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Supreme Court of Texas.
In RE Gulf Exploration, LLC, Gulf Partners, LLC, Santa Rosa Resources, INC.,
Karst Investments, LLC, Ninety Six Corporation, Mary Kennedy, Individually and
as the Independent Executrix of the Estate of W. D. Kennedy, Relators.
No. 07-0055.

January 17, 2008

Appearances:
James M. Chaney, Kirk & Chaney, Oklahoma City, OK, Petitioner.
Brad Miller, Kerr, Ward, McLaughlin & Miller, LLP, Midland, Texas, for Real Party in Interest Great Western Drilling, LTD.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: Please be seated. The Court is ready to hear argument in 07-0055, In Re Gulf Exploration and others [In re GULF EXPLORATION, LLC, Gulf Partners, LLC, Santa Rosa Resources, 2007 WL 647821,Supreme Court of Texas].

SPEAKER: May it please the Court, Mr. Chaney will present the argument for the relators.

ORAL ARGUMENT OF JAMES M. CHANEY ON BEHALF OF THEPETITIONER

MR. CHANEY: Good morning. May it please the Court.

We're here this morning on oil and gas matter. My clients and Mr. Miller's clients are sophisticated oil and gas participants and they agreed to a Model Form joint operating agreement that in several respects varied the model form. Among the variances was an arbitration clause that says that all disputes or controversies on paraphrasing slightly arising out of, or relating to the agreement shall be submitted to binding arbitration. Another nonstandard provision -- excuse me -- this is a standard provision of the joint operating agreement, they'll treat each other with good faith with respect to their activities there under.

JUSTICE BRISTER: So can a -- Palacios [In Re Palacios, ___ S.W.3d

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___, W.L. 1791683 (Tex. 6/30/06)], and Apache [Apache Bohai Corp., LDC v. Texaco China, B.B., 330 F.3d 307, 310 (5th Cir. 2003) cert.den. 540 U.S. 880]-- federal courts, of course, often --

MR. CHANEY: Yes, your Honor.

JUSTICE BRISTER: -- all that's filed is the motion to propel arbitration in cases really often, state court somewhere. In a state court in Texas, your case has been filed down there. You all moved for arbitration. Could the State Court have dismissed it -- compelled arbitration and dismissed it?

MR. CHANEY: Your Honor, I think dismissal is problematical because then the review process would be triggered. That's not--

JUSTICE BRISTER: You could do that -- according to Green Tree [Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)], you can do that in federal court.

MR. CHANEY: I think arguably, the court here could have done it but that's not what happened. The Court here exercised its discretion --

JUSTICE BRISTER: Well --

MR. CHANEY: -- to stay the matter.

JUSTICE BRISTER: -- right. But that's -- I mean that what's at issue. You argued that it's just the issue of -- Apache appears to say, it's just the issue of whether the trial court should have stayed or dismissed that might be subject to [inaudible].

MR. CHANEY: Well, I think that's partially the issue and, of course, that was the only issue before the court in Apache and before this Court in Palacios but I think the broader issue is the policy that dictates that there will not be appeals from orders sustaining arbitrability.

JUSTICE BRISTER: But Green Tree violates that to some degree because, I mean, the U.S. Supreme Court says if the trial court compels arbitration and dismisses, then you can appeal.

MR. CHANEY: That's correct, your Honor, and I submit that --

JUSTICE BRISTER: But what would be wrong with doing that in state courts, too? I know that's not your case --

MR. CHANEY: That's not this case but I would submit there's probably nothing wrong with that, other than I think the better course of discretion would be to do what the trial court here did and that is, retain the case. It comes back to the trial court. There may be issues that the trial court needs to deal with, other than dismiss it and start an immediate, perhaps appellate process. I don't know if that was the Court's reasoning but that seems to be the tide, that seems to be the prevailing trend on these cases that they are dismissed in favor of -- excuse me -- stayed in favor of the arbitration proceeding going forward. What happened --

JUSTICE HECHT: What should inform that decision?

MR. CHANEY: Yes, your Honor? I'm sorry, your Honor?

JUSTICE HECHT: What should inform that decision?

MR. CHANEY: What should inform the decision as to dismissal versus a stay, your Honor? I suppose the possibility or probability that the trial court may see the need to deal with something after arbitration has concluded. That's all the --

JUSTICE BRISTER: Somebody's going to have to --somebody's going to have to confirm or fake it.

MR. CHANEY: Yes, and it would, I think, initially, in the first instance, it would go back to the trial court regardless, that's where you would get it and enforce it. I don't recall this arbitration clause. Some of them say they can be summarily enforced in the federal

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court having jurisdiction over the parties but certainly someone has tomake some decision.

Again, I can't answer those questions fully and completely because that's not our case. In our case, the court exercised its discretion to stay the matter and that's the question, and that's the issue that this Court spoke to in Palacios and said that, like it or not, one-sided or not, the rule is that, except in an exceedingly rare case, where someone carries their heavy burden of indisputably and clearly showing that the trial court has abused its discretion, that there should be no review by mandamus, otherwise we get the process.

JUSTICE HECHT: Do you think that means an elevated mandamus review or is that like --

MR. CHANEY: I think it has to mean --

JUSTICE HECHT: -- real, real, real clear --

MR. CHANEY: I think it has to mean some kind of elevated mandamus review. I don't know what else heavy burden and clearly and indisputably mean, those aren't, in combination, the phrases this Court typically uses in mandamus and the Court acknowledged the clear and unequivocal policy, and said there was no doubt that it was the policy of the federal and the state legislatures to ban appellate review or ban direct appellate review of decisions granting arbitrability and to grant direct appellate review of decisions denying arbitrability. That's the policy, and the Court is simply carrying that out with that elevated standard.

JUSTICE O'NEILL: Well, what -- where does that inquiry go to? Does the inquiry go to the error in compelling arbitration or the error in granting the stay? Because how could you ever determine whether it's really, really, really erroneous to stay?

MR. CHANEY: Well, I think it -- your Honor, our research, and we pointed this out in the reply, has revealed one instance where that occurred. And I'm not intimately familiar with all of the facts, but I know the facts in the appellate opinion, I think it was a case out of San Antonio, perhaps Corpus Christi, Court of Appeals case where their Court of Appeals said, "Trial Court, you errored in granting a stay because the parties' initial agreement had an arbitration clause in it but there was an amendment to that that deleted that clause." I think that's a clear and indisputable abuse of discretion.

JUSTICE O'NEILL: But in that event, the review goes towards the order compelling as opposed to a stay order. In other words,it's kind of a back door way to get to the merits of the arbitration decision.

MR. CHANEY: That's correct, your Honor, and that those are the facts in that case. But the facts in this case, again, what informs the discretion of the court in a particular case is to whether to grant arbitration and whether to stay pending arbitration, I think, is going be highlyspecific to the facts of each case.

In this case, I would respectfully submit, there's little room for argument. The Great Western parties proposed drilling a well here on lands owned by the parties jointly. My clients had a list of the acreage that was owned within the area of mutual interest undisputably and they said, "Wait a minute, you don't own any acreage over here. We know the trend is going this way. What are you doing?" asking a question about this well that was drilled under this joint operating agreement, the Airfield No. 2, with thisarbitration clause and this duty of good faith. And Great Western said, "Don't worry about it, we're handling the land matters, we're taking care of it." So Iwould submit there's little room for argument that in this case, the discretion weighs in favor of finding that the duty of good faith

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relates to this activity under this agreement, drilling this well and the questions about this well.

I would also point out, the Court of Appeals referred to the wrong joint operating agreement. There are two joint operating agreements in this case. At least, there are two that are pertinent. The two that are pertinent are the Strawn Formation joint operating agreement and the Lower Clearfork Formation joint operating agreement. Justice Strange, in his opinion, footnoted and said, 'Well, I've looked at the joint operating agreement and I can clearly see that bright line.' He looked at the wrong one. He looked at the joint operating agreement that relates to the Strawn prospect. The wells we're talking about are Lower Clearfork prospects. I would defy most persons to look, in any event, at the Strawn prospect -- excuse me -- at the Strawn Prospect joint operating agreement, and tell me which bright lines include the AMI. There are bright lines all over the map, but if you look at the Lower Clearfork Prospect Agreement, and these are pages 125 and 170 of the record, it's clear that any observer would think that the Labores that the oils were being drilled in were included in the AMI. That's what prompted two different representatives in two different locations to get my clients to make a phone call, that, combined with the list of acreage that's attached to the joint operating agreement --

JUSTICE BRISTER: But if the CA was right on the merits, whether this should or shouldn't have gone to arbitration, is there any reason -- they could have done this by saying the trial court should have dismissed this case rather than stayed it and then got to the same questionanyway. Is that --

MR. CHANEY: Well, I suppose, your Honor. I'm not sure that the Court of Appeals would have had -- it would have been proper for the Court of Appeals to say to the trial court, "You should have dismissed, you shouldn't have exercised your discretions".

JUSTICE BRISTER: Why should they have not said that?

MR. CHANEY: Well, I don't understand why the Court of Appeals has the authority to direct the trial court to dismiss this, instead of performing a discretionary act, which is simply, "I, the Trial Court, decide in my discretion, I will retain this case to review anything that I may need to review or may have the power to review after the arbitration is over," rather than being forced by the Court of Appeals to dismiss it and no longer deal with it.

JUSTICE BRISTER: So is it purely in the -- it's purely up to the trial courts. Trial judge decides, "do I want this reviewed or do I not want this reviewed."

MR. CHANEY: I can't say in every single scenario that we can concoct that that would be the case but I think --

JUSTICE BRISTER: I would assume most trial judges are going to decide --

MR. CHANEY: I'm sorry.

JUSTICE BRISTER: I assume most trial judges would say, "I don't want this reviewed."

MR. CHANEY: That seems to be what they do, your Honor. I would submit and I think that the core of your question though is, "Is the standard of review from a dismissal versus the standard of review from a stay of the trial proceeding pending arbitration -- is the standard different". Clearly, the standard is different and I think there is this heightened standard for Apache and for Palacios from a stay of the proceeding but I would submit on these facts. In this case, it wouldn't make any difference. I don't need to rely on the heightened standard of Palacios to find error in the Court of Appeals' opinion. I'll take a

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lower standard, I'll take the regular appellate standard as the - - they're both de novo questions of law. Do these claims, do these causes of action, under the law, which says, unless we can say with positive assurance that there is no interpretation of the arbitration clause that would cover these claims, that's the test, that's the normal test. Unless we can say that the matter should go to arbitration. And the Court of Appeals said, "There's not even a duty of good faith here." The Courtof Appeals' opinion says the duty of good faith stops at the border of the AMI. It's my clients called, asked a question, were told a lie, the Court of Appeals said it didn't matter, the duty of good faith stopped here. The Court of Appeals said "you don't have a breach of the confidentiality provision." Reached out on a real on the merits of that claim in the face of the cases that say, whether it's reviewed from a dismissal or reviewed from a stay, the cases say even if you believe the claims are frivolous, even if you believe they lack merit, the court determining arbitrability is not to decide the merits of the claim. And once again, the Court of Appeals said, "You don't have a joint venture, youdon't have a breach of the good faith claim, you don't have a breach of confidentiality claim." And even counsel for the opposition concedes in his brief in this Court that confidentiality, perhaps the breach of confidentiality claim is arbitrable.

Now, Great Western says it's not because you combined it with these other claims and I'm not sure I understand that argument, but if we concede that the breach of confidentiality provision goes toarbitration and even though the Court of Appeals didn't find that it should, I don't understand frankly why the fraud claim doesn't go to arbitration. The fraud claim didn't arise in a vacuum. The fraud claim is two people on two occasions called and asked a question, and they were misled. They were told we'll take care of this, we're buying acreage out here. That fraud claim didn't arise in a vacuum, it arose because these parties were parties to the joint operating agreement with an arbitration provision that says they'll act in good faith with respect to their activities under the agreement and they'll arbitrate claims that relate to it.

I would submit, your Honors, that this case is squarely within the facts of Palacios and perhaps another case will decide the issue of the trial court's discretion to stay versus dismiss or whether there should or shouldn't be a heightened standard of review. But again, as this Court said in Palacios, this is the world we are in and the federal and the state legislatures have spoken, and if this case survives review, if the Court of Appeals' opinion stands unchanged, I would submit Palacios has no meaning, that if a court can reach out under the rubric of looking at arbitrability and rule on the merits of four or five claims, and find that they don't exist, and do that on mandamus on a review from a stay in favor of arbitrability, then I would submit Palacios no longer is in effect. Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Thank you, Counselor. The Court is now ready to hear argument from the real party in interest.

SPEAKER: May it please the Court. Mr. Miller will present argument for the real party in interest.

ORAL ARGUMENT OF BRAD MILLER ON BEHALF OF THERESPONDENT

MR. MILLER: May it please the Court. Goodmorning.

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Rick Strange -- Justice Rick Strange wrote agood opinion here and ought to be upheld, the matters that were reviewed by Justice Strange in that Court, same job that this Court has to perform. It has to look at these contracts, it has to look at the arbitration demands and see --clearly, there's an arbitration provision and we acknowledge that, but is it restricted to the geographical limitations that are in these three joint operating agreements and the initial agreement that triggered the whole venture. And after carefully reasoning and carefully reviewing the contract language, there are specific defined terms in each of these joint operating agreements.

First, what's the contract area? Because when you look at the arbitration provision, it's not just a general -- it is a broad form arbitration provision, no question about that because it's -- any dispute, controversy or claim arising out of or relating to this agreement or the briefs thereof, et cetera. But then it goes on to restrict that by saying the term "agreement" includes the contract itself, which is this joint operating agreements, and their exhibits and attachments, which is where we get into the property descriptions part in the AMI map.

JUSTICE HECHT: What's your response to the petitioner's statement that the Court of Appeals looked at the wrong joint operating agreement?

MR. MILLER: Judge, I think this is the joint operating agreement that is the only one that has properties that are joined and it's part of the Latigo Strawn Agreement, you call it the Strawn Agreement, I call it the Latigo Strawn. But it's -- I think the first one of the three that are attached to the arbitration demand on the record and it is the only one that adjoins Labors 1 and 10, which you can't see from where you are, but there is a bright line that goes all the way around there. There's a thicker line. And if the Court looks at that and then reads the record from the hearing at the district court where Judge Gilles ruled clear what Judge Gilles was looking at. Now, those exhibits were not admitted, they were not offered, and they're not part of this record. And I can't talk much about them but there were colored maps, and they were discussed. And it's clear from the record that even most of Mr. Chaney's clients, except for two, acknowledged that these two Labors were outside any of the JOA Areas of Mutual Interest. Two of the gulf entities claimed that the agreements they signed had only black and white AMI maps, but setting that aside, if the Court just looks at the property descriptions and the oil and gas leases that are attached in the exhibits.

JUSTICE BRISTER: But they relate -- but the dispute relates to that agreement.

MR. MILLER: Their agreement doesn't relate to Labors 1 and --

JUSTICE BRISTER: They may be wrong, they may be wrong. They may have no interest in these wells but they're claiming they do. So why isn't that a dispute that relates to that agreement?

MR. MILLER: Because the agreements themselves do not relate to the lands that are in dispute.

JUSTICE BRISTER: Well --

JUSTICE WAINWRIGHT: Before we go further, you said this agreement and held it up. Can you identify it?

MR. MILLER: Yes, your Honor, I'm sorry. It's Exhibit A(1). I don't have the page numbers because I don't have the identical record reference but it's from tab 4.1(B).

JUSTICE WAINWRIGHT: In what document?

MR. MILLER: And it's the joint operating agreement dated May 1st,

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2003, covering the Latigo Prospect, Strawn Prospect.

JUSTICE WAINWRIGHT: And what's the entire document you held up?

MR. MILLER: It's a model form operating agreement --

JUSTICE WAINWRIGHT: No, is that your appendix? What is that?

MR. MILLER: No, this is the appendix of the Court of Appeals but I think the same tab numbers are carried over in the record.

JUSTICE WAINWRIGHT: Thank you.

JUSTICE BRISTER: Palacios did left open a door that we might review by mandamus, an order of staying a case rather than dismissing but that wasn't what the Court of Appeals did here.

MR. MILLER: No, the Court of Appeals granted the mandamus.

JUSTICE BRISTER: They looked -- they decided the mandamus whether this case should have gone to arbitration.

MR. MILLER: That's --

JUSTICE BRISTER: But all Palacios said was --Palacios specifically says it bars appeal of interlocutory orders favorable to --

MR. MILLER: That's correct.

JUSTICE BRISTER: -- arbitration and that's what this is. This is an appeal, an interlocutory -- that's what they had in front of them, an interlocutory order favorable to arbitration. Right?

MR. MILLER: Well, this is a ritual proceeding--

JUSTICE BRISTER: This is --

MR. MILLER: -- this particular case we're here on today.

JUSTICE BRISTER: Right, an -- we had an interlocutory order by the trial court compelling arbitration. That's an order favorable to arbitration. It may be wrong but we said in Palacios, it bars appeal of those, that you might be able to appeal the order of whether the trial court should have stayed or dismissed but that wasn't this -- you didn't appeal whether the trial court should have dismissed.

MR. MILLER: We brought an original proceeding and we said that the trial court had abused its discretion in both staying and in ruling that the disputes were covered by the arbitration. We were within the scope of the arbitration clause.

JUSTICE BRISTER: Did the trial court -- how did the trial court abuse its discretion in staying the case?

MR. MILLER: Because it considered the contracts, which it does as a matter of law, and it misconstrued the contracts.

JUSTICE BRISTER: That's making the same question. Two questions: Should this go to arbitration or not? And, okay, if I've decided that right or wrong, it's going to arbitration then the question is should I --and I'm going to order arbitration, should I dismiss the rest of the case or should I stay it. You didn't appeal this order.

MR. MILLER: I didn't appeal that order because it's not a final order and the Texas statute doesn't give you the right to appeal it.

JUSTICE BRISTER: But that's the only one that Palacios says you can, maybe under some circumstances in the Fifth Circuit appeal.

MR. MILLER: But Palacios --

JUSTICE BRISTER: What -- what case says you can appeal this order?

MR. MILLER: None. I have not appealed anything. I brought an original proceeding --

JUSTICE BRISTER: What case says you can mandamus this order?

MR. MILLER: Freis v. Canales [Freis v.Canales, 877 S.W.2d 283, Tex., 1994], said it.

JUSTICE BRISTER: Which we reversed inPalacios.

MR. MILLER: Well, didn't you -- you know I -- it looked to me like --

JUSTICE BRISTER: But we actually recognized that the U.S. Supreme

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Court had reversed it, which is their prerogative on federal laws. So you're arguing Freis v. Canales?

MR. MILLER: I'll start there. I recognized Palacios and we've attempted -- and we think we showed, met the burden that Palacios imposed but then the Supreme Court opinion -- Green Tree Financial, I believe, is the case you're referring to. It says what it says sowe don't think the Court of Appeals abused its discretion in rendering the orders and judgments that it rendered. It did the same thing that the Fifth Circuit did in this that we styled-- the Tittle v. Enron [Tittle v. Enron Corp., 463 F.3d 410, C.A.5 (Tex.),2006] case which is the Ken Lay Skilling case where they were arguing over -- between the insureds over these fiduciary policies, and in that case again, just as this Court said in the Segal v.Ewan, we got to look at the whole contract. We can't just look at one portion and favor it over another. We have to look at these contracts in whole. And when we look at these joint operating agreements, as you did in the Segal case, if it doesn't say something, we're not going to supply that missing term if the overall intent is to confine -- in our case here -- confine our relationships, contractual and otherwise, to this geographical area, and we'll arbitrate decisions about this geographical area. We're not going to write in a term that says, "And, oh, by the way, anything you say relates to this, we'll arbitrate it, even if it doesn't relate to the lands that are within thisagreement." So in the Tittle case they -- they-- that was not a mandamus case, that was a direct appeal of a refusal to compel arbitration but they upheld that decision because those contracts didn't include that language.

JUSTICE BRISTER: If the trial judge had compelled arbitration and dismissed the rest of the case, the order would have been final and you could have appealed. Right?

MR. MILLER: Yes, sir.

JUSTICE BRISTER: Is there any reason -- should we encourage Texas trial judges -- if they're ordering arbitration, should we encourage them to dismiss or should we encourage them to stay?

MR. MILLER: I think we should encourage them to dismiss because otherwise parties -- and my client's position really, if mandamus is gone, which is really a limited remedy to begin with, they could end up losing their right to have their case heard by court and/or jury and that's a valuable right.

CHIEF JUSTICE JEFFERSON: And then when the --when there's an arbitration award, how is that enforced? Do you file a new lawsuit to enforce arbitration --

MR. MILLER: That's authorized --

CHIEF JUSTICE JEFFERSON: -- in this proceeding?

MR. MILLER: -- that's authorized by the Texas Act and then also by the Federal Act, I believe. You just -- you take your arbitration award down to the courthouse, you file a petition, you attach it to it, and you ask it to be enforced.

JUSTICE BRISTER: Are you in a county where there's more than one district court?

MR. MILLER: Yes, sir.

JUSTICE BRISTER: Which means it may end up in another district judge who thinks it shouldn't have gone to arbitration.

MR. MILLER: Well, that's the problem with going to any court that's different from the first one.

JUSTICE BRISTER: The problem with filing a case twice rather than once because then you get inconsistent rulings.

MR. MILLER: But, in some cases, you don't have to file a lawsuit

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to get the arbitration. If these properties had been within the area of mutual interest, we'd have been in arbitration and then if we didn't like what happened at arbitration or thought we were defrauded, or there was some misconduct there, then, when they sought to enforce that, then that would be the first time it would happen. It's not necessarily always going to be a two-step process.

JUSTICE O'NEILL: Well, and if we encourage trial courts to dismiss rather than stay, we'd be encouraging trial courts to violate Palacios or we'd be undermining our decision in Palacios.

MR. MILLER: I mean, you can view it that way, but when you consider balancing everything out when a party is compelled to arbitrate a dispute, that they did not agree to arbitrate, then they have to go through that entire process --

JUSTICE BRISTER: That's a terrible injustice. The problem is both the Texas and the Federal Act say orders favoring arbitration don't get appealed, orders hostile to arbitration do. It's what those folks said. Now, if we say, "Well, look all you have to do to get around that is just dismiss the case," that looks like we're kind of just ignoring them. Doesn't it?

MR. MILLER: Well, it could be reviewed that way and I know the policy favoring arbitration is very strong but what do you do, as in this case, where we think the trial court made a big legal mistake, not a factual mistake but a legal mistake, and that's going to send you down a road that you may not recover from.

JUSTICE O'NEILL: But haven't we -- I mean, isn't it clear that the arbitrator is the one to decide what's within the clause and what's not within the clause?

MR. MILLER: I don't think that's the law, your Honor. I think that the Courts say that when -- the cases that are in our brief say, here's your job, is there an arbitration agreement, and then construe the agreement to determine whether the dispute is within the scope of it, and that is -- that involves a process of construing the contract, which is clearly a matter of law. And the trial court makes the determination of, if whether or not the dispute is within the scope of the agreement to arbitrate, and that's the law that I understand.

Now, the arbitrators, if let's say this Court sends us back to arbitration, they might make a decision preliminarily that because the properties are outside of the AMIs, which I think is going to be established, then we don't have jurisdiction to consider the ownership issues that are being claimed in that, which, you know, brings me around to Mr.Chaney's point about the confidentiality thing which I do think is a bit of a problem for my client in the sense that if you alleged, there's a breach of the confidentiality provision and it's in the operating agreement, and it's a special provision. It's not, you know, any form thing, that -- those issues might have to be arbitrated. But there's cases out there where some issues have been decided that are arbitrable, and they get sent to arbitration, and some issues aren't. But ownership of property, real property, which oil and gas leases are, outside of the Areas of Mutual Interest were never agreed to be arbitrated under any of these three operating agreements because when you look -- and the other thing, I want to point the Court to is, if you look at the language in -- in the Exhibit A to each of the three operating agreements, they talk about -- I'm sorry -- on the parts that talk about -- they're on page 17 A of each of these three operating agreements, and they talk about "acquired interest" and that's what triggers the duty of anybody within this group of owners, which my client had about 40 percent. I think the combined Gulf Group as about

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14 percent, and there's a bunch of other percents out there that are not involved in this dispute. They defined the term "acquired interest" in that to be oil and gas interests, minerals, whatever, that are directly or indirectly on land within the AMI. Such interests in so far, and only in so far as they cover lands within the AMI being herein called acquired interest, then such party -- the acquiring party shall notify the other parties in writing of such acquisition or proposed acquisition in all of its terms including initial consideration. Then you have to put that offer out there for everybody to participate but only if it's an acquired interest. So nothing is triggered if you buy something in Terry County or Midland County, only if you acquire an interest in the AMI. So the dispute over ownership is clearly outside of the agreements of the parties to arbitrate. All of the factual claims in the arbitration demand are triggered by one essential set of facts and that is,Great Western bought leases in Labors 1 and 10, which are outside of the AMI, drilled wells, and did not offer those to any of the Gulf Group.

Now, I put this hypothetical in our brief and Ithink it makes some sense to look at it from the other side. If those wells that were drilled had been dry holes and we hadn't said anything to anybody otherthan we're going to buy leases as is alleged here, that Great Western allegedly promised we'll take care of the land and you'll be in blah, blah, blah. If we had done that, those wells were dry holes, run up a couple of million dollars ofexpense, submitted joint interest billings to the owners in the AMI next doorand said, "Here, we want you to pay your 14 percent. We're going to pay 40percent of this." And they said, "Well, we don't have an agreement that covers those lands," then, could we in good faith have said, "Well, we're going to take that to arbitration because we have a general arbitration provision in the agreement next door and this relates to that, so therefore you're going to have to go to arbitration and defend yourself or you're going to have to pay thesebills." I don't think that would be the case and that's the flipside of this issue. If the lands are outside, we don't have an agreement to arbitrate decisions about those lands.

If the Court doesn't have any other questions, I don't believe I have anything else.

CHIEF JUSTICE JEFFERSON: Thank you, Counselor.

MR. MILLER: Thank you.

REBUTTAL ARGUMENT OF JAMES M. CHANEY ON BEHALF OF THEPETITIONER

MR. CHANEY: That's an interesting scenario, of course, but it's not what happened and it's not what happened because Great Western lied about its conduct.

Great Western said, "Don't worry, we're takingcare of the problem," and my clients were lulled into inaction. They did nothing, they were told nothing, and then they discovered according to the allegations that these additional wells had been drilled, and they immediate put Great Western on notice that they believe they're entitled to participate. So the scenario, if you didn't lie to me and you secretly drilled these wells, anddidn't tell me about them, and then sent me a bill, might be an interesting scenario for another case but it's not this case. It was two years ago, this month that this proceeding began with my client's demand for arbitration to the

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American Arbitration Association, process is a wonderful thing, all the due process this case has had. My client's remedy of a speedy resolution to its dispute has been severely undermined by virtue. I would submit, of the Court of Appeals disregard of this Court's opinion in Palacios. I think that's what this case comes down to. We are standing here debating the merits of my client's claims. We are debating, is it the Strawn Map or is it the Lower Clearfork Map. We are debating whether or not my clients are bound by a color map that they never received. The agreement they received said, "Look at Exhibit A (1)." This is Exhibit A(1) of the joint operating agreement. Yes, the list of properties attached to the joint operating agreement is that the parties owned did not include acreage in the Labors where these additional wells were drilled. That is the nature of an Area of Mutual Interest, that's why you have it. If you own all of the properties, you don't need an Area of Mutual Interest [inaudible].

I would submit there are all manner of issues here that compel arbitrability of this case. The parties could have waived their right to the extent of the AMI. There may be a estopped claim, that the AMI stops at this line that's not on the maps my clients got, or they may havesimply defrauded my clients. But the question is, "Do these claims arise out ofor relate to the clause that these sophisticated participants agreed to --excuse me -- the agreement that these participants agreed to?" The agreement doesn't say anywhere in it, anything remotely like, we will only litigate ownership issues to the extent they relate to the ownership of these particular properties. It doesn't say that. It says we will arbitrate issues that arise from or relate to this agreement. And I would submit, if you call someone and ask them about a prospect or a property that they're drilling or proposing to drill under this agreement and they don't tell you the truth, and you're damaged by that, that's a claim that arises from or relates to this agreement.

When all is said and done, can we all say that the courts have no business weighing the merits of the grievance or whatever particular language in the written instrument, which will support the claim, which is exactly what the Court of Appeals did. Can we all say, having read the Court of Appeals' opinion, that the Court of Appeals resolved any doubts about the scope of arbitration in favor of arbitration and that the policy favoring arbitration is so compelling that the Court should not deny arbitration unless it can be said with positive assurance the arbitration clause is not susceptible of an interpretation which would cover the disputed issue. And with all respect to the Court of Appeals, I would submit they got it wrong in this case and this matter should be arbitrated.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

SPEAKER: All rise.

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