BEFORE THE OIL CONSERVATION DIVISION

NEW MEXICO DEPARTMENT OF ENERGY,

MINERALS AND NATURAL RESOURCES

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:

CASE NO. 11932

APPLICATION OF PIONEER NATURAL RESOURCES USA, INC. FOR COMPULSORY POOLING, LEA COUNTY, NEW MEXICO.

RESPONSE IN SUPPORT OF PIONEER'S COMPULSORY POOLING APPLICATION AND IN OPPOSITION TO HARTMAN'S MOTION TO DISMISS

COMES NOW Pioneer Natural Resources U.S.A., Inc. ("Pioneer"), by and through its attorneys of record, Hinkle, Cox, Eaton, Coffield & Hensley, L.L.P., and submits this Response in support of its Compulsory Pooling Application and in Opposition to Hartman's Motion to Dismiss, and in support thereof states:

I. SUMMARY OF ARGUMENT

In his motion, Hartman seeks to dismiss Pioneer's application for compulsory pooling on the grounds that (1) the OCD has no jurisdiction over the application because Hartman has unilaterally offered to lease his interest in the forty (40) acre tract at issue in

the application and (2) Pioneer has failed to negotiate in good faith with Hartman concerning the pooling of his mineral interest. Although Hartman's arguments are deceptively simple, they fail to apprise the Division of critical facts related to the negotiations between the parties and the acts of Hartman himself as related to the application at issue here. Consideration of such facts and the undisputed testimony offered by Pioneer at the April 2, 1998 hearing unquestionably establish that the parties have not agreed to pool their interests in the subject tract at issue in this case and that Pioneer has at all times material hereto negotiated in good faith with Hartman. Hartman's motion is merely an attempt to manipulate the administrative process in order that he can seek a risk-free look at the success of Pioneer's proposed well before deciding whether to lease on additional acreage or join in any other well Pioneer may propose. Accordingly, Hartman's motion should be denied.

II. STATEMENT OF RELEVANT FACTS

A. Statement Regarding Hartman's "Undisputed Facts"

Hartman included a statement of undisputed facts ("Hartman's statement") in his Memorandum in Support of his Motion to Dismiss and Opposition to Compulsory Pooling, most of which are inaccurate, incomplete, and disputed. Pioneer responds with particularity to Hartman's statement of Undisputed Facts as follows:

1. Pioneer disputes Paragraph 1 of Hartman's statement to the extent it infers that the failure to admit a complete copy of the Title Opinion dated June 4, 1997 at the April 2, 1998 hearing was improper. Pioneer introduced excerpts from the Title Opinion at the hearing which established Hartman's ownership interest within Pioneer's prospect.

The entire Title Opinion was not introduced because contrary to customary OCD practice, Hartman had made no entry of appearance for the hearing until late in the afternoon on the day prior to the hearing and did not file a pre-hearing statement. Consequently, Pioneer assumed the hearing would be uncontested.

In addition, Pioneer disputes Hartman's statement that "Pioneer or EnerQuest agreed to a lease with Muirfield Resources Co. [on] a forty (40) acre tract" to the extent the statement attempts to suggest that the circumstances of Hartman's case are similar to that of Muirfield's or that Pioneer has somehow acted in an improper or inconsistent manner in dealing with Hartman. On the contrary, unlike Hartman, Muirfield only owns an undivided mineral interest in a single 40-acre tract.

Finally, Pioneer disputes Hartman's statement that Pioneer "had secured thirty-one leases pertaining to the 120-acre tract" before contacting Hartman, to the extent the statement infers that such action was somehow improper as to Hartman. EnerQuest approached Hartman immediately upon learning from its examining attorney that Hartman owned a mineral interest in the EnerQuest/Pioneer prospect. As the undisputed testimony of Mr. Craig Clark established, Hartman was thereafter contacted on numerous occasions with offers to lease Hartman's mineral interest in the 120-acre tract, or in the alternative, to participate in the drilling of Pioneer's proposed well.

2. Pioneer disputes Paragraph 2 of Hartman's statement to the extent the statement alleges that the May 12, 1997 letter from EnerQuest was an "unsolicited request". Rather, it is clear on its face that the May 12th letter was a response to Hartman's request for an offer pursuant to a telephone conversation that same day with

EnerQuest's Vice President Robert Floyd. *See Exhibit 1 to April 2, 1998 Hearing.*

In addition, Pioneer disputes Hartman's statement to the extent it infers that EnerQuest's failure to describe its development plans for the property was somehow improper. As a matter of law and industry custom and practice, a lessee is not obligated to inform a potential lessor of its development plans for the property.

3. Pioneer disputes Paragraph 3 of Hartman's statement to the extent that it infers or suggests that Pioneer was obligated, legally or otherwise, to submit to Hartman information relative to the lessee's drilling plans, well locations, spud date, etc.

4. Pioneer disputes Paragraph 4 of Hartman's statement that EnerQuest's lease offer was a "blind solicitation". Hartman requested a lease offer and EnerQuest/Pioneer responded with the May 12, 1997 offer to lease and then the July 11, 1997 hand-delivery of the bonus check and proposed lease. *See Exhibit 1 to April 2 Hearing.*

In addition, Pioneer disputes Hartman's statement that he "heard nothing more from EnerQuest on this matter". The undisputed testimony of Mr. Craig Clark at the April 2, 1998 hearing established that following the delivery of the proposed lease to Hartman on July 11, 1997, Mr. Craig Clark, acting on behalf of EnerQuest and Pioneer, made numerous phone calls to Hartman in an effort to arrive at an agreement regarding the proposed lease. Hartman refused to respond to any of Mr. Clark's phone calls. *See Testimony of Mr. Craig Clark at the April 2 Hearing.*

5. Pioneer disputes Paragraph 5 of Hartman's statement. Specifically, Pioneer disputes Hartman's statement to the extent that it states that Pioneer first contacted Hartman regarding the acreage at issue on January 9, 1998. Contrary to Hartman's

statement, the uncontested testimony at the April 2, 1998 hearing established that following the delivery of the proposed lease to Hartman on July 11, 1997, Mr. Craig Clark, acting on behalf of EnerQuest and Pioneer made numerous phone calls to Hartman in an effort to arrive at an agreement regarding the proposed lease. Hartman refused to respond to any of Mr. Clark's phone calls. *See Exhibit I to April 2 Hearing and Mr. Craig Clark's Testimony.* As a result of Hartman's refusal to correspond with Pioneer over a nine (9) months, Pioneer treated Hartman's silence as an election not to lease his mineral interest. Accordingly, Pioneer sent Hartman information in the form of the January 9, 1998 letter proposing the drilling of a test well. *See Exhibit B to Hartman's Motion.*

In addition, Pioneer disputes Hartman's statement to the extent that it states that the location of the well "remains a mystery at this late date". At all times material hereto, Pioneer has sought to drill the proposed well on a legal location. In fact, Pioneer's letter of January 9, 1998 and the proposed Joint Operating Agreement ("JOA") forwarded to Hartman in February 1998 specified that the well would be drilled at a legal location. *See Exhibit B to Hartman's Motion*; *Exhibit 7 to April 2 Hearing*. Contrary to Hartman's statements, Pioneer has never sought nor does it currently seek to drill the well at an unorthodox location. *Id.*

6. Pioneer admits Paragraph 6 of Hartman's statement.

7. Pioneer admits Paragraph 7 of Hartman's statement.

8. Pioneer disputes Paragraph 8 of Hartman's statement to the extent it infers that Pioneer failed to act in good faith in seeking to join Hartman's mineral interest for the purpose of drilling the proposed well or otherwise offered Hartman an inadequate amount

of time to respond to EnerQuest's and Pioneer's offer to lease Hartman's mineral interest in the 120-acre tract Pioneer seeks to develop. On the contrary, the undisputed testimony at the April 2, 1998 hearing established that EnerQuest and Pioneer forwarded Hartman an offer to lease his mineral interest on May 12, 1997 and hand-delivered a bonus check and proposed lease to Hartman on July 11, 1997. *See Exhibit 1 to April 2 Hearing.* Subsequently, Mr. Craig Clark, acting on behalf of EnerQuest and Pioneer made numerous phone calls to Hartman in an effort to arrive at an agreement regarding the proposed lease. Hartman refused to respond to any of Mr. Clark's phone calls. *See Testimony of Mr. Craig Clark at April 2 Hearing.*

9. Pioneer admits Paragraph 9 of Hartman's statement.

10. Pioneer admits Paragraph 10 of Hartman's statement.

11. Pioneer disputes Paragraph 11 of Hartman's statement. Specifically, Pioneer disputes Hartman's statement that he unilaterally "issued" a lease to Pioneer. Fee oil and gas leases are not unilaterally "issued" by one party. They are contracts which result from negotiations between the parties who reach a meeting of the minds as to all terms of the oil and gas lease. Hartman's offer to lease received by Pioneer on April 1, 1998 was merely a counter-offer to Pioneer's offers of May 12, 1997 and July 11, 1997. This counter-offer was rejected by Pioneer. Accordingly, no agreement exists as between Hartman and Pioneer to pool their interests. N.M.S.A. 1978 § 70-2-17(C).

12. Pioneer admits Paragraph 12 of Hartman's statement. Specifically, Pioneer admits that Hartman's offer to lease varied the terms of Pioneer's May 12, 1997 offer to Hartman by changing in pertinent part the primary term, the royalty rate, the bonus, and

the lands to be covered by the lease. *See Exhibit 6 to April 2 Hearing.*

13. Pioneer admits Paragraph 13 of Hartman's statement.

14. Pioneer admits Paragraph 14 of Hartman's statement, except to the extent that it implies that Pioneer's intentions are not reasonable or prudent.

15. Pioneer disputes Paragraph 15 of Hartman's statement to the extent the statement attempts to suggest that the circumstances of Hartman's case are similar to that of the ***working interest*** owners referenced in Paragraph 15 or that Pioneer has somehow acted in an improper or inconsistent manner in dealing with Hartman's mineral interests. Testimony at the April 2 hearing clearly established that the carried working interests given to the working interest owners referenced in Paragraph 15 constituted a portion of the consideration paid to them for generating the prospect. *See Testimony of Mr. Craig Clark at April 2 Hearing.*

16. Pioneer disputes Paragraph 16 of Hartman's statement to the extent the statement infers that Pioneer was obligated to offer evidence at the hearing of proposed secondary recovery operations for the property.

17. Pioneer does not dispute Paragraph 17 of Hartman's statement insofar as it indicates that Pioneer has agreed to pay other lessors a 25% royalty rate under the terms of their leases. However, Pioneer disputes Hartman's statement to the extent that it suggests that the terms of those leases were similar to that proposed by Hartman on April 1, 1998, which Pioneer denies.

In addition, Pioneer admits that it has agreed to a 25% royalty rate in instances where the mineral interest owners have agreed to lease all of their interest in the 120-acre

tract, and in fact, Pioneer has now offered Hartman a 25% royalty rate if he will lease his entire mineral interest in the 120-acre tract. *See Exhibit A attached hereto.*

B. Pioneer's Statement of Additional Undisputed Material Facts

The following is a statement of the material facts as to which no genuine issue exists and which are relevant to the disposition of Hartman's Motion:

1. In 1996, EnerQuest began contemplating exploration on a 120-acre tract consisting of NE/4 SW/4 and S/2 NW/4 of Section 18, T20S, R39E, Lea County, New Mexico, being a part of a larger, 1560 acre prospect. *See Testimony of Mr. David Keller at April 2 Hearing.* In January 1997, Pioneer became involved in EnerQuest's prospect, agreeing to serve as Operator of the prospect.

2. In an effort to obtain the rights to develop the 120-acre tract, EnerQuest obtained oil and gas leases from individuals who owned mineral interests in the tract. *See Testimony of Mr. Craig Clark at April 2 Hearing.*

3. Upon discovery of Hartman's ownership of an interest in the prospect, EnerQuest contacted Hartman by phone on May 12, 1997 to propose obtaining a lease on Hartman's mineral interest covering the 120-acre tract. In the telephone conversation, Hartman indicated that he would be willing to entertain a proposal from EnerQuest. *See Exhibit 1 to April 2 Hearing.*

4. Accordingly, later that day, EnerQuest forwarded Hartman a written "offer to purchase an oil and gas lease" covering the entire 120-acre tract under the following terms:

(a) 2 year primary term

(b) 22.5% royalty

(c) $150.00 per net acre

Id.

5. Despite requesting and receiving an offer from EnerQuest, Hartman failed to respond to the offer for over two months. *See Exhibit 1 to April 2 Hearing.*

6. In an effort to receive a response, on July 11, 1997, EnerQuest hand delivered to Hartman a proposed oil and gas lease referenced in the May 12, 1997 letter. Although the proposed leased changed the primary term from two (2) years to three (3) years, all other terms remained the same. In addition, EnerQuest attached a check for the proposed bonus in the amount of $1,943.10. Despite receiving the proposed oil and gas lease and bonus check, Hartman failed to respond. *See id.*

7. Thereafter, Mr. Craig Clark, acting on behalf of EnerQuest and Pioneer made numerous phone calls to Hartman in an effort to arrive at an agreement regarding the proposed lease. Hartman refused to respond to any of Mr. Clark's phone calls. *See Testimony of Mr. Craig Clark at April 2 Hearing.*

8. Because they received no response from Hartman for a period of eight (8) months, Pioneer and EnerQuest assumed that Hartman had chosen not to lease his interest in the 120-acre tract. Accordingly, on January 9, 1998, Pioneer sought to obtain Hartman's voluntary joinder by sending Hartman a letter proposing to drill a test well on the NE/4 SW/4 of Section 18 with an attached Authority for Expenditure. The letter also informed Hartman that in the event he did not elect to participate in the drilling of the well,

Pioneer and EnerQuest remained willing to lease Hartman's mineral interest under their prior offer. Hartman did not respond to Pioneer's and EnerQuest's January 9th letter. *See Exhibit B to Hartman's Motion.*

9. Because Hartman had refused to communicate with EnerQuest and Pioneer for a period of nine (9) months regarding the 120-acre tract, Pioneer filed an application for compulsory pooling of Hartman's interest on February 2, 1998. *See Exhibit 2 to April 2 Hearing.*

10. In an effort to continue to attempt to resolve the matter without the need for a compulsory pooling hearing, on February 12, 1998, Pioneer sent to Hartman a letter enclosing a Joint Operating Agreement, referencing the AFE that had been sent to Hartman on January 9, 1998, and again renewing their offer to lease. *See Exhibit D to Hartman's Motion.*

11. Pioneer did not receive any response from Hartman until approximately 4:45 p.m. on April 1, 1998, the day before the compulsory pooling hearing, at which time Hartman offered an oil and gas lease which materially altered the terms of Pioneer's proposed lease and the terms of the May 12, 1997 offer made by EnerQuest. *See Exhibit 6 to April 2 Hearing.*

12. Specifically, Hartman's April 1st offer changed in pertinent part the royalty rate, the primary term, the bonus provision, and reduced the acreage covered by the lease to include only the 40-acre tract upon which the proposed well was to be drilled. *See id.*

13. Pioneer rejected Hartman's April 1st offer to lease on the grounds that Hartman's offer only covered forty (40) acres, rather than all of Hartman's mineral interest in the 120-acre tract. *See Testimony of Mr. Craig Clark at April 2 Hearing.*

III. ARGUMENT AND AUTHORITIES

A. Pioneer and Hartman have reached no agreement to pool their interests under N.M.S.A. 1978 § 70-2-17(C)[1]

The New Mexico Supreme Court has long held that when analyzing an oil and gas lease, a court must proceed as it would with any other contract. Specifically, the Court has held that "[a]n oil and gas lease is merely a contract between the parties and is to be tested by the same rules as any other contract." *Leonard v. Barnes*, 75 N.M. 331, 404 P.2d 292, 302 (1965); *Harvey E. Yates Co. v. Powell*, 98 F.3d 1222, 1229 (10th Cir. 1996).

Under applicable New Mexico contract law, in order to be legally enforceable, an oil and gas lease must be supported by an offer, acceptance, consideration, and mutual assent. *Garcia v. Middle Rio Grande Conservancy Dist.*, 121 N.M. 728, 918 P.2d 7 (1996) (noting traditional elements of an enforceable agreement). The offer must be accepted unconditionally by the offeree and substantially as made to constitute an agreement between the parties. *Polhamus v. Roberts*, 50 N.M. 236, 175 P.2d 196,198 (1947). If the terms of the acceptance materially change the terms of the offer, the result is a counter-offer not an acceptance and no agreement is formed until acceptance of the counter-offer. *Id.*; *Gardner Zemke Co. v. Dunham Bush Inc.*, 115 N.M. 260, 850 P.2d 319, 322 (1993).

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[1] N.M.S.A. 1978 § 70-2-17(C) provides that the OCD has the power to pool interests in a proposed development of lands when the owners of such interests "have not agreed to pool their interests."

In the present case, the undisputed evidence clearly establishes that Pioneer and Hartman have not agreed to pool their interests pursuant to § 70-2-17(C). Prominent among the many provisions upon which a lessor and lessee must agree before an oil and gas lease exists are the bonus, royalty rate, the primary term, and the lands covered. On May 12, 1997, Pioneer made an offer to lease Hartman's entire mineral interest in the 120-acre tract within the Pioneer/EnerQuest prospect with a (1) two-year primary term; (2) a 22.5% royalty; and (3) $150.00 per net acre bonus. After the expiration of nine (9) months in which Pioneer received no communication, Hartman finally responded on April 1, 1998 at approximately 4:45 p.m. with a proposed lease which he admits in his Motion changed the material terms of Pioneer's May 12th offer. Specifically, Hartman admits that his April 1st communication changed the royalty rate, the primary term, the bonus provision, and the acreage covered by the lease. Pioneer rejected Hartman's April 1st communication. Likewise there clearly exists no agreement between Hartman and Pioneer for Hartman's participation in the proposed well, despite Pioneer's submission to Hartman of a well proposal, an AFE, and a joint operating agreement.

Under these facts, it is clear that the parties have reached no agreement to pool their interests pursuant to § 70-2-17(C). Indeed, because Hartman's April 1st communication materially altered the terms of Pioneer's May 12th offer, Hartman's April 1st communication constituted a counter-offer which was rejected by Pioneer. *See Gardner*, 850 P.2d at 322. As a result, no agreement to pool exists between the parties. *See Garcia*, 918 P.2d at 7 (Agreement must be supported by mutual assent.). Compulsory pooling is therefore necessary and appropriate under § 70-2-17(C).

Ignoring his own factual admissions which establish that no agreement to pool has been reached, Hartman contends an agreement exists because he has unilaterally agreed to lease his mineral interest only on the forty (40) acre tract which is the subject of the pooling application. Accordingly, Hartman contends that Pioneer is improperly attempting to utilize the governmental power of force pooling to require Hartman to lease and accept terms less favorable than those Pioneer has accepted from other lessors. *See Hartman's Brief at 9*. None of Hartman's arguments withstand scrutiny.

As an initial matter, Hartman's efforts to characterize his unilateral offer to lease his interest in the 40-acre tract as constituting an agreement between the parties must be rejected. As set forth above, Hartman's offer constituted at best a counter-offer to Pioneer's original May 12th offer which was rejected by Pioneer, resulting in no agreement between the parties. Hartman has no authority to unilaterally determine the terms upon which an agreement exists under § 70-2-17(C). Moreover, Hartman's representation that Pioneer's application constitutes an attempt to require him to lease under terms less favorable than those Pioneer has accepted from other lessors is a gross misrepresentation of the factual record in this case. While it is true that Pioneer has agreed to pay up to a 25% royalty rate, Pioneer has never agreed to ***any*** lease covering less than the lessor's entire mineral interest in the 120-acre tract. Rather than constituting an inappropriate attempt to utilize compulsory pooling, Pioneer's application merely represents an attempt to avail itself of a legitimate statutory remedy in an instance where the parties have failed to reach a meeting of the minds as to the interests to be pooled. Hartman's efforts to claim the parties have reached an agreement to pool their interests must be rejected. Pioneer's

compulsory pooling application should be granted.

B. Pioneer has made reasonable efforts to secure Hartman's voluntary participation

Alternatively, Hartman contends that Pioneer's application for compulsory pooling should be dismissed on the grounds that Pioneer has failed to make reasonable efforts to secure Hartman's voluntary participation in the prospect because Pioneer filed its pooling application only nineteen days after it had sent Hartman an AFE on the proposed well. Accordingly, Hartman contends that under the Division's opinion *In re Application of Meridian Oil, Inc.*, Case No. 11434, Pioneer's force pooling application must be dismissed. Hartman's argument should be rejected because (1) *Meridian* is inapplicable to the facts of this case and (2) Pioneer has in fact made reasonable efforts to obtain Hartman's voluntary participation in this prospect.

In *Meridian*, Meridian sought an order pooling all mineral interests in the Blanco-Mesaverde Pool underlying an existing 320-acre spacing and proration unit for the purpose of drilling and completing a proposed well to be drilled at an unorthodox infill gas well location. The acreage at issue was subject to a pre-existing Operating Agreement and Communitization Agreement under which Hartman and Four Star Oil & Gas Company were working interest owners. On October 31, 1995, Meridian renewed a request for a voluntary agreement of the working interest owners in the unit for the drilling of the proposed well. On November 8, 1995, only eight days after making this request, Meridian filed its application to force pool the acreage. The Division dismissed Meridian's application, concluding that under these facts, "Meridian . . . failed to make reasonable efforts to adequately obtain voluntary joinder of all working interests . . . prior to filing its

application." Accordingly, the Division dismissed Meridian's pooling application.

Hartman contends the Division's holding in *Meridian* is applicable to this case because Pioneer filed its pooling application only nineteen (19) days after it had sent Hartman an AFE for the proposed well. Hartman's efforts to analogize his case to that of *Meridian* is disingenuous and mischaracterizes the undisputed evidence presented before the OCD at the April 2 hearing. Unlike *Meridian*, Pioneer spent approximately nine (9) months attempting to negotiate with Hartman concerning his voluntary participation in the proposed prospect. Contrary to his assertions, Pioneer's May 12, 1997 offer was not "unsolicited" but was a response to a request for an offer made by Hartman in a telephone conversation held earlier that same day. Hartman failed to respond in any way to Pioneer's offer for over eight (8) months despite repeated efforts on the part of Pioneer to gain a response. On January 9, 1998, Pioneer sent Hartman an AFE and again renewed its May 12 offer to lease Hartman's mineral interest in the event he elected not to participate in the drilling of the well. Pioneer again renewed this offer on February 12, 1998 which remained unanswered until approximately 4:45 p.m. on the day prior to the hearing on Pioneer's application. Rather than indicating unreasonable efforts, the undisputed facts of this case unquestionably demonstrate that Pioneer has made every effort possible to obtain Hartman's voluntary participation in the prospect.

Moreover, Hartman's argument that Pioneer has failed to make reasonable efforts to obtain his voluntary participation is completely without merit when viewed in light of the fact that Hartman is an experienced operator in New Mexico and is an experienced litigant before the OCD, well-versed in OCD rules, regulations and the compulsory pooling statute.

Indeed, in support of his motion, Hartman included a decision by the Division in which he opposed a force pooling application. *See Exhibit G to Hartman's Motion*. Given Hartman's extensive experience before the OCD and his failure to respond to Pioneer's attempts to negotiate for approximately nine (9) months until the "eleventh hour", his argument that Pioneer failed to make reasonable efforts to gain his participation is without merit, borders on the frivolous, and should be summarily rejected.

C. Pioneer has negotiated in good faith with Hartman

Finally, without citation to authority, Hartman contends Pioneer's application should be dismissed because Pioneer has failed to negotiate in good faith with Hartman. This argument is without merit. A party fails to negotiate in good faith when it conducts negotiations "as a kind of charade or sham, all the while intending to avoid reaching an agreement." *Continental Ins. Co. v. N.L.R.B.*, 495 F.2d 44, 48 (2nd Cir. 1974). In determining whether a party has negotiated in good faith, a court must examine the party's conduct in the totality of the circumstances in which the bargaining took place. *N.L.R.B. v. Billion Motors, Inc.*, 700 F.2d 454, 456 (8th Cir. 1983).

In the present case, the undisputed testimony of Mr. Craig Clark at the April 2 hearing concerning the totality of the circumstances surrounding the negotiations establishes Pioneer's good faith. In response to Hartman's request, EnerQuest and Pioneer made an offer to lease Hartman's interest in the 120-acre tract on May 12, 1997. After receiving no response, on July 11, 1997, EnerQuest hand delivered to Hartman a proposed oil and gas lease referenced in the May 12, 1997 letter with an attached check for the proposed bonus in the amount of $1,943.10. Pioneer made numerous phone calls

to Hartman over the next several months. Despite receiving the proposed oil and gas lease and bonus check, Hartman failed to respond to any of EnerQuest's and Pioneer's offer, and failed to return any their phone calls.

Because they had received no response from Hartman, Pioneer and EnerQuest assumed that Hartman had chosen not to lease his interest in the 120-acre tract. Accordingly, on January 9, 1998, Pioneer sought to obtain Hartman's voluntary joinder by sending Hartman a letter proposing to drill a test well on the NE/4 SW/4 of Section 18 with an attached Authority for Expenditure. The letter also informed Hartman that in the event he did not elect to participate in the drilling of the well, Pioneer and EnerQuest remained willing to lease Hartman's mineral interest under their prior offer. Hartman did not respond to Pioneer's and EnerQuest's January 9th letter.

Because Hartman had refused to communicate with EnerQuest and Pioneer for a period of nine (9) months regarding the 120-acre tract, Pioneer filed an application for compulsory pooling of Hartman's interest on February 2, 1998. In an effort to continue to attempt to resolve the matter without the need for a compulsory pooling hearing, on February 12, 1998, Pioneer sent to Hartman a letter enclosing a Joint Operating Agreement, referencing the AFE that had been sent to Hartman on January 9, 1998, and again renewing their offer to lease. Pioneer did not receive ***any*** response from Hartman to ***any*** of its communications until approximately 4:45 p.m. on April 1, 1998, the day before the compulsory pooling hearing. In his "eleventh" hour response, Hartman offered an oil and gas lease which materially altered the terms of Pioneer's proposed lease and the terms of the May 12, 1997 offer made by EnerQuest. Pioneer rejected this counter-offer,

but offered Hartman a 25% royalty rate if he would lease his entire mineral interest in the 120-acre tract. *See Exhibit A attached hereto.*

As these facts unquestionably demonstrate, Pioneer has never engaged in negotiations as a charade or sham to avoid reaching an agreement with Hartman and Pioneer has made a good faith effort to do so. *Continental Ins.*, 495 F.2d at 48. In light of Hartman's conduct in this case by failing to negotiate for nine (9) months, coupled with his "eleventh" hour response, any asserted lack of good faith negotiation must be attributed to Hartman, not Pioneer. Hartman's argument that Pioneer failed to negotiate in good faith is devoid of merit and should be summarily rejected.

In an effort to sidestep his own conduct in this case, Hartman attempts to support his lack of good faith argument by pointing to the fact that the lease proposed by him is identical or substantially equivalent to terms Pioneer offered to other lessors and the fact that Pioneer has never offered Hartman a lease only on the 40-acre tract at issue in the application. Neither argument support Hartman's claim of lack of good faith.

First, Hartman's representation that his proposed lease is identical or substantially equivalent to those leases Pioneer has accepted from other lessors is a gross misrepresentation of the factual record in this case. At all times material hereto, Pioneer has consistently agreed to a royalty rate, bonus provisions, and a primary term with mineral lessors who have agreed to lease all of their interest in the 120-acre tract. Hartman's offer in no way proposed terms similar to that of those other lessors. Specifically, Hartman's offer reduced the acreage covered to only the 40-acre tract at issue in Pioneer's application. Thus, Hartman's claim that his lease was substantially similar to

others accepted by Pioneer is inaccurate and misleading and should be rejected.

Moreover, despite Hartman's suggestion to the contrary, it is not improper for Pioneer to attempt to lease all of Hartman's mineral interest in the proposed 120-acre tract rather than merely the 40-acre tract at issue in this application. Hartman's argument overlooks the fact that Pioneer's prospect includes all of the land encompassed in the 120-acre tract, not just the 40-acre tract at issue here. If Pioneer's initial well on its prospect is successful, the offset acreage is also potentially productive. Industry custom and practice demands that a prudent operator of a wildcat well attempt to lease the offset locations prior to exposing himself and his partners to risk of drilling the initial well. If Hartman wants to have a "look" at the results of the initial well, he should have it as a participating partner, rather than as a lessor with a premium royalty rate given to others who were willing to lease their entire mineral interest in the 120-acre tract. If Hartman wants a "***free*** look" at the results of the initial well, it should be as the owner of a pooled, unleased mineral interest under § 70-2-17(C).

V. CONCLUSION

In the present case, the totality of the circumstances surrounding the negotiations between the parties unquestionably establishes that there has been no agreement between the parties to pool their interests. Moreover, Pioneer has at all times material hereto attempted to negotiate in good faith with Hartman and obtain his voluntary participation in the 120-acre prospect. Any lack of good faith or unreasonable negotiations must be attributable to Hartman in light of his failure to negotiate for a period of nine (9) months and his "eleventh" hour offer which substantially changed the terms of Pioneer's

proposal.

Pioneer realizes that neither Pioneer nor the OCD can force Hartman to agree to Pioneer's terms. But the reverse is also true—neither Hartman nor the OCD can force Pioneer to agree to Hartman's terms. Pioneer respects Hartman's right "not to agree", but that decision subjects Hartman's interest to compulsory pooling. Section 70-2-17(C) was drafted and enacted to address ***exactly*** the situation at hand. Hartman's motion is without merit and Pioneer's application to force pool should be granted.

HINKLE, COX, EATON, COFFIELD & HENSLEY, L.L.P.

By: _____

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that a true and correct copy of the foregoing **Response in Support of Application for Compulsory Pooling and in Opposition to Hartman's Motion to Dismiss** was forwarded to opposing counsel, via facsimile and regular mail on this the **10th** day of **April, 1998**.

Mr. J.E. Gallegos
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_____
Timothy R. Brown

PIONEER

April 6, 1998

Doyle Hartman
3811 Turtle Creek Blvd., Suite 200
Dallas, Texas 75219

V a Facsimile
(214) 520-0811

Re: Proposed Lease Terms
S/2 NW/4 and NE/4 SW/4 of Section 18,
T-20-S, R-39-E, N.M.P.M., Lea County, New M :xico
McCasland 18 Fee No. 11 Well

Gentlemen:

Pioneer Natural Resources USA, Inc., is in receipt of your original executed lease dated April 1, 1998, covering the NE/4 SW/4 of Section 18, T-20-S, R-39-E, N M.P.M., Lea County, New Mexico. The terms of the lease executed by Mr. Hartman, and the chan es made to the lease form are unacceptable to Pioneer. However, Pioneer would accept a lease from Mr. Hartman incorporating the following terms:

1. The lease shall cover the S/2 NW/4 and N E/4 SW/4 of Section 18, T-20-S, R-39-E, N.M.P.M., Lea County, New Mexico.

2. Mr. Hartman may reserve a 1/4th royalty nterest.

3. The lease shall provide for a primary term of one (1) year, with the option of maintaining the lease through a 180 day continuous de velopment program. Pioneer will offer $100 per net acre as bonus consideration.

4. The language deleted in Line 3 - Paragrap 1 1 of your lease form providing for enhanced recovery operations must be reinstated.

5. On Page 2 of Exhibit "A" to the lease, the word "leasee's" should be "Lessee's". Also, in the second paragraph from the bottom of Page 2, Lessor should provide Lessee with reasonable notice of its intent to conduct additional tests.

Should these terms be acceptable, please make the necessary changes to the lease form and forward an executed original lease at your earliest convenience. Also, should Mr. Hartman elect to participate in drilling operations for the McCasland 18 Fee No. 11 Well please execute and return the AFE and

Operating Agreement previously forwarded to your office. Pioneer's lease offer shall expire on Friday, April 10, 1998, at 4:00 P.M., unless earlier rescinded.

Please call me at (915) 571-1476 should wish to discuss this matter.

Sincerely,

Richard C. Winchester

Richard C. Winchester
Senior Landman

cc: M. Craig Clark
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Midland, Texas 79701

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