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SUPREME COURT OF TEXAS
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CAUSE NO. 17-0266

In The Supreme Court of Texas

BURLINGTON RESOURCES OIL & GAS COMPANY, LP,
Petitioner,

v.

TEXAS CRUDE ENERGY, LLC and AMBER HARVEST, LLC,
Respondents.

On review from the Thirteenth Court of Appeals
No. 13-16-00248-CV

Brief of Amicus Curiae TLMA, NARO-TX, and NARO For Denial of Petition for Review

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III. IDENTITY AND INTEREST OF AMICUS CURIAE TLMA, NARO-TEXAS, and NARO

The Texas Land and Mineral Owners Association ("TLMA") is a statewide advocacy association whose members are farmers, ranchers, and mineral and royalty owners comprising approximately 950 members. TLMA's charter is to support a business and legal environment that accommodates the continued exploration for and production of oil and natural gas, and also protects the property rights of mineral owners.

The National Association of Royalty Owners-Texas, Inc. ("NARO-Texas") is a non-profit trade association organized under Texas law, representing a statewide membership of oil and gas royalty owners and landowners. NARO-Texas is the Texas Chapter of the National Association of Royalty Owners, Inc. ("NARO"). NARO has members in all 50 states and has several thousand members at any given point in time. NARO-Texas and NARO seek to protect and promote the economic interests and legal rights of oil and gas royalty owners throughout Texas and the United States.

TLMA and NARO-Texas are paying the fees for preparation and submission of this brief.

TLMA, NARO-Texas, and NARO submit this brief in support of Respondents, Texas Crude Energy, LLC ("Texas Crude") and Amber Harvest, LLC ("Amber Harvest"), and respond to the briefing of Petitioner, Burlington Resources

Oil & Gas Company, LP ("Burlington") and Amicus Curiae Texas Oil & Gas Association ("TXOGA").

More than 672,000 Texas households receive billions of dollars in oil and gas royalties each year.[1] This case is important to those households, even though it involves an overriding royalty, because the language in the assignments at issue is similar to that found in many oil and gas leases. Moreover, the precedent at issue is primarily from lease interpretation cases, and the amicus curiae brief of TXOGA agrees that the issue is of importance to parties to oil and gas leases. *See* TXOGA's Amicus Brief, 1.

IV. SUMMARY OF THE ARGUMENT

The case at bar involves the issue of whether certain provisions in assignments of overriding royalty interests to Amber Harvest and Texas Crude ("Assignments") allow Burlington to deduct post-production costs from the amount it receives from its purchaser when calculating royalty payments.[2] The Granting Clause of the Assignments ("Granting Clause") provides:

> [Assignor] does hereby ASSIGN, TRANSFER AND CONVEY unto [Assignee], its successors and assigns, an overriding royalty interest in the quantity described below in all oil, gas, condensate, drip gasoline and other hydrocarbons that may be produced and saved from those lands covered by those certain oil, gas and mineral leases described in Exhibit "A" attached hereto and made a part hereof for all purposes,

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[1] www.tipro.org/current-issues/royalty-owners, last visited April 5, 2018.

[2] For brevity, the terms "overriding royalty" and "royalty" will be used interchangeably in this brief.

> and pursuant to the terms and conditions of the said oil, gas and mineral leases. **Said overriding royalty interests shall be delivered to ASSIGNEE into the pipelines, tanks or other receptacles with which the wells may be connected, free and clear of all development, operating, production, and other costs**. However, Assignee shall in every case bear and pay all windfall profits, production and severance taxes assessed against such overriding royalty interest.

(emphasis added). *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*, 516 S.W.3d 638, 641 (Tex. App.—Corpus Christi 2017). The Assignments further provide that the method of royalty distribution depends on whether the royalty is taken in kind or paid in cash ("Royalty Clause"):

> This Assignment and the interest assigned hereby shall be <u>**subject to the following terms and provisions**</u>, to wit:…
>
> The overriding royalty interest share of production shall be delivered to ASSIGNEE or to its credit into the pipeline, tank or other receptacle to which any well or wells on such lands may be connected, free and clear of all royalties and all other burdens and all costs and expenses except the taxes thereon or attributable thereto,
>
> <u>***or***</u> ASSIGNOR at ASSIGNEE'S election,
>
> shall pay to ASSIGNEE, for ASSIGNEE'S overriding royalty oil, gas or other minerals the applicable percentage of the <u>**value**</u> of the oil, gas or other minerals, as applicable, produced and saved under the leases.
>
> "<u>**Value**</u>", as used in this Assignment, shall refer to
>
>> (i) in the event of an arm's length sale on the leases, <u>**the amount realized**</u> from such sale of such production and any products thereof,
>>
>> (ii) in the event of an arm's length sale off of the leases, <u>**the amount realized**</u> for the sale of such production and

any products thereof, and

(iii) in all other cases, the market value at the wells.

(emphasis added). *Burlington*, 516 S.W.3d at 642. The plain language of the Assignments indicates that the default method for paying the royalty is delivery of a percentage of production in kind; but the assignee may elect to receive cash if it chooses. If the royalty is paid in cash, the method of valuing the payment differs depending on where and how the production is sold.

The parties concede that Amber Harvest did not take production in kind and that Burlington sold all production in arm's length sales off the leases. *Id.* at 642. Accordingly, the court of appeals properly found that, "because the royalties were taken in cash and the minerals were sold at arm's length, the royalties are based on the 'amount realized' by Burlington from those sales and are therefore free of post-production costs." *Burlington,* 516 S.W.3d at 648. In other words, Burlington may not deduct post-production costs from the amount it realizes from sales of production, then pay a royalty based on the reduced amount of its proceeds.

Contrary to the plain meaning of the language in the Assignments, Burlington and TXOGA insist that the Granting Clause controls the meaning of the terms that were carefully spelled out in the Royalty Clause. Specifically, they contend the Granting Clause establishes a valuation point for the royalty at the wellhead and that post-production costs incurred after that point may be deducted from the royalty.

Even though the Royalty Clause expressly provides that the royalty will be valued differently depending on how or where production is sold or whether it is taken in kind, Burlington and TXOGA assert that the Granting Clause controls. Thus, with regard to the post-production cost issue, Burlington and TXOGA have presented a single question to the court: *Does the Granting Clause control the subsequent terms of the Royalty Clause*?

The answer is resoundingly no. The court of appeals properly applied the well-settled principle that a court harmonizes all provisions of an unambiguous instrument to ascertain the intent of the parties. Burlington and TXOGA's argument that the Granting Clause controls appears to be a misconceived attempt to resurrect the "repugnant to the grant" doctrine that has been rejected by this Court. Acceptance of Burlington and TXOGA's argument would erode decades of case precedence regarding deed and contract interpretation. Furthermore, the rule of interpretation Burlington and TXOGA endorse would not be limited to construction of the assignments at issue, but would extend to all contracts, both in the oil and gas industry and other endeavors. In short, reversal of the court of appeals' decision would have far-reaching effects on all commercial activity in Texas.

Accordingly, amici urge the Court to deny Burlington's petition. The court of appeals' decision correctly follows this Court's precedent and provides no basis for this Court to write further on the issue.

V. ARGUMENT

A. The Assignments carefully define the value of the royalty depending on the type of sale or whether production is taken in kind.

Throughout their briefing, Burlington and TXOGA contend that there are hard and fast rules regarding the allocation of post-production costs, depending on whether certain terms are used. Contrary to their contention, there is only one rule when it comes to the interpretation of deeds, assignments, leases, and contracts. The rule is, when an instrument is unambiguous, a court's primary duty is to ascertain the parties' intent as expressed within the four corners of the instrument. *See Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991). Courts give the language of the instrument its plain and grammatical meaning unless doing so would clearly defeat the parties' intentions. *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002). Courts also examine the entire instrument and "attempt to harmonize all its parts, even if different parts appear contradictory or inconsistent, because [courts] presume that the parties intended every clause to have effect." *Tana Oil & Gas Corp. v. Cernosek*, 188 S.W.3d 354, 359-60 (Tex. App.—Austin 2006, pet. denied) (citing *Anadarko Petroleum*, 94 S.W.3d at 554; *Heritage Res., Inc. v. NationsBank, Co.*, 939 S.W.2d 118, 121 (Tex. 1996); and *Luckel v. White*, 819 S.W.2d 459, 462 (Tex. 1991).

Applying this long-standing rule, the court of appeals' decision harmonizes all parts of the Assignments to ascertain that the parties' intent was to place a different value on the royalty depending on how and where production was sold or whether it was delivered in kind. *Burlington*, 516 S.W.3d at 643-44.

1. The Granting Clause contains an in kind royalty provision that bears no type of cost except its share of taxes.

The assignments' Granting Clause is a classic example of an in kind royalty provision. To take a royalty "in kind" means "to receive what is due under a royalty interest in specie, that is, in oil or gas itself." 8 Williams & Meyers Oil and Gas Law, Manual of Terms (2017). Historically, oil and gas leases and conveyances have provided that the oil royalty is payable in kind. Smith & Weaver Texas Law of Oil & Gas § 4.6 A (2017). The leading treatise on Texas oil and gas law illustrates a common in kind royalty provision as follows:

> The royalty clause entitles the lessor to her fractional share of the oil "produced and saved from the land, the same to be delivered at the wells or to the credit of Lessor into the pipeline to which the wells may be connected."

Id. Comparing the above in kind royalty example to the Granting Clause, the two clauses are strikingly similar:

> Said overriding royalty interests shall be delivered to ASSIGNEE into the pipelines, tanks or other receptacles with which the wells may be connected, free and clear of all development, operating, production, and other costs.

Burlington, 516 S.W.3d at 641. Both of the above clauses use the word "delivered" to indicate that royalty is to be taken by the lessor/assignee in kind, not paid in cash based on the proceeds of a sale or the market value of the production.

The two clauses above differ in that the assignee's royalty in the Granting Clause does not bear any kind of costs except its share of taxes. The royalty must be delivered "free and clear of all development, operating, production, and other costs." Once the assignee takes delivery of its share of production at the pipeline, tank, or other receptacle connected to the well, it may make use of the production for its own purposes on the property or bear the cost of turning the production into a marketable product or transporting it to a market. The assignee has complete control over all costs, except taxes, because the royalty bears no costs to the delivery point, where the assignee takes title to the production.

2. If the assignee does not want to take the royalty in kind, it may elect to be paid in cash.

The Granting Clause does not address whether the royalty may be paid in cash. It only addresses delivery of the royalty in kind. However, when reading the assignment as whole, the subsequent Royalty Clause specifically addresses the lessor's option to take the royalty in cash and defines the terms when exercising that option. The Royalty Clause begins by stating:

> This Assignment and the interest assigned hereby shall be <u>**subject to the following terms and provisions**</u>, to wit:…

(emphasis added). *Burlington*, 516 S.W.3d at 642. The parties' use of the words "subject to" is significant. This Court has said, "The words 'subject to,' used in their ordinary sense, mean subordinate to, subservient to or limited by." *Wenske v. Ealy*, 521 S.W.3d 791, 796 (Tex. 2017) (interpreting “subject to” clause in a deed). Thus, the parties to the Assignment are stating in clear and certain terms that all other provisions of the Assignment, including the in kind royalty language in the Granting Clause, are subordinate to the Royalty Clause.

The Royalty Clause then repeats the provision for delivery of the royalty in -kind, but goes on to state:

> ***or*** ASSIGNOR at ASSIGNEE’S election,
>
> shall pay to ASSIGNEE, for ASSIGNEE’S overriding royalty oil, gas or other minerals the applicable percentage of the **value** of the oil, gas or other minerals, as applicable, produced and saved under the leases.
>
> “**Value**”, as used in this Assignment, shall refer to
>
> > (i) in the event of an arm’s length sale on the leases, **the amount realized** from such sale of such production and any products thereof,
> >
> > (ii) in the event of an arm’s length sale off of the leases, **the amount realized** for the sale of such production and any products thereof, and
> >
> > (iii) in all other cases, the market value at the wells.

(emphasis added). *Burlington*, 516 S.W.3d at 642. The language, “or ASSIGNOR at ASSIGNEE’s election,” emphasizes that cash payment is optional. If the assignee does not affirmatively elect to receive the royalty as a cash payment, the assignor must deliver the royalty share of production in kind at the pipeline, tank or other receptacle connected to the well. If the assignee elects to receive cash in lieu of delivery in kind, the Royalty Clause establishes three separate methods for calculating the cash value of the royalty.

3. Texas Crude and Amber Harvest's royalty is a percentage of the amount realized by Burlington without deduction of post-production costs.

The parties concede that all production was sold off the leasehold premises in arm's-length transactions. *Burlington*, 516 S.W.3d at 642. So, only provision (ii) of the "value" definition in the Royalty Clause applies. Provision (ii) requires a valuation of the royalty based on the amount the assignor actually receives, *i.e.* the amount realized, from the sale of production in an arm's length transaction where the point of sale is off the leasehold premises. *See Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 699 (Tex. 2008). Thus, pursuant to the plain language of the Assignments, the assignee's royalty is a percentage of the gross proceeds from the sale of production.

Texas courts define the term "amount realized" as "the proceeds received from the sale of the gas or oil." *Cernosek*, 188 S.W.3d at 360 (citing *Yzaguirre v. Kcs Res.*, 53 S.W.3d 368, 372-73 (Tex. 2001); *Heritage Res.*, 939 S.W.2d 118 (Tex. 1996); *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 242-46 (Tex. 1981); and 8 Williams & Meyers Oil and Gas Law, Manual of Terms (2017). *See also Occidental Permian Ltd. v. Helen Jones Found.*, 333 S.W.3d 392, 399 (Tex. App.—Amarillo 2011, pet. denied) ("'Amount realized' means the proceeds received from the sale of gas or oil."). Burlington does not dispute this definition, explaining in its brief that "Texas courts interpreted the phrase "amount realized" to refer to the price obtained for the production (as opposed to the market value of the production, which might differ from the price received)." Petitioner's Brief on the Merits, 27.

However, Burlington and TXOGA cite several cases they suggest stand for the proposition that "amount realized" or "proceeds"-type royalty clauses must allow for the deduction of post-production costs. Petitioner's Brief on the Merits, 33-35; TXOGA's Amicus Brief, 7-8. These cites are a red herring. In each of the cases, the courts address royalty clauses where the "amount realized" or "proceeds" language is immediately followed by qualifying language, such as "realized at the well," indicating that the royalty will be based on sale proceeds net of post-production costs. *See Bowden*, 247 S.W.3d at 699, 701 n.2 ("amount realized by lessee, <u>computed at the mouth of the well</u>"); *Helen Jones Foundation*, 333 S.W.3d at 396 ("'amount realized' from such sale <u>when gas is sold at the wells</u>"); *Judice v. Mewbourne Oil Co.*, 939 S.W.2d, 133, 136-37 (Tex. 1996) ("on the gross proceeds <u>realized at the well</u>"); *Warren v. Chesapeake Expl., L.L.C.*, 759 F.3d 413, 418-19 (5th Cir. 2014) ("amount realized by lessee, <u>computed at the mouth of the well</u>").

In the present case, the "amount realized" language in the Royalty Clause is not qualified by a valuation point, such as the wellhead. The royalty is simply a percentage of "the amount realized for the sale of such production…."; and the court of appeals properly recognized this distinction. *See Burlington*, 516 S.W.3d at 649 (distinguishing *Warren*, 759 F.3d 413). Although some royalty clauses designate a valuation point, there is no requirement that they do so. Some are simply based on the gross proceeds of the sale of production. *See Chesapeake Exploration, L.L.C. v. Hyder*, 483 S.W.3d 870, 872 (Tex. 2016) (royalty clause provided for "a perpetual cost-free…overriding royalty of five percent (5%) of gross production obtained").

Accordingly, as in *Hyder*, the assignee's royalty from sales of production in arm's length transactions does not bear deductions for post-production costs because the royalty is simply a percentage of the amount actually received by the lessee. Although Burlington calculated the royalty based on the amount it realized from sales of production, it improperly deducted post-production costs from that amount.

B. Burlington and TXOGA incorrectly attempt to set the royalty value at the wellhead by resurrecting the "repugnant to the grant" doctrine, which was expressly overruled in *Luckel v. White*.

Burlington and TXOGA manufacture a royalty valuation point where none exists in order to justify Burlington's improper deduction of post-production costs. They contend the language in the Granting Clause—"Said overriding royalty interest shall be delivered to ASSIGNEE into the pipelines, tanks, or other receptacles…."—qualifies the "amount realized" language in the Royalty Clause and sets the royalty valuation point at the wellhead. Petitioner's Brief on the Merits, 28-32; TXOGA Brief 7-8. In other words, they argue that the Granting Clause changes the "amount realized" provision in the Royalty Clause from a "gross proceeds" to a "net proceeds" royalty.

However, Burlington and TXOGA have it backwards. The Assignments expressly provide that the Granting Clause is subject to the Royalty Clause. If the Court accepts Burlington and TXOGA's argument, then it would be approving the concept that the Granting Clause of a conveyance takes priority over and controls subsequent provisions, even when those provisions expressly state otherwise. This would drastically alter well-settled precedence established by this Court and create uncertainty for parties to any type of conveyance or contract.

In *Alford v. Krum*, the majority held that when the Granting Clause of a fractional mineral deed conflicted with a subsequent clause in the deed, the conflict could be resolved in favor of the Granting Clause. *Alford v. Krum*, 671 S.W.2d 870, 872-73 (Tex. 1984). The majority explained:

> In cases involving the construction of mineral deeds, the "controlling language" and the "key expression of intent" is found in the Granting Clause, as it defines the nature of the permanent mineral estate conveyed. It logically follows that when there is an irreconcilable conflict between the clauses of a deed, the Granting Clause prevails over all other provisions.

Id. at 872. The reasoning of the *Alford* majority is commonly known as the "repugnant to the grant" doctrine. *See Resolving Fractional Interest Problems in Oil and Gas Deeds: A Framework for Analysis*, 47 Baylor L. Rev. 1, 2-3 (1995). However, seven years after its decision in *Alford*, this Court expressly overruled its holding and eviscerated the "repugnant to the grant" doctrine. *Luckel*, 819 S.W.2d at 463-464.

In *Luckel v. White*, this Court "concluded that the majority in *Alford* incorrectly failed to harmonize the provisions under the four corners rule and then erred in applying the 'repugnant to the grant' rule in disregard of the future lease clause." *Id.* at 464. The majority in *Luckel* reiterated that:

> The primary duty of a court when construing such a deed is to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the "four corners rule." That intention, when ascertained, prevails over arbitrary rules. The court, when seeking to ascertain the intention of the parties, attempts to harmonize all parts of the deed. The parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement. Even if different parts of the deed appear contradictory or inconsistent, the court must strive to harmonize all of the parts, construing the instrument to give effect to all of its provisions.

Id. at 462 (internal cites, quotations, and emphasis omitted). In his concurrence, Justice Mauzy went on to say, "our interpretation of deeds should not be dictated by arbitrary rules like the repugnant to the grant rule," and noted that the majority opinion in *Alford* was "regrettable." *Id.* at 465 (internal emphasis omitted).

Yet, like the majority in *Alford*, Burlington and TXOGA argue that the Granting Clause controls the subsequent provisions of the Assignments, asserting: "Their Granting Clauses define the nature of Amber Harvest's overriding royalty, including its royalty valuation point." Petitioner's Brief on the Merits, 38. According to Burlington and TXOGA, the "delivery" language in the Granting Clause sets the royalty valuation point, and disallows any type of modification in subsequent provisions.

Neither Burlington nor TXOGA cite to *Alford* or use the phrase “repugnant to the grant.” However, their entire argument is structured around the concept that the Granting Clause defines the royalty valuation point and that subsequent clauses must be read as being subject to the Granting Clause. This is what makes their argument dangerous. Burlington and TXOGA are trying to argue “repugnant to the grant” without saying it. They are trying to pry open a doorway to a doctrine that was slammed shut by this Court 27 years ago.

This Court has consistently maintained that, “Royalty owners and working interest owners are, of course, free to agree on what royalty is due, the basis on which it is to be calculated, and how expenses are to be allocated.” *French v. Occidental Permian, Ltd.*, 440 S.W.3d 1, 8 (Tex. 2014). The terms of the parties’ agreement in this case should not be construed by arbitrary rules. Looking at the Assignments as a whole, the parties clearly and unambiguously state their intent. All terms of the Assignments are subject to the provisions of the Royalty Clause, which values the royalty as a percentage of the amount realized from the sale of production in arm’s length transactions. Ignoring the express language of the Royalty Clause renders those provisions meaningless, which Texas law prohibits. Accordingly, deduction of post-production costs from the amount realized is simply not allowed in this case.

C. The doctrine of merger applies to the documents at issue.

The court of appeals correctly agreed with Texas Crude and Amber Harvest that the specific language in the Assignments supersedes the language in the Prospect Development Agreement and Joint Operating Agreement between Burlington and Texas Crude. *Burlington*, 516 S.W.3d at 646. Regarding the merger doctrine issue in this matter, amici adopts the arguments of Texas Crude and Amber Harvest in their Brief on the Merits.

VI. CONCLUSION

The court of appeals' opinion follows the well-established four corners doctrine and gives meaning to every provision within the Assignments. It does not ignore the "delivery" language of the Granting Clause. Rather, the opinion recognizes that the Granting Clause does not control and that parties are free to allocate post-production costs as they see fit.

Accordingly, the court of appeals' decision stands for the proposition that parties may freely contract with each other to shift the allocation of post-production costs depending on the circumstances of the disposition of production, and this Court should deny Burlington's petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this amicus curiae brief contains 3,977 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ *Steven H. Lord, Jr.*
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