**FIFTH JUDICIAL DISTRICT COURT**
**COUNTY OF LEA**
**STATE OF NEW MEXICO**

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| **TMBR/SHARP DRILLING, INC., et al,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **No. CV-2001-315C** |
| | ) | |
| **DAVID H. ARRINGTON OIL & GAS, INC., JAMES D. HUFF, MADELINE STOKES, ERMA STOKES HAMILTON, JOHN DAVID STOKES, and TOM STOKES** | ) | |
| | ) | |
| **Defendant.** | ) | |

**RESPONSE OF DAVID H. ARRINGTON OIL & GAS, INC. TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING TORTIOUS INTERFERENCE**

COMES NOW the Defendant, DAVID H. ARRINGTON OIL & GAS, INC., ("Arrington") by and through its attorneys of record, Losee, Carson, Haas & Carroll (Ernest L. Carroll), and submits this Response to Plaintiff's Motion for Partial Summary Judgment Against David H. Arrington Oil & Gas Regarding Tortious Interference and states as follows:

## I. Introduction

Based upon this Court's interlocutory order granting partial summary judgement against Arrington, Plaintiffs TMBR/Sharp Drilling, Inc., Ameristate Oil & Gas, Inc., Thomas Beall, Mark Nearburg, Louis Mazzallo, F. Howard Walsh, Jr., Jade Resources, Inc. CHI Energy, Inc. and Thomas C. Brown ("TMBR/Sharp") now seek a summary judgment against Arrington for tortious interference alleging that Arrington wrongfully

obtained permits to drill two wells and that as a result TMBR/Sharp was damaged. Arrington disputes that it wrongfully obtained the permits and further disputes that TMBR/Sharp was prevented from continuously drilling upon the leasehold acreage in question. Further Arrington asserts that TMBR/Sharp has alleged improper and highly speculative and unsubstantiated damages and that TMBR/Sharp has based its motion on immaterial and disputed facts.

## II. Statement of Material Facts

Arrington hereby responds to the statement of facts contained in TMBR/Sharp's Statement of Undisputed Material Facts as follows:

A. THE LEASES

1. Arrington admits the truth of TMBR/Sharp's fact number 1[1].

2. Arrington admits the truth of TMBR/Sharp's fact number 2.

3. Arrington admits the truth of TMBR/Sharp's fact number 3.

4. Arrington admits that the Court has ruled with respect to the Original Stokes Leases, however, Arrington asserts that the fact contained in paragraph number 4 is not a material fact with respect to TMBR/Sharp's motion for summary judgment. TMBR/Sharp's fact number 4 references the Court's December 27, 2001, ruling. The Court's December 27, 2001, Order Granting Partial Summary Judgment Regarding Filing of Unit Designations (the "Order") is an interlocutory order and as such is subject to be overturned, modified or changed at any time prior to the issuance of

[1] Arrington adopts the defined terms contained in the Motion.

a final order in this matter and is thereafter subject to appeal.[2] Although the Order establishes the law of the case, that law did not exist prior to the issuance of the Order, therefore the Order is not material to the actions of Arrington prior to the issuance of the order. The only actions of Arrington upon which TMBR/Sharp may base its instant motion are actions which occurred prior to the issuance of the Order and knowledge that the Court would so rule. Interlocutory orders may be revisited at any time prior to final judgment. Sims v. Sims, 1996-NMSC-078, 122 N.M. 681; Barker v. Barker, 94 N.M. 162, 165-166, 608 P.2d 138, 141-142 (1980); Universal Constructors, Inc. v. Fielder, 118 N.M. 657, 659, 884 P.2d 813, 815 (Ct. App. 1994).

B. THE TOP LEASES

5. Arrington admits the truth of TMBR/Sharp's fact number 5, and further states that the Stokes Top Lease was executed by Madeline Stokes on April 4, 2001. **See Exhibits E to Plaintiff's Motion for Partial Summary Judgment Against David H. Arrington Oil & Gas Regarding Tortious Interference and Brief in Support Thereof** (the "Motion").

6. Arrington denies the allegations in paragraph number 6 and asserts that such fact, even if it were true, is immaterial to the allegations of tortious

[2] Arrington has already placed the Court and the Plaintiff's on notice of its intention to appeal the Order.

interference in this matter. Paragraph number 15 of the Stokes Top Lease states:

> "Notwithstanding any other provisions of this oil and gas lease, the end of the primary term hereof shall be extended until the third (3rd) anniversary date of this oil and gas lease next following the expiration of the continuous development provision contained in added Paragraph No. 12 on Exhibit "A" attached to the Prior Lease, provided that in no event shall the primary term hereof expire later than the 20th anniversary date of this oil and gas lease." **See Exhibit "E" attached to the Motion.**

7. Arrington admits the truth of TMBR/Sharp's fact number 7, and further states that the Hamilton Top Lease was executed by Erma Hamilton on April 4, 2001. **See Exhibits "F" to the Motion.**

8. Arrington asserts that the Hamilton Top Lease is for the same primary term as the Stokes Top Lease as was hereinabove recited in paragraph number 6 of this response.

9. Arrington admits the truth of TMBR/Sharp's fact number 9

10. Arrington asserts that the fact contained in paragraph number 10 is not a material fact. Fact number 10 is based upon an interlocutory order which is subject to be overturned, modified or changed at any time prior to the issuance of a final order in this matter and is thereafter subject to appeal. Although the Order establishes the law of the case, that law did not exist prior to the issuance of the Order, therefore the Order is not material to the actions of Arrington prior to the issuance of the order. The actions of Arrington upon which TMBR/Sharp must base the instant motion are

actions which occurred prior to the issuance of the Order and knowledge that the Court would so rule.

C. ASSIGNMENT OF HUFF TOP LEASES

11. Arrington admits the truth of TMBR/Sharp's fact number 11 and further states that the Assignment from Huff to Arrington recites that the assignment is "EFFECTIVE for all purposes as of March 27, 2001."

D. THE PERMITS

12. Arrington denies the allegations contained in paragraph number 12. Arrington asserts that on *July 17, 2001,* Arrington filed its application for permit to drill the Triple Hackle Dragon "25" No. 1 Well in the W/2 of Section 25, Township 16 South, Range 35 East, Lea County, New Mexico and that the OCD approved the application on *July 19, 2001.* **See paragraph (5) of Exhibit "H" to the Motion.**

13. Arrington denies the allegations contained in paragraph number 13. Arrington asserts that on *July 25, 2001,* Arrington filed it application for permit to drill the Blue Drake "23" No. 1 Well in the E/2 of Section 23, Township 16 South, Range 35 East, Lea County, New Mexico and that the OCD approved the application on *July 30, 2001.* **See paragraph (6) of Exhibit "H" to the Motion.**

14. Arrington denies the allegations contained in paragraph number 14. Arrington asserts that on August 8, 2001, the OCD denied TMBR/Sharp's application for a permit to drill the Blue Fin "25" No. 1 Well in the *N/2* of

Section 25, Township 16 South, Range 35 East, Lea County, New Mexico, rather than the E/2 as alleged. Arrington further admits that the OCD denied the application by reason of the previous issuance of the permit for Arrington's Triple Hackle Dragon "25" Well No. 1. **See paragraph (8) of Exhibit "H" to the Motion.**

15. Arrington admits the truth of TMBR/Sharp's fact number 15.

16. Arrington denies that the Original Stokes Leases are in full force and effect. The statement that the Original Stokes Leases are in full force and effect is based on an interlocutory order which is subject to be overturned, modified or changed at any time prior to the issuance of a final order in this matter and is thereafter subject to appeal. Although the Order establishes the law of the case, that law did not exist prior to the issuance of the Order, therefore the Order is not material to the actions of Arrington prior to the issuance of the order. The actions of Arrington, upon which TMBR/Sharp must base the instant motion, are actions which occurred prior to the issuance of the Order and knowledge that the Court would so rule. Further Arrington asserts that although the Original Stokes Leases contain a continuous development clause such a fact is immaterial to the issue of tortious interference as alleged in this case. On December 27, 2001, the Court issued an Order Granting Partial Summary Judgment Regarding Force Majeure (the "Force Majeure Order"). The Force Majeure Order effectively prevents the termination of

the Original Stokes Leases for any failure to timely commence a well pursuant to the continuous development clause. Further each of the Original Stokes Leases cover additional acreage upon which no conflicting APD existed and upon which TMBR/Sharp could have fulfilled its continuous drilling obligations.

17. Arrington denies the truth of TMBR/Sharp's fact number 17. With respect to the facts alleged in paragraph 17, Arrington asserts that TMBR/Sharp is attempting to mislead the Court into the wrongful belief that lease ownership automatically grants the lessee the "right" to drill a well and that Arrington "wrongfully" obtained drilling permits based on untrue representations of leasehold ownership. Contrary to TMBR/Sharp's suggestion, the rights granted under the Original Stokes Leases do not necessarily entitle TMBR/Sharp to drill and operate wells upon the leased lands. The Original Stokes Leases did not cover one hundred percent of the mineral or operating rights in the proration units in which TMBR/Sharp proposed to drill the Blue Fin "25 No. 1 Well and the Leavelle "23" No. 1 Well. Any one owning a mineral or operating right in the proration unit dedicated to the Blue Fin "25" No. 1 Well and the Leavelle "23" No. 1 Well has an equal right to drill and operate a well. One of the tasks assigned to the OCD is to determine who among those owning a mineral or operating right will be the operator and will drill and operate the well.

Pursuant to certain farmout agreements with Ocean Energy, Arrington has an undivided 15% of the operating rights in the proration unit designated for the Triple Hackle Dragon "25" No. 1 Well. The leases, with respect to the farmout agreements with Ocean Energy, are not at issue in this lawsuit.[3] Arrington's acquisition of these operating rights gave Arrington an independent right to seek a permit to drill a well and to be the operator of such well. At the time that Arrington sought and was granted the permits for the Triple Hackle Dragon "25" No. 1 Well and the Blue Drake "23" No. 1 Well, Arrington had a reasonable belief that it owned operating rights in the proration units to which the wells were dedicated. Arrington continues to believe that he owns operating rights in the proration units to which the wells were dedicated and that its actions in seeking the permits were not "wrongful" or "based on untrue representations of leasehold ownership. Arrington sought and was granted the permits at a time prior to the issuance of the Court's December 27, 2001, Order. The issuance of the Order is the only basis upon which TMBR/Sharp relies to assert that Arrington wrongfully obtained the drilling permit or that the issuance of the permits to Arrington were based upon untrue representations of leasehold interest. The issuance of the permits to Arrington was in July,

[3] Arrington also owns leases in the NE/4 of Section 25. Ownership of the leases in the NE/4 of Section 25 would allow Arrington to rightfully seek a permit to drill a well in either the E/2 or the N/2 of Section 25. The Blue Fin "25" No. 1 Well proposed by TMBR/Sharp was dedicated to the N/2 of Section 25. With respect to the Blue Fin "25" No. 1 Well, Arrington had an equal independent right to drill a well with TMBR/Sharp.

2001, five months before the Order became the law of the case. The Order is an interlocutory order which is subject to be overturned, changed or modified prior to the issuance of a final order and is subject to appeal after the issuance of the final order. **See Affidavit of Jeffrey G. Bane attached hereto as Exhibit "1".**

18. Arrington denies the allegations contained in paragraph number 18. Arrington's approved drilling applications have not prevented TMBR/Sharp from exercising its rights and fulfilling its obligations under the Original Stokes Leases and Arrington is not preventing TMBR/Sharp from drilling additional wells. The Original Stokes Leases covered the following:

Township 16 South, Range 35 East, N.M.P.M.

Section 13: SE/4
Section 23: SE/4
Section 24: NW/4 SW/4, NW/4 NE/4
Section 25: NW/4
Section 26: NE/4

TMBR/Sharp drilled the Blue Fin "24" No. 1 Well in the W/2 of Section 24, Township 16 South, Range 35 East. Arrington has approved drilling permits for the Triple Hackle Dragon "25" Well No. 1 to be located in the W/2 of Section 25, Township 16 South, Range 35 East and the Blue Drake "23" Well No. 1 to be located in the E/2 of Section 23, Township 16 South, Range 35 East. No other wells have been drilled on the leased premises and no other permits have been issued which cover the leased

premises. Therefore, TMBR/Sharp has always had the opportunity to seek and obtain drilling permits covering the remaining lands covered by the leases, specifically the Section 13 and Section 26 acreage. Furthermore, with respect to the two permits which Arrington was granted, TMBR/Sharp has always been free to commence a forced pooling action before the OCD and have themselves declared the operator under the permits which Arrington has been granted.[4] TMBR/Sharp is attempting to create the illusion that as the lessee of the Original Stokes Leases, TMBR/Sharp had an exclusive right to drill on the leasehold acreage or on lands pooled therewith. TMBR/Sharp is wrong. TMBR/Sharp's rights under the Original Stokes Lease are subject to the rights of all other undivided mineral owners, who have an equal right to drill a well and develop the minerals. Additionally, TMBR/Sharp's rights under the Original Stokes Leases are also subject to the authority granted to the OCD. Moreover, the Original Stokes Leases do not require that the lessee must be the entity to drill and operate a well upon the leased premises. The fact of the matter is that anyone, including Arrington, who

[4] The situation where two completing owners of operating rights want to drill and operate a well on the same lands is fairly common. In such situations one or both of the competing owners will petition the OCD for an order force pooling the other owners and the OCD is typically asked to make the determination as to which owner of operating rights should drill and operate the proposed well. NMSA 1978, Section 70-2-1 through 70-2-38, (2001) grants the OCD the jurisdiction and authority over all matters relating to the conservation of oil and gas, the prevention of waste of oil and gas, the protection of correlative rights, and the disposition of wastes resulting from oil and gas operations. The OCD is the proper authority to make a determination with respect to the forced pooling of the minerals and to determine which completing entity should drill and operate the well.

drilled a well on the leased premises would have satisfied the requirements of the Original Stokes Leases to obtain production. **See Exhibits "A" and "B" attached to the Motion. See also Exhibit "1", hereto.**

19. Arrington admits the truth of TMBR/Sharp's fact number 19.

20. Arrington admits the truth of TMBR/Sharp's fact number 20.

21. Arrington admits that the OCD found that Arrington had "demonstrated at least a colorable claim of title" and, therefore, Arrington's permits remained valid and that the OCD refused to issue conflicting permits to TMBR/Sharp. Arrington further admits that the OCD did not make a determination as to the continued validity of the Original Stokes Leases. **See Exhibit "H" to the Motion.**

22. Arrington admits that the order issued by the OCD stating that Arrington "has demonstrated at least a colorable claim of title" was issued prior to the Court's issuance of its Order. Arrington further admits that the Court's Order, in effect, declared that the Original Stokes Leases were in full force and effect. However, Arrington denies that the Order makes a determination as to Arrington's present possessory interest in the Huff Top Leases. The Order does not diminish Arrington's rights under the Huff Top Leases. Further, Arrington asserts that the Order addressed only the continuing nature of the Original Stokes Leases and did not

address a possessory interest in *acreage*. **See Exhibit "H" to the Motion.**

23. Arrington denies the facts asserted in paragraph 23. From the date of the Huff Top Leases, Arrington has had an equitable right in such leases. Huff, acting as agent for Arrington, negotiated and contracted for the Huff Top Leases and Arrington paid for the leases. **See Affidavit of Jeffrey G. Bane attached hereto as Exhibit "1".**

E. DAMAGES

24. Arrington denies the facts asserted in paragraph 24. Arrington asserts that at the time it obtained the two permits to drill, Arrington had a reasonable belief that the Original Stokes Leases had expired and that Arrington could demonstrate a claim of colorable title to the Huff Top Leases, and which was so held by the OCD. Arrington further asserts that it has not failed or refused to release those permits and has not obstructed TMBR/Sharp's entitlement to the drilling permits it has requested. Arrington has offered to release the permit to drill the Blue Drake Well No. 1 located in the E/2 Section 23, Township 16 South, Range 35 East. Arrington has not offered to release the permit to drill the Triple Hackle Dragon "25" Well No. 1, because Arrington's ownership of operating rights, which are not at issue herein, give Arrington an equal right to drill and operate the well. Further TMBR/Sharp could have sought

operatorship of any well drilled through a forced pooling action, which TMBR/Sharp apparently declined to do. **See Affidavit of Jeffrey G. Bane attached hereto as Exhibit "1".**

25. Arrington denies the facts alleged in paragraph number 25. Arrington asserts that TMBR/Sharp has not been prevented from drilling on the other acreage covered by the Original Stokes Leases. If TMBR/Sharp truly believed the Original Stokes Leases were in full force and effect, it could have met its obligations by drilling wells in Section 13 and Section 26 or lands pooled therewith. Arrington has not prevented TMBR/Sharp from drilling wells in Section 13 and Section 26. Furthermore, as stated in paragraph 24 above, Arrington has agreed to release the permit for the Blue Drake "23" No. 1 Well. TMBR/Sharp has always been free to met its obligations under the Original Stokes Leases. **See Affidavit of Jeffrey G. Bane attached hereto as Exhibit "1".**

26. Arrington admits the truth of paragraph number 26, but asserts that it is irrelevant and immaterial to the claim of tortious interference.

27. Arrington admits the truth of paragraph 17, but asserts that it is irrelevant and immaterial to the claim of tortious interference. Moreover, Arrington asserts that attorneys fees incurred in a tortious interference action are not recoverable as special damages in the same tortious interference action.

28. Arrington denies the facts contained in paragraph 28. Arrington asserts that TMBR/Sharp was not "forced" to file an application with the OCD to prevent Arrington from drilling on the acreage subject to the Original Stokes Leases. Arrington affirmatively asserts that had TMBR/Sharp really been serious about drilling an additional well it would have filed a forced pooling application with the OCD and sought operatorship of the well. The effect on the Original Stokes Leases is the same regardless of who drills a well on the leased premises or lands pooled therewith. Additionally, TMBR/Sharp could have satisfied its obligations under the Original Stokes Leases by drilling wells in Section 13 and Section 26. Arrington further asserts that although the Order may presently reinstate the Original Stokes Leases, the Order is an interlocutory order which is subject to be overturned, changed or modified by a final order and is thereafter subject to appeal. **See Affidavit of Jeffrey G. Bane attached hereto as Exhibit "1".**

29. Arrington denies the truth of the allegations contained in paragraph 29. Arrington asserts that from the date of the Huff Top Leases, Arrington had an equitable right in the Huff Top Leases. At the time Huff negotiated and contracted for the Huff Top Leases, Huff was acting as agent for Arrington and the Huff Top Leases were paid for by Arrington. **See Affidavit of Jeff Bane attached hereto as Exhibit "1".**

30. Arrington does not deny that TMBR/Sharp has incurred attorney's fees in the prosecution of this litigation, however Arrington denies that such attorney's fees incurred in a tortious interference action are recoverable as special damages in the same tortious interference action. In New Mexico, absent statutory authority or rule of court, attorneys fees are not recoverable as an item of damages. Aboud v. Adams, 84 N. M. 683, 507 P.2d 430 (1973). Special damages must be pleaded as well as proved. Garver v. Public Service Company of New Mexico, 77 N. M. 262, 421 P.2d 788 (1966).

31. Arrington denies that TMBR/Sharp has been damaged as the result of Arrington having obtained the two permits to drill. TMBR/Sharp could have drilled other wells which would have included lands covered by the Original Stokes Leases and TMBR/Sharp could have petitioned the OCD for a forced pooling order granting TMBR/Sharp the right to drill and operate the wells under permit to Arrington. TMBR/Sharp did nothing to mitigate any potential damages it might have suffered. Moreover, Arrington denies that TMBR/Sharp incurred damages of $500,000 as the result of lost production, the time value of money, and decreased prices on the oil and gas that could have been produced if Arrington had not obtained the two permits. TMBR/Sharp has not alleged a single fact to support a damage award of $500,000. The damages contemplated in TMBR/Sharp's damage calculation requires economic, engineering and

geological facts which have not been alleged and even if alleged would not be undisputed. TMBR/Sharp's calculation of damages is highly speculative, not supportable and must be proved at trial.

## III. ARGUMENTS AND AUTHORITIES

Summary Judgment will be granted only when the moving party is entitled to a judgment as a matter of law upon clear and undisputed facts. The purpose of a hearing on the motion for such a judgment is not to resolve factual issues but to determine whether there is any genuine issue of material fact in dispute and if not, to render judgment in accordance with the law applied to the established facts or, if there be a genuine factual issue, to deny the motion for summary judgment. Great W Construction Company v. N.C. Ribble Co., 77 NM 725, 427 P2d 246 (1967). In the case of Tapia v. Springer Transfer Co., 106 NM 461, 744 P2d 1264 (Ct. App. 1987), the Court of Appeals held concerning a motion for summary judgment, "Summary Judgment is proper when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. Matkins v. Zero Refrigerated Lines, Inc., 92 NM 511, 602 P2d 195 (Ct. App. 1979)." The Motion as presented by TMBR/Sharp contains numerous disputed material facts which must be resolved and the motion should therefore be denied.

The Restatement of Torts 2d, §766A defines the act of "Intentional Interference with Another's Performance of His Own Contract," as follows:

> "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry)

> between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him." [Emphasis added.]

TMBR/Sharp has not met its burden of proof with respect to establishing that Arrington intentionally and improperly interfered with the performance of its contract. To prevail TMBR/Sharp must prove not only that Arrington's actions were done intentionally but also that Arrington's actions were improper. Arrington's actions were neither intentional nor improper.

Intent is a question of fact and summary judgment must be denied if there are disputed issues of fact. In this case, TMBR/Sharp alleges that Arrington's actions in seeking the permits to drill wells were done with the intention to prevent TMBR/Sharp from fulfilling its contractual obligations under the Original Stokes Lease. Arrington denies that it acted with such intention and asserts that its actions with respect to seeking the permits to drill were done in performance of the terms of the Huff Top Leases and based upon Arrington's reasonable belief that the Original Stokes Leases had expired by their own terms. Given Arrington's reasonable belief that the Original Stokes Leases had expired by their own terms and that Arrington was operating under the terms of the Huff Top Leases, TMBR/Sharp has not meet its burden of proof with respect to establishing that Arrington's actions were taken with the intent to harm TMBR/Sharp.

TMBR/Sharp has crafted its Motion from the point of view that Arrington's belief that the Original Stokes Leases had expired by their own terms was not reasonable

because the Order which the Court issued on December 27, 2001, found that the Original Stokes Leases were still valid. TMBR/Sharp's reliance on the Order is misplaced. The Order became the law of the case upon its issuance on December 27, 2001. Until the issuance of the Order Arrington was entitled to its reasonable belief that the Original Stokes Leases had expired by their own terms. The Court's December 27, 2001, Order is the only ruling in New Mexico as to the question at issue and the only case on point found, with respect to the filing of a unit designation, is Sauder v. Frye, 613 S.W.2d 63 (Ct. App. Ft. Worth 1981). In the Sauder case, given similar facts, the Fort Worth, Texas Court of Appeals held that the lease terminated by its own terms. Therefore, Arrington was justified in its belief that the Original Stokes Leases had expired. Furthermore, it was not improper for Arrington to seek permits to drill wells on leasehold acreage which it either owned or reasonably believed it owned the requisite operating rights. TMBR/Sharp has not met its burden of proof with respect to establishing that Arrington's actions were improper. At the very least there is a question of fact as to that issue.

TMBR/Sharp cites Ettenson v. Burke, 2001-NMCA-003, 130 N. M. 67, 17 P.3d 440, as a statement of the elements necessary to establish tortious interference with a contract. Arrington agrees that the elements set forth in Ettenson are what TMBR/Sharp must prove. The Ettenson court said:

> "Establishing tortious interference with contract is not easy. Ettenson had to prove that (1) Burke had "knowledge of the contract" between Ettenson and the corporation, (2) performance of the contract was refused, (3) Burke "played an active and substantial part in causing [Ettenson] to lose

> the benefits of his contract," (4) damages flowed from the breached contract, and (5) Burke induced the breach "without justification or privilege to do so." **Wolf v. Perry**, 65 N.M. 457, 461-62, 339 P.2d 679, 681-82 (1959). Not every interference leading to a breach of contract amounts to an unlawful act or a civil action; tort liability attaches only when the interference is without "justification or privilege." **Williams v. Ashcraft,** 72 N.M. 120, 121, 381 P.2d 55, 56, (1963). In causing one to lose the benefits of a contract, the tort-feaor must act either with an improper motive or by use of improper means." *[Emphasis added.]*

TMBR/Sharp has failed to establish the elements of tortious interference required under Ettenson. TMBR/Sharp alleges that the first element of tortious interference is met because Arrington had knowledge of the existence of the Original Stokes Leases. Such is true, Arrington knew of Original Stokes Leases and had a reasonable belief that they had expired by there own terms.

TMBR/Sharp alleges that the second element of tortious interference is met because Hamilton and Stokes issued a top lease to Arrington and Arrington obtained drilling permits that thwarted TMBR/Sharp's ability to obtain permits. TMBR/Sharp's position is unsupportable. The fact that Stokes and Hamilton issued top leases to Arrington which were made specifically subject to the Original Stokes Leases does not improperly interfere with the Original Stokes Lease. Furthermore, the second element in Ettenson requires that performance of the contract be refused. TMBR/Sharp's allegation that Arrington "thwarted" its ability to obtain drilling permits does not rise to the level of refusing to perform under the contract. Arrington did nothing which caused Stokes and Hamilton to refuse performance of the contract. In fact it was TMBR/Sharp who refused to perform. TMBR/Sharp had the ability to seek drilling permits on

leasehold acreage other than that which Arrington had under permit and TMBR/Sharp failed to do so. Also, TMBR/Sharp had the ability to seek and be granted operatorship of the Arrington permits pursuant to a force pooling order from the OCD but TMBR/Sharp refused to even attempt to obtain such an order.

TMBR/Sharp was not even "thwarted" from fulfilling its obligations under the Original Stokes Leases because Arrington obtained the two drilling permits. TMBR/Sharp could have fulfilled its obligations under the Original Stokes Leases by drilling wells on other of the leased premises or lands pooled therewith or TMBR/Sharp could have petitioned the OCD for a forced pooling order with respect to Arrington's permits to drill and been granted the right to operate those wells. TMBR/Sharp did neither.

The Original Stokes Leases did not give TMBR/Sharp an exclusive right to drill and operate a well on acreage covered by the Original Stokes Leases. The right to drill and operate a well is owned equally by all of the mineral owners or lessees in the proration unit. Therefore, any of the mineral owners or lessees may apply to the OCD to drill and operate a well. The terms of the Original Stokes Leases would be perpetuated regardless of which mineral owner or lessee drilled and operated the well. If the Original Stokes Leases were valid and Arrington drilled the wells which were permitted, the actions of Arrington would have perpetuated the leases. Furthermore, had TMBR/Sharp drilled a well on Section 13 or 26, the Original Stokes Leases would have been perpetuated.

TMBR/Sharp can not establish the third element of tortious interference by stating that Arrington played and active and substantial part in causing TMBR/Sharp to lose the benefits of its contract. As more fully discussed in the preceding paragraph, TMBR/Sharp has failed to establish that it lost the benefits of its contract with respect to the Original Stokes Leases solely by actions of Arrington. If TMBR/Sharp lost anything it was because of its own failure to act.

With respect to the forth element of tortious interference, TMBR/Sharp argues that damages flowed from the breach of contract as a result of Arrington's actions. As support for such damages TMBR/Sharp alleges that it suffered damages including; (1) loss of production; (2) time value of money; (3) decrease in prices that it would have received for any production if wells could have been drilled; (4) attorneys' fees; and (5) costs. If TMBR/Sharp lost money as a result of loss of production, Arrington is not responsible. TMBR/Sharp had the opportunity to drill wells on other of the leased lands or lands pooled therewith. TMBR/Sharp also had the option of force pooling the wells which Arrington had permitted and seeking operatorship of such wells. Furthermore, the damages as recited in the Affidavit of Jerry Phillips (see Exhibit "C" to the Motion) are based upon engineering, geologic and economic estimates which have not and can not be proven to a reasonable degree of certainty. No one can be certain that a well, which has not yet been drilled, once drilled will be capable of production.

The Restatement of Torts 2d, §774A requires that damages resulting from a tort be proven with a "reasonable degree of certainty." The Restatement of Torts 2d, § 912 states:

> "One to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit." *[Emphasis added.]*

In order to prove its damages with respect to the production which it argues was lost, TMBR/Sharp must provide the engineering, geologic and economic facts sufficient to form the basis of its statement that it suffered damages in excess of $500,000. TMBR/Sharp has failed to allege any such facts. Because an issue of fact to be determined exists, summary judgment is improper.

TMBR/Sharp also alleges that incurring attorneys' fees as a result of the tortious interference satisfies the damage element of a tortious interference claim. TMBR/Sharp is wrong. In New Mexico, absent statutory authority or rule of court, attorneys fees incurred in the same action are not recoverable as an item of damages. Aboud v. Adams, supra.; Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979) There is no statutory authority allowing attorneys fees as an item recoverable as damages in this case and TMBR/Sharp has cited none. Additionally, special damages must be pleaded as well as proven. Garver v. Public Service Company of New Mexico, supra.; Jemez Properties, Inc. v. Lucero, supra. TMBR/Sharp has neither plead nor proven a claim for special damages.

As support for its notion that attorneys fees are recoverable as damages and that incurring attorneys fees satisfies the damage element of a tortious interference with a contract claim, TMBR/Sharp cites Dinkle v. Denton, 68 N.M. 108, 359 p.2d 345

(S. Ct. 1961) and LaMure v. Peters, 122 N.M. 367, 924 P.2d 1379 (Ct. App. 1996). Although these cases do provide that attorneys fees were recoverable, the attorneys fees which were being referred to were attorneys fees incurred in defending other independent actions and not the attorneys fees incurred in bringing the immediate suit. The attorneys fees which TMBR/Sharp has referenced appear to be the attorneys fees for bringing the instant action and as such are not the type of attorneys fees contemplated in Dinkle v. Denton, supra and LaMure v. Peters, supra.

With respect to the last element which must be satisfied to establish a claim for tortious interference, it is significant that TMBR/Sharp failed to even mention the fifth element. As discussed in Ettenson v. Burke, supra., the fifth element is critical. Not every interference leading to a breach of contract amounts to an unlawful act or one without justification or privilege; tort liability attaches only when the interference is without "justification or privilege." It is undeniable that Arrington was justified in his belief that the Original Stokes Leases had expired by their own terms and that the Huff Top Leases were in effect. The fact that it is undeniable is supported by the fact that TMBR/Sharp ultimately filed its designation of pooled unit in the Lea County records. If TMBR/Sharp were convinced that its filing of the Form C-102 in the Lea County OCD office was sufficient there would have been no need for it to also make a filing in the Lea County records. Additionally, there was no New Mexico law for either Arrington or TMBR/Sharp to rely upon and the only case on point was the Texas case which held that the prior lease had expired due to the failure of the lessee to properly record a unit designation prior to the expiration of the primary term of the lease. Therefore, up until

the Court entered its December 27, 2001, Order, Arrington has as much right to believe that the Original Stokes Leases had expired as TMBR/Sharp had to believe that they had not.

## IV. CONCLUSION

WHEREFORE, Arrington prays the Court for an Order denying TMBR/Sharp's Motion for Partial Summary Judgment Against David H. Arrington Oil & Gas Regarding Tortious Interference.

LOSEE, CARSON, HAAS & CARROLL, P.A.

By: _____
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Attorneys for Defendants, David H. Arrington Oil & Gas, Inc.

## CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing pleading to be mailed on this 11 day of February, 2002 to the following:

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Midland, TX 79701

Ernest L. Carroll

**FIFTH JUDICIAL DISTRICT COURT**
**COUNTY OF LEA**
**STATE OF NEW MEXICO**

| | | |
|---|---|---|
| **TMBR/SHARP DRILLING, INC., et al.** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **vs.** | ) | **No. CV-2001-315C** |
| | ) | |
| **DAVID H. ARRINGTON OIL & GAS, INC., JAMES D. HUFF, MADELINE STOKES, ERMA STOKES HAMILTON, JOHN DAVID STOKES, and TOM STOKES** | ) | |
| | ) | |
| **Defendants.** | ) | |

AFFIDAVIT OF JEFFREY G. BANE

STATE OF NEW MEXICO )
: ss.
COUNTY OF LEA )

EXHIBIT
number 1

I, JEFFREY G. BANE, being duly sworn, state:

1. I am a resident of Midland, Texas.

2. I employed with David H. Arrington Oil & Gas, Inc. ("Arrington") as a General Manager, in charge of land management as well as other supervisory duties.

3. The facts set forth herein are personally known to be to be true, and if called as a witness, I could competently testify thereto under oath.

4. James Huff regularly negotiates and contracts for oil and gas leases in the capacity of agent for Arrington.

5. The Stokes and Hamilton top leases were leases which James Huff negotiated and contracted for in his capacity as agent for Arrington.

6. The Stokes and Hamilton top leases were paid for by Arrington.

7. At the time that Arrington obtained the permits to drill the Triple Hackle Dragon "25" Well No. 1 and the Blue Drake "23" Well No. 1, Arrington had a reasonable belief that the

Original Stokes Leases had expired by their own term and that Arrington had the right to seek such permits pursuant to the terms of the Huff Top Leases.

8. Since the issuance of the Court's December 27, 2001, Order, Arrington has offered to release to TMBR/Sharp, the permit to drill the Blue Drake "23" Well No. 1.

9. Arrington has not agreed to release the permit to drill the Triple Hackle Dragon "25" Well No.1 because Arrington owns 15% of the operating rights in the proration unit dedicated to the Triple Hackle Dragon "25" Well No. 1 which are not in dispute in this matter.

10. Arrington acquired 15% operating rights in the proration unit dedicated to the Triple Hackle Dragon "25" Well No. 1 pursuant to a farmout agreement with Ocean Energy.

11. In a situation where Arrington and a competing mineral or operating right owner each want to drill a well on the same proration unit. Arrington would seek operatorship of such well through a forced pooling action before the OCD. Such an option was available to TMBR/Sharp in the instant case.

12. Arrington was aware that TMBR/Sharp could have filed a force pooling petition for the proration units in both sections 25 and 23, township 16 south, range 35 east, Lea County, New Mexico, and that by virtue of such petition become the operator for such wells.

13. Before drilling a well in either Section 23 or 25, Arrington would have filed a force pooling action itself for its proposed proration units in order to prevent non-joining mineral owners from being carried cost and risk free through the drilling and testing of the well. By filing a forced pooling application all mineral owners have to join in drilling the well or pay a penalty for not joining in the drilling of a well to cover the consenting parties risk incurred in the drilling of the well.

14. It is not prudent for an operator to drill deep oil and gas wells such as involved in this case without voluntary joinder or by force pooling all mineral owners.

FURTHER, Affiant sayeth naught.

Jeffrey G. Bane

SUBSCRIBED AND SWORN TO before me this 9th day of February, 2002.

My commission expires:

December 14, 2002

Notary Public