IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20125

Glassell Non-Operated Interests, Limited; ACG3 Mineral Interests, Limited; Yates Energy Corporation,
Plaintiffs – Appellees

v.

EnerQuest Oil & Gas, L.L.C.,
Defendant – Appellant

Appeal from the United States District Court
for the Southern District of Texas
Case No. 4:16-CV-1573

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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The Honorable Lynn N. Hughes
United States District Judge
Southern District of Texas

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STATEMENT REGARDING ORAL ARGUMENT

EnerQuest respectfully requests oral argument. Argument will permit counsel to address the workings of the contract provisions at issue and the nuanced law governing the Statute of Frauds in light of the unique factual circumstances at issue in this case.

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STATEMENT OF JURISDICTION

The district court had diversity jurisdiction pursuant to 28 U.S.C. § 1332. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the order from which the appeal is taken is a final order of a district court of the United States, disposing of all parties' claims. In addition, this appeal is from an order granting injunctive relief, and therefore this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Did the district court improperly construe the contract at issue by failing to consider and give effect to every relevant provision and by failing to enforce those provisions as written?
2. Did the district court err in holding that the contract at issue satisfies the Statue of Frauds where:
    a. the contract fails to identify the subject real property with reasonable certainty;
    b. the contract contains an insufficient "key or nucleus" description of the property to support the backstop use of extrinsic evidence to clarify that description;
    c. Texas law expressly forbids the use of the specific types of extrinsic evidence relied upon when not referenced in the contract;
    d. the district court made an improper credibility determination regarding competing affidavits from the parties' expert surveyors;
    e. the district court improperly relied upon extrinsic evidence to "supply the location" of the property, rather than to merely clarify the location from data already contained within the contract; and
    f. the partial performance exception does not apply?

INTRODUCTION

This suit arises from area of mutual interest ("AMI") provisions in a series of agreements between Plaintiff-Appellees Glassell Non-Operated Interests, Ltd. and ACG3 Mineral Interests, Ltd.[1] (collectively, "Glassell"), Plaintiff-Appellee Yates Energy Corporation ("Yates"), Defendant-Appellant EnerQuest Oil & Gas, L.L.C. ("EnerQuest"), and other parties, to develop oil and gas interests in Gonzales County, Texas, and DeWitt County, Texas. After two other parties to the contract, DKE Dyersdale, Inc. ("DKE") and Pati-Dubose, Inc. ("Pati-Dubose") assigned their pre-owned interests to EnerQuest, Glassell and Yates claimed that EnerQuest breached the AMI agreement by failing to offer to share those pre-owned interests. The parties filed cross motions for summary judgment, and the district court construed the contract in favor of Glassell and Yates and granted their motion for summary judgment.

This Court must reverse the district court's judgment and render judgment for EnerQuest for two independent reasons. First, the district court erred by not considering every provision of the contract and by not enforcing those provisions as written. Instead, in interpreting the AMI provisions, the court added words that do not exist in the contract, and the court's interpretation rendered multiple provisions meaningless. Construing the contract as a whole and giving effect to every provision, the only reasonable construction of the contract is that EnerQuest had no obligation to

[1] ACG3 Mineral Interests, Ltd., is the successor in interest to the Alfred C. Glassell III 1957 Trust, which was a party to the contract at issue. ROA.10.

offer to share the pre-owned interests. Second, and in the alternative, even if EnerQuest had such an obligation, the AMI provisions are unenforceable for failure to comply with the Statute of Frauds. The map purporting to show the real property subject to the AMI does not identify the property with reasonable certainty. And, contrary to Texas law, the district court improperly resorted to extrinsic evidence in the form of seismic mapping files not referenced in the AMI provisions or the map.

STATEMENT OF THE CASE

I. Facts

A. In October 2010 the parties entered the Seitel Seismic Agreement covering a 40-square-mile area in and around the Dubose Field.

EnerQuest, Glassell, and Yates have oil and gas interests in Gonzales and DeWitt counties in an area called the "Dubose Field." In October 2010, Yates, on behalf of itself, EnerQuest, and other parties, entered an agreement with Seitel Data Limited ("Seitel"), a provider of seismic data, to purchase 3D seismic licenses in a 40-square-mile area "in and around the Dubose Field" (the "Seitel Agreement"). ROA.210. A map attached to the Seitel Agreement purported to show the location of the 40-square-mile area (the "Seitel Map"). ROA.214.

B. In September and October 2011 the parties entered a Development Agreement.

A year later, on September 9, 2011, EnerQuest, Glassell and Yates entered a letter agreement with several other parties (the "Letter Agreement"). ROA.194. The

Letter Agreement contained an AMI agreement and memorialized the parties' agreement to farm out and develop their interests in the the Dubose Field using a third party operator. *Id.* A month after those parties (the "Original Parties")[2] signed the Letter Agreement, additional parties with working interests in the Dubose Field (the "New Parties")[3] sought to participate in the Letter Agreement. On October 5, 2011, the Original Parties signed an Amendment that allowed the New Parties to ratify the Letter Agreement (the "Amendment"). ROA.251. The next day the New Parties, including DKE and Pati-Dubose, formally ratified the Letter Agreement (the "Ratification"). ROA.259.

The Letter Agreement, the Amendment, and the Ratification comprise a development agreement (the "Development Agreement") among the Original Parties and the New Parties (collectively, the "Parties," and each individually, a "Party").

C. The Development Agreement contains AMI provisions that obligate the Parties to offer to share certain defined "Acquired Interests" but exclude interests the Parties already owned from the definition of "Acquired Interest."

The Development Agreement contains AMI provisions with an "Effective Date" of August 1, 2010. ROA.196. Under the AMI agreement the parties are mutually obligated to offer to share certain interests they acquire in the area with one an-

[2] The Original Parties are EnerQuest; Yates; Jalapeno Corporation ("Jalapeno"); Glassell, Glassell III 1957 Trust; and Curry Glassell. ROA.194.
[3] The New Parties are DKE; Cathy D. Dohnalek; Walter Mengden, Jr.; Walter Mengden III; Joseph Mengden; Carl Mengden; Susan Mengden; Michael Mengden; and Pati-Dubose. ROA.259.

other. The Development Agreement defines what interests must be shared and excludes from that definition certain interests.

i. The Parties are obligated to offer to share certain defined "Acquired Interests."

Sections 2.5, 2.6, and 2.7 of the Letter Agreement contain the obligation to share as follows:

> **2.5** . . . [A]ny Party who acquired an **Acquired Interest** within the AMI after the Effective Date but before the execution of this Agreement shall notify the other Parties promptly and in writing of the details of the acquisition of such **Acquired Interest** . . .
>
> **2.6** . . . [A]fter a Party acquires an **Acquired Interest** within the AMI after the execution of this Agreement, such Party shall promptly notify the other Parties in writing of the details of the acquisition of such **Acquired Interest** . . . A Party who acquired an **Acquired Interest** . . . shall be referred to as an "Acquiring Party," and the Parties receiving notification of an **Acquired Interest** shall be referred to as "Receiving Parties."
>
> **2.7** . . . [T]he Receiving Party may elect in writing to acquire its pro-rata share of such **Acquired Interest.**

ROA.197 (emphasis added). In short, the AMI agreement requires each Party to offer to share with each other Party any "Acquired Interest"—a defined term under the Development Agreement. Thus, a Party's obligation to offer to share a particular interest turns on whether that interest meets the definition of an "Acquired Interest."

ii. An interest must satisfy three requirements to meet the definition of "Acquired Interest."

To be an "Acquired Interest," an interest must meet three requirements and not fall under several specific exclusions. Section 2.1 of the Letter Agreement states the requirements for an interest to qualify as an "Acquired Interest":

> The AMI shall cover all lands within the 40 square miles covered by the Seitel Agreement plus the one-half (1/2) mile halo provided for under the COP/Seitel/Yates Agreement. The AMI shall cover and apply to (i) royalty interest, mineral interest, overriding royalty interest, production payment interest, net profits interest, or any other type of interest in oil, gas, or other minerals, (ii) any oil and gas lease, or (iii) any farmout agreement, . . . if such interest, lease, or agreement covers or includes lands located wholly or partly within the AMI and which were or are acquired after August 1, 2010 (the "Effective Date") . . . . Any such interest, lease or agreement acquired by a Party shall be referred to herein as an "Acquired Interest."

ROA.196. Thus, an "Acquired Interest" is generally any interest that meets three requirements: (1) it is covered by the AMI; (2) it is acquired by a Party; and (3) it is acquired after August 1, 2010.

iii. But certain interests are excluded from the definition of "Acquired Interest" even if they meet other requirements.

The general definition of "Acquired Interest" in section 2.1 is subject to four specific exclusions:

First, section 2.1 provides that any interest "acquired by Glassell from the Estates of Alfred C. Glasssell [sic], Jr. or Clare A. Glassell [ ], are [sic] excluded from the AMI." ROA.196. Glassell is an Original Party. The Estates of Alfred C. Glassell,

Jr. and Clare A. Glassell (the "Glassell Estates") are not parties to the Development Agreement. Under section 2.1, then, any interest Glassell acquired from the Glassell Estates after the Effective Date is excluded from the AMI. Consequently, any such interest is also excluded from the definition of "Acquired Interest," because it does not meet the first requirement—that it is covered by the AMI.

Second, section 2.3 of the Letter Agreement provides: "All interests, leases or agreements owned by a Party prior to the Effective Date (including non-consent interests acquired under existing joint operating agreements with respect thereto) shall not be considered part of or subject to the AMI." ROA.197. Any interest owned by an Original Party before August 1, 2010 is excluded from the definition of "Acquired Interest," because it also does not meet the first requirement of that definition—that it is covered by the AMI.

Third, consistent with section 2.3, section 1.4 of the Amendment provides: "If any New Party owned an interest within the AMI prior to the Effective Date, then upon the ratification of the Development Agreement by such New Party . . . such interest shall be excluded from the Existing AMI." ROA.252. Thus, any interest any New Party owned before August 1, 2010, is excluded from the AMI. As a result, any such interest is also excluded from the definition of "Acquired Interest," because the first requirement of that definition—covered by the AMI—is lacking.

Fourth, section 1.5 of the Ratification similarly provides: "All interests, leases or agreements owned by a New Party prior to the Effective Date (including non-

consent interests acquired under existing joint operating agreements with respect thereto) shall not be considered part of or subject to the AMI." ROA.260. Thus, the AMI does not cover or apply to any interest owned by any New Party prior to August 1, 2010. As a result, any such interest is excluded from the definition of "Acquired Interest," because the first requirement of that definition—covered by the AMI—is lacking.

iv. Additional exception from obligation to offer to share.

Finally, section 2.13 of the Letter Agreement provides an additional, different exclusion:

> Notwithstanding any other provision of this Agreement, it is understood that should Yates acquire all or any part of the interest of Jalapeno at any time, then Yates does not have to offer that interest to the other parties to this Agreement. Likewise, should Jalapeno acquire all or any part of the interest of Yates at any time, then Jalapeno does not have to offer that interest to the other parties to the Agreement.

ROA.199. Section 2.13 thus addresses any interest acquired at any time (1) by Yates from Jalapeno, or (2) by Jalapeno from Yates.[4] Unlike the four other exclusions discussed above, Section 2.13 does not state that such an interest is not part of the AMI and therefore not an "Acquired Interest." Instead, section 2.13 provides that Yates and Jalapeno "do not have to" comply with the obligation to offer to share any such

[4] Yates and Jalapeno are both Original Parties, and Yates and Jalapeno are related entities. *See* ROA.194 (reflecting that Jalapeno Corporation is represented by Harvey Yates, Jr.), 606.

interest under sections 2.5, 2.6, and 2.7 of the Letter Agreement, even though such an interest may meet the definition of an "Acquired Interest."

v. Summary of obligation to offer to share any "Acquired Interest" under Development Agreement.

In summary, sections 2.5, 2.6, and 2.7 of the Letter Agreement require each Party to offer to share with each other Party any "Acquired Interest." Section 2.1 defines an "Acquired Interest" in general as any interest that meets three requirements: (1) covered by the AMI; (2) acquired by a Party; and (3) acquired after August 1, 2010; subject to several specific exclusionary provisions. The following table summarizes the specific exclusions at issue:

EXCLUSIONARY PROVISIONS IN DEVELOPMENT AGREEMENT				
Exclusionary Provision	**Party Affected**	**Interest Affected**	**Effect on Meeting Requirements for Definition of "Acquired Interest" under § 2.1**	**Effect on Obligation to Offer to Share under §§ 2.5, 2.6 and 2.7**
Letter Agreement § 2.1	Glassell	Any interest acquired from the Glassell Estates after August 1, 2010	Such interest does not meet definition of "Acquired Interest" because it is not covered by AMI	Obligation not triggered because interest is not an "Acquired Interest"
Letter Agreement § 2.3	All Parties	Any interest owned by an Original Party prior to August 1, 2010	Such interest does not meet definition of "Acquired Interest" because it is not covered by AMI	Obligation not triggered because interest is not an "Acquired Interest"
Amendment § 1.4; Ratification § 1.5	All Parties	Any interest owned by a New Party prior to August 1, 2010	Such interest does not meet definition of "Acquired Interest" because it is not covered by AMI	Obligation not triggered because interest is not an "Acquired Interest"

Letter Agreement § 2.13	Yates and Jalapeno	Any interest acquired at any time (1) by Yates from Jalapeno, or (2) by Jalapeno from Yates	No effect	Excepted from obligation to offer to share, even if interest is an "Acquired Interest"

D. Neither the Development Agreement nor the Seitel Agreement adequately describes the lands subject to the AMI.

The Development Agreement states that the AMI "covers all lands within the 40 square miles covered by the Seitel Agreement plus the one-half (1/2) mile halo provided for under the COP/Seitel/Yates Agreement." ROA.196. The Development Agreement does not describe the 40 square miles or the halo beyond that statement. The Development Agreement attaches the Seitel Agreement, but the Seitel Agreement does not describe the 40-square-mile area. Instead, the Seitel Agreement attaches the Seitel Map, a black-and-white map. ROA.214.

The Seitel Map is not a Tobin map[5] but is a custom plat that lacks the characteristic information found in Tobin maps. On the Seitel Map, a heavy black line purports to show the boundary of the land subject to the AMI. *Id.* But this line does not even form a complete enclosure, meaning that it does not show where the AMI area ends. (The map is reproduced at page 34, *infra.*) That 40-square-mile area is supple-

[5] A Tobin map "includes names of surveys, general land office abstract numbers, names of owners in the chain of title, acreage amounts in each tract, survey lines for each tract, the lessors of oil, gas, and mineral leases covering each tract, and well sites . . . [and is] prepared using aerial photography to eliminate errors in . . . plotting." *Dixon v. Amoco Prod. Co.*, 150 S.W.3d 191, 195 (Tex. App.—Tyler 2004, pet. denied).

mented by a halo, described in the "COP/Seitel/Yates Agreement," also attached as an exhibit to the Development Agreement. ROA.236. That agreement provided that ConocoPhillips would agree to "extend the area depicted on Exhibit A to the Seitel Agreement to include a one-half (1/2) mile halo around the 'New Acquisition' and 'License Area' as depicted on said exhibit." ROA.237. There is no further description of that "halo."

E. In April 2016 EnerQuest acquired from New Parties DKE and Pati-Dubose interests that they owned before the Effective Date.

In March 2016, EnerQuest considered acquiring the interests that DKE and Pati-Dubose owned before the Effective Date ("Pre-Owned Interests") after they elected not to participate in certain wells proposed by EOG, the operator, in the Dubose Field. ROA.405. Glassell and Yates concede that DKE and Pati-Dubose owned the Pre-Owned Interests prior to August 1, 2010. ROA.179 ("To be sure, Pati-Dubose and DKE Dyersdale owned the interests from before the Effective Date . . ."). On March 29, 2016, Greg Olson, EnerQuest's President, e-mailed Fred Yates about this potential acquisition. ROA.94, 290. Olson initially said that if EnerQuest were to purchase those interests, "we'll be offering this interest to the other parties to the [Development Agreement]." ROA.94, 290.

On April 15, 2016, DKE and Pati-Dubose assigned the Pre-Owned Interests to EnerQuest for a total of $7.339 million. ROA.303-18, 320-35, 412-13, 696. After Yates inquired about the status of the transaction, and after the transaction had

closed, Olson corrected his earlier statement, explaining that EnerQuest had determined the interests were not subject to the AMI:

> I got a little ahead of myself on the AMI obligations under the September 9, 2011 letter agreement. I must have confused the September 9, 2011 letter agreement AMI obligations with the obligation under the 12/20/2011 EOG Farmout Agreement. As part of the transaction process EnerQuest's lawyer pointed out my incorrect assumption. Specifically, he directed my attention to Section 2.3 of the September 9, 2011 letter agreement which clearly excludes from the AMI interest owned by the parties prior to the Effective Date. My apologies for confusion.

ROA.93, 289. Yates disagreed, and this lawsuit followed. ROA.92, 288.

Meanwhile, Glassell and Yates asked EOG to suspend what they assert should be their share of the net revenues attributable to the Pre-Owned Interests. *See* ROA.697. As is customary in the industry when there are competing claims to production proceeds, EOG has suspended revenues associated with the Pre-Owned Interests. *See* ROA.715.

II. Procedural History

In June 2016, Glassell and Yates sued EnerQuest for breach of contract. ROA.8, 12-14. EnerQuest filed an amended answer denying those claims and asserting affirmative defenses, including that the AMI provisions in the Development Agreement were unenforceable under the statute of frauds. ROA.140, 147. After an initial pretrial conference on September 6, 2016, Judge Hughes *sua sponte* quashed "formal discovery" between the parties, *see* ROA.3, and directed the parties to "talk to

each other" regarding discovery. ROA.732, 738. At a second pretrial conference on October 17, 2016, Glassell and Yates advised that they intended to file a motion for summary judgment, and the Court set a briefing schedule. ROA.742, 758-62.

Glassell and Yates filed a motion for summary judgment on October 31, 2016. ROA.167-89. They asserted that the Pre-Owned Interests met the requirements for an "Acquired Interest" under section 2.1 the Development Agreement and therefore EnerQuest was required to offer to share those interests with the other Parties under sections 2.5, 2.6, and 2.7. ROA169-73. Glassell and Yates also argued that the description of the AMI in the Development Agreement satisfied the statute of frauds. ROA181-87. Glassell and Yates attached various exhibits, including a declaration of Nedra Foster, a land surveyor. ROA.298-300. Foster claimed that she could identify the AMI with reasonable certainty because she examined "[a] more legible copy" of the Seitel Map,[6] General Land Office records, and "Seitel shape files," none of which was attached to or referenced in the Development Agreement. ROA.299. Foster also created and relied upon a new map of the AMI from the "shape files." ROA.301.

On November 21, 2016, EnerQuest filed a response to Glassell and Yates's motion for summary judgment and its own cross-motion for summary judgment. ROA.343-73. EnerQuest asserted that it had no obligation to offer to share the Pre-Owned Interests under sections 2.5, 2.6, and 2.7, because the Pre-Owned Interests do not meet the definition of "Acquired Interests." ROA.355-60. EnerQuest explained

[6] The "more legible copy" of the AMI is at ROA.337.

that pursuant to sections 2.3 of the Letter Agreement, 1.4 of the Amendment, and 1.5 of the Ratification, the AMI does not cover or apply to the Pre-Owned Interests and, consequently, they are excluded from the definition of "Acquired Interest," because the first requirement of that definition—covered by the AMI—is lacking. *Id.*

EnerQuest also argued that the AMI provisions of the Development Agreement were unenforceable for failure to comply with the statute of frauds. ROA.360-71. EnerQuest attached as an exhibit an affidavit from Maxey Sheppard, a land surveyor, who testified that he could not determine the boundary of the AMI with reasonable certainty based on Development Agreement, the Seitel Agreement, the COP-Seitel Agreement or any of the exhibits to those agreements, including the Seitel Map. ROA.419-23. EnerQuest also filed a motion to allow discovery relating to the facts and circumstances surrounding the negotiation and execution of the Development Agreement. ROA.430-41.

On January 12, 2017, Glassell and Yates filed a reply and response to EnerQuest's motion. ROA580-83. Their reply and response included an affidavit from Fred Yates regarding Yates's alleged reliance on Olson's initial statement potential transaction involving the Pre-Owned Interests that EnerQuest planned to offer to share—the statement that Olson subsequently corrected. ROA.542-44. Fred Yates asserted that "Yates was not able to purchase any portion of the [Pre-Owned Interests]" because of Olson's initial statement. ROA.543.

The reply and response also included a supplemental declaration from Foster. ROA.580-83. Ms. Foster's two declarations showed the extensive process that she had to undertake to attempt to identify the AMI. First, she looked to the text of the Development Agreement. ROA.299. Because that did not provide an adequate property description, she looked to the Seitel Agreement. *Id.* When that agreement did not provide an adequate property description, she looked to the Seitel Map. *Id.*; ROA.580-81. When the Seitel Map itself failed to provide an adequate property description, she looked to the legend of the Seitel Map, which contained the phrase "Coordinate System: NAD 1927 State Plane Texas South Central FIPS 4204." ROA.581. Based on that reference (which itself was insufficient to supply an adequate property description), Foster then contacted counsel for Glassell and Yates to obtain Seitel "mapping data" that was "associated with the referenced Texas State Plane Coordinate System on the Seitel Map." *Id.* After she created a different map using this Seitel mapping data, Foster then used General Land Office records to "verify" her work. ROA.581-82.

The mapping data is proprietary, non-public data of Seitel, a non-party to the Development Agreement. *See* ROA.644. Neither the Development Agreement, the Seitel Agreement, nor the Seitel Map refers to or incorporates this mapping data. *See id.*

On February 3, 2017, EnerQuest filed its reply. ROA597-619. Enerquest's reply included an affidavit from Olson. ROA.635-40. Olson stated that he is "not a

lawyer," ROA.636; that he "made a mistake when [he] first told Fred Yates that the [Pre-Owned Interests] EnerQuest wanted to acquire were subject to the AMI," ROA.639; that "[a]fter [he] consulted with an outside attorney and reviewed the Development Agreement (which [he] had not reviewed for a number of years), [he] realized that the [Pre-Owned Interests] were, by definition, excluded from the AMI under Section 2.3 of the Development Agreement," ROA.638; and that pursuant to an exclusivity period contained in a letter of intent agreement between EnerQuest and DKE and Pati-Dubose, DKE and Pati-Dubose "could not have negotiated with Mr. Yates even if he wanted to," ROA.639. EnerQuest's reply also included a supplemental affidavit from Maxey Sheppard. ROA.642-45.

III. Disposition below

On December 28, 2017, Judge Hughes issued an opinion granting summary judgment in favor of Glassell and Yates on liability on the breach of contract claim and denying EnerQuest's motion. ROA.653-58. The opinion devoted approximately one page to construing the Development Agreement. *See* ROA.654-55. That portion contained virtually no reference to the actual language of the contract. *See id.* The opinion did not discuss the key defined term, "Acquired Interest," even once. *See id.*

Instead, the opinion focused on the difference between the exclusions in sections 2.1 and 2.13, on one hand, and section 2.3, on the other, repeatedly characterizing those provisions to related to certain "transfers" between certain parties. *See id.*

With respect to what he described as "Clare and Alfred transfers" (covered by section 2.1) and "transfers between Jalapeno and Yates" (covered by section 2.13), Judge Hughes emphasized, "it is the transfers, not the original ownership, that are excluded." *See* ROA.655.[7] Addressing EnerQuest's argument that the Pre-Owned Interests do not meet the definition of an "Acquired Interest" because of the exclusions set out in sections 2.3 of the Letter Agreement, 1.4 of the Amendment, and 1.5 of the Ratification, Judge Hughes concluded that section 2.3 "does not suggest that a later transfer to another participant would be excluded from the agreement's sharing provisions." ROA.655. Judge Hughes did not mention section 1.4 of the Amendment or section 1.5 of the Ratification. *See id.*

Judge Hughes did not rule on the issue of remedies. After some briefing on the remedies the parties conferred and drafted a proposed order granting specific performance but staying implementation pending appeal. *See* ROA 713-17. Judge Hughes signed the proposed order. ROA.713-17. EnerQuest timely filed its notice of appeal. ROA.718-20.

[7] As relevant here, the Development Agreement does not contain the word "transfer." *See* ROA.194-272. The only occurrence of the word "transfer" in the documents comprising the Development Agreement comes in Exhibit D.1 to the Seitel Agreement, which refers to the "transfer" of confidential geophysical data. *See* ROA.218-19, 223, 235. Otherwise, the word "transfer" does not occur in the text of the Letter Agreement, the Amendment, or the Ratification. *See* ROA.194-209 (Letter Agreement), 251-58 (Amendment), 259-70 (Ratification).

SUMMARY OF THE ARGUMENT

This Court must reverse the district court's grant of summary judgment and render judgment for EnerQuest for two reasons. First, the district court's construction of the Development Agreement erroneously omits multiple relevant provisions and renders them meaningless. Construing the words actually used and giving effect to all relevant provisions shows that the Pre-Owned Interests are not "Acquired Interests" and are therefore not subject to the obligation to offer to share. Thus, EnerQuest did not breach the agreement.

Second, and in the alternative, even if the Pre-Owned Interests were subject to the AMI agreement, the AMI provisions do not comply with the Statute of Frauds and are therefore unenforceable. Glassell and Yates' expert had to rely on proprietary seismic data that the agreements and the map did not even refer to, much less attach, to determine the location of the AMI. Texas law does not permit the use of such extrinsic evidence that a contract does not refer to in order to provide a property description to satisfy the Statute of Frauds. The district court erred in relying on such evidence. Under either theory, this Court must reverse the judgment of the district court and render judgment for EnerQuest.

STANDARD OF REVIEW

Texas contract law and the Texas Statute of Frauds govern this dispute. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) ("[F]ederal courts sitting in diversity apply state substantive law and federal procedural law.").

This Court reviews de novo a district court's judgment on cross-motions for summary judgment. *Cedyco Corp. v. PetroQuest Energy, LLC*, 497 F.3d 485, 488 (5th Cir. 2007). "The determination that a contract is unambiguous and the interpretation of that contract are legal questions also reviewed de novo." *Fort Worth 4th St. Partners, L.P. v. Chesapeake Energy Corp.*, 882 F.3d 574, 577 (5th Cir. 2018).

Each party's motion is considered "independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Jauch v. Choctaw County*, 874 F.3d 425, 428 (5th Cir. 2017). The appellate court may affirm only if there is no genuine issue of material fact and one party is entitled to prevail as a matter of law. *Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, 539 (5th Cir. 2004); *see also* Fed. R. Civ. P. 56.

ARGUMENT

I. EnerQuest did not breach the Development Agreement because the Pre-Owned Interests are not "Acquired Interests" and are therefore not subject to the AMI.

Unambiguous provisions of a contract must be enforced as written. *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 860 (Tex. 2005). Courts "must give effect to the

written expression of the parties' intent . . . [by] reading all parts of the contract together, giving effect to each individual part." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 132 (Tex. 1996) (citation omitted). "The intention of the parties is discovered primarily by reference to the words used in the contract." *Preston Ridge Fin. Services Corp. v. Tyler*, 796 S.W.2d 772, 775 (Tex. App.—Dallas 1990, writ denied) (citation omitted).

Here, considering every relevant provision together the only reasonable construction of the Development Agreement is that the Pre-Owned Interests are not "Acquired Interests" and are therefore not subject to the obligation to offer to share. Nevertheless, the district court held that EnerQuest had and breached an obligation to offer to share the Pre-Owned Interests under the Development Agreement. The district court based its judgment on an erroneous construction of the Development Agreement, and that judgment must therefore be reversed.

A. Applying the terms of the Development Agreement to the Pre-Owned Interests, the Pre-Owned Interests do not meet the Definitional Requirements of an "Acquired Interest."

The AMI agreement requires each Party to offer to share with each other Party any "Acquired Interest." Section 2.1 of the Letter Agreement defines an "Acquired Interest" as any interest that meets three requirements: (1) it is covered by the AMI; (2) it is acquired by a Party; and (3) it is acquired after August 1, 2010. Then, there are the specific exclusions in sections 2.1, 2.3, and 2.13 of the Letter Agreement, section

1.4 of the Amendment, and section 1.5 of the Ratification. Applying all these terms to the Pre-Owned Interests shows that the Pre-Owned Interests do not meet the definition of an "Acquired Interest."

The proper inquiry begins and ends with the first definitional requirement in section 2.1—whether the Pre-Owned Interests are covered by the AMI. Section 1.4 of the Amendment (signed by the Original Parties) and section 1.5 of the Ratification (signed by the New Parties)[8] answer that question. They provide:

> *Section 1.4* – "If any New Party owned an interest within the AMI prior to the Effective Date, then upon the ratification of the Development Agreement by such New Party . . . such interest shall be excluded from the Existing AMI," ROA.252;
>
> *Section 1.5* – "All interests, leases or agreements owned by a New Party prior to the Effective Date (including non-consent interests acquired under existing joint operating agreements with respect thereto) shall not be considered part of or subject to the AMI," ROA.260.

DKE and Pati-Dubose are each a New Party to the Development Agreement. DKE and Pati-Dubose owned the Pre-Owned Interests before August 1, 2010. As such, under the terms of sections 1.4 of the Amendment and 1.5 of the Ratification (and consistent with section 2.3 of the Letter Agreement), the Pre-Owned Interests "shall be excluded from the . . . AMI," and "shall not be considered part of or subject to the AMI." Consequently, the Pre-Owned Interests do not meet the first require-

[8] If either of the Pre-Owned Interests were owned by an Original Party, rather than a New Party, this question would implicate section 2.3 of the Letter Agreement and would be resolved the same as under sections 1.4 and 1.5.

ment of the definition of an "Acquired Interest," because the AMI does not cover them.

Because the Pre-Owned Interests are not "Acquired Interests," EnerQuest had no obligation to offer to share them under sections 2.5, 2.6, and 2.7 of the Development Agreement. The district court erred in holding otherwise and must be reversed.

B. The district court's construction of the Development Agreement renders multiple relevant contract provisions.

Judge Hughes noted that the exclusions in sections 2.1 and 2.13 address transfers—namely between the Glassell Family (2.1) and Yates and Jalapeno (2.13) . He observed that section 2.3 excludes only what a party owns and does not mention transfer. Based on this, he held that "a later transfer to another participant" of an interest owned by a Party before the Effective Date is not "excluded from the agreement's sharing provisions." ROA.655.

To begin with Judge Hughes read the word "transfer" into the contract even though that word does not occur once in any of the relevant provisions. *See Hochstadter v. Sam*, 83 Tex. 464, 466, 18 S.W. 753, 754 (1892) ("To place the construction on the contract that appellee claims, we would have to incorporate words into the contract which the parties did not place there.").

Moreover, Judge Hughes's construction ignored the relevant provisions excluding interests previously owned by a new party—section 1.4 of the Amendment and section 1.5 of the Ratification. Judge Hughes's construction was therefore erroneous.

Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 121 (Tex. 1996) ("We presume that the parties to a contract intend every clause to have some effect."); *see* J.*M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (noting that a court "must examine and consider the entire writing in an effort to harmonize and give effect to ***all*** the provisions of the contract so that none will be rendered meaningless." (emphasis added))

One might assume that if Judge Hughes had considered section 1.4 of the Ratification and section 1.5 of the Amendment, he would have interpreted them the same way he interpreted the similar section 2.3 of the Letter Agreement. If so, his construction still renders these exclusions meaningless. Judge Hughes erroneously interpreted the obligation to offer to share an interest owned by a Party before the Effective Date as depending on whether that interest was acquired by (or "transferr[ed]" to) another Party after the Effective Date. That interpretation is contrary to the words used in the Development Agreement. In short, if section 1.4 of the Ratification and section 1.5 of the Amendment do not exclude the Pre-Owned Interests from the definition of "Acquired Interest," then those provisions are superfluous.

To illustrate how Judge Hughes's reading renders section 2.3, section 1.4, and section 1.5 meaningless, consider two different scenarios: (1) a hypothetical scenario in which the Pre-Owned Interests are still owned by DKE and Pati-Dubose and have not been acquired by any other Party like EnerQuest (the "Unsold Interests"); and (2) the scenario at bar, in which EnerQuest acquired the Pre-Owned Interests after the Effective Date (the "Transferred Pre-Owned Interests"). Under Judge Hughes's read-

ing of the Development Agreement, the Unsold Interests would be excluded from the obligation to offer to share under sections 2.3, (and sections 1.4 and 1.5), because "[section] 2.3 excludes what a party owns already . . . . [it] says that a participant does not have to offer to the others what it had when it signed the agreement, even if it is located in the area of mutual interest . . . ." *See* ROA.655.[9] But under the second scenario, the Transferred Pre-Owned Interests ***would*** be subject to the obligation to offer to share, because the section 2.3 exclusion would cease applying to the Transferred Pre-Owned Interests upon their "transfer to" EnerQuest. ROA.655.

That reading, however, renders section 2.3 superfluous, because section 2.3 would merely duplicate the work of section 2.1. Under section 2.1, the Unsold Interests would not meet the third requirement of an "Acquired Interest," because the Unsold Interests were not acquired after August 1, 2010. Thus, the Unsold Interests would not be subject to the obligation to offer to share in the first place. There would be no need for section 2.3 to, in Judge Hughes's words, "exclude what a party owns already" from the obligation to offer to share. The Unsold Interests would have already been excluded by section 2.1. If, as Judge Hughes concluded, section 2.3 "does not suggest that later transfer to another participant would be excluded from the agreement's sharing provisions," then section 2.3 is meaningless and superfluous.

[9] Judge Hughes confusingly also states that section 2.3 speaks of an interest that "***was acquired after the date of the original agreement***," *see* ROA.655 (emphasis added), but that statement is contrary to the actual language of section 2.3, *see* ROA.197 ("All interests, leases or agreements ***owned*** by a Party ***prior to the Effective Date*** (including non-consent interests acquired under existing joint operating agreements with respect thereto) shall not be considered part of or subject to the AMI." (emphasis added)).

That construction is erroneous, because a court "must read contractual provisions so none of the terms of the agreement are rendered meaningless or superfluous." *In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017).

C. EnerQuest's reading is the only construction of the Development Agreement that refers to the words actually used and gives effect to all relevant provisions.

Conversely, the reading advanced above by EnerQuest—the reading this Court must adopt—is the only construction that gives effect to section 2.3 (and sections 1.4 and 1.5), in addition to section 2.1, and applies all those provisions as written. Under proper application of the Development Agreement by its terms, the hypothetical Unsold Interests would not qualify as "Acquired Interests" under section 2.1, thus giving effect to section 2.1. But the Transferred Pre-Owned Interests ***also*** would not qualify—and ***do not*** qualify—as "Acquired Interests," giving effect to section 2.3 (and sections 1.4 and 1.5).

Moreover, EnerQuest's construction gives effect to the other exclusions not implicated by the Pre-Owned Interests—namely, those in sections 2.1 and 2.13 of the Letter Agreement. The provision in section 2.1 excludes from the AMI any interest acquired by Glassell from the non-party Glassell Estates after August 1, 2010. EnerQuest's construction of section 2.3 (and sections 1.4 and 1.5) would not alter or duplicate the exclusionary work of section 2.1 in this regard. Any interest acquired by Glassell from the Glassell Estates would not implicate section 2.3, section 1.4, or sec-

tion 1.5, because by definition any such interest would not have been owned by a Party before the Effective Date (the predicate trigger for section 2.3, section 1.4, or section 1.5 to apply). EnerQuest's construction would therefore give full effect to the exclusion contained in section 2.1.

Nor would EnerQuest's construction of section 2.3 (and sections 1.4 and 1.5) render section 2.13 meaningless or superfluous. Again, section 2.13, which differs from the other exclusions, addresses interests conveyed between Yates and Jalapeno. But it does not address whether such interests are covered by the AMI or meet the definition of an "Acquired Interest." Instead, section 2.13 provides that Yates and Jalapeno "do not have to" comply with the obligation to offer to share any such interests under sections 2.5, 2.6, and 2.7 of the Letter Agreement, regardless of whether such interest meet the definition of an "Acquired Interest." EnerQuest's construction also gives effect to that provision.

To illustrate how EnerQuest's construction gives effect to section 2.13, consider two hypothetical scenarios involving acquisitions of an interest within the AMI boundary between Yates and Jalapeno: (1) a scenario in which Yates acquires an interest within the AMI from Jalapeno that Jalapeno owned before the Effective Date (the "Pre-Owned Jalapeno Interest"); and (2) a scenario in which Yates acquires an interest located within the AMI from Jalapeno that Jalapeno acquired after August 1, 2010 (the "Later-Acquired Jalapeno Interest"). Yates's acquisition of the Pre-Owned Jalapeno Interest would implicate section 2.3, which would exclude the Pre-Owned Jalapeno

Interest from the definition of "Acquired Interest." Therefore, the Pre-Owned Jalapeno Interest would be functionally identical to the Pre-Owned Interests at bar, and the obligation to offer to share under sections 2.5, 2.6, and 2.7 would not be triggered. Granted, with respect to the Pre-Owned Jalapeno Interest, section 2.3 would carry the day and section 2.13 would do no work.

But Yates's acquisition of the Later-Acquired Jalapeno Interest would not implicate section 2.3 (or section 1.4 or section 1.5), because by definition any such interest were not owned by a Party before the Effective Date. And that is where EnerQuest's construction gives effect to section 2.13. The Later-Acquired Jalapeno Interest would meet all three requirements to qualify as an "Acquired Interest" under section 2.1: it would be covered by the AMI; it would be acquired by a Party (Yates); and it would be acquired after August 1, 2010. Without section 2.13, Yates would have to offer to share the Later-Acquired Jalapeno Interest under sections 2.5, 2.6, and 2.7. But under section 2.13, however, Yates would "not have to offer [the Later-Acquired Jalapeno Interest] to the other parties to [the Development] Agreement." ROA.199. EnerQuest's construction therefore gives full effect to section 2.13.

Further, it would have been reasonable for the Parties to envision and contract for a situation like the one involving the Later-Acquired Jalapeno Interest. For example, suppose in 2012 Jalapeno acquired an interest subject to the AMI from a non-party to the Development Agreement, Jones ("the Jones Interest"). Suppose, as required by sections 2.5, 2.6, and 2.7, Jalapeno offered the other Parties their propor-

tionate shares of the Jones Interest. Suppose no Party exercised its right to participate in the Jones Interest, and therefore Jalapeno retained all the Jones Interest (the "Retained Jones Interest"). Then, in 2014, Yates (a related party to Jalapeno) wanted Jalapeno to transfer the Retained Jones Interest to Yates. But for section 2.13, Yates would have to again offer the Retained Jones Interest to the other parties because it would meet the definition of an Acquired Interest. Section 2.3 would not apply because Jalapeno acquired the Retained Jones Interest after the Effective Date. Yet section 2.13 would except Yates from the obligation to offer to share the Retained Jones Interest. Thus, section 2.13 serves a different purpose than section 2.3 (and section 1.4 of the Amendment and section 1.5 of the Ratification) and is therefore not rendered meaningless or superfluous by EnerQuest's asserted construction.

Because EnerQuest's reading of the Development Agreement is the only reasonable construction that refers the words actually used and gives effect to all relevant provisions, this Court must reverse the judgment of the district court and render judgment that EnerQuest did not breach of the Development Agreement by not offering to share the Pre-Owned Interests.

II. In the Alternative, even if the Acquired Interests are subject to the AMI, the AMI Provisions are Unenforceable under the Statute of Frauds.

Even if the Court concludes that the Pre-Owned Interests are subject to the AMI, the AMI provisions do not comply with the Statute of Frauds and are therefore unenforceable. In particular, the Development Agreement does not identify the AMI

boundary with "reasonable certainty." ROA.655. Glassell and Yates's expert—and Judge Hughes—had to rely on extrinsic evidence that was not attached to or mentioned in any of the agreements to supply the location. That was error. This is precisely the scenario the Statute of Frauds aims to prevent: use of a description of property that is not part of the contract and is supplied after-the-fact by only one side the transaction.

Glassell and Yates conceded below that the Development Agreement fails to identify the AMI boundary with reasonable certainty by its own terms. *See* ROA.522. Instead, relying on extrinsic evidence, they asserted (and Judge Hughes apparently agreed) that their land surveyor could create a map of the AMI property by reviewing proprietary, nonpublic "mapping data" that the Development Agreement did not mention. *See* ROA.523-26. But the Development Agreement contains an insufficient "key or nucleus" description to support the backstop use of extrinsic evidence in the first place. And, even if extrinsic evidence were permissible, Glassell and Yates—and Judge Hughes—improperly relied on the mapping data and other extrinsic evidence to "supply the location" of the AMI boundary rather than to merely clarify the AMI boundary from the data already contained within the Development Agreement itself.

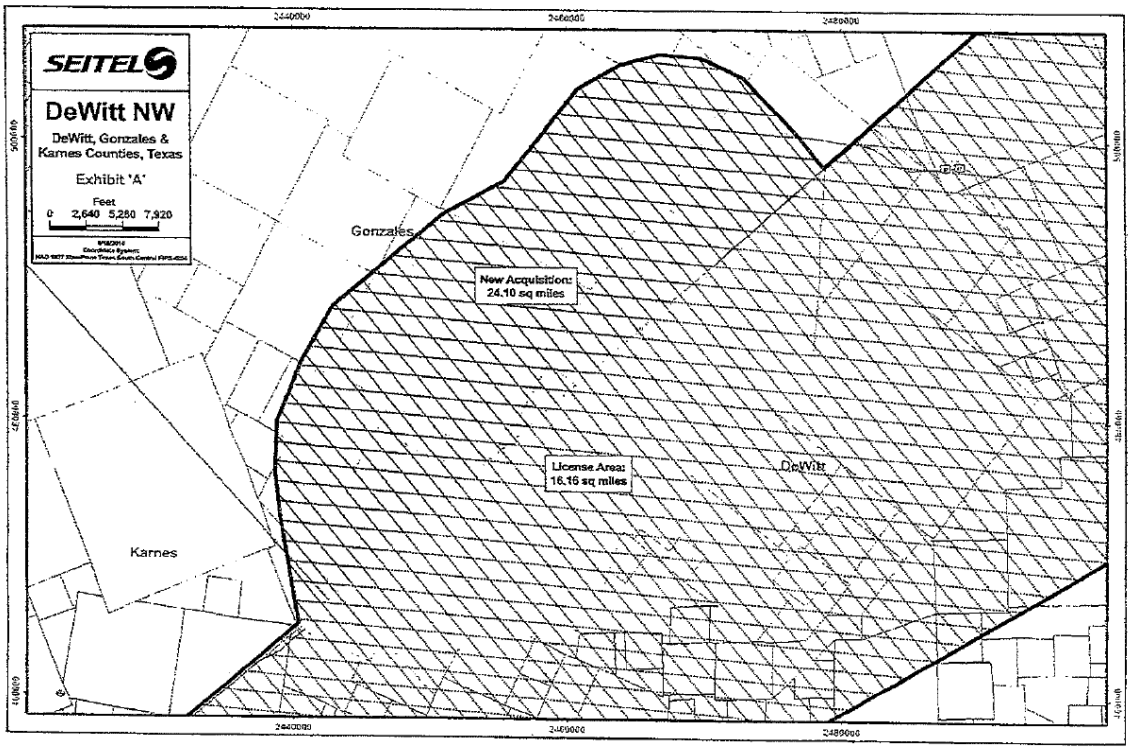
A. The AMI provisions of the Development Agreement do not identify the AMI boundary with reasonable certainty and therefore fail to comply with the Statute of Frauds.

AMI provisions must comply with the Statute of Frauds. Tex. Bus. & Comm. Code § 26.01; *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 909 (Tex. 1982) (holding that an AMI agreement is subject to the statute of frauds). Consequently, the AMI must contain a sufficient property description—the most "essential" element of an agreement relating to real property. *Smith v. Griffin*, 116 S.W.2d 1064, 1066 (Tex. 1938). The Development Agreement fails to identify the AMI boundary with reasonable certainty and is consequently unenforceable.

To satisfy the statute of frauds, a contract for the transfer of an interest in real property "must furnish within itself, or by reference to some other existing writing, the means or data by which the [property] to be conveyed may be identified with reasonable certainty." *Long Trusts v. Griffin*, 222 S.W.3d 412, 416 (Tex. 2006) (citing *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972)). Even if the parties' intention can be inferred from the contract or otherwise clearly determined, the contract will not be enforceable unless that intention is adequately expressed in the contract. *See U.S. Enters., Inc. v. Dauley*, 535 S.W.2d 623, 627–28 (Tex. 1976); *Morrow*, 477 S.W.2d at 540. Although a map attached to a written contract can be used to remedy a defective property description, the map must contain enough descriptive information to identify the property without resort to extrinsic or parol evidence. *Id.*

Here, the Development Agreement never defines the boundary of the AMI. The Development Agreement itself simply states that the AMI "covers all lands within the 40 square miles covered by the Seitel Agreement plus the one-half (1/2) mile halo provided for under the COP/Seitel/Yates Agreement." ROA.196. The Development Agreement does not describe the 40 square miles or the halo beyond that statement. It does not contain any metes and bounds descriptions or other description of the 40 square miles or the halo. The Seitel Agreement, in turn, also does not contain a metes and bounds description or other legal description of the 40 square miles or the halo.

Although a written contract need not contain a metes and bounds description directly, it must furnish within itself or by direct reference a means to identify the property in some way with reasonable certainty. *Tex. Builders v. Keller*, 928 S.W.2d 479, 481 (Tex. 1996. But even the items referenced in the Development Agreement fail to sufficiently identify the AMI boundary. The Development Agreement refers to the Seitel Agreement which, in turn, attaches the Seitel Map. It is shown below:



The Seitel Map does not supply the essential, missing terms necessary to identify the AMI boundary with reasonable certainty. *See* ROA.214.[10] This for several reasons.

First, as shown the Map contains heavy black lines that presumably were intended to indicate the boundary of the AMI area. *Id.* But the black lines do not form a complete enclosure. Instead, the lines simply reach the end of the mapped area without ever connecting. It is impossible to know the terminus of the AMI boundary because the map does not show it.

[10] This black-and-white map, as Glassell and Yates conceded below, is the map attached to the Seitel Agreement. *See* ROA.184. Glassell and Yates's attempt to use a "more legible color copy" of that map is discussed further below.

Second, the black lines cut through dozens of tracts of land, partially enclosing some tracts and entirely enclosing others, without identifying where these tracts are dissected. *Id.*

Third, the thickness of the line itself appears to cover some 400-500 feet. It is not clear whether the land within that 400-500 feet is within or outside of the AMI. *Id.*

Fourth, the scale of the map appears to be off. In particular, the 16.16 square mile tract appears to be larger than the 24.10 square mile tract. *Id.*

Fifth, there is a 0.26 square mile discrepancy between what the Development Agreement says the AMI covers and what the Seitel Map purports to show. The Seitel Map refers to 40.26 square miles across two parcels of land apparently located in DeWitt, Gonzales, and Karnes Counties and divided between a 24.10 square mile parcel and a 16.16 square mile parcel (the division unexplained), but located on the same map. *Id.* The Development Agreement, on the other hand, states that "the AMI shall cover all lands within the 40 square miles covered by the Seitel Agreement . . . ." ROA.196. Thus, there is a 0.26 square mile discrepancy between what the Development Agreement says the AMI covers and what the Seitel Map purports to show. 0.26 square miles is over 166 acres, or more than a quarter of a section. Based on the language of the Development Agreement, these 166 acres are not within the AMI. But it is not possible to determine where these acres are on the Seitel Map.

Texas courts have consistently rejected property descriptions and maps that suffered from the same deficiencies presented here. In *Dauley*, the Supreme Court considered whether a plat attached to a contract identified the subject property with reasonable certainty. The contract described the two tracts as being "marked on Exhibit 'A' attached hereto and colored in green[.]" 535 S.W.2d at 625 (attaching plat). The *Dauley* court noted that the shaded triangle on the map did not have any identifying name or number on it that corresponded with one or more of the tracts listed in the contract, did not indicate the size of the disputed tracts, and did not have course or distance calls along the purported boundary lines. *Id.* at 629. Noting all these deficiencies, the *Dauley* court held "that the summary judgment proof shows as a matter of law that the [contract] did not sufficiently describe the [property] in question[.]" *Id.* at 631.

The Seitel Map has the same deficiencies. The boundary line is indecipherable because it contains no distance calls, does not follow any established tract or survey lines, and marks out an area with uncertain size and dimensions. *See, e.g., Guenther v. Amer-Tex Construction Co.*, 534 S.W.2d 396, 398 (Tex. Civ. App.—Austin 1976, no writ) (holding property description on map failed under Statute of Frauds because it did not show the width or length of the boundary lines, did not indicate whether the boundary lines were to be parallel, and did not depict the approximate size of the tract or the number of acres it contained, notwithstanding that the parties knew and understood what was intended to be conveyed and that a surveyor made a metes and

bounds description of the property after the fact); *Sabine Invoice Co. v. Stratton*, 549 S.W.2d 247, 249-50 (Tex. Civ. App.—Beaumont 1977, no writ) (holding that plat depicting several tracts within a perimeter boundary failed under the Statute of Frauds because it did not state the courses and distances of boundary lines).

For these reasons, the description of the AMI in the Development Agreement—including the Seitel Agreement and the Seitel Map— fails to identify the AMI boundary with reasonable certainty.

B. The Development Agreement contains an insufficient "key or nucleus" description to support the backstop use of extrinsic evidence.

In holding that the Development Agreement did not violate the Statute of Frauds, the district court considered extrinsic evidence proffered by Glassell and Yates, including: (1) a "more legible color copy" of the Seitel Map created by their surveyor expert after the fact; (2) unidentified General Land Office ("GLO") records; and (3) "native mapping file data" that Seitel maintained.[11] ROA.656 ; *See* ROA.298-99. That was error. A property description must furnish enough information to lo-

[11] Glassell's surveyor Nedra Foster asserted that she relied on these three categories of extrinsic evidence in addition to the original Development Agreement, the Amendment, and the Ratification. ROA.298-99. However, Glassell and Yates's expert designation of Foster stated that she reviewed *eleven* additional types of documents or data, including numerous other maps, geometry and statistics data, license agreements, "control point data" from another third party, and other public records in fashioning her AMI map attached to her affidavit. *See* ROA.559-60. It remains unclear how Foster reviewed 17 different sets of documents and data yet purports to "identify the AMI with reasonable certainty" using a subset of six of those documents and data. That unexplained discrepancy in and of itself precludes summary judgment because it is impossible to determine on this record whether the three categories of extrinsic evidence cited by Foster are, in fact, the evidence she relied upon to allegedly identify the AMI boundary. Notably, Judge Hughes' *sua sponte* quashing of all discovery prevented EnerQuest from deposing Foster to attempt to discover all the evidence she relied on.

cate the general area "as in identifying by tract survey and county," as well as to determine the "size, shape, and boundaries" of the property. *Reiland v. Patrick Thomas Properties, Inc.,* 213 S.W.3d 431, 437 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (citing *Morrow*, 477 S.W.2d at 539). "Only in limited circumstances may extrinsic evidence be used and then 'only for the purpose of identifying the [property] with reasonable certainty from the data in the [writing].'" *Preston Expl. Co., L.P. v. GSF, L.L.C.*, 669 F.3d 518, 522 (5th Cir. 2012) (quoting *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983)). Black-letter Texas law allows the use of extrinsic evidence only if the language of the contract furnishes a "key or nucleus" description of the property, and even then allows the use of such evidence only as an aid to identify the property *from the data in the contract*, and not to supply a missing description. *Long Trusts*, 222 S.W.3d at 416.

As shown, the Development Agreement, Seitel Agreement and the Seitel Map do not furnish enough information to locate the tract survey, shape, or boundary of the AMI. The geographic description of the AMI does not come close to providing a "key or nucleus" of information sufficient for a property description. The description does not contain any survey names, abstract numbers, lease names, acreage amounts, course or distance calls, or roads or other landmarks associated with any interests that would be subject to the AMI. As a result, the Development Agreement does not support the backstop use of extrinsic evidence in the first place and the dis-

trict court erred in relying on such evidence. That alone should end this Court's inquiry.

C. Even if extrinsic evidence were allowed, Texas law forbids the use of the specific types of extrinsic evidence the district court relied on when not referenced in the underlying contract.

Texas courts have never authorized, and in fact have explicitly rejected, use of the specific types of extrinsic evidence the district court relied upon in its Statute of Frauds analysis when not referenced in the underlying contract. EnerQuest addresses each of the three types of extrinsic evidence in turn.

The "more legible color copy" of the Seitel Map. Under Texas law, a party cannot use a map to provide or supplement a property description unless the map is expressly referenced in the agreement. *Matney v. Odom*, 210 S.W.2d 980, 984 (Tex. 1948. "[T]he map must be referred to in the contract, and it is not sufficient to show that the parties consulted a map at the time of their [n]egotiations." *Id.* Here, the only map expressly referred to in the Development Agreement is the black-and-white Seitel Map attached to the Seitel Agreement. Another color map cannot be used.

The GLO records. Under Texas law, a party may not resort to real property records to cure an otherwise insufficient property description. *Reiland v. Patrick Thomas Properties, Inc.*, 213 S.W.3d 431, 438 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In *Reiland*, the court held that a property description was insufficient even where a surveyor could locate real property by reviewing Harris County Real Property

Records, emphasizing that the records were not "attached to or referenced by" the contract at issue. *See id.*; *see also Morrow*, 477 S.W.2d at 540-41 (finding description insufficient even though a surveyor was able to make a plat locating the property after a search of abstract records and on directions given by an attorney).

The Seitel "mapping data." First, Glassell and Yates never identified exactly what this native mapping file data is. They did not attach the "native mapping file data" to their motion for summary judgment, *see* ROA.192, and Foster's affidavit refers primarily to "Seitel shape files." These presumably are the native mapping file data, but that is not clear. Glassell and Yates refer to identify the AMI's geographic location, but that is not clear.

Regardless, the Development Agreement simply does not refer to "native mapping file data" or "Seitel shape files" or electronic files whatsoever. Therefore, Glassell and Yates cannot rely on these files—which are quintessential unreferenced extrinsic evidence. *See*, *e.g.*, *Crowder v. Tri-C Resources, Inc.*, 821 S.W.2d 393, 396-97 (Tex. App.—Houston [1st Dist.] 1991, no writ (rejecting extrinsic evidence that was not explicitly referred to in the agreement or otherwise described the land in the AMI). Even if this "data" was exchanged during the negotiations of the Development Agreement (and there is no evidence that it was), it would be improper parol evidence. *See Matney*, 210 S.W.2d at 984 ("[I]t is not sufficient to show that the parties consulted a map at the time of their [n]egotiations, since this would be an attempt to refer to the map by parol evidence instead of by a contract recital, a reference which would not

meet the requirement of the statute."). At bottom, Glassell and Yates have never cited, and EnerQuest is unaware of any, case law that permits "shape files" or other electronic files maintained by a third party to be used properly as extrinsic evidence when the contract did not refer to such files.

As a result, Foster's opinions—which admittedly depend completely on electronic files and other impermissible extrinsic evidence—have no evidentiary value. *See Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995) ("Where an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or a judgment."); *Barham v. Powell*, 554 S.W.2d 826, 829 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (rejecting surveyor's testimony "to the effect that the instrument was sufficient to supply the location or description of the land" as "superfluous and inadmissible"). Because the district court's Statute of Frauds determination expressly relied upon Foster's affidavit—and relied upon the "mapping data," in particular— its judgment must be reversed.

D. The district court erred by making a credibility determination about the parties' surveyor experts.

Without any discussion whatsoever, Judge Hughes credited Foster's opinion and discredited EnerQuest's surveyor. Judge Hughes stated that, "Maxey Sheppard, Enerquest's [sic] surveyor, said that the agreements and the map did not sufficiently identify the land. His report was inadequately precise. He cannot merely look at it

and feign incomprehension." ROA.656. That, too, was error. In considering summary judgment evidence, courts must "refrain from making credibility determinations or weighing the evidence." *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398–99 (5th Cir. 2008) (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150 (2000)). Judge Hughes' judgment must be reversed for this additional reason, because "[c]redibility determinations are not part of the summary judgment analysis." *Quorum Health Res., L.L.C. v. Maverick County Hosp. Dist.*, 308 F.3d 451, 458 (5th Cir. 2002).[12]

E. The district court improperly relied upon extrinsic evidence to "supply the location" of the AMI boundary, rather than to merely clarify the boundary from data already contained within the contract.

Even if there were an adequate reference or some sufficient link between the Development Agreement and the extrinsic evidence proffered by Glassell and Yates, the district court nonetheless improperly relied upon that extrinsic evidence to supply the location of the AMI boundary in violation of Texas law. That, too, was error. A party can use extrinsic evidence only "for the purpose of identifying the property with reasonable certainty from the data contained in the contract, not for the purpose of supplying the location or description of the property." *Long Trusts*, 222 S.W.3d at 416. As the Texas Supreme Court stated in 1945:

[12] The district court's error in making a credibility determination at the summary judgment state is all the more glaring when one considers that the court "quashed" formal discovery, *see* ROA.3.

> The certainty of the contract may be aided by parol only with certain limitations. The essential elements may never be supplied by parol. The details which merely explain or clarify the essential terms appearing in the instrument may ordinarily be shown by parol. But the parol evidence must not constitute the framework or skeleton of the agreement. That must be contained in the writing. Thus, resort to extrinsic evidence, where proper at all, is not for the purpose of supplying the location or description of the land, but only for the purpose of identifying it with reasonable certainty from the data in the memorandum.

Wilson v. Fisher, 188 S.W.2d 150, 152 (Tex. 1945).

Here, the district court improperly relied upon the mapping data to "supply[] the location" of the AMI. *Id.* The district court concluded that by, "[u]sing . . . the mapping data," Foster sufficiently identified the AMI boundary. ROA.656. But in explaining her own use of the mapping data, Foster stated, "the Seitel mapping data gives a reasonably certain location of each line of the perimeter of the AMI." ROA.582. Foster thus did not use the extrinsic mapping data evidence to merely clarify the AMI boundary from the data already contained within the Development Agreement. Rather, she relied upon that extrinsic evidence to—in her words—"give[] a . . . location" of the AMI boundary that the data contained within the Development Agreement does not supply. Using the extrinsic mapping data evidence, Foster created a new and different map to provide a reasonably certain definition of the AMI boundary. But Texas law forbids the use of extrinsic evidence to supply the essential terms necessary to identify the property with reasonable certainty. *Accord Ardmore, Inc. v. Rex Group, Inc.*, 377 S.W.3d 45, 58 (Tex. App.—Houston [1st Dist.] 2012, pet. de-

nied) (affirming admission of parol evidence merely "to clarify the meaning of the markings" *already contained within* the contract at issue).

Therefore, the AMI provisions of the Development Agreement do not satisfy the Statute of Frauds. Accordingly, even if this Court determines that EnerQuest had an obligation to offer to share the Pre-Owned Interests, this Court must reverse the district court's judgment and render judgment in favor of EnerQuest, because the AMI provisions are unenforceable.

F. The partial performance exception does not apply.

To the extent the district court also held that the partial performance exception precludes EnerQuest from asserting the Statute of Frauds defense, *see* ROA.656, that determination was erroneous. Glassell and Yates asserted two partial performance arguments. First, they argued that, having previously accepted the benefits of the Development Agreement, EnerQuest cannot now assert its unenforceability under the Statute of Frauds. As discussed below, that argument fails because Texas courts consider Statute of Frauds challenges on a transaction-by-transaction basis. Second, Glassell and Yates argued that Yates detrimentally relied on the initial e-mail from Greg Olson to Fred Yates in which Olson initially said that if EnerQuest were to purchase the Pre-Owned Interests, "we'll be offering this interest to the other parties to the [Development Agreement]." ROA.94, 290. This second argument does not preclude EnerQuest from asserting the Statute of Frauds defense, because denying en-

forcement of the Development Agreement would not amount to a fraud or virtual fraud.

i. The partial performance exception does not apply because Texas courts analyze compliance with the Statute of Frauds on a transaction-by-transaction basis.

For purposes of the Statute of Frauds, each "Acquired Interest" transaction under the Development Agreement is analyzed independent of any other. That EnerQuest may have acquired its pro rata share of another "Acquired Interest" offered by another Party in a prior transaction[13] does not preclude EnerQuest from asserting the Statute of Frauds defense as to the instant transaction involving the Pre-Owned Interests.

In *Long Trusts*, the defendant trustees argued that an agreement providing the plaintiff, Griffin, an ongoing opportunity to participate in oil and gas wells violated the Statute of Frauds. *See* 222 S.W.3d at 416. The trustees asserted this defense after they had performed under the agreements for approximately 20 years. *Id.* The court of appeals stated that "[a] defense to the Statute of Frauds is unavailable when the party seeking to rely on the defense recognizes the challenged agreements, acts under their provisions, accepts benefits under them, and even performs under them over a long period of time without complaint or action claiming they are invalid." *Long*

[13] The interests EnerQuest acquired were *de minimus*. In two small acquisitions, it paid a total of $876.13 ($829.08 + $47.05) for its share of interest Yates had acquired. ROA.637. EnerQuest has subsequently spent more to cure title defects than it paid for those intersts. *Id.*

Trusts v. Griffin, 144 S.W.3d 99, 105 (Tex. App.—Texarkana 2004), *rev'd*, 222 S.W.3d 412 (Tex. 2006). The court of appeals reasoned that because the trustees had accepted the benefits of the agreement, they were estopped from challenging the agreement's validity under the statute of frauds. *Id.*

The Texas Supreme Court rejected the partial performance argument. *Long Trusts v. Griffin*, 222 S.W.3d at 417. The court held that the trustees only sought to avoid the letter agreements with respect to future projects, not "with respect to performance already accepted." *Id.* at 415. Griffin's rights under the agreements developed on a "project by project or well by well basis," and "participation or non-participation on any one project or well [would] not affect Griffin's rights to participate in any other project or well." *Id.* at 415. The court further noted that "Griffin's acquisitions of interests in the past were completely separate from future transactions and did not insulate the agreements from the Statute of Frauds for wells not drilled." *Id.* Fairness permitted the trustees "to assert the defense as to future transactions toward which respondents have paid nothing." *Id.*

The Supreme Court's reasoning in *Long Trusts* applies here. Just like in *Long Trusts,* the AMI provisions provide that each transaction is separate—whenever a party acquires an "Acquired Interest," it must offer that interest to the other parties to the Development Agreement. Each acquisition of an "Acquired Interest" creates a new and separate obligation for the acquiring party to offer the non-acquiring parties an opportunity to participate. Each transaction under the AMI provisions is independ-

ent of the others. As such, EnerQuest is not precluded from asserting the Statute of Frauds defense here.

ii. The partial performance exception does not apply because it is not unfair to enforce the Statute of Frauds in this case.

Glassell and Yates also asserted, and the district court agreed, that "Yates had relied on Enerquest's [sic] saying that it would offer shares to the participants in the development agreement and, in reasonable reliance on the agreement and Enerquest's [sic] representation, withdrew from its independent bidding" on the Pre-Owned Interests ROA.657. Characterizing that assertion as a "partial performance" argument, the district court held that the Development Agreement was "exempt from being void under the statute of frauds." ROA.656.

The doctrine of partial performance applies only "in equity if denial of enforcement would amount to a virtual fraud." *Exxon Corp. v. Breezevale Ltd.,* 82 S.W.3d 429, 439 (Tex. App.—Dallas 2002, pet denied). Based on this record, Glassell and Yates cannot show that enforcement of the Statute of Frauds would amount to a "virtual fraud."

A virtual fraud occurs only when, among other things, (1) one "party acting in reliance on the contract has suffered a substantial detriment for which [it] has no adequate remedy," and (2) the other party, if permitted to plead the statute, would reap an "unearned benefit." *Breezevale*, 82 S.W.3d at 439-40. Glassell and Yates failed to show that they will suffer a "substantial detriment" if required to keep their money

instead of exchanging it for their shares of the Pre-Owned Interests. Even if given a chance to acquire a pro rata share of the Pre-Owned Interests, Glassell and Yates would have to pay a proportionate amount of what EnerQuest paid for those interests. Nor did Glassell and Yates establish that EnerQuest would receive an "unearned benefit" by retaining properties that it—and not Glassell and Yates—has paid for. As the *Long Trusts* court held, equity and fairness allows EnerQuest to assert the Statute of Frauds as to a "transaction [] toward which [Glassell and Yates have] paid nothing." *Long Trusts,* 222 S.W.3d at 417.[14]

At least, when viewed alongside Olson's affidavit, ROA.635-40, Yates's affidavit, ROA.542-44, creates disputed fact issues on regarding partial performance that preclude summary judgment. These issues include the unresolved factual question of whether, under an exclusivity period in the letter of intent between EnerQuest and DKE and Pati-Dubose, DKE and Pati-Dubose "could . . . have negotiated with Mr. Yates even if he wanted to." *See* ROA.639. Judge Hughes erred by unilaterally agreeing with Glassell and Yates's version of the events leading up to EnerQuest's acquisition of the Pre-Owned Interests without considering the evidence proffered by EnerQuest and allowing the fact finder to resolve the dispute fact questions.

[14] Glassell and Yates also failed to plead reliance damages below. When promissory estoppel or partial performance applies to except an agreement from compliance with the statute of frauds, the party is entitled to only reliance damages, not benefit-of-the-bargain damages. *See Breezevale Ltd.*, 82 S.W.3d at 441. Since Glassell and Yates have neither pleaded nor presented any evidence that they incurred any reliance damages, they are not entitled to recovery under these exceptions to the statute of frauds. *Wade v. XTO Energy Inc.*, 2013 WL 257361, at *5 (Tex. App.—Fort Worth Jan. 24, 2013, no pet.).

CONCLUSION AND PRAYER

EnerQuest respectfully prays that this Court reverse the grant of summary judgment in favor of Glassell and Yates and render judgment for EnerQuest.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 4, 2018, the following counsel are being served with a copy of this document via the Court's CM/ECF system, in accordance with Fed. R. App. P. 25 and 5th Cir. R. 25:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 11,697 words, excluding the parts of the brief exempted by Fed. R. Civ. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type-style requirements of Fed. R. Civ. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font, and with 12-point font in the footnotes.

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