Summary of the Case

This case concerns a mineral lease in which Appellant Mid-Missouri Waste Systems, LLC, was the landlord and Appellee Lafarge North America, Inc., was the tenant. Mid-Missouri sought a declaratory judgment against Lafarge for breach of the lease, damages, and to quiet title over the leased property. After a bench trial, the district court entered judgment for Lafarge on the merits. Mid-Missouri appeals. There are two issues on appeal.

The district court materially misinterpreted the lease's language, confusing the definition of time when Lafarge was required to perform certain duties. Taking the court's other findings as true, a correct reading of the lease necessitates judgment for Mid-Missouri on one of its claims.

The district court also entered a memorandum order with its "Findings of Fact and Conclusions of Law." It adopted the text of the order nearly verbatim from Lafarge's proposed findings of fact, but failed to state any conclusions of law. Under Rule 52(a), Federal Rules of Civil Procedure, this was error.

Request for Oral Argument

The issues in this case are complex and subtle. They raise difficult questions. The interchange of oral argument would assist the Court in understanding the case and the parties' arguments. The appellant requests twenty minutes of argument, with five of those minutes reserved for rebuttal.

Corporate Disclosure Statement

Appellant Mid-Missouri Waste Systems, LLC, is an Illinois limited liability company that has no parent corporation. No publicly held corporation owns 10% or more of its stock.

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Jurisdictional Statement

This is an appeal from a final order and judgment of the United States District Court for the Western District of Missouri in a declaratory action brought pursuant to 28 U.S.C. § 2201 and Rule 57, Federal Rules of Civil Procedure. The district court had jurisdiction pursuant to 28 U.S.C. § 1332, as the parties are citizens of different states and the amount in controversy exceeds $75,000.00.

The district court entered its final order and judgment disposing of all parties' claims on September 28, 2009. The appellant filed its Notice of Appeal on October 22, 2009. Under Rule 4(a)(1)(A), Federal Rules of Appellate Procedure, the Notice of Appeal was timely, as it was filed within thirty days of the district court's final order and judgment. Therefore, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

I. The district court erred in failing to state any conclusions of law in its memorandum order granting Lafarge judgment on partial findings, because Rule 52(a), Federal Rules of Civil Procedure, requires that in issuing such an order, "the court must find the facts specially and state its conclusions of law separately;" as a result, this Court's review of the legal basis of the district court's decision is hobbled because no basis was stated.

Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 (1940)

Fogarty v. Piper, 781 F.2d 513 (8th Cir. 1985)

Supermercados Econo, Inc. v. Integrand Assur. Co., 375 F.3d 1 (1st Cir. 2004)

Ford Motor Co. v. Lloyd Design Corp., 22 Fed. Appx. 464 (6th Cir. 2001)

Rule 52, Federal Rules of Civil Procedure

II. The district court erred in finding (a) that the Lease did not obligate Lafarge to continue "to pump from and prevent the accumulation of water in" the Chouteau Pit after 2004, and (b) that Lafarge met this obligation prior to 2004, because these findings were contrary to the terms of the Lease, the evidence, and the court's other findings; the Lease obligated Lafarge to keep the Chouteau Pit dry from 2002 until it was terminated in June, 2006, and Lafarge did not meet this obligation.

United States v. El Paso Nat. Gas Co., 376 U.S. 651 (1964)

In re Las Colinas, Inc., 426 F.2d 1005 (1st Cir. 1970)

Jetz Serv. Co. v. Botros, 91 S.W.3d 157 (Mo. App. 2002)

Stacey v. Redford, 226 S.W.3d 913 (Mo. App. 2007)

Statement of the Case

W.J. Menefee Construction Company owned five tracts of land in Pettis County, Missouri, on part of which it intended to construct a landfill. In 1996, Lafarge entered into a thirty-year Mineral Lease with Menefee granting Lafarge the right to extract limestone from some of Menefee's tracts. Mid-Missouri bought Menefee's property in 2001 and succeeded Menefee in the Lease.

In 2006, Mid-Missouri filed a declaratory action against Lafarge in United States District Court for breach of the Lease, damages, and to quiet title in the leased property. Though the case originally was filed in the Northern District of Illinois, the venue was transferred to the Western District of Missouri in 2007.

Both parties filed pretrial motions for summary judgment, which were denied. The district court held a bench trial over three days in May, 2009. Thereafter, it adopted Lafarge's proposed findings of fact nearly verbatim in a memorandum order, granted Lafarge's motions for judgment on partial findings at the close of the plaintiff's evidence and judgment at the close of all evidence for Lafarge, and entered judgment for Lafarge. In its memorandum order, the court neither adopted any party's conclusions of law nor stated any of its own.

Mid-Missouri timely appealed to this Court.

Statement of Facts

Appellant Mid-Missouri Waste Systems, LLC, is an Illinois limited liability company registered to do business in both Illinois and Missouri (Appendix 23). Appellee Lafarge North America, Inc., is a Maryland corporation with its principal place of business in Colorado (Appx. 23). This is an appeal from a declaratory action Mid-Missouri brought against Lafarge for breach of contract, damages, and to quiet title (Appx. 23).

Background

W. J. Menefee Construction Company had owned and operated a quarry near Sedalia, Missouri, since 1954 (Transcript 8; Appx. 326). It owned five tracts of land: Tract 1 (the "retained property"), Tracts 2 and 2A (the "leased property"), and Tracts 3 and 3A (the "North Property") (Tr. 15-17; Appx. 326-27). Menefee mined Burlington and Chouteau limestone and sold it for construction projects (Tr. 8-9). The Burlington layer of rock resides on top of the Chouteau rock (Tr. 32-33; Appx. 331).

In the early 1990s, Menefee obtained a permit to build a landfill on Tract 1 (Tr. 10-11, 391-92; Appx. 327). Certain features, such as a landfill sump drain, were originally designed to be located on Tract 2 (Tr. 557-58; Appx. 327). Menefee intended to sell the Sedalia property and the landfill permit to a company that would develop and operate the landfill (Tr. 11).

In 1996, Menefee sold the North Property to Lafarge (Tr. 15). Simultaneously, it entered into a Mineral Lease with Lafarge covering Tracts 2 and 2A (Tr. 15). The term of the Lease was thirty years, from July 1, 1996, through June 30, 2026 (Tr. 15; Appx. 260). A full copy of the Lease is in the Appendix at pages 260-77, and a copy without its appended land descriptions is in the Addendum to this brief at pages A31-A41.

The Lease granted Lafarge "the exclusive right to enter upon the Leased Property to mine, convert and remove any and all minerals, rock, and other materials located on the Leased Property," subject to its conditions (Appx. 260). Menefee retained the right to construct a landfill on the retained property (Tr. 17; Appx. 260). As soon as the Lease took effect, Lafarge began to mine the quarry on the leased property from where Menefee had stopped (Tr. 15, 69).

Controlling water is very important when planning, building, and operating a landfill (Tr. 101). In order to control the water for the prospective landfill on Tract 1, one of the conditions to which Lafarge's right to enter and mine was subject, paragraph 4(d), required Lafarge "to pump from and prevent the accumulation of water" in a sump drain on the retained property known as the Chouteau Pit (Tr. 18, 19; Appx. 261). Paragraph 4(d) of the Lease states as follows:

> Obligation to Pump. As an additional condition to [Lafarge]'s exercise of its right to mine (and exercise its right of entry as granted in paragraph 6 below), [Lafarge] shall use reasonable efforts to pump from and prevent the accumulation of water in the area located on

> [Mid-Missouri]'s Retained Property commonly known between the parties as the "Chouteau Pit", and discharge such water into the lake located at the northeastern corner of [Menefee]'s Retained Property (the "Lake") until such time that [Menefee]'s Retained Property is actually used as a solid waste disposal area or, if not so used, when the land reclamation permit currently affecting such property necessitates the commencement of the complete reclamation of such property.

(Appx. 261).

The Chouteau Pit, which is 70 or 80 feet deep, was created when Menefee mined the area around it below the Burlington rock layer and down into the Chouteau rock layer (Tr. 32-33; Appx. 331). When not pumped, the Chouteau Pit will fill up from surface water (Tr. 32-33; Appx. 331). At trial, Mr. James Menefee, the president of Menfee Construction (Tr. 7), testified that he previously had maintained the water level in the Chouteau Pit between the top of the Chouteau rock and the bottom of the Burlington rock (Tr. 30-31; Appx. 331). He stated that he pumped water from the pit "constantly" at the time Lafarge took over that duty pursuant to the Lease (Tr. 20). He stated, however, that he never kept the pit completely dry (Tr. 30).

In paragraph 6(a), the Lease gave Lafarge a limited right of entry onto the retained property for a variety of purposes (Appx. 262). Because the Chouteau Pit was located on the retained property, rather than the leased property, paragraph 6(a) of the Lease provided as follows:

> During the term of the Lease, [Lafarge] will have the right, at its own cost, to enter upon [Menefee]'s Retained Property for the limited

> purpose of … to meet its obligations to pump water from the Chouteau Pit into the Lake as described in paragraph 4(d) above … The right of entry shall continue for the discharge and removal of water as described above so long as either [Lafarge] or its successors and assigns is conducting mining operations on the Leased Property and/or the real property to the [north property].

(Appx. 262).

In paragraph 15(a), the Lease provided that an "Event of Default" of the Lease included the following:

> [Lafarge]'s failure to perform any of the terms, conditions or covenants of this Lease to be observed or performed by it for more than sixty (60) days after written notice, or if such cure cannot reasonably by effected within such sixty (60) day period, the failure to commence the cure within such sixty (60) day period and diligently to pursue completion of the cure…

(Appx. 266). If an "Event of Default" occurred, then under paragraph 15, Menefee,

> besides all such other rights or remedies it may have hereunder, or in law in equity [*sic*], shall have the immediate right to enter the Leased Property and take possession thereof and of all permanent improvements thereon and may remove all persons and any property from the Leased Property by force, summary action, or otherwise, and such property may be removed and stored in a public warehouse or elsewhere at the cost of and for the account of [Lafarge], all without service of notice or resort to legal process, and without being deemed guilty of trespass or becoming liable for any such loss or damage which may be occasioned thereby.

(Appx. 266).

In August, 2002, Menefee granted Mid-Missouri a power of attorney to enforce the Mineral Lease (Tr. 108-09; Appx. 327). At the same time, Mid-

Missouri began negotiating with Menefee to purchase the landfill permit and all of Menefee's property, both leased and retained, subject to the Lease with Lafarge (Tr. 103). Mid-Missouri and Menefee completed their deal in 2004, whereupon Mid-Missouri succeeded Menefee as landlord under the Lease (Tr. 102-03, 111-12; Appx. 327).

Events leading to the proceedings below

Prior to 2002, Lafarge kept the water level in the Chouteau Pit at between 15 and 20 feet (Tr. 83, 418). On October 28, 2002, Mid-Missouri sent Lafarge a notice of breach letter in which it alleged that Lafarge had breached the lease in three ways, one of which was that "water still remains" in the Chouteau Pit (Tr. 393-94; Appx. 59). In response, Lafarge met with several Mid-Missouri representatives, denied that it was in breach of the Lease, and concluded that Mid-Missouri did not have a good understanding of the Lease's terms (Tr. 393-95; Appx. 330). Still, Lafarge then began pumping water from the pit "as low as possible" (Tr. 393-95; Appx. 330).

On June 30, 2004, Mid-Missouri sent Lafarge a letter advising it that it "intends to commence construction of the LANDFILL" on the retained property "within 60 days, including development of infrastructure and the first phase of operations" (Appx. 64). Mid-Missouri stated, "Pursuant to paragraph 6(a) of the

LEASE, notice is hereby given to terminate LAFARGE's right of entry on the retained property" (Appx. 64).

Lafarge continued entering the retained property in the period after June, 2004, without Mid-Missouri's objection (Tr. 400-01). While Lafarge ceased actively blasting and hauling rock from the leased property in December, 2004, (Tr. 400), it did not stop pumping water from the Chouteau Pit until January, 2005, at which time it claimed it left the pit "dry" (Tr. 401).

At trial, Joe Fitzpatrick, who previously had worked for Menefee and then continued his employment with Lafarge, testified that Lafarge maintained the same water level in the Chouteau Pit as had Menefee, which was between 15 and 20 feet (Tr. 78, 83; Appx. 331). He agreed that a photograph from 1999 showed as much (Tr. 81; Appx. 331). Keith Stoker, Lafarge's plant manager (Tr. 417), testified that he was in charge of pumping out the Chouteau Pit in 2000 and 2001, and that Lafarge maintained Menefee's water level in the pit (Tr. 418-19; Appx. 331-32). Lafarge's expert, Michael McLaughlin, testified that topographical data showed that Lafarge maintained the same water level as Menefee (Tr. 556-57; Appx. 332).

Kevin Peart, Lafarge's director of manufacturing in the Western United States and Latin America (Tr. 387), testified that Lafarge increased its pumping of the Chouteau Pit after Mid-Missouri's 2002 breach letter (Tr. 394). He testified that he told his employees to ensure that the water was drained as low as possible

(Tr. 394). Rick Crider, a former Mid-Missouri employee, testified that his written activity report for June 28 through July 2, 2004, stated, "The Chouteau Pit is just about pumped out again, but we're supposed to have a big storm this weekend again" (Tr. 261-62). He testified that his report for July 12, 2004, stated, "Lafarge has just about got the Chouteau Pit pumped out again" (Tr. 262-63). He testified that his report from October 4 through October 15, 2004, stated, "Lafarge is doing a good job pumping the Chouteau Pit with all the rain" (Tr. 263).

Mr. Crider was provided with a photograph that he identified as being of a dry Chouteau Pit (Tr. 265-66). He testified that another photograph showed that the Chouteau Pit was dry except for having a puddle of water in the sump area, where water would be expected (Tr. 266). He further testified that he took a photograph on November 8, 2004, that showed a dry Chouteau Pit (Tr. 267, 283).

In any case, as the district court found, Lafarge stopped pumping water from the Chouteau Pit in December, 2004 (Appx. 333). Thereafter, water from around the surrounding land then began to drain into the pit, which led to massive flooding on the retained property to the point where the property was not suitable for developing a landfill (Tr. 116-17, 448, 558).

To determine the damages from the flooding of the retained property, both Mid-Missouri and Lafarge retained expert witnesses who testified at trial (Tr. 155-250, 286- 337, 502- 99). Mid-Missouri's expert calculated that 360 million gallons

of water needed to be pumped from the retained property before construction of the landfill could begin (Tr. 170). Lafarge's expert admitted he was unable to replicate Mid-Missouri's expert's calculations, but he did some calculations on his own (Tr. 513-14, 531-36). He studied old photographs and diagrams (Tr. 531-2, 536, 542), and testified that the damages calculated by Mid-Missouri's expert were too high (Tr. 561). Lafarge's expert also stated that Mid-Missouri's internal estimations were lower than the expert's estimation (Tr. 564-65).

On March 18, 2006, having discovered that Lafarge had stopped pumping water from the Chouteau Pit, Mid-Missouri sent Lafarge another letter stating that it was a "written notice of breach of mineral lease" (Tr. 112-13; Appx. 74). In the letter, Mid-Missouri complained of several breaches, among which was the following:

> As a condition of its right to mine on Tracts 1 and Tracts 2 and 2A, LA FARGE is to use reasonable efforts to pump water from the Chouteau Pit (Paragraph 4(d) – MINERAL LEASE). Despite repeated oral requests and written notice, LA FARGE has failed to consistently pump water from the Chouteau Pit, and as of February 2006, the Chouteau Pit is filled with water. … MID-MISSOURI demands LA FARGE continue with its obligations to pump as a condition of its right to continue use of Tracts 2 and 2A.

(Appx. 75).

Lafarge responded on March 29, 2006 (Appx. 79). As to the Chouteau Pit, it stated the following:

> Mid-Missouri apparently contends that Lafarge should be engaged in certain pumping activities in the area referred to in the July 1, 1996 Lease as the "Retained Property." Lafarge respectfully disagrees. Lafarge will remind you of your letter dated June 30, 2004, which you do not mention. This letter advised Lafarge of Mid-Missouri's intention to commence landfill construction nearly two years ago and this letter terminated Lafarge's right to enter the "Retained Property." Of course, as you and Mid-Missouri should be aware, the water you are contending Lafarge should be pumping is located on the "Retained Property." By depriving Lafarge of any right of access, Mid-Missouri has itself prevented the activity it is seeking. Thus, Lafarge has no liability for this.

(Appx. 79) (emphasis in the original).

Mid-Missouri replied to Lafarge on June 13, 2006 (Appx. 67). It stated the following:

> In your March 29 correspondence, you state that my letter of June 30, 2004 "terminated Lafarge's right to enter onto the 'Retained Property'." Mid Mo's notice of intent to proceed with construction of the landfill in no way was intended to deny Lafarge access with regard to your obligation to pump water from the Chouteau Pit or otherwise use the sediment basin as was contemplated in the Lease.

(Appx. 67-68). Additionally, Mid-Missouri advised Lafarge that because Lafarge had not cured the alleged breach of failing to prevent the accumulation of water in the Chouteau Pit, it was "holding Lafarge in default and is immediately terminating Lafarge's right to enter on to" the leased property (Appx. 69).

The proceedings below

In November, 2006, Mid-Missouri filed a declaratory action against Lafarge in the United States District Court for the Northern District of Illinois (Appx. 4).

On March 20, 2007, the venue was transferred to the Western District of Missouri (Appx. 4). In its complaint, Mid-Missouri sought a declaratory judgment that Lafarge had breached the Lease (Appx. 30), damages for the breach (Appx. 32), and to quiet title over the leased property (Appx. 33).

One of the breaches Mid-Missouri alleged was Lafarge's failure to pump water from the Chouteau Pit since 2002, even after Mid-Missouri had demanded that it do so (Appx. 28-29, 30-31). It alleged that the Lease obligated Lafarge "to keep the Chouteau Pit pumped free of water" (Appx. 25, 26). It alleged that Lafarge's failure to pump water from the Chouteau Pit damaged it in excess of $75,000, generally because Lafarge's failure "prevented Mid-Missouri from constructing a landfill on Tract 1" (Appx. 32). In its answer, Lafarge denied these allegations (Appx. 87-91, 92, 95-96).

Neither party ever requested a jury trial: as early as May 23, 2007, the case was set for a bench trial (Appx. 5). Before trial, both parties filed motions for summary judgment (Appx. 101, 103). The district court denied them (Appx. 106). After discovery, it held a bench trial over three days in May, 2009 (Appx. 19).

At the close of Mid-Missouri's evidence, Lafarge moved for judgment on partial findings under Rule 52(c), Federal Rules of Civil Procedure (Appx. 110). The district court "provisionally" denied the motion (Appx. 112). At the close of all evidence, Lafarge moved for judgment in its favor (Appx. 113). The court

asked both parties for proposed findings of fact and conclusions of law (Tr. 601-02), and took the matter under advisement (Tr. 600).

On June 15, 2009, both parties filed respective proposed findings of fact and conclusions of law (Appx. 115, 217). The district court issued a memorandum order on September 28, 2009, in which it stated it was issuing "Findings of Fact and Conclusions of Law" (Appx. 326). Except for portions of a few paragraphs, however, the court adopted all the language in the order verbatim from Lafarge's proposed findings of fact; it adopted the text of Lafarge's proposal as follows:

District court's paragraphs	**Paragraphs of Lafarge's proposal**
1-10 (Appx. 326-29)	1-10 (Appx. 122-24)
14-19 (Appx. 329-31)	11-16 (Appx. 124-26)
20-37 (Appx. 331-34)	94-126 (Appx. 152-62)
39-55 (Appx. 335-40)	18-42 (Appx. 126-35)
56-60 (Appx. 340-41)	56-61 (Appx. 139-43)
64-72 (Appx. 341-45)	79-93 (Appx. 148-52)
73-91 (Appx. 345-48)	127-145 (Appx. 163-69)
93-107 (Appx. 349-52)	63-78 (Appx. 143-47)
108-112 (Appx. 352-53)	146-153 (Appx. 169-71)

Only a portion of paragraph 10, a portion of paragraph 107, and paragraphs 38, 61 through 63, and 92 were from the court's own hand, rather than Lafarge's proposal (*cf.* Appx. 326-53 *and* 122-71). The court even forgot to remove one of Lafarge's footnotes, number 3, which Lafarge had included in its proposal to pray that a trial exhibit in controversy be admitted: "Because MMW 'opened the door' on this issue, Lafarge respectfully submits that Def. Ex. 262-E should be admitted on the merits" (Appx. 334).

All the court's findings regarding the Chouteau Pit, paragraphs 14 through 38, were taken verbatim from Lafarge. Using Lafarge's text, the district court found that Lafarge was not obligated to pump water from the Chouteau Pit after mid-2004 (Appx. 334-35), and that before that time, Lafarge had complied with its obligation (Appx. 331-33).

The court did not, however, adopt any of Lafarge's conclusions of law. Its order does not state any conclusions of law or cite to any legal authority. At the conclusion of the order, the district court granted Lafarge's motions for judgment on partial findings at the close of the plaintiff's evidence and for judgment at the close of all evidence, which it termed "summary judgment" (Appx. 353-54). Simultaneously, it entered judgment in Lafarge's favor (Appx. 355).

On October 22, 2009, Mid-Missouri filed its notice of appeal to this Court (Appx. 356).

Summary of the Argument

After a three-day bench trial, both parties submitted proposed findings of fact and separate conclusions of law at the district court's request. The court granted judgment on the merits to Lafarge and issued an order purporting to make "Findings of Fact and Conclusions of Law." Rule 52(a), Federal Rules of Civil Procedure, requires that such an order "must find the facts specially and state its conclusions of law separately." While the court adopted nearly the whole of its order from Lafarge's proposed findings of fact, it failed to state any conclusions of law. By doing so, the court deprived Mid-Missouri of a meaningful appeal, because it left this Court to infer the legal basis of its decision. This was error.

In the findings of fact that the district court did issue, it materially misread the parties' Mineral Lease. One condition of Lafarge's rights to enter and to mine the property it leased from Mid-Missouri obligated it to pump from and prevent the accumulation of water in a limestone pit on Mid-Missouri's retained property. The Lease provided that Lafarge must perform this duty until Mid-Missouri actually begins operating the retained property as a landfill, which to this day has not happened. But the district court found that Lafarge only was required to do this when it actively mined on the leased property, which it had not since late 2004. The Lease also required Lafarge to keep the pit dry, but the court found that before 2004, keeping 15-20 feet of water in it sufficed. These findings were error.

Argument

I. The district court erred in failing to state any conclusions of law in its memorandum order granting Lafarge judgment on partial findings, because Rule 52(a), Federal Rules of Civil Procedure, requires that in issuing such an order, "the court must find the facts specially and state its conclusions of law separately;" as a result, this Court's review of the legal basis of the district court's decision is hobbled because no basis was stated.

Standard of Review

This is an appeal from a judgment that the district court entered on partial findings after a bench trial. Rule 52(c), Federal Rules of Civil Procedure, requires that such a judgment be in the form prescribed by Rule 52(a). Under Rule 52(a), "The court must find the facts specially and state its conclusions of law separately." This Court reviews the conclusions of law in a Rule 52(a) order *de novo*. *Kelley v. S. Pac. Co.*, 419 U.S. 318, 323 (1974).

* * *

Rule 52(a), Federal Rules of Civil Procedure, expressly mandates that, when issuing final judgment in a judge-tried case, the trial court "must find the facts specially and state its conclusions of law separately." The law of the United States is that a Rule 52(a) order mingling ultimate findings of fact with mere arguments of law does not meet this requirement. In this case, after a bench trial, both parties

submitted detailed proposed findings of fact and separate conclusions of law that each cited numerous authorities. While the district court accepted the appellee's findings of fact nearly verbatim and stated that it was issuing "findings of fact and conclusions of law," it actually omitted any conclusions of law, separate or otherwise. Its final order cited no statutes, rules, or court decisions and gave no discussion or opinion of the law involved in its decision. Instead, the court recited numerous findings of facts and then proceeded to grant judgment to the appellee without explaining its basis for doing so. Was this error?

Rule 52(c), Federal Rules of Civil Procedure, states:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party …. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

The pertinent part of Rule 52(a) states:

> In an action tried on the facts without a jury …, *the court must find the facts specially and state its conclusions of law separately*. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.

(Emphasis added).

The requirement in Rule 52(a) that the trial court "find the facts specially and state its conclusions of law separately" "has a twofold purpose: (1) to engender care on the part of the trial judge in ascertaining the facts and (2) to make possible

meaningful review in the appellate courts." *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 415 (5th Cir. 1981). As such, beyond merely making "particular findings," the district court should "refer in its opinion to the applicable legal analysis." *Id.* The "conclusions of law must be sufficient to indicate the bases of the trial court's decision." *Kruger v. Purcell*, 300 F.2d 830, 831 (3d Cir. 1962).

Thus, the findings of fact and conclusions of law entered pursuant to this rule "should be such that they 'furnish the Court with a clear understanding of the grounds upon which the district court based its decision.'" *Fogarty v. Piper*, 767 F.2d 513, 515 (8th Cir. 1985) (citing *Cross v. Pasley*, 267 F.2d 824, 826 (8th Cir. 1959)). Proper findings of fact and conclusions of law should "[s]tate the legal and factual basis for the order" and "[d]iscuss" the law at issue. *Id.* The "absence of findings of fact *or* conclusions of law may require remand." *Kennedy Bldg. Assocs. v. CBS Corp.*, 576 F.3d 872, 881 (8th Cir. 2009) (citing *Fogarty*, 767 F.2d at 515) (emphasis added).

This case concerns a Missouri mineral lease in which Appellant Mid-Missouri Waste Systems, LLC, was the landlord and Appellee Lafarge North America, Inc., was the tenant. Mid-Missouri sought (1) a declaratory judgment that Lafarge had breached the lease (Appendix 30), (2) damages for the breach (Appx. 32), and (3) a determination that its title in the leased property was superior

to that of Lafarge (Appx. 33). The parties' respective accounts of the facts differed greatly (*cf.* Appx. 122-96 *and* 219-31).

Neither Mid-Missouri nor Lafarge ever requested a jury trial to resolve their factual disputes. As early as May 23, 2007, the case was set for a bench trial (Appx. 5). Before trial, both parties filed motions for summary judgment, which were denied (Appx. 101, 103, 106). The court held a bench trial over three days in May, 2009 (Appx. 19), requested proposed findings of fact and conclusions of law, and took the matter under advisement (Transcript 600-04). The district court stated in its final order that it was granting Lafarge's motions for "Judgment on Partial Findings Made at the Close of All Evidence" and judgment at the close of all evidence (which it incorrectly termed "summary judgment") (Appx. 353-54), and then entered judgment for Lafarge (Appx. 355). The court tried the case without a jury and partially found facts so as to reach its judgment. Its final order was therefore a "judgment on partial findings" under Rule 52(c), requiring the court to "find the facts specially and state its conclusions of law separately" under Rule 52(a).

As requested, both parties filed proposed findings of fact and conclusions of law after trial (Appx. 115, 217). Each followed Rule 52(a) and included detailed, specific findings of fact and separate, enumerated conclusions of law that thoroughly discussed the relevant legal questions, cited to authority, and made

conclusions based on the proposed facts found. Mid-Missouri's proposed separate conclusions of law were 25 pages long (Appx. 232-57), and Lafarge's were twelve pages long (Appx. 196-208).

In its Rule 52(a) order, the district court stated it was issuing "Findings of Fact and Conclusions of Law" (Appx. 326). It adopted Lafarge's proposed findings of fact nearly verbatim. *See* Statement of Facts, *ante*, at 21. Indeed, the court even forgot to remove a footnote, number 3, which Lafarge had included to ask that a certain trial exhibit whose admissibility was in controversy be admitted: "Because MMW 'opened the door' on this issue, Lafarge respectfully submits that Def. Ex. 262-E should be admitted on the merits" (Appx. 344).

Conspicuously missing, however, were *any* conclusions of law, either adopted from one of the parties' proposals or drafted by the court. While in its long discussion of the facts the court occasionally interposed argumentative remarks that the appellee likely will term "conclusions of law" (*see, e.g.* Appx. 335 ("Therefore, because Lafarge was no longer mining the property, it was not obligated to continue to pump the Chouteau Pit")), none of these remarks actually discuss any legal bases.

These brief statements were not conclusions of law. They were mere arguments citing to no authority and providing no legal discussion. Nowhere in the final order did the court cite anything besides the Record or discuss any legal

principles. It apparently believed that Lafarge did not breach the mineral lease and Mid-Missouri was not damaged. But while the court thoroughly stated the findings of facts from which it ostensibly derived these beliefs – taken nearly verbatim from Lafarge's proposal – the court gave no explanation of how any controlling law mandated that result. Rather, it simply issued findings of fact followed by a single-paragraph "conclusion" granting judgment in favor of Lafarge (Appx. 353-54).

The court could have adopted Lafarge's proposed conclusions of law, which purport to explain at length just why under Missouri law Mid-Missouri had not met its burden of proof. Lafarge cited to numerous federal and Missouri authorities governing what constitutes notice and breach, the terms and rights involved in a mineral estate, what defines "mining," and how courts should resolve disputes over water (Appx. 196-208). While Mid-Missouri disagrees with Lafarge's assessment of both the facts and the law, had the district court agreed with Lafarge and entered Lafarge's proposed conclusions of law, the court at least would have met the terms of Rule 52(a), providing Mid-Missouri meaningful appellate review of the legal basis for its decision that it could challenge in this Court.

As it stands, however, the Court is left to infer the "the applicable legal analysis," *Gupta*, 654 F.2d at 415 "the bases of the trial court's decision," *Kruger*, 300 F.2d at 831, and "the grounds upon which the district court based its decision,'" *Fogarty*, 767 F.2d at 515. As a result, Mid-Missouri is unable to appeal

the district court's legal conclusions. Neither it nor this Court can have any clear understanding of what those conclusions were or how the court reached them.

Very few reported cases have involved Rule 52(a) orders that make findings of fact but fail to state any actual conclusions of law. Cases construing the "separateness" requirement of Rule 52(a) more often involve orders that make legal conclusions but lack adequate findings of fact. *See, e.g., SquirtCo v. Seven-Up Co.*, 628 F.2d 1086, 1092 (8th Cir. 1980); *Finney v. Ark. Bd. of Correction*, 505 F.2d 194, 212 (8th Cir. 1974). In those cases, if "(1) the record itself sufficiently informs the court of the basis for the trial court's decision on the material issue, or (2) the contentions raised on appeal do not turn on findings of fact," the district court's failure is no bar to appellate review. *Id.* at 212 n.16.

But the few cases that have involved solely missing conclusions of law in Rule 52(a) orders hold that if reviewing the district court's Rule 52(a) order would require the Court "to infer the conclusions of law," the judgment should be vacated and the case remanded for "conclusions in compliance with Rule 52(a)." *Supermercados Econo, Inc. v. Integrand Assur. Co.*, 375 F.3d 1, 4-5 (1st Cir. 2004). When a district court makes "no conclusions of law on [an] issue at all" in a Rule 52(a) order, the appellate court "cannot without resorting to speculation determine the basis on which the district court rested its decision," and "the appropriate procedure is to vacate the decision of the district court and remand for

an explanation of its decision." *Ford Motor Co. v. Lloyd Design Corp.*, 22 Fed. Appx. 464, 469 (6th Cir. 2001).

The Supreme Court has noted that "mingling" findings of fact in a Rule 52(a) order with legal arguments fails to comply with Rule 52(a). *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940). It "is of the highest important to a proper review of the action of a court … that there should be fair compliance with Rule 52(a)." *Id.* Consequently, a district court's Rule 52(a) order containing statements of ultimate fact that "are mingled" with arguments of law should be reversed and the case remanded for separate, "explicit findings of fact and conclusions of law," as Rule 52(a) mandates. *See Daniel v. Wash. County Bd. of Ed.*, 488 F.2d 82, 83 (5th Cir. 1973) (following *Mayo, supra*).

When the district court has failed under Rule 52(a) "adequately to explain its conclusions of law, as distinguished from findings of fact," it is "advisable" for the Court of Appeals to remand the case "to require the district court to explicitly state the legal basis for" reaching its ultimate conclusion. *Schwartz v. Internal Rev. Svc.*, 511 F.2d 1303, 1306-07 (D.C. Cir. 1975). Indeed, in *Fogarty*, *supra*, this Court vacated the trial court's judgment and remanded the case precisely for this reason: the Rule 52(a) order failed to state the separate findings of fact and conclusions of law, as required. 781 F.2d at 515. In *Fogarty*, the Rule 52(a) order at issue contained no conclusions of law at all. *Id.*

The district court's Rule 52(a) order in this case does not facilitate this Court's review. Mid-Missouri has no way to appeal its conclusions of law and meaningfully discuss them before this Court, because the district court entered no conclusions of law at all. It only mingled among its findings of fact a few cursory, argumentative statements citing to no authority whatsoever.

In so doing, the district court failed to comply with Rule 52(a) and prejudiced Mid-Missouri's ability to have a meaningful appeal of the law at issue. The trial court left this Court "to infer the conclusions of law." *Supermercados*, 375 F.3d at 4. It made "no conclusions of law on the issue[s] at all," and this Court "cannot without resorting to speculation determine the basis on which the district court rested its decision." *Ford Motor Co.*, 22 Fed. Appx. at 469. The district court failed "adequately to explain its conclusions of law, as distinguished from findings of fact." *Schwartz*, 511 F.2d at 1306.

The "appropriate procedure" in this situation "is to vacate the decision of the district court and remand for an explanation of its decision." *Ford Motor Co.*, 22 Fed. Appx. at 469. It is "advisable" for this Court "to require the district court to explicitly state the legal basis for" reaching its ultimate conclusion. *Schwartz*, 511 F.2d at 1307. Therefore, the Court should follow *Fogarty*, 781 F.2d at 515, vacate the judgment below, and remand this case for the making of "conclusions in compliance with Rule 52(a)." *Supermercados*, 375 F.3d at 5.

II. The district court erred in finding (a) that the Lease did not obligate Lafarge to continue "to pump from and prevent the accumulation of water in" the Chouteau Pit after 2004, and (b) that Lafarge met this obligation prior to 2004, because these findings were contrary to the terms of the Lease, the evidence, and the court's other findings; the Lease obligated Lafarge to keep the Chouteau Pit dry from 2002 until it was terminated in June, 2006, and Lafarge did not meet this obligation.

Standard of Review

This is an appeal from a judgment the district court entered on partial findings after a bench trial. Rule 52(c), Federal Rules of Civil Procedure, requires that such a judgment be in the form prescribed by Rule 52(a). Under Rule 52(a), "The court must find the facts specially and state its conclusions of law separately." This Court reviews the conclusions of law in a Rule 52(a) order *de novo* and its findings of fact for clear error. *Kelley v. S. Pac. Co.*, 419 U.S. 318, 323 (1974).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 365, 395 (1948)). When "an adjudication of parties' rights and obligations under a contract rests

solely upon a reading of the contract itself," the Court's review of the contractual language is *de novo*. *In re Stevenson Assocs, Inc.*, 777 F.2d 415, 418 (8th Cir. 1985).

* * *

The parties' written mineral lease granted Lafarge the rights to enter and to mine the leased property. As a condition of these rights, it also obligated Lafarge "to pump from and prevent the accumulation of water" in a pit on Mid-Missouri's land adjacent to the lease property until Mid-Missouri actually begins operating the adjacent land as a landfill or the land is reclaimed. Mid-Missouri alleged that Lafarge had breached the lease by failing to meet this obligation from 2002 through 2006. The district court found that Lafarge was only obligated to do so as long as it was mining, and it had stopped mining in 2004. It also found that Lafarge had met this obligation by keeping the water level in the pit the same as when the previous owner of the leased property had owned it. Was this error?

A. While the district court's findings of fact are subject to the "clearly erroneous" test, the Court should review the findings of fact in this case especially critically because the district court adopted the appellee's proposed findings of fact nearly verbatim.

As discussed in Point I, in issuing its Rule 52(a) order the district court mechanically adopted Lafarge's proposed findings of fact. It omitted the portions of Lafarge's proposal that were irrelevant to the judgment, reordered the remaining paragraphs, drafted a few argumentative statements citing to no authority that it

mingled into the findings of fact. As the Statement of Facts, above, shows, the district court's order corresponds with Lafarge's proposal as follows:

District court's paragraphs	Paragraphs of Lafarge's proposal
1-10 (Appx. 326-29)	1-10 (Appx. 122-24)
14-19 (Appx. 329-31)	11-16 (Appx. 124-26)
20-37 (Appx. 331-34)	94-126 (Appx. 152-62)
39-55 (Appx. 335-40)	18-42 (Appx. 126-35)
56-60 (Appx. 340-41)	56-61 (Appx. 139-43)
64-72 (Appx. 341-45)	79-93 (Appx. 148-52)
73-91 (Appx. 345-48)	127-145 (Appx. 163-69)
93-107 (Appx. 349-52)	63-78 (Appx. 143-47)
108-112 (Appx. 352-53)	146-153 (Appx. 169-71)

The court only drafted the introduction and conclusion, a portion of paragraph 10, a portion of paragraph 107, and paragraphs 38, 61 through 63, and 92. These portions only make short, argumentative statements that do not cite either the record or any authority. The court even forgot to remove one of Lafarge's footnotes, number 3, which Lafarge had included in its proposal to ask that a certain trial exhibit in controversy be admitted: "Because MMW 'opened the

door' on this issue, Lafarge respectfully submits that Def. Ex. 262-E should be admitted on the merits" (Appx. 344).

While the "clearly erroneous test is to be applied whether the lower court personally prepares such findings and conclusions or adopts those submitted by counsel," nonetheless the "use of this practice by district judges" of adopting counsel's proposed findings of fact is "disfavored." *George W. Bennett Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.*, 502 F.2d 1045, 1049 n.17 (5th Cir. 1974); *see also United States v. Howard*, 360 F.2d 373, 378 n.7 (3d Cir. 1966). This is because findings of fact "drawn with the insight of a disinterested mind are … more helpful to the appellate court." *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656 (1964).

In his opinion for the Court in *El Paso*, Justice Douglas quoted a passage that Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit wrote advising district judges of their duty under Rule 52(a):

> Who shall prepare the findings? Rule 52 says the court shall prepare the findings. 'The court shall find the facts specially and state separately its conclusions of law.' We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. … This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52 – the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit.

> I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.

Id. at 656 n.4 (quoting J. Skelly Wright, SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 166 (1963)). Judge Wright earlier had spent many years as a district judge himself.

Mechanically adopting findings proposed by one of the parties has a consequence that some of findings made by district court will not be supported by evidence. *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942). "Ordinarily," it is "the better practice for the trial court to prepare its own findings with such help as it may derive from counsels' requests." *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 (1st Cir. 1970). "The practice of adopting proposed findings verbatim should be limited to extraordinary cases where the subject matter is of a highly technical nature requiring expertise which the court does not possess." *Id.*

> The purpose of [Rule 52(a)] is to require the trial judge to formulate and articulate his findings of fact and conclusions of law in the course of his consideration and determination of the case and as a part of his decision making process, so that he himself may be satisfied that he has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and th[e] court on appeal may be fully informed as to the bases of his decision when it is made. Findings and conclusions prepared ex post facto by counsel, even

> though signed by the judge, do not serve adequately the function contemplated by the rule.

Roberts v. Ross, 344 F.2d 747, 752 (3d Cir. 1965).

"The independence of the court's thought process may be cast in doubt when the findings proposed by one of the parties winds up as the court's opinion." *Las Colinas*, 426 F.2d at 1009. The practice of "adopt[ing] the findings … prepared by victorious counsel" raises "the possibility that such findings …, prepared by the nonobjective advocate, may not fully and accurately reflect the thoughts entertained by the impartial judge at the time of his initial decision." *Indust. Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970). Mechanically adopting counsel's proposed findings of fact "is an abandonment of the duty imposed on trial judges by [Rule 52(a)], because findings so made fail to 'reveal the discerning line for decision.'" *Kelson v. United States*, 503 F.2d 1291, 1296 (10th Cir. 1974) (quoting *El Paso*, 376 U.S. at 656-57). "[T]he greater the extent to which the court's eventual decision reflects no independent work on its part, the more careful [this Court is] obliged to be in [its] review." *Las Colinas*, 426 F.2d at 1010.

As such, "While the 'clearly erroneous' rule of [Rule 52(a)] applies to a trial judge's findings of fact whether he prepared them or they were developed by one of the parties and mechanically adopted by the judge," the Court "'can take into account the District Court's lack of personal attention to factual findings in

applying the clearly erroneous rule.'" *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980) (citation omitted). "Thus, when a district court adopts a party's proposed findings of fact, '[the appellate court] examines the findings *especially critically* when deciding whether they are clearly erroneous.'" *Andre v. Bendix Corp.*, 774 F.2d 786, 800 (7th Cir. 1985) (citations omitted) (emphasis added).

In this case, the district court mechanically adopted Lafarge's proposed findings of fact. In engaging in this disfavored practice, the court abandoned the duty imposed on it by Rule 52(a), and its findings of fact do not reflect the thoughts entertained by an impartial trial judge. Thus, while the "clearly erroneous" standard still applies to the findings of fact in this case, this Court should be more careful in reviewing those findings. The Court should examine the district court's findings of fact especially critically when deciding whether they are clearly erroneous.

B. The district court erred in finding (a) that the Lease did not obligate Lafarge to continue to prevent the accumulation of water in the Chouteau Pit after 2004, and (b) that Lafarge did meet this obligation before 2004.

As discussed in Point I, although the trial court issued numerous findings of fact in its Rule 52(a) order, it did not issue any conclusions of law whatsoever. This Court is left to speculate just how the district court's findings of fact legally necessitated the result that judgment should be entered for Lafarge. As Mid-

Missouri explained in Point I, this alone necessitates that the judgment be vacated and the case remanded for entry of proper conclusions of law.

But to the extent that the district court did make findings about what result the facts necessitated, some of them were error: specifically (a) that Lafarge was not obligated to prevent the accumulation of water in the Chouteau Pit after 2004, and (b) that Lafarge did meet this obligation before 2004.

Mid-Missouri alleged that Lafarge had breached the Lease by failing to pump from and prevent the accumulation of water in the Chouteau Pit. Under a heading "Failure to Pump the Chouteau Pit" (Appx. 330), the district court found that "because Lafarge was no longer mining the property, it was not obligated to continue to pump the Chouteau Pit" (Appx. 335). The district court premised these findings on a fundamental misreading of the Lease. Read correctly, and taking the other findings of fact as true, the court should have granted judgment for Mid-Missouri on its claims concerning Lafarge's failure to pump from and prevent the accumulation of water in the Chouteau Pit between 2002 and June, 2006.

In Missouri, "[t]he primary rule in the interpretation of a contract is to ascertain the intention of the parties and to give effect to that intention." *Speedie Food Mart, Inc. v. Taylor*, 809 S.W.2d 126, 129 (Mo. App. 1991). Extrinsic evidence to ascertain this intention is only admitted if the contract is unclear and ambiguous. *Id.* The test for determining if an ambiguity exists in a written

contract is "whether the disputed language, in the context of the entire agreement, is reasonably susceptible of more than one construction giving the words their plain meaning as understood by a reasonable average person." *Id.*

i. The Lease required Lafarge to keep the Chouteau Pit free of water until Mid-Missouri actually began using its retained property as a landfill or until the reclamation of the property began; whether Lafarge was conducting mining operations was irrelevant.

In its Rule 52(a) order, the district court cited to paragraph 6(a) of the Lease, which grants Lafarge a right of entry on Mid-Missouri's adjacent retained property "during the term of the lease" for a variety of reasons, including "to meet its obligations to pump water from the Chouteau Pit into the Lake as described in paragraph 4(d)" (Appx. 262). That paragraph goes on to state, as the district court quoted (Appx. 329):

> The right of entry shall continue for the discharge and removal of water as described above so long as either [Lafarge] or its successors and assigns is conducting mining operations on the Leased Property and/or [Lafarge's North Property].

(Appx. 262).

The district court found that the evidence was that Lafarge had ceased its mining operations on the leased property in 2004 (Appx. 334). From this, the court found that "because Lafarge was no longer mining the property," under paragraph 6(a) of the Lease "it was not obligated to continue to pump the Chouteau Pit" (Appx. 335).

Paragraph 6(a), however, does not detail the terms of Lafarge's obligation to pump the Chouteau Pit. Instead, that language is contained in paragraph 4(d), as paragraph 6(a) references:

> Obligation to Pump. As an additional condition to [Lafarge]'s exercise of its right to mine (and exercise its right of entry as granted in paragraph 6 below), [Lafarge] shall use reasonable efforts *to pump from and prevent the accumulation of water in* the area located on [Mid-Missouri]'s Retained Property commonly known between the parties as *the "Chouteau Pit"*, and discharge such water into the lake located at the northeastern corner of [Mid-Missouri]'s Retained Property (the "Lake") *until* such time that *[Mid-Missouri]'s Retained Property is actually used as a solid waste disposal area or, if not so used, when the land reclamation permit currently affecting such property necessitates the commencement of the complete reclamation of such property*.

(Appx. 261) (emphasis added).

Thus, the provision of the Lease titled "Obligation to Pump" states plainly that for as long as it has the "right to mine," Lafarge is obligated "to pump from and prevent the accumulation of water" in the Chouteau Pit "until" the "Retained Property is actually used as a solid waste disposal area" or when "the complete reclamation" of the property is necessary. The terms of when Lafarge's obligation to pump the Chouteau Pit ends are stated in paragraph 4(d), "Obligation to Pump."

The provision that the district court found to be controlling, paragraph 6(a), plainly is not. Paragraph 6(a) merely describes the terms of Lafarge's right of entry onto Mid-Missouri's retained property, on which it was hoping to build the

landfill. The district court interpreted this irrelevant paragraph incorrectly and gave it undue weight.

Under Paragraph 6(a), "During the term of the Lease," Lafarge was extended the right of entry onto the retained property "to meet its obligations to pump water from the Chouteau Pit … as described in paragraph 4(d)" (Appx. 262). If, for some reason, the Lease term had expired, but Lafarge was conducting mining in the area, the right of entry would continue as long as the mining was continuing (Appx. 262). But during the term of the lease, Lafarge *always* had the right to enter to pump the Chouteau Pit. If Lafarge was not mining, as the district court found, then its right of entry onto the adjacent retained property, not the leased property, only would hinge on whether the entry was during the term of the lease. The breaches Mid-Missouri alleged between 2002 and June, 2006, plainly were within the term of the Lease.

The right of entry provisions in paragraph 6(a) say nothing of how long Lafarge was obligated to pump out the Chouteau Pit. Paragraph 4(d) does, and controls that question. Paragraph 4(d) expressly obligates Lafarge to pump the Chouteau Pit and "prevent the accumulation of water" in the pit until Mid-Missouri actually began landfill operations on the retained property or the retained property was entirely reclaimed.

ii. Even taking the district court's non-contract findings as true, under a correct reading of the Lease Lafarge breached it by failing to prevent the accumulation of water in the Chouteau Pit at times between 2002 and June, 2006.

There was no evidence that Mid-Missouri had actually begun landfill operations on the retained property by June, 2006, or that the property had been entirely reclaimed. Neither contingency alleviating Lafarge of its obligation to pump the Chouteau Pit under paragraph 4(d) had in fact occurred. Even if Lafarge were not actively mining, the district court found that the Lease gave it the right to mine on the leased property until 2026 (Appx. 328). The Lease was not terminated until June, 2006, when Mid-Missouri declared Lafarge to be in default (Appx. 69). Mid-Missouri alleged that Lafarge's breach of failing to pump from and prevent the accumulation of water in the Chouteau Pit extended back to 2002 (Appx. 28).

The thirty-year term of the Lease did not mean that Lafarge would be blasting and hauling mined material continuously from 1996 to 2026. But the right to enter the leased property and right to mine was Lafarge's for those thirty years, as long as it was licensed to do so. During the period of that time before Mid-Missouri actually began operating the landfill on the retained property or the retained property was entirely reclaimed, Lafarge was obligated to prevent the accumulation of water in the Chouteau Pit under paragraph 4(d) of the Lease.

Mid-Missouri acknowledges that it generally terminated Lafarge's right of entry onto the retained property on June 30, 2004, due to impending construction

of the landfill, as the district court found (Appx. 331). But Mid-Missouri specifically told Lafarge that it still had the right of entry onto the retained property under paragraph 6(a) of the Lease to meet its "obligation to pump water from the Chouteau Pit" (Appx. 68).

In fact, Lafarge pumped water from the Chouteau Pit up until January, 2005 (Tr. 401), months after the general right of entry was terminated in June, 2004 (Appx. 331). Lafarge claimed it had pumped the Chouteau Pit "dry" in January, 2005 (Tr. 401). Mr. Crider, whose written reports the district court found credible, extensively detailed Lafarge's pumping endeavors after June, 2004 (Appx. 332). His written activity report for June 28 through July 2, 2004, stated, "The Chouteau Pit is just about pumped out again, but we're supposed to have a big storm this weekend again" (Appx. 332). His report for July 12, 2004, stated, "Lafarge has just about got the Chouteau Pit pumped out again" (Appx. 332). His report from October 4 through October 15, 2004, stated, "Lafarge is doing a good job pumping the Chouteau Pit with all the rain" (Appx. 332).

Apparently, in June, 2004, when Lafarge stopped actively blasting and hauling rock, it did not believe that Mid-Missouri's general termination of its right to enter the retained property alleviated it from its obligation to pump water out of the Chouteau Pit. Otherwise, Lafarge would have been trespassing, which it plainly was not. Regardless of whether Lafarge was actively blasting and hauling

rock, it was obligated to prevent the accumulation of water in the Chouteau Pit until Mid-Missouri actually began landfill operations on the retained property or the property was entirely reclaimed.

The breach regarding the Chouteau Pit Mid-Missouri described in its complaint extended back to 2002 (Appx. 27). It alleged that Lafarge was obligated to prevent "the accumulation of water" in the Chouteau Pit "by pumping it so that it was free of water" (Appx. 25), and also that Lafarge was "required to keep the Chouteau Pit pumped free of water" (Appx. 26). Mid-Missouri alleged that Lafarge had failed adequately to meet these obligations "since 2002" (Appx. 27).

Based on its erroneous interpretation of paragraph 6(a) of the Lease, taken verbatim from Lafarge's proposed language, the district court found that, for the period after 2004, Lafarge was not obligated to pump water from the Chouteau Pit (Appx. 334-35). It made no findings on whether Lafarge had done so or not after 2004 (Appx. 334-35). Lafarge claimed it last had done so in January, 2005 (Tr. 401). The district court accepted reports that Lafarge was pumping water out of the pit after Mid-Missouri terminated its general right of entry (Appx. 332). For the period *before* 2004, it found that "Lafarge complied with its obligation under the Mineral Lease to pump the Chouteau Pit at least through the end of 2004" (Appx. 333).

The court based this finding on several pieces of evidence. The Chouteau Pit is 70 or 80 feet deep and proceeds down through two layers of rock, the Burlington rock and the Chouteau rock (Appx. 331). "The Burlington layer of rock resides on top of the Chouteau layer" (Appx. 331). At trial, "Mr. Menefee," the president of the company to whose Lease rights Mid-Missouri had succeeded, "testified that he maintained the water level between the top of the Chouteau rock and the bottom of the Burlington rock" (Appx. 331). "Mr. Fitzpatrick who previously worked for Menefee and then continued his employment with Lafarge, also testified that Lafarge maintained the same water level in the Chouteau Pit as Menefee" (Appx. 331).

"Additionally, Mr. Stoker, who was in charge of pumping the Chouteau Pit from September 2000 until the fall of 2001, also testified to maintaining the water level under the Burlington rock layer and within the Chouteau rock layer" (Appx. 331-32). "Topographical data also proves that Lafarge maintained the same water level as Menefee" (Appx. 332). Lafarge even may have been "keeping the water level a tenth of a foot lower than Menefee" (Appx. 332). The court noted that "Despite taking multiple photos of the site, not one MMW photo shows the Chouteau Pit full of water between 2002-2004" (Appx. 332).

Mid-Missouri, however, did not allege in court that Lafarge's breach was necessarily in keeping the pit "full of water." It alleged that Lafarge had failed "to keep the Chouteau Pit *pumped free of water*" (Appx. 26) (emphasis added).

In paragraph 4(d), the Lease describes Lafarge's "obligation to pump" as requiring it "to prevent the accumulation of water" in the Chouteau Pit. The plain language of the Lease obligated Lafarge to keep the Chouteau Pit *dry*, as it occasionally attempted to do after Mid-Missouri complained in writing (Appx. 331-32). While Menefee may have kept the water level between the top of the Chouteau rock and the bottom of the Burlington rock, and Lafarge may have kept the same water level, doing merely that patently did *not* meet Lafarge's obligation under paragraph 4(d) of the Lease. That Mr. Menefee did the same is irrelevant – he did not seek to build a landfill on the property.

The district court found that Lafarge did not keep the pit dry, but rather that it kept the water at the same level as Menefee, which plainly was *not* dry. Menefee may not have "prevented the accumulation of water" in the Chouteau Pit, but Lafarge was obligated to. Taken as true, the district court's findings regarding the level to which Lafarge pumped water from the Chouteau Pit plainly show that Lafarge *did not* meet its obligation under paragraph 4(d) of the Lease.

The Lease required Lafarge to prevent the accumulation of water in the Chouteau Pit – to keep it dry – as long as it had the right to mine on the leased

property, except until Mid-Missouri started using the retained property as a landfill or the retained property was reclaimed. By June, 2006, when Mid-Missouri declared Lafarge in default and terminated the Lease, Mid-Missouri had not actually started using the retained property as a landfill, and the retained property had not been reclaimed. The district court erred in finding that Lafarge had met this obligation prior to 2004, and after 2004 was not so obligated at all. Even taking its other findings as true, the court entirely misread and misinterpreted the portions of the Lease concerning Lafarge's obligation to keep the Chouteau Pit free of water. Under a correct interpretation, the facts it found necessitate a different conclusion. This is one of the unfortunate results of a district court mechanically adopting one counsel's proposed findings.

iii. The Lease's notice-and-cure provision does not hinder Mid-Missouri's claim that Lafarge breached the Lease by failing to pump from and prevent the accumulation of water in the Chouteau Pit between 2002 and June, 2006, because that provision addresses termination of the Lease, not claims for breach.

Because it did not issue any conclusions of law at all, the district court did not directly conclude that, as a matter of law, Mid-Missouri had failed to give Lafarge adequate notice of its breach in failing to prevent the accumulation of water in the Chouteau Pit, barring it from suit. It did, however, briefly discuss the Lease's "event of default" provisions (Appx. 329-30) and find that besides a letter in 2002, Mid-Missouri did not send any "additional notices of breach" regarding

this obligation "until March 2006 (Appx. 330). The district court misunderstood the Lease's "event of default" provisions. It also misunderstood what constitutes "notice" in Missouri.

The district court found that "before an 'Event of Default' can occur" under the Lease, Mid-Missouri "is required to give written notice to Lafarge of its alleged breach. Lafarge then has 60 days to cure the breach, or commence the cure within 60 days and diligently pursue completion of the cure" (Appx. 330). But the provision of the Lease to which the court cited, paragraph 15(a), said nothing of barring Mid-Missouri from suing Lafarge. Rather, it deals exclusively with Mid-Missouri terminating the Lease should Lafarge default. The Lease is crafted in such a way that default is not a condition precedent to a suit for breach. The parties can sue for breach while the thirty-year lease continues. Mid-Missouri did not actually exercise its right to declare Lafarge in default until June, 2006, after giving notice and opportunity to cure that was legally sufficient in Missouri.

Paragraph 15(a) states as follows:

> Default. The following shall constitute a default or an "Event of Default" under this Lease: (a) [Lafarge]'s failure to perform any of the terms, conditions or covenants of this Lease to be observed or performed by it for more than sixty (60) days after written notice thereof, or if such cure cannot reasonably be effected within such sixty (60) days period and diligently to pursue completion of the cure.

(Appx. 266). The remainder of paragraph 15 provides the effect on the agreement of an "Event of Default:"

> If any Event of Default occurs [Mid-Missouri], besides all such other rights or remedies it may have hereunder, or in law in equity [*sic*], shall have the immediate right to enter the Leased Property and take possession thereof and of all permanent improvements thereon and may remove all persons and property from the Leased Property by force, summary action, or otherwise, and such property may be removed and stored in a public warehouse or elsewhere at the cost of and for the account of [Lafarge], all without service of notice or resort to legal process, and without being deemed guilty of trespass or becoming liable for any loss or damage which may be occasioned thereby.

(Appx. 266).

Nowhere does the Lease's default provision, paragraph 15, state or imply that a default is a condition precedent to Mid-Missouri's ability to file a lawsuit against Lafarge for a breach of the Lease. Generally, in Missouri, "Conditions precedent are disfavored and contract provisions are construed as such only if unambiguous language so requires or they arise by necessary implication. … A condition precedent denotes an event, which qualifies a duty under an already enforceable contract." *Jetz Serv. Co. v. Botros*, 91 S.W.3d 157, 162 (Mo. App. 2002). Where notice-and-cure is expressly a condition precedent to a party having the ability to sue on the contract, it will be enforced as such. *Gillioz v. State Hwy. Comm'n*, 153 S.W.2d 18, 21 (Mo. 1941).

The law of Missouri is that, if the parties in this case had intended a declaration of default in compliance with paragraph 15(a) of the Lease to be a condition precedent to filing a lawsuit for breach, that intention plainly must have

been expressed in the Lease. It was not, either in paragraph 15(a) or anywhere else. As a result, paragraph 15 cannot operate to bar Mid-Missouri's claim that Lafarge breached the Lease by failing to pump from and prevent the accumulation of water in the Chouteau Pit, and the district court erred in suggesting otherwise. Instead, written notice of a breach is a prerequisite only to the finding of a notice of default, which in turn triggers Mid-Missouri's ability to immediately enter and take the property and permanent improvements on it.

When in June, 2006, Mid-Missouri eventually *did* declare Lafarge to be in default, it *did* comply with paragraph 15 vis-à-vis its claim that Lafarge had breached the lease by failing to meet its obligation to pump. It filed this case in November, 2006, months later. Lafarge did not countersue Mid-Missouri for breach in somehow invalidly declaring it to be in default and terminating its right of entry. The district court recounts these events well. "On October 28, 2002, MMW sent Lafarge a notice of breach letter wherein it" stated that Lafarge was in breach of the lease in part because "water still remains" in the Chouteau Pit (Appx. 330).

> In response to the October 2002 letter, Lafarge met with several [Mid-Missouri] representatives to discuss its concerns. Lafarge denied that it was in breach of the Mineral Lease and concluded that [Mid-Missouri] did not have a good understanding of the terms of the Mineral Lease. However, in order to show good will Lafarge began draining the water 'as low as possible' from the Chouteau Pit.

(Appx. 330) (citations to record omitted).

Then, on March 18, 2006 "[Mid-Missouri] sent Lafarge a second written notice of breach wherein [Mid-Missouri] demanded," in part, that Lafarge "pump water from the Chouteau Pit" (Appx. 331). Lafarge responded on March 29, 2006, stating that it "has no liability" to pump water from the Chouteau Pit (Appx. 79). On June 13, 2006, after more than 60 days had gone by and Lafarge had taken no action to cure its breach or diligently pursue completion of such a cure, Mid-Missouri sent Lafarge a letter advising "that Mid-Missouri Waste Systems, LLC is holding Lafarge in default and is immediately terminating Lafarge's right to enter on to [the leased property]" (Appx. 69), partly "due to Lafarge's decision to stop pumping" the Chouteau Pit (Appx. 68).

In Missouri, even oral notice can be sufficient under a written-notice-and-cure provision if written notice would be "useless," because "the law does not require a party to do a useless act." *Darr v. Structural Sys., Inc.*, 747 S.W.2d 690, 694 (Mo. App. 1988). "The law does not require written notice to be given when doing so would be a vain and useless act." *Stacey v. Redford*, 226 S.W.3d 913, 918 (Mo. App. 2007). Even though it did not have to in order to sue Lafarge for breach of contract, Mid-Missouri plainly did provide Lafarge the requisite notice to trigger an Event of Default under paragraph 15(a), both in 2002 and again in 2006.

The Lease did not put Mid-Missouri under any duty to send Lafarge a continuous stream of breach letters regarding the Chouteau Pit. Doing so would

have been a "vain and useless act" that the law of Missouri does not require. From as early as 2002, Lafarge knew well that Mid-Missouri expected it to fulfill its obligation "to pump from and prevent the accumulation of water in" the Chouteau Pit by keeping it dry. When Lafarge did not do so in 2002, Mid-Missouri notified it that it was in breach of the Lease. Lafarge acknowledged this and took some steps to cure its failure. When in 2006 Mid-Missouri again found the Chouteau Pit not pumped dry and found out that Lafarge had not been pumping the Chouteau Pit at all since 2005, it reminded Lafarge of its obligation. That time, Lafarge disclaimed liability. Thereafter, Mid-Missouri waited more than 60 days, declared Lafarge to be in default, and then sued it for breach of contract.

The notice-and-cure provision of the Lease is a condition precedent only to an event of default, not Mid-Missouri's ability to sue on the lease. In any case, Mid-Missouri sued on the lease only after declaring Lafarge in default pursuant to the Lease. Taking the district court's findings as true, Mid-Missouri gave Lafarge sufficient notice and opportunity to cure its failure to prevent the accumulation of water in the Chouteau Pit, properly declared it in default, and then filed this case. To the extent that the district court in any way may have found that Mid-Missouri failed to adhere to paragraph 15(a) vis-à-vis the Chouteau Pit and found that doing so affected the result of that issue in some manner, that finding was error.

The Lease obligated Lafarge to pump from and prevent the accumulation of water in the Chouteau Pit at all times between 2002 and June, 2006. Lafarge did not meet this obligation. The district court's findings that the Lease did not require Lafarge to pump out the Chouteau Pit after 2004 and that Lafarge met this obligation before 2004 were error. Under a correct reading of the Lease, the district court's other findings of fact necessitate a different result than the court reached. This Court should vacate the district court's judgment and remand this case for judgment in Mid-Missouri's favor on Lafarge's breach of the Lease in failing to meet this requirement and any resulting damages.

Conclusion

The Court should vacate the district court's judgment. It should remand this case for entry of (1) proper findings of fact and separate conclusions of law in compliance with Rule 52(a), Federal Rules of Civil Procedure, (2) judgment in Mid-Missouri's favor on its claim that Lafarge breached the Lease by failing to pump out and prevent the accumulation of water in the Chouteau Pit at times between 2002 and June, 2006, and (3) further proceedings.