IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-00283

FORREST GERMANY, A MISSISSIPPI RESIDENT, AND E.B. GERMANY & SONS, A TEXAS CORPORATION

APPELLANTS

v.

DENBURY ONSHORE, LLC, AJIT JHANGIANI, A TEXAS RESIDENT, ROSEWOOD PARTNERS, L.L.C., A MISSISSIPPI CORPORATION, AND PIRVEST, INC., A TEXAS CORPORATION

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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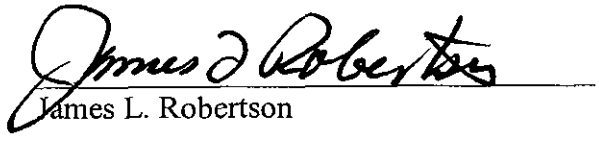

James L. Robertson

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Statement of Issues

The sole issue is whether the circuit court properly granted summary judgment to the defendants. This appeal of the circuit court's summary judgment ruling raises the following questions as to Rosewood Partners, L.L.C., Pirvest, Inc., and Ajit Jhangiani:

1. Whether the circuit court properly granted summary judgment to Rosewood, Pirvest, and Mr. Jhangiani on all of the claims of Forrest Germany and E. B. Germany & Sons (sometimes collectively "Germany") under a letter agreement of July 11, 2002, and settlement agreement of December 22, 2004, where

- Germany allowed the ninety day option-to-purchase period under the letter agreement to expire without ever paying the $125,000.00 purchase price,
- Germany was not a party to and never otherwise acquired any interest in the letter agreement,
- Rosewood, Pirvest, and Mr. Jhangiani, discharged all duties specified and imposed upon them by the settlement agreement, and
- Germany did not sustain any damages under the settlement agreement because the only interest they could have acquired under that instrument (Rosewood's interest in the letter agreement) was worthless.

2. Whether the circuit court properly concluded that a restrictive covenant in a purchase agreement does not violate Mississippi anti-trust law, where that covenant restricts only the purchaser and does not apply to the general public, and there is no evidence of any tendency toward monopoly or injury to competition.

Statement of the Case

A. Nature of the Case

On March 18, 2005, Mr. Germany and his company filed suit on a ninety day purchase option that expired three days later, on March 21, 2005, without ever being exercised, tolled, or

extended. Neither the parties nor the circuit court took any action that extended the option period past its expiration date.

This was Germany's second lawsuit against Rosewood, Pirvest, and Mr. Jhangiani. Unhappy with the settlement they negotiated in the first lawsuit, Germany sought to reassert claims they had released just 87 days earlier. The circuit court concluded this was improper and granted summary judgment to defendants.

Rosewood, Pirvest, and Mr. Jhangiani are dissatisfied with Germany's factual statement and thus provide this statement of the case under MRAP 28(b). Germany's statement of facts consists mostly of extraneous and irrelevant matters (with sparse citations to the record) relating to claims that Germany released in the first settlement agreement and were dismissed with prejudice in the circuit court.

B. Course of Proceedings and Disposition in Circuit Court

On March 18, 2005, Forrest Germany and his company, E.B. Germany & Sons ("Germany"), sued Denbury Onshore, LLC, Rosewood Partners, L.L.C., Pirvest, Inc., and Ajit Jhangiani in the Circuit Court of Pike County, Mississippi. Germany alleged that Denbury, Rosewood, Pirvest, and Mr. Jhangiani conspired to deprive him of minerals rights Germany claimed to possess by virtue of a contract and settlement agreement.[1] Defendants sought summary judgment.[2] On January 22, 2007, the circuit court entered its order granting summary judgment.[3] Two weeks later, Germany timely filed notice of appeal.[4]

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[1] R.112-118.
[2] R.150-472; R.483-484.
[3] R.1247-1259; Appellants' Record Excerpts at 11-36.
[4] R.1280-1281.

C. Statement of Facts

On July 11, 2002, Denbury purchased the McComb Field from Rosewood for $2.5 million.[5] In connection with the purchase, Rosewood agreed that neither it nor its members (including Mr. Germany and his company) would acquire any royalty interest in the field for three years.[6]

As part of the purchase, Denbury and Rosewood entered into a two-page letter agreement,[7] also dated July 11, 2002, under which Denbury had the exclusive right to purchase a one percent royalty interest in the McComb Field, but upon acquiring that one percent interest would share any additional royalty purchases with Rosewood on an equal basis until Rosewood also acquired a one percent interest.[8] Denbury and Rosewood were the only parties to the letter agreement. Although Mr. Germany (whose company owned about five percent of Rosewood) and the majority Rosewood partner, Luther Henderson, negotiated the sale as agents for Rosewood, neither Mr. Germany nor his company was a party to the sale or letter agreement.[9]

The letter agreement obligated Denbury to make a reasonable attempt to purchase royalty interests, but insulated Denbury from liability for its failure or inability to make additional royalty purchases:

> Denbury will make a reasonable attempt to purchase said royalty interest for the parties (*sic*) joint account, at prices and upon terms acceptable to Denbury, but will not be held responsible and or (*sic*) liable if it is unable to purchase or does not purchase any additional overriding interests or royalty interests.[10]

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[5] R.154-193; Appellants' Record Excerpts at 56-94.
[6] R.168 (§18.2); Appellants' Record Excerpts at 168 (§18.2).
[7] R. 46-47; Appellants' Record Excerpts at 95-96.
[8] R.194-195; Appellants' Record Excerpts at 95-96.
[9] In their sworn interrogatory answers, which were part of the summary judgment record, Mr. Germany and his company admitted that Mr. Germany's actions in the matter were on behalf of Rosewood ("Forrest Germany will testify regarding negotiations between Luther Henderson and Forrest Germany, on behalf of Rosewood Partners, and representatives of Denbury . . . ending in a letter agreement dated July 11, 2002."). R.363-364.
[10] R.194-195 (§5); Appellants' Record Excerpts at 95-96 (§5).

Two years later, on October 27, 2004, Mr. Germany (along with his wife and company) filed suit in the Circuit Court of Pike County, No. 04-280-A, against Rosewood, Pirvest and Mr. Jhangiani, individually and as Executor of the Estate of Luther Henderson, deceased, over ownership and control of Rosewood and debts Mr. Germany owed the company.

On December 22, 2004, the Germany parties settled their lawsuit by entering into a written settlement agreement[11] under which they relinquished any interest in Rosewood, and in exchange Rosewood conveyed to them a parcel of real property, forgave their debts and obligations, and granted to Mr. Germany a 90-day option period within which he could pay $125,000.00 to purchase Rosewood's interest in the letter agreement with Denbury:

> With the execution of this Agreement, Rosewood shall execute an assignment [of interest to be] . . . held in trust by Raymond B. Albertson, counsel for Rosewood, until such time as Forrest Germany delivers the sum of $125,000.00 to Rosewood . . . Until such time as Forrest Germany pays the $125,000.00 to Rosewood, Rosewood will retain all right, title, and interest in the Letter Agreement . . . In the event that Forrest Germany does not pay the sum of $125,000.00 to Rosewood within ninety (90) days from the execution of this Agreement, the Assignment[12] shall become null and void.[13]

The settlement agreement imposed no burden on Rosewood to help Mr. Germany decide whether to exercise the purchase option, other than to require Rosewood to acknowledge the existence of the agreement to Denbury (but only if Denbury inquired about it) and authorize Denbury to discuss the letter agreement with Mr. Germany:

> Immediately upon being asked by Denbury, Jhangiani will acknowledge Forrest Germany's right to assignment of Rosewood's interests in the Letter Agreement upon payment of the $125,000.00 as set out above, an (*sic*) will authorize Germany to

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[11] R.420-447; Appellants' Record Excerpts at 128-145.

[12] The Assignment, had it ever become effective, would have been to "E. B. Germany & Sons, L.L.C.," Mr. Germany's company. R. 44.

[13] R.421 (§3); Appellants' Record Excerpts at 130 (§3).

> discuss the Letter Agreement with Denbury, to the extent consistent with this paragraph.[14]

Mr. Germany, his wife, and his company signed the settlement agreement.[15] By doing so, they acknowledged their review of the agreement and their understanding that it constituted a complete release of all claims:

> **PLEASE READ THIS AGREEMENT CAREFULLY, IT CONTAINS A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS AGAINST Defendants (*sic*).**
>
> **I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THE FOREGOING AGREEMENT, THAT I UNDERSTAND ALL OF ITS TERMS, AND THAT I AM ENTERING INTO IT VOLUNTARILY.**
>
> **I FURTHER ACKNOWLEDGE THAT I AM AWARE OF MY RIGHT TO REVIEW AND CONSIDER THIS AGREEMENT AND TO CONSULT WITH AN ATTORNEY ABOUT IT, AND STATE THAT BEFORE SIGNING THIS AGREEMENT, I EXERCISED THESE RIGHTS TO THE FULL EXTENT THAT I DESIRED.**[16]

The settlement agreement also required a complete dismissal, with prejudice to refilling, of Germany's original lawsuit.[17] On December 23, 2004, Germany filed Plaintiff's (sic) Stipulation of Dismissal, "dismiss[ing] *with prejudice* the above styled and numbered cause."[18] [emphasis supplied]. See MRAP 41(a)(1).

Mr. Germany never paid the $125,000.00 option purchase price.[19] By its terms, the letter agreement terminated in three years or when Rosewood acquired a one percent interest, whichever occurred first. Denbury never acquired the threshold one percent interest, so it never

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[14] R.421 (§3); Appellants' Record Excerpts at 130 (§3).
[15] R.448.
[16] R.428; Appellants' Record Excerpts at 137 (emphasis in original).
[17] R.422; Appellants' Record Excerpts at 131.
[18] Plaintiff's (sic) Stipulation of Dismissal which is Appendix A hereto.
[19] R.450.

offered any royalty purchases to Rosewood. Because Rosewood did not acquire a one percent interest, the letter agreement terminated on July 11, 2005, three years after it was signed.

On January 27, 2005, less than six months before the letter agreement was set to expire, Mr. Germany sent a letter to Denbury asking it to extend the letter agreement for two years. Mr. Germany claimed to own Rosewood's interest in the letter agreement, and did not disclose the option purchase requirement or his failure to fulfill it:

> . . . I have reached a settlement agreement with the estate of L.A. Henderson. As part of our settlement, I have relinquished my interest in Rosewood Partners in exchange for 100% of the Rosewood Partners interest in that certain Letter Agreement dated July 11, 2002 . . . ."[20]

Denbury, however, knew the truth – that Mr. Germany had not paid the $125,000.00 option price – because Mr. Jhangiani had sent a letter to Denbury on February 2, 2005, informing Denbury of the option agreement and authorizing Denbury to discuss the letter agreement with Mr. Germany:

> To the extent possible, please let this letter serve as authorization by Rosewood Partners, LLC for Forrest Germany to discuss the Letter Agreement with Denbury Resources, Inc.[21]

Denbury declined to discuss an extension with Mr. Germany but did indicate it would do so when he purchased Rosewood's interest.[22] Three weeks later, however, Denbury responded to Mr. Germany by rejecting his request to extend the letter agreement.[23]

Despite never paying the option purchase price, Mr. Germany and his company sued Mr. Jhangiani, Rosewood, and Pirvest again on March 18, 2005, this time adding Denbury as a

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[20] R.469.

[21] R.612; Appellants' Record Excerpts at 156; *see also* R.1082-1083 (Jhangiani deposition testimony).

[22] R.470. Denbury's Dean Edzards did not, as Mr. Germany claims in his brief, state that he "could not" discuss the letter agreement based on his conversation with Mr. Jhangiani (Appellants' Brief at 9). Rather, he simply declined to do so until the purchase was completed.

[23] R.472; Appellant's Record Excerpts at 154.

defendant.[24] Mr. Germany and his company alleged that Denbury breached the letter agreement, contending they acquired an interest in it through their settlement with Rosewood. Once again, Mr. Germany described the settlement agreement as though the purchase option never existed:

> The Defendant Rosewood Partners, by a settlement agreement, agreed to assign to Plaintiff, Forrest Germany, all of its right, title and interest in the letter agreement . . . .[25]

Mr. Germany and his company asserted claims against Rosewood, Pirvest, and Mr. Jhangiani for breach of contract, intentional infliction of emotional distress, tortious interference with contract, bad faith, conspiracy, and violation of Mississippi's anti-trust statutes, claiming they conspired to prevent Mr. Germany from obtaining information from Denbury. Acting in accordance with MRAP 56(c), the circuit court granted summary judgment to defendants.[26]

Summary of the Argument

Germany's claims are limited to those, if any, arising under the settlement agreement of December 22, 2004. Germany released all claims that were or may have been made in No. 04-280-A. Moreover, by Stipulation filed December 23, 2004, all such claims were "dismiss[ed] with prejudice." MRCP 41(a)(1).

The circuit court properly granted summary judgment to defendants on Germany's claims under the letter agreement because they were not parties to that agreement and never acquired any interest in it.

The circuit court properly granted summary judgment to defendants on Germany's claims under the settlement agreement because defendants fulfilled the only requirements in that agreement concerning Germany's acquisition of information from Denbury. Although Mr.

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[24] Debora C. Germany, a plaintiff in No. 04-280-A, was not and is not a plaintiff/appellant in the case at bar.
[25] R.114.
[26] R.1247-1259; Appellants' Record Excerpts at 11-36.

Germany now claims that he was to have full access to information about the letter agreement and that Rosewood was required to help him obtain it, those provisions were not in the settlement agreement. The settlement agreement required that Mr. Jhangiani acknowledge its existence to Denbury, and authorize Denbury to communicate with Mr. Germany about the letter agreement. Mr. Jhangiani fulfilled these requirements. The settlement agreement also contained specific clauses, in all capital letters and bold face print, by which the parties disclaimed the existence of or their reliance on any agreements or negotiations not included in the settlement agreement.

The circuit court properly granted summary judgment on Germany's claim for breach of the duty of good faith and fair dealing because Mr. Jhangiani complied faithfully with the settlement agreement. Germany attempts to use the duty of good faith not to enforce good faith performance of the settlement agreement, but to rewrite it to impose additional burdens he now wishes he had bargained for at the time. The settlement agreement required Mr. Jhangiani to acknowledge its existence to Denbury and authorize Denbury to communicate with Mr. Germany. It did not require Mr. Jhangiani or anyone else to obtain information from Denbury and forward it to Mr. Germany, or to persuade Denbury to release information to Mr. Germany.

Mr. Germany failed to provide the circuit court with *any* evidence that *anyone* did *anything* to hinder his acquisition of information from Denbury. Mr. Germany can prove only that Denbury never gave him the information. He has no idea – and no evidence – of why Denbury did not provide the information. As a result, he introduced no evidence sufficient to create a genuine issue of material fact concerning any breach of any duty of good faith and fair dealing that Rosewood, Pirvest, or Mr. Jhangiani may have owed to him.

Mr. Germany controlled his own destiny with respect to the purchase option. If he wanted to acquire an interest in the letter agreement, all he had to do was pay the option purchase

price. Mr. Germany let the ninety day option period expire, without action by himself or his company. As a result, the circuit court properly concluded that defendants were not the proximate cause of any damages to Germany. Moreover, Germany did not sustain any damages because the only interest he could have obtained by exercising his purchase option (Rosewood's interest in the letter agreement) was worthless. Rosewood was not entitled to any royalty interest unless and until Denbury obtained a one percent interest. Rosewood's interest was worthless because this one percent interest was never triggered. As a result, Mr. Germany cannot possibly claim any damages under any of his theories of recovery.

The circuit court properly granted summary judgment on Germany's anti-trust claim because the restrictive covenant at issue applied only to Rosewood and its members, and because there was no evidence of any tendency toward monopoly.

Argument

The circuit court properly granted summary judgment to defendants on all of Germany's claims. This court's review of the circuit court's grant of summary judgment is *de novo*. *Burton v. Choctaw County*, 730 So.2d 1, 3 (Miss. 1997). This court "may affirm the lower court's grant of summary judgment on grounds other than that which the trial court used." *Kirksey v. Dye*, 564 So.2d 1333, 1336 (Miss. 1990) (citations omitted). This court:

> . . . [is] not in the business of reversing a trial court when it has made a correct ruling or decision. We are first interested in the result of the decision, and if it is correct we are not concerned with the route – straight path or detour – which the trial court took to get there . . . An appellee is entitled to argue and rely upon any ground sufficient to sustain the judgment below.

Hickox by and through Hickox v. Holleman, 502 So.2d 626, 635 (Miss. 1987) (citations omitted); *see also, e.g., Pride Oil Co., Inc. v. Tommy Brooks Oil Co.*, 761 So.2d 187 (Miss. 2000) (affirming summary judgment on partially different grounds).

Under Mississippi law, summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MRCP 56(c); *e.g., Palmer v. Biloxi Regional Medical Ctr., Inc.*, 564 So.2d 1346, 1355 (Miss. 1990). To preclude summary judgment, a genuine issue of fact must be material – "the existence of a hundred contested issues of fact will not thwart summary judgment where none of them is material." *Grisham v. John Q. Long V.F.W. Post*, 519 So.2d 413, 415 (Miss. 1988).

I. The circuit court properly granted summary judgment on all claims under the letter agreement because Mr. Germany had no interest in that agreement.

Germany was not a party to the letter agreement. To the contrary, Denbury and Rosewood were the only parties to that letter agreement. Mr. Germany had an opportunity to acquire an interest in the letter agreement by exercising the ninety day purchase option under the settlement agreement, which provided that:

> In the event that Forrest Germany does not pay the sum of $125,000.00 to Rosewood within ninety (90) days from the execution of this Agreement, the Assignment[27] shall become null and void.[28]

The ninety-first day after the settlement agreement came and passed without Mr. Germany paying the $125,000.00 option fee that would have granted his company an interest in the letter agreement.

Mr. Germany continues to argue – albeit without citation to legal authority – that he may pursue claims for what he contends were breaches of the letter agreement despite his lack of any interest in it.[29] Germany's statement of facts contains pages of claims related to Denbury's performance under the letter agreement. The circuit court properly granted summary judgment

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[27] As noted above, the Assignment, had it ever become legally effective, would have been "to E. B. Germany & Sons, L.L.C.," Mr. Germany's company. R.44.
[28] R.421 (§3); Appellants' Record Excerpts at 130 (§3).
[29] Appellant's Brief at 16.

on those claims because Germany was not a party to the letter agreement and never acquired any interest in it.[30]

II. The circuit court properly granted summary judgment on all claims relating to the settlement agreement.

A. Defendants fulfilled the only requirements in the settlement agreement concerning Germany's acquisition of information from Denbury.

The settlement agreement required that Mr. Jhangiani acknowledge the existence of the settlement agreement to Denbury, if asked, and authorize Denbury to discuss the letter agreement with Mr. Germany. It did not require anyone to help Mr. Germany obtain information from Denbury.[31] In their statement of facts, Germany claims that:

> An essential term of the Settlment (*sic*) Agreement was that Germany would have full access to all information that Rosewood would have had access to prior to determining whether to purchase the Letter Agreement.

(Appellants' Brief at 8). The settlement agreement says nothing of the sort. Germany takes the rather startling position that this "essential term" somehow was implied, but nothing in the agreement remotely suggests such an interpretation and Germany does not point this court to any such contractual provision. Mr. Germany testified in the circuit court that "[m]yself and my attorney made sure all parties were clear I had all rights to information related to the royalty acquisition program . . . [and] [w]hen this was made clear in the Settlement (*sic*) negotiations, I agreed to dismiss the lawsuit."[32] In fact, the settlement agreement included a clearly worded

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[30] Independently, Mr. Germany provides meaningful argument only for his third point of error, concerning the duty of good faith and fair dealing. Mr. Germany's discussion of his first two points of error consists of conclusory statements, lacks a single citation to the record, and contains only two citations to legal authority (a string cite of cases listing the elements of a claim for interference with business relations, and a statute and case giving the general rule of liability for anti-trust violations). This court may choose not to consider these points on appeal as a result of Mr. Germany's failure to cite any meaningful authority or make any meaningful argument in support of them. *See Estate of Mason v. Fort*, 616 So.2d 322, 327 (Miss. 1993).

[31] R.421 (§3); Appellants' Record Excerpts at 130 (§3).

[32] Appellants' Record Excerpts at 48.

entirety clause that forecloses Germany's attempts to impose additional obligations either by implication or by some argument that the parties discussed other obligations in their negotiations. Under the express terms of the settlement agreement:

> Plaintiffs and Defendants understand and agree that this is the entire Agreement between Plaintiffs and Defendants, that it supersedes all prior discussions, actions, or conversations between them and that neither Defendants nor Plaintiffs have made any promises other than those contained in this Agreement.
>
> . . .
>
> This Agreement sets forth the entire agreement between the Parties hereto, and fully supersedes any and all prior agreements, negotiations, or understandings between the Parties . . . .[33]

In their brief, Germany really describes the settlement agreement they wish – in hindsight – that they had negotiated for, but didn't. If Mr. Germany needed additional information to exercise the purchase option, he should have obtained it before entering into the settlement agreement or made its production a condition of that agreement. Instead, he signed an agreement that did not require anyone to help him obtain information, and then sued the settling parties when they failed to fulfill a non-existent obligation.

Mr. Jhangiani discharged his duty under the settlement agreement when he sent a letter to Denbury acknowledging the existence of the agreement and authorizing Denbury to discuss the letter agreement with Mr. Germany.[34] This fact – which disposes of Germany's claims – is not disputed. Germany implies in their brief that they doubt the authenticity of the letter because Mr. Germany never received a copy of it,[35] but that does not controvert Mr. Jhangiani's testimony[36] that he sent it to Denbury – the only recipient mandated by the settlement agreement.

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[33] R.425, 427; Appellants' Record Excerpts at 134, 136.

[34] R.612; Appellants' Record Excerpts at 156; *see also* R.1082-1083 (Jhangiani deposition testimony).

[35] Appellants' Brief at 20.

[36] R.1082-1083 (Jhangiani deposition testimony). Germany also contends that defendants failed to authenticate the letter. But Mr. Germany himself introduced the letter as an exhibit in his

B. Defendants did not breach the duty of good faith and fair dealing.

In an effort to impose liability on Rosewood, Pirvest, and Mr. Jhangiani despite their compliance with the settlement agreement, Germany claimed they violated the covenant of good faith and fair dealing. Mississippi law applies that covenant to contracts. *See Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992). But good faith must be tied specifically to some contractual obligation, and "the faithfulness of *an agreed purpose* between two parties, a purpose which is consistent with justified expectations of the other party." *Univ. of S. Miss. v. Williams*, 891 So. 2d 160, 170 (Miss. 2004) (*citing Cenac*, 609 So. 2d at 1272) (emphasis added). The circuit court properly granted summary judgment on this claim because nothing in the settlement agreement imposed any obligation on defendants to help Mr. Germany acquire information from Denbury.

Far from relying on the duty of good faith to enforce compliance with any contractual provision, Germany improperly uses that duty to try to create additional substantive contract terms. The settlement agreement clearly and unambiguously detailed Mr. Jhangiani's duties concerning Mr. Germany's communication with Denbury. The settlement agreement required Mr. Jhangiani only to acknowledge the existence of the settlement agreement and authorize Denbury to discuss the letter agreement with Mr. Germany:

> Immediately upon being asked by Denbury, Jhangiani will acknowledge Forrest Germany's right to assignment of Rosewood's interests in the Letter Agreement upon payment of the $125,000.00 as set out above, an (*sic*) will authorize Germany to discuss the Letter Agreement with Denbury, to the extent consistent with this paragraph.[37]

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response to the summary judgment motions. R.612 (Plaintiff's Exhibit 18). As a result, the letter properly became part of the summary judgment record when no one objected to its introduction by Mr. Germany. Mr. Germany also waived any objection by his failure to assert and obtain a ruling on it in the circuit court.

[37] R.421 (§3); Appellants' Record Excerpts at 130 (§3).

The settlement agreement did not require Mr. Jhangiani or anyone else to obtain information from Denbury and forward it to Mr. Germany, or to pressure, compel, or cajole Denbury into releasing information to Mr. Germany. It did not even require anyone to make an effort to help Mr. Germany obtain the information. These were all terms that Germany could have bargained for or perhaps secured some other way, but didn't. Here, as elsewhere, the settlement agreement's silence speaks volumes.

Germany contends that Mr. Jhangiani failed to fulfill the letter agreement because he did not authorize Denbury to release royalty acquisition information. But the settlement agreement did not impose any such requirement. Mr. Germany no doubt wishes he had bargained for this obligation, but he did not. The summary judgment evidence established that Mr. Jhangiani's sole duties were to "acknowledge Forrest Germany's right to assignment of Rosewood's interests in the Letter Agreement upon payment of the $125,000.00" and authorize Denbury to discuss the letter agreement with Mr. Germany.[38] Mr. Jhangiani discharged this duty with his letter to Denbury.[39]

Alternatively, even if Rosewood, Pirvest, or Mr. Jhangiani had some duty with respect to Mr. Germany's acquisition of information from Denbury, Mr. Germany failed to provide any evidence that this duty was breached. Even in his argument to this court, Mr. Germany claims that Denbury never gave him the information – but can only speculate as to why: "Jhangiani either failed to authorize the release of the information, Jhangiani authorized the release, but Denbury willfully failed to comply, or Denbury and Jhangiani agreed to withhold the information and cut Germany out of any profits."[40] In other words, Mr. Germany has no idea –

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[38] R.421 (§3).

[39] R.612; Appellants' Record Excerpts at 156; *see also* R.1082-1083 (Jhangiani deposition testimony).

[40] Appellants' Brief at 17. Mr. Germany places great emphasis on what he calls Mr. Jhangiani's "threat" to cut him out of the letter agreement (Appellants' Brief at 9). According to Mr.

and most certainly no evidence – of why Denbury did not provide the information. If, as Mr. Germany speculates, Mr. Jhangiani authorized the release (the only one of Mr. Germany's theories supported by the record) "but Denbury willfully failed to comply," that would mean that Mr. Jhangiani did not breach the duty of good faith.[41] Mr. Germany failed to provide the circuit court with any evidence that Rosewood, Pirvest, or Mr. Jhangiani did anything to hinder his acquisition of information from Denbury.

Germany's reliance on *Favre Property Mgt., LLC v. Cinque Bambini*, 863 So.2d 1037, 1046 (Miss. App. 2004) is misplaced for several reasons. *Favre* concerned a party's failure to perform an act expressly contemplated by the contract, a real estate purchase and sale agreement that specifically required the buyer to obtain a survey of the property and provide it to the seller, and contained a clause requiring all parties to use reasonable efforts to effectuate a transfer of the property. *Id.* at 1040-41. Favre, the purchaser's assignee, paid the earnest money required by the contract but the seller refused to provide any property description to Favre despite repeated requests.

The claimed breach in *Favre* arose from a direct contractual obligation, the duty to provide a survey – *which was impossible to fulfill without a legal description of the property. Id.* at 1041, 1043. Favre's failure to provide the survey, in turn, constituted a breach of the contract:

> The survey was due within sixty days of the effective date of the contract. Favre was unable to simply forego obtaining the survey; before it could do so, it had to secure [the seller's] agreement to

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Germany, Mr. Jhangiani told him "I've done all I'm going to do, I've been talking with Dean and if you can't come up with $125,000.00 we are going to cut you out." R.682. If this is true, it constitutes no evidence of any breach. Indeed, by its terms, the settlement agreement says that if Mr. Germany "does not pay the sum of $125,000.00" he and his company are automatically "cut out" by his own inaction, not by anything Mr. Jhangiani might do. Mr. Jhangiani had fulfilled his obligations under the settlement agreement and was free to refuse to provide any other assistance.

[41] As Mr. Germany put it, ". . . if [the letter] was sent to Denbury, the facts remains that the information was never released to myself." R. 683. But that would not give rise to any liability for Rosewood, Pirvest, or Mr. Jhangiani.

> use the description in the deed. Presumably, if Favre did not obtain a survey and [the seller] refused to use the description in the deed, then Favre would have been in breach of its contractual duty to provide a survey.

Id. at 1046. Although Mr. Germany may have preferred to have the information from Denbury before deciding whether to exercise his purchase option, his inability to obtain that information did not make Mr. Germany's exercise of the option impossible or prevent him from fulfilling any obligation under the settlement agreement.

Independently, Favre's appeal was from an order of dismissal for failure to state a claim, subject to a far stricter standard on appeal. The appellate court held that it was "unable to say that [the seller's] intentional withholding of a legal description, especially in light of [the seller's] other misbehavior, could under no set of facts be so unreasonable as to constitute a breach of the covenant of good faith and fair dealing." *Id.* at 1046. Denial of a motion to dismiss for failure to state a claim may be revisited on summary judgment, meaning the facts in *Favre* might well have given rise to a proper summary judgment, once the parties had a full opportunity for discovery.

Finally, the facts in *Favre* were very different from this case because (1) Favre was suing the defendant for *its* failure to provide information within *its* possession, rather than for some undefined duty to help obtain information from someone else, and (2) Favre had evidence that the seller "had the legal description in its possession, and . . . had given it to an attorney with instructions not to distribute it without permission." *Id.* at 1042. In contrast, Germany produced no evidence that Rosewood, Pirvest, or Mr. Jhangiani ever withheld any information, instructed Denbury to withhold any information, or did anything to prevent or hinder his acquisition of

information from Denbury.[42] To the contrary, the uncontroverted evidence showed that Mr. Jhangiani sent his letter to Denbury even without being asked to do so.

C. Mr. Germany cannot establish proximate cause of damages under any of his theories.

Even if Germany somehow could show some breach of duty by Rosewood, Pirvest, or Mr. Jhangiani, the circuit court properly concluded – as an alternative ground for granting summary judgment – that Germany could not establish proximate cause of any damages. During his 90-day option period, Mr. Germany could have exercised his right to pay $125,000.00 and acquire Rosewood's interest in the letter agreement. He did not – and that was solely his decision. This is particularly clear given Mr. Germany's apparent desire to pursue a claim against Denbury for breach of the letter agreement. If Mr. Germany wanted standing to sue Denbury, he could have acquired it by paying the option purchase price. Because Mr. Germany always controlled his own destiny with respect to exercise of the purchase option, the circuit court properly concluded that defendants did not cause him any damages.

Additionally, Mr. Germany claims he did not receive information critical to his decision whether to exercise the purchase option. If the information he purportedly required had led him to decline to exercise that option, the failure to provide it could not have damaged him. If the information had led him to exercise the option, then the only interest Mr. Germany would have acquired was Rosewood's – and it was worthless.[43] The letter agreement provides that Rosewood was not entitled to any royalty interest unless and until Denbury obtained a one percent interest. Rosewood's interest in the letter agreement was worthless because the one

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[42] R.681-683.

[43] Mr. Germany makes a passing reference in his brief to some sort of derivative action he might have pursued, but fails to provide any explanation of or legal authority for this claim (Appellants' Brief at 15). More important, he failed to raise this issue in the circuit court and cannot do so for the first time on appeal. *See Tower Loan of Mississippi, Inc. v. Jones*, 749 So.2d 189, 191-92 (Miss. 1999) (issue not raised is waived unless plain error exists).

percent interest was never triggered. As a result, Mr. Germany cannot possibly claim any damages under the letter agreement.[44]

III. The circuit court properly granted summary judgment on the antitrust claim because the restrictive covenant did not tend to effect or enhance a monopoly.

When it sold the McComb Field to Denbury, Rosewood agreed that neither it nor its members (including Mr. Germany and his company) would acquire any royalty interest in the field for three years.[45] Mr. Germany claims this restrictive covenant violated Mississippi anti-trust laws. Those laws, however, are overlain with the same common law architecture that federal courts use in construing federal anti-trust laws. *See Owens Corning v. R. J. Reynolds Tobacco Co.*, 868 So.2d 331, 344 (Miss. 2004). Mr. Germany presented no evidence to the circuit court – and cites no evidence to this court – showing any injury to competition in a properly delineated geographic and product market. As a result, the circuit court properly rejected the anti-trust claim.

Independently, the circuit court properly held that the restrictive covenant did not violate the anti-trust provision, because it applied solely to Rosewood and its members. The general public retained the full right to purchase interests in the McComb Field. Agreements that do not tend to effect or enhance a monopoly generally do not violate Mississippi anti-trust law. *Cf., Empiregas, Inc. v. Bain*, 599 So.2d 971, 975 (Miss. 1992) ("no threat to the public of monopoly or unfair competition"); *Texas Road Boring Co. v. Parker*, 194 So.2d 885, 89 (Miss. 1967) ("no tendency toward the establishment of a monopoly"); *Donahoe v. Tatum*, 134 So.2d 442, 444 242 Miss. 253, 259 (Miss. 1961); *Redd Pest Control v. Foster*, 761 So.2d 967, 973 (Miss. App. 2000). This case is similar to *Hood Industries, Inc. v. King*, 255 So.2d 912 (Miss. 1971), in

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[44] As the circuit court noted, if the defendants somehow prevented Mr. Germany from obtaining information, all they did was save him from spending $125,000.00 to purchase a worthless interest. R.1273. Appellants' Record Excerpts at 32.

[45] R.168 (§18.2); Appellants' Record Excerpts at 168 (§18.2).

which this court held that a forty year non-compete agreement for the acquisition of mining leases did not violate Mississippi anti-trust law.

Because the restrictive covenant in this case applied only to Rosewood and its members, and because there was no evidence of any tendency toward monopoly, the circuit court properly held that the restrictive covenant did not violate Mississippi anti-trust law.

Conclusion

The circuit court properly granted summary judgment to defendants in this case, and that decision should be affirmed.

This the 20th day of December, 2007.

Respectfully submitted,

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James L. Robertson

IN THE CIRCUIT COURT OF PIKE COUNTY, MISSISSIPPI

FORREST GERMANY, DEBORA C. GERMANY, MISSISSIPPI RESIDENTS and E.B. GERMANY & SONS, A TEXAS CORPORATION — PLAINTIFFS

VS. — CAUSE NO: 04-280-A

AJIT JHANGIANI, A TEXAS RESIDENT , THE ESTATE OF LUTHER HENDERSON, BY AJIT JHANGIANI, EXECUTOR, and ROSEWOOD PARTNERS, L.L.C, A MISSISSIPPI CORPORATION — DEFENDANTS

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PIKE COUNTY, MISS.
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PLAINTIFF'S STIPULATION OF DISMISSAL

The Plaintiff, Pursuant to Rule 41, Mississippi Rules of Civil Procedure, by stipulation, dismisses with prejudice the above styled and numbered cause.

This the 23rd day of December, 2004.

Respectfully submitted:

FORREST GERMANY, DEBORA C. GERMANY, MISSISSIPPI RESIDENTS, AND E.B. GERMANY & SONS, A TEXAS CORPORATION, PLAINTIFFS

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APPENDIX A