included within a drilled area. *See* Exs. A.1 at ¶ 12, A.2 at ¶15, and A.3 at ¶ 15. By tying partial vertical termination to the end of continuous-development operations, the leases provide that the date of the end of such operations

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[2] *See also Duke v. Sun Oil Co.*, 320 F.2d 853, 859 (5th Cir. 1963) ("continuous drilling clause" may operate "to extend the terms of the grant").

[3] *See also Mayfield v. de Benavides*, 693 S.W.2d 500, 502-03 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (lease language stating that even with presence of partial-termination provision, "this lease shall remain in full force and effect as to all of the land covered hereby" so long as lease is continuously developed); *Gilbert v. Smedley*, 612 S.W.2d 270, 272 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.) ("at the end of the primary term, subject to the continuous drilling provisions, the lease would [vertically] terminate").

triggers the release of undeveloped acreage. *Id.* In other words, on the specific date that continuous-development operations ended, acreage in undrilled areas reverts to the lessor and acreage in drilled areas is retained by the lessee. *See Judice v. Mewbourne Oil Co.*, 890 S.W.2d 180, 182 (Tex. App.—Amarillo 1994), *aff'd in part and rev'd in part on other grounds*, 939 S.W.2d 133 (Tex. 1996). Here, because the Lands were already fully developed at the end of continuous-development operations—*i.e.*, *all* of the leased land was included in a drilled unit—*no* land reverted to Petroplex at the moment the continuous-development operations ended.

The McReynolds Lease's continuous-development clause states:

> Lessee, his heirs or assigns, agrees to commence, or cause to be commenced, a location to be selected by Lessee on the above described land within 60 days from approva[l] of title and approval of said location by the Railroad Commission, operations for the drilling of a test well for oil or gas to a depth sufficient to test the Spraberry-Dean formations and then continuously drill additional wells on 160 acre spacings at an interval no more than 180 days from completion of one well to the commencement of another. Extensio[n] of time by drilling shall be cumulative. Failure to commence operations in the time specified shall result in expiration of this lease as to all undrilled locations.

Exhibit A.1 at ¶ 12. The uncontroverted summary-judgment evidence provides that Pioneer or its predecessors-in-interest fully met the obligations of this provision by (1) commencing drilling operations on a well as specified within 60 days from receiving approval, and (2) continuously drilling additional wells on 160-acre spacing intervals, each begun no more than 180 days from completion of the last well. Exs. A and A.5. Because the lease was fully developed at the time continuous-development operations ended upon the drilling of the McReynolds B No. 3 well on September 17, 1973, there were no "undrilled locations" at the end of continuous-development operations that would have been subject to partial termination. Based on the plain terms of the McReynolds lease and the uncontroverted facts, the lease did not partially vertically terminate at the end of continuous-development operations. Said another way, no acreage leased under the

McReynolds lease reverted to Petroplex at the moment continuous-development operations ended on the lease because the leased land was already fully developed.

The same is true of the Wheeler and Brown leases. The continuous-development-operations clause of those leases states:

> Lessee agrees to commence the drilling of a test well on the most easterly proration unit of the lease acreage within 60 days from the date hereof and to continuously develop the lease acreage until all of such acreage has been included in a proration unit as to each productive zone. In complying with this provision, not more than 90 days shall elapse between the completion of one well and the commencement of the next well. The sole penalty for failure to comply with this provision to drill and develop will be the termination of this lease as to all land covered hereby not included in a proration unit. Also at the termination of such continuous development program this lease shall terminate as to all zones not then productive in each separate proration unit created hereunder. Proration units shall be of the size prescribed by the Railroad Commission of Texas in order for a well located thereon to receive a full allowable, plus 10% tolerance if such is permitted under the regulations of the said Railroad Commission of Texas.

Exhibits A.2 at ¶ 15 and A.3 at ¶ 15. Again, it is undisputed, and the uncontroverted summary-judgment evidence establishes that Pioneer or its predecessors-in-interest fully met the obligations of this provision by (1) commencing the drilling of a well on the lease within 60 days of the date of the lease, and (2) continuously drilling on the lease without allowing 90 days to elapse between the completion of one well and the commencement of the next well. Ex. A; Ex. B (Deposition of R. Davis at 50-53). Because the Leases were fully developed at the end of continuous-development operations upon the drilling of the McReynolds B No. 3 well on September 17, 1973, no land was not included within a proration unit at the end of continuous-development operations. Accordingly, based on the plain terms of the Wheeler and Brown leases and the uncontroverted facts, the leases did not partially vertically terminate at the end of continuous-development operations. Said another way, no acreage leased under the Wheeler and Brown leases reverted to the lessors at the moment continuous-development operations ended on the lease because the land was already fully developed.

For these reasons, Pioneer respectfully requests that the Court grant partial summary judgment holding that no leased acreage reverted to lessors at the moment in time that continuous-development operations ended on the leases.

2. The plain language of the leases evinces no intent—much less clear and unequivocal intent—to depart from the Texas rule that production anywhere on the leases perpetuates the leases everywhere; thus, there has been no vertical segregation requiring independent production on separate units of the leased land.

The second question presented in this motion is whether the leases vertically segregated into independent producing units at the expiration of continuous development—such that production is forever thereafter required in each separate drilled unit in order to maintain the lease as to each unit. Because there is no language in the three leases so indicating, Petroplex's position should be rejected and Pioneer respectfully requests partial summary judgment holding that the lease has not vertically segregated into separate units with independent production obligations.

a. There is no clear, precise, and unequivocal language in the leases segregating the leases into separate units and requiring independent production to perpetuate the lease as to each unit.

The first place we turn to construe leases' language is, again, the language itself. The McReynolds Lease states:

> Lessee, his heirs or assigns, agrees to commence, or cause to be commenced, a location to be selected by Lessee on the above described land within 60 days from approva[l] of title and approval of said location by the Railroad Commission, operations for the drilling of a test well for oil or gas to a depth sufficient to test the Spraberry-Dean formations and then continuously drill additional wells on 160 acre spacings at an interval no more than 180 days from completion of one well to the commencement of another. Extensio[n] of time by drilling shall be cumulative. Failure to commence operations in the time specified shall result in expiration of this lease as to all undrilled locations.

Exhibit A.1 at ¶ 12. And the Wheeler and Brown leases state:

> Lessee agrees to commence the drilling of a test well on the most easterly proration unit of the lease acreage within 60 days from the date hereof and to continuously

> develop the lease acreage until all of such acreage has been included in a proration unit as to each productive zone. In complying with this provision, not more than 90 days shall elapse between the completion of one well and the commencement of the next well. The sole penalty for failure to comply with this provision to drill and develop will be the termination of this lease as to all land covered hereby not included in a proration unit. Also at the termination of such continuous development program this lease shall terminate as to all zones not then productive in each separate proration unit created hereunder. Proration units shall be of the size prescribed by the Railroad Commission of Texas in order for a well located thereon to receive a full allowable, plus 10% tolerance if such is permitted under the regulations of the said Railroad Commission of Texas.

Exhibits A.2 at ¶ 15 and A.3 at ¶ 15.

Simply put, there is no language in these provisions—much less language that is clear, precise, and unequivocal—indicating that at the end of continuous-development operations, the leases segregate vertically into separate units requiring independent production to perpetuate the leases as to each unit. That fact alone should end this Court's inquiry. The absence of language segregating the lease into separate units requiring independent production acts as a bar to such a construction of the lease *as a matter of law* because (1) the language does not evince a meeting of the parties' minds as to vertical segregation into separate units with independent production obligations; (2) the language does not clearly, precisely, and unequivocally depart from Texas's rule that production anywhere on the lease perpetuates the lease as to all leased land; (3) courts are not permitted to amend the language of a lease or add language to which the parties never agreed; and (4) limitations on granted leasehold estates—such as one that would require independent production on separate units to retain the lease as to each unit—may not be found by implication.

To be sure, the original parties to the leases certainly *could have* incorporated such language into the leases, but they elected not to do so. For example, they could have included language like that in the lease at issue in *Community Bank of Raymore*, in which the parties included a provision clearly and unmistakably stating that after the expiration of continuous-development operations, "the

provisions of this Lease shall be separately applicable to each proration unit . . . and each such proration unit shall be considered as being covered by a separate lease for all purposes herein." 416 S.W.3d at 756. There is no such language in the leases here. Likewise, the parties could have included language like that in the lease at issue in *Riley v. Meriwether*, in which the parties clearly and unmistakably stated that after the expiration of continuous-development operations, "this assignment shall terminate as to each Tract separately upon the termination of production." 780 S.W.2d 919, 925 (Tex. App.—El Paso 1989, writ denied); *see also Parten v. Cannon*, 829 S.W.2d 327, 329 (Tex. App.—Waco 1992, writ denied) (quoting lease language allocating acreage to separate production units and providing that "[p]roduction or operations on said allotted area . . . shall maintain this lease in effect only with regard to the land within the described area"). Again, there is no such language in the leases at issue here.

Petroplex's position—that upon the expiration of continuous development, the lease segregated into separate units with independent production obligations—therefore finds no support in the plain text of the leases. The job of the courts is to give effect to the intent of the parties *as expressed in the leases*—not to what they failed to express, might have expressed, or even intended to express but did not. Indeed, the Texas Supreme Court rejected a similar argument to that advanced by Petroplex in *Mathews*, in which the Court held that absent a clear textual basis, it could not conclude that production in one unit of a lease failed to perpetuate the lease as all units in the lease. The Court reasoned:

> In order to sustain petitioners' position that [disputed acreage] is no longer [held] under the lease, it would be necessary to disregard the plain wording of the habendum clause, and a court would have to do something far more radical than raising or recognizing an implied covenant or something of similar nature. It would be necessary to rewrite the habendum clause in an authorized lease and transform it into an entirely different contractual obligation.

425 S.W.2d at 33. Based on the wholesale lack of lease language supporting Petroplex's position, its argument must likewise be rejected.

b. Applying Texas law, courts have repeatedly rejected attempts by lessors to imply lease segregation with independent production obligations where lease language effecting such a segregation is not present at all or is not clear, precise, and unequivocal.

As has been previously discussed, courts have repeatedly rejected attempts by Texas lessors to partially terminate leases based on lease-segregation-type arguments—*i.e.*, that units of leased land should be treated independently such that production in one area of the lease was insufficient to perpetuate the lease as to non-producing units—when clear and unequivocal lease language fails to effect such segregation. *E.g.*, *Mathews*, 425 S.W.2d at 33.[4] These cases apply the settled Texas rule that "[i]f the parties intend that separate portions of the entire land covered by the lease should be developed as units [with independent production obligations,] the lease should expressly so state." *Hunt Prod. Co.*, 135 S.W.2d at 601.

When, as here, there is a complete absence of language segregating a lease into separate units for which production must be independently achieved to perpetuate the lease for each unit, it is an easy call for courts: there is no vertical segregation. *E.g.*, *Mathews*, 425 S.W.2d at 33; *Hillegust*, 282 S.W.2d at 896; *Orive*, 346 S.W.2d at 384. Indeed, the Corpus Christi Court of Appeals rejected Petroplex's precise argument—for lack of textual support in the lease—in *Humphrey v. Seale*, 716 S.W.2d 620, 621-23 (Tex. App.—Corpus Christi 1986, no writ). There, the lease provided that after 180 days from completion of the first drilled oil well, the lease effected a partial vertical termination such that the lessee retained only those acres surrounding a producing well; all remaining, undeveloped acreage reverted to the lessor. *Id.* at 621. The issue in the case was whether the

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[4] *See also* n.1, *supra*.

producing areas of the lease that survived vertical termination thereafter segregated into separate leases—each requiring its own production to perpetuate the lease as to its 40-acre area—or whether production in one of the retained 40-acre areas perpetuated the lease as to all retained areas. *Id.* at 621-22.

The court of appeals rejected the lessor's argument that the retained areas had segregated into separate units requiring independent production to perpetuate the lease therein. The court wrote:

> Absent the provisions of [the vertical-termination clause], the lease would remain in effect over the entire leased premises during the term of the lease; that is, for as long as oil or gas was produced in paying quantities after the expiration of the primary term. Production on any portion of the leased premises would hold the entirety. In reviewing [the vertical-termination clause], we find an obligation of lessee . . . to release . . . all undeveloped acreage to lessor, retaining 40 acres around each producing well. . . . [A]fter the release was made in accordance with [the clause], three 40-acre tracts remained under lease, one around each of the three remaining [w]ells. . . . [The clause] does not require the lessee to relinquish additional acreage from the lease after the initial release is accomplished. . . . *As all three of the 40-acre tracts are under the same lease and lease terms, production on one will keep the lease in effect for all.*

Id. at 622 (emphasis added). The court continued:

> If the parties to the lease had wished to provide for a continual relinquishment of nonproducing acreage, so that a 40-acre tract would no longer be subject to the lease once production had ceased on that particular 40-acre tract, it would have been simple to include such language. However, in the absence of such a provision, the general rule that production any where [sic] on the leased premises will maintain the lease prevails.

Id. The same is true here: if the original parties to the lease had intended production on any retained drilled unit to perpetuate the lease only as to that unit, they could have so stated. Because they did not, Texas's rule—that production anywhere perpetuates the lease everywhere—prevails as a matter of law.

Four additional courts reached the same conclusion in cases that present a much closer call than this one. In *PEC Minerals LP v. Chevron U.S.A.*, for example, the Fifth Circuit was asked

whether a provision that segregated the lease for purposes of delay-rental requirements in the primary term effected segregation of producing areas in the secondary term. 439 Fed. Appx. 413, 414-15 (5th Cir. 2011). The provision at issue allowed the lessee to hold undeveloped areas of the lease during the primary term by paying "one dollar per acre for each acre contained in such undeveloped drilling or spacing unit or fraction thereof." *Id.* at 415. The dispute arose from the sentences that followed, which stated that (1) rental payments could be avoided for any area of the lease on which the lessee drilled or produced "for as long as such production continues" in the individual unit; and (2) "the provisions of this subparagraph . . . shall be separable and shall be considered and applied as a separate agreement as respects each such undeveloped drilling or spacing unit." *Id.*

The lessor asserted that the provision "modifie[d] the Lease's habendum clause . . . such that acreage is held by the Lease past the primary term only with regard to the property in the particular units of land where production continues." *Id.* at 416. But the Fifth Circuit disagreed because of Texas's well-settled rules of lease construction that: (1) the "traditional habendum clause provides that the lease will extend to all acreage covered by the lease as long as oil and gas is produced anywhere on the leased property," *id.* at 416 (citing, *e.g.*, *Ridge Oil*, 148 S.W.3d at 149); and (2) that rule will apply as a matter of law absent "clear, precise, and unequivocal" language to the contrary, *id.* at 416-17 (citing *Anadarko Petroleum Corp.*, 94 S.W.3d at 554; *Mathews*, 425 S.W.2d at 333). With these principles in mind, the court reasoned "that because the language [of the provision] is inextricably embedded in the Lease's delay rental provision, this language only applies during the primary term of the Lease." *Id.* at 417. The court continued:

> The [disputed provision] clarifies that delay rentals are not due for any unit during drilling and continued production on that unit. [But] [w]ithout additional clear, precise, and unequivocal language to the contrary, we agree that the [provision] has no effect beyond the primary term of the Lease, which is when the delay rental provisions of the Lease were relevant.

Id. at 417-18. Because the parties did not include in the lease "unequivocal language terminating the Lease during the secondary term with regard to all non-producing units," none would be implied. *Id.* at 420. And, notably, the same result was reached in three additional, nearly identical cases:

- *Glasscock v. Sinclair Prairie Oil Co.*, 185 F.2d 910, 911-12 (5th Cir. 1950) (holding that segregation provision of delay-rentals clause applied only in the primary term);
- *Johnson v. Montgomery*, 31 S.W.2d 160, 165 (Tex. Civ. App.—Amarillo 1930, writ ref'd) (contract's language segregating leased land into separate areas for purposes of delay rentals "applies only to the rentals and was not intended by its language to limit the estate"); and
- *Lido Oil Co. v. W.T. Waggoner Estate*, 31 S.W.2d 154, 158 (Tex. Civ. App.—Amarillo 1930, writ ref'd) ("the stipulation in the lease that each producing well should hold 2,000 acres in a square relates only to the obligation requiring the payment of future rentals" during the primary term).

Although each of those courts held firm that lease terms will not be held to segregate the leasehold estate into separate units requiring independent production unless they do so by clear, precise, and unequivocal language, this case presents a much easier determination—like that in *Humphrey*—because there is *no* language in the lease effecting segregation of developed land such that production in one area of the lease perpetuates the lease as to that area only. Absent such clear, precise, and unequivocal language, courts may not imply it. Accordingly, Pioneer respectfully requests that this Court hold—consistent with Texas law, the leases' plain language, and the uncontroverted facts—that the leases have not vertically segregated into separate producing units such that production on one drilled area of the lease perpetuates the lease only as to that area.[5]

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[5] Petroplex is likely to direct the Court to *Nafco Oil & Gas, Inc. v. Tartan Resources Corp.*, 522 S.W.2d 703, 707-08 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) for the proposition that a vertical-termination provision in a continuous-development clause does segregate the lease into separate units requiring independent production to perpetuate the lease therein—even without express language so indicating. But that holding in *Nafco Oil & Gas* was implicitly overruled when the same court later reached the precise opposite conclusion in *Humphrey*, 716 S.W.2d at 621-23. Moreover, even if *Nafco* could somehow survive *Humphrey*, it has no precedential value because it irreconcilably conflicts with the Texas Supreme Court's recent holding

V. Conclusion and Prayer for Relief

For these reasons, Pioneer respectfully requests that this Court set this Motion for hearing and that after the hearing, this Court grant Pioneer's Motion for Partial Summary Judgment Regarding Vertical Termination and Segregation and hold that:

- the Leases have not vertically segregated into separate units requiring independent production on each unit to perpetuate the leases thereon;
- at the expiration of continuous-development operations, no partial vertical termination of the leasehold estate occurred because the Leases were fully developed; and
- current production on the Lands perpetuates the Leases as to all leased acreage.

Pioneer additionally requests any and all further relief to which it may be entitled.

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that absent express lease language to the contrary, "when a lease covers more than one tract and provides . . . that it shall remain in force for a stated term and 'as long thereafter as oil or gas, or either one of them is produced from said land,' production on any part of 'said land' continues the lease in effect as to all land covered by the lease." *Ridge Oil Co.*, 148 S.W.3d at 149.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 11th day of July, 2014, a true and correct copy of the foregoing was delivered via certified mail, return receipt requested, as follows:

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