OIL AND GAS LAW

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I. INTRODUCTION

The following survey provides a brief overview of significant oil and gas law decisions of the United States Court of Appeals for the Fifth Circuit that occurred between July 2012 and June 2013. During this period, the Fifth Circuit made important rulings relating to (1) fraud and misrepresentations during oil and gas lease negotiations;[1] (2) when a contract constitutes a binding agreement or a non-binding agreement to agree;[2] (3) the scope of gas suppliers' duties to obtain replacement gas during force majeure events;[3] (4) the type of drilling cost information operators must provide to owners under Louisiana law to recover those costs from the owners;[4] and (5) the language required to effectively reserve minerals from a conveyance.[5]

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1. Petrohawk Props., L.P. v. Chesapeake La., L.P., 689 F.3d 380 (5th Cir. July 2012).
2. Coe v. Chesapeake Exploration, L.L.C., 695 F.3d 311 (5th Cir. Sept. 2012).
3. *See* Ergon-West Va., Inc. v. Dynegy Mktg. & Trade, 706 F.3d 419 (5th Cir. Jan. 2013).
4. *See* Brannon Props., LLC v. Chesapeake Operating, Inc., 514 F. App'x 459 (5th Cir. Feb. 2013) (per curiam).
5. *See* Temple v. McCall, 720 F.3d 301, 304 (5th Cir. June 2013).

II. VALIDITY OF COMPETING OIL & GAS LEASES—MISREPRESENTATIONS AND FRAUD: *PETROHAWK PROPERTIES, L.P. V. CHESAPEAKE LOUISIANA, L.P.*

In *Petrohawk Properties, L.P. v. Chesapeake Louisiana, L.P.*, the Fifth Circuit considered two competing Louisiana oil and gas leases executed during the Haynesville Shale leasing frenzy.[6] The state law claims involved fraud, misrepresentation, breach of contract, and intentional interference with a contract.[7] The Fifth Circuit affirmed the district court's judgment that Petrohawk Properties, L.P. (Petrohawk) procured its mineral lease by fraud, and thereafter rescinded the lease, dismissed Chesapeake's tort claim, and dismissed Petrohawk's claim seeking a return of its bonus money.[8]

The first lease in this dispute belonged to Chesapeake Louisiana, L.P. (Chesapeake).[9] Lee and Patsy Stockman, the landowners, executed the lease in 2005, which was set to expire in July 2008.[10] In April 2008, however, Chesapeake and the Stockmans agreed to extend the Chesapeake lease (Chesapeake Extension).[11] For the Chesapeake Extension, Chesapeake gave the Stockmans a check for $500 per acre, totaling $241,430.[12] The Chesapeake Extension was never recorded.[13]

In May 2008, before the Stockmans deposited the Chesapeake Extension check, Petrohawk, through its representative, Lisa Broomfield, approached the Stockmans about leasing the same property.[14] When told of the Chesapeake Extension, Broomfield responded that the Chesapeake Extension was not "legal or valid" because Chesapeake had not recorded it under Louisiana's race statute.[15] Broomfield offered the Stockmans a lease bonus of $3,000 per acre, totaling $1.45 million, but did not explain their potential liability to Chesapeake for breaching the Chesapeake Extension.[16]

The next day, Broomfield returned with a lease containing substantially different terms from those the Stockmans had negotiated.[17] Broomfield explained that the lease (referred to as the May 9 Lease) was merely a "placeholder" to allow Petrohawk to beat Chesapeake in the race to the courthouse.[18] Mr. Stockman insisted the May 9 Lease expressly disclaim the warranty of title.[19] Broomfield struck through the warranty of title and ensured

6. *See Petrohawk Props., L.P.*, 689 F.3d at 383.
7. *Id.*
8. *Id.*
9. *Id.* at 384.
10. *Id.*
11. *Id.*
12. *Id.*
13. *See id.*
14. *Id.*
15. *Id.* (internal quotation marks omitted).
16. *Id.*
17. *Id.*
18. *Id.* (internal quotation marks omitted).
19. *Id.*

the Stockmans that the act had the same effect as disclaiming the warranty of title.[20] The Stockmans then signed the May 9 Lease, and Petrohawk tendered a draft payable on July 2, 2008, for the royalty bonus of $1.45 million.[21]

A few days later, Mr. Stockman went to the county clerk to verify that Louisiana was a race state and that Chesapeake had not recorded the Chesapeake Extension.[22] Once verified, Mr. Stockman hired an attorney to send a letter with Chesapeake's uncashed check to Chesapeake, revoking the Stockmans' consent to the Chesapeake Extension.[23]

Mr. Stockman then tried to deposit the Petrohawk draft.[24] Petrohawk dishonored the draft because Chesapeake's original lease had not yet expired.[25] To explain the dishonored draft, Petrohawk wrongfully told Mr. Stockman that the May 9 Lease was not binding, but that if he walked away, he would not get the $1.45 million.[26] "[Petrohawk] did not tell Mr. Stockman that he was legally entitled to payment of the Petrohawk draft."[27] Petrohawk offered Mr. Stockman an additional $500 per acre to delay the lease bonus payment until July 15, 2008, after Chesapeake's original lease expired, which increased the bonus to $1.7 million.[28] On July 15, 2008, the Stockmans and Petrohawk executed a new lease, entitled "Amendment of Oil, Gas and Mineral Lease" (July 15 Lease), that incorporated the May 9 Lease by reference and included additional terms.[29] That same day, Petrohawk wired the Stockmans the $1.7 million lease bonus.[30]

Subsequently, Chesapeake sued the Stockmans for breach of contract.[31] The Stockmans denied liability and contended that their letter to Chesapeake and return of the bonus payment revoked their consent to the Chesapeake Extension.[32] The Stockmans and Chesapeake settled their dispute in 2009.[33]

Petrohawk intervened in the dispute between Chesapeake and the Stockmans and sought a declaratory judgment that the May 9 Lease was valid and superior to the Chesapeake Extension.[34] The district court severed the intervention complaint, which created this case.[35] Chesapeake filed a counterclaim against Petrohawk for intentionally interfering with its contract

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20. *Id.*
21. *Id.* at 384–85.
22. *Id.* at 385.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* (internal quotation marks omitted).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 385–86.
34. *Id.* at 386.
35. *Id.*

with the Stockmans.[36] The Stockmans filed a counterclaim against Petrohawk alleging that the May 9 Lease was void due to fraud, or alternatively, that the May 9 Lease was void for failure of consideration, and that the July 15 Lease novated the May 9 Lease.[37] Petrohawk filed an alternative counterclaim against the Stockmans and sought the return of its $1.7 million lease bonus if the May 9 Lease was rescinded or novated.[38]

Before the trial, the district court ruled that Petrohawk's May 9 Lease primed the Chesapeake Extension because the May 9 Lease was recorded first.[39] At trial, the issues were:

> (1) the Stockmans' claims for fraud, failure of consideration, and novation;
> (2) Chesapeake's claim for intentional interference with a contract;
> (3) Petrohawk's prayer for judgment declaring the May 9 Lease to be in full force and effect; and
> (4) Petrohawk's alternative counterclaim for a return of the [$1.7 million] lease bonus if the May 9 Lease [was] rescinded or novated.[40]

After a three-day bench trial, the district court ruled that Petrohawk obtained the May 9 Lease by fraud and rescinded that lease.[41] The district court dismissed Chesapeake's claim for intentional interference with a contract based on Louisiana's significant limitations on that cause of action.[42] The district court also dismissed Petrohawk's counterclaim for the return of its $1.7 million bonus, concluding that the bonus was paid for the July 15 Lease, not the rescinded May 9 Lease.[43] The district court held that the July 15 Lease stood on its own terms but incorporated the May 9 Lease's warranty of title exclusion.[44] Both Petrohawk and Chesapeake appealed to the Fifth Circuit.[45]

The Fifth Circuit first addressed Petrohawk's four challenges to the district court's fraud finding.[46] Petrohawk first argued that there was no misrepresentation of fact and that "fraud cannot be based on an opinion statement or a misrepresentation of law."[47] According to Petrohawk, Broomfield's statements were simply her opinions or statements of law.[48] The Fifth Circuit rejected Petrohawk's arguments.[49] The Fifth Circuit cited the Louisiana Supreme Court's holding in *American Guaranty Co. v. Sunset Realty*

36. *Id.*
37. *Id.* at 385–86.
38. *Id.* at 386.
39. *Id.*
40. *Id.*
41. *Id.* at 387.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 388.
47. *Id.* at 388–89.
48. *Id.* at 388.
49. *Id.* at 389–91.

& Planting Co.,[50] which stated that when a person states a matter that might be an opinion as an existing fact, and not as a mere expression of opinion, and the matter is material to the transaction, then the statement "becomes a statement of fact and not an expression of opinion."[51] The Fifth Circuit found that Broomfield made the misrepresentations to Mr. Stockman as statements of fact to assure him that he could legally sign the May 9 Lease; thus, those statements could form the basis of a fraud claim.[52] The Fifth Circuit rejected "Petrohawk's argument that a misrepresentation of law [could not] give rise to a fraud claim. Under Louisiana law, the relevant inquiry is whether there was 'a misrepresentation, suppression, or omission of *true information*.'"[53] The Fifth Circuit cited many examples in which Louisiana courts have found fraud when the underlying false statement was a misrepresentation of the law.[54]

The Fifth Circuit rejected Petrohawk's second argument that there was no factual basis that Petrohawk intended to defraud the Stockmans.[55] The Fifth Circuit stated that Broomfield was an experienced landman and paralegal in Louisiana real estate and contract law, that Petrohawk was in a frenzy to do whatever it took to get the Stockmans' lease, and that Broomfield discouraged Mr. Stockman from consulting with an attorney when he raised concerns about his signing of the Chesapeake Extension.[56] These facts supported a finding that Petrohawk intended to defraud the Stockmans.[57] The Fifth Circuit found that Broomfield misrepresented material facts when she told the Stockmans that the Chesapeake Extension would be invalid when Petrohawk recorded a new lease.[58] Furthermore, because of Broomfield's experience as a landman and paralegal, she knew that her misrepresentations were false when made.[59]

The Fifth Circuit rejected Petrohawk's third argument that Mr. Stockman relied on the results of his own investigation, not on Broomfield's

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50. Am. Guar. Co. v. Sunset Realty & Planting Co., 23 So. 2d 409, 449 (La. 1944).

51. *Petrohawk Props., L.P.*, 689 F.3d at 389 (quoting *Am. Guar. Co.*, 23 So. 2d at 449) (internal quotation marks omitted).

52. *Id.* The Fifth Circuit also rejected Petrohawk's argument that no fraud was committed because Broomfield's statements were not wholly false. *Id.* at 389 n.3. "[S]he was correct that [in Louisiana] the first lease to be recorded is the valid lease from a third party's perspective." *Id.* The Fifth Circuit rejected that argument because the Louisiana Supreme Court has stated that "[o]ne conveying a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, even though his . . . statement is true as far as it goes . . . . [S]ince such concealment is, in effect, a false representation that what is disclosed is the whole truth." *Am. Guar. Co.*, 23 So. 2d at 456 (alteration in original) (quoting 26 C.J.S. 1074, ¶ 17) (internal quotation marks omitted).

53. *Petrohawk Props., L.P.*, 689 F.3d at 389 (quoting Shelton v. Standard/700 Assocs., 2001-0587, pp. 4–5 (La. 10/16/01); 798 So. 2d 60, 64).

54. *Id.*

55. *Id.*

56. *Id.* at 389–90.

57. *Id.* at 390.

58. *Id.* at 388–89.

59. *Id.* at 389–90.

misrepresentations.[60] The evidence showed that Mr. Stockman relied on Broomfield's statements rather than the results of his own investigations.[61]

The Fifth Circuit also rejected Petrohawk's fourth argument that the truth was readily and reasonably ascertainable by the Stockmans.[62] Under Louisiana law, fraud does not vitiate consent when the complaining party "could have ascertained the truth without difficulty, inconvenience, or special skill."[63] In this case, the Fifth Circuit stated that the fraudulent misrepresentation concerned the recordation's legal effect on a mineral lease's validity.[64] For a landowner such as Mr. Stockman to ascertain the truth of the statement, it would require consulting a knowledgeable attorney, which, as the Fifth Circuit stated, entailed difficulty and inconvenience.[65]

Petrohawk next argued that even if Chesapeake fraudulently induced the Stockmans to sign the May 9 Lease, the Stockmans confirmed the May 9 Lease through their June 2, 2008 revocation letter to Chesapeake and acceptance of payment for the July 15 Lease.[66] In Louisiana, a party can confirm a relatively null contract, which cures the relative nullity.[67] "An express act of confirmation must contain or identify the substance of the obligation and evidence the intention to cure its relative nullity. Tacit confirmation may result from voluntary performance of the obligation."[68]

The Fifth Circuit began its analysis by deciding whether Louisiana law required actual or constructive knowledge to confirm a relative nullity.[69] Petrohawk argued that the standard should be constructive knowledge.[70] The Fifth Circuit, however, concluded that, "because the confirming party relinquishes a cause of action and must intend to cure the vice, . . . Louisiana law requires actual knowledge of the vice."[71]

Petrohawk argued that even if the standard was actual knowledge, "the Stockmans knew of and confirmed the fraud by the time they signed the July 15 Lease."[72] The Fifth Circuit rejected this argument based on the district court's finding that "Mr. Stockman did not know of the fraud until the Chesapeake trial in 2009"—long after the Stockmans signed the July 15 Lease.[73]

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60. *Id.* at 390.
61. *Id.*
62. *Id.*
63. LA. CIV. CODE ANN. art. 1954 (2008).
64. *Petrohawk Props., L.P.*, 689 F.3d at 390.
65. *Id.* at 390–91.
66. *Id.* at 391.
67. LA. CIV. CODE ANN. arts. 1842 (2008), 2031 (2008).
68. LA. CIV. CODE ANN. art. 1842.
69. *Petrohawk Props., L.P.*, 689 F.3d at 391–92.
70. *Id.* at 392.
71. *Id.*
72. *Id.*
73. *Id.*

Petrohawk next challenged the district court's ruling that it was not entitled to a return of the bonus it paid the Stockmans.[74] Petrohawk argued "the July 15 Lease [was] either an amendment to or a novation of the May 9 Lease, and . . . it [was] entitled to a return of the bonus" either way.[75] Petrohawk also argued that if it were an amendment, then the May 9 Lease's rescission would require rescinding the July 15 Lease, which would mandate "a return of the bonus under Article 2033 of the Louisiana Civil Code. If the July 15 Lease [was] a novation (or a new lease that extinguish[ed] . . . the May 9 Lease)," then, Petrohawk argued, "it [was] entitled to a return of the bonus [under the] implied warranty of title," which the July 15 Lease did not expressly exclude.[76]

The Fifth Circuit began its analysis by reviewing "the district court's determination that the July 15 Lease [was] a stand-alone lease, and not merely an amendment to the May 9 Lease."[77] The Fifth Circuit held that "the July 15 Lease [was] a complete contract in and of itself," with granting language, a description of the leased property, a reference to adequate consideration, and a primary term.[78] "Rather than simply amending the May 9 Lease, the July 15 Lease incorporated by reference many [of the May 9 Lease's] provisions."[79]

The Fifth Circuit rejected "Petrohawk's argument that there [was] an implied warranty of title in the July 15 Lease that [would require] the return of the lease bonus."[80] The July 15 Lease incorporated the May 9 Lease's terms, including the May 9 Lease's warranty of title exclusion.[81] Accordingly, the July 15 Lease had no implied warranty of title, and Petrohawk was not entitled to a return of the bonus it paid the Stockmans.[82]

The Fifth Circuit next addressed Chesapeake's claim against Petrohawk for intentional interference with a contract.[83] Louisiana's version of this cause of action is much narrower than the common law doctrine of interference with a contract.[84] According to the Fifth Circuit, *9 to 5 Fashions, Inc. v. Spurney*

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74. *Id.* at 392–93.

75. *Id.* at 393.

76. *Id.* Article 2033 provides that after a contract is rescinded for a relative nullity "[t]he parties must be restored to the situation that existed before the contract was made." LA. CIV. CODE ANN. art. 2033 (2008).

77. *Petrohawk Props., L.P.*, 689 F.3d at 393.

78. *Id.*

79. *Id.* at 393–94.

80. *Id.* at 394.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.* "[T]he Louisiana Supreme Court first recognized the cause of action for intentional interference with a contract in *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228, 232–34 (La. 1989)." *Id.* The Supreme Court expressly declined to adopt the broad common law doctrine for interference with a contract and instead recognized "only a corporate officer's duty to refrain from intentional and unjustified interference with the contractual relation between his employer and a third person." *Id.* at 394–95 (quoting 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 234 (La. 1989)) (internal quotation marks omitted). In Louisiana, the elements for this cause of action are "(1) the existence of a contract or a legally protected interest between the plaintiff and the corporation; (2) the corporate officer's knowledge of the contract; (3) the officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome; (4) absence of justification on the part of the officer; [and]

"requires that the defendant owe a duty to the plaintiff in order for the plaintiff to have a viable claim for tortious interference with a contract."[85] Chesapeake argued that Petrohawk owed it three duties: "(1) a duty not to engage in unfair business practices pursuant to the Louisiana Unfair Trade Practices Act ('LUTPA'); (2) a general duty under public policy not to induce the Stockmans to break their contract; and (3) a duty not to commit fraud on the public record by recording a fraudulently acquired document."[86] The Fifth Circuit rejected Chesapeake's arguments because the proposed duties were broad and ill-defined, not a narrow, individualized duty that Petrohawk owed Chesapeake.[87]

III. CONTRACT DISPUTE—BINDING CONTRACT OR NON-BINDING AGREEMENT TO AGREE? *COE V. CHESAPEAKE EXPLORATION, L.L.C.*

In *Coe v. Chesapeake Exploration, L.L.C.*, the Fifth Circuit considered a contract dispute between Peak Energy Corporation (Peak) and Chesapeake Exploration, L.L.C. (Chesapeake).[88] Peak sued to enforce an agreement with Chesapeake for Chesapeake to purchase some of its Haynesville Shale acreage in Harrison County, Texas.[89] Chesapeake contended that (1) the agreement between the parties was unenforceable under the statute of frauds, (2) the agreement was fatally indefinite, and (3) Peak had failed to perform.[90] The district court disagreed and awarded Peak damages of $19,751,004, including pre-judgment and post-judgment interest, $434,951.80 in attorneys' fees, and $19,851.92 in costs.[91] The Fifth Circuit, finding no error, affirmed.[92]

In 2008, Chesapeake sought to acquire as much Haynesville Shale acreage as it could.[93] Chesapeake identified Peak as an owner of mineral rights in the area and created detailed maps of Peak's potential holdings, which Chesapeake believed to be 5,404.75 net mineral acres.[94] In June 2008, a Chesapeake representative approached Peak and offered to purchase all of Peak's deep rights in the Haynesville Shale in Harrison County, Texas.[95] Peak stated that it did not know how many Haynesville Shale acres it had in the area but that it was willing to sell them all to Chesapeake for $15,000 per acre for a 75% net revenue interest.[96] Chesapeake's CEO, Aubrey McClendon, instructed

(5) causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought by the officer." *Id.* at 395.

85. *Id.* at 396.
86. *Id.*
87. *See id.*
88. *See* Coe v. Chesapeake Exploration, L.L.C., 695 F.3d 311, 314 (5th Cir. Sept. 2012).
89. *Id.*
90. *See id.*
91. *See id.* at 316.
92. *See id.* at 324.
93. *See id.* at 314.
94. *See id.*
95. *See id.*
96. *See id.*

Chesapeake's representative to "make the deal for us," and on July 1, Chesapeake's representative and Peak reached an oral agreement.[97]

On July 2, Chesapeake's executive vice president emailed Peak a letter entitled "Offer to Purchase," which stated:[98]

> [Chesapeake] hereby submits a cash offer of Eighty One Million Seventy One Thousand Two Hundred Fifty and No/100ths Dollars ($81,071,250.00) ("Purchase Price") to Peak Energy Corporation ("Seller"), effective July 2, 2008 (the "Effective Date"), for all the Seller's right, title and interest in certain oil and gas leases located in Harrison County, Texas (and only those located in Harrison County, Texas), such leases being shown in the map attached hereto as Exhibit "A", excepting and reserving unto the Seller all right, title and interest in and to the formations, intervals, strata and depths found between from the surface of the Earth and the stratigraphic equivalent of the base of Cotton Valley formation and further reserving an overriding royalty interest described below (the "Leases").[99]

The "terms and conditions" section provided that "[t]he leases to be conveyed . . . shall include approximately 5,404.75 net acres, and [a]djustments to the Purchase Price based on the Seller delivering more or less than 5,404.75 net acres shall be made in accordance with the allocated value of $15,000 per net acre."[100] The July Agreement "further provided that '[t]his offer will be considered void if not accepted by 5:00 PM CDT, on July 3, 2008,' was a 'valid and binding agreement,' and that the transaction's closing date was August 31, 2008."[101] Attached to the July Agreement was Exhibit A, a letter-sized map showing Harrison County with several areas highlighted with "PEAK" written next to them.[102] Chesapeake and Peak executed the July Agreement.[103]

Three weeks later, Chesapeake asked Peak for a final list of leases to be conveyed.[104] As they worked on preparing the lease list and other closing documents, the parties requested and received extensions beyond the original August 31 closing date.[105] During this time, "Chesapeake repeatedly expressed its intent to complete the transaction and Peak, believing itself bound by the July Agreement, did not solicit or entertain any offers for its holdings in Harrison County."[106]

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97. *Id.* (internal quotation marks omitted).
98. *Id.* This is called the "July Agreement." *Id.*
99. *Id.* at 314–15.
100. *Id.* at 315 (alterations in original) (quoting the Offer to Purchase) (internal quotation marks omitted).
101. *Id.* (alteration in original) (quoting the Offer to Purchase).
102. *See id.* (internal quotation marks omitted).
103. *See id.*
104. *Id.*
105. *Id.*
106. *Id.*

On October 9, Chesapeake requested to postpone the closing until January 2009.[107] Six days later, Chesapeake informed Peak that it would not complete the transaction because there were "timing issues" and because the properties were "edgy."[108] Chesapeake's decision coincided with a significant decrease in natural gas prices, which began in August 2008, and a decline in fair market value of deep rights in Harrison County, which had fallen to $3,000 per acre.[109]

In September 2009, Peak sued to enforce the July Agreement.[110] Chesapeake contended that "the July Agreement was simply an agreement to negotiate, or letter of intent, and not binding. It claimed that the agreement did not meet the requirements of the Texas statute of frauds and was too indefinite to be enforced."[111] In September 2010, the district court held a bench trial.[112] In November 2010, the district court appointed an oil and gas expert and asked him whether, after reviewing the partial findings of fact, exhibits, and Harrison County's Deed and Property Records, he could "identify by reference to the volume and page number of said deed records the oil and gas leases contained within the shaded areas of the Map wherein [Peak] is named as the lessee."[113] The expert testified that he could identify the leases and determine the status of the deep rights by examining the leases and additional public records.[114] The district court then entered judgment in favor of Peak.[115]

On appeal to the Fifth Circuit, Chesapeake first argued that the July Agreement did not adequately identify the property to be conveyed and, therefore, failed to satisfy the statute of frauds.[116] "To satisfy the Statute of Frauds, a contract [conveying an interest in land] 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."[117] A court can use a map referenced in the agreement to aid a defective description if it "contains enough descriptive information which, when considered in connection with the attempted written description . . . make[s] location of the land possible."[118] "If the agreement contains a sufficient nucleus of description,

107. *Id.*
108. *Id.* (internal quotation marks omitted).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* (internal quotation marks omitted).
114. *Id.* at 315–16.
115. *Id.* at 316.
116. *Id.*
117. *Id.* (alteration in original) (quoting Long Trusts v. Griffin, 222 S.W.3d 412, 416 (Tex. 2006) (per curiam)) (internal quotation marks omitted).
118. *Id.* at 316–17 (quoting River Rd. Neighborhood Ass'n v. S. Tex. Sports, 720 S.W.2d 551, 558 (Tex. App.—San Antonio 1986, writ dism'd)) (internal quotation marks omitted).

then 'parol evidence may be introduced to explain the descriptive words in order to locate the [property].'"[119]

The July Agreement's Exhibit A was a printout of a computer file, which was admitted into evidence, along with an enlarged version of the exhibit.[120] Chesapeake created Exhibit A using GIS-enabled computerized mapping software.[121] "At different layers . . . the map 'show[ed] county lines, city lines, water boundary lines, and the location of specific gas units,' 'accurately depict[ed] the location of surface owners within the county' and 'ha[s] embedded within it the GPS coordinates for each specific location and boundary line depicted on the map.'"[122]

The Fifth Circuit rejected Chesapeake's argument that the July Agreement did not provide a sufficient nucleus of description for the statue of frauds.[123] The Fifth Circuit stated that the central purpose of the "nucleus of description" requirement was to avoid cases in which a court enforces the sale of property the buyer did not intend to convey or the seller did not intend to buy based on an unclear contract.[124] A party can meet this level of certainty by different means, not just by including metes and bounds descriptions.[125] Here, the Fifth Circuit relied on the "recital of ownership" as the means to provide a sufficient nucleus of description, which the seller usually indicates by using "such words as 'my property,' 'my land,' or 'owned by me.'"[126] Texas courts have extended this rule to situations in which the grantor conveys all of her property in a specified area, even when the property includes different lots.[127] Texas courts have also extended this rule to oil and gas lease conveyances.[128] Because a recital of ownership eliminates the risk that the parties are misidentifying the property, if the owner conveys *all* the property she owns in the area described in the contract, then it meets the statute of frauds' demands.[129]

Because the July Agreement conveyed all of Peak's rights in the leases in the areas shown in Exhibit A and even further restricted the conveyance to the

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119. *Id.* at 317 (alteration in original) (quoting Gaut v. Daniel, 293 S.W.3d 764, 767 (Tex. App.—San Antonio 2009, pet. denied)).

120. *Id.*

121. *Id.*

122. *Id.* at 317–18 (final alteration in original) (quoting the district court).

123. *Id.* at 318.

124. *Id.* (internal quotation marks omitted).

125. *Id.*

126. *Id.* at 318–19 (quoting Kmiec v. Reagan, 556 S.W.2d 567, 569 (Tex. 1977) (per curiam)) (internal quotation marks omitted).

127. *Id.* at 319 n.20 ("[H]olding that '[t]he description of the [property to be conveyed] as all lots now owned by Mrs. Kepton in Knox City is sufficient, for it leads to the certain identification of the property.'" (quoting Sanderson v. Sanderson, 109 S.W.2d 744, 747 (Tex. 1937))).

128. *Id.* at 319 n.21 ("[E]xplaining that '[s]pecifically in the context of oil and gas leases, under Texas law, a grant of all of a transferor's interests located within a clearly defined area, such as a named state or county, is sufficiently descriptive to effect a conveyance and thus satisfy the Statute of Frauds.'" (quoting Baker Hughes Oilfield Operations, Inc. v. Union Bank, N.A. (*In re* Cornerstone E & P Co.), 436 B.R. 830, 843, 844–45 (Bankr. N.D. Tex. 2010))).

129. *Id.* at 319.

deep rights, the Fifth Circuit concluded that it was analogous to other cases in which Texas courts enforced agreements when a grantor conveyed all the property the grantor owned in a particular area.[130] The Fifth Circuit held that the July Agreement contained an adequate nucleus of description under the statute of frauds.[131]

Because the July Agreement contained an adequate nucleus of description, the Fifth Circuit rejected Chesapeake's argument that the district court erred by instructing the expert to review the public records when determining if he could identify the leases.[132] In these cases, Texas courts allow extrinsic evidence to "identify[] the property . . . from the data contained in the contract."[133]

Chesapeake next argued that the July Agreement was too indefinite to enforce, and specifically that the parties did not intend the July Agreement to bind them and that it lacked essential terms.[134] The July Agreement stated "that it was 'valid and binding', was entitled 'Offer to Purchase,' and provided that Chesapeake's offer would be void if Peak did not accept it by" a specified date and time.[135] Furthermore, representatives from Peak and Chesapeake, including Chesapeake's Chief Executive Officer, testified that they believed the July Agreement was valid and binding when executed.[136] Lastly, "Chesapeake continually reassured Peak it was not 'looking for a way out' of the July Agreement while the parties were trying to finalize the closing documents.[137]

Despite the evidence to the contrary, Chesapeake argued that the parties could not have intended the July Agreement to bind them because they later signed a Confidentiality Agreement that denied that intent.[138] In September 2008, Chesapeake asked to review Peak's private files to perform its due diligence.[139] Peak agreed but required Chesapeake to sign a Confidentiality Agreement, the final paragraph of which provided that "[n]othing in this Agreement shall impose any obligation upon the Companies or the Recipient to consummate any business transaction with the other or to enter into any discussions or negotiations with respect thereto."[140] The Fifth Circuit rejected Chesapeake's argument because the Confidentiality Agreement was signed several months after the July Agreement, the Confidentiality Agreement did not address the July Agreement's substance, and the other evidence demonstrating the parties' intent outweighed the Confidentiality Agreement's language.[141]

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130. *Id.*
131. *Id.*
132. *Id.* at 319–20.
133. *Id.* at 320 (alteration in original) (quoting Long Trusts v. Griffin, 222 S.W.3d 412, 416 (Tex. 2006) (per curiam)) (internal quotation marks omitted).
134. *Id.*
135. *Id.* at 320–21.
136. *Id.* at 321.
137. *Id.* (internal quotation marks omitted).
138. *Id.*
139. *Id.*
140. *Id.* (quoting the Confidentiality Agreement) (internal quotation marks omitted).
141. *Id.*

The Fifth Circuit next rejected Chesapeake's argument that the July Agreement was too indefinite to enforce because it did not contain all essential terms.[142] Essential contract terms generally include time of performance, price to be paid, and service to be rendered.[143] The July Agreement contained these essential terms.[144] But Chesapeake argued that the parties did not have a meeting of the minds on other allegedly essential elements, including the lease schedule, revenue interest, and other terms that a final Purchase and Sale Agreement would include.[145]

The absence of certain closing documents does not necessarily make an agreement non-binding so long as the agreement contains all the essential terms.[146] Because the Fifth Circuit held that the July Agreement's Exhibit A adequately described the properties to be conveyed, the absence of the lease list—a more formalized description of the conveyed property—was not fatal to the July Agreement's enforceability.[147]

Chesapeake argued that the parties had not agreed on the net revenue interest to be conveyed because the day before Chesapeake informed Peak it was not going to complete the transaction, Peak asked Chesapeake to eliminate the July Agreement's 75% net revenue interest requirement.[148] The Fifth Circuit held, however, that one party's unsuccessful attempt to retroactively change an essential term does not prove that the parties had not previously agreed to and included the essential term in the agreement.[149]

Next, Chesapeake argued that the July Agreement lacked specific terms the final Purchase and Sale Agreement would include, like warranties of title, depth limitations, non-compete provisions, and options to acquire additional acreage.[150] The Fifth Circuit noted that the July Agreement did contain depth provisions, and, more importantly, Chesapeake provided no authority that the other provisions were essential elements in a conveyance of oil and gas leases and not terms that the parties could leave open for later negotiation.[151] Accordingly, the Fifth Circuit held that these provisions were not essential and the July Agreement was sufficiently definite to enforce.[152]

Chesapeake's final challenge to the district court's judgment was that the July Agreement was unenforceable because Peak could not perform its

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142. *Id.*

143. *Id.* (citing Port Freeport v. RLB Contracting Inc., 369 S.W.3d 581, 590 (Tex. App.—Houston [1st Dist.] 2012, pet. denied)).

144. *Id.*

145. *Id.* at 321–22.

146. *Id.* at 322 (citing Castano v. San Felipe Agric., Mfg. & Irrigation Co., 147 S.W.3d 444, 448 (Tex. App.—San Antonio 2004, no pet.)).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.*

152. *See id.*

obligations under the Agreement.[153] To prevail on a breach of contract claim, a plaintiff must prove that it performed or tendered performance.[154] The July Agreement stated that the leases to be conveyed to Chesapeake would include approximately 5,404.75 net acres, each with at least a 75% net revenue interest.[155] The July Agreement also contained an adjustment clause that stated the parties would adjust the purchase price based on Peak delivering more or less than the 5,404.75 net acres in accordance with the allocated value of $15,000 per net acre.[156] At trial, Peak conceded that it could only deliver 1,645.917 acres that met the July Agreement's specifications.[157] Chesapeake argued that Texas courts have held that the seller fails to tender performance when the amount of acreage it delivers differs by 10% or more from the acreage in the contract.[158] In this case, the number of acres Peak could deliver and the number of acres listed in the July Agreement diverged by 70%.[159]

The Fifth Circuit rejected Chesapeake's argument because that approach only applies to a sale in gross of a specific tract and not a sale of land by the acre.[160] Here, the parties included an adjustment clause in the July Agreement for a change in the sale price depending on the number of acres actually conveyed.[161] Additionally, the record indicated that Chesapeake was willing to acquire any and all acreage Peak could deliver and that both parties knew the total number of acres was uncertain.[162] To the Fifth Circuit, "this demonstrate[d that] the parties included the word 'approximately' before '5,404.75 net acres,'" used the phrase "more or less," and included an adjustment clause because they were making a sale by the acre of all leases Peak could deliver rather than a sale in gross for specific tracts of land.[163] Accordingly, the Fifth Circuit affirmed the district court's conclusion that Peak was willing and able to tender performance under the July Agreement.[164]

153. *Id.*
154. *Id.* at 323 (citing S. Elec. Servs., Inc. v. City of Houston, 355 S.W.3d 319, 323 (Tex. App.—Houston [1st Dist.] 2011, pet. denied)).
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* (citing Slagle v. Clark, 237 S.W.2d 430, 433–34 (Tex. Civ. App.—Amarillo 1951, no writ)).
159. *Id.*
160. *See id.* (citing Steward v. Jones, 633 S.W.2d 544, 545–46 (Tex. App.—Texarkana 1982, no writ); *Slagle*, 237 S.W.2d at 433; Lee v. Watson, 181 S.W.2d 599, 600–01 (Tex. Civ. App.—Beaumont 1944, writ ref'd w.o.m.)).
161. *Id.*
162. *Id.*
163. *Id*. at 323 & n.40 ("[T]he words 'more or less' when used in a deed indicate a sale in gross, unless there was an understanding qualifying or defining these words." (quoting *Slagle*, 237 S.W.2d at 433) (internal quotation marks omitted)).
164. *See id.*

IV. FORCE MAJEURE PROVISIONS IN GAS SUPPLY CONTRACTS: *ERGON-WEST VIRGINIA, INC. V. DYNEGY MARKETING & TRADE*

In *Ergon-West Virginia, Inc. v. Dynegy Marketing & Trade*, the Fifth Circuit interpreted two force majeure clauses in gas supply contracts after Hurricanes Katrina and Rita hit in 2005.[165] The issue was whether Dynegy Marketing & Trade (Dynegy), the gas supplier, had a contractual duty to secure replacement gas after declaring force majeure because of the hurricane damage.[166] The case involved two contracts with different force majeure language.[167] The district court held that Dynegy did not have that contractual duty under the Ergon Refining Contract, but did under the Ergon-West Virginia Contract.[168] The Fifth Circuit, however, held that neither contract required Dynegy to attempt to secure replacement gas during the force majeure period.[169]

Two separate natural gas refinery companies, Ergon Refining, Inc. (Ergon Refining) and Ergon-West Virginia, Inc. (Ergon-West Virginia), entered into contracts with Dynegy, a natural gas supplier.[170] After Hurricanes Katrina and Rita damaged the gas industry's infrastructure, Dynegy's suppliers declared force majeure.[171] In return, Dynegy also claimed force majeure with respect to its Ergon Refining and Ergon-West Virginia Contracts.[172] Ergon Refining and Ergon-West Virginia then had to purchase gas on the open market for considerably more than the amount provided in their Dynegy contracts.[173] Ergon Refining and Ergon-West Virginia sued Dynegy to recover their damages and argued that the contracts' force majeure clauses required Dynegy to attempt to secure replacement gas, which all parties agreed Dynegy did not do.[174]

With respect to the Ergon Refining Contract, the relevant language stated, "[A] party to the contract is only entitled to invoke force majeure if that party 'remedied with all reasonable dispatch' the force majeure event."[175] The district court found the term "with all reasonable dispatch" latently ambiguous and looked to extrinsic evidence to determine the parties' intent.[176] The extrinsic evidence included primarily expert testimony, which stated that it was the standard practice in the natural gas industry for a seller to simply pass on force majeure if its upstream suppliers have declared force majeure.[177] The

165. Ergon-West Va., Inc. v. Dynegy Mktg. & Trade, 706 F.3d 419 (5th Cir. Jan. 2013).
166. *Id.* at 421–22.
167. *See id.* at 422.
168. *Id.*
169. *See id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 424 (quoting the Ergon Refinancing Contract).
176. *Id.* at 424–25.
177. *Id.*

Fifth Circuit disagreed that the phrase "with all reasonable dispatch" was ambiguous because "reasonable" is unambiguous and when used to modify other terms in a contract, it designates that the specific term "would be thought satisfactory to the offeror by a reasonable man in the position of the offeree.[178] The Fifth Circuit noted, however, that "the district court . . . properly looked to extrinsic evidence of standards used by the gas industry to determine what was 'reasonable dispatch.'"[179] Based on the expert's testimony, "reasonable dispatch" did not include securing replacement gas, so the Fifth Circuit held Dynegy's responses to the hurricanes satisfied the Ergon Refining Contract's "reasonable dispatch" requirement.[180]

With respect to the Ergon-West Virginia Contract, its force majeure language was significantly different than the Ergon Refining Contract.[181] They both enumerated certain force majeure events like hurricanes and well failures, but the Ergon-West Virginia Contract ended with a catch-all category: "and any other causes, whether of the kind herein or otherwise, not within the control of the party claiming suspension *and which by the exercise of due diligence such party is unable to prevent or overcome*."[182] The case turned on whether the final clause only modified the "other causes" or each of the enumerated force majeure events as well.[183] Dynegy argued that the final clause only applied to other, unenumerated causes, so it would not require a party to use due diligence, like attempting to secure replacement gas on the open market to overcome an enumerated cause such as a hurricane.[184] Ergon-West Virginia argued that the due diligence clause applied to all force majeure events.[185] The Fifth Circuit found that both arguments had support in Texas case law.[186] As such, the Ergon-West Virginia Contract was ambiguous, and the district court should have considered the same extrinsic evidence that it relied on to interpret the Ergon Refining Contract to clarify the Ergon-West Virginia Contract.[187] The Fifth Circuit held that the expert's testimony counseled the court to conclude that Dynegy had no duty to provide replacement gas under the Ergon-West Virginia Contract; therefore, Dynegy was not held liable to Ergon-West Virginia for not providing replacement gas.[188]

Justice Reavley would have affirmed the district court's judgment and dissented with respect to the Fifth Circuit's holding on the Ergon-West Virginia

178. *Id.* (quoting Christy v. Andrus, 722 S.W.2d 822, 824 (Tex. App.—Eastland 1987, writ ref'd n.r.e.)) (internal quotation marks omitted).
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 423 (quoting the Ergon–West Virginia Contract) (internal quotation marks omitted).
183. *Id.* at 425.
184. *Id.* at 425–26.
185. *Id.* at 426.
186. *Id.*
187. *Id.*
188. *Id.*

Contract.[189] According to Justice Reavley, Dynegy's obligation to Ergon-West Virginia was to deliver a specific quantity of gas, not a particular source of gas.[190] If Dynegy could not deliver that quantity because of the hurricanes, then the force majeure clause would be material, but since Dynegy could still transport gas after the hurricanes, simply at a higher price and from different suppliers, Justice Reavley believed the Ergon-West Virginia Contract required it to do so.[191]

V. ASSESSING WHETHER A STATEMENT OF DRILLING COSTS PROVIDED TO OWNERS IS "DETAILED ENOUGH" IN LOUISIANA: *BRANNON PROPERTIES, LLC V. CHESAPEAKE OPERATING, INC.*

In *Brannon Properties, LLC v. Chesapeake Operating, Inc.*, the Fifth Circuit interpreted a Louisiana statute requiring the operator of a well within a drilling unit to provide a "detailed report" of the unit well's costs to the unleased mineral owners.[192] Brannon Properties, LLC (Brannon) appealed the district court's final order, which held that the report Chesapeake Operating, Inc. (Chesapeake) provided Brannon was detailed enough to meet the statute's requirements.[193] The Fifth Circuit reversed and remanded the district court's ruling and held that the report was not detailed enough to meet the statute's requirements.[194]

> Under Louisiana law, operators of . . . wells within a drilling unit "shall issue" to owners of land in the unit "a sworn, *detailed*, [and] itemized statement . . . contain[ing] the cost of drilling, completing, and equipping the unit well." If an operator fails to furnish this report within the time frame specified, the operator "shall forfeit his right to demand contribution from the owner or owners of the unleased oil and gas interests for the costs of the drilling operations of the well."[195]

Chesapeake operated a producing well on property that the Louisiana Office of Conservation had unitized.[196] Brannon was an unleased mineral owner with land in the same unit.[197] Brannon requested a report under § 30:103.1 of the Louisiana Revised Statutes.[198] In response, Chesapeake

189. *Id.* at 426–27 (Reavley, J., dissenting in part).
190. *Id.*
191. *Id.*
192. Brannon Props., LLC v. Chesapeake Operating, Inc., 514 F. App'x 459, 459 (5th Cir. Feb. 2013) (per curiam).
193. *Id.*
194. *Id.* at 462.
195. *Id.* at 459–60 (alteration in original) (citation omitted) (quoting LA. REV. STAT. ANN. § 30:103.2 (2007)).
196. *Id.* at 460.
197. *Id.*
198. *Id.*

provided an eighteen-page report containing itemized entries that gave the date, expenditure amount, and whether the entry was an intangible or tangible drilling and completion cost.[199] Brannon sued Chesapeake, claiming that it had waived "its right to demand contribution [from Brannon] for the well's drilling and operating costs because its report was insufficiently detailed to comply with the statute."[200]

The district court concluded the report contained sufficient detail.[201] The district court stated that it was forced to interpret the statute because there was no case law on what is detailed enough to meet the statutory requirement.[202] The district court concluded that, although the report was not detailed enough according to the dictionary definition of "detailed," it was "detailed enough, because the purpose of the statute is that you alert these non-participants as to how much it has cost and how long before you begin drawing your check."[203]

The Fifth Circuit found the district court's ruling erroneous for two reasons: (1) it looked to the statute's purpose when the statute's text was unambiguous; and (2) the statutory purpose the court considered was contravened by the statute's language.[204]

As for the first reason, "[t]he district court determined that 'if you use the O.E.D.' (Oxford English Dictionary) definition of 'detailed,' the report" that only listed the date, the cost, and whether the expenditure was for tangible or intangible drilling costs was not "detailed enough."[205] The Fifth Circuit stated that by this determination, "the district court implicitly concluded . . . the statute '[was] sufficiently unambiguous to foreclose any contention' that the report provided enough information to meet the statutory requirement of detail."[206] The Fifth Circuit agreed that the statute's plain language was unambiguous and noted that "[a]n ordinary man understands what 'detailed' means, especially when the term is used in connection with a report informing the unleased mineral owner of the 'cost of drilling, completing, and equipping the unit well.'"[207] The Fifth Circuit agreed that Chesapeake's lump-sum cost reporting failed to meet this standard, especially in light of "subsequent quarterly reports . . . that Chesapeake provided Brannon[, which] were detailed because they included, in addition to a vendor name and invoice number, a *description of the service or parts provided*."[208] According to the Fifth Circuit, these reports showed that "Chesapeake could and, as a standard practice, did provide

199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* (quoting the district court) (internal quotation marks omitted).
204. *See id.*
205. *Id.* at 461 (quoting the district court) (internal quotation marks omitted).
206. *Id.* (citing United States v. 92 Buena Vista Ave., Rumson, N.J., 507 U.S. 111, 123 (1993)).
207. *Id.* (quoting State v. Evans, 38 So. 2d 140, 143 (La. 1948)).
208. *Id.*

more information to satisfy the statutory requirement of a 'detailed' report."[209] Concluding that the reports were not "detailed enough" under the unambiguous statute "should have ended the [district] court's statutory interpretation."[210]

As for the second reason, the Fifth Circuit noted that, even if it were proper to consider the legislative purpose, the statutory purpose the district court considered was contravened by the statute's language.[211] To assess the statute's purpose:

> [T]he district court looked to a state appellate court opinion, which concluded, without citation, that the laws were enacted "to provide a procedure by which the owner of unleased lands in a drilling or production unit could have the amount of drilling costs fixed, so that the remaining proceeds of the sale of production could be released and he could obtain his proportionate part of those proceeds without too great a delay."[212]

An operator could fulfill that purpose, however, if the report simply contained a lump sum of the well's cost.[213] According to the Fifth Circuit, the statute's requirement that an operator's report be itemized and detailed strongly suggests that the legislature "intended the statute to do more than simply notify the unleased mineral owner of the drilling costs."[214] Because the Fifth Circuit had no evidence of what the statute's additional purpose could have been, it was impossible for the court to determine whether Chesapeake's report fulfilled that purpose.[215] Accordingly, the Fifth Circuit found that its analysis of the statute's purpose did not support finding for Chesapeake.

Ultimately, the Fifth Circuit ruled that because Chesapeake's report was insufficiently detailed under § 30:103.1, Brannon was excused from contributing to the cost of drilling for the period covered by the deficient report.[216]

VI. DEED INTERPRETATION: *TEMPLE V. MCCALL*

In *Temple v. McCall*, the Fifth Circuit considered whether a deed that did not expressly mention mineral rights reserved the mineral rights in the grantor.[217] The Fifth Circuit affirmed the district court's judgment that McCall, successor-in-interest to the grantor who reserved the mineral rights, owned the disputed mineral rights.[218]

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209. *Id.* at 461–62.
210. *Id.* at 461.
211. *Id.*
212. *Id.* (quoting Scurlock Oil Co. v. Getty Oil Co., 324 So. 2d 870, 876 (La. Ct. App. 1975)).
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. Temple v. McCall, 720 F.3d 301, 303 (5th Cir. June 2013).
218. *Id.*

The forty-acre tract of land at issue was originally owned by Elizabeth Paul Jenkins and T.J. Paul Jr.[219] In 1965, Jenkins and Paul conveyed 35.89 acres of the forty-acre tract to the Sabine River Authority (SRA) to create Toledo Bend Lake.[220] As was allowed by statute, Jenkins and Paul expressly reserved the mineral rights in perpetuity from this conveyance.[221] Later in 1965, Jenkins conveyed to Paul all of her interest in the originally owned forty acres, including the severed mineral rights.[222] In 1969, Paul sold part of the property to R.V. Woods (the Paul–Woods Deed).[223] The parties agreed that through this transaction, Paul sold Woods some of the surface area that *had not* been conveyed to the SRA and the mineral rights under that property.[224] The case was about whether Paul also sold Woods his mineral rights under the surface area that had been conveyed to the SRA.[225] The Paul–Woods Deed, in relevant part, reads:

> Grant[ed], Bargain[ed], S[old], Convey[ed] and Deliver[ed] with full guaranty of title, and with complete transfer and subrogation of all rights and actions of warranty against all former proprietors of the property presently conveyed unto R.V. Woods . . . the following described property:
>
> > All that part [within the given coordinates that comprise the original 40-acre tract] lying West and South of the Public Road, LESS portion sold to Sabine River Authority.[226]

The parties dispute whether the "LESS" clause excluded from the sale only the surface rights in the 14.982-acre tract, which clearly belonged to SRA, or the mineral rights under that land as well.[227] The district court found that McCall, Paul's successor-in-interest, owned the disputed minerals.[228] Temple, Woods's successor-in-interest, appealed to the Fifth Circuit.[229]

Temple's appeal primarily argued that the language in the Paul–Woods Deed did not adequately reserve the disputed minerals.[230] The Fifth Circuit agreed and found that the language within the Paul–Woods Deed was ambiguous.[231] The deed was ambiguous because it did not mention whether the conveyance included the disputed minerals, and the property description did not indicate whether the sale was intended to encompass only the surface area

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219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* (alteration in original) (quoting the Paul–Woods Deed).
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 304.
231. *Id.*

owned by SRA or also the mineral rights under that property.[232] To interpret the ambiguous contract, Louisiana law permits looking to "the usual and customary manner of fulfilling like contracts as persuasive [evidence of] the intention of the parties."[233]

The Fifth Circuit found persuasive testimony from McCall's land-conveyancing expert, who testified that the type of description in the Paul–Woods Deed often depicts the "surface area of a piece of property" conveyed when the property consists of jagged edges and does not form a perfect square.[234] According to the expert, this was the preferred method of describing a conveyed property when the parties were not going to prepare a survey.[235] The expert also opined that McCall's predecessor-in-interest did not transfer, and did not intend to transfer, the disputed mineral rights in the Paul–Woods Deed because the sellers would have included words like "oil, gas, [or] minerals" or included a specific reference to the prior reservation if they had intended to transfer the disputed mineral rights.[236]

The Fifth Circuit distinguished this case from *Sheridan v. Cassel*.[237] The court distinguished the cases on many grounds, but primarily because, unlike the Deed in *Sheridan*, the description in the Paul–Woods Deed did not contain the "LESS" language to exclude some of the acreage from the larger property's description.[238] The Fifth Circuit made an *Erie* guess that the Louisiana Supreme Court would reach the same conclusion it reached—that the Paul–Woods Deed did not convey the disputed mineral rights to Temple's predecessor-in-interest.[239]

VII. CONCLUSION

In *Petrohawk Properties, L.P. v. Chesapeake Louisiana, L.P.*, the Fifth Circuit rescinded an oil and gas lease obtained by fraud and refused to extend Louisiana's very narrow definition of the "intentional interference with a contract" cause of action.[240] The Fifth Circuit decided that the court could consider a map attached to a letter agreement that contained specific geographical information about oil and gas leases to be conveyed as a sufficient nucleus of description for the statute of frauds in *Coe v. Chesapeake*

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232. *Id.*

233. *Id.* at 305 (quoting Par-Co Drilling, Inc. v. Franks Petroleum Inc., 360 So. 2d 642, 644 (La. Ct. App. 1978)) (internal quotation marks omitted); *see also* Frischhertz Elec. Co. v. Hous. Auth. of New Orleans, 534 So. 2d 1310, 1313 (La. Ct. App. 1988) (considering the "customary manner of fulfilling like contracts . . . to interpret the meaning of the ambiguous terms of the contract" (citing LA. CIV. CODE ANN. art. 2053 (2008))).

234. *Temple*, 720 F.3d at 305 (internal quotation marks omitted).

235. *Id.*

236. *Id.* (alteration in original) (internal quotation marks omitted).

237. Sheridan v. Cassel, 2011-162 (La. App. 3 Cir. 6/8/11); 70 So. 3d 89.

238. *Temple*, 720 F.3d at 304; *Sheridan*, 70 So. 3d at 93.

239. *Temple*, 720 F.3d at 308.

240. Petrohawk Props., L.P. v. Chesapeake La., L.P., 689 F.3d 380, 394–96 (5th Cir. July 2012).

Exploration, L.L.C.[241] In *Ergon-West Virginia, Inc. v. Dynegy Marketing & Trade*, the Fifth Circuit held that the force majeure provisions in two gas supply contracts did not require the supplying party to seek out alternative sources of gas because that was not industry custom.[242] In *Brannon Properties, LLC v. Chesapeake Operating, Inc.*, the Fifth Circuit held that simply providing an owner with the date, amount, and whether a cost was tangible or intangible was not "detailed enough" information to comply with § 30:103.1 of the Louisiana Revised Statutes.[243] And in *Temple v. McCall*, the Fifth Circuit held that a mineral reservation in a deed that described the property by starting with the description of a larger tract and then excluding some acreage from the conveyance with "LESS" language was sufficient to reserve the minerals under the acreage excluded from the conveyance.[244]

241. Coe v. Chesapeake Exploration, L.L.C., 695 F.3d 311, 318 (5th Cir. Sept. 2012).
242. Ergon-West Va., Inc. v. Dynegy Mktg. & Trade, 706 F.3d 419, 425 (5th Cir. Jan 2013).
243. Brannon Props., LLC v. Chesapeake Operating, Inc., 514 F. App'x 459, 460 (5th Cir. Feb. 2013) (per curiam).
244. *Temple*, 720 F.3d at 303–04.