UNITED STATES DISTRICT COURT * WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CLB PROPERTIES, INC. **DOCKET NO. 3:16-cv-1271**

versus **JUDGE:_____**

MRD OPERATING LLC and HUNTER TEMPLE **MAGISTRATE:_____**

MEMORANDUM IN SUPPORT OF MRD's 12(b)(6) MOTION TO DISMISS

MRD Operating LLC ("MRD") respectfully moves to dismiss all claims asserted against it by CLB Properties, Inc. ("CLB") because – even after going back to the drawing board and filing its third petition in less than three months – its claims are still futile.

Accordingly, MRD respectfully prays that its 12(b)(6) motion be granted, and that the CLB's case be dismissed, with prejudice.

Respectfully submitted,

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INTRODUCTION

I. *CLB #1*

On May 27, 2016, CLB first sued MRD in state court seeking allegedly unpaid royalties, penalties, attorney fees, and interest, in addition to dissolution of the subject mineral lease ("*CLB #1*").[1] CLB made these claims on behalf of itself as well as a purported "class" of other royalty owners in Lincoln Parish (although not a single other royalty owner was ever even mentioned).

On June 24, 2016, MRD paid CLB for all allegedly outstanding royalties and then removed *CLB#1* to this Honorable Court.[2] Simultaneous with the removal, MRD also filed a motion to dismiss[3] because:

(1) no demand for royalties had been made (much less alleged) and CLB therefore had no claim under the Mineral Code (*e.g.* LSA-R.S. 31:137) or the mineral lease between CLB and MRD ("Lease");

(2) claims for royalties are governed by the Mineral Code – not the Louisiana Unfair Trade Practices Act ("LUTPA"); and

(3) CLB's claims were not even actionable on a "class" basis.

After reviewing MRD's motion to dismiss and receiving payment for all allegedly outstanding royalties, CLB voluntarily dismissed *CLB#1* the following Monday, June 27, 2016.[4]

II. *CLB #2*

On August 8, 2016, CLB resurfaced with yet another lawsuit ("*CLB #2*")[5]. The claims against MRD remain substantively identical as those urged in *CLB #1* which – even CLB now admits – failed to state a claim for relief.[6] This peculiarity is compounded further considering

[1] Exhibits 3 and 3(A) – *CLB Properties, Inc. v. MRD Operating LLC*; Case 3:16-cv-00901; W.D. La., Monroe Division. ("*CLB #1*")
[2] Exhibit 3(B) – Notice of Removal in *CLB #1*.
[3] Exhibit 3(C) – Motion to Dismiss in *CLB #1*.
[4] Exhibit 3(D) – Voluntary Dismissal in *CLB #1*.
[5] Exhibit 4 – Petition in *CLB Properties, Inc. v. MRD Operating LLC and Hunter Temple*; #C-58414; Lincoln Parish, La. ("*CLB #2*")
[6] Exhibit 3(D) – Voluntary Dismissal in *CLB #1*; Exhibit 4 – Petition in *CLB #2*; par. 17.

CLB now judicially confesses that MRD has paid all royalties allegedly owed, and that such payment was made ***before*** *CLB #1* was dismissed and, likewise, ***before*** *CLB #2* was filed.[7]

Importantly, CLB has not alleged (and cannot allege) any event or activity which occurred from the time it dismissed *CLB #1* and filed *CLB #2*. Nevertheless, CLB still claims it is entitled to extraordinary relief from MRD, including double royalties, treble damages, dissolution of the mineral leases, attorney's fees, court costs, and interest.[8]

In other words, CLB is now relying on the ***same exact facts*** which – by CLB's own admission – failed to state a claim for relief in *CLB #1*. In fact, while *CLB #1* claimed there were royalties allegedly due and owing, *CLB #2* admits all such royalties have now been paid.[9] Accordingly, it is with even greater justification, *a fortiori*, that *CLB #2* fails to state a claim for relief.

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[7] Exhibit 4 – Petition in *CLB #2*; par. 20.
[8] Exhibit 4 – Petition in *CLB #2*; p. 6.
[9] Exhibit 4 – Petition in *CLB #2*; par. 20.

MATERIAL MISREPRESENTATIONS

I. The "31 Days" Misrepresentation

CLB now claims:

> On May 25, 2016, CLB…made written demand via e-mail for the outstanding royalty payments to MRD…[10]
>
> * * *
>
> On June 24, 2016, CLB's bank account was finally credited with the outstanding royalty payments, ***thirty-one (31) days*** after the first written notice was sent to MRD…CLB was not paid the outstanding royalties within thirty (30) days of written demand, entitling it to damages, interest on the late paid royalties from the date due and reasonable attorney fees.[11]

CLB's arithmetic is incorrect. The gap between the alleged first demand (5/25) and payment (6/24) is within ***thirty (30) days***.

At best, this is a mathematical misstep. At worst, it is a deliberate attempt to create a remedy where there is none. Either way, it is a material misrepresentation.[12]

For instance, LSA-R.S. 31:138 provides:

> The lessee shall have ***thirty days after receipt*** of the required notice within which to pay the royalties due or to respond by stating in writing a reasonable cause for nonpayment. [13]

Failure to comply with this framework can subject a lessee to significant repercussions, including dissolution, penalties, attorney fees, and interest – the ***exact*** relief prayed for by CLB.

To the extent it concerns the Court, the circumstances strongly suggest that the "31 days" misrepresentation was deliberate. First and foremost, if accepted as true, the passing of "31 days" between demand and payment would theoretically open the door to extraordinary remedies which are otherwise unavailable to CLB (*e.g.* dissolution, penalties, attorney fees, interest, etc.).

[10] Exhibit 4 – Petition in *CLB #2*; par. 13. (Emphasis added).
[11] Exhibit 4 – Petition in *CLB #2*; par. 20,21. (Emphasis added).
[12] For brevity, MRD will not address the voluminous defects associated with CLB's purported "written demands." However, MRD will emphasize that there is no case allowing for the requisite demand to be sent via "email."
[13] Emphasis added.

Second, MRD's prior motion to dismiss was centered around CLB's failure to comply with even the most basic notice-and-cure provisions of the Mineral Code, making specific, pin-point citations to LSA-R.S. 31:138 and interpretive jurisprudence.[14] ***After*** reviewing this motion, *CLB #1* was voluntarily dismissed. Accordingly, any feigned ignorance of article 138 is dubious.

Finally, over the past month since dismissing *CLB #1*, CLB and its team of counsel have brainstormed how to obtain leverage against MRD. And what better leverage is there than the threat of dissolution and penalties?

II. The Lease Misrepresentation

Just as it did in *CLB #1*, CLB once again conveniently omits the notice-and-cure provisions provided for in the Lease because the truth is simply incongruent with its desires.

> In the event Lessor [CLB] considers that operations are not being conducted in compliance with this contract, Lessee [MRD] shall have ***sixty (60) days*** after receipt of such notice to comply with the obligations imposed by virtue of this instrument.[15]
>
> * * *
>
> In the event Lessor considers that Lessee has not complied with all its obligations hereunder, both express and implied, Lessor shall notify Lessee in writing, setting out specifically in what respects Lessee has breached this contract. Lessee shall then have ***sixty (60) days*** after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor.[16]

Much like the "31 days" misrepresentation, the evidence strongly suggests CLB's omission of the Lease's sixty (60) day notice-and-cure period was intentional. After all, this exact issue was pointed-out by MRD to CLB before *CLB #1* was dismissed. Not to mention, the Lease was executed by CLB's sole member – a licensed attorney pushing these lawsuits. Accordingly, CLB clearly knew about the Lease's notice-and-cure language prior to dismissing *CLB #1* and – even worse – prior to filing *CLB #2*.

[14] Exhibit 3(C) – Motion to Dismiss in *CLB #1*; pp. 4,5.
[15] Exhibit 1 – Lease; par. 12. (Emphasis added).
[16] Exhibit 1 – Lease; par. 35. (Emphasis added).

III. The Water Contract Misrepresentation

Most disturbing of all, CLB now – for the very first time – claims that it lost an agreement whereby it would have been able to sell water to MRD ("Water Contract") due to some unspecified "bad" conduct, as follows:

> Because of attempts by CLB and Bowman on its behalf to obtain the royalty payments to which CLB was rightfully and legally entitled, ***Defendants did not give CLB the water contract*** which it had been promised, resulting in substantial losses to CLB. This coercive and unfair conduct of the Defendants violates the Louisiana Unfair Trade Practices Act.[17]

Despite filing multiple petitions in *CLB #1* addressing the same exact common nucleus of operative facts, CLB ***never even mentioned*** the Water Contract which it now complains about in *CLB #2*, which begs the question: why did CLB fail to even mention the Water Contract in *CLB #1*?

The answer is simple (albeit practically unbelievable): **CLB has the Water Contract.**[18]

That is correct – CLB's newest claim is belied by a simple document which proves the ***existence*** of the very agreement which CLB claims to be ***nonexistent***. Even worse, Chris Bowman – the same gentleman who rushed to the courthouse to file suit on behalf of his company and a phantom "class" which has yet to be identified – was CLB's signatory to the Water Contract, which was executed only ***days*** before *CLB #1* was filed.[19]

At this juncture, the Court may consider this question: is it even remotely plausible that CLB "forgot" about executing the Water Contract? Or, on the other hand, is it more likely that CLB is attempting to manufacture a claim where it has none under the law?

Regardless of CLB's motive, there is clearly no possible claim for relief related to any alleged non-delivery of the Water Contract because CLB does, in fact, have the Water Contract.

[17] Exhibit 4 – "Petition" in *CLB #2*; par. 23, 24. (Emphasis added).
[18] Exhibit 2 – Water Contract.
[19] The Water Contract was signed by Chris Bowman on 5/17/16 and *CLB #1*was filed days later on 5/27/16.

IV. Recap of CLB's Material Misrepresentations

Without using ***any*** adjectives, adverbs, or hyperbole, MRD offers the following summary of CLB's material misrepresentations:

The "31" Days Misrepresentation→ MRD filed a previous motion to dismiss in *CLB #1* which cited the thirty (30) day notice-and-cure provision of LSA-R.S. 31:138 and jurisprudence thereunder. MRD's prior motion to dismiss also explained what remedies were/were not available depending on compliance with this notice-and-cure period. After reviewing MRD's prior motion to dismiss, CLB dismissed *CLB #1*. No other action was taken until *CLB #2* was filed. In *CLB #2*, CLB alleges that thirty-one (31) days passed between demand and payment. However, the dates alleged in *CLB #2* between demand (5/25) and payment (6/24) only amount to thirty (30) days. CLB also prays for relief which is only available if payment is not made within thirty (30) days or fraud is proven. CLB does not allege fraud and payment was made within thirty (30) days of demand.

The Lease Misrepresentation→ In *CLB #1*, MRD pointed-out the sixty (60) day notice-and-cure period of the Lease. After being so notified, CLB dismissed *CLB #1*. CLB has since filed *CLB #2* which refers to the Lease on multiple occasions. However, CLB does not mention the sixty (60) day notice-and-cure period contained in the Lease anywhere in *CLB #2*.

The Water Contract Misrepresentation→ CLB filed two (2) different petitions in *CLB #1*, and neither mentioned the Water Contract. In its prior pleadings, MRD pointed-out that TEMPLE had been joined to destroy diversity jurisdiction and therefore removed *CLB #1* to this Court. CLB did not object to the removal. Instead, CLB dismissed *CLB #1* three (3) days after being removed to this Court. In *CLB #2*, CLB now mentions the Water Contract for the first time. CLB alleges it did not receive the Water Contract because of the "unfair" conduct of the Defendants. However, CLB actually does have the Water Contract. In fact, CLB's sole member signed the Water Contract days before the first petition in *CLB #1* was filed.

Is it reasonable to believe, or fair to the civil justice system, to even entertain the notion that a company wholly owned by a lawyer with extensive legal experience would make the misrepresentations above inadvertently?

Suing people is not a sport or recreational activity.[20] Fortunately for MRD, Rule 12(b)(6) is available to disinfect precisely the type of vexation presented by CLB.

[20] "***Litigation is not a game – rather, it is a search for the truth and an effort to obtain justice***." (Emphasis added) *See, Sins v. ANR*, 77 F.3d 846, 849 (5th Cir. 1996); *Hall v. Freese*, 735 F.2d 956, 961-62 (5th Cir. 1984); *Blintliff v. U.S.*, 462 F.2d 403, 407 (5th Cir. 1972); and *Orchestrate Hr, Inc. v. Trombetta*, (N.D. Tex. 6/8/2016); 2016 WL 3179967.

FRCP RULE 12(b)(6) STANDARD

Under Federal Rule of Civil Procedure 12(b)(6) a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted,"[21] and this motion may be filed contemporaneous with the filing of a notice of removal.[22] A complaint will only survive a 12(b)(6) challenge if it alleges "enough facts to state a claim to relief that is plausible on its face."[23] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[24]

Ordinarily, courts are bound to accept the well-pleaded facts as true without reference to any extrinsic evidence; however, this Court and the U.S. Fifth Circuit (among other courts) have recognized an exception to this rule "when the plaintiff's complaint references a document that is not attached to the complaint [but] is central to the plaintiff's complaint." [25]

Courts are not bound to accept as true bald assertions, conclusions, or inferences, or legal conclusions "couched" or "masquerading" as facts.[26] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[27] And pleaders who are unable to show plausible entitlement to relief should be dismissed at an early stage in the litigation so as to minimize the costs of time and money by the litigants and the courts.[28]

[21] *Bell v. Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 & 570, 127 S. Ct. 1955, 1965, & 1974, 167 L. Ed. 2d 929 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed. 868 (2009).
[22] *McWaters v. Lee Engineering Supply Co.*, (E.D. La. 4/7/2003); 2003 WL 1824658 (Granting the defendants' motion to dismiss which was filed "contemporaneously with its Notice of Removal."); *Parten v. HMR Advantage Health Systems, Inc.*, (S.D. Ala. 3/9/2010); 2010 WL 892070 (Granting the defendants' motion to dismiss which was filed "contemporaneously with the Notice of Removal" filed by another defendant.).
[23] *Twombly*, 550 U.S. 544, 570.
[24] *Iqbal*, 556 U.S at 678.
[25] *Bennett v. Libbey Glass, Inc.*, (W.D. La. 9/30/15); 2015 WL 5794523; *Collins v. Morgan Stanley Dean Witter*, 99-41037 (5th Cir. 8/31/2000); 224 F.3d 496; *Scanlan v. Texas A&M University*, (5th Cir. 8/19/2003); 343 F.3d 533; and *TexCom Gulf Disposal, LLC v. Montgomery County*, 623 Fed. Appx. 657 (5th Cir. 8/19/15). The Lease and the Water Contract are referenced in and central to CLB's Petition; therefore, they are both properly considered.
[26] *Gooley v. Mobile Oil Corp.*, 851 F.2d 513, 514 (5th Cir. 1988).
[27] *Iqbal*, 556 U.S. at 678.
[28] *Bell v. Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 & 570, 127 S. Ct. 1955, 1965, & 1974, 167 L. Ed. 2d 929 (2007).

LAW & ANALYSIS

MRD's analysis is two-fold: first, under the Lease, CLB has no claim for relief; and second, even under the default rules of the Mineral Code, CLB still has no claim for relief.

I. CLB has no claim against MRD under the Lease.

The Lease reflects a bilateral, arms-length agreement between CLB and MRD regarding the leasing of mineral rights in exchange for royalty payments. By the signature of its sole member – a licensed attorney – CLB agreed to the terms and conditions outlined in the Lease, including the sixty (60) day notice-and-cure provision. While the default rules of the Mineral Code call for a thirty (30) day period, this is nevertheless a perfectly acceptable modification. *See*, LSA-R.S. 31:3; *Taylor v. Morris*, 49,425 (La. App. 2 Cir. 10/1/2014); 150 So.3d 952, 957 ("[I]ndividuals may renounce or modify what is established in their favor by the provisions of the Mineral Code…"); *Moore v. QEP Energy Co.*, (W.D. La. 8/29/2014); 2014 WL 4277926 ("[P]arties to a mineral lease have the freedom to renounce or modify any rights they have under the Mineral Code."); *B.A. Kelly Land Co., LLC v. Questar Exploration and Production Co.*, 47,509 (La. App. 2 Cir. 11/14/2012); 106 So.3d 181, 190 ("[T]he mineral lease constitutes the law between the parties and regulates their respective rights and obligations."); and *Jumonville v. Sunset Petroleum, Inc.*, 2013-0895 (La. App. 1 Cir. 9/13/2013); 2013 WL 8290614, holding:

> The trial court correctly found that the notice provision of the lease between the parties requires that respondents are entitled to notice and ***opportunity to cure*** before an action can proceed….a mineral lease constitutes the law of the parties and regulates their respective rights. (Emphasis added).

Even according to CLB's own allegations, all purported breaches were cured well within sixty (60) days of the first demand. In fact, ignoring CLB's incorrect "31 days" misrepresentation, the dates alleged in *CLB #2* between demand (5/25) and payment (6/24) show

that MRD actually cured all alleged breaches within thirty (30) days. In other words, and contrary to CLB's inflammatory legal labels, MRD actually acted expeditiously and in complete compliance with the Lease.

Accordingly, CLB has absolutely no viable claim under the Lease. CLB's frivolous claims for dissolution, double royalties, treble damages, attorney fees, interest and court costs should therefore be dismissed.

II. Even if the default provisions of the Mineral Code applied (which they do not), CLB would still not have a claim against MRD.

(1) No claim for dissolution exists under the Mineral Code.

The Mineral Code is clear: dissolution is not an available remedy unless:

(i) "fraud" has been alleged and proven; and/or

(ii) payment was not tendered within thirty (30) days of demand.[29]

CLB does not allege (and cannot prove) that MRD committed "fraud." And, as discussed above, payment was tendered within thirty (30) days of CLB's first demand. Accordingly, no claim for dissolution exists even under the default rules of the Mineral Code.

(2) No claim for penalties, attorney fees, or interest exists under Mineral Code jurisprudence.

There are sixty-eight (68) different decisions citing the applicable provisions of the Mineral Code – specifically, articles 137 through 141. For the Court's convenience, citations for all of these decisions are attached hereto by footnote.[30]

[29] LSA-R.S. 31:139 ("If the lessee pays the royalties due in response to the required notice, the remedy of dissolution shall be unavailable unless it be found that the original failure to pay was fraudulent."); *Lewis v. Texaco Exploration and Production Co., Inc.*, 96-CA-1458 (La. App. 1 Cir. 7/30/1997); 698 So.2d 1001, 1008 ("If the lessee pays the royalties demanded within thirty (30) days after receipt of the lessor's written notice, the remedy of dissolution becomes unavailable to the lessor, unless the lessee fraudulently withheld payment."); and *Acquisitions, Inc. v. Frontier Explorations, Inc.*, 82-808 (La. App. 3 Cir. 5/25/1983); 432 So.2d 1095, 1102 ("[Defendant/Lessee] tendered payment of the shut-in royalties well within the thirty-day delay. No allegations of fraud have been made against [Defendant/Lessee]. Accordingly the remedy of cancellation was no longer available to [Plaintiff/Lessor].").

There is not a single case awarding penalties, attorney fees, and interest whenever payment for allegedly outstanding royalties was made within the thirty (30) day period. Nevertheless, this is precisely the form of relief requested by CLB in the case *sub judice*.

[30] *Wilson v. Palmer Petroleum, Inc*., App. 1 Cir.1997, 706 So.2d 142; *Lewis v. Texaco Exploration and Production Co., Inc*., App. 1 Cir.1997, 698 So.2d 1001; *Bayou Bouillon Corp. v. Atlantic Richfield Co*., App. 1 Cir.1980, 385 So.2d 834; *Broadhead v. Pan Am. Petroleum Corp*., App. 3 Cir.1964, 166 So.2d 329; *Pierce v. Atlantic Refining Co*., App. 3 Cir.1962, 140 So.2d 19; *Bailey v. Meadows*, App. 2 Cir.1961, 130 So.2d 501; *Bollinger v. Texas Co*., Sup.1957, 232 La. 637, 95 So.2d 132; *Melancon v. Texas Co*., Sup.1956, 230 La. 593, 89 So.2d 135; *Chevron USA, Inc. v. Vermilion Parish School Bd*., W.D.La.2003, 215 F.R.D. 511; *Acquisitions, Inc. v. Frontier Explorations, Inc*., App. 3 Cir.1983, 432 So.2d 1095; *Chevron USA, Inc. v. Vermillion Parish School Bd*., W.D.La.2001, 128 F.Supp.2d 961; *Samson Contour Energy E & P, L.L.C. v. Smith*, App. 2 Cir.2014, 175 So.3d 967; *Stream Family Ltd. Partnership v. Marathon Oil Co*., App. 3 Cir.2009, 27 So.3d 354; *Duhe v. Texaco, Inc*., App. 3 Cir.2001, 779 So.2d 1070; *Massey v. TXO Production Corp*., App. 2 Cir.1992, 604 So.2d 186; *Rivers v. Sun Exploration and Production* Co., App. 2 Cir.1990, 559 So.2d 966; *Willis v. Franklin*, App. 3 Cir.1982, 420 So.2d 1243; *Chevron USA, Inc. v. Vermillion Parish School Bd*., W.D.La.2001, 128 F.Supp.2d 961; *O'Neal v. JLH Enterprises, Inc*., App. 2 Cir.2003, 862 So.2d 1021, 37,432 (La.App. 2 Cir. 12/1/03); *Bailey v. Franks Petroleum, Inc*., App. 1 Cir.1985, 479 So.2d 563; *Lamson v. Austral Oil Co., Inc*., App. 3 Cir.1998, 712 So.2d 1081; *Rebstock v. Birthright Oil & Gas Co*., App. 1 Cir.1981, 406 So.2d 636; *Succession of Miller v. Moss*, App. 3 Cir.1985, 479 So.2d 1035, writ denied 484 So.2d 135; *McDowell v. PG&E Resources Co*., App. 2 Cir.1995, 658 So.2d 779; *Chevron USA Inc. v. School Bd. Vermilion Parish*, C.A.5 (La.)2002, 294 F.3d 716; *Oracle 1031 Exchange, LLC v. Bourque*, App. 3 Cir.2012, 85 So.3d 736; *Fite Oil & Gas, Inc. v. SWEPI, L.P*., (5th Cir. 2/5/2015); 600 Fed. Appx. 239; *Quality Environmental Processes, Inc. v. I.P. Petroleum Co., Inc*. (La. 5/7/2014); 144 So.3d 1011; *Ford v. British Petroleum* (E.D. La. 3/17/2014); 2014 WL 1093703; *Ross v. Enervest Operating, L.L.C*. (La. App. 2 Cir. 6/26/2013); 119 So.3d 943; *Slattery Co. Inc. v. Chesapeake Louisiana LP* (W.D. La. 3/19/2013); 2013 WL 1152718; *Williams v. Chesapeake Louisiana, Inc*. (W.D. La. 3/11/2013); 2013 WL 951251; *Alyce Gaines Johnson Special Trust v. El Paso E & P Co. L.P*. (W.D. La. 2/24/2013); 2013 WL 686580; *B.A. Kelly Land Co., L.L.C. v. Questar Exploration and Production Co*. (La. App. 2 Cir. 11/14/2012); 106 So.3d 181; *Jefferson v. Beusa Energy, LLC* (W.D. La. 8/17/2012); 2012 WL 3598394; *Adams v. BP America Production Co*. (W.D. La. 3/27/2012); 2012 WL 1038035; *CLK Company, L.L.C. v. CXY Energy, Inc*. (La. App. 3 Cir. 12/19/2007); 972 So.2d 1280; *Shenandoah Chiropractic, P.A. v. National Specialty Ins. Co.* (S.D. Fla. 12/3/2007); 526 F.Supp. 2d 1283; *Noel v. Discus Oil Corp*. (La. App. 2 Cir. 5/13/1998); 714 So.2d 105; *Louisiana Land and Exploration Co. v. Unocal Corp*. (E.D. La. 4/26/1995); 1995 WL 250437; *Hanks v. Wilson* (La. App. 1 Cir. 3/11/1993); 633 So.2d 1345; *Bickham v. Amoco Production Co*. (E.D. La. 8/5/1993); 1993 WL 302677; *Chevron U.S.A., Inc. v. Landry* (La. App. 1 Cir. 6/20/1989); 546 So.2d 858; *Willis v. International Oil and Gas Corp* (La. App. 2 Cir. 3/29/1989); 541 So.2d 332; *Lapeze v. Amoco Production Co*. (5th Cir. 4/15/1988); 842 F.2d 132; *Win Oil Co., Inc. v. UPG, Inc*. (La. App. 2 Cir. 6/10/1987); 509 So.2d 1023; *McLaurin v. Shell Western E. & P., Inc*. (5th Cir. 12/12/1985); 778 F.2d 235; *Trinidad Petroleum Corp. v. Pioneer Natural Gas Co*. (La. App. 3 Cir. 5/27/1982); 416 So.2d 290; *Arceneaux v. Hawkins*, App. 3 Cir.1979, 376 So.2d 362; *Frey v. Amoco Production Co*., E.D.La.1990, 741 F.Supp. 601; *Agurs v. Amoco Production Co*., W.D.La.1979, 465 F.Supp. 154; *Louisiana Land and Exploration Co. v. Pennzoil Exploration and Production Co*., E.D.La.1997, 962 F.Supp. 908; *Fuller v. Franks Petroleum, Inc*., App. 2 Cir.1987, 501 So.2d 1024; *Knighton v. Texaco Producing, Inc*., W.D.La.1991, 762 F.Supp. 686; *Hilliard v. Amoco Production Co*., App. 3 Cir.1996, 688 So.2d 1176, 1995-1366, 1995-1367; *Broussard v. Union Pacific Resources Co*., App. 3 Cir.2001, 778 So.2d 1199, 2000-01079 (La.App. 3 Cir. 1/31/01); *Denbury Onshore, L.L.C. v. Pucheu*, App. 3 Cir.2009, 6 So.3d 386, 2008-1210; *Fairfield Energy Corp. v. Anadarko Petroleum Corp*. (W.D. La. 10/13/2011); 2011 WL 4862141; *Wegman v. Central Transmission, Inc*., App. 2 Cir.1986, 499 So.2d 436; *Eagle Lake Estates, L.L.C. v. Cabot Oil & Gas Corp*., E.D.La.2004, 330 F.Supp.2d 778; *Matthews v. Sun Exploration and Production Co*., App. 2 Cir.1988, 521 So.2d 1192; *Acadia Holiness Ass'n v. IMC Corp*., App. 3 Cir.1993, 616 So.2d 855; *Barham v. St. Mary Land & Exploration Co*. (La. App. 2 Cir. 11/20/2013); 129 So.3d 705; *Texas Gas Exploration Corp. v. Lafourche Realty Co., Inc*. (La. App. 1 Cir. 11/9/2011); 79 So.3d 1054; *Henry v. Ballard & Cordell Corp*. (La. App. 3 Cir. 6/30/1981); 401 So.2d 600; *Midstates Oil Corp. v. Waller*, C.A.5 (La.)1953, 207 F.2d 127; *Texaco Inc. v. Louisiana Land and Exploration Co*., M.D.La.1992, 136 B.R. 658; and *Bates v. Prater* (La. App. 2 Cir. 5/9/2007); 956 So.2d 814.

Considering the case *sub judice* involves a lessee who paid within thirty (30) days of demand ***and*** a Lease with a sixty (60) day notice-and-cure period, it is with even greater justification, *a fortiori*, that CLB's claims for such extraordinary relief be denied.

The applicable provisions of the Mineral Code are penal in nature; therefore, they are strictly construed: "penalties [are] reserved for [only] the most blameworthy conduct."[31] Sensibly, there is no case under the Mineral Code which even suggests that a lessee's payment of royalties within thirty (30) days of demand is anywhere near the "most blameworthy conduct" justifying the extraordinary remedies of penalties, attorney fees, and interest.

Nevertheless, it appears CLB believes the Mineral Code operates as some sort of automatic, lottery-style windfall for lessors (so long as several material misrepresentations are accepted as true, of course). This is, quite simply, a severe misunderstanding of the Mineral Code's. *See, Lewis v. Texaco Exploration and Production Co., Inc.*, 96-CA-1458 (La. App. 1 Cir. 7/30/1997); 698 So.2d 1001*HN8 (Holding, the purpose of the notice-and-cure scheme is to "give the lessee reasonable notice of the problem or deficiency with payment of royalties and an opportunity to correct it.").

In fact, unless egregious behavior is alleged and proven, courts decline to award penalties, attorney fees, and interest even when the payment is ***not*** made within thirty (30) days of demand. For just a few examples, *see* the following cases which all involved royalty payments made by the mineral lessee more than thirty (30) days after the lessor's demand and the courts ***still*** refused to award penalties, attorney fees, or interest: *Rivers v. Sun Exploration and Production Co.*, 21324 (La. App. 2 Cir. 4/4/1990); 559 So.2d 963; *O'Neal v. JLH Enterprises, Inc.*, 37,432 (La. App. 2 Cir. 12/1/2003); 862 So.2d 1021; *Succession of Miller v. Moss*, 84-961

[31] *Samson v. Smith*, 49,495 (La. App. 2 Cir. 12/29/2014); 175 So.3d 967, 981.

(La. App. 3 Cir. 12/11/1985); 479 So.2d 1035; and *Knighton v. Texaco Producing, Inc.*, 88-2662 (W.D. La. 3/11/1991); 762 F.Supp. 686.

Accordingly, here – where payment was timely tendered under both the Lease's sixty (60) day cure period ***and*** the Mineral Code's default thirty (30) day cure period – it is with even greater justification, *a fortiori*, that CLB has no claim for penalties, attorney fees, or interest.

(3) CLB's flurry of defective demands and lawsuits further precludes recovery.

Courts are unkind to lessors who rush into royalty litigation without strict adherence to the Mineral Code. In fact, failing to comply with the notice-and-cure framework from the apex can forever hinder a lessor's right to remedies beyond collection of the royalties owed. CLB – who filed a purported "class" action for mineral royalties the day after it emailed a purported demand for only its own royalties – is one of those lessors who engaged in self-destruction.

For instance, in *Rebstock v. Birthright*, 14304 (La. App. 1 Cir. 10/12/1981); 406 So.2d 636, the court denied the lessors' claims for penalties, attorney fees, and interest because they had poisoned any rights they otherwise would have had to such claims by failing to comply with the notice-and-cure requirements of the Mineral Code from the proverbial "Jump Street."

Specifically, the *Rebstock* demands, petitions, and payments were made as follows:

- 5/21/79: Petition #1
- 8/24/79: Demand
- 1/23/80: Payment
- 3/7/80: Petition #2

Based on these facts, the *Rebstock* court dismissed the case because the lessors' claim for

> non-payment of royalties ***was not seriously made until the filing of the [Petition #2] in March of 1980. At that point in time, payments had been tendered***…plaintiffs have no right to proceed with this action because of their failure to comply with the requirements of LSA-R.S. 31:137 and 138.[32]

[32] *Id.* at 643 (Emphasis added).

So, take the exact *Rebstock* holding and apply it to the case *sub judice*:

> [CLB's] claims for non-payment of royalties not seriously made until the filing of [*CLB #2*] in [August 2016]. At that point in time, payments by [MRD] had been tendered [back in June 2016].[33]

Similarly, in *Bickham v. Amoco Production Company*, 92-305 (E.D. La. 8/5/1993); 1993 WL 302677, the court likewise dismissed the lessors' claims for penalties, attorney's fees, and interest where suit was filed against the lessee before thirty (30) days had passed from the first demand, holding:

> [Defendant/Lessee] contends that [Plaintiffs'/Lessors'] complaint should be dismissed for their failure to allow thirty days to elapse from the dates of the initial demand letters before filing suit…The Court agrees.[34]

See also, *Willis v. Franklin*, 82-98 (La. App. 2 Cir. 10/13/1982); 420 So.2d 1243 (Dismissing lessor's claim because suit was filed before thirty (30) days had elapsed from the first demand).

As a reminder, the allegations in *CLB #2* candidly reflect that:

(i) no action was taken between the dismissal of *CLB #1* and the filing of *CLB #2*; and

(ii) MRD paid CLB all royalty payments before *CLB #1* was dismissed and, likewise, before *CLB #2* was filed.

Much like the miller's daughter in Rumpelstiltskin, CLB is attempting to spin old straw into new gold. However, under *Rebstock*, *Bickham*, and *Willis*, the same demands which were insufficient to state a claim for relief under *CLB #1* are equally ineffectual under *CLB #2*.

[33] For a recap of the demands, lawsuits, and payment in this matter, *see* below:
5/25/16: Demand #1 from CLB to MRD
5/27/16: Demand #2 from CLB to MRD; "Class Action Petition" filed in *CLB #1*.
6/14/16: "Amemded [sic] and Restated Class Action Petition" filed in *CLB #1*.
6/24/16: Payment made by MRD and received by CLB + Motion to Dismiss filed by MRD.
6/27/16: Voluntary Dismissal filed by CLB in *CLB #1*.
8/8/16: Petition filed in *CLB #2*

[34] *Id.* at *2.

III. LUTPA is not even applicable.[35]

(1) CLB's claims are governed by the Mineral Code – not LUTPA.

Courts have consistently held that any attempt to repackage a claim for royalties into a different legal label – such as an "unfair trade practices" claim – is futile. *See, Wilson v. Palmer Petroleum, Inc.*, 97-CA-2386 (La. App. 1 Cir. 11/26/1997); 706 So.2d 142, 145 ("Lessors' claims were 'royalty claims' subject to the Mineral Code…Claim does not lose its identity as a mineral royalty claim…merely because the claim is characterized as a [LUTPA] claim."); *Quality Environmental Processes, Inc. v. I.P. Petroleum Company, Inc.*, (La. 5/7/2014) (Dismissing "LUTPA" claim in mineral rights dispute); 144 So.3d 1011; *Acadia Holiness Association, v. IMC*, 92-639 (La. App. 3 Cir. 4/7/1993); 616 So.2d 855 (Holding that legal label attached to mineral royalty claim did not change its true character).[36]

(2) LUTPA claims are reserved for only the most extreme instances of unethical and unfair conduct.

Only the "most egregious" examples of fraud or misrepresentation are covered under the penumbra of LUTPA – in other words, "the range of prohibited practices under LUTPA is extremely narrow."[37]

CLB does not allege any fraud or misrepresentation. Rather, CLB is upset because its royalty payments were delivered within thirty (30) days after demand. Contractual compliance is a far-cry from the "egregious" behavior covered under the "extremely narrow" ambit of LUTPA.

(3) CLB has no "ascertainable loss."

LUTPA only applies whenever there is an "ascertainable loss." CLB admittedly already has its royalties. It therefore has no damages or, in LUTPA terms, any "ascertainable loss."[38]

[35] LSA-R.S. 51:1401, *et seq.* ("LUTPA").
[36] This exact issue was addressed in MRD's prior motion to dismiss. This is yet another example of CLB's obstinacy.
[37] *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.*, 2009-1633 (La. 4/23/2010); 35 So.3d 1053.

IV. CLB has no cause of action for any alleged "reporting" failure.

While CLB does not ever specifically make a claim for relief related to the "reporting" issue, it does spend a significant portion of its Petition in *CLB #2* making (incorrect) assertions regarding MRD's public reporting requirements. However, the Louisiana legislature and the U.S. Fifth Circuit have made clear that – even if accepted as true – this still does not give rise to any private cause of action. To the contrary, any claim related to public "reporting" requirements belongs to the Commissioner of Conservation – not CLB. *See,* LSA-R.S. 30:18 *et seq.*; *Mills v. Davis*, 92-5006 (5th Cir. 1/21/1994); 11 F.3d 1298, 1305; and *Trahan v. Superior Oil Co.*, 81-3081 (5th Cir. 3/21/1983); 700 F.2d 1004.

Accordingly, to the extent the CLB was even suggesting that it had a private cause of action based on any alleged public "reporting" failure, that claim must also fail.

CONCLUSION

WHEREFORE, Defendant, MRD Operating LLC, respectfully prays that this 12(b)(6) motion be GRANTED and that the claims made by CLB Properties, Inc. for dissolution, penalties, attorney fees, interest and court costs be DISMISSED, with prejudice, along with all other relief to which it may be entitled.

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[38] Of course, without damages, CLB is likewise not entitled to "treble damage" or "attorney fees" under LUTPA.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 8th day of September, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which sent notification to all counsel of record.

Russell A. Woodard, Jr.
Russell A. Woodard, Jr.