

**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**

**APPELLANT**

**VS.**

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

**APPELLEE**

**AN APPEAL FROM THE ORDER OF THE CIRCUIT COURT OF PIKE  
COUNTY, MISSISSIPPI GRANTING DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

**ENTERED JANUARY 19, 2007  
JUDGE MIKE TAYLOR, PRESIDING**

**APPELLANTS' BRIEF**

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### CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or recusal.

1. Forrest Germany, Appellant
2. E.B. Germany & Sons, Appellant
3. Wayne Dowdy, Attorney for Appellants
4. Andrea A. Sanders, Attorney for Appellants
5. Denbury Onshore, LLC, Appellee
6. Ajit Jhangiani, Appellee
7. William F. Blair, Attorney for Appellee
8. Troy F. Odom, Attorney for Appellee
9. John Gordon Roach, Attorney for Appellee
10. Raymond B. Albertson, Attorney for Appellee

THIS the 27<sup>th</sup> of September, 2007.

Respectfully submitted,

FORREST GERMANY, and E.B. GERMANY & SONS,  
APPELLANTS

BY: \_\_\_\_\_

WAYNE DOWDY

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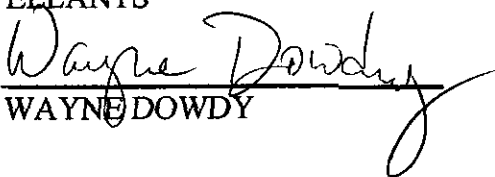
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## **STATEMENT OF THE ISSUES**

Forrest Germany and E.B. Germany & Sons respectfully submit that the following issues are relevant on appeal:

I. Whether the Circuit Court of Pike County, Mississippi erred by granting Denbury Onshore, LLC's [hereinafter Denbury] Motion for Summary Judgment on the basis that the Appellants were not parties to a Letter Agreement between Denbury Onshore, LLC and Rosewood Partners, LLC (hereinafter "Rosewood").

II. Whether the Circuit Court erred by granting Summary Judgment as to the claim for conspiracy against defendants, Denbury and Ajit Jhangiani, individually and on behalf of Pirvest on the basis that Appellant lacked standing to sue for breach of contract (the aforementioned Letter Agreement).

III. Whether the Circuit Court erred by granting Summary Judgment as to the claim for breach of contract (the Settlement Agreement), against Ajit Jhangiani, individually, and on behalf of Pirvest when Appellant, Forrest Germany was a party to the Settlement Agreement contract at all times following execution of the Settlement Agreement.

## **STATEMENT OF THE CASE**

### **A. Statement of Facts Relevant to the Issues Submitted for Review**

In 1993 Forrest Germany (Germany), began purchasing initial acreage to put together the McComb Field Unit (Field). At that time, Germany procured certain acreage and geology studies from Duke Carlisle and Riley Hagan in exchange for a 3% overriding royalty interest (Carlisle Hagan Agreement). Germany Oil's interests were passed through several successive corporations, and eventually came to be owned by Rosewood, LLC. Luther Henderson, owner of Pirvest, Inc., helped Germany form Rosewood Partners, LLC in March 1997. (R. 670-71).

Germany assigned all acquired interests in the Field to Rosewood along with the Carlisle Hagan Agreement, which had been amended in 1997 to give a right of first refusal to Rosewood on the 3% royalty interest held by Carlisle and Hagan. (R. 492). Rosewood continued to assemble acreage, purchased one well and drilled two new wells. After acquiring an aggregate 75% royalty interest, Rosewood reunited the Field, through the Mississippi Oil and Gas Board. (R. 671).

Germany and Henderson were both shareholders and officers of Rosewood. Germany served as the President and managed the daily affairs of Rosewood both before and after Henderson's death. (R. 676). Germany held approximately 4.4% (four and

four-tenths percent) interest in Rosewood, which was scheduled to increase to a little over 18% (eighteen percent) at the repayment of certain debts. (R. 568). Henderson's interest in Rosewood was held primarily by Pirvest Inc., a parent company of Rosewood. Ajit Jhangiani was an officer of Pirvest, Inc, and became President of Pirvest after Henderson's death. (R. 671).

-- Rosewood planned to use Carbon Dioxide (CO2) injection as a means for tertiary recovery, which required a ready supply of CO2 to the Field. Denbury Resources, (Denbury) owns the CO2 pipeline that services the Field. (R. 671).

On April 12, 2002, Henderson, Germany, Garreth Roberts, President of Denbury, Ron Evans, Vice President of Reservoir Engineering for Denbury, Wayne Beninger, and Mark Worthy, another Denbury Vice President met to begin negotiating the sale of Rosewood's interest in the McComb Field to Denbury. An intense bargaining process ensued culminating with a Purchase and Sale Agreement that conveyed all of Rosewood's rights in the Field to Denbury in exchange for 1) \$2,500,000.00 (2.5 million dollars); 2) a profit sharing agreement contingent on the price of oil per barrel; 3) an agreement by Germany to forgo any future attempts to purchase royalty interests in the McComb Field area; 4) and an option for Rosewood to purchase certain royalty interests from Denbury if Denbury purchased a requisite amount of interest first, within a defined time. (R. 671-74; R. 503-541; R. 542-43).

The Letter Agreement provided that Denbury would make a "reasonable attempt"



to purchase royalty and overriding interests within a three year period, and that if Denbury acquired more than 1.00% royalty within three years, it was required to offer half the excess to Rosewood Partners at cost. (R. 542-43).

The final Purchase and Sale Agreement was signed on July 11, 2002, and incorporated by reference the Letter Agreement. (R. 503-41; R. 542-43). The signing occurred at a meeting in Denbury's conference room with Dubission, Edzards, Wayne Beninger, Mark Worthy, Luther Henderson and Germany in attendance. Germany understood that Denbury would be free from liability for failure to purchase royalty interests under the Letter Agreement, if and only if, Denbury made a "reasonable attempt" to purchase said royalties. Germany and Henderson formulated their understanding of a "reasonable attempt" based on assurances made by Edzards that Denbury would do what they had done to develop similar fields such as Little Creek, ten miles east of McComb. In fact, Edzards used evidence of past performance to induce the signing of the letter agreement, and demonstrated that Denbury had successfully purchased between three and four percent royalty in Little Creek. (R. 674-75).

Denbury's "reasonable attempt" to purchase the royalty interests was not to begin until the "Final Division Order Title Opinion" was rendered for the McComb Field, an event expected by both Denbury and Rosewood to occur sometime in September or October of 2002. (R. 542). Instead of attempting to purchase royalties shortly after October 2002, as anticipated by both parties and memorialized in the Letter Agreement,

Denbury allowed two years to pass before making any attempts to purchase overriding or royalty interests. (R. 675).

On September 22, 2002, after signing the Purchase and Sale Agreement, which incorporated by reference, the Letter Agreement, Luther Henderson sustained severe injuries in a motor vehicle accident, from which he died a week later. Germany continued to perform duties as President of Rosewood after the accident. On September 24, 2002, Germany signed the Final Assignments and Bill of Sale for the McComb Field sale while Henderson was in a coma. Germany also continued to perform certain curative work required by the Purchase and Sale Agreement, and to receive final payments from Denbury on behalf of Rosewood. (R. 676; R.544-45).

In October 2003, Germany faxed a copy of the Carlisle Hagan agreement to William Watkins, a royalty broker, because Watkins was trying to sell the Carlisle Hagan interest. (R. 676-77). Germany called Dean Edzards immediately to notify him of Carlisle and Hagan's interest in selling their royalties, and in fact, Denbury's lawyer, Si Bondurant, prepared an acknowledgment of overriding royalty on October 20, 2003 which was executed by Dubission to help clear the title for sale. (R. 550-51).

Despite the fact that Germany communicated with Edzards frequently about the Carlisle Hagan interest, Denbury failed to contact Watkins, and in November 2003, Carlisle and Hagan sold half of their interest to David Hart. (R. 546-47).

Forrest Germany continued to act on behalf of Rosewood as its President, and as

such remained in frequent communication with Denbury regarding the royalty acquisition program throughout 2003 and most of 2004. Ajit Jhangiani, Executor of Henderson's estate, began questioning decisions made by Germany in late 2003, and became increasingly hostile toward him. (R. 677).

In October 2004, Gregg Gapp, Henderson's son-in-law, called Germany and told him that Jhangiani was negotiating with Denbury to sell the Price Sliver and Letter Agreement for \$300,000.00 (three-hundred thousand dollars) each. (R. 678). Germany called and wrote Dean Edzards to put him on notice that he was still the President of Rosewood, and that Edzards should not deal with Jhangiani on matters related to Rosewood. (R. 571). Edzards surprised Germany by stating that he was already dealing with Jhangiani to purchase the Price Sliver and Letter Agreement, and that neither transaction was any of Forrest's business. (R. 678-79).

On October 29, 2004, attorney Charles Sartain wrote a letter on behalf of Germany to Jay Anthis, an attorney for the Estate of Luther Henderson, to memorialize a conversation between Anthis and Sartain. The letter stated that Anthis told Sartain that "Ajit has been offered something close to \$300,000.00 for Rosewood's rights in its July 11, 2002 letter agreement with Denbury Resources." Sartain also pointed out that the offers had not been communicated to Rosewood's minority members previously and sought additional information about the offer. Sartain also reminded Anthis that Jhangiani had no experience in the oil and gas industry and that Germany was in a much

better position to evaluate such offers. Sartain asked for information regarding possible sale of the Price Sliver, and reminded Jhangiani that Germany and Sons interest in Rosewood was to increase from "4.43755% to 18.7719% upon the payout of Luther and/or Pirvest's loans to the company," and asked for updates affecting interests of minority shareholders (Germany). (R. 568).

During the same time, starting in 2003, Germany began having conversations with Jhangiani to protect certain rights he had in the probate of the Henderson estate. On numerous occasions before his death, Henderson had discussed his intentions regarding Germany, and expressly stated to Germany that he intended to forgive Germany's debt to Rosewood, deed a house in Brookhaven, Mississippi to Germany, and to convey some cash value or interest in Rosewood to Germany. These arrangements were in exchange for Germany's efforts in putting together the McComb Field over several years, on behalf of Rosewood for which Germany received no salary. (R. 679).

On October 27, 2004, Germany filed a lawsuit in the Circuit Court of Pike County, Mississippi to protect his interests in the Henderson estate. (R. 553-59; R. 560-67). On October 30, 2004, Jhangiani had a notice of a special meeting sent to Rosewood shareholders. (R. 569). The notice process involved irregularities that resulted in Jhangiani being the only shareholder present at the meeting in Dallas, Texas on November 9, 2004. Jhangiani used his majority vote to elect to collect Forrest's debt to Rosewood, sell the Brookhaven house, and remove Germany as President of Rosewood.

(R. 679-90; R. 572-73).

Jhangiani, the Estate, and Germany agreed upon a settlement to the Pike County Circuit Court action and signed a Settlement Agreement on December 22, 2004. Pursuant to the Settlement Agreement, the Estate, was required among other things to give Germany a ninety day option to purchase the rights under the Letter Agreement from Rosewood for \$125,000.00. The option to purchase expired by its own terms ninety days after the signing of the Settlement Agreement. An essential term of the Settlement 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. (R. 574-91).

Jhangiani knew that Germany could not produce \$125,000.00 without the assistance of investors, and also knew that Germany would need evidence of profitability to involve the investors. This evidence could only be obtained by access to Denbury's information regarding their status in the royalty acquisition program. If Denbury had not purchased 1% royalty interest by July 11, 2005, then Rosewood's profit sharing status would never be triggered, and the Letter Agreement would be worth nothing. (R. 680-81).

By the terms of the Settlement Agreement, Germany had only ninety days to obtain the necessary information from Denbury, gather investors, and make the purchase if he elected to, therefore time was of the essence. (R. 681). Accordingly, On January 3,

2005, Germany sent a letter to Dean Edzards noticing him of the Settlement Agreement and attempting to renew a working relationship with him. (R. 606). Germany again wrote to Edzards on January 27, 2005. In this letter Germany requested an extension of the July 11, 2005 deadline of the original Letter Agreement in light of the fact that Denbury delayed active solicitation of purchases for two years, and Germany also requested an update on royalty purchases. Germany reminded Edzards of the Settlement Agreement with Jhangiani, and notified Edzards of Germany's rights pursuant to the Settlement Agreement. (R.607).

On February 2, 2005, Edzards faxed a letter to Germany stating that he had talked to Jhangiani, and that he could not release the information until Germany had remitted the \$125,000.00 purchase price to the estate and become the rightful holder of the rights under the Letter Agreement. (R. 609). On February 3, 2005, Charles Sartain sent a letter on Germany's behalf to Ray Albertson, the Estate's attorney, asking for Jhangiani's cooperation, and describing the "catch 22" that Jhangiani and Denbury were leaving Germany in. (R. 610).

Subsequently Germany called Jhangiani asking that he authorize Denbury to release the information pursuant to the terms of the Settlement Agreement. Jhangiani told Forrest "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. 687; R. 668; R. 682).

Simultaneously, Germany made numerous attempts to call Dean Edzards and

Garreth Roberts throughout February and March of 2005, none of his messages were returned, and he was unable to establish personal contact. (R. 683). Germany sent a fax on February 21, 2005 to Edzards requesting that Edzards call and try to work out a reasonable solution. (R. 613). Edzards sent Germany a fax on February 22, 2005 stating that Denbury would not extend the terms of the Letter Agreement if Germany elected to purchase it, with the same message sent to Germany again in a separate facsimile transmittal on February 24, 2005. Both facsimile transmittals were copied to Ajit Jhangiani and Bill Blair. (R. 614; R. 615). Denbury was highly motivated to pay more than Germany for the Letter Agreement so that Denbury could avoid sharing the royalty interests with anyone. During the years since the Letter Agreement was signed, the rights under both increased significantly in value as the price of oil escalated. (R. 683).

When his deposition was taken by Defendants, Germany saw for the first time a copy of a letter that Jhangiani alleges he sent to Denbury on February 7, 2005. However, the letter was copied to no one, not Germany, Albertson, or Sartain, and if it was sent to Denbury, the fact remains that the information was never released to Germany. (R. 612). The option to purchase expired by its own terms, as did the rights under the Letter Agreement. Subsequently this lawsuit was filed to protect the rights of Germany under the Settlement Agreement, and the Letter Agreement. (R. 683).

On Feb 13, 2002 Rosewood had a reservoir engineering report completed by DeGolyer and McNaughton (DeGoyler). DeGoyler read data from two wells, drilled to

determine potential recoveries for the field, and reported an expectation that the field would produce 22.6 million barrels of oil in Rosewood's hands. Paul Szatkowski, P.E., Senior Vice President of DeGoyler, told Germany and Wayne Beninger, project engineer for Rosewood, that if they had Denbury's economics (ownership of the CO2 pipeline) that Denbury could produce 30 million barrels of oil. (R. 684).

At 30 million barrels, one percent of royalty of the field would produce 300,000 barrels, and at today's price of \$68.00 per barrel, the future revenue would be \$20,400,000.00. (R. 684).

**B. Procedural History and Disposition of the Court Below:**

The course of proceedings and disposition of the case below are as follows: Appellants perfect this appeal from an Order issued by the Circuit Court of Pike County, Mississippi, which granted summary judgment to all defendants, Denbury, Rosewood, Ajit Jhangiani, personally, and Pirvest, Inc as to all claims. Oral argument was heard on Defendants' Motion for Summary Judgment in the Spring of 2006, and Judge Mike Taylor asked to take the matter under advisement to consider the various pleadings and evidentiary matters. During pretrial motion hearings the judge granted summary judgment to all defendants as to all claims, and signed two different Orders as to that effect on January 19, 2007.



### **SUMMARY OF THE ARGUMENT**

On January 11, 2007, in the Circuit Court of Pike County, Mississippi, the court pronounced the following findings of fact:

1) The Plaintiffs were not a party to the Letter Agreement between Denbury Onshore, LLC (hereinafter "Denbury") and Rosewood Partners, LLC (hereinafter "Rosewood"), and therefore lacked standing to sue for breach of the Letter Agreement;

2) Forrest Germany did not pay the \$125,000.00 price set forth in the Settlement Agreement to purchase the rights under the Letter Agreement from Rosewood, and therefore did not become a party to the Letter Agreement.

Plaintiffs disagree that these findings of fact preclude claims against Denbury for harm perpetrated against Germany, individually. *See Vickers v. First Mississippi Nat'l Bank*, 458 So.2d 1055, 1061-62 (Miss.1984). Furthermore, Plaintiffs strenuously urge the court to reconsider the notion that these two findings of fact justify disposing of all claims as to all defendants. Specifically, these findings do not preclude a claim for bad faith against Ajit Jhangiani, Rosewood, and Pirvest, Inc. in its contractual relations with Germany pursuant to the Settlement Agreement, nor do they preclude a claim for tortious interference with business relations against all defendants, and certainly they do not dispose of the anti-trust and conspiracy claims as to all defendants.

### **STANDARD OF REVIEW**

The grant or denial of Summary Judgment is reviewed de novo by the Court. *Davis v. Hoss*, 869 So.2d 397, 401 (Miss.2004) (en banc). The Court stands in the same position as the trial court and reviews the evidentiary submissions in a light favoring the non-moving party. *Id.*

Rule 56(c) of the Mississippi Rules of Civil Procedure provides that Summary Judgment shall be granted by a court if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact. Miss.R.Civ.P. 56(c); *Saucier ex rel. Saucier v. Biloxi Reg’l Med. Ctr.*, 708 So.2d1351, 1354 (Miss.1998).

“If, in this view, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, Summary Judgment should forthwith be entered in his favor, otherwise, the motion should be denied.” *Williamson ex. rel. Williamson v. Keith*, 786 So.2d 390, 393 (Miss.2001).

## **ARGUMENT AND AUTHORITIES**

**I. Whether the Circuit Court of Pike County, Mississippi erred by granting Denbury Onshore, LLC's Motion for Summary Judgment on the basis that the Appellants were not parties to a Letter Agreement between Denbury Onshore, LLC and Rosewood Partners, LLC.**

The stated findings of the court do not dispose of the claim that the Jhangiani, Rosewood, and Pirvest conspired to breach the Settlement Agreement, and to tortiously interfere with Plaintiffs' business relations with Jhangiani, Rosewood, and Pirvest, nor do they dispose of the anti-trust claim.

Tortious interference with business relations may exist when willful and intentional acts which were calculated to cause damage to a plaintiff in his business were done with the unlawful purpose of causing damage and loss and without justification on the part of the defendant, and actual damage and loss resulted from the acts. *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.*, 743 So.2d 954, 969 (Miss.1999); *Par Industries, Inc. v. Target Container Co.*, 708 So.2d 44, 48 (Miss. 1998); *Protective Service Life Ins. Co. v. Carter*, 445 So.2d 215, 217 (Miss. 1983).

Plaintiffs have presented undisputed evidence to the court that Edzards and Jhangiani both told him on separate occasions that they intended to prevent him from obtaining information that would allow him to exercise his rights under the option or in the alternative to exercise his rights as a minority shareholder of Rosewood, and the

evidence supports that they did, in fact, effectively bar Germany from obtaining that information. Factual disputes remain as to whether defendants' actions were justified. As to the question of damages, even if the Letter Agreement never had any value, if Germany had received the information he was promised by Jhangiani in the Settlement Agreement, at that time he could have pursued a derivative action on behalf of Rosewood for Denbury's failure to make a "reasonable attempt" to purchase royalty.

Mississippi has an anti-trust law that prohibits a trust or combine, which is: a combination, contract, understanding, or agreement, express or implied, between two or more persons or corporations, the effect of which would be to unlawfully restrain trade, or unlawfully attempt to restrain trade, or to unlawfully hinder competition. Any person injured or damaged by a trust or combine may recover all damages of every kind sustained by him proximately caused by the acts of those engaged in the trust or combine. Miss.Code Ann. § 75-21-1(1972); *Wagley v. Colonial Baking Co.*, 208 Miss. 815, 856 (Miss.1950)

The Court's findings do not dispose of Plaintiffs' claims that Jhangiani's actions in concert with Denbury's served to create an illegal trust or combine which had the effect of drastically restricting the trade and therefore the prices of royalty interests in a market as limited as the McComb Field.

**II. Whether the Circuit Court erred by granting Summary Judgment as to the claim for conspiracy against defendants, Denbury and Ajit Jhangiani, individually and on behalf of Pirvest on the basis that Appellant lacked standing to sue for breach of contract (the aforementioned Letter Agreement).**

Plaintiff maintains that Denbury failed to make a reasonable effort to purchase royalty as required by the Letter Agreement. With Luther Henderson dead, and Forrest cut out of the deal, Denbury no longer had to worry about being held accountable for its actions, inactions, or malfeasance, if any, pursuant to the Letter Agreement. Jhangiani wanted to liquidate the Henderson Estate's assets and wanted the lawsuit filed by Germany against him dropped. Both parties had ample motivation to eliminate the only party who could hold them accountable, Forrest Germany. As stated in Plaintiff's previous pleadings and motions, in a conspiracy the actions of one become the actions of all co-conspirators.

Plaintiffs have submitted sworn testimony that has been uncontradicted that both Ajit Jhangiani and Dean Edzards, agent of Denbury threatened to cut Forrest Germany out of any deals made regarding the Letter Agreement. Those threats along with the outcome that Forrest was prevented from obtaining any information about royalty acquisitions, provide substantial circumstantial evidence that Edzards and Jhangiani, for whatever reason, intentionally deprived Germany of his rights.

**III. Whether the Circuit Court erred by granting Summary Judgment as to the claim for breach of contract (the Settlement Agreement), against Ajit Jhangiani, individually, and on behalf of Pirvest when Appellant, Forrest Germany was a party to the Settlement Agreement contract at all times following execution of the Settlement Agreement.**

It is undisputed that Forrest Germany was a party to the Settlement Agreement, and that the Settlement Agreement constituted a binding contract that afforded the parties to that contract all rights and duties pursuant to any ordinary contract in the State of Mississippi. As such Germany had a right to expect good faith and fair dealing from the other parties to the Settlement Agreement, including Rosewood, Ajit Jhangiani, and Pirvest. *See Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992); *Morris v. Macione*, 546 So.2d 969, 971 (Miss.1989); *Farve Property Mgt, LLC v. Cinque Bambini*, 863 So.2d 1037, 1046 (Miss.2004); and *Miss.Code Ann. § 75-1-203* (1972).

“Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party.” In the case at bar, the Plaintiffs had justified expectations that Jhangiani would fulfill his part of the Settlement Agreement, and authorize Denbury to release royalty acquisition information to Germany. Jhangiani either failed to authorize the release of information, Jhangiani authorized the release, but Denbury willfully refused to comply, or Denbury and Jhangiani agreed to withhold the information and cut Germany out of any profits.

The duty of good faith and fair dealing is “based on fundamental notions of fairness, and its scope necessarily varies according to the nature of the agreement.” *Cenac*, 609 So.2d at 1272. The Mississippi Supreme Court has identified conduct “such as subterfuge and evasion” as clearly violating the duty. *Id.* Although it is still unclear why Germany was never granted access to the royalty acquisition information until well after his option expired, the fact remains that the information was not released. The facts regarding who sent letters to whom or when they were sent, may never be fully known, but the outcome remains the same, Denbury and Jhangiani achieved their stated purpose to “cut” Germany “out of the deal.” This goal was accomplished through evasion of Germany’s requests for information, subterfuge through stalling and placing Germany in a “catch 22” the likes of which could not have been contemplated by parties dealing in “good faith”.

The covenant of good faith and fair dealing “not only imposes a duty not to prevent or hinder the other party’s performance, but may impose a duty ‘to take some affirmative steps to cooperate in achieving these goals.’” *Favre*, 863 So.2d at 1046 quoting *Cenac*, 609So.2d at 1272. Here the Court makes clear that mere failure to act may constitute a breach of the duty of good faith. Rosewood’s failure to assist Germany in obtaining the requisite information, whether passive or aggressive, certainly hindered Germany’s ability to consummate his deal with Jhangiani and Rosewood. Furthermore, the *Favre* decision suggests that Rosewood, Pirvest and Jhangiani, as parties to the

Settlement Agreement may even have had an affirmative duty, particularly in light of the deadline in the option, to assist Germany in getting the information he needed to determine the value of the Letter Agreement. *Favre*, 863 So.2d at 1046.

The *Favre* case is factually analogous to the case at bar and involved a Purchase Agreement for real property initially signed by Cinque, the seller, and RMC, the buyer. The purchase agreement was subsequently assigned to Favre, Property Management, LLC (Favre), and by its terms required Favre to make a series of installment payments. *Id.* The property was to remain titled to Cinque until the final payment was made, and could be terminated by the failure of the buyer to make any of the payments on time. *Id.* Additionally, the contract provided that the buyer would obtain a survey on the land by a designated time, or that the buyer could forgo a survey so long as the seller agreed to the description of the subject property used in the deed. *Id.* If a survey was completed and revealed that the property contained less than the requisite 2,850 acres, then the buyer could exercise an option to purchase additional acreage at an agreed upon price. *Id.*

A dispute arose when Cinque refused to provide Favre with a legal description of the property that Favre alleged was necessary to obtain the survey. When Favre was unable to obtain the survey, Favre refused to pay the subsequent installment. Cinque then began negotiations to sell certain timber in violation of the original Purchase Agreement. The Court held that Cinque had breached the covenant of good faith and fair dealing by refusing to provide the legal description despite the fact that public land records should



have contained the same information. Additionally, the Court found that Cinque actually had a duty to take affirmative action to help make sure that the objective of the contract was achieved.

Similarly, Jhangiani, agent for Rosewood and Pirvest, and a party to the Settlement Agreement, had a duty to Germany while he held an option to purchase the Letter Agreement, not to hinder Germany's efforts to execute his option. In fact, Jhangiani, may well have had an affirmative duty to facilitate the release of said information. *Id.* Jhangiani presented Germany with a copy of a letter some three years later after the onset of this litigation purporting to have authorized the release of the information to Germany, but the letter was not copied to anyone at the time nor was Germany made aware that it was sent, nor has it been authenticated by the defendants. Whether the letter was sent or not, Denbury did not release the information, and Jhangiani did nothing further to assist Germany in retrieving the information.

Jhangiani's failure to authorize release of the information or in the alternative to obtain the information for Germany are not unlike those of Cinque in the *Favre* case when Cinque refused to provide the legal description of the property for sale, and in fact, are probably more egregious than Cinque's because, Germany could not simply go to the courthouse to look up royalty acquisitions.

Not only did this breach of the implied covenant of good faith and fair dealing result in Germany allowing his option to expire, but it also created an effective bar to

Germany making a timely demand on Rosewood to sue Denbury for breach of the Letter Agreement, and subsequently filing a derivative action on behalf of Rosewood as a minority shareholder. In fact, Germany was not aware of how much royalty Denbury had purchased until well after discovery in the case sub judice had commenced.

### CONCLUSION

Considering the evidence in the light most favorable to Germany, and giving appellants the benefit of all inferences that may be reasonably drawn from the evidence presented the Motion for Summary Judgment should have been denied.

The judgment of the Circuit Court of Pike County, Mississippi should be reversed and remanded, as the facts and inferences established by Appellants created a genuine issue of material fact which by law should be reserved for the jury,

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

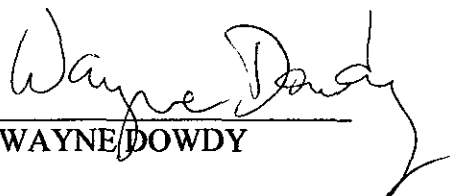
I, Wayne Dowdy, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Appellants' Brief to the following:

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This, the 29 day of September, 2007.

  
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WAYNE DOWDY