2-18

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICANT: MEWBOURNE OIL COMPANY	)	**CAUSE CD NO.**
	)	
RELIEF SOUGHT: POOLING	)	**200604826**
	)	
LEGAL DESCRIPTION: SECTION 1, T20N, R24W, ELLIS COUNTY, OKLAHOMA	)	

MOTION TO REOPEN TO DETERMINE SANCTIONS AND RESTITUTION ARISING FROM APPLICANT'S ADJUDICATED MISCONDUCT

COMES NOW Optima Oil & Gas Company, a Colorado limited liability company, Respondent herein, and respectfully moves the Commission for an Order reopening this matter for an evidentiary hearing on the proper sanctions and restitution due the Respondent by the Applicant arising from the Applicant's adjudicated misconduct and in support of its Motion states as follows:

1. Optima Oil & Gas Company is the only respondent named in this matter.

2. This case was commenced by the filing of an Application on June 1, 2006; was heard on June 27, 2006, uncontested without appearance by Movant either personally or through counsel, and recommended approval. The Application was granted by the Commission on August 10, 2006 by Order No. 528230.

3. After further proceedings before the Commission, Movant appealed Commission Order No. 528230 to the Oklahoma Supreme Court. By Opinion filed April 8, 2008, in Case No. 103,742, the Oklahoma Court of Civil Appeals VACATED Order No. 528230 upon finding, *inter alia.*, that, "*Mewbourne's counsel misled the Oklahoma Corporation Commission and caused it to enter an erroneous order granting P.O. 528230.*" *See* Opinion of Oklahoma Court of Civil Appeals, filed April 8, 2008, Case No. 103,742, Par. 42, attached as Exhibit "1." The Court of Civil Appeal's Opinion was upheld by the Oklahoma Supreme Court on September 8, 2008, and the case was remanded to the Commission for further proceedings consistent with the Opinion.

4. In subsequent legal proceedings between the Respondent and Applicant, it was determined that the adjudicated finding on appeal that "*Mewbourne's counsel misled the Oklahoma Corporation Commission and caused it to enter an erroneous order granting P.O. 528230*" was a "*determination necessary to the [Court of Appeal's] judgment*" and that "*[Mewbourne had] a full and fair opportunity to litigate this issue.*" Accordingly, the United States District Court for the Western District of Oklahoma by Order filed July 21, 2010, determined that "issue preclusion bars the [re]litigation" of whether Mewbourne misled the Oklahoma Corporation Commission. *See* Order of Honorable Robin Cauthron filed July 21, 2010, Case No. CIV-09-145, pp. 7-8, attached as Exhibit "2." This ruling was not appealed and is now final.

5. Ultimately, the United States Court of Appeals for the Tenth Circuit, by Order and Judgment filed October 23, 2012, held that Mewbourne's misconduct was in the nature of "intrinsic fraud" and that as such is a "public rights" issue which is within the jurisdiction of the Commission. The Tenth Circuit held that, under Oklahoma law, only the Oklahoma Corporation Commission has the jurisdiction to determine damages or other relief arising from Mewbourne's litigation misconduct occurring before the Commission. *See* Order and Judgment of Tenth Circuit Court of Appeals filed October 23, 2012, Case No. 11-6230, pp. 9-11, attached as Exhibit "3." The Tenth Circuit held that, "[N]othing in *Leck* precludes Optima from also seeking damages [arising from Mewboure's intrinsic fraud, before] the OCC." *Id.*, p. 11. The Tenth Circuit's Order and Judgment is now final and conclusive.

6. In this matter, the Oklahoma Corporation Commission has acted as a Constitution court of record. *See* Oklahoma Constitution, Article 9, Section 19 (in all matters within its jurisdiction, the Commission shall have the powers and authority of a court of record). Under Oklahoma law, every court of record has the inherent authority to determine and remedy litigation misconduct, to include awarding sanctions and/or restitution to the injured party. By the Tenth Circuit Court of Appeal's final Order and Judgment, it has been conclusively determined that Mewbourne's misconduct was in the nature of "intrinsic fraud" and that such is a "public rights" issue which falls within the jurisdiction of the Commission to remedy. *Id.*, p. 11. As a direct result of Mewbourne's adjudicated misconduct, Optima has incurred substantial economic loss in an amount which should be determined in an evidentiary hearing before the Commission.

WHEREFORE, premises considered, Optima Oil & Gas Company, Movant herein, hereby respectfully requests that the Commission reopen this matter and determine the proper sanctions and equitable restitution due Optima as a result of Mewboure's adjudicated misconduct (intrinsic fraud upon the Commission), consistent with the final Opinions, Orders, and Judgments of the Oklahoma Court of Appeals, the U.S. District Court for the Western District of Oklahoma, and the United States Court of Appeals for the Tenth Circuit. Movant further requests that the Commission remand, as it determines proper, the determination of the amount of such sanctions and restitution due Optima by Mewbourne Oil Company to an administrative law judge for full evidentiary hearing, report, and recommendation.

Respectfully submitted,

WALKER & WALKER

Russell J. Walker, OBA #9293
Andrew J. Waldron, OBA #17362
WALKER & WALKER
511 Couch Drive, Third Floor
Oklahoma City, Oklahoma 73102
ATTORNEYS FOR
OPTIMA OIL & GAS COMPANY

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of January, 2014, a true and correct copy of the above and foregoing document was sent via first class U.S. mail, postage prepaid, to the following:

Sally Shipley, Esq.
Deputy General Counsel
Oil and Gas Conservation Division
Oklahoma Corporation Commission
2010 North Lincoln
Oklahoma City, Oklahoma 73105

John C. Moricoli, Jr., Esq.
Two Leadership Square
211 North Robinson, Suite 1200
Oklahoma City, Oklahoma 73102-7114

James W. George, Esq.
Crowe & Dunlevy
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102-8273

Mewbourne Oil Company
211 North Robinson, Suite 2000
One Leadership Square
Oklahoma City, Oklahoma 73102

Richard A. Grimes, Esq.
Grimes, Anderson & Day, PLLC
609 South Kelly Avenue, Suite K-4
Edmond, Oklahoma 73003

Greg R. Renegar, Esq.
The Renegar Building
2964 Via Esperanza
Edmond, Oklahoma 73013

Daniel H. Charest, Esq.
Susman Godfrey, LLP
901 Main Street, Suite 5100
Dallas, Texas 75202

Russell J. Walker

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

OPTIMA OIL & GAS COMPANY, LLC,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 103,742
	)	
THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and MEWBOURNE OIL COMPANY,	)	
	)	
Appellees.	)	

APPEAL FROM THE CORPORATION COMMISSION

P. O. 528230 IS VACATED AND REMANDED WITH INSTRUCTIONS
COMMISSION ORDER 529450 IS REVERSED AND REMANDED WITH INSTRUCTIONS

John C. Moricoli, Jr.
Philip A. Schovanec
MORICOLI, MATULA,
SCHOVANEC & HICKMAN
Oklahoma City, Oklahoma — For Appellant

Benjamin Jackson
GENERAL COUNSEL
OKLAHOMA CORPORATION
COMMISSION
Michele Craig
DEPUTY GENERAL COUNSEL

EXHIBIT "A"

OKLAHOMA CORPORATION COMMISSION
Oklahoma City, Oklahoma

For Appellee Oklahoma Corporation Commission

Richard A. Grimes
GRIMES, ANDERSON & DAY, P.L.L.C.
Edmond, Oklahoma

For Appellee Mewbourne Oil Company

OPINION BY KEITH RAPP, CHIEF JUDGE:

¶1 Optima Oil & Gas Company, LLC (Optima) appeals a Corporation Commission pooling order and an order denying Optima's Motion to Stay Issuance of Order and Motion to Vacate Order No. 528230 in this action involving a Pooling Application filed by Mewbourne Oil Company (Mewbourne).

BACKGROUND

¶2 Mewbourne filed a Pooling Application with the Corporation Commission (Commission) on June 1, 2006, in Cause CD No. 200604826, seeking to force pool Optima's rights in Section 1, Township 20 North, Range 24 West, Ellis County, Oklahoma (the Unit). Optima owns 85 percent of the oil and gas leasehold rights underlying this property and Mewbourne owns the remaining 15 percent. Optima was the only respondent listed on the Pooling Application.[1]

[1] Optima, Mewbourne, and others had drilled another section in April 2006. There had been a meeting between the parties concerning the Fagala well in this section, which apparently is in the same local area. Thus, it can be said that Optima and Mewbourne were acquainted and had an apparent ongoing interest in the Fagala well.

¶3 On that same date, Mewbourne mailed, via certified mail, return receipt requested, the Pooling Application and the Notice of Hearing to Optima at its Oklahoma City business address.[2] The certified mail receipt was accepted and signed by Optima's receptionist/secretary on June 2, 2006. On July 31, 2006, the secretary quit her job with Optima, without notice, due to personal problems.[3] She did not notify anyone with Optima of the certified mail received from Mewbourne. The certified letter remained unopened until William Jack, Optima's local operations manager, discovered the letter in the secretary's file drawer on August 8, 2006, after the Pooling Application hearing. William Jack, upon discovery of the letter, notified Optima's attorney of the letter.

¶4 Mewbourne presented the Pooling Application to the Commission as an uncontested application on June 27, 2006, before Michael Porter, the Administrative Law Judge (ALJ). Optima did not appear at the hearing because it did not know about the hearing.[4]

---

[2] Mewbourne mailed the Application and Notice of Hearing to:

Optima Oil and Gas Company
211 N. Robinson, Suite 1600 South
Oklahoma City, OK 73102

Record, page 137-E. This Court notes this is the same street address as Mewbourne.

[3] Record, Vol. I of II, p. 43, lines 16 - 24 (August 14, 2006, hearing).

[4] Record, Vol. I of II, p. 39 (August 14, 2006, hearing).

¶5 At the hearing, Mewbourne presented one witness, Chuck Falkenstein, a petroleum landman for Mewbourne to testify regarding whether it had made a diligent effort to reach a private agreement with the other owners in the Unit, as required by Corporation Commission Rule 165:5-7-7. He also testified concerning the fair market value of the oil and gas interests within the Unit.

¶6 Falkenstein testified that Mewbourne sent a proposal letter to all owners on May 21, 2006. He stated that he had made a diligent effort to reach an agreement with the owners for the purpose of drilling the Unit well. He also testified that Mewbourne filed the Pooling Application because it was unable to reach agreement with the other owners.[5]

¶7 As to the fair market value issue, Falkenstein testified that he had made a diligent investigation regarding the values paid for other interests in the Unit and surrounding eight units.[6] Based on this investigation, Falkenstein stated he ascertained that the fair market value should be $250 per acre with a corresponding 3/16th royalty interest. Falkenstein stated that the amount listed in the Pooling

---

[5] Record, Vol. I of II, p. 8 (June 27, 2006, hearing).

[6] Falkenstein testified that the highest price paid per acre was by Chesapeake, which had paid $325 per acre. The next highest price paid was $250 per acre, which was paid by Optima. After Optima, the next highest price was $200 per acre.

Application reflected his investigation and, in his opinion, it reflected the current accurate market value.

¶8 In addition, Falkenstein testified that the scheduling requested in the Pooling Application reflected a fair length of time. Falkenstein also testified that Mewbourne requested the Commission appoint it operator of the Unit.

¶9 Falkenstein admitted at the hearing, upon the ALJ's questioning, that Optima owns 556.6 acres of the Unit and Mewbourne owns 102 acres.

¶10 After hearing testimony, the ALJ concluded that the Pooling Application should be granted and made the recommendation to the Commission.

¶11 Optima filed a Motion to Stay Issuance of Order and to Reopen the next day, on August 9, 2006, after discovery of the unopened Notice of Hearing. Optima argued that it was the sole respondent in the matter and the owner of 85 percent of the oil and gas leasehold interests in the Unit. It further argued that Optima would have contested Mewbourne's application if it had been aware of the filing and that Mewbourne knew this was not an uncontested matter between the lease owners. Optima asked the Commission to stay issuing an order on the matter, to reopen the cause, and to remand it to the ALJ for a full trial on the merits. The Commission set Optima's motion for hearing on August 14, 2006.

¶12 On August 10, 2006, the Commission entered Pooling Order No. 528230 (P. O. 528230) granting Mewbourne's Pooling Application as requested. This pooling order was entered before Optima's motion was heard, but after its filing. P. O. 528230 set forth the provisions governing the participation or nonparticipation by any owner within the Unit, including naming Mewbourne, as a minor lease interest holder, operator of the Unit well.

¶13 On the same day that the Commission entered P.O. 528230, August 10, 2006, Optima filed a Motion to Vacate Order No. 528230, seeking to vacate P. O. 528230 and to allow a full hearing on the merits of the Pooling Application. Optima argued that, prior to the Commission entering P. O. 528230, it had filed a motion asking the Commission to stay issuance of the order and to reopen the cause for a trial on the merits. Optima further argued that the Commission needed to conduct a full hearing of the issues.

¶14 On August 11, 2006, Mewbourne filed with the Commission an Affidavit of Mailing, certifying it had mailed a copy of P. O. 528230 "to each owner whose interest was pooled by said order," pursuant to P. O. 528230, paragraph 11. Mewbourne sent the Affidavit to Optima at both the Oklahoma City address and its Denver, Colorado address, as well as to Optima's counsel.

¶15 The ALJ, Michael Decker, heard Optima's Motion to Stay Issuance of Order and to Reopen on August 14, 2006. The parties noted that the only issue before the ALJ was the motion to reopen because the motion to stay was moot in light of the Commission previously entering P. O. 528230.

¶16 Optima presented the testimony of William Jack, the operations manager for Optima in Oklahoma City and a certified petroleum landman. Mr. Jack testified that he is a contract employee for Optima and handles all the day-to-day functions. He also testified that a partnership in Colorado, M & M Oil and Gas Properties (M & M), owns the stock in Optima and that the two partners of M & M reside in Denver, Colorado. Mr. Jack testified he makes recommendations to the owners and they make the decisions based on his recommendations.

¶17 Mr. Jack also testified regarding Optima's business relationship with Mewbourne. He stated that Optima is a working interest participant with Mewbourne in an offset well, the Mewbourne No. 1-6 Fagala (Fagala well). The Fagala well is located in the adjacent quarter section to Mewbourne's proposed wellbore in P. O. 528230. Mr. Jack testified that Optima originally had 52 percent of the spacing unit of the Fagala well, but sold "25 percent of 8/8 of a working

interest"[7] to Crusader Energy III during the drilling of the well in April 2006.[8] Mr. Jack testified that Mewbourne was aware of this transaction and the terms of the transaction.[9]

¶18 Mr. Jack also told the ALJ that he spoke with Mr. Falkenstein in February, 2006, regarding the fair market value Optima paid on the Fagala. Mr. Jack testified he also told Mr. Falkenstein that Optima had "86.875 percent of this unit by our acreage position and that any attempt to pool this matter would be such that we would protest."[10] According to Mr. Jack, he also advised Mr. Falkenstein that Optima intended to operate the well and that it "would be protesting any matter that would be filed."[11] Mr. Jack also stated on cross-examination that he could have presented his testimony and evidence on fair market value, operations, and other issues concerning the proposed Pooling Application at the June 27, 2006, hearing.

---

[7] Record, Vol. I of II, page 31, lines 7 - 8 (August 14, 2006, hearing).

[8] The terms were for "$200 an acre, transferring a 25 percent interest in the unit at $200 an acre at 75 percent net revenue interest the transferee put a quarter back interest after the well, the initial well, had produced 7/10 of a Bcf." Record, Vol. I of II, pp. 31 - 32, lines 24 - 4 (August 14, 2006, hearing).

[9] Record, Vol. I of II, page 33 (August 14, 2006, hearing).

[10] Record, Vol. I of II, page 36, lines 15 - 17 (August 14, 2006, hearing).

[11] Record, Vol. I of II, page 36, lines 23 - 24 (August 14, 2006, hearing).

¶19 Mr. Jack also testified concerning his initial discovery of the unopened, certified letter containing Mewbourne's Pooling Application in his secretary's drawer on August 8, 2006.[12] Mr. Jack explained that his ex-secretary was having personal problems and abruptly quit her employment with Optima on July 31, 2006.[13] He discovered the unopened certified letter from Mewbourne in her desk.

¶20 On cross-examination, Mr. Jack testified that Brent J. Morse, one of the partners of M & M, sent an August 1, 2006, letter to its vendors and participants asking that future correspondence and documents be sent to Optima's Denver office.[14]

¶21 Optima's attorney argued that Mewbourne had notice that Optima, an 85 percent interest owner, intended to protest any Pooling Application and Mewbourne's request to be appointed operator based on Mr. Jack's conversation with Mr. Falkenstein. He further argued that Mewbourne had an obligation to apprise the Commission of this information at the June 27, 2006, hearing rather than submitting the Pooling Application as an uncontested application.

---

[12] Record, Vol. I of II, p. 37, lines 10 - 19 (August 14, 2006, hearing).

[13] Record, Vol. I of II, pp. 43 - 44 (August 14, 2006, hearing).

[14] Record, Vol. I of II, pp. 45 - 47 (August 14, 2006, hearing).

¶22 In addition, Optima's attorney argued that procedural due process was not satisfied because Optima was not given a fair opportunity to be heard. Optima also argued that proper notice was not given to it as required by the Oklahoma Statutes, Oklahoma Constitution, and Commission Rules.

¶23 In response, Mewbourne argued that it followed the requisite notice requirements and that Optima failed to appear at the hearing to protest. Thus, fairness to the parties and to counsel and judicial economy required the Commission to follow strict compliance and to deny the motion. Mewbourne did not deny that it had actual knowledge of Optima's intent to protest any attempt by Mewbourne to pool the matter.

¶24 The next day, August 15, 2006, Optima's Motion to Vacate P. O. 528230 was heard by the ALJ, Michael Decker. The ALJ incorporated by reference the testimony and evidence from the August 14, 2006, hearing on Optima's Motion to Reopen. The parties also submitted additional testimony and evidence.

¶25 Mewbourne offered the testimony of Mr. Falkenstein, the petroleum landman who testified at the Pooling Application hearing. Mr. Falkenstein contradicted Mr. Jack's testimony by stating he had never had any conversations with Mr. Jack. However, on redirect, he admitted that he knew that Optima objected to the Pooling Application and to Mewbourne acting as operator of any

well to be drilled on the Unit. Mr. Falkenstein testified that Mewbourne hired a brokerage firm to do the market value checks on the Unit. The landman from this firm contacted Mr. Jack regarding the price Optima paid for a lease. Mr. Jack advised the landman that Optima would "protest any pooling hearing that was filed" and the landman relayed this information to Mr. Falkenstein.

¶26 After the hearing, the ALJ concluded "that the motion to vacate the order be added to my previous statement and that we reopen this cause for a protested hearing on the merits of the pooling application."[15] The ALJ opined that, pursuant to *Gose v. Corporation Comm'n*, 1969 OK 137, 460 P.2d 118, the Commission has the "authority in a pooling matter to do what is necessary to make sure their correlative rights are protected," including reopening the pooling order.[16] The ALJ noted that after considering all of the factors, his decision was that it was best to reopen the pooling application and allow a complete hearing on the merits. He stated there had been "extraordinary circumstances regarding the delivery of the application and notice to the party" and, after hearing testimony regarding Optima's ownership being in Denver, Colorado, there was a question whether the

---

[15] Record, Vol. I of II, p. 86, lines 17 - 20 (August 15, 2006, hearing).

[16] Record, Vol. I of II, p. 90, lines 14 - 22 (Decision of ALJ - August 15, 2006).

real party in interest had been given notice.[17] Finally, the ALJ noted that Mewbourne had received notice of Optima's intent to protest the Pooling Application.

¶27 On August 16, 2006, Optima filed a Motion to Stay Effectiveness of Order No. 528230 and a Motion to Set Appeal and For Expedited Appellate Process and Entry of Final Order.

¶28 Mewbourne's oral appeal of the ALJ's recommendation to grant Optima's motions to reopen and to vacate P. O. 528230 was heard on August 21, 2006, by Randolph S. Specht, Oil and Gas Appellate Referee (Appellate Referee). After hearing a statement by the ALJ and argument of counsel, the Appellate Referee entered his Report, filed August 22, 2006, affirming the ALJ's recommendation to grant the reopening and to remand to the ALJ for a full hearing on the merits. The Appellate Referee concluded:

> Therefore, when one reviews the totality of the circumstances presented in this cause: including the fact that Optima and Mewbourne had an ongoing business relationship the fact that Optima had noticed Mewbourne of its intent to protest the future pooling application of Mewbourne; the lack of actual receipt due to inefficiencies within Optima's office and other concerns support the granting of the motion to reopen and remand as well as vacate the pooling order.[18]

---

[17] Record, Vol. I of II, p. 91, lines 4 - 17 (Decision of ALJ - August 15, 2006).

[18] Record, Vol. II of II, pp. 175 - 76.

¶29 Mewbourne appealed the Appellate Referee's Report to the Commission. The Commission issued a Deliberations Report on August 25, 2006. The Commission reversed the recommendations of the ALJ and the Appellate Referee to grant Optima's motions to vacate and to reopen.

¶30 The Commission also entered an Order Dismissing Motion to Stay Effectiveness of Order No. 528230 and an Order Dismissing Motion to Set Appeal and Expedite Appellate Process and Entry Final.

¶31 The Commission's Order Denying Motion to Vacate Order No. 528230 and Motion to Stay Issuance of Order and to Reopen was entered on September 8, 2006 (Order No. 529450). The Commission made the following findings, in part:

> 1. This is an Application of Mewbourne Oil Company for pooling oil and gas interests in certain named common sources of supply in the 640-acre drilling and spacing unit consisting of Section 1, Township 20 North, Range 24 West, Ellis County, Oklahoma. Optima was the only respondent named in this Application.
>
> 3 [sic]. Mewbourne caused a copy of the Application and Notice of Hearing in this cause to be mailed to Optima by certified mail at least fifteen (15) days before the scheduled hearing date. Optima signed for and accepted that certified mailing but contends that its manager in Oklahoma City was not made aware of such fact by the employee who signed for the mailing.
>
> 4 [sic]. Optima did not appear on the date this cause was set for hearing and Mewbourne obtained the recommendation of an Administrative Law Judge for the requested relief. Order No. 528230 was issued in this cause on August 10, 2006.

> 5 [sic]. Optima seeks to vacate Order No. 528230 and have this cause reopened for the purpose of a protest concerning certain issues, including operations and values.
>
> 6 [sic]. The Commission finds that notice was properly given to Optima in this matter and that the Motion to Vacate Order No. 528230 should be denied. The issuance of that Order moots the need to consider the Motion to Stay Issuance of Order and same should be denied.

Based on these findings, the Commission denied Optima's request to vacate P. O. 528230 and to stay issuance of P. O. 528230.

¶32 Optima appeals the Commission's initial P. O. 528230 and the Commission's Order No. 529450, denying its request to vacate and stay issuance of P. O. 528230.

STANDARD OF REVIEW

¶33 The Oklahoma Constitution provides two standards of review in appeals from a Corporation Commission order, depending on the issue raised by the appealing party. If a violation of a constitutional right is asserted, this Court must "exercise its own independent judgment as to both the law and the facts." Oklahoma Const., art. 9, § 20. On all other issues, a more deferential standard is applied and, the review is confined to determining whether "the Commission has regularly pursued its authority, and whether the findings and conclusions of the

Commission are sustained by the law and substantial evidence." *Id*; *see*, *Application of Southwestern Bell*, 2007 OK 55, ¶ 9, 164 P.3d 150, 156.

ANALYSIS

¶34 Optima's appeal is grounded on lack of notice and misrepresentation by Mewbourne before the Corporation Commission. Such lack of notice involves constitutional concerns. First, Optima argues the Corporation Commission erred in entering P. O. 528230 and Order 529450, denying Optima's motion to reopen and vacate P. O. 528230. Optima argues the Commission's action deprives it of constitutional rights to due process and also presents a jurisdictional issue capable of being raised at any time. Optima also argues the Corporation Commission erred because the initial pooling order, P. O. 528230, is based on fraudulent and misleading evidence and is not supported by substantial competent evidence.

¶35 The question is this: Did the Corporation Commission err in not vacating P. O. 528230 when faced with the facts and the findings of its own ALJ and Appellate Referee, and, in doing so, did the Corporation Commission err in failing to vacate P. O. 528230?

¶36 Moreover, the Corporation Commission has failed to account for the evidence concerning lack of notice and its denial of due process. Instead, the

Commission appears to have viewed the question of notice strictly on the veneer of adherence to a statutory guideline.

¶37 Under the circumstances of this case, this Court finds the Corporation Commission erred in denying Optima's request to vacate P. O. 528230 for the reasons set out in subsequent paragraphs.

¶38 It is undisputed that Mewbourne presented its Pooling Application to the Corporation Commission on the uncontested docket in the face of its actual notice that Optima, an 85 percent interest owner in the Unit, opposed any pooling application in this Unit proposed by Mewbourne. Second, it is undisputed that Mewbourne had actual knowledge that Optima opposed Mewbourne's request to be appointed operator of the Unit. Optima's opposition to Mewbourne's plans for Section 1 is confirmed by the fact that Optima took immediate corrective measures either the same day, or the following day, it learned of adverse action taken by Mewbourne, which was inimical to Optima's interest.

¶39 The Appellate Referee correctly summarized the effect of these circumstances when he wrote:

> Thus, based on: (1) the fact that Optima had informed Mewbourne that it wished to protest any future pooling application in the area; (2) the fact that Optima never had actual notice of the pooling application covering Section 1 that was heard on June 27, 2006 until August 8, 2006; (3) given the fact that Optima knew of other transactions in the area of which both parties had notice but were not brought out at the

> hearing; (4) the fact that that [sic] Optima would have sought operations as a 85% owner; (5) the fact that that [sic] Optima would have challenged the well costs established for the proposed Section 1 unit well; and (6) as the ALJ found: given the totality of the circumstances, the cause should be reopened and the order vacated for the taking of additional evidence in a protested setting.

The Appellate Referee concluded:

> 2) The Referee believes that on the face of the proceedings, Mewbourne did properly notify Optima of the pooling application and hearing. Moreover, as one looks at the *totality of the circumstances* involved; on receipt of service the placing of the application and notice in a disgruntled employee's drawer until after the hearing on the merits, the request of Optima that Mewbourne serve all process upon the Colorado office; and the fact that William Jack notified Mewbourne that it would protest all future pooling applications; one can find that due process was not properly served in this particular case.
>
> 3) Just because service may be facially valid, but latently ineffective, means that the judgment is not impervious to an attack for an infirmity that lies beneath the *record's* surface. The ALJ's reliance upon the *Vance* and *Shamblin* cases is not totally inappropriate as applied to these circumstances. As noted in *Shamblin*: "It is the totality of circumstances - not the particular norms of statutory requirements - that dictates the quality of service necessary to safeguard an individual's property interest at stake." (Emphasis of court and footnote omitted). One must also consider that the validity of service in any case rests on the particular facts and circumstances of *that* case.
>
> 4) Therefore, when one reviews the totality of the circumstances presented in this cause: including the fact that Optima and Mewbourne had an ongoing business relationship the fact that Optima had noticed Mewbourne of its intent to protest the future pooling application of Mewbourne; the lack of actual receipt due to inefficiencies within Optima's office and other concerns support the

> granting of the motion to reopen and remand as well as vacate the pooling order.

¶40 The facts here are similar to a cause of action where a default judgment has been taken. The courts are reluctant to sustain such as not being in the interests of justice and can operate as a denial of access to the courts. *See St. John Med. Ctr. v. Brown*, 2005 OK CIV APP 101, 125 P.3d 700. For example, in *Brown*, the appellant's attorney failed to timely file a pleading due to a mishap of events, which resulted in the trial court entering a default judgment.

¶41 The Court of Civil Appeals concluded the trial court abused its discretion in granting summary judgment on the petition to vacate. *Id.* at ¶ 14, 125 P.3d at 703. The Court also reiterated several tenets that should be considered in determining whether the trial court abused its discretion in ruling on a motion to vacate a default judgment as outlined by the Oklahoma Supreme Court:

> "[I]n proceedings of this character each case must depend on the facts of the particular case; default judgments are never viewed with favor; litigated questions should be tried on their merits; it is the policy of the law to afford every party to an action a fair opportunity to present his side of a cause; . . . discretion should always be exercised so as to promote the ends of justice. . . ."
>
> [*Burroughs v. Bob Martin Corp.*, 1975 OK 80, ¶ 23, 536 P.2d 339, 342-43.] Trial courts should also consider whether the defaulting party had a valid defense, whether vacation could be granted without substantial delay or injustice, and whether allowing the default judgment to stand would work a serious injustice.

Id. at ¶ 10, 125 P.3d at 702. In concluding the trial court abused its discretion, the Court of Civil Appeals found:

> [T]he trial court's denial of the petition to vacate the default judgment does not further justice. The default judgment would work a serious injustice against Brown, and there has been no showing that vacation of the default judgment would cause substantial delay or injustice.

Id. at ¶ 14, 125 P.3d at 703. Thus, the Court of Civil Appeals reversed and remanded the matter for further proceedings.

¶42 This Court finds the principle set forth in *Brown* instructive in the present action. Here, Mewbourne and Optima had a prior working relationship. Also, although Mewbourne mailed the Pooling Application to Optima, it is undisputed that Optima never had actual notice of the Pooling Application and hearing because of the disgruntled secretary's failure to notify anyone from Optima of the receipt of the application. Furthermore, Mewbourne presented the Pooling Application as uncontested although it had actual notice and knowledge that Optima intended to oppose any pooling application on the Unit submitted by Mewbourne and any application by Mewbourne to be appointed operator. Further, it is undisputed that Mewbourne did not present to the Corporation Commission a complete disclosure of facts to allow the Corporation Commission to make an informed decision. This failure denies the Corporation Commission the opportunity to perform its duty in an informed, intelligent manner. In so doing,

Mewbourne's counsel misled the Corporation Commission and caused it to enter an erroneous order granting P. O. 528230. In addition, it does not appear from the record that allowing the matter to proceed on the merits would cause substantial delay or injustice.

¶43 The totality of the circumstances require this Court to find the Corporation Commission erred in denying Optima's motion to reopen or to vacate P. O. 528230. Thus, Order 529450 denying Optima's motion to reopen or to vacate is reversed and remanded for further proceedings consistent with this Opinion.

¶44 Based on the foregoing, this Court also finds that P. O. 528230 is not supported by substantial evidence and the Corporation Commission erred in entering P. O. 528230. P. O. 528230 is hereby vacated and the matter remanded to the Corporation Commission for a full hearing on the merits of Mewbourne's Pooling Application and any further proceedings consistent with this Opinion.

¶45 P. O. 528230 IS VACATED AND REMANDED WITH INSTRUCTIONS. COMMISSION ORDER 529450 IS REVERSED AND REMANDED WITH INSTRUCTIONS.

GABBARD, P.J., and GOODMAN, J. (sitting by designation), concur.

April 8, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

OPTIMA OIL & GAS COMPANY, LLC, a Colorado Limited Liability Company,	)	
Plaintiff,	)	
vs.	)	Case Number CIV-09-145-C
MEWBOURNE OIL COMPANY, a Texas Corporation,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff filed a Complaint on February 5, 2009, asserting claims of abuse of process, fraud, constructive fraud, tortious interference with contractual or business relations, and tortious interference with prospective business advantage. Plaintiff is also seeking punitive damages. Plaintiff filed the present motion for partial summary judgment.

BACKGROUND

Plaintiff, a Colorado limited liability company, and Defendant, a Texas corporation, are both oil companies that owned oil and gas leasehold rights underlying a tract of land designated as Section 1, Township 20 North, Range 24 West, in Ellis County, State of Oklahoma (the Unit). Plaintiff owned 85% of the leasehold rights, while Defendant owned 15%. In February 2006, a dispute arose with respect to developing the Unit. According to Plaintiff, it informed Defendant that, as the majority leasehold owner, it intended to operate the Unit, was taking steps to develop it, and was actively marketing the prospect. Plaintiff contends that Defendant then indicated that it would await Plaintiff's decision regarding

development of the Unit. However, in June 2006, Defendant filed an application with the Oklahoma Corporation Commission (OCC) seeking to force pool Plaintiff's rights and interests within the Unit. This application was placed on the uncontested docket, even though Defendant was aware that Plaintiff intended to protest any pooling application it filed, and was set for hearing. Defendant sent notice of the application and upcoming hearing to Plaintiff at its Oklahoma City office but, due to problems at that particular office, Plaintiff did not receive actual notice of the hearing until after it occurred.

Subsequently, Plaintiff filed a Motion to Stay Issuance of Order and to Reopen. Before ruling on this motion, the OCC entered Pooling Order No. 528230 granting Defendant's pooling application. Plaintiff then filed a motion to vacate, requesting a full hearing on the pooling application. Both motions were ultimately denied by the OCC. Plaintiff then appealed to the Oklahoma Court of Civil Appeals (COCA), which found that the OCC erred in denying Plaintiff's motions, reversing and remanding for further proceedings. While Plaintiff's appeals were pending, Defendant filed a Motion for Extension of Time to Commence Operations under the pooling order and was ultimately granted a one-year extension, by which time Plaintiff's leases in the Unit had expired. The COCA ultimately found in favor of Plaintiff on its appeal and remanded the pooling order to the OCC.

Plaintiff subsequently filed a complaint on June 25, 2008, alleging claims of tortious interference with contractual rights and prospective business relations, fraud, and abuse of process. The complaint was voluntarily dismissed on August 19, 2008, and the present

complaint was filed on February 5, 2009. In its motion for partial summary judgment, Plaintiff argues that it is the real party in interest and that it has standing to pursue its claims. In addition, Plaintiff seeks a court order concerning the preclusive effect of a number of issues that it claims were fully litigated in the process of appealing the orders of the OCC.

STANDARD

A motion for summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Material facts are those that may affect the outcome of the litigation under applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine only if it is such that a reasonable jury could find in favor of the nonmoving party. Id. The moving party bears the burden of demonstrating the lack of a genuine issue about any material facts. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Once this burden is met, the nonmoving party must then respond and introduce specific facts demonstrating a genuine issue of material fact. Fed. R. Civ. P. 56(e)(2). When deciding a motion for summary judgment, the court may only consider admissible evidence and must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" Scott v. Harris, 550 U.S. 372, 378, 127 S.Ct. 1769, 1774 (2007) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1541 (10th Cir. 1995).

The Supreme Court noted that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The Court went on to explain that, in this situation, there could be no genuine issue of material fact because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

DISCUSSION

Plaintiff argues that issue preclusion bars the litigation of the following issues in this case: (1) Plaintiff is the real party in interest with standing to bring the present action; (2) Plaintiff received insufficient notice of the OCC hearing on Defendant's pooling application; (3) Defendant misled the OCC; and (4) the OCC's pooling order was entered in violation of Plaintiff's due process rights. The Court must look to Oklahoma law to determine whether issue preclusion applies in the present instance. See Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 373 (1996). In Oklahoma, there are four requirements for issue preclusion:

> [T]he issue sought to be precluded must be the same as that involved in the prior judicial proceeding; the issue was litigated in the prior action; the issue was in fact actually determined in the prior proceeding; and the determination of that issue was necessary to support the judgment in the prior proceeding.

Franklin v. Thompson, 981 F.2d 1168, 1170 (10th Cir. 1992) (internal citations and quotation marks omitted). "An issue is actually litigated and necessarily determined if it is properly raised in the pleadings, or otherwise submitted for determination, and judgment would not have been rendered but for the determination of that issue." Okla. Dep't of Pub. Safety v. McCrady, 2007 OK 39, ¶ 7, 176 P.3d 1194, 1199.

Issue preclusion will not apply, however, if the party against whom the doctrine is invoked did not have a full and fair opportunity to litigate the issue in the prior proceeding. Id. In making this determination, trial courts must consider:

> (1) whether the defendant had ample incentive to litigate the issue fully in the earlier proceeding; (2) whether the judgment or order for which preclusive effect is sought is itself inconsistent with one or more earlier judgments in the defendant's favor; and (3) whether the second action affords the defendant procedural opportunities unavailable in the first that could readily produce a different result. Other factors which can be relevant include: (1) whether the current litigation's legal demands are closely aligned in time and subject matter to those in the earlier proceedings; (2) whether the present litigation was clearly foreseeable to the defendant at the time of the earlier proceedings; and (3) whether in the first proceeding the defendant had sufficient opportunity to be heard on the issue.

Cities Serv. Co. v. Gulf Oil Corp., 1999 OK 14, ¶ 15, 980 P.2d 116, 125 (footnotes omitted).

A. Plaintiff's Standing and Status as Real Party in Interest

Defendant contends that Plaintiff is not the real party in interest in this lawsuit. According to Defendant, there are two separate entities named Optima Oil. One is a Colorado limited liability company (Colorado Optima) and the other is an Oklahoma business (Oklahoma Optima). Defendant claims that Oklahoma Optima was the party owning the leasehold interests in the Unit and the one that participated in the proceedings

before the OCC. According to Defendant, Colorado Optima, the entity that filed this lawsuit, is separate and distinct from Oklahoma Optima and therefore is not entitled to maintain the present action.

This issue was clearly raised by the parties in the prior proceeding before the COCA and it was actually litigated. Plaintiff stated in its brief-in-chief on appeal that it was a Colorado limited liability company with its principal place of business in Denver, CO. (See Dkt. No. 35, Ex. 3 at COCA-00040.) In its answer brief, Defendant claimed that there was never any reference to Plaintiff's status as a Colorado limited liability company and that no evidence was put on during the proceedings before the OCC regarding Colorado Optima's relationship to the Unit. (See Dkt. No. 35, Ex. 3 at COCA-000119; COCA-000129.)

In addition, it is clear that the COCA necessarily determined the issue. In its recitation of the underlying facts, the COCA stated that notice of the OCC hearing was mailed to Optima "at its Oklahoma City business address." (Dkt. No. 35, Ex. 1 at 3.) Additionally, the COCA noted that Defendant later sent correspondence "to Optima at both the Oklahoma City address and its Denver, Colorado address." (Dkt. No. 35, Ex. 1 at 6.) It is clear that the COCA considered that Colorado Optima was the appellant in the case before it. The fact that the COCA then proceeded to issue a ruling indicates that it found that Plaintiff had standing to bring the appeal. Such a finding was necessary to the court's judgment, since absent standing the court would have had no choice but to dismiss Plaintiff's appeal.

Contrary to Defendant's arguments, a review of the pertinent factors indicates it had a full and fair opportunity to litigate the issue of Plaintiff's standing during the appeal to the

COCA. It had every incentive to do so at that stage of the litigation. In addition, the present action was clearly foreseeable at the time of Plaintiff's appeal. If either party still felt aggrieved at the end of the appellate process, it was very likely that a subsequent lawsuit would be filed. Because Defendant had every opportunity to be heard on this issue in the prior proceeding, the Court finds that issue preclusion bars the relitigation of Plaintiff's standing and status as the real party in interest.* Plaintiff's motion will be granted on this point.

B. Defendant Misled the OCC

According to Plaintiff, Defendant misled the OCC when it represented that the pooling application was uncontested even though Plaintiff had previously informed Defendant that it intended to protest any pooling application that it filed. Plaintiff contends that the COCA's opinion indicates that it conclusively determined that Defendant misled the OCC and therefore Defendant is precluded from arguing to the contrary in the present litigation.

It is clear from the briefs filed before the COCA that this issue was actually litigated by the parties. (See Dkt. No. 35, Ex. 3 at COCA-000057; COCA-000060; COCA-000133-COCA-000139.) Further, it is clear that the COCA actually decided the issue, stating that "Mewbourne presented the Pooling Application as uncontested although it had actual notice and knowledge that Optima intended to oppose any pooling application on the Unit submitted

---

*Even if the Court were to find otherwise, it seems, based upon the parties' submissions, that Plaintiff would be entitled to summary judgment on the issue of its standing. Plaintiff has submitted copies of checks showing payment by Plaintiff, with a Colorado address, to the lessors of the interests in the Unit. (See Dkt. No. 43, Ex. 1.)

by Mewbourne.... In so doing, Mewbourne's counsel misled the Corporation Commission and caused it to enter an erroneous order." (Dkt. No. 35, Ex. 1 at 19-20.) The Court finds that this determination was necessary to the COCA's judgment because the court very clearly linked Defendant's conduct with the entry of an erroneous order. Defendant has not demonstrated that it lacked a full and fair opportunity to litigate this issue, and therefore it will be precluded from arguing in the course of the present proceedings that it did not mislead the OCC.

C. Due Process and Lack of Notice

Even if these issues were actually litigated by the parties on appeal, the Court finds that a careful reading of the COCA opinion indicates that they were not actually decided. In its findings, the COCA makes no mention that Plaintiff's due process rights were violated. Although it states that Plaintiff never had actual notice of the pooling application and hearing, the COCA never indicates that the notice was insufficient for constitutional purposes. Plaintiff goes too far in attempting to ascribe preclusive value to the COCA's opinion. Defendant will not be precluded from arguing whether it provided Plaintiff with sufficient notice of the pooling application and hearing and whether Plaintiff's due process rights were violated in the underlying OCC proceedings.

CONCLUSION

For the reasons set forth herein, Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 35) is GRANTED IN PART and DENIED IN PART. The underlying COCA

opinion precludes Defendant from arguing that: (1) Plaintiff lacks standing to bring the present claims; and (2) it did not mislead the OCC during proceedings before that entity.

IT IS SO ORDERED this 21st day of July, 2010.

ROBIN J. CAUTHRON
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

October 23, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OPTIMA OIL & GAS COMPANY, LLC, a Colorado Limited Liability Company,

Plaintiff-Appellant,

v.

MEWBOURNE OIL COMPANY, a Texas Corporation,

Defendant-Appellee.

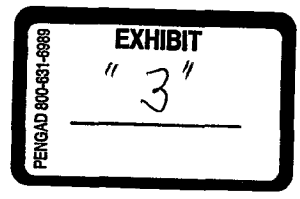
No. 11-6230
(D.C. No. 5:09-CV-00145-C)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **HOLLOWAY**, and **MATHESON**, Circuit Judges.

Optima Oil & Gas Company, LLC, appeals from the district court's order granting Mewbourne Oil Company's motion to dismiss for lack of subject matter jurisdiction. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.



BACKGROUND

Optima owned 85% of the oil and gas leasehold rights in certain property in Ellis County, Oklahoma (the Unit).[1] Mewbourne owned the remaining 15%. In 2006, Optima informed Mewbourne that it intended to be the operator of the Unit and that it was taking steps toward development of the Unit. Nonetheless, Mewbourne filed an application with the Oklahoma Corporation Commission (OCC) seeking an order force pooling Optima's rights and interests in the Unit and naming Mewbourne as the operator of the Unit.[2] Mewbourne sent notice of the application and hearing to Optima's Oklahoma City, Oklahoma office. An Optima employee signed the certified mail receipt, but did not give anyone in management the certified mail. Optima did not appear at the hearing on the application, because it did not know about it.

Despite knowing Optima's opposition to the pooling application, Mewbourne proceeded at the hearing before an OCC Administrative Law Judge (ALJ) with an uncontested application for force pooling. The ALJ recommended to the OCC that the pooling application be granted.

The day after the hearing, someone at Optima discovered the unopened mail containing the notice of hearing and the application. Optima filed a motion to stay

---

[1] The Unit was in Section 1, Township 20 North, Range 24 West, Ellis County, Oklahoma.

[2] "'Force pooling' occurs when the [OCC] requires owners of drilling rights to pool their interests and contribute to development costs." *Fleet v. Sanguine, Ltd.*, 854 P.2d 892, 895 n.8 (Okla. 1993), *abrogated on other grounds by Purcell v. Santa Fe Minerals, Inc.*, 961 P.2d 188, 193 (Okla. 1998).

issuance of an order granting the pooling application or to reopen proceedings. Although the motion was set for a hearing, the OCC granted the pooling application before the motion was heard. The same day the application was granted, Optima filed a motion to vacate the pooling order and requested a full hearing on the application's merits.

The ALJ held a hearing on the motion to reopen, at which Optima presented witness testimony and argued that Mewbourne knew it opposed the application for force pooling and to name Mewbourne as operator. Mewbourne also appeared at the hearing and presented argument. The following day, the ALJ heard the motion to vacate, and the parties presented additional testimony, evidence, and argument. Mewbourne's witness admitted on redirect that he knew Optima objected to the pooling application and request to name Mewbourne as operator. The ALJ recommended that the pooling order be vacated and the matter be reopened for a complete hearing on the merits, in light of the question of notice and Mewbourne's knowledge that Optima opposed the pooling application. An appellate referee agreed with the ALJ's recommendation, but the OCC rejected the recommendations to grant the motions to vacate and reopen. Optima appealed.

The Oklahoma Court of Civil Appeals vacated the pooling order and the order denying the motions to reopen and to vacate, concluding that the OCC erroneously designated Mewbourne as operator. The Oklahoma Court of Civil Appeals found that Optima did not have actual notice of the pooling application and that Mewbourne

had presented the application as uncontested despite knowing that Optima would oppose it. Also, the court found that Mewbourne misled the OCC by failing to disclose facts necessary for the OCC to make an informed decision. The Oklahoma Court of Civil Appeals remanded to the OCC "for a full hearing on the merits of Mewbourne's Pooling Application and any further proceedings consistent with this opinion." Aplt. App., Vol. 1, at 47. The Oklahoma Supreme Court affirmed the Oklahoma Court of Civil Appeal's decision in favor of Optima.

Optima then filed this suit in federal district court against Mewbourne, alleging claims of tortious interference with contractual relationships and tortious interference with prospective business opportunities and seeking damages.[3] The complaint asserted that while the appeal from the OCC's decision was pending, Optima's lessors agreed to extend the leases for six months to commence drilling. Even though the lease extensions were recorded, Mewbourne contacted the lessors and convinced them to sign top leases covering the same leases Optima held.[4] Optima asserted that although Mewbourne knew Optima's lease extensions would expire if Mewbourne delayed drilling beyond the six-month extension time, Mewbourne filed a motion with the OCC for a one-year extension of time to begin

---

[3] Optima also asserted abuse-of-process, fraud, and constructive-fraud claims in its complaint, but later voluntarily dismissed those claims.

[4] A top lease is a "lease[] that take[s] effect only if the pre-existing lease should expire or be terminated." *Concorde Res. Corp. v. Kepco Energy, Inc.*, 254 P.3d 734, 736 n.4 (Okla. Civ. App. 2011).

drilling. A hearing was held on the motion. Both parties appeared and Optima objected to an extension. According to Optima, Mewbourne misrepresented at the hearing that granting an extension would preserve the status quo, even though Mewbourne knew that Optima would lose its leasehold rights in the Unit and those rights would vest in Mewbourne due to the top leases. The OCC granted a one-year extension of the date to begin drilling. Optima successfully appealed, but its leases had already expired and Mewbourne had obtained all of Optima's leasehold interests.

In the complaint, Optima asserted that Mewbourne's tortious conduct caused it to lose significant business opportunities and subjected it to financial harm. Optima maintained that during Mewbourne's actions before the OCC to force pool the Unit, Mewbourne, under oath, knowingly withheld and misrepresented material facts to the OCC, wrongfully depriving Optima of its leasehold rights and interests. And "Mewbourne engaged in wrongful and fraudulent conduct at the [OCC] designed to deny Optima the ability to commence drilling within the time necessary to preserve its leasehold rights." *Id.* at 25. Further, Optima contended that Mewbourne's actions, despite knowing Optima held an 85% leasehold interest, resulted in extinguishment of Optima's leasehold interests, thereby denying Optima prospective business opportunities.

The district court denied Mewbourne's first two motions to dismiss—one under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted and the other under Federal Rule of Civil Procedure

12(b)(1) for lack of subject matter jurisdiction due to incomplete diversity of citizenship between the parties. The court granted, in part, Optima's motion for partial summary judgment under Federal Rule of Civil Procedure 56, holding that Mewbourne is bound by the Oklahoma Court of Civil Appeal's determination that Mewbourne misled the OCC, causing it to enter an erroneous pooling order.

Mewbourne filed a third motion to dismiss. This Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction asserted that Optima must submit its tortious interference claims for damages to the OCC. The district court granted the motion, relying on *Leck v. Continental Oil Co.*, 800 P.2d 224 (Okla. 1989). In *Leck*, the plaintiff sought damages for misrepresentations the defendant made to the OCC during a hearing. *Id.* at 229. *Leck* held that the OCC has jurisdiction to consider intrinsic fraud claims for damages based on a defendant's misrepresentations to the OCC during adversarial proceedings. *Id.* at 229-30. The district court determined that, as in *Leck*, Optima's complaint made clear that its tortious interference claims arose from Mewbourne's misrepresentations to the OCC and jurisdiction would therefore lie only in the OCC, not the district court. This appeal followed.[5]

---

[5] Before ruling on the second motion to dismiss, the district court held an evidentiary hearing on the issue of whether there was complete diversity of citizenship between the parties. The court concluded that there was. On appeal, we granted Optima's unopposed motion to file a Supplemental Appendix containing an affidavit more clearly establishing diversity. Accordingly, the only jurisdictional question before us is whether the district court erred in granting the third motion to dismiss.

ANALYSIS

We review de novo the district court's Rule 12(b)(1) dismissal for lack of subject matter jurisdiction. *Smith v. United States*, 561 F.3d 1090, 1097 (10th Cir. 2009). In doing so, we "accept[] the district court's findings of jurisdictional facts unless they are clearly erroneous." *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1231 (10th Cir. 2012) (internal quotation marks omitted).

Optima argues that the district court had subject matter jurisdiction over its tort claims related to or arising from Mewbourne's misconduct before the OCC. Optima contends that the court applied *Leck* too broadly, because *Leck* is limited to cases involving intrinsic fraud, whereas its tort claims involve extrinsic fraud. *See Leck*, 800 P.2d at 226 (stating that "allegations . . . in the nature of intrinsic fraud" must be decided in forum where fraud occurred). Optima maintains that all issues of fact concerning intrinsic fraud were resolved by the Oklahoma Court of Civil Appeals, but its tort claims could not be resolved by the OCC because they are not based on the adjudicated facts.

Leck defines intrinsic fraud as

> any fraudulent conduct of the successful party which was practiced during the course of an actual adversary trial of the issues joined and which had no effect directly and affirmatively to mislead the defeated party to his injury after he announced ready to proceed with trial. If during the trial the successful party urges forged instruments or perjured testimony or fails to introduce witnesses of whom he had knowledge and whose testimony would help his adversary and impair his own case, he is guilty of fraud; but it is intrinsic fraud, for relief from which application must be made to the court having jurisdiction of the issues joined and tried.

800 P.2d at 229-30 (internal quotation marks omitted). In contrast, extrinsic fraud is "(a) any fraudulent conduct of a successful party, (b) perpetrated *outside* of an actual adversary trial or process and (c) practiced directly and affirmatively on the defeated party, (d) whereby he was prevented from presenting *fully* and *fairly* his side of the case." *Patel v. OMH Med. Ctr., Inc.*, 987 P.2d 1185, 1196 (Okla. 1999). "Examples of extrinsic fraud include false representations that the defeated party is merely a nominal party against whom no relief is sought, false promise of compromise, concealment of suit, kidnapping of witnesses, and similar conduct." *Id.* The *Leck* court found that the "allegations of misrepresentation" in that case were "allegations of intrinsic fraud because they refer[red] to false information given by the appellee at the adversarial hearing before the [OCC]." 800 P.2d at 230.

In its complaint, Optima asserted misrepresentation by Mewbourne to the OCC as the basis for its claims. With respect to the tortious interference with contractual and business relations claim, Optima asserted that "[a]s a result of Mewbourne's misconduct, Mewbourne interfered with Optima's contractual rights under its leases. . . . Mewbourne engaged in wrongful and fraudulent conduct at the [OCC] designed to deny Optima the ability to commence drilling within the time necessary to preserve its leasehold interests." Aplt. App., Vol. 1, at 25. With respect to the tortious interference with prospective business advantage, Optima asserted that "Mewbourne's intentional and tortious acts and conduct resulted in the extinguishment of Optima's leasehold interests. Mewbourne wrongfully,

intentionally and maliciously interfered with [Optima's] prospective business advantage by cutting off Optima's leasehold interests and all potential business opportunities related thereto . . . ." *Id.* at 26.

As the district court found, these claims arise from misrepresentations made by Mewbourne to the OCC and any damages arise as a result of the misrepresentations. The alleged fraudulent misrepresentations to the OCC with regard to cutting off Optima's leasehold interests are intrinsic fraud. *See Fransen v. Conoco, Inc.*, 64 F.3d 1481, 1489 (10th Cir. 1995). "A claim that a party misrepresented facts to the OCC is properly brought before the OCC." *Id.* (citing *Leck*); *Leck*, 800 P.2d at 230 ("Relief from intrinsic fraud must be made by direct attack in the same case in which the fraud was committed."). The district court therefore correctly determined that it did not have jurisdiction to consider Optima's claims. *See Fransen*, 64 F.3d at 1489 (citing *Leck*); *Leck v. Cont'l Oil Co.*, 892 F.2d 68, 69 (10th Cir. 1989) (per curiam) (concluding that district court correctly decided that it lacked subject matter jurisdiction to consider issue regarding misrepresentation to OCC).

Optima also contends that *Leck* is distinguishable because there was no adversarial proceeding on the merits of the force pooling application.[6] *See Leck,*

---

[6] Mewbourne contends that this issue, as well as others, were not raised in the district court and therefore should not be considered on appeal. We reject that argument because waiver and forfeiture rules do not apply to jurisdictional issues and therefore issues concerning jurisdiction can be raised at any time. *See Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 n.7 (10th Cir. 2007); *Huerta v. Gonzales*, 443 F.3d 753, 755 (10th Cir. 2006).

800 P.2 at 230 (noting misrepresentation made at adversarial hearing). It is true that the proceedings on the uncontested application were not adversarial because Optima had not received actual notice of the hearing and application and therefore did not appear at the hearing. All other proceedings before the OCC, however, were adversarial proceedings. And the Oklahoma Court of Civil Appeals explicitly remanded for a full hearing on the merits of the pooling application. Therefore, we conclude that there were adversarial proceedings available for Optima to assert its claims against Mewbourne.

Optima next contends that Okla. Stat. tit. 23, § 3 permits a cause of action for tortious interference. *See id.* ("Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."). This statute does not in any way undermine *Leck's* holding that proceedings on intrinsic fraud must occur before the OCC, not the district court.

Optima further contends that because it does not seek relief from the prior OCC ruling on the intrinsic fraud issues that have already been vacated and there is no issue to reconsider at the OCC, the only remaining issue is a private dispute for money damages, which is appropriately heard in the district court. "The distinction between public and private rights is not always immediately apparent." *Rogers v. Quiktrip Corp.*, 230 P.3d 853, 857 (Okla. 2010). *Leck* states that district courts have jurisdiction over private rights disputes, whereas the OCC has limited jurisdiction to

protect the "public rights in development and production of oil and gas." 800 P.3d at 226; *see id.* (indicating that unitization orders, pooling orders, and orders setting allowables on unit's well are matters of public rights; recognizing that OCC "has jurisdiction to hear only public rights disputes involving actions on joint operating agreements or disputes concerning a pooling order's effect"); *see also Rogers*, 230 P.3d at 857 ("Public rights, at a minimum, must arise between the government and others: the liability of one individual to another under the law as defined is a matter of private rights."). When addressing the misrepresentation issue, *Leck* does not expressly state that it is dealing with a public right. We conclude, however, that *Leck* considered a public right, because the essence of the claim was intrinsic fraud on a tribunal. Since we conclude that intrinsic fraud is at issue in this case, we also conclude that a public right is at issue. Additionally, we note the *Leck* plaintiff sought money damages for the misrepresentations to the OCC. Leck, 800 P.2d at 229. Therefore, nothing in *Leck* precludes Optima from also seeking damages from the OCC.

CONCLUSION

Accordingly, we conclude the district court correctly granted Mewbourne's motion to dismiss for lack of subject matter jurisdiction. The judgment of the district court is AFFIRMED.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge